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

STUDENT, a minor, by and through
her Parent[1]

Petitioner,

v

Erin H. Leff, Hearing Officer

DISTRICT OF COLUMBIA
PUBLIC SCHOOLS,

Respondent

OSSE
STUDENT HEARING OFFICE
2012 JAN 25 PM 4:48

HEARING OFFICER DETERMINATION

STATEMENT OF THE CASE

On November 1, 2012 Parent, on behalf of her child ("Student"), filed an Administrative Due Process Complaint Notice ("Complaint"), HO 1,[2] requesting a hearing to review the identification, evaluation, placement or provision of a free, appropriate public education ("FAPE") to Student by District of Columbia Public Schools ("DCPS") under the Individuals with Disabilities Education Act, as amended ("IDEA"). 20 U.S.C.A. §1415(f)(1)(A). Respondent DCPS filed a Response to Parent's Administrative Due Process Complaint Notice (HO 5) on November 9, 2012. This was within the 10 day timeline for filing a response established in 34 C.F.R. § 300.508(e)(1). The parties did not provide information regarding a resolution meeting. There had been a resolution meeting scheduled for November 28, 2012

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[1] Personal identifying information is provided in Appendix A, attached hereto.
[2] Hearing Officer Exhibits will be referred to as "HO" followed by the exhibit number; Petitioner's Exhibits will be referred to as "P" followed by the exhibit number; Respondent's Exhibits will be referred to as "R" followed by the exhibit number; and Joint Exhibits will be referred to as "J" followed by the exhibit number.

which was canceled and should have been rescheduled.[3] The 45 day timeline began to run on December 2, 2012, the day after the 30 day resolution period ended. Following the Prehearing Conference held on December 6, 2012, I issued a Prehearing Conference Order on December 8, 2012. HO 10.

On December 6, 2012, DCPS filed an unopposed Motion for Continuance of 10 days due to multiple scheduling conflicts arising, in part, as a result of DCPS' winter break. I granted the continuance on December 7, 2012. My Hearing Officer Determination is due on January 25, 2013.

On January 9, 2013, Petitioner requested, by email, an expedited teleconference to address DCPS' denial of Petitioner's request to allow her educational expert to observe Student in her then current program in preparation for the due process hearing. I held a teleconference regarding this request on January 10, 2013. After hearing from Petitioner's counsel and Respondent's counsel, I denied Petitioner's request that I order DCPS to allow this observation. In denying this request I stated there is no authority under the IDEA to require the school district to allow such an observation in preparation for a due process hearing. *See, Letter to Marnas*, 42 IDELR 10 (OSEP 2004). *See also, School Board of Manatee County, Florida v. L.H.*, 666 F.Supp.2d 1285 (M.D. Fla. 2009). In DCPS schools establish their own policies regarding visits to classrooms.[4]

At all times relevant to these proceedings Petitioner was represented by Donovan Anderson, Esq., and Maya Washington, Assistant Attorney General, represented DCPS.

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[3] As the parties were in attendance at the due process hearing and raised no questions regarding a resolution in the instant matter it is clear there either was no meeting or there was a meeting and no resolution was reached. In either event Petitioner did not request my intervention for the delay in the resolution meeting as authorized by 34 C.F.R. §300.510.

[4] My denial of Petitioner's request was reviewed on the record during the due process hearing held on January 15, 2013.

[redacted] LEA Representative and Dean of Students, Malcolm X Elementary School, served as DCPS party representative and was present throughout the entire hearing. By agreement of the parties, the hearing was scheduled for January 15, 2013. The hearing was held as scheduled in Room 2003 of the Student Hearing Office.

The legal authority for the hearing is as follows: IDEA, 20 U.S.C.A. § 1415(f) (2010); 34 C.F.R. § 300.511(a) (2010); and the District of Columbia Municipal Regulations, Title 5e, Chapter 30, Education of Handicapped (2003).

ISSUE

The issue is whether DCPS failed to provide Student a free, appropriate, public education ("FAPE") because DCPS has not provided Student a placement that can implement the 10/25/12 individualized education program ("IEP"). The self-contained classroom at Malcolm X Elementary School, Student's current school of attendance, is not able to implement this IEP. It is a classroom for students with intellectual disabilities.[5]

RELIEF REQUESTED

Petitioner requested an appropriate placement that can implement Student's IEP.

SUMMARY OF THE EVIDENCE

A. Exhibits

Exhibits admitted on behalf of Petitioner are:

[5] This is issue, as discussed during the due process hearing, is one that addresses whether the particular placement is able to implement the IEP. It is not a question of whether the IEP actually has been implemented. This issue looks back to the date of the IEP (10/25/12) and questions whether the classroom placement at Malcolm X IEP was able to implement the IEP and further whether this same classroom placement will be able to implement the IEP in the future.

1. Psychological evaluation dated July 17, 2012
2. Review of IEE dated August 1, 2012
3. Classroom Observation tool dated November 14, 2012
4. Email from Anderson to Washington dated January 8, 2013
5. [redacted] Resume

Exhibits admitted on behalf of Respondent are:

R-3	IEP Progress Report	November 8, 2012
R-4	Occupational Service Trackers	2012-2013 SY
R-5	Behavioral Support Service Trackers	2012-2013 SY
R-6	IEP Progress Report	2011-2012 SY
R-7	Psycho-educational Evaluation Report	May 4, 2010
R-8	Communication DCPS and Petitioner	January 8, 2012

Joint Exhibits[6] admitted by the parties are:

J-1	Amended IEP	December 19, 2012
J-2	RSM Notes	December 18, 2012

Exhibits admitted by the Hearing Officer are:[7]

1 Administrative Due Process Complaint Notice dated November 1, 2012
2 Notice of Hearing Officer Appointment dated November 2, 2012
3 Prehearing Conference Scheduling letter of November 5, 2012 with attached Order re Timelines
4 Prehearing Conference Notice (with attachment) of November 9, 2012
5 District of Columbia Public Schools' Response of November 9, 2012 to Petitioner's Due Process Complaint
6 Student's IEP dated 10/25/12
7 December 6, 2012 DCPS Motion for Continuance of the Due Process Hearing
8 December 6, 2012 Amended DCPS Motion for Continuance of the Due Process Hearing
9 Order of December 7, 2012 granting Motion for Continuance
10 Prehearing Conference Order of December 8, 2012
11 List of Proposed Hearing Officer Exhibits sent October 15, 2012
12 Email
- Chain regarding request for a teleconference to address denial of school observation

B. Testimony

Petitioner testified and presented the following witnesses:

[6] These two exhibits, J-1 and J-2, were originally provided as R-1 and R-2, respectively. The parties agreed to admit them as joint exhibits. They can be found in the Respondent's bound exhibits. I have relabeled the hard copies of these exhibits to reflect their being joint exhibits for identification purposes.
[7] Emails, constituting documents of record, forwarding the following documents to opposing counsel and the hearing officer are filed with the document unless otherwise noted.

- [redacted], admitted as an expert in instruction and placement of students in special education
- [redacted], Associate Head of School for Curriculum and Instruction at Kingsbury Day School

DCPS presented the following witnesses:

- [redacted] Special Education Teacher, Malcolm X Elementary School
- [redacted], LEA Representative and Dean of Students, Malcolm X Elementary School
- [redacted] Social Worker, Malcolm X Elementary School

FINDINGS OF FACT

Based upon the evidence presented, I find the following facts by a preponderance of the evidence:[8]

1. Student is [redacted] She attends Malcolm X Elementary School ("Malcolm X") where she is in 4th grade. Student is classified as having a specific learning disability and, since October 25, 2012, her IEP has required she receive all her IEP services outside the general education setting. She is to receive 27 hours of specialized instruction per week as well as 2 hours per month of occupational therapy and 3 hours per month of behavior support services outside general education. The IEP also requires Student receive one hour per month of behavior support

[8] The instant complaint follows a prior complaint involving the 2011-2012 school year. That complaint was resolved. Some of the evidence presented at the instant due process hearing overlaps with the prior school year. I allowed this evidence to be presented to create a context for the evidence in the instant matter. However, the only issue before me in the instant matter is one regarding Student's current classroom placement following the development of the 10/25/12 IEP. I did not consider and will not address matters preceding the 10/25/12 IEP in this HOD unless they impact the instant issue.

services in general education.[9] Testimony of Petitioner; Testimony of [redacted]; Testimony of [redacted]; J 1; P 1.

2. Student is currently functioning academically between 2 and 4 years behind her current grade placement. Her lowest skill area is in math fluency which is at the K-9 grade level; her highest skill area is in math calculation which is at the 2.3 grade level. She has not made any academic progress in more than two years. J 1; J 2; P 1; P 3; R 3; R 6.

3. In addition to requiring a full time, special education program outside the general education environment Student requires a low student – teacher ratio with limited external stimuli. She also requires psychotherapeutic intervention. Instruction should be provided in multiple modalities. The program should be highly structured. The environment should be supportive and facilitate positive peer interaction. P 1; P 2.

4. The IEP meeting which resulted in the 10/25/12 IEP was held, in part, because Petitioner had repeatedly indicated to Malcolm X personnel that she was not satisfied with Student's program and services in the general education classroom to which Student was assigned at the beginning of the 2012- 2013 school year. Petitioner thought the work was too difficult for Student. Student had on-going behavioral problems when in the general education classroom. Testimony of Petitioner; Testimony of [redacted]; Testimony of [redacted]; Testimony of [redacted]; Testimony of [redacted].

5. Malcolm X is a "turn around" school. At the beginning of this school year it introduced new programs and new staff. Malcolm X is an open space school building so there are few walls in the building. The self-contained classroom has walls and a door. Testimony of [redacted]; Testimony of [redacted]; Testimony of [redacted].

[9] This apparent anomaly to Student receiving all her IEP services outside the general education environment is addressed at FN 22, p, 16. *Infra.*

6. Following the development of the 10/25/12 IEP Student was moved to the separate, self-contained classroom at Malcolm X. Last school year the self-contained classroom enrolled students with intellectual disabilities. In contrast, the self-contained classroom during the current 2012-2013 school year is non-categorical in nature. There are 5 students in the self-contained classroom. One student is classified as intellectually disabled. One student is classified as having autism. A third student is classified as emotionally disabled, and the instant student is one of two students in this classroom who are classified as having specific learning disabilities. The instant student is one of the two higher performing students in the classroom. The students in the class are performing academically between the end of kindergarten and the beginning of second grade. Testimony of [redacted]

7. The teacher assigned to the self-contained classroom, [redacted] is a certified special education teacher. A classroom aide with 25 years of experience also is assigned to the classroom. [redacted] was on maternity leave from October 19, 2012 through January 7, 2013. While on maternity leave, [redacted] provided all lesson plans for the class as required by DCPS policy. The class was covered by [redacted], a certified substitute teacher who is certified in elementary education. She has 25 years of experience as an elementary school teacher. During her maternity leave, [redacted] also maintained on-going contact with [redacted] and the classroom aide regarding the classroom in an effort to assure IEP goals were being addressed. Testimony of [redacted]; Testimony of [redacted].

8. Before [redacted] was hired [redacted] attempted to find a substitute teacher certified in special education to cover the self-contained classroom while [redacted] was on maternity leave but was unable to do so. [redacted] was one of the substitute teachers recommended by the Office of Special Education to cover the self-contained classroom. She was

hired after being interviewed by the principal, a special education teacher and [redacted]. Testimony of [redacted]

9. The school week at Malcolm X is 27.5 hours long. Student's current schedule consists of 4.5 hours of academic instruction in the self-contained classroom each day. She also receives 45 minutes of instruction in "specials"[10] each day. The specials are not provided in the self-contained classroom. The students, teacher and aide from the self-contained classroom go to the specials classroom. The teacher with the subject matter expertise provides the instruction to a class that also includes general education students. The special education students sit together in the classroom, apart from the general education students, and the staff from the special education classroom then work with the special education students following the subject matter teacher's general instruction. The staff from the self-contained classroom receive the lesson plans for the day's instruction in advance so they can plan for the instruction for the students in the self-contained classroom. The special education students sit at their own table in the cafeteria and have recess by themselves for a total of 3.75 hours per week. This configuration of services results in Student receiving 22.5 hours of academic instruction in the self-contained classroom and 3.75 hours of instruction in specials each week. Student also has approximately 2 hours of related services (behavior support service and occupational therapy) outside of general education each week. Related services are sometimes provided when Student is in recess and sometimes when she is in her afternoon academic class. J 2; Testimony of [redacted]; Testimony of [redacted] Testimony of [redacted].

10. Following Student's placement in the self-contained classroom, Petitioner made multiple requests to talk to or meet with the classroom teacher. Petitioner made these requests to [redacted] [redacted] indicated she would relay the message to [redacted]. Petitioner

[10] Specials refers to non-academic classes such as art and music.

expressed specific concerns regarding Student's homework assignments including Student's homework being, on different occasions, either too easy or too hard and, on other occasions, being nonexistent. Despite Petitioner's repeated requests, Student's teacher neither called Petitioner nor was a meeting scheduled.[11] There was no effort to assure [redacted] contacted Petitioner after the original request to contact Petitioner was forwarded to [redacted]. Moreover, no one told Petitioner [redacted] was on maternity leave until January 14, 2013 when Petitioner and her educational expert went to the school and met with [redacted].[12] During this meeting [redacted] informed Petitioner she had been on maternity leave. Testimony of Petitioner; Testimony of [redacted]; Testimony of [redacted].

11. Petitioner does not want Student to attend Malcolm X. J 2; Testimony of Petitioner; Testimony of [redacted].

12. Petitioner and [redacted] visited Malcolm X on January 14, 2013. During that visit Petitioner identified [redacted] as her sister and provided a different name to identify her. [redacted] used this name during the visit and also changed her area code thereby providing a false telephone number. Testimony of [redacted], Testimony of [redacted]

13. Petitioner has not received a report card for Student since she was assigned to the self-contained classroom. However, students in self-contained classrooms do not receive report cards. They receive IEP Progress Reports. Student received an IEP Progress Report on November 8, 2012. R 3; Testimony of Petitioner; Testimony of [redacted] Testimony of [redacted].

14. Student has shown gains academically and behaviorally since her placement in the self-contained classroom. She is better able to interact appropriately with her peers, both disabled and

[11] During the telephone conference held on January 10, 2013, Respondent's counsel offered to facilitate the scheduling of a meeting between Petitioner, her educational advocate, if she so chose, and [redacted]. Petitioner did not respond to this offer.

[12] See discussion, *Infra* at p. 10, regarding the circumstances of this meeting.

non-disabled. She does not leave the classroom to roam the building or to gain time away from class by sitting with a selected teacher to reduce stress created in class. She has become a class leader. She is able to do some classroom work independently. Testimony of [redacted]; Testimony of [redacted].

15. Kingsbury Day School ("Kingsbury") is a full-time, separate, private, special education school. It provides special education to students from pre-K through 12th grade. Most of the students in the school have learning disabilities and/or attentional problems. Kingsbury also serves high functioning students with autism and some students with low incidence disabilities. The instant Student has visited Kingsbury and completed the application process. She has been accepted. If she were to attend Kingsbury, Student would be in a classroom with a total of 7 students (including Student): 4 with learning disabilities, 1 with attention deficit disorder and 1 with multiple disabilities. Academically these students are performing between the mid first and mid second grade levels. There is a teacher with special education certification and an assigned assistant teacher in the classroom. All instruction is provided by these two individuals except for specials where the students are taught by teachers certified in that subject area. Kingsbury is able to implement Student's IEP. Testimony of [redacted].

DISCUSSION

WEIGHT AND CREDIBILITY OF TESTIMONIAL EVIDENCE

The following discussion is based on my review of the exhibits introduced by the parties, witness testimony and the record in this case. The credibility of two witnesses in this case is particularly troubling. Petitioner and her expert witness, [redacted], misrepresented [redacted] identity to school officials during a school visit that occurred on January 14, 2013.

Following my declining, on January 10, 2013, to issue an order requiring [redacted] be allowed to visit Student's classroom,[13] Petitioner and [redacted] went to Malcolm X. Petitioner stated [redacted] was Student's aunt and identified her by a false name.[14] During this visit on January 14, 2013 [redacted] used this false name in the school and, in addition, provided a false telephone number.[15] The blatant, intentional misrepresentations used by these individuals to circumvent school policy calls into question their credibility in the due process hearing. I, therefore, have not used their testimony to determine findings of fact unless there is documentary or corroborating testimonial evidence supporting their statements. I note [redacted] admitted her deception while under oath, and I recognize her candor in doing so. This candid admission, however, does not, in my view, rehabilitate her credibility. Both she and Petitioner have made clear, through their intentional acts of deception, they are willing to do anything in order to achieve their desired end – the placement of Student at a private school at DCPS expense. [redacted] testified she had misrepresented her identity because she wanted to observe Student in school.[16] The deception carried out by these individuals not only disrespects the hearing process, DCPS' policy and [redacted] position as an expert, it disrespects Student, who has clear needs which were not considered when they chose to hide [redacted] identity. Their willingness to take any action to achieve their ends also demonstrates an inability to weigh variables and reach

[13] As noted above, and stated on the record, I declined to issue this order as there is no legal authority supporting requiring a petitioner's expert be granted access to a student's classroom in preparation for a due process hearing. The legal authority is counter to this position. DCPS schools establish their own policies regarding visits to classrooms.

[14] It is noteworthy, in this regard, that [redacted] had been present at a school event in December. The Dean of Students (and, reportedly, the principal), who testified here, ultimately recognized [redacted] from this previous interaction and identified her real identity.

[15] She gave her current telephone number but changed the area code.

[16] Coincidentally, despite the deception, Petitioner and [redacted] were not able to observe Student in class on this visit because she was not in the classroom due to a minor disruption which was quickly resolved by the school.

reasoned decisions which also raises questions about [redacted] expert opinion testimony in this matter. I, therefore, have chosen not to rely on [redacted] expertise.[17]

While I find the testimony of the remaining three witnesses presented in this matter to be credible, some witness were more persuasive than others. Where these differences in persuasiveness are relevant to my determination, I so indicate. I note, moreover, that [redacted], Respondent's chief witness, served as party representative in this matter and had the benefit of hearing all testimony presented by Petitioner as well as Petitioner's opening statement prior to her own testimony. I further note that [redacted] and [redacted] also revealed some willingness to be evasive when interacting with Petitioner as neither of them informed Petitioner that [redacted] was on maternity leave. This raises questions regarding the weight to be given their testimony, and I have noted areas where I found their responses to be evasive.

ISSUE

Whether DCPS failed to provide Student a free, appropriate, public education because DCPS has not provided Student a placement that can implement the 10/25/12 individualized education program. The self-contained classroom at Malcolm X Elementary School, Student's current school of attendance, is not able to implement this IEP. It is a classroom for students with intellectual disabilities.

Under the IDEA each local education agency is required to provide a FAPE to each student found eligible for special education and related services. A FAPE is:

> Special education and related services that . . . are provided at public expense, under public supervision and direction, and without charge; . . . [m]eet the

[17] I qualified [redacted] as an expert based on her experience and education. I noted when DCPS objected to her qualification as an expert due, in part, to the deception in which she participated that it is my view the deception raised issues of credibility and weight which I have now resolved by finding [redacted] testimony to have limited credibility. I have further determined not to rely on her expert opinion as a result of the credibility issues. Had [redacted] not presented with these credibility issues, I would have relied on her expert opinion as her years of experience and education support her being qualified as an expert.

> standards of the [state educational agency] . . . [i]nclude an appropriate preschool, elementary school, or secondary school education . . . ; and . . .[a]re provided in conformity with an . . .IEP that meets the requirements of [the IDEA regulations].

34 C.F.R. § 300.17. *See also*, D.C. Code § 30.3001.1. After a school district develops an IEP that meets all of a student's educational needs, it must identify a placement in which to implement the IEP. The placement is to be in the least restrictive environment in which the IEP can be implemented. 34 C.F.R. §§ 300.114 – 300.118. *See also*, D.C. Code §§ 30.3011 – 30.3013.

The issue before me, as discussed above, is one that addresses whether the classroom placement at Malcolm X is able to implement the IEP. It is not a question of whether the IEP goals have actually been implemented. Rather, this issue looks back to the date of the IEP and questions whether the classroom placement at Malcolm X was able to implement the 10/25/12 IEP and looks forward to ask whether the classroom placement at Malcolm X will be able to implement the IEP in the future. For the reasons that follow I conclude the classroom placement[18] at Malcolm X is appropriate. It was able to implement Student's IEP and it will be able to implement Student's IEP in the future. This classroom is the least restrictive environment in which the IEP can be implemented. In reaching this conclusion I am cognizant of some possible specific implementation issues, but actual implementation of the IEP is not before me.[19]

Placement/Hours/Least Restrictive Environment ("LRE")

The parties are in agreement as to Student's placement. Student requires a full time, placement outside the general education environment. Student's 10/25/12 IEP requires she

[18] DCPS refers to specific classroom placements as location issues, and, in this instance, I agree the classroom placement is a location issue. For ease of discussion I will for the remainder of the instant HOD refer to the classroom without the addition of the modifier "placement" in the discussion.

[19] The parties presented evidence that addressed, at least in part, implementation issues. I note I allowed this evidence to provide a structure and framework to the issue before me. I emphasize here, however, that there was no issue regarding implementation before me. The only issue before me addressed whether the self-contained classroom at Malcolm X was and is able to implement Student's IEP.

receive 27 hours of specialized instruction outside the general education environment each week. She also is to receive 2 hours of occupational therapy and 3 hours of behavioral support outside the general education environment each month. This totals approximately 27.25 hours[20] of special education and related services outside the general education environment each week. The school week at Malcolm X is 27.5 hours. Student's related services are provided in the afternoon at times that may overlap with instructional time thereby accounting for the excess number of hours of service per week when compared to the hours in the school week (27.25 v. 27.5, respectively).[21] The IEP also requires Student receive 1 hour of behavior support in the general education environment each week. This requirement appears to run counter to the full time, out of general education program reflected in Student's schedule and that was discussed by all witnesses in this matter. This apparent contradiction is addressed *Infra* at FN 22, p.16.

Student's specials and her lunch are not in separate special education environments in that general education students are in the rooms in which these occur at the same time Student and her classmates are in these rooms. However, Student and her classmates are not intermingled with the general education students in either of these settings. Both in the specials classrooms and in the cafeteria, Student and her classmates are seated together and separate from the general education students. While this may not technically be outside the general education environment, the separation from general education students is akin to being outside the general education environment. Being in a shared space, but separated from general education students is generally understood to be distinguishable from the general education environment. For example, students who are required to receive services in the general education environment are to be intermingled

[20] Student also has lunch and recess for a total of 3.75 hours per week. This results in a total of 31 hours per week in Student's schedule.
[21] The overlap of hours for related services with the rest of Student's scheduled day also accounts for the apparent overage of hours when compared to the length of the school week.

with general education students, not set apart from the classroom as a whole in a section of their own. Thus the configuration of Student's specials classrooms is the other side of this same concept. Separating special education students in a general education classroom is akin to creating a separate environment. It is also important to recognize that the IDEA does not require special education students educated outside the regular education environment never see or interact with a general education student. As reflected in the continuum of placements that must be available to students, placements in separate classes and placements in separate schools are distinctly different. 34 C.F. R. § 300.115(b)(1). Placements in separate classes are, by nature, different from placement in separate schools in that students who are in separate classes in general education schools do have some limited opportunities to interact with their non-disabled peers. Special education classes in general education schools are less restrictive than placements in separate special education schools and therefore preferable under IDEA if the student is able to benefit from his/her education in such a setting. 34 C.F.R. §§ 300.114 – 300.117.

> Special classes, separate schooling, or other removal of children with disabilities from the regular educational environment should occur only when the nature or severity of the disability of a child is such that education in regular classes with the use of supplementary aids and services cannot be achieved satisfactorily. The overriding rule is that placement decisions must be determined on an individual, case-by-case basis, depending on each child's unique needs and circumstances and based on the child's IEP.

Letter to Trigg, 50 IDELR 48 (OSEP 2007).

In the instant matter the MDT, including the parent, have agreed Student is to receive all her instruction outside the regular education environment. This is occurring. While Student is in spaces with general education students when in specials her instruction occurs in tandem with her peers from the self-contained classroom only, with direct service provided by the staff from

the special education classroom.[22] Thus Student is within a special education environment created within the general education classroom.

Based on Student's schedule it also appears she receives approximately 45 minutes less special instruction per week than that required by her IEP. DCPS argues this deviation in the number of hours of special education instruction provided to Student is of a *de minimis* nature and therefore does not constitute an inability to implement the IEP. *See, for example, Shank v. Howard Road* 585 F. Supp. 2d 56 (D.D.C. 2008*); See also, Catalan ex rel EC v. District of Columbia* (D.D.C. 2007). I agree. The school schedule appears to be such that it is not feasible to provide the precise number of hours required by the Student's IEP each week. While it would be possible to create an individual schedule for Student so that she culd receive the extra 9 minutes per day she is missing. This would seem to be a process that would elevate form over function. The intent of the IEP was to create a program for Student that was outside of regular education and Malcolm X has done so. DCPS is providing and has provided Student a program in compliance with her 10/25/12 IEP.

Teacher Certification

Throughout the hearing, Petitioner emphasized that Student's instruction had not been provided by a certified, special education teacher from the date of the development of the IEP on 10/25/12 through January 7, 2013 as the special education teacher assigned to the self-contained classroom was out of school on maternity leave. This emphasis was intended to

[22] I note that DCPS and Petitioner have revealed some confusion on this point. The reference to behavioral services in general education within the 10/25/12 IEP suggests a lack of understanding that Student was receiving instruction in specials outside the general education environment based on how the seating in the class was structured, rather than instruction in the general education environment with her non-disabled peers. [redacted] also referred to the specials as a time in general education.

demonstrate that the classroom to which Student was assigned was unable to implement her IEP. I do not agree. At hearing DCPS' witnesses stated the substitute teacher providing Student special instruction during the assigned teacher's maternity leave was certified as a substitute and in elementary education. Respondent's witnesses each stated they did not know whether she held special education certification.[23] DCPS argues the assigned substitute meets the requirement for covering the class, and I agree. There is no requirement in IDEA that a teacher providing special education be certified as a special education instructor. *See,* 34 C.F.R. § 300.35. While IDEA does require that teachers providing services to special education students be highly qualified in the area in which they are teaching which for a special education teacher in the elementary grades would mean certification in special education, 34 C.F.R. §§ 300.18 & 300.156, IDEA does not create a right of action on behalf of an individual student for the failure of a particular local education agency employee to be highly qualified. 34 C.F.R. § 300.156(e). Moreover, I note again that the assigned certified special education teacher maintained some responsibility for the classroom. Additionally, in the District of Columbia substitute certification requires only that substitutes have completed a bachelor's degree at an accredited institution of higher learning. Subject matter education and/or experience are not required. D.C. Code § 5-E1601.10. Thus the substitute met the qualifications for serving as a substitute. While I again note that DCPS was less than forthright with Petitioner regarding the special education teacher's absence and less than candid when testifying as to the substitute's

[23] I found this testimony to be evasive. Both [redacted] and [redacted] testified they knew about the substitute's certification in elementary education, and each testified s/he did not know whether she was certified in special education. I find this unlikely. The Office of Special Education had referred the substitute to Malcolm X as one of four possible replacements for the assigned teacher while she was on maternity leave. [redacted] had asked for assistance after she could not find a certified special education teacher to serve as a substitute. The Office of Special Education informed her that a teacher who has substitute certification was qualified to cover the class. The selected substitute was interviewed, and Yohn participated in the interview. With all of this information it seems unlikely that the substitute's credentials had not been provided to Malcolm X. I would have found this testimony more credible and less evasive if either of the witnesses had offered some explanation for their ignorance.

certification, DCPS policy did assure the special education teacher maintained responsibility for the delivery of IEP compliant programs to Student and her classmates. The special education teacher developed the lesson plans that were used in her absence, as required, and maintained contact with the substitute teacher and the classroom aide for similar purposes.

Kingsbury

The program at Kingsbury, the school Petitioner asserts is able to implement Student's IEP, has many similarities with the program provided at Malcolm X. The specials at Kingsbury, like Malcolm X, are taught by teachers who are not certified in special education. The Kingsbury classroom, if Student attended, would have 7 students and two staff while the Malcolm X classroom has 5 students and 2 staff. Ongoing therapeutic intervention/behavior support is available to Student in both locations. At Kingsbury Student's abilities place her in the middle of her classroom peers and at Malcolm X she is one of the 2 best students in the class. The significant difference between the two programs is that at Malcolm X Student has some opportunity to interact with her non-disabled peers outside of instruction, while at Kingsbury she would not. The programs at both schools are able to implement Student's IEP. Malcolm X is a less restrictive environment than Kingsbury and, as such, the preferable placement under IDEA. 34 C.F.R. § 300.114.

Educational Benefit

The uncontroverted testimony is that Student has shown benefit from the Malcolm X classroom. She has had fewer disruptive and disciplinary incidents since moving to the self-contained classroom. She has been leaving the classroom less frequently to seek relief from the

pressure so the classroom. She is better able to interact with both her non-disabled peers and her peers with disabilities. She is a leader in the self-contained classroom. In addition she has begun to complete some academic work independently. All of this improvement has occurred since the end of October. It is likely, that this success will grow, and she will show even more benefit as the school year progresses.

Petitioner's argument

Petitioner's argument is that the classroom at Malcolm X has failed to implement Student's IEP and is not able to do so. This argument for the reasons stated above is not supported by the evidence. DCPS has provided Student a classroom that can provide the program and services described by Student's IEP. All services provided to Student are either outside the general education setting entirely or provided in a separate section within a general education setting. The uncontroverted testimony is that Student is benefitting from this program. Petitioner has not established that the program at Malcolm X has been unable to provide Student's IEP program and services, nor has Petitioner established the program at Malcolm X will not be able to provide the programs and services contained in Student's IEP. In reaching this determination I am mindful of Petitioner's wise statement made during her testimony. This case is, "....all about [Student]." She is receiving benefit from the program at Malcolm X. She is placed in the least restrictive environment appropriate for her.

The classroom at Malcolm X was able to implement Student's IEP and continues to be able to do so. I, therefore, conclude by a preponderance of the evidence Petitioner has not met her burden of proof. Because I find against Petitioner I do not address herein Petitioner's arguments in support of her remedy request.

CONCLUSIONS OF LAW

Based upon the foregoing Findings of Fact and Discussion, I conclude, as a matter of law, DCPS did not fail to provide Student a free, appropriate, public education by failing to provide Student a placement that could implement her individualized education program. DCPS provided Student a placement that was able to implement the 10/25/12 individualized education program. The self-contained classroom at Malcolm X Elementary School, Student's current school of attendance, is able to implement this IEP.

ORDER

Based upon the above Findings of Fact and conclusions of law, it is hereby ordered that this complaint be **Dismissed.**

IT IS SO ORDERED:

June 25, 2013
Date

Erin H. Leff
Hearing Officer

NOTICE OF RIGHT TO APPEAL

This is the final administrative decision in this matter. Any party aggrieved by the Findings and/or Decision 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 Decision of the Hearing Officer in accordance with 20 USC §1451(i)(2)(B).