

**DISTRICT OF COLUMBIA
OFFICE OF THE STATE SUPERINTENDENT OF EDUCATION**

Student Hearing Office
810 First Street, NE, Second Floor
Washington, DC 20002

OSSE
Student Hearing Office
May 30, 2013

on behalf of

Petitioner,

Hearing Officer: Kimm Massey, Esq.

v.

DISTRICT OF COLUMBIA PUBLIC SCHOOLS,

Respondent.

HEARING OFFICER DETERMINATION

**BACKGROUND AND
PROCEDURAL HISTORY**

Student is a year old male, who currently attends a DCPS elementary school. On March 15, 2013, Petitioner filed a Complaint against respondent DCPS, alleging that DCPS denied Student a free appropriate public education (“FAPE”) by failing to propose an appropriate program, to propose an appropriate placement, to implement the IEP, to provide occupational therapy, and to meet Student’s needs at the DCPS elementary school. Petitioner also raised the issue of whether the private placement being requested by Parent is a proper placement. As relief for these alleged denials of FAPE, Petitioner requested placement and funding at the requested private placement for the remainder of SY 2012/13 and SY 2013/14, with all related fees and costs, as well as compensatory education.

On March 26, 2013, DCPS filed its Response to the Complaint. Therein, DCPS asserted that it sufficiently evaluated Student in all areas of suspected disability and developed an appropriate IEP and placement which takes into account the concerns of Parent and the rest of the team, and that the IEP is appropriately being implemented. DCPS also asserted that Student is accessing the appropriate grade level standards and demonstrating progress although he has serious health concerns, and that since Student does not have a full-time IEP a full-time IEP should be considered before moving Student to more restrictive placement such as a private school. Finally, DCPS asserted that location of services is purely an administrative issue within the discretion of DCPS, and Student’s IEP can be implemented at the proposed location.

On April 1, 2013, Petitioner filed a Motion for the recusal of the hearing officer. On April 4, 2013, the hearing officer issued an Order denying the motion. By letter dated April 23, 2013, the Student Hearing Office (“SHO”) indicated that the matter had been reviewed and the Acting Director of the SHO was declining to appoint another hearing officer to hear this matter.

The parties concluded the Resolution Meeting process by participating in a resolution session on April 17, 2013. No agreement was reached. The 45-day timeline began on April 15, 2013 and will end on May 29, 2013, which is the HOD deadline.

On April 26, 2013, the hearing officer convened a prehearing conference and led the parties through a discussion of the issues, relief requested, and other relevant topics. The hearing officer issued a Prehearing Order on April 26, 2013.¹

On April 30, 2013, Petitioner filed a Motion to strike comp ed plan (sic) and Objections to the Exhibits. On May 1, 2013, Petitioner filed DCPS filed an Opposition to the motion.

By their respective letters dated April 29, 2013, DCPS disclosed eight documents (Respondent’s Exhibits 1-8), and Petitioner disclosed sixty-four documents (Petitioner’s Exhibits 1-64).

The hearing officer convened the due process hearing on May 6, 2013.² The hearing officer took DCPS’s motion to strike and objections under consideration, and after considering the pleadings and the parties’ oral arguments, the hearing officer denied the motion and overruled the objections. Thereafter, all of DCPS’s disclosed documents were admitted into the record; Petitioner’s Exhibits 2-3, 11, 13-14, 20, 22-23, 25, 34, 35, 51-52, 59, and 62 were admitted over DCPS’s objection, and all remaining documents disclosed by Petitioner were admitted without objection. The hearing officer then received opening statements and Petitioner’s testimonial evidence prior to adjourning the hearing.

The hearing officer reconvened the hearing on May 7, 2013. The hearing officer received DCPS’s testimonial evidence and closing statements, then the hearing officer concluded the hearing.

The due process hearing was convened and this Hearing Officer Determination is written pursuant to the Individuals with Disabilities Education Improvement Act (“IDEA”), 20 U.S.C. §§ 1400 et seq., the implementing regulations for IDEIA, 34 C.F.R. Part 300, and Title V, Chapter 30, of the District of Columbia Municipal Regulations (“D.C.M.R.”).

ISSUE(S)

The issues to be determined are as follows:

¹ The hearing officer also issued several revised Prehearing Orders at Petitioner’s request.

² Counsel for each party and the witnesses for each party are listed in the Appendix that accompanies this decision.

1. Did DCPS fail to propose an appropriate IEP by failing to include a sufficient number of hours of service outside of general education, a smaller more supportive school environment, and appropriate accommodations, including a scribe?
2. Did DCPS fail to implement Student's IEP by failing to provide all of the occupational therapy services and specialized instruction listed on the IEP?
3. Did DCPS fail to meet Student's needs at the current DCPS elementary school by failing to provide meaningful educational progress?
4. Is the private placement requested by Parent a proper placement?

FINDINGS OF FACT³

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

1. Student is a year old male, and he currently attends fifth grade at a DCPS elementary school.⁴
2. On January 25, 2011, a multidisciplinary team determined Student eligible for special education and related services as a Student with a specific learning disability ("SLD") due to his underachievement in the area of written expression and avoidance behaviors relating to writing assignments. The team also determined that Student met the criteria for Other Health Impairment ("OHI") due to his diagnosis of Attention Deficit Hyperactivity Disorder ("ADHD").⁵
3. In September 2011, Student was diagnosed with postural tachycardia syndrome ("POTS"), which refers to an exaggerated increase in heart rate with standing. POTS is an abnormality in the regulation of heart rate, but the heart itself is usually normal. Student experiences equilibrium when he is lying down, and his heart rate is elevated when he is sitting or standing. In fact, whenever Student's upper body is higher than his feet he experiences an elevated heart rate, so lying down or getting up and moving around helps Student.⁶
4. In November 2011, Student was diagnosed with Ehlers-Danlos syndrome ("EDS), which is a hereditary disorder of connective tissue. Common features of EDS include joint hypermobility (i.e. looseness), abnormal wound healing, and sometimes soft and stretchy skin. Student exhibits joint hypermobility and stretchy skin with atrophic

³ To the extent that the hearing officer has declined to base a finding of fact on a witness's testimony that goes to the heart of the issue(s) under consideration, or has chosen to base a finding of fact on the testimony of one witness when another witness gave contradictory testimony on the same issue, then the hearing officer has taken such action based on the hearing officer's determinations of the credibility and/or lack of credibility of the witness(es) involved.

⁴ See Complaint at 3; Respondent's Exhibit 5.

⁵ Petitioner's Exhibit 10.

⁶ Testimony of Parent; Petitioner's Exhibit 51.

scarring. EDS causes connective tissues to break, which results in scar tissue, so heavy lifting is contraindicated for Student. A November 2, 2011 initial consultation summary report resulting from Student's evaluation for EDS recommended, *inter alia*, that Student receive occupational therapy to learn how to keyboard and use his hands without discomfort, and that Student be allowed to lie down in the classroom when he is unable to remain upright, to have salty snacks and water as needed, and to self-regulate in physical education.⁷

5. Student's current IEP is dated November 13, 2012. The IEP identifies Student's primary disability as multiple disabilities, and it requires Student to receive 200 minutes per week of specialized instruction outside of general education, 150 minutes per week of specialized instruction in general education, 30 minutes per week of behavioral support services outside of general education, and 120 minutes per month of occupational therapy outside of general education. The IEP also calls for Student to receive assistive technology consisting of an Apple iPad 2 for communication, and a laptop computer, word processing program, typing program, and Apple iPad 2 for learning and studying.

The IEP provides that Student does not require the support of a dedicated aide. However, the IEP requires that Student be provided with the following Other Classroom Aids and Services:

[Student] benefits from sitting in a chair that is low to the ground and where his knees raise above his waist. [Student] has the ability to lie down in the classroom when he is unable to remain upright; he is able to walk around and/or stand up during instruction. Seating for a prolonged period of time is not recommended for [Student]; he should have opportunities for physical movement throughout the school day. He is allowed to have salty snacks and water as needed; he needs reminders to drink water and is allowed to use the restroom as needed. [Student] can use a weighted lap pad and/or special seating during class. [Student] goes to the nurse, as needed, to take his blood pressure. In physical education, he is allowed to self-regulate his participation in activities. . .

If [Student] is not in class due to health reasons, please provide the classwork and homework assignment . . .

It is important for all teachers working with [Student] to reduce the amount of information presented per page; . . . Give both verbal and written directions and instructions to [Student]; have him explain in his own words what is expected of him . . . reduce the amount of information visible per page as well as the quantity of tasks [Student] has to complete to demonstrate mastery.

Classroom aids, services, and supports that may be provided in the regular education class or other education related settings include: use of an alphabet strip; use of computerized pre-writing organizers; use of a baseline for writing assignments; and use of a word bank on assignments. . . multi-sensory instruction; encouraging proofreading

⁷ Testimony of Parent; Petitioner's Exhibit 13.

before submitting assignments; and providing visual cues and aides (sic) and checklists for task completion . . . mathematics charts . . .

It is important to allow [Student] to dictate his responses to an adult and/or scribe, especially for extended writing assignments and/or when he is physically unable to write independently. If [Student] does not have access to an adult and/or to a scribe, provide him with a handheld recorder . . . reminding him of proper positioning . . . ; using a tube pencil grip and/or floral tape; reducing the amount of handwriting required . . . ; moving large amounts of writing, when required, to the beginning of the school day; using roller-ball pens; writing on top of multiple sheets of paper and/or a desk calendar blotter; and using a $\frac{3}{4}$ binder as a slant board.

[Student] may use the assistive technologies provided to him both at home and at school . . . please provide classwork and homework assignments to him via email . . . ⁸

6. Student's previous IEP was dated January 31, 2012. This IEP also identified Student as having Multiple Disabilities, but it provided for Student to receive 100 minutes per week of specialized instruction outside general education, 150 minutes per week of specialized instruction in general education, 30 minutes per week of behavioral support services, and 120 minutes per month of occupational therapy. This IEP also indicated that Student did not require the services of a dedicated aide. Moreover, the Other Classroom Aids and Services section includes the information contained in the first and fourth-sixth paragraphs set forth in the preceding Paragraph, above, except that there is no mention of dictating responses to an adult or scribe and using a handheld recorder.⁹
7. Student's January 31, 2012 and November 13, 2012 IEPs both contained the following accommodations: interpretation of oral directions, markers to maintain place, repetition of directions, simplification of oral directions, calculators, pencil grip, copy from paper/book instead of board, write in tests books, dictated response to examiner, location with minimal distractions, preferential seating, small group testing, use of a clear workspace, use of noise-canceling headphones, adaptive or special furniture, flexible scheduling, test administered at best time of day for student, and breaks between subtests, extended time on subtests, breaks during a subtest, extended time, modify length of tasks, breaks for movement, use of timer.¹⁰
8. Student's January 2012 IEP did not contain any goals in the academic area of mathematics and in the area of adaptive/daily living skills, but Student's November 2012 IEP contains six goals for mathematics and three goals for adaptive/daily living skills. Student's January 2012 IEP contained twelve annual goals in written expression, and six of the seven annual goals in written expression on the November 2012 IEP are copied verbatim from the January 2012 IEP. Student's January 2012

⁸ Respondent's Exhibit 5.

⁹ Petitioner's Exhibit 16; Petitioner's Exhibit 16.

¹⁰ Respondent's Exhibit 5 at 18; Petitioner's Exhibit 16 at 14-15.

- IEP contained six goals in the area of emotional, social, and behavioral development, and the four emotional, social, and behavioral development goals in Student's November 2012 IEP are copied verbatim from the January 2012 IEP. Student's January 2012 and November 2012 IEPs both contain three goals in the area of motor skills/physical development, but there is no overlap or repetition between the goals in that area.¹¹
9. A January 2011 confidential psychological evaluation report revealed that Student received intelligence testing scores in the following ranges: General Intelligence and Verbal Intelligence - significantly above average; Nonverbal Intelligence - moderately above average; and Composite Memory - average.¹²
 10. A June 2012 assistive technology consultation report reveals that Student's "participation and success in the learning process continue to be curtailed by multiple disabilities." The report notes Student's inability to use writing instruments and resultant reliance on a laptop to accomplish written tasks. Ultimately, the evaluator recommended further assistive technology evaluation to explore more specific options in the areas of voice recognition, touch screen use, digital audio player and recording, math, scanning and optical character recognition, and reading, writing and learning software.¹³
 11. DCPS has provided Student with an iPad to use at school and at home, but neither Student nor Parent has been given any training on the use of the iPad. The iPad contains voice activated software, which Student can use at home, but Student cannot use the software at school because the school environment is too noisy.
 12. A November 2012 educational assessment administered to Student resulted in scores in the following ranges: Broad Reading - high average; Broad Math - Average; Academic Fluency - average; and Broad Written Language - low average. Hence, writing is an area of weakness for Student. Moreover, writing causes Student physical pain, and as a result the evaluator scribed for Student during a portion of the spelling subtest due to Student's physical pain that prevented him from writing. The examiner opined that being provided with the use of technology or a scribe could have resulted in higher quality responses in the area of writing.¹⁴
 13. A January 2013 occupational therapy evaluation report includes the following recommendations for Student: extra time to rest between demanding physical activities, seating accommodations that provide adequate support and stability, access to a scribe, reduced written tasks or alternate formats, use of a roller pen, access to technology to complete written assignments, formal instruction in selected assistive technology, formal instruction in and an appropriate space in which to use speech to text technology, support from staff familiar and proficient in assistive technology, a

¹¹ Respondent's Exhibit 5; Petitioner's Exhibit 16.

¹² Petitioner's Exhibit 8 at 7.

¹³ Petitioner's Exhibit 28.

¹⁴ Petitioner's Exhibit 40; testimony of educational consultant.

learning environment with minimized unexpected or loud auditory distractions, noise cancelling headphones or a quiet room during testing, extended time for tests, extended deadlines for long written assignments, multisensory approaches to learning, and preferential seating.¹⁵

14. In light of Student's social/emotional issues, as well as his medical and attentional issues, Student needs a very flexible and small classroom environment where it is understood that Student will sometimes not be able to produce work that he otherwise can produce because he is in pain.¹⁶
15. Student has been experiencing social/emotional issues at school since at least April of 2010, when he began seeing a private therapist outside of the school setting. The initial concerns for Student were issues with depression and anxiety. More recently, Student has come to view school as a place where he cannot compete because he cannot physically do all that is expected of him and all that the other students can do. Hence, Student does not like school and he does not feel good at school.¹⁷
16. During his individual behavioral support sessions at DCPS since fall of 2011, Student and his counselor have worked on how to cope with the stress of having health issues and a learning disability in school, the anxiety/worries that go along with feeling different, and how to work on social connections with his peers. Student has made progress in these sessions. He is able to state the coping strategies he should use, but now he's working on how to actually put the strategies in practice when he feels overwhelmed. Student's social, emotional and behavioral development goals remained the same on his previous and current IEPs because he is still working on those goals and have not mastered them. Student also participates in a weekly social skills/friendship group at school.¹⁸
17. In light of Student's EDS, Student would benefit from the availability of a scribe and Student requires the use of voice recognition software in the classroom during the school day, which will require a relatively quiet environment.¹⁹
18. On April 17, 2012, the special education coordinator ("SEC") at Student's current school sent to the Program Manager at DCPS's Office of Special Education, on behalf of Student's multidisciplinary team ("MDT"), an IEP Paraprofessional Justification for Student, which indicated that Student requires an IEP paraprofessional for educational and medical purposes because Student's impairments of ADHD, EDS and POTS are "chronic and severe in nature and affect the student throughout the school day" and the full-time support of an IEP paraprofessional is

¹⁵ Petitioner's Exhibit 64.

¹⁶ Testimony of psychotherapist; *see* Petitioner's Exhibit 57.

¹⁷ Testimony of psychotherapist.

¹⁸ Testimony of DCPS school social worker.

¹⁹ Petitioner's Exhibits 23, 25, 27.

- required to allow Student to participate in his least restrictive environment (“LRE”), i.e. the general education setting, with his non-disabled, same-aged peers.²⁰
19. By email dated April 25, 2012, the Program Manager at DCPS’s Office of Special Education denied the request for a dedicated aide for Student, stating that Student’s independence should continue to be fostered and that the paraprofessional assigned to Student’s DCPS elementary school’s Autism class could be utilized at different times during the day as necessary for Student.²¹
 20. In October 2012, Student’s IEP team refused to change Student’s educational placement in response to a request by Parent and Petitioner’s counsel for a change in educational placement to a more restrictive environment that would separate Student from his non-disabled peers and remove him from general education. In doing so, the team determined that Student was receiving FAPE in his LRE, the general education environment.²²
 21. Student’s medical conditions impact his education because, due to the conditions, Student has physical difficulties with writing and he cannot sit for long periods without movement breaks and a change in the type of seating he is using. In the current DCPS elementary school, Student is allowed to change his seat as needed during the school day by, for example, sitting in a beanbag chair or lying on the floor. However, the alternative seating tends to be in a location removed from the rest of the students, such as in a corner. Hence, although Student is being given access to all the types of seating he needs, when he changes his seating it separates him from the rest of the class physically, which also has the effect of separating him socially. In fact, during SY 2011/12, Student often did his work on the floor in the corner behind the teacher’s desk while the rest of the students and the teacher were in the middle of the room.²³
 22. In light of Student’s medical conditions and his need for a variety of seating arrangements and movement breaks, Student needs a flexible classroom environment where he can change seating arrangements but still be in a location in class that allows him to remain a part of the class both physically and socially.
 23. In a recent observation of Student on March 13, 2013 that lasted slightly more than one hour, Student was provided a writing prompt for writing his homework in his notebook, the teacher repeated directions for Student and checked in with him, Student was allowed breaks for movement in that he was allowed to sit in alternative seating, and Student was provided with preferential seating in front of his math class. Hence, some of the accommodations listed on Student’s IEP were provided to him during the observation. On the other hand, Student was tardy coming to class and did not have a pencil, but his organizational goals and accommodations and/or his goals

²⁰ Petitioner’s Exhibit 24.

²¹ Petitioner’s Exhibit 26.

²² Petitioner’s Exhibit 32.

²³ Testimony of educational consultant; testimony of Parent.

in the area of adaptive/daily living skills were not utilized to help him address these issues.²⁴

24. Student's IEP goals have not been consistently introduced during SY 2011/12 and SY 2012/13. For example, by Reporting Period 3 of SY 2012/13, which covered the period from January 26 through March 29 of 2013, two of Student's math goals still had not yet been introduced, and another math goal had just been introduced during the third reporting period.

Similarly, by the third reporting period of SY 2012/13, four of Student's written expression goals had not yet been introduced and another written expression goal had just been introduced. One of the written expression goals that had not yet been introduced was a goal that was copied verbatim from the previous IEP, which Student was reported to have mastered by the end of SY 2011/12. Another goal that had not yet been introduced by the third reporting period of SY 2012/13 required Student to complete a graphic organizer to help him plan and order his thoughts during the writing process. This same goal was not introduced during SY 2011/12 until the fourth and final reporting period. As the graphic organizer is the first step of the writing process, it should have been introduced early on and not saved for the end of each school year.²⁵

25. Parent is concerned that Student may not have begun receiving any of his specialized instruction and accommodations during SY 2012/13 until January of 2013, and even then, Mom suspects that Student is not receiving all of the services required by the IEP. Parent's concerns stem from the facts that, *inter alia*, in October 2012 Student was reporting to Parent that he was not receiving any service hours, Student's special education teacher was unable to provide Parent with any work samples for Student at an October 2012 MDT meeting for Student, Student reported to Parent in January 2013 that he was being pulled out of class to work on assignments while sitting next to his special education teacher, and at the March 2013 resolution meeting for this case Student's special education teacher reported that she is providing Student with 300 minutes of inclusion services in general education in the area of math each week and approximately 90 to 120 minutes of specialized instruction outside of general education each week.²⁶

26. The current DCPS school placed a dedicated aide with Student for approximately a month in February to March of 2013 without Parent's knowledge, and the aide made a habit of yelling at Student and making Student carry a heavy binder, which may have resulted in the tearing of Student's connective tissue. Moreover, Student's OT service provider at the current school created a contract that required Student to sit on an exercise ball whenever he was not sitting in his chair, even though Student should not sit on an exercise ball for more than 6 minutes per day. All three of Student's teachers signed the contract, and Student was required to sign the contract as well.²⁷

²⁴ Testimony of educational consultant.

²⁵ Petitioner's Exhibits 29 and 48; Respondent Exhibit 1; testimony of educational consultant.

²⁶ Testimony of Parent.

²⁷ Testimony of Parent.

27. During SY 2011/12, Student consistently received grades of 3, which meant he was proficient and met the standard. During SY 2010/11, Student has consistently received grades of 3 in the academic areas of science and social studies, as well as in art and music. However, Student has received grades of 2, which means basic and approaches the standard, in language arts and mathematics, as well as in health/physical education.²⁸
28. During SY 2011/12, with respect to OT services, Student received 90 minutes of service in September, 60 minutes of service in October, 180 minutes of service in November, 30 minutes of service in December, 105 minutes of service in January, and 90 minutes of service in February, and most of the missed sessions were due to school closures. There is no indication in the record of how much OT service Student received in March through June of SY 2012/13.²⁹
29. During SY 2012/13, Student primarily received direct OT services every week, with some missed sessions due to school closures, Student's absence, or the provider's unavailability. However, there is no evidence in the record indicating how long each of Student's OT sessions lasted during SY 2012/13.³⁰
30. The private school Parents have requested as relief in this case is a full-time special education school, in that all of the students at the school have full-time IEPs and all of the teachers at the school are certified in special education at the elementary level. The school offers small classroom sizes and student-to-teacher ratios, with a typical class of approximately 12 to 14 students in the intermediate division where Student would be located. Tuition at the school is \$37,500 for integrated related services and instruction, and there is an additional charge for pullout related services.³¹
31. Although Petitioner submitted a proposed compensatory education report requesting 100 hours of specialized instruction through tutorial and 10 hours of individual OT services, Petitioner presented no documentary or testimonial evidence at all tending to establish (i) the educational harm suffered by Student as a result of the alleged denials of FAPE; and (ii) that the requested compensatory education would place Student in the same position he would have occupied but for the alleged denials of FAPE.³²

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:

²⁸ Petitioner's Exhibits 30 and 47; Respondent Exhibit 6.

²⁹ Petitioner's Exhibit 45.

³⁰ Petitioner's Exhibit 46.

³¹ Testimony of private school's associate director of admissions.

³² See Petitioner's Exhibit 59.

The burden of proof in an administrative hearing is properly placed upon the party seeking relief. *Schaffer v. Weast*, 546 U.S. 49, 62 (2005). In this regard, IDEA does not require a departure from the ordinary default rule that plaintiffs bear the risk of failing to prove their claims. *See id.*; *Ridley School District v. M.R.*, 680 F.3d 260, 269 (3rd Cir. 2012); *L.E. v. Ramsey Board of Educ.*, 435 F.3d 384, 391 (3rd Cir. 2006). Now, for a consideration of Petitioner’s claims.

1. Appropriateness of IEP

The “free appropriate public education” required by [IDEA] is tailored to the unique needs of the handicapped child by means of an “individualized educational program.” Board of Education of the *Hendrick Hudson Central School District, Westchester County, et. al. v. Rowley*, 458 U.S. 176 (1982). IDEA is designed, not to maximize the potential of each disabled child, but to provide a “basic floor of opportunity” to disabled children. *Id.* In this regard, the IEP, and therefore the personalized instruction, should be reasonably calculated to enable the child to achieve passing marks and advance from grade to grade if the child is being educated in the regular classrooms of the public education system. *Id.* at 203-4.

In determining whether a Student’s IEP is appropriate, the hearing officer must determine (1) whether the LEA has complied with the procedures set forth in IDEA, and (2) whether the IEP developed through IDEA’s procedures was reasonably calculated to provide Student with educational benefits. *Id.* In determining whether an IEP is reasonably calculated to provide educational benefits, the measure and adequacy of the IEP is to be determined “as of the time it is offered to the student.” *Thompson R2-J Sch. Dist. v. Luke P.*, 540 F.3d 1143, 1149 (10th Cir. 2008), *cert. denied*, 555 U.S. 1173 (2009).

In the instant case, Petitioner does not dispute that DCPS complied with the procedures set forth in IDEA. Instead, Petitioner contends that DCPS failed to propose an appropriate IEP by failing to include a sufficient number of hours of service outside of general education, a smaller more supportive school environment, and appropriate accommodations, including a scribe. DCPS disagrees with Petitioner, contending that Student’s IEP team does not agree that Student requires more IEP hours and noting that Petitioner’s educational consultant who opined otherwise is not a member of the IEP team and has not attended any of Student’s IEP meetings.

A review of the evidence in this case reveals that Student is of above average intelligence, and on recent educational testing he scored in the high average range in reading, the average range in math and academic fluency, and the low average range in written language. A review of Student’s most recent IEPs reveal that under his January 2012 IEP he was entitled to receive 100 minutes per week of specialized instruction outside general education and 150 minutes per week of specialized instruction in general education, with twelve annual goals in the academic area of written expression, and under his November 2012 IEP he is entitled to receive 200 minutes per week of specialized instruction outside of general education and 150 minutes per week of specialized instruction in general education, with six annual goals in the academic area of mathematics and seven annual goals in the academic area of written expression. Given Student’s above average intelligence and scores of average or better on recent educational testing in all areas except written expression, the hearing officer is persuaded that the amount of specialized instruction Student is receiving outside of general education is sufficient to provide Student with

the basic floor of opportunity he is entitled to receive under IDEA, especially since Student has been able to receive passing marks in all academic subjects and he has been promoted from grade to grade.

With respect to whether sufficient and appropriate accommodations have been included in Student's IEPs, the evidence in this case reveals that Student's IEPs include a vast array of accommodations and other classroom aids and services, with the result that the majority of the recommendations made in Student's evaluations and medical consultation reports have been incorporated into the IEPs. Indeed, despite Petitioner's argument that Student's IEP is inappropriate for failure to include a scribe, among other accommodations, the evidence in this case reveals that Student's November 2012 IEP requires makes provision for Student to dictate his responses to an adult and/or scribe, or to use a handheld recorder. Under these circumstances, the hearing officer concludes that at the time they were written, Student's IEPs contained sufficient and appropriate accommodations such that they were reasonably calculated to provide Student with educational benefits.

With respect to Petitioner's contention that the IEPs are inappropriate for failure to provide Student with a smaller more supportive school environment, the evidence in this case demonstrates that Student needs a very flexible and small classroom environment in light of his social/emotional, medical and attentional issues. Moreover, Student requires the use of voice recognition software in the classroom during the school day, which requires a relatively quiet environment, but Student has been unable to use the voice recognition software on his iPad at his current school because the environment is too noisy. In addition, although Student requires a flexible classroom environment where he can change seating arrangements but still be in a location in class that allows him to remain a part of the class both physically and socially, when Student changes his seating in his current DCPS school it separates him from the rest of the class physically, which also has the effect of separating him socially. Based on this evidence, the hearing officer is persuaded that Student's most recent IEPs have been inappropriate for failure to provide Student with the very flexible and small classroom environment that he needs to receive sufficient educational benefits to satisfy the requirements of IDEA.

In summary, although Petitioner has failed to meet its burden of proving that DCPS failed to propose an appropriate IEP for Student by failing to include a sufficient number of hours of service outside of general education and appropriate accommodations, including a scribe, Petitioner has met its burden of proving that DCPS failed to propose an appropriate IEP for Student by failing to provide the smaller more supportive school environment that Student requires.

2. Implementation of IEP

“[T]o prevail on a claim under the IDEA, a party challenging the implementation of an IEP must show more than a *de minimis* 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.” *Catalan v. District of Columbia*, 478 F. Supp. 2d 73 (D.D.C. 2007). The deviations from the IEP's stated requirements must be "material." *Id.* Hence, a

failure to implement all services outlined in an IEP does not constitute a per se violation of IDEA. *Schoenbach v. District of Columbia*, 309 F. Supp. 2d 71, 83 n.10 (D.D.C. 2004).

In the instant case, Petitioner argues that DCPS has failed to implement Student's IEP, while DCPS argues that Petitioner has failed to meet its burden of proof on this claim. Upon reviewing the evidence, the hearing officer has determined that the evidence of lack of implementation was provided by Parent's testimony. Parent's belief that Student did not begin receiving his specialized instruction hours until January 2013 was based on reports from Student in October 2012 that he was not receiving his IEP services and reports from Student's in January 2012 that he had begun receiving pullout services. However, this testimony lacked the certainty and a sufficient level of detail to prove by a preponderance of the evidence, even when considered together with Student's special education teacher's failure to provide work samples, that Student's IEP was not being implemented during SY 2012/13 prior to January 2013.

Similarly, Parent's testimony that in March 2013 Student's special education teacher reported that she was providing Student with 300 hours per week of services inside general education and 90 to 120 minutes per week of services outside general education is lacking in sufficient detail to meet Petitioner's burden of proof on this claim. Moreover, given that Student's current IEP entitles him to receive only 150 minutes of specialized instruction inside general education and 200 minutes per week of specialized instruction outside general education, it is not clear based on this testimony, standing alone, that the alleged deviations from the IEP's stated requirements are material.

Moreover, Petitioner contends that DCPS failed to provide Student with all of the occupational therapy services listed on his IEP, but the evidence in this case is less than clear in this respect. *See* Findings of Fact 28 and 29, *supra*. Moreover, Petitioner has failed to establish that any deviations from Student's IEP with respect to OT services were material.

For the reasons set forth herein, the hearing officer concludes that Petitioner has failed to meet its burden of proving that DCPS failed to implement Student's IEP.³³

3. Meaningful Educational Progress

As noted above, "IDEA guarantees only a basic floor of opportunity, specifically designed to meet the child's unique needs, supported by services that will permit him to benefit from the instruction. An IEP need not be the best possible one, nor does it entitle a disabled child to a program that maximizes the child's potential. Nevertheless, a school district must provide the student with a meaningful educational benefit." *Klein Independent School Dist. v. Hovem*, 690 F.3d 390, 396 (5th Cir. 2012) (internal quotations and citations omitted).

In the instant case, Petitioner contends that DCPS has failed to meet Student's needs or provide Student with meaningful educational benefit. However, the hearing officer has already ruled

³³ In reaching this conclusion, the hearing officer has also taken into account the evidence demonstrating that Student's IEP goals have not been consistently introduced during SY 2011/12 and SY 2012/13; however, absent concrete evidence regarding the educational impact on Student of this lack of consistency, this evidence is insufficient to support a conclusion that Petitioner has met its burden of proof.

above that at the time they were written, Student's IEPs were reasonably calculated to provide Student with educational benefit, except to the extent that they failed to provide Student with the smaller more supportive school environment that he requires. Upon a review of all of the evidence, pleadings and arguments in this case, the hearing officer finds no reason to alter that conclusion. Hence, the hearing officer will rely upon the analysis set forth in subsection (1), above, with respect to this claim.

4. Requested Private Placement

“Courts have identified a set of considerations relevant to determining whether a particular placement is appropriate for a particular student, including 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 school, the placement's cost, and the extent to which the placement represents the least restrictive environment.” *N.G. v. District of Columbia*, 556 F.Supp.2d 11, 37 (D.D.C. 2008) (quoting *Branham v. District of Columbia*, 427 F.3d 7, 12 (D.C. Cir. 2005) (citing *Board of Education v. Rowley*, *supra*, 456 U.S. 176, 202)).

In the instant case, Petitioner contends that the requested private school is an appropriate placement for Student. However, the requested private placement is a full-time special education school comprised solely of disabled students with full-time IEPs where Student would receive full-time specialized instruction outside of general education and would not have any interaction at all with non-disabled students, whereas the evidence in this case demonstrates that Student has above average intelligence, he scores primarily in the average range on academic testing, and he has been able to make passing marks and advance from grade to grade in the general education environment, which his IEP team has determined to be his LRE. Under these circumstances, the hearing officer concludes that the requested private placement is not an appropriate educational placement for Student because the school does not represent the LRE for Student, and the services offered by the school do not match up with Student's specialized educational needs. *See* 34 C.F.R. § 300.114(a)(2) (to the maximum extent possible disabled children must be educated with non-disabled children unless the nature or severity of the child's disability is such that education in regular classes with the use of supplementary aids and services cannot be achieved satisfactorily). As a result, the hearing officer will deny Petitioner's request for funding and placement at the private school for SY 2013/14.

Nevertheless, as the hearing officer has determined that DCPS has denied Student a FAPE by failing to provide Student with the very flexible and small supportive classroom environment he requires, the hearing officer will order DCPS to convene an IEP/placement meeting for Student to assign an educational placement for Student to attend for SY 2013/14 that offers a small supportive environment that is quiet enough for Student to use his voice recognition software (unless DCPS chooses to provide Student with a full-time scribe), and that is flexible enough to allow Student to change seating arrangements as needed but still be in a location in class that allows him to remain a part of the class both physically and socially.

ORDER

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

1. Within 25 calendar days of the issuance of this Order, DCPS shall convene an IEP/placement meeting for Student to assign an educational placement for Student to attend for SY 2013/14 that offers a small supportive environment that is quiet enough for Student to use his voice recognition software (unless DCPS chooses to provide Student with a full-time scribe), and that is flexible enough to allow Student to change seating arrangements as needed but still be in a location in class that allows him to remain a part of the class both physically and socially.
2. All remaining claims and requests for relief in Petitioner's March 15, 2013 Complaint are **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 U.S.C. § 1415(i).

Date: 5/29/2013

/s/ Kimm Massey

Kimm Massey, Esq.
Hearing Officer