

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

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

Parents, on behalf of the STUDENT,¹)	
)	
Petitioners,)	Case Number:
)	
v.)	Hearing Date: March 4, 2011
)	
THE DISTRICT OF COLUMBIA PUBLIC SCHOOLS,)	Hearing Officer: Frances Raskin
)	
Respondent.)	

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STUDENT HEARING OFFICE
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HEARING OFFICER DETERMINATION

I. JURISDICTION

This proceeding was invoked in accordance with the Individuals With Disabilities Education Improvement Act of 2004 ("IDEA"), codified at 20 U.S.C. §§ 1400 *et seq.*, the District of Columbia Code §§ 38-2561.01 *et seq.*; the federal regulations at 34 C.F.R. §§ 300.1 *et seq.*; and the District of Columbia regulations at D.C. Mun. Reg. tit. 5-E §§ 3000 *et seq.*

II. BACKGROUND

Petitioners are the parents of a _____-year-old student ("Student") with a disability who attends a public school in the District of Columbia. On January 18, 2011, Petitioners filed an Administrative Due Process Complaint ("Complaint") against the District of Columbia Public Schools ("DCPS") pursuant to IDEA.

This Hearing Officer was appointed to preside over this case on January 21, 2011. Respondent DCPS filed a response to the Complaint on January 24, 2011. The parties participated in a resolution meeting on February 4, 2011. The parties were unable to resolve the Complaint and agreed to proceed to a due process hearing. Thus, the forty-five day, due process hearing period began on February 5, 2011.

¹ Personal identification information is provided in Attachment A.

On February 9, 2011, this Hearing Officer held a prehearing conference in which counsel for Petitioners and counsel for Respondent DCPS participated. On February 9, 2011, this Hearing Officer issued a Prehearing Conference Order.

The due process hearing commenced on March 4, 2011. At the outset of the due process hearing, this Hearing Officer admitted into evidence Petitioners' exhibits 2, 7, 8-14, and 16, and DCPS exhibits 3 and 4-7. The Student and his father ("Petitioner") testified, and presented the testimony of one other witness. DCPS presented no witnesses. After the parties presented oral closing arguments, the due process hearing concluded on March 4, 2011.

III. ISSUE PRESENTED

This Hearing Officer certified the following issue for adjudication at the due process hearing: Whether DCPS denied the Student a free, appropriate, public education ("FAPE") by developing an individualized educational program ("IEP") on December 17, 2010, that fails to provide the Student sufficient specialized instruction in a small, structured setting.

After reviewing the evidence in this case, it became apparent that the sole issue litigated at the hearing differed from the issue this Hearing Officer certified for hearing. First, neither party contested the appropriateness of the Student's December 17, 2010, IEP. Rather, the evidence and the stipulations of the parties revealed that the sole issue in this case is whether DCPS denied the Student a FAPE by failing to provide a location of services that can meet his unique needs, implement his December 17, 2010, IEP, or allow him to benefit from the academic instruction. To obtain the relief they are seeking, Petitioners must show that the Non-Public School they proposed is appropriate.

IV. FINDINGS OF FACT

1. The Student is a _____ year-old, special-education student who is in the grade in a public school in the District of Columbia.² His full-scale IQ is 87, which is in the nineteenth percentile of his same age peers and the low average range of general intellectual ability.³

2. The Student's verbal comprehension is in the fourth percentile, which is the borderline range.⁴ He has a great deal of difficulty expressing himself logically and understanding oral language.⁵ His low functioning in this area is likely to negatively affect him in the classroom.⁶

² Testimony of Student, Petitioner.

³ Petitioners Exhibit 9 at 4 (October 26, 2008, Comprehensive Evaluation).

⁴ *Id.* at 3.

⁵ *Id.* at 4.

⁶ *Id.*

3. The Student's perceptual reasoning is in the thirtieth percentile, which is in the average range.⁷ It is easier for him to understand information when it is presented in multiple modes, i.e., with visual cues and hands-on objects.⁸ In this way, he is better able to accommodate new information based on previously learned information.⁹

4. The Student's working memory is in the thirty-fourth percentile, which is in the average range.¹⁰ He has acquired adequate strategies for retaining and organizing information.¹¹ He may have a few difficulties with working memory during tasks with a high influx of rapid information.¹²

5. The Student's processing speed is in the sixty-sixth percentile, which is in the low average range.¹³ He has adequate ability to perceive visual stimuli automatically and to transfer images into a form that has meaning.¹⁴ This reflects his performance on tasks that require visual elaboration, visual acuity, concentration, and the ability to perform under pressure.¹⁵

6. In 2008, the Student performed at the third percentile in broad reading, which was in the low range.¹⁶ His scores for basic reading, fluency, and comprehension fell below the expected level for his grade level and age group.¹⁷ His processing strengths will assist him with phonological processing that is necessary for basic reading and fluency.¹⁸ However, his low basic reading and fluency interfere with his ability to attend to the content in a passage, which contributes to low comprehension.¹⁹ In addition, his low language development may negatively impact his reading comprehension.²⁰ His academic skills in reading are significantly below the level of expectation for his level of ability.²¹

7. In 2008, the Student performed in the fifty-first percentile in broad math, which was in the average range.²² He had acquired grade-level skills in addition, subtraction, multiplication, and division.²³

⁷ *Id.*

⁸ *Id.*

⁹ *Id.*

¹⁰ *Id.*

¹¹ *Id.*

¹² *Id.*

¹³ *Id.*

¹⁴ *Id.* at 4-5.

¹⁵ *Id.* at 5.

¹⁶ *Id.*

¹⁷ *Id.*

¹⁸ *Id.*

¹⁹ *Id.*

²⁰ *Id.*

²¹ *Id.* at 7.

²² *Id.*

²³ *Id.* at 5-6.

8. In 2008, the Student's broad written language abilities fell within the fourth percentile, which was in the low range.²⁴ He had trouble combining ideas and formulating concepts of his own when he was required to write within a given topic and elaborate on his ideas.²⁵ His difficulty expressing himself through writing can be characteristic of low language development.²⁶ His academic skills in writing are significantly below the level of expectation for his level of ability.²⁷

9. The Student exhibits clinically significant inattention, hyperactivity and impulsivity, learning problems, aggression, and difficulties in peer relations.²⁸ He displays behaviors typically associated with conduct disorder and oppositional defiance.²⁹ He requires assistance with building and maintaining friendships and controlling his impulsive behavior.³⁰

10. The Student's problems with inattention are characterized by his difficulty paying attention to details and making careless mistakes.³¹ He very often gets sidetracked and gives up easily on tasks.³² In terms of his hyperactivity and impulsivity, he has trouble waiting his turn, is fidgety, and is constantly moving.³³ His learning problems include trouble remembering and understanding what he has read, poor spelling, and occasionally forgetting subjects he has already mastered.³⁴

11. He exhibits aggression by intentionally damaging the belongings of others, and failing to show remorse for his misbehavior.³⁵ Occasionally, he refuses to follow adult direction.³⁶ He has trouble making friends and is often excluded by groups of his peers.³⁷ He often displays poor social skills and frequently does not interact well with other students.³⁸

12. The Student's conduct disorder leads him to destroy or damage items that belong to other students.³⁹ He occasionally threatens or scares others.⁴⁰ He exhibits oppositional defiance in blaming others for his mistakes or misbehavior.⁴¹ Occasionally, he loses his temper.⁴²

²⁴ *Id.* at 6.

²⁵ *Id.*

²⁶ *Id.*

²⁷ *Id.* at 7.

²⁸ *Id.* at 6.

²⁹ *Id.*

³⁰ *Id.*

³¹ *Id.*

³² *Id.* at 6-7.

³³ *Id.* at 7.

³⁴ *Id.*

³⁵ *Id.*

³⁶ *Id.*

³⁷ *Id.*

³⁸ *Id.*

³⁹ *Id.*

⁴⁰ *Id.*

⁴¹ *Id.*

13. The Student's overall fine motor and visual perception skills are in the average range and he demonstrates intact neuromotor skills.⁴³ Fine motor skills encompass four motor skills: fine manual control, i.e., the motor skills involved in writing and drawing, which require a relatively high degree of precision; manual coordination, i.e., the coordination involved in reaching, grasping, and manipulating objects with an emphasis on speed, dexterity, and coordination of the arms and hands; body coordination; and strength and agility.⁴⁴

14. Visual motor integration reflects the extent of unification of a student's eye-directed hand movements.⁴⁵ Visual perception is the ability to perceive what is seen, whether in various orientations, in close proximity to other objects, when only part of it is seen, and in relation to oneself and/or other objects.⁴⁶ The Student's overall visual motor integrations skills are at the fifth percentile, which is in the low range of functioning among his same-age peers.⁴⁷ His visual perception is at the twenty-third percentile, which is in the below average range.⁴⁸ His motor coordination, i.e., handwriting skill, is in the third percentile, which is in the low range of functioning.⁴⁹ The Student exhibits no weaknesses in neuromotor skills.⁵⁰

15. The Student's delays in fine motor precision, manual dexterity, visual-motor integration, visual perception, and motor coordination skills may impact his classroom performance.⁵¹ He would benefit from direct occupational therapy service to address his motor delays.⁵² He should have reduced requirements for production of written work and be provided extra time as needed to complete written language tasks.⁵³ He also should be provided alternatives to writing, such as access to a word processor.⁵⁴ To demonstrate knowledge of content, he should be allowed to give short-phrase answers to questions and be provided opportunities to give verbal responses.⁵⁵

16. The Student would benefit from motor-based activities to improve his fine motor skills.⁵⁶ He should receive preferential seating to reduce his distractibility and inattention, which may impact his classroom performance if modifications are not provided.⁵⁷ The Student also should receive multimodal instructions, i.e. verbal directions paired with written directions, and

⁴² *Id.*

⁴³ Petitioners Exhibit 8 at 6 (March 31, 2009, Occupational Therapy Report).

⁴⁴ *Id.* at 2.

⁴⁵ *Id.* at 3.

⁴⁶ *Id.*

⁴⁷ *Id.*

⁴⁸ *Id.*

⁴⁹ *Id.*

⁵⁰ *Id.* at 5.

⁵¹ *Id.* at 6.

⁵² *Id.*

⁵³ *Id.*

⁵⁴ *Id.*

⁵⁵ *Id.*

⁵⁶ *Id.*

⁵⁷ *Id.*

be asked to repeat directions to verify his comprehension.⁵⁸ Finally, important details should be highlighted for the Student to facilitate his visual attention.⁵⁹

17. The Student does not have a communication disorder that would prevent him from accessing the curriculum.⁶⁰ Nonetheless, his receptive vocabulary abilities are in the borderline range, i.e., he exhibits a very mild weakness in oral vocabulary attainment.⁶¹ He also has below average expressive vocabulary ability, which is a mild to moderate deficit in his ability to orally define words.⁶² His spoken language skills are in the average range.⁶³

18. The Student has a mild weakness in antonyms, which reflects his borderline functioning in word knowledge, retrieval, and oral expression in response to a single word stimulus.⁶⁴ He has a very mild weakness in syntax construction, which reflects his borderline functioning in the oral expression of words, phrases, and sentences when using grammatical rules to formulate and express sentences.⁶⁵

19. The Student has average abilities in paragraph comprehension.⁶⁶ He has average abilities in nonliteral language, i.e., the ability to comprehend nonliteral language in the form of figurative speech, indirect requests, and sarcasm.⁶⁷ He also has average abilities in pragmatic judgment, i.e., the ability to express communicative intent; recognize appropriate topics for conversation; select relevant information for directions or requests; initiate taking turns; use language to express gratitude, sorrow and other feelings; and to judge the pragmatic appropriateness of the language behavior of others.⁶⁸ He has appropriate eye contact, topic initiation, topic maintenance, and sequential, unstructured narrative skills.⁶⁹

20. On November 4, 2010, DCPS convened a meeting of the Student's IEP team.⁷⁰ The Petitioner attended this meeting, as did the DCPS Special Education Coordinator, special education teacher, general education teacher, speech-language pathologist, social worker, and director of special education.⁷¹

21. At the November 4, 2010, meeting, the Student's general education math teacher reported that his behavior in class has negatively impacted his ability to master the curriculum.⁷²

⁵⁸ *Id.*

⁵⁹ *Id.*

⁶⁰ Petitioners Exhibit 7 at 6 (December 8, 2008, Speech-Language Triennial Evaluation).

⁶¹ *Id.* at 3. The Student's receptive vocabulary is in the borderline range. *Id.*

⁶² *Id.* at 3, 6.

⁶³ *Id.* at 3.

⁶⁴ *Id.* at 4.

⁶⁵ *Id.*

⁶⁶ *Id.* at 5.

⁶⁷ *Id.*

⁶⁸ *Id.*

⁶⁹ *Id.*

⁷⁰ Petitioners Exhibit 12 (November 4, 2010, IEP Meeting Notes).

⁷¹ *Id.* at 1.

⁷² *Id.* at 2.

He has knowledge gaps as a result of his frequent absences due to disciplinary actions.⁷³ When he is in class, he frequently requires multiple reminders to begin his class work or to refrain from distracting other students.⁷⁴ At the time of the meeting, the Student was failing math.⁷⁵

22. At the November 4, 2010, IEP meeting, the Student's English teacher reported that he struggles greatly with decoding grade-level text.⁷⁶ This impacts his ability to complete independent class work assignments or participate in classroom discussions that require independent reading.⁷⁷ He also struggles with writing and his sentence construction, spelling, and mechanics often impede his understanding.⁷⁸ He has a strong grasp of grammar and can code and compose simple sentences.⁷⁹ The Student also requires multiple reminders and redirection to accomplish independent routine tasks such as remaining silent during independent reading or raising his hand to participate during discussion.⁸⁰ At the time of the meeting, the Student was failing English.⁸¹

23. At the November 4, 2010, meeting, the Student's social studies teacher expressed concerns that echoed those of the math and English teacher.⁸² He requires multiple reminders each class period to avoid distractions and avoid distracting others.⁸³ He spends a lot of class time trying to get his classmates to notice him, laugh at him, or talk with him.⁸⁴ He does not spend much time working on the class readings or notes.⁸⁵ When he answers reading questions, he rushes and does not answer the question asked.⁸⁶ He requires modifications to the reading and tests.⁸⁷ However, since he does not complete the class work or homework, these modifications are not very helpful.⁸⁸ At the time of this meeting, the Student was failing social studies.⁸⁹

24. The Student willingly attends his occupational therapy sessions but spends most of the time off task.⁹⁰ In his counseling sessions, he shows defiance and anger.⁹¹ He does not

⁷³ *Id.*

⁷⁴ *Id.*

⁷⁵ *Id.*

⁷⁶ *Id.*

⁷⁷ *Id.*

⁷⁸ *Id.*

⁷⁹ *Id.*

⁸⁰ *Id.*

⁸¹ *Id.* at 2.

⁸² *Id.*

⁸³ *Id.*

⁸⁴ *Id.*

⁸⁵ *Id.*

⁸⁶ *Id.* at 3.

⁸⁷ *Id.*

⁸⁸ *Id.*

⁸⁹ *Id.* at 2.

⁹⁰ *Id.*

⁹¹ *Id.*

respond well when he does not get an answer or his desired response immediately.⁹² This can trigger behaviors that can spiral out of control.⁹³ He also tries to “be cool” in front of other students and show off.⁹⁴

25. At the November 4, 2010, IEP meeting, the team developed an IEP for the Student that provided twenty hours of specialized instruction, with six hours in the general education setting and fourteen hours in the special education setting.⁹⁵ The team did not revise the goals from the Student’s prior IEP because he was not making sufficient progress on these goals.⁹⁶ The team also specified that the Student would receive thirty minutes per week of speech-language services outside the general education setting, thirty minutes per week of speech-language services in the general education setting, one hour per week of behavioral support services, and thirty minutes per week of occupational therapy.⁹⁷ The IEP team also updated the Student’s behavior intervention plan.⁹⁸ Petitioner signed this IEP and indicated that he agreed with its contents.⁹⁹

26. At the November 4, 2010, meeting, the IEP team also discussed the possibility that the Student may require another location of services to ensure his needs are being met.¹⁰⁰ They agreed that he requires a smaller setting where he can receive more support and individualized attention.¹⁰¹

27. On December 17, 2010, DCPS convened a meeting of the Student’s IEP team.¹⁰² The Student’s teachers and related service providers provided reports on the Student’s progress.¹⁰³ Their comments were substantially similar to the reports they provided at the November 4, 2010, meeting.¹⁰⁴ The IEP team agreed to draft an IEP for the Student that provides 27.5 hours of specialized instruction and related services outside the general education setting.¹⁰⁵ Petitioner agreed to this level of services.¹⁰⁶ However, the IEP team never drafted

⁹² *Id.*

⁹³ *Id.*

⁹⁴ *Id.*

⁹⁵ *Id.* at 4; Petitioners Exhibit 11 at 9 (November 4, 2010, IEP). On November 18, 2010, the student’s special education teacher amended the IEP to correct the date of services. Respondent Exhibit 3 at 1. Petitioner authorized this change and agreed that it did not require an IEP team meeting. *Id.* at 2. The amendment provides that the IEP was to be in effect from December 1, 2010, through November 3, 2011. *Id.* at 1.

⁹⁶ Petitioners Exhibit 12 at 4.

⁹⁷ Petitioners Exhibit 11 at 9 (November 4, 2010, IEP).

⁹⁸ *Id.* at 15-17.

⁹⁹ *Id.* at 1.

¹⁰⁰ Petitioners Exhibit 12 at 4.

¹⁰¹ *Id.*

¹⁰² Petitioners Exhibit 13 (December 17, 2010, MDT Meeting Notes).

¹⁰³ *Id.* at 2-5.

¹⁰⁴ *Id.*

¹⁰⁵ Stipulation of parties.

¹⁰⁶ *Id.*; Petitioners Exhibit 13 at 5.

this revised IEP.¹⁰⁷

28. On January 18, 2011, DCPS convened a meeting of the Student's IEP team to discuss a new location of services for the Student.¹⁰⁸ DCPS proposed placing the Student at a DCPS middle school ("DCPS Proposed School").¹⁰⁹ Petitioner expressed concerns about the appropriateness of the DCPS Proposed School, including his concerns about its discipline procedures and ability to provide consistent services to the Student.¹¹⁰ The DCPS representative asserted that the DCPS Proposed School can implement the Student's IEP.¹¹¹ DCPS provided Petitioner a Prior Written Notice ("PNOP") informing him that the Student would attend the DCPS Proposed School for the remainder of the 2010-2011 school year.¹¹² The PNOP indicated that the Student would be in a combination setting, i.e., in both general education and special education classes.¹¹³

29. The Proposed DCPS School cannot implement the Student's December 17, 2010, IEP.¹¹⁴ The Proposed DCPS School cannot implement an IEP that provides a student 27.5 hours of specialized instruction and related services outside the general education environment.¹¹⁵

30. The Student has been accepted for admission to the Non-Public School for the remainder of the 2010-2011 school year.¹¹⁶ The Non-Public School would be able to implement the Student's December 17, 2010, IEP, and provide him 27.5 hours of specialized instruction and related services outside the general education setting.¹¹⁷ The Student would be in a small, structured classroom with eight other students, one special education teacher, and a teacher's assistant.¹¹⁸ Each student at the Non-Public School receives therapeutic support throughout the school day.¹¹⁹ The Non-Public School also has a behavior management system that provides rewards for good behavior.¹²⁰ This system would lead to improvements in the Student's behavior and allow him to access the curriculum.¹²¹

31. All of the witnesses at the due process hearing provided credible testimony. Their testimony was corroborated by with the documentary evidence. DCPS presented no testimony to rebut the testimony of Petitioners' witnesses.

¹⁰⁷ *Id.*

¹⁰⁸ Petitioners Exhibit 14 at 1 (January 18, 2011, MDT Meeting Notes).

¹⁰⁹ *Id.* at 2.

¹¹⁰ *Id.*

¹¹¹ *Id.*

¹¹² Respondent Exhibit 4 at 1 (Prior Written Notice).

¹¹³ *Id.*

¹¹⁴ Stipulation of parties.

¹¹⁵ *Id.*

¹¹⁶ Petitioners Exhibit 16 (February 11, 2011, Letter from Non-Public School).

¹¹⁷ Testimony of Non-Public School Admissions Director.

¹¹⁸ *Id.*

¹¹⁹ *Id.*

¹²⁰ *Id.*

¹²¹ *Id.*

VII. CONCLUSIONS OF LAW

IDEA guarantees children with disabilities the right to a free and appropriate public education with services designed to meet their individual needs.¹²² FAPE is defined as:

[S]pecial 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)...¹²³

In deciding whether DCPS provided the Student a FAPE, the inquiry is limited to (a) whether DCPS complied with the procedures set forth in IDEA; and (b) whether the Student's IEP is reasonably calculated to enable him to receive educational benefit.¹²⁴

In matters alleging a procedural violation, a hearing officer may find that a student did not receive FAPE only if the procedural inadequacies impeded the student's right to FAPE, significantly impeded the parent's opportunity to participate in the decision-making process regarding provision of FAPE, or caused the student a deprivation of educational benefits.¹²⁵ In other words, an IDEA claim is viable only if those procedural violations affected the Student's *substantive* rights.¹²⁶

The burden of proof is properly placed upon the party seeking relief.¹²⁷ Petitioners must prove the allegations in the Complaint by a preponderance of the evidence.¹²⁸

VIII. DISCUSSION

Petitioners Proved that DCPS Denied the Student a FAPE by Failing to Provide a Location of Services that Can Meet His Unique Needs, Implement His December 17, 2010, IEP, or Allow Him to Benefit from the Academic Instruction.

FAPE "consists of educational instruction specially designed to meet the unique needs of the handicapped child, supported by such services as are necessary to permit the child to benefit

¹²² 20 U.S.C. §§ 1400(d) (1)(A), 1412 (a) (1); *Bd. of Educ. v. Rowley*, 458 U.S. 176, 179-91 (1982); *Shaffer v. Weast*, 546 U.S. 49, 51 (2005).

¹²³ 20 U.S.C. § 1401 (9); 34 C.F.R. § 300.17.

¹²⁴ *Rowley*, 458 U.S. at 206-207.

¹²⁵ 34 C.F.R. § 300.513 (a)(2).

¹²⁶ *Lesesne v. District of Columbia*, 447 F.3d 828, 834 (D.C. Cir. 2006) (emphasis in original; internal citations omitted).

¹²⁷ *Shaffer v. Weast*, 546 U.S. 49, 56-57 (2005).

¹²⁸ 20 U.S.C. § 1415 (i)(2)(c). See also *Reid v. District of Columbia*, 401 F.3d 516, 521 (D.C. Cir. 2005) (discussing standard of review).

from the instruction.”¹²⁹ The IEP is the centerpiece of special education delivery system.¹³⁰

An appropriate educational program begins with an IEP that accurately reflects the results of evaluations to identify the student's needs,¹³¹ establishes annual goals related to those needs,¹³² and provides appropriate specialized instruction and related services.¹³³ For an IEP to be “reasonably calculated to enable the child to receive educational benefits,” it must be “likely to produce progress, not regression.”¹³⁴ A local education agency (“LEA”) must implement a student’s IEP in the least restrictive environment (“LRE”).¹³⁵

The term “educational placement” refers to the type of educational program prescribed by the IEP.¹³⁶ “Educational placement” refers to the general educational program, such as the classes, individualized attention, and additional services a child will receive, rather than the “bricks and mortar” of the specific school.¹³⁷ The considerations relevant to determining whether a particular placement is appropriate for a particular student include the nature and severity of the student's disability; the student's specialized educational needs; the link between those needs and the services offered by the school; the placement's cost; and the extent to which the placement represents the least restrictive environment.¹³⁸

Parents seeking an alternative placement are not subject to the same mainstreaming requirements as an LEA is required to meet.¹³⁹ Rather, “the test for the parents' private placement is that it is appropriate, not that it is perfect.”¹⁴⁰

¹²⁹ *Rowley*, 458 U.S. at 188-89 (citation omitted).

¹³⁰ *Lillbask ex rel. Mauclair v. Conn. Dep't of Educ.*, 397 F.3d 77, 81 (2d Cir. 2005) (internal quotation marks omitted).

¹³¹ 34 C.F.R. § 300.320 (a) (1).

¹³² 34 C.F.R. § 300.320 (a) (2).

¹³³ 34 C.F.R. § 300.320 (a) (4).

¹³⁴ *Walczak v. Florida Union Free Sch. Dist.*, 142 F.3d 119, 130 (2d Cir. 1998) (internal quotation marks and citation omitted).

¹³⁵ 20 U.S.C. § 1412 (a) (5); 34 C.F.R. §§ 300.114 (a) (2) and 300.116 (a) (2). Determining whether a student has been placed in the “least restrictive environment” requires a “flexible, fact-specific analysis, considering whether, with the aid of appropriate supplemental aids and services, education in the regular classroom may be achieved, and, if not, whether the school has included the student in regular classes, programs, and activities to the maximum extent appropriate.” *P. v. Newington Bd. of Educ.*, 546 F.3d 111, 113 (2d Cir. 2008).

¹³⁶ *T.Y. v. N.Y. Dept. of Educ.*, 584 F.3d 412, 419 (2d Cir. 2009) (citation omitted).

¹³⁷ *Id.*

¹³⁸ *Branham*, 427 F.3d at 12 (citing *Rowley*, 458 U.S. at 202).

¹³⁹ *M.S. v. Yonkers Bd. of Educ.*, 231 F.3d 96, 105 (2d Cir. 2000); see also *Cleveland Heights-University Heights City Sch. Dist. v. Boss*, 144 F.3d 391, 399-400 (6th Cir. 1998) (holding private placement's failure to meet IDEA mainstreaming requirement does not bar parental reimbursement). Educating a student with a disability in a regular education classroom “is familiarly known as ‘mainstreaming.’” *Daniel R.R. v. State Bd. of Educ.*, 874 F.2d 1036, 1039 (5th Cir. 1989).

¹⁴⁰ *Warren G. v. Cumberland County Sch. Dist.*, 190 F.3d 80, 84 (3d Cir. 1999).

Here, there is no dispute that the goals, hours of specialized instruction, and setting specified by the Student's December 17, 2010, IEP are reasonably calculated to enable him to receive educational benefit.¹⁴¹ DCPS agreed to this IEP, and then proposed a school that cannot implement it.

This Hearing Officer concludes that, at the time DCPS issued the PNOP to the DCPS School, it must have known that this location of services was inappropriate because it could not provide the 27.5 hours of specialized instruction that the Student requires. Yet, DCPS has proposed no alternative location of services in the more than two months between the issuance of the PNOP and the due process hearing. As a result, this Hearing Officer must infer that DCPS cannot implement the Student's December 17, 2010, IEP.

The evidence is uncontroverted that the Non-Public School is an appropriate setting for the Student. The Non-Public School can implement the Student's IEP and provide the small, structured classroom he requires to receive educational benefit. While Petitioners failed to show that the Non-Public School is the Student's least restrictive environment, this alone will not render this an inappropriate setting for the Student.¹⁴² This Hearing Officer finds that the benefits the Student will receive at the Non-Public School outweigh any concerns about whether it is his least restrictive environment.

Thus, Petitioners proved by a preponderance of the evidence that DCPS denied the Student a FAPE by failing to provide a location of services that can implement his December 17, 2010, IEP.¹⁴³ Petitioners further proved that the Non-Public School is an appropriate setting for the Student.

ORDER

Based upon the Findings of Fact and Conclusions of Law herein, it is this 21st day of March 2011, it is hereby:

ORDERED that, on or before April 7, 2011, DCPS shall provide funding and transportation for the Student to attend the Non-Public School through the remainder of the 2010-2011 school year.

By: /s/ Frances Raskin
Frances Raskin
Hearing Officer

¹⁴¹ Stipulation of parties.

¹⁴² See *P. v. Newington Bd. of Educ.*, 546 F.3d at 119 (“[w]hile mainstreaming is an important objective, we are mindful that the presumption in favor of mainstreaming must be weighed against the importance of providing an appropriate education to handicapped students”); *Briggs v. Board of Education*, 882 F.2d 688, 692 (2d Cir. 1989) (“where the nature or severity of the handicap is such that education in regular classes cannot be achieved satisfactorily, mainstreaming is inappropriate”) (citations omitted); *Lachman v. Illinois State Bd. of Educ.*, 852 F.2d 290, 295 (7th Cir. 1988).

¹⁴³ Petitioner is the prevailing party on this claim.

NOTICE OF APPEAL RIGHTS

The decision issued by the Hearing Officer is final, except that any party aggrieved by the findings and decision of the Hearing Officer shall have 90 days from the date of the decision of the hearing officer to file a civil action with respect to the issues presented at the due process hearing in a district court of the United States or a District of Columbia court of competent jurisdiction, as provided in 20 U.S.C. § 1415(i)(2).

Distributed to:

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