

District of Columbia
 Office of the State Superintendent of Education
 Office of Review and Compliance
 Office of Dispute Resolution
 810 First Street, NE – Second Floor
 Washington, DC 20002
 Tel: 202-698-3819
 Fax: 202-478-2956

Confidential

<p>Parent on Behalf Student¹,</p> <p>Petitioner,</p> <p>v.</p> <p>Public Charter School (“School A”) (“LEA”)</p> <p>Respondent.</p> <p>Case # 2016-0100</p> <p>Date Issued: July 9, 2016</p>	<p style="text-align: center;">CORRECTED HEARING OFFICER’S DETERMINATION ²</p> <p>Hearing Date:</p> <p>June 22, 2016</p> <p>Counsel for Each Party listed in Appendix A</p> <p><u>Hearing Officer:</u> <u>Coles B. Ruff, Esq.</u></p>
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¹ Personally identifiable information, including the name of the Respondent, is in Appendices A & B attached to this decision which must be removed prior to public distribution.

² This Corrected HOD adds [REDACTED] as one of Petitioner’s two counsel in Appendix A and Appendix B on Pages 17 & 18 and corrects the case number on the cover page. These are the only corrections made. The issuance date, July 9, 2016, as well as the applicable appeal date remain the same.

JURISDICTION:

The hearing was conducted, and this decision was written, pursuant to the Individuals with Disabilities Act (“IDEA”), P.L. 101-476, as amended by P.L. 105-17 and the Individuals with Disabilities Education Improvement Act of 2004, the District of Columbia Code, Title 38 Subtitle VII, and the District of Columbia Municipal Regulations, Title 5 Chapter E30. The Due Process Hearing was convened on June 22, 2016, at the District of Columbia Office of the State Superintendent of Education (“OSSE”) Office of Dispute Resolution 810 First Street, NE, Washington, D.C. 20003, in Hearing Room 2003.

BACKGROUND AND PROCEDURAL HISTORY:

The student is age _____ and in grade _____.³ He is a child with a disability pursuant to IDEA under the classification of multiple disabilities (“MD”), which includes an intellectual disability (“ID”) and a hearing impairment (“HI”). During school year (“SY”) 2013-2014 the student attended a separate special education school within District of Columbia Public Schools (“DCPS”) and had an individualized educational program (“IEP”) that prescribed a least restrictive environment (“LRE”) in which the student was totally removed from his non-disabled peers.

Petitioner enrolled the student in a public charter school located in the District of Columbia (“School A”) at the start of SY 2014-2015. School A is its own local educational agency (“LEA”) for special education purposes. On April 25, 2016, Petitioner filed a due process complaint alleging School A denied the student a free appropriate public education (“FAPE”) by, inter alia, failing to mainstream the student into general education classes and failing to fully implement the student’s IEP.

Petitioner seeks as relief that the Hearing Officer finds the LEA denied the student a FAPE. Petitioner requests compensatory education in the form of an eight (8) week summer camp, capable of providing services to students with intellectual disabilities and who are hard of hearing, to remediate the loss of opportunity of the student to interact with disabled and non-disabled peers.

On May 6, 2016, the School A filed a timely response to Petitioner’s complaint in which it denies that it failed to provide the student with a FAPE. School A admits in its response, inter alia, that is its own LEA and serves both general education and special education students and has self-contained special education program for high needs students. School A contends it reviewed and revised the student’s IEP on May 26, 2015, and developed a class schedule for the student at the beginning of SY 2015-2016 that included the student spending time in a general education classroom for part of the school day. School A asserts the schedule was developed at the demand of Petitioner, who did not want the student to spend his entire day in the self-contained classroom, despite the IEP’s prescription of a self-contained program. School A contends the student’s disabilities are so severe that he continues to require a full time self-contained special education setting. Respondent asserts that despite the student’s time in general education the student suffered no harm.

³ The student’s current age and grade are noted in Appendix B.

The parties participated in a resolution meeting on May 24, 2016, and did not resolve the complaint. The parties did not mutually agree to proceed directly to hearing. The 45-day period began on May 25, 2016, and ends [and the Hearing Officer's Determination ("HOD") is due] on July 9, 2016.

The undersigned Impartial Hearing Officer ("Hearing Officer") convened a pre-hearing conference ("PHC") on the complaint on May 20, 2016, and issued a pre-hearing order ("PHO") on May 25, 2016, outlining, inter alia, the issues to be adjudicated.

ISSUES: ⁴

The issues adjudicated are:

1. Whether the LEA denied the student a FAPE by failing to mainstream the student after November 4, 2015, when the LEA allegedly became aware the student was able to make progress in the general education setting.⁵
2. Whether the LEA denied the student a FAPE by materially failing during SY 2015-2016 to implement the student's May 26, 2015, IEP and his November 4, 2015, IEP by providing him only 17.5 hours per week of specialized instruction.⁶
3. Whether the LEA denied the student a FAPE because the student's May 26, 2015, IEP and November 4, 2015, IEP lacked a discussion and description of his LRE and his placement along the continuum of alternative placements.

RELEVANT EVIDENCE CONSIDERED:

This Hearing Officer considered the testimony of the witnesses and the documents submitted in the parties' disclosures (Petitioner's Exhibits 1 through 8 and Respondent's Exhibits 1 through 10) that were admitted into the record and are listed in Appendix A.⁷ Witnesses' identifying information is listed in Appendix B.⁸

⁴ The Hearing Officer restated the issue(s) at the outset of the hearing and the parties agreed that these were the issue(s) to be adjudicated. At the outset of the hearing Petitioner withdrew one of the four issues that were delineated in the PHO: "Whether the LEA denied the student a FAPE because the student's November 4, 2015, IEP lacks the amount, frequency, duration and location of behavioral support services."

⁵ Petitioner's counsel explained with regard to mainstreaming that from November 4, 2015, rather than the student spending 1.5 hours per day in a general education classroom, there should have been a special educator in that classroom and the student should have then spent one additional hour per day in general education with a special educator present.

⁶ Petitioner asserts that instead of the student being with a special educator for the full 25.75 hours per week, he was given 15 hours per week of one to one instruction from his dedicated aide who was not a special educator.

⁷ Any items disclosed and not admitted or admitted for limited purposes was noted on the record and summarized in

SUMMARY OF DECISION:

Petitioner sustained the burden of proof by a preponderance of the evidence on the following issues: (2) Whether the LEA denied the student a FAPE by materially failing during SY 2015-2016 to implement the student's May 26, 2015, IEP and his November 4, 2015, IEP by providing him only 17.5 hours per week of specialized instruction, and (3) Whether the LEA denied the student a FAPE because the student's May 26, 2015, IEP and November 4, 2015, IEP lacked a discussion and description of his LRE and his placement along the continuum of alternative placements.

Petitioner did not sustain the burden of proof by a preponderance of the evidence on the following issue: (1) Whether the LEA denied the student a FAPE by failing to mainstream the student after November 4, 2015, when the LEA allegedly became aware the student was able to make progress in the general education setting.

As relief for the denials of FAPE determined, the Hearing Officer grants Petitioner the requested compensatory education as relief with modification.

FINDINGS OF FACT:⁹

1. The student is a child with a disability pursuant to IDEA with the classification of MD that includes ID and HI. (Petitioner's Exhibits 7-1)
2. The student has Down syndrome. He communicates with others through unintelligible speech, gestures, facial expressions and pointing. He is basically oral but is dependent on American Sign Language ("ASL") support. He is able to communicate his needs and wants at the two-word utterance level. He requires one-to-one attention to complete tasks, remain focused and remain seated. The student is hard of hearing and uses a personal amplification device to access the curriculum. The student is currently operating academically far below is age and grade level. (Petitioner's Exhibits 7-2, 7-3, 7-4, 7-5, Witness 1's testimony, Petitioner's testimony)
3. During SY 2013-2014, the student attended a DCPS separate special education school, where special education students have no interaction with non-disabled peers. The

Appendix A.

⁸ Petitioner presented three witnesses: Petitioner, the student's dedicated aide during his time at School A, and a witness testifying about the summer program Petitioner is seeking as compensatory education. Respondent presented no witnesses.

⁹ The evidence (documentary and/or testimony) that is the source of the Finding of Fact ("FOF") is noted within a parenthesis following the finding. A document is noted by the exhibit number. The second number following the exhibit number denotes the page of the exhibit from which the fact was extracted. When citing an exhibit that has been submitted by more than one party separately the Hearing Officer may only cite one party's exhibit.

student's IEP prescribed a dedicated aide for 5.5 hours per day outside general education. (Petitioner's Exhibit 1-1, 1-12, 1-13)

4. On May 27, 2014, DCPS developed an IEP which required the following services outside general education: 27.75 hours per week of specialized instruction; .5 hours per week of adaptive physical education; .25 hours per week of audiology services; 1 hour per week of occupational therapy ("OT"); 1 hour per week of physical therapy ("PT") and 1.5 hour per week of speech and language services. The May 27, 2014, IEP did not prescribe a dedicated aide. (Petitioner's Exhibit 2-1, 2-9, 2-10, 2-11)
5. The May 27, 2014, IEP meeting notes state the following: "The team believes [the student] would benefit from a lesser restrictive environment, this is in agreement with his guardian and so we will begin the LRE process immediately. We went over the LRE process but because we are asking for a lesser restrictive environment the turnaround time should be minimum." The student did not return to DCPS for SY 2014-2015 and there was no change by DCPS of the student's LRE from a full time out of general education placement. (Petitioner's Exhibit 3-3)
6. On August 25, 2014, the student began attending School A. School A is its own LEA for purposes of rendering special education and related services. School A is a general education school where the student is exposed to his non-disabled peers. School A adopted the May 27, 2014, IEP DCPS developed for the student. (Petitioner's testimony, Witness 1's testimony, Petitioner's Exhibit 7-1)
7. When Petitioner enrolled the student in School A at the start of SY 2014-2015 she discussed with the school staff the type of classroom where the student was to receive services. She specifically questioned whether the school provided a special education classroom with general education students as well, and she was satisfied with what was described to her by the school staff. (Petitioner's testimony)
8. The student's dedicated aide started assisting the student on his first day at School A at the start of SY 2014-2015. The dedicated aide was proficient in ASL and used it to communicate with the student. The dedicated aide was not a special education teacher. (Witness 1's testimony)
9. Initially, the School A special education teacher came up with the curriculum and lesson plans for the student. Later, the dedicated aide began to go on line to search out lesson plans for the student. He followed the format of the initial plans provided by the special education teacher. The student had been given a foundation of the alphabets with ASL while the student was attending his DCPS school. Based on this foundation, the aide provided the student instruction and the student made some academic progress. (Witness 1's testimony)
10. During most of the student's first year at School A, the student was exclusively in a self-contained special education classroom led by a special education teacher. In the special

education classroom, the student was with fourteen other students who had IEPs.
(Witness 1's testimony)

11. Unlike most of the students in the self-contained classroom, the student required one-to-one attention. The student often needed to be removed from the special education classroom by the aide because of the chaotic and sometimes violent behavior of some of the other students in that classroom. While in the self-contained classroom the student did not do very well. He often seemed confused and inattentive because of the distractions from other students and he was often afraid. He was not able to communicate interact with students and would get very agitated. (Witness 1's testimony)
12. The student also spent part of his school day in a special education suite away from other students where the dedicated aide provided the student individualized instruction and services. The dedicated aide expressed concern to the School A staff that due to the disruptive behaviors of other students the aide believed the student needed more one-to-one attention rather than be in the self-contained classroom. (Witness 1's testimony)
13. Near the end of SY 2014-2015, Petitioner realized that the student was placed in the special education self-contained classroom. She understood that in the self-contained class all students had IEPs and were provided differentiated instruction on their individual academic level. Petitioner thought there were other special education classes in School A when she enrolled the student, but found out there was only that one self-contained classroom. (Petitioner's testimony)
14. The student was the only student in the self-contained classroom with Down syndrome and he was not with students of his intellectual or physical age group. Petitioner was not satisfied with the self-contained classroom and believed the class had too many students and too many distractions for the student to gain any benefit. (Petitioner's testimony)
15. On May 26, 2015, School A developed a new IEP for the student that required that he receive 27.75 hours per week of specialized instruction; 1 hour per week of OT; 4 hours per month of PT, and 30 minutes per week of speech and language services. All of these services were to be provided outside of the general education setting. The IEP required the student to have accommodations that included use of ASL. (Petitioner's Exhibit 4-1, 4-9, 4-10, 4-11)
16. Petitioner did not have a sit down meeting with the school staff about the student's services until the May 26, 2015, IEP meeting. At that meeting, she pushed for the student to be out of the special education classroom and in a general education setting. (Petitioner's testimony)
17. Petitioner wanted the student in a general education classroom where she believed the student would be provided the one-to-one attention he could not get in the special education classroom. She also wanted the student to be around diverse general education students in order to permit him to learn from them. School A agreed the student would

spend part of the day in the general education classroom near the end of SY 2014-2015 and during SY 2015-2016. (Petitioner’s testimony)

18. School A developed a class schedule for the student at the beginning of SY 2015-2016 that required that the student spend some time in the general education classroom for part of the school day. The schedule was developed at the demand of Petitioner, who did not want the student to spend his entire day in the self-contained classroom despite the IEP’s prescription of a self-contained program. (Petitioner’s Exhibit 5)

19. The student’s class schedule for SY 2015-2016 was as follows: (Petitioner’s Exhibit 5)

Time	Location	Assignment
8:00 a.m. to 9:00 a.m.	[REDACTED] Class	Sped instructor w/dedicated aide
9:00 a.m. to 9:30 a.m.	[REDACTED] Class	General Educator w/dedicated aide
9:30 a.m. to 10:00 a.m.	[REDACTED] Class	Sped instructor w/dedicated aide
10:00 a.m. to 11:00 a.m.	Suite B	w/dedicated aide - no Sped instructor
11:00 a.m. to 11:30 a.m.	[REDACTED] Class	Sped instructor w/dedicated aide
11:30 a.m. to 12:30 p.m.	Lunch & Recess	w/dedicated aide
12:30 p.m. to 1:30 p.m.	Suite B	w/dedicated aide - no Sped instructor
1:30 p.m. to 2:30 p.m.	[REDACTED] Class	General Educator w/dedicated aide
2:30 p.m. to 3:30 p.m.	Suite B	w/dedicated aide - no Sped instructor

20. The student only received 10 hours per week of specialized instruction outside of general education and 7.5 hours per week inside the general education setting. The IEP also provided for a dedicated aide for 32 hours per week outside general education. (Petitioner’s Exhibits 4-1, 4-9, 4-10, 4-11, 5)

21. When the student was in the general education classroom his progress improved dramatically. His reading began to flourish. He was attempting to read books and sing songs. School A gave Petitioner no explanation for keeping the student in the self-contained special education classroom for any part of the school day. Petitioner did not want the student in the special education classroom at all because the other students were so rowdy. (Petitioner’s testimony)

22. On November 4, 2015, School A amended the student’s IEP to reflect 27.75 hours per week of specialized instruction; 1 hour per week of OT; 4 hours per month of PT per month; 30 minutes per week of speech and language services, and 1 hour per month of audiology services. All of these services were to be provided outside of the general education setting. The number of minutes per day of behavior support services to be delivered inside general education was omitted from the document. The IEP required the student to have accommodations that included use of ASL. (Petitioner’s Exhibit 7-1, 7-9, 7-10 7-11)

23. The student’s November 4, 2015, IEP includes academic goals in math, reading and written expression. His math goals include being able count from one to 100, add and subtract numbers within 20, identify equal signs 4 out of 5 times, and identify and draw two-dimensional shapes. His reading goals include being able to recite the alphabet and

identify some of his pre-primer sight words, eventually master his pre-primer sight words and identify short and long vowel sounds. The student is able to write his name with assistance and his written expression goal is to write the letters of the alphabet with support of adults. (Petitioner's Exhibit 7-3, 7-4, 7-5)

24. The November 4, 2015, IEP included a page entitled "LRE" listed the hours that the student would be provided specialized instruction and related services and that all the services except behavioral support would be provided in the special education setting. Behavioral support was to be provided in general education but there were no specific hours listed. Other than listing the hours of services and the setting in which those services would be provided, the IEP did not include a specific discussion or description of the student's LRE or the student's placement on the continuum of educational placements. (Petitioner's Exhibit 7-1, 7-9, 7-10, 7-11)
25. The student made progress in the special education classroom with the help of the dedicated aide, but made more progress in the general education classroom because there were fewer distractions. Petitioner would have been more satisfied if the student was with the dedicated aide in the general education classroom instead of being in the special education classroom at all. (Petitioner's testimony)
26. The student made progress relative to his IEP goals during both SY 2014-2015 and during SY 2015-2016 as reflected in his IEP progress reports that were prepared by the School A special education teacher. (Respondent's Exhibit 5)
27. Petitioner began homeschooling the student in February 2016 and the student stopped attending School A. The time the student spent with the dedicated aide during both SY 2014-2015 and from the start of 2015-2016 until the student left School A in February 2016 was beneficial to the student. Petitioner hired the dedicated aide to provide the student with home school instruction after the student left School A. (Petitioner's testimony, Respondent's Exhibit 9-2)
28. The student is doing well now being home schooled but misses the social interaction he would have going to a regular school. The student is home schooled with the dedicated aide Monday through Thursday for four to six hours per day. Petitioner has not yet identified a school for the student to attend for SY 2016-2017. (Petitioner's testimony, Respondent's Exhibit 9-2)
29. Petitioner is seeking as compensatory education an order funding the student's participation in two (2) four week sessions of a program developed for students with special needs provided by Creative Health Solutions ("CHS"). CHS provides OT, speech language and allied services in both direct therapy and group programs. CHS has licensed OT and speech and language therapists. The CHS Foundations for Learning ("FOL") summer program is designed to prepare children for pre-school and/or to provide therapeutic intervention to children who have problematic school behaviors. (Witness 2's testimony)

30. The student visited CHS on May 24, 2016, with his dedicated aide for an initial consultation. The CHS staff was versed in ASL and the student was able to get along there without the need for the aide during the visit. The dedicated aide believes the program would offer the student the opportunity to learn from and emulate other children. (Witness 1's testimony)
31. The CHS staff reviewed with Petitioner the student's medical history and his current functioning. The occupational therapist and speech language pathologist concluded the FOL program would improve the student's ability to engage socially with other children. The FOL program is three hours per day twice per week on Tuesday and Thursday from 9 a.m. to noon. The speech language pathologist may present the student with some academic material. (Witness 2's testimony)
32. Because the student's current dedicated aide is sensitive to the student's emotions, the CHS staff believe it would be helpful for the dedicated aide to be with the student during the program to assist the student when he gets frustrated or has difficulty communicating. It would be a unique opportunity for the aide to be present with the student, but if the aide is not present the therapists will communicate relevant information to Petitioner directly. (Witness 2's testimony)
33. The cost of the CHS summer program is a flat rate of \$2800. The budget Petitioner presented includes, in addition to the cost of the program, the dedicated aide's time and transportation that amounts to an additional a cost of \$2777.64. The budgeted costs breakdown as follows:

CHS Summer Program Costs (Fixed Rate)	\$2,800.00
Dedicated ASL Aide Class Time \$27.81 per hour for 48 hours =	\$1,334.88
Dedicated Aide Transportation Time (.5 rate) \$13.90 per hour for 32 hrs. =	\$ 444.80
Dedicated Aide Mileage \$0.575 per mile at 60 mi/day, for total of 960 miles =	\$ 552.00
Processing/review time of aide to Petitioner: \$27.81 per hour for 16 hours	\$ 444.96
TOTAL	\$5,576.64

(Petitioner's Exhibit 8, Witness 2's testimony)

CONCLUSIONS OF LAW:

Pursuant to IDEA §1415 (f)(3)(E)(i) a decision made by a hearing officer shall be made on substantive grounds based on a determination of whether the child received a free appropriate public education ("FAPE").

Pursuant to IDEA §1415 (f)(3)(E)(ii) in matters alleging a procedural violation a hearing officer may find that a child did not receive FAPE only if the procedural inadequacies impeded the child's right to FAPE, significantly impeded the parent's opportunity to participate in the decision making process regarding provision of FAPE, or caused the child a deprivation of educational benefits. An IDEA claim is viable only if [DCPS'] procedural violations affected the student's substantive rights." *Lesesne v. District of Columbia*, 447 F.3d 828, 834 (D.C. Cir. 2006)

34 C.F.R. § 300.17 provides:

A free appropriate public education or FAPE means special education and related services that--
(a) Are provided at public expense, under public supervision and direction, and without charge;
(b) Meet the standards of the SEA, including the requirements of this part; (c) Include an appropriate preschool, elementary school, or secondary school education in the State involved; and (d) Are provided in conformity with an individualized education program (IEP) that meets the requirements of Sec. 300.320 through 300.324

Pursuant to 5E DCMR 3030.14 the burden of proof is the responsibility of the party seeking relief. *7 Schaffer v. Weast*, 546 U.S. 49, 126 S.Ct. 528 (2005). In this case the student/parent is seeking relief and has the burden of proof that the action and/or inaction or proposed placement is inadequate or adequate to provide the student with FAPE.

Based solely upon the evidence presented at the due process hearing, an impartial hearing officer must determine whether the party seeking relief presented sufficient evidence to prevail. See DCMR 5-3030.34. The normal standard is preponderance of the evidence. See, e.g. *N.G. V. District of Columbia* 556 f. Sup. 2d (D.D.C. 2008) se also 20 U.S.C. §1451 (i)(2)(C)(iii).

ISSUE 1: Whether the LEA denied the student a FAPE by failing to mainstream the student after November 4, 2015, when the LEA allegedly became aware the student was able to make progress in the general education setting.

Conclusion: Petitioner did not sustain the burden of proof by a preponderance of the evidence on this issue.

To provide a FAPE, the school district is obligated to devise an IEP for each eligible child, mapping out specific educational goals and requirements in light of the child's disabilities and matching the child with a school capable of fulfilling those needs. *See* 20 U.S.C. §§ 1412(a)(4), 1414(d), 1401(a) (14); *School Comm. of the Town of Burlington, Mass. v. Department of Educ. of Mass.*, 471 U.S. 359, 369, 105 S.Ct. 1996, 2002, 85 L.Ed.2d 385 (1985); *Jenkins v. Squillacote*, 935 F.2d 303, 304 (D.C. Cir.1991); *District of Columbia v. Doe*, 611 F.3d 888, 892 n.5 (D.C. Cir.2010).

The FAPE requirement is satisfied "by providing personalized instruction with sufficient support services to permit the child to benefit educationally from that instruction." *Smith v. District of Columbia*, 846 F.Supp.2d 197, 202 (D.D.C.2012) (citing *Bd. of Educ. of Hendrick Hudson Cent. Sch. Dist. v. Rowley*, 458 U.S. 176, 203, 102 S.Ct. 3034, 73 L.Ed.2d 690 (1982)).

The standard set out by the Supreme Court in determining whether a child is receiving a FAPE, or the "basic floor of opportunity," is whether the child has "access to specialized instruction and related services which are individually designed to provide educational benefit to the handicapped child." *A.I. ex rel. Iapalucci v. District of Columbia*, 402 F.Supp.2d 152, 167 (D.D.C.2005) (quoting *Rowley*, 458 U.S. at 201.) The IDEA imposes no additional requirement that the services so provided be sufficient to maximize each child's potential commensurate with the opportunity provided other children. *Id.* at 198 (internal quotations and citations omitted.) Congress, however, "did not intend that a school system could discharge its duty under the

[IDEA] by providing a program that produces some minimal academic advancement, no matter how trivial.” *Hall ex rel. Hall v. Vance County Bd. of Educ.*, 774 F.2d 629, 636 (4th Cir.1985).

Bd. of Educ. of Hendrick Hudson Cent. Sch. Dist. v. Rowley, 458 U.S. 176, 200 (1982), the Hearing Officer must first look to whether the State complied with the procedures set forth in the IDEA, and second, whether an individualized educational program developed through the IDEA’s procedures is reasonably calculated to enable the child to receive educational benefits. If these requirements are met, the State has complied with the obligations imposed by Congress and the courts can require no more. *Id.* at 206-07

An IEP need not conform to a parent’s wishes in order to be sufficient or appropriate. See *Shaw v. Dist. of Columbia*, 238 F. Supp. 2d 127, 139 (D.D.C. 2002). While parents may desire “more services and more individualized attention,” when the IEP meets the requirements discussed above, such additions are not required. See, e.g., *Aaron P. v. Dep’t of Educ., Hawaii*, No. 10-574, 2011 WL 5320994 (D. Hawaii Oct. 31, 2011)

IDEA requires that children with disabilities be placed in the least restrictive environment (“LRE”) so that they can be educated in an integrated setting with children who do not have disabilities to the maximum extent appropriate. See 20 U.S.C. § 1412(a)(5)(A). Removing a child with disabilities “from the regular education environment occurs only when the nature or severity of the disability is such that education in regular classes cannot be achieved satisfactorily.” See 20 USC 1412(a)(5), 34 CFR 300.114(a)(2)(i)-(ii) (emphasis added); 34 C.F.R. § 300.550; *Roark ex rel. Roark v. District of Columbia*, 460 F.Supp.2d 32, 43 (D.D.C. 2006) (“The IDEA requires school districts to place disabled children in the least restrictive environment possible.”) Further, an appropriate location of services under the IDEA is one that is capable of “substantially implementing” a Student’s IEP. *Johnson v. District of Columbia*, 962 F. Supp. 2d 263 (D.D.C., 2013).

Petitioner contends the student should have been mainstreamed into a general education classroom while the LEA contends the student’s disabilities are so severe that he continues to require a full time self-contained special education setting. Petitioner did not provide sufficient evidence that the LEA should actually have mainstreamed the student. There was evidence that the student was with general education students at some part of a school day during SY 2015-2016. Nonetheless, he required one-to-one attention at all times.¹⁰ Petitioner insisted that the student be placed in a general education classroom where she believed the student would be provided the one-to-one attention he could not get in the special education classroom.¹¹ Yet, the student already had the one to one dedicated aide, and the Hearing Officer notes that the one-to-one attention Petitioner stated that she sought for the student is totally divergent from what is typically provided in a general education classroom.

The evidence demonstrates the student has severe disabilities and is operating far below is age and grade level.¹² The student never had the LRE determination that had been ordered by DCPS

¹⁰ FOF #s 11, 12

¹¹ FOF #17

¹² FOF # 2

during SY 2014-2015, presumably because Petitioner changed the student's school to a school that serves as its own LEA. Although Petitioner asserts there is evidence that the student performed well academically in a general education classroom, there has been no formal assessment of the student's disabilities, academic, social, psychological and physical needs, and the potential benefits and problems the student may face in each possible educational environment, in order to determine the appropriate educational setting for the student. There must be some formal determination that would support a change in the student's LRE.

The evidence demonstrates that when the student was in the general education setting, he seemed to enjoy himself and he engaged socially with other students. Despite his increased social engagement, there are other factors that bear upon whether the environment is appropriate for the student. One major factor is whether the student is accessing the general education curriculum. There was insufficient evidence regarding this. In fact, the testimony of the dedicated aide was that he went on the internet to obtain lessons for the student. There was no testimony as to whether these internet lessons supplemented, supplanted or satisfied the curriculum requirements of the LEA.¹³

As an additional factor, Petitioner is homeschooling the student and claims that the student is making progress. The student is receiving instruction provided by the dedicated aide he had at the LEA. The dedicated aide goes to the student's home and provides one-on-one services. This educational environment does not provide the student with the mainstreaming Petitioner claims the student requires. In fact, it provides the student with an environment more akin to the self-contained setting the LEA asserts the student requires. Based upon the foregoing, the Hearing Officer concludes Petitioner did not sustain the burden of proof by a preponderance of the evidence on this issue.

ISSUE 2: Whether the LEA denied the student a FAPE by materially failing during SY 2015-2016 to implement the student's May 26, 2015, IEP and his November 4, 2015, IEP by providing him only 17.5 hours per week of specialized instruction.

Conclusion: Petitioner sustained the burden of proof by a preponderance of the evidence that the student was not provided the specialized instruction the student's IEP prescribes.

34 C.F.R. § 300.323(c)(2) requires that, as soon as possible following the development of an IEP, special education and related services are made available to the child in accordance with the child's IEP.

5E DCMR 3002.3 provides that:

(c) The LEA shall ensure that an IEP is developed and implemented for each eligible child with a disability served by the LEA.

(d) The LEA shall ensure that special education and related services are provided to an eligible child with a disability in accordance with the child's IEP...

¹³ FOF # 9

(f) The LEA shall make a good faith effort to assist the child to achieve the goals and objectives or benchmarks listed in the IEP.

“To prevail on a claim under IDEA, a party challenging the implementation of an IEP must show more than a de minimus failure to implement all elements of that IEP, and, instead, must demonstrate that the ...authorities failed to implement substantial or significant portions of the IEP “Savoy v. District of Columbia (DC Dist. Court) February 2012 adopted Houston Indep. School District v. Bobby R. 200 F3d 341 (5th Circ. 2000)

The student’s May 26, 2015, IEP, required that he receive 27.75 hours per week of specialized instruction; 1 hour per week of OT; 4 hours per month of PT, and 30 minutes per week of speech and language services. All of these services were to be provided outside of the general education setting. On November 4, 2015, the LEA amended the student’s IEP. Like the May 26, 2015, IEP, all of these services, save behavioral support, were to be provided outside of the general education setting.

The evidence demonstrates that the LEA provided instruction to the student through the use of a dedicated aide. The dedicated aide not only provided instruction, he appears to have developed his own lessons from material he found on the internet. There is no evidence that any of this material conformed with the LEA’s curriculum or that it adequately responded to the goals and objectives contained in the student’s IEP. During the time the student was in the self-contained classroom there was a special educator available to him. However, there was no evidence the student had any special educator available to him when he was in the general education setting, only the dedicated aide. In addition, there was time the student spent alone with the dedicated aide in a separate classroom with no special educator. Although the student’s IEP progress reports indicate that the student was progressing relative his IEP goals, the evidence is clear that the student’s IEP was not implemented with fidelity.

School A developed a class schedule for the student at the beginning of SY 2015-2016 that allowed the student spend some part of the school day in the general education classroom. The student’s IEP was not amended to reflect the schedule change. Despite what the IEP prescribed, the student only received 10 hours per week of specialized instruction outside of general education of the 27.75 hours per week he was to receive. Although the modifications permitted to the student’s services appear to have been motivated by a desire to appease Petitioner, the breach of the service requirements of the student’s May 26, 2015 and November 4, 2015 IEPs was significant and substantial.

Despite Respondent’s claim that the student was not harmed by its failure to implement the IEP, it was clear from both Petitioner’s and the dedicated aide’s unrefuted testimony that the student suffered during his time at School A from not having proper instruction, albeit for reasons in their opinion other the student’s IEP not being implemented with fidelity. Consequently, the Hearing Officer concludes Petitioner sustained the burden of proof by a preponderance of the evidence on this issue.

ISSUE 3: Whether the LEA denied the student a FAPE because the student's May 26, 2015, IEP and November 4, 2015, IEP lacked a discussion and description of his LRE and his placement along the continuum of alternative placements.

Conclusion: Petitioner sustained the burden of proof by a preponderance of the evidence on this issue.

There appears to be no express requirement under IDEA that an IEP include a determination of a student's LRE. The student's November 4, 2015, IEP has a page specifically entitled LRE. However, the page does not specifically state what the student's LRE is on the continuum of alternative placements. Petitioner has cited a recent case that supports her position that the lack of a LRE discussion and designation in the IEP renders the IEP defective.¹⁴

Although Petitioner's engagement in the decision-making process is vital, the decision regarding the student's education program and LRE are made by more than one (1) person for a reason. Parents rely upon the expertise of educators and evaluators and teachers and evaluators rely on the knowledge and information of the parent. This merger provides the best opportunity for the student to have his educational needs appropriately met.

Given the unique facts of this case where Petitioner specifically requested that the student be in a general education setting and the LEA believed the student continued to require a self-contained program, this was an instance where it would have been appropriate for there to have been a specific discussion of the student's LRE reflected in the student's IEP. In this instance, the Hearing Officer concludes that the failure of the IEP to include such a discussion of the student's LRE on the continuum of placements significantly impeded Petitioner's opportunity to participate in the decision making process regarding provision of FAPE

¹⁴ *Brown v. District of Columbia*, 67 IDELR 169, April 13, 2016 [I]t appears that no provision of the statute or regulations, by express terms, requires that an IEP include a determination of a student's least restrictive environment and appropriate placement [along the continuum of placements]. However, the undersigned finds that the statute and regulations, read in context, in fact impose such requirement. 20 U.S.C. § 1414(d)(1)(A)(i)(V) (providing that an IEP must include "an explanation of the extent, if any, to which the child will not participate with nondisabled children in the regular class and in activities described in subclause (IV)(cc)[.]"); see also A.I. ex rel. Iapalucci, 402 F. Supp. 2d at 159 (holding that an IEP must include, among other things, a statement regarding "the child's ability to interact with non-disabled children")... In sum, given the emphasis the IDEA places on the concept of an LRE and the central role the IEP plays in the broader statutory framework, it only makes sense that -- as the Magistrate Judge concluded -- an IEP team is required to discuss a student's specific LRE and the IEP is required to include at least a brief description of it. If that were not the case, it would be very difficult to ensure that the IEP "enable[s] the child to achieve passing marks and advance from grade to grade" in the 'least restrictive environment' possible." Dixon, 83 F. Supp. 3d at 232 (quoting K.S., 962 F. Supp. 2d at 220). Perhaps more importantly, it would undermine a student and parent's right to engage in the collaborative process engineered to create an IEP "tailored to address the specific needs of each disabled student." Stein, 709 F. Supp. 2d at 70 (citing Iapalucci, 402 F. Supp. 2d at 163-64). Therefore, because the plaintiff's IEP fails to discuss his LRE, as well as appropriate alternative placements, the Court finds that his IEP is legally deficient."

Remedy:

A hearing officer may award appropriate equitable relief when there has been an actionable violation of IDEA. *See* 20 U.S.C. § 1415(f)(3)(E)(ii)(II); *Eley v. District of Columbia*, 2012 WL 3656471, 11 (D.D.C. Aug. 24, 2012) (citing *Branham v. District of Columbia*, 427 F.3d at 11–12.) The Hearing Officer has concluded that the student was not provided all specialized instruction outside general education that he was to have been provided.

Compensatory Education

Under the theory of compensatory education, "courts and hearing officers may award educational services ... to be provided prospectively to compensate for a past deficient program. The inquiry must be fact-specific and, to accomplish IDEA's purposes, the ultimate award must be reasonably calculated to provide the educational benefits that likely would have accrued from special education services the school district should have supplied in the first place." Reid, 401 F.3d 522 & 524. To aid the court or hearing officer's fact-specific inquiry, "the parties must have some opportunity to present evidence regarding [the student's] specific educational deficits resulting from his loss of FAPE and the specific compensatory measures needed to best correct those deficits." *Id.* at 526.

Petitioner requests as compensatory education that the student be provided eight weeks in a summer program. Petitioner also seeks the cost and transportation of the dedicated aide to accompany the student in the summer program and to brief Petitioner on what happens in the program.

There was sufficient evidence that the student would benefit from the summer program the Petitioner is seeking as compensatory education. The dedicated aide testified that during the student's visit to the program he did not need the aide's assistance. The representative of the program testified that the student would benefit from the program without the aide and that program staff could brief Petitioner directly about the student progress in the program. However, he also testified that the student's experience in the program would be enhanced with the dedicated aide being there with him. Based upon this testimony the Hearing Officer finds it reasonable that the dedicated aide's presence in the program would be helpful to the student. However, there was no specific testimony offered during the hearing with regard to travel time, mileage and the dedicated aide briefing Petitioner. Therefore, the Hearing Officer will not include in the compensatory education award anything other than the cost of the program and the dedicated aide's time with the student during his hours in the program.

ORDER: ¹⁵

1. Within ten (10) business days of the date of this order, the LEA, [REDACTED], shall provide Petitioner authorization and fund the cost of the summer

¹⁵ Any delay in Respondent meeting the timelines of this Order that are the result of action or inaction by Petitioner shall extend the timelines on a day for day basis.

program at [REDACTED] and time of the dedicated aide to accompany the student at a total cost not to exceed \$4,134.88.

2. All other requested relief is denied.

APPEAL PROCESS:

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).

/S/ Coles B. Ruff

Coles B. Ruff, Esq.
Hearing Officer
Date: July 9, 2016

Copies to: Counsel for Petitioner
 Counsel for DCPS - LEA
 OSSE-SPED due.process@dc.gov
 ODR hearing.office@dc.gov