

DISTRICT OF COLUMBIA
OFFICE OF THE STATE SUPERINTENDENT OF EDUCATION

Office of Dispute Resolution
810 First Street, N.E., 2nd Floor
Washington, DC 20002

STUDENT, ¹)	
through the Parents,)	
)	Date Issued: May 29, 2015
Petitioners,)	
)	Hearing Officer: John Straus
v.)	
)	Case No: 2015-0031
District of Columbia Public Schools (“DCPS))	
)	Hearing Dates:
Respondent.)	April 20, 2015 Room: 2006
)	April 21, 2015 Room: 2006
)	May 19, 2015 Room: 2006
)	

HEARING OFFICER DETERMINATION

Background

The Petitioners, who are the parents of the Student, filed a due process complaint notice on January 26, 2015, alleging that the student had been denied a free appropriate public education (“FAPE”) under the Individuals with Disabilities Education Act (“IDEA”).

The Petitioners alleged DCPS denied the Student a FAPE by failing to develop an Individualized Education Program (“IEP”) on May 1, 2014, June 12, 2014 and September 24, 2014 that is reasonably calculated to provide educational benefit. Specifically, the Petitioners alleged the IEPs lacked the correct disability category and the IEPs lack a sufficient type and amount of specialized instruction to meet the student’s identified needs. The Petitioners also alleged DCPS denied the Student a FAPE by failing to propose a placement for the 2014-2015 school year that is reasonably calculated to enable the student to make progress in the general education curriculum because the Student requires a placement in a special school. The Petitioner requested the Hearing Officer order DCPS to fund the student’s placement and transportation to the Nonpublic School for the 2014-2015 school year.

DCPS asserted that on June 12, 2014, and September 24, 2014, DCPS proposed an appropriate IEP and placement for the student. DCPS argues it made a FAPE available to the parent and the parent rejected the offer and expressed intent to unilaterally place the student at Nonpublic School, and to remain in the private school.

Subject Matter Jurisdiction

Subject matter jurisdiction is conferred pursuant to the IDEA, as modified by the Individuals with Disabilities Education Improvement Act of 2004, 20 U.S.C. Section 1400 et. seq.; the implementing regulations for the IDEA, 34 Code of Federal Regulations (“C.F.R.”) Part 300; and Title V, Chapter E-30, of the District of Columbia Municipal Regulations (“D.C.M.R.”); and 38 D.C. Code 2561.02.

Procedural History

The due process complaint was filed on January 26, 2015. This Hearing Officer was assigned to the case on January 27, 2015.

Neither the Petitioners nor the Respondent waived the resolution meeting. The resolution meeting took place on February 4, 2015. At the resolution meeting, parties agreed to keep the 30-day resolution period open. The 30-day resolution period ended on February 25, 2015 and the 45-day timeline to issue a final decision began on February 26, 2015. The Petitioner filed an Unopposed Motion for Continuance which was approved by the Chief Hearing Officer. The final decision due date was continued for 21 days from April 11, 2015 to May 2, 2015 and the hearing was scheduled April 20 and 21, 2015. The Hearing took place as scheduled over two consecutive days on April 20 and 21, 2015. The Respondent did not complete its case on April 21st. Thereafter, the parties requested a continuance for 27 days for the HOD due date from May 2, 2015 to May 29, 2015. The motion was approved by the Chief Hearing Officer on April 23, 2015. The final day of the hearing was held on May 19, 2015 and a final decision is due by May 29, 2015.

The Petitioner was represented by Michael Eig, Esq. and DCPS was represented by Daniel McCall, Esq. Neither party objected to the testimony of witnesses by telephone. The Petitioners participated in person throughout the hearing.

The Petitioner presented six witnesses: a Clinical Psychologist, Educational Advocate, Nonpublic School Education Director (“Education Director”), Nonpublic School Social Worker (“NP SW”), Nonpublic School Speech/Language Pathologist (“SLP”) and the Mother of the Student (“Mother”). DCPS presented four witnesses: School Psychologist, DCPS Social Worker (“SW”), General Education Teacher (“GET”), DCPS Speech Language Pathologist (“DCPS SLP”) and Local Education Agency Representative (“LEA Representative”).

The Petitioner’s disclosures dated April 13, 2015, containing a witness list and Exhibits P-1 through P-50 were timely filed and admitted into evidence. DCPS’ disclosures dated April 13, 2015, containing a witness list and Exhibits R-1 through R-63, were timely filed and admitted into evidence.

The issues to be determined in this Hearing Officer Determination are as follows:

1. Whether DCPS denied the Student a FAPE by failing to develop an IEP on May 1, 2014, June 12, 2014 and September 24, 2014 that is reasonably calculated to provide educational benefit; specifically, the IEPs lacked the correct disability category and the IEPs lacks a sufficient type and amount of specialized instruction to meet the student's identified needs.
2. Whether DCPS denied the Student a FAPE by failing to propose a placement for the 2014-2015 school year that is reasonably calculated to enable the student to make progress in the general education curriculum; specifically the Student requires a placement in a special school.

For relief, Petitioner requested the Hearing Officer to order DCPS to fund the student's placement and transportation to Nonpublic School for the 2014-2015 school year.

Findings of Fact²

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

1. The Student lives with his parents in the District of Columbia. The Student attended Elementary School for Kindergarten and First grade. He enrolled in Nonpublic School at the beginning of the 2014-2015 school year.³
2. On August 27, 2012, the Student received an Educational assessment. The evaluator noted the Student made noises and shook his head during the testing session. At times, he became restless and moved around his chair and moved his feet around. The Student received the following standardized scores on the Woodcock-Johnson III ("WJ-III"):

Letter word identification	52
Story Recall	85
Understanding Directions	100
Applied Problems	96
Picture Vocabulary	97

The average score on this assessment is 100. The Letter word identification subtest was not completed due to the Student's noncompliance. The Story Recall subtest was completed with many prompts from the evaluator. The evaluator also observed the Student

² Footnotes in these Findings of Fact refer to the sworn testimony of the witness indicated or to an exhibit admitted into evidence. 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, 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.

³ Mother

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in school and noted the Student was not participating and began talking to himself and made noises. His teacher noted that the Student was withdrawn.⁴

3. On August 27, 2012, the Student received a Psychological assessment. The cognitive assessment indicated the Student has average nonverbal intelligence. The evaluator stated the Student is a student with Autism Spectrum Condition. The evaluator recommended the Student receive one-to-one instruction at a table top at least 30 minutes per week.⁵
4. On August 27, 2012, the Student received a Speech and Language assessment. The evaluator observed the Student's pragmatic skills are moderately delayed. The assessment yielded severe delays in receptive and expressive language. The evaluator stated, without intervention, the Student's receptive language deficits will adversely impact his ability to understand teacher presented directions and academic content in the classroom setting. The evaluator further stated his articulation errors and delayed expressive language skills will negatively affect his ability to ask and answer questions, communicate his wants, needs and ideas to be understood by his teachers and peers.⁶
5. On September 13, 2012, the Student received an OT assessment. The evaluator stated the Student demonstrated average neuromuscular skills, fine motor skills, visual motor integration and visual perceptual skills and is able to replicate novel motor sequences. The evaluator also noted the Student has definite food preferences based on texture and therefore has a limited diet which may impact his ability to participate in school based social events.⁷
6. On September 26, 2012, the IEP team reviewed the assessment reports and determined the Student is a student with Autism Spectrum Disorder under the IDEA.⁸
7. On May 2, 2013, the IEP team developed goals and determined the Student requires one hour of Specialized Instruction per week in the general education setting, 180 minutes of Speech-Language Pathology ("SLP") per month outside the general education setting, and 120 minutes of Behavior Support Services per month outside the general education setting.⁹
8. On February 3, 10, 17, and 21, 2014 and March 24, 2104, the Student received a Neuropsychological assessment from the Clinical Psychologist. The assessment yielded an average general abilities score in cognitive functioning, although he had significant discrepancies in intellectual abilities. The assessment yielded the following standard scores on the WJ-III:

Brief Reading	69
Basic Reading Skills	87

⁴ P-4, R-10, Mother, LEA Representative

⁵ P-5, R-9, Mother, School Psychologist

⁶ P-6, R-5, Mother, DCPS SLP

⁷ P-7, R-11, Mother

⁸ R-8, R-12, R-15 School Psychologist, SW, LEA Representative

⁹ P-9, R-20, R-21, R-30, Mother, SW, GET, LEA Representative

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Letter Word Identification	78
Passage Comprehension	54
Word Attack	99
Broad Math	66
Math Calculation Skills	70
Calculation	70
Math Fluency	77
Applied Problems	74
Brief Writing	80
Spelling	74
Writing Samples	90

The assessment states the Student is a student with a Specific Learning Disability and Autism Spectrum Disorder. The Clinical Psychologist recommended the Student be placed in a class with a low student to teacher ratio (3 or 4 to 1) in all learning experiences with teachers who are experienced teaching student with Specific Learning Disabilities and Autism Spectrum Disorders. The assessment report further states that the Student requires remedial support/tutoring in reading, math and writing. The Clinical Psychologist further recommended the Student be provided a behavioral rewards system and social skills training. Finally, the Clinical Psychologist recommended the Student receive Occupational Therapy services to develop sensory strategies.¹⁰

9. On May 1, 2014, the IEP team unanimously agreed the Student continues to be a student with Autism Spectrum Disorder under the IDEA. The IEP team determined the Student requires 5 hours of Reading per week outside the general education setting, 2 hours of Mathematics per week outside the general education setting, one hour of Written Expression per week in the general education setting, 180 minutes of Speech-Language Pathology (“SLP”) per month outside the general education setting, 120 minutes of Behavior Support Services per month outside the general education setting, 120 minutes of SLP per month in the general education setting, one hour of Specialized Instruction per week on a consultative basis and 30 minutes of Behavior Support Services per month on a consultative basis. The team determined the Student would receive additional assessments and review the assessments on June 12, 2014.¹¹
10. On May 5, 2014, the Petitioners, through counsel, notified DCPS that they reject the proposed IEP and the Petitioners will be seeking a private placement.¹²
11. On May 14, 2014, the Petitioners, through counsel, notified DCPS that they disagreed with the disability category in the May 1, 2015 IEP and the number of service hours on the IEP are not sufficient to meet the Student’s needs.¹³

¹⁰ P-10, Clinical Psychologist, Mother, LEA Representative

¹¹ P-15, R-30, R-33, R-34, R-35, R-36, R-37, R-38, Mother, School Psychologist, SW, GET, LEA Representative

¹² P-16

¹³ P-17, Mother

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12. On May 16 and 23, 2014, the Student received an educational assessment. The assessment yielded average written expression scores, poor to average phonological processing scores and normal behaviors overall. The evaluator noted the Special Education Teacher had an elevated number of concerns in the area of learning and that the Student displays unusual difficulty comprehending and completing school work. The evaluator stated the Student continues to be a Student with Autism under the IDEA. The evaluator noted the Student has difficulty learning academic skills on par with his grade level.¹⁴
13. On June 2, 2014, the Student was observed by the Educational Advocate. The observer noted the Student interacted with his teacher and peer appropriately. However, the Student required frequent redirection, did not face the teacher, and moved constantly while sitting on the floor. The Student also had an atypical pencil grasp, wrote his name with upper and lower case letters, demonstrated incorrect spacing between letters and he responded to questions without identifying the main idea. The Educational Advocate noted that the class at Elementary School provided a warm and inviting setting that was visually stimulating. The teachers cared for the Student and there were class routines that were comfortable for the Student. The GET and SW stated the Student interacted with his peers. He enjoyed the class projects and appeared excited and smiled often.¹⁵
14. On May 16 May 23, and June 5, 2014, the Student received a Speech and Language Assessment. The assessment report states the Student has weakness in the area of pragmatics or social language skills.¹⁶
15. On June 12, 2014, the IEP team reviewed the neuropsychological assessment and educational assessment. The Petitioner's attorney requested the team identify the Student as a student with Multiple Disabilities ("MD"); however, the DCPS staff disagreed and determined the Student continues to be a student with Autism Spectrum Disorder under the IDEA. The team determined the Student requires 6 hours of Reading per week outside the general education setting, 2 hours of Mathematics per week outside the general education setting, one hour of Written Expression per week in the general education setting, 2 hours of Written Expression per week outside the general education setting, 180 minutes of SLP per month outside the general education setting, 120 minutes of Behavior Support Services per month outside the general education setting, 180 minutes of SLP per month in the general education setting, 60 minutes of Behavior Support Services per month in the general education setting, one hour of Specialized Instruction per week on a consultative basis and 60 minutes of Behavior Support Services per month on a consultative basis. The team noted the Student benefitted from interactions with his non-disabled peers. The team agreed to reconvene to review the SLP assessment.¹⁷
16. On July 11, 2014, the Student received another Speech and Language Assessment. The results of the assessment revealed moderate to severe delays in the areas of expressive and

¹⁴ P-18, R-39, R-40, School Psychologist

¹⁵ P-19, Educational Advocate, GET, SW

¹⁶ P-21, R-43, DCPS SLP

¹⁷ P-23, P-24, P-25, R-42, R-44, R-45, R-46, R-47, R-48, R-49, R-50, R-51, R-52, Educational Advocate, School Psychologist, SW, DCPS SLP, LEA Representative

receptive language skills, with relative strength noted in the area of expressive language and significant weaknesses in the area of receptive language. The assessment also yielded average expressive and receptive vocabulary. The Student's expressive and receptive language weaknesses may continue to impact upon academic functioning as concepts become more abstract. The evaluator recommended the Student continue to receive speech and language support targeting pragmatic language skills, turn-taking, perspective taking and topic maintenance. The evaluator also recommended the Student increase his expressive language skills as it relates to sentence production, grammatical structure and story retell. The Student needs to work on receptive language skills, especially as it relates to following oral directions. The Student would benefit from instructions broken down into smaller parts when presented orally and in writing, repeated directions, frequent check ins to ensure the Student is on task and sentence modeling to develop sentence structure.¹⁸

17. On August 11, 2014, the Petitioners notified DCPS that the Student will attend Nonpublic School for the 2014-2105 school year and requested DCPS to place and fund the Student's tuition at Nonpublic School.¹⁹
18. On August 20, 2014, DCPS notified the Petitioners that it would not agree to bear the cost for tuition at Nonpublic School.²⁰
19. On September 22, 2014, the Student was observed by the Educational Advocate. The Student was distracted. The Educational Advocate noted the Student was upset because the location of the class changed.²¹
20. On September 24, 2014, the IEP team reviewed the Speech and language assessment. The Educational Advocate requested the IEP team identify the Student as a student with MD due to the Student's specific learning disability and speech and language impairment. The IEP team determined the Student continues to be a student with Autism under the IDEA. The IEP team further determined there would be no changes to the Student's service hours. The Petitioner's attorney stated the Petitioners rejected the IEP.²²
21. On February 10 and 11, and March 10, 11 and 18, the Student received an OT assessment. The assessment report states the Student has difficulty recalling information that is visually presented and demonstrated, sustaining and recalling information that is presented visually and completing tasks that include more specific aspects of visual perception. These deficits affect his working memory and ability to recall information which significantly impacts the Student's daily school activities. The evaluator recommended the Student be provided two, thirty minute sessions of OT per week to address executive functioning skills, motor planning and sensory/self-regulation skills to function within the classroom environment. The evaluator recommended specific goals and accommodations for the Student.²³

¹⁸ P-26, R-54, DCPS SLP

¹⁹ P-27, Educational Advocate

²⁰ P-28

²¹ P-30A, Educational Advocate

²² P-33, P-34, P-35, R-58, R-59, R-60, R-61, R-62, Educational Advocate, School Psychologist, SW, DCPS SLP, LEA Representative

²³ P-41, Education Director

22. On March 26, 2015, the Student was observed by the Educational Advocate. The Educational Advocate noted the Student participated in his group without mumbling and contorting himself. The Student has benefitted at Nonpublic School from integrated services and structure. As a result, he shuts down less and is less frustrated. The NP SW facilitates opportunities for the Student to play with other students during recess.²⁴

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:

"Based solely upon evidence presented at the hearing, an impartial hearing officer shall determine whether the party seeking relief presented sufficient evidence to meet the burden of proof that the action and/or inaction or proposed placement is inadequate or adequate to provide the student with a FAPE." 5 D.C.M.R. E-3030.3. The burden of proof in an administrative hearing is properly placed upon the party seeking relief. *Schaffer v. Weast*, 44 IDELR 150 (2005).

DCPS did not deny the Student a FAPE by failing to develop IEPs on May 1, 2014, June 12, 2014, and September 24, 2014 that are reasonably calculated to provide educational benefit with respect to the correct disability category.

The Petitioner argues the Student is a student with MD under the IDEA because in addition to Autism Spectrum Disorder, the Student is a student with a SLI and SLD under the IDEA. There is no dispute that the Student is a student with Autism under the IDEA. The IDEA defines autism as "a developmental disability significantly affecting verbal and nonverbal communication and social interaction, generally evident before age 3." 34 C.F.R. § 300.8(c)(1)(i). Additionally, the IDEA offers the following guidance: "Other characteristics often associated with autism are engagement in repetitive activities and stereotyped movements, resistance to environmental change or change in daily routines, and unusual responses to sensory experiences." 34 C.F.R. § 300.8(c)(1)(i).

There are several assessment reports that diagnose the Student with autism. A diagnosis of autism will not in itself entitle a student to receive special education and related services. As with other disabilities identified in the IDEA, a student with autism must show that the disability has an adverse effect on his educational performance. 34 C.F.R. § 300.8(c)(1)(i). Although the IDEA requires districts to consider whether a student's autism "adversely affects" his educational performance, it does not define the term. In this case, it is clear that the Student's communication difficulties and resistance to environmental change has a significant impact on his educational performance.

Although the Student has severe expressive and receptive language deficits, there is no formal diagnosis in the record of a speech and language impairment by a SLP. The IDEA defines a speech or language impairment as a "communication disorder, such as stuttering,

²⁴ P-40, Educational Advocate, Education Director

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impaired articulation, a language impairment, or a voice impairment, that adversely affects a child's educational performance.” 34 C.F.R. § 300.8(c)(11). The fact that a child has a speech or language impairment will not in itself make him eligible for IDEA services. In *Letter to Clarke*, 48 IDELR 77 (OSEP 2007), the United States Department of Education Office of Special Education Program (“OSEP”) noted that whether a child with a speech-language impairment qualifies as a child with a disability under the IDEA will depend on more than academic performance. Noting that districts should use a variety of assessment tools, OSEP observed that a child's eligibility for services due to a speech or language impairment must be determined on a case-by-case basis. In this case, the Student has a language impairment that has an adverse effect on his educational performance.

In *Letter to Prifitera*, 48 IDELR 163 (OSEP 2007), OSEP stated an eligibility group can determine that a child has an SLD if: 1) the child does not achieve adequately or meet state-approved grade-level standards in one of eight enumerated areas (34 C.F.R. § 300.309(a)(1)); 2) the child (i) fails to make sufficient progress with the use of research-based intervention techniques or (ii) exhibits a pattern of strengths and weaknesses in performance, achievement, or both (34 C.F.R. § 300.309(a)(2)(i) through (ii)); and 3) the group determines that its findings under (1) and (2) are not the result of factors such as a visual, hearing, or motor disability, environmental or economic disadvantage, or limited English proficiency (34 C.F.R. § 300.309(a)(3)). In this case, the Student does not achieve adequately academically, he exhibits a pattern of strengths and weaknesses in performance and achievement, and none of the eliminating factors under 34 C.F.R. § 300.309(a)(3) are present.

Pursuant to 34 C.F.R. § 300.8(c)(7), multiple disabilities means concomitant impairments (such as mental retardation-blindness), the combination of which causes such severe educational needs that they cannot be accommodated in special education programs solely for one of the impairments. In this case, autism, speech and language impaired and a specific learning disability may be concomitant impairments under the IDEA.

DCPS argues that an incorrect disability category does not amount to a denial of FAPE. Pursuant to 34 C.F.R. § 300.513(a)(2), in matters alleging a procedural violation, a hearing officer may find that a child did not receive a FAPE only if the procedural inadequacies impeded the child's right to a FAPE; significantly impeded the parent's opportunity to participate in the decision-making process regarding the provision of a FAPE to the parent's child; or caused a deprivation of educational benefit. OSEP explains that children with one of the disabilities in 34 C.F.R. § 300.8 should be identified as a child with a disability using the category that is most appropriate for the child. Some children may be identified under other disability categories. Services must meet the child's needs and cannot be determined by the child's eligibility category. 71 Fed. Reg. 46,655 (2006). There is nothing in the record that indicates the Student's needs were determined by the Student's current disability category. Therefore, the Hearing Officer finds no substantive denial of FAPE by failing to determine the Student is a student with MD under the IDEA.

DCPS denied the Student a FAPE by failing to develop IEPs on May 1, 2014, June 12, 2014, and September 24, 2014 that are reasonably calculated to provide educational benefit because the IEPs lacks a sufficient type and amount of specialized instruction to meet the student's identified needs.

As described by the U.S. Supreme Court, the IEP is a comprehensive statement of the educational needs of a child with a disability and the specially designed instruction and related services a district will employ to meet those needs. *Burlington Sch. Comm. v. Massachusetts Dept. of Educ.*, 556 IDELR 389 (U.S. 1985). A district's obligation to provide FAPE to a student with a disability is satisfied when the district provides the student with the personalized educational program necessary to allow the child to derive an educational benefit from that instruction. In other words, the FAPE requirement of the IDEA demands access to educational opportunity only, not the specific achievement of educational results. *Board of Educ. of the Hendrick Hudson Cent. Sch. Dist. v. Rowley*, 553 IDELR 656 (U.S. 1982).

In his initial evaluation, the Student had average academic achievement, despite his disability and despite the distractibility during the testing session. The IEP team then develop an initial IEP for the Student that provided one hour per week of specialized instruction per week in the general education setting. The IEP team then increased the hours of service to seven hours of specialized instruction per week outside the general education setting and one hour of specialized instruction per week in the general education setting without reviewing anymore assessments.

Over a year and a half later, the Student was reevaluated by the Clinical Psychologist. This time, the assessment yielded significantly lower academic achievement scores. However, after reviewing the Neurological Assessment, the IEP team increased the hours of specialized instruction outside the general education setting by three hours per week to ten hours per week.

The Clinical Psychologist recommended the Student be placed in a class with student to teacher ratio of three or four to one on a full time basis and for the Student to receive Occupational Therapy services to develop sensory strategies. A subsequent OT assessment report recommended the Student be provided two, thirty minute sessions of OT per week to address executive functioning skills, motor planning and sensory/self-regulation skills to function within the classroom environment.

The IEP team convened on June 12, 2014 and September 24, 2014 since it reviewed the Neuropsychological Assessment report. Based on the evidence, the IEPs do not provide the Student with the personalized educational program necessary to allow the child to derive an educational benefit from that instruction. In fact, the Student was losing ground to his peers academically at an alarming rate. Therefore, the Hearing Officer finds DCPS denied the Student a FAPE by failing to provide a sufficient type and amount of specialized instruction to meet the student's identified needs.

DCPS did not deny the Student a FAPE by failing to propose a placement for the 2014-2015 school year that is reasonably calculated to enable the student to make progress in the general education curriculum.

Pursuant to 34 C.F.R. § 300.115(a), DCPS “must ensure that a continuum of alternative placements is available to meet the needs of children with disabilities for special education and related services.” The comments to the regulations clarify that:

The Act does not require that every child with a disability be placed in the regular classroom regardless of individual abilities and needs. This recognition that regular class placement may not be appropriate for every child with a disability is reflected in the requirement that LEAs make available a range of placement options, known as a continuum of alternative placements, to meet the unique educational needs of children with disabilities. This requirement for the continuum reinforces the importance of the individualized inquiry, not a “one size fits all” approach, in determining what placement is the LRE for each child with a disability. The options on this continuum must include the alternative placements listed in the definition of special education under Sec. 300.38 (instruction in regular classes, special classes, special schools, home instruction, and instruction in hospitals and institutions). These options must be available to the extent necessary to implement the IEP of each child with a disability.

See 71 Fed. Reg. 46,587 (2006). As stated above, the continuum, in general, ranges from the least restrictive to the most restrictive: instruction in regular classes, special classes, special schools, home instruction, and instruction in hospitals and institutions. 34 C.F.R. § 300.115(b)(1) and *H.H. v. Indiana Bd. of Special Educ. Appeals*, 50 IDELR 131 (N.D. Ind. 2008). What is pertinent in making the placement decision will vary, at least to some extent, based upon the child's unique and individual needs. *Letter to Anonymous*, 21 IDELR 674 (OSEP 1994).

The Student was unilaterally removed from attending a mix of general education classes and special education classes in his neighborhood school to a special school that provides services to students with disabilities exclusively. DCPS argues that the Student received benefit from being in his general education classes by having the opportunity to model behavior exhibited by his nondisabled peers. The Petitioner maintains that the Student was a loner with behavioral problems at his neighborhood school.

The Student was observed on at least two occasions at Elementary School. During the first observation, the Student was not participating and began talking to himself and made noises. During the second observation, the Student interacted with his teacher and peer appropriately. However, the Student required frequent redirection, did not face the teacher, and moved constantly while sitting on the floor. The class at Elementary School provided a warm and inviting setting that was visually stimulating. The teachers cared for the Student and there were class routines that were comfortable for the Student. The Student was observed on at least two occasions at Nonpublic School. During the first observation, the Student was not paying attention and was upset because the location of the class changed. During the second observation, the Student participated in his group without mumbling and contorting himself.

The Student has difficulty adjusting to new settings. While the Student did receive educational benefit at Nonpublic School, the evidence does not support that the Student benefitted from a more restrictive placement such as a special school. The student received educational benefit from the *program* offered at the Nonpublic School; ie. a full time program²⁵ of specialized instruction and related services. DCPS was not willing to provide the program needed for the Student at Elementary School. Therefore, the Hearing Officer finds DCPS denied the Student a FAPE by failing to provide the Student with a full time IEP; DCPS did not fail to propose a placement for the 2014-2015 school year that is reasonably calculated to enable the student to make progress in the general education curriculum by placing the Student at his neighborhood school.

ORDER

As a result of DCPS' failure to provide a full time program for the student, DCPS is ordered to do the following:

- (1) DCPS shall reimburse the Petitioner for tuition paid at Nonpublic School for the Student's education for the 2014-2015 school year;
- (2) DCPS shall convene an IEP team meeting at Nonpublic School within 10 school days to review and revise the student's IEP to provide OT and full time special education services;
- (3) If DCPS provides a less restrictive placement for the Student that can implement the full time IEP for the 2015-2016 school year, the team shall develop a transition plan for the Student;
- (4) For every day of delay by the Petitioner, DCPS shall have one day to convene the meeting; and
- (5) No further relief is granted.

IT IS SO ORDERED.

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: May 29, 2015

/s/ John Straus
Hearing Officer

Copies to:

Petitioner (U.S. mail)

²⁵ Most full time programs provided by DCPS are 27.5 hours of specialized instruction and related services per week.

2015-0031

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Petitioner's Attorney: Michael Eig, Esq. (electronically)

DCPS' Attorney: Daniel McCall, Esq. (electronically)

DCPS (electronically)

ODR (electronically)