

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

Student Hearing Office  
810 First Street, NE, 2nd Floor  
Washington, DC 20002

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PETITIONERS, on behalf of  
[CHILD],<sup>1</sup>

Petitioner,

v

DISTRICT OF COLUMBIA  
PUBLIC SCHOOLS,

Respondent.

Date Issued: January 27, 2011

Hearing Officer: Peter B. Vaden

Case No:

Hearing Dates: January 10, 13, 14  
and 18, 2011

Student Hearing Office, Room 2006  
Washington, D.C.

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STUDENT HEARING OFFICE

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**HEARING OFFICER DETERMINATION**

**INTRODUCTION AND PROCEDURAL HISTORY**

This matter came to be heard upon the Administrative Due Process Complaint Notice filed by PARENTS (the "Parents"), under the Individuals with Disabilities Education Act, as amended (the "IDEA"), 20 U.S.C. § 1400, *et seq.*, and Title 5-E, Chapter 5-E30 of the District of Columbia Municipal Regulations ("D.C. Regs."). In their Due Process Complaint, the Petitioners alleges that District of Columbia Public Schools' ("DCPS") October 13, 2010 Individualized Education Program ("IEP") would deny the Child a Free Appropriate Public

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Personal identification information is provided in Appendix A.

Education ("FAPE") because the IEP fails to provide annual goals in reading, mathematics, social-behavioral deficits, or fine or gross motor development. The Parents further object to the proposed placement of the Child in a general education classroom and contend that the proposed special education and related services are insufficient. Parents seek an order requiring DCPS to fund Child's placement at SECOND PRIVATE SCHOOL ("SPS") and request reimbursement for Child's tuition expenses at SPS from the beginning of the 2010-2011 school year.

The Child, an AGE girl, is a resident of the District of Columbia and is eligible for special education services under the primary disability Other Health Impaired ("OHI"). The Parents' Due Process Complaint, filed on October 28, 2010, named DCPS as respondent. The undersigned Hearing Officer was appointed on November 1, 2010. The parties met for a resolution session on November 10, 2010. No agreement was reached and the parties decided that the case should proceed to a due process hearing. A prehearing telephone conference was held with the Hearing Officer and counsel on November 23, 2010 to discuss the hearing date, issues to be determined and other matters. A continuance was requested by the Parents on November 24, 2010 to accommodate scheduling for four hearing days and the appearance of witnesses around the DCPS Winter Break. A 33-day continuance was granted and approved by the Chief Hearing Officer, extending the due date for this Hearing Officer Determination to January 27, 2011.

The due process hearing was held before the undersigned Impartial Hearing Officer on January 10, 13, 14 and 18, 2011 at the Student Hearing Office in Washington, D.C. The hearing, which was closed to the public, was recorded on an electronic audio recording device. The Parents appeared in person and were represented by counsel. Respondent DCPS was represented by counsel and, at most times, by SCHOOL PSYCHOLOGIST. The Parents called as witnesses

FIRST PRIVATE SCHOOL (“FPS”) ADMINISTRATOR, PRIVATE SPEECH/LANGUAGE PATHOLOGIST (“PSLP”), EDUCATIONAL CONSULTANT, SPS CURRICULUM COORDINATOR, and MOTHER. DCPS called as witnesses OCCUPATIONAL THERAPIST (“OT”), DCPS SPEECH PATHOLOGIST (“DCPS S/P”), SPED TEACHER, SCHOOL PSYCHOLOGIST, and SPECIAL EDUCATION COORDINATOR (“SPED COORDINATOR”). Parents’ Exhibits P-1 through P-41 and DCPS Exhibits R-1 through R-3 and R-5 through R-10 admitted into evidence without objection. DCPS withdrew Exhibit R-4, which had been included in its prehearing disclosures.

### **JURISDICTION**

The Hearing Officer has jurisdiction under 20 U.S.C. § 1415(f) and D.C. Regs. tit. 5-E, § 3029.

### **ISSUES AND RELIEF SOUGHT**

1. Whether DCPS failed to complete special education evaluation and IEP development within IDEA timelines;
2. Whether IEP omission of goals and services for Reading, Mathematics, Social and OT was a denial of FAPE;
3. Whether the Speech-Language services in the IEP are inadequate to provide FAPE;
4. Whether the proposed provision of IEP services in the General Education setting was a denial of FAPE; and
5. Whether the Child’s placement at SPS is proper under the IDEA.

The Petitioners seek an order requiring that DCPS fund Child’s private placement at SPS.

## FINDINGS OF FACT

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

1. Child is an AGE resident of the District of Columbia. Testimony of Mother.
2. Starting at age 3, Child attended FPS, a private school in Washington, D.C. Child attended FPS for five years, through the 2009-2010 school year. Testimony of Mother. Student never had an IEP at FPS. Testimony of FPS Administrator.
3. FPS is an "inclusion" school where a small number of children with hearing loss are instructed in the same classroom with mostly nondisabled peers. Testimony of FPS Administrator. Child did not attend FPS as a hearing impaired student.
4. For the 2009-2010 school year, Child repeated first grade at FPS. Testimony of Mother.
5. At FPS, Child was placed in a general education classroom with approximately 14 students. Her classroom was staffed with two teachers. Child and her classmates would regularly be taught in the classroom in smaller groups of 1 to 4 children. Testimony of FPS Administrator.
6. At FPS, Child struggled with reading fluency and comprehension and mathematics. Testimony of FPS Administrator.
7. At FPS, Child experienced more difficulty with large group instruction. Testimony of FPS Administrator.
8. At FPS, Child had difficulties with peer relationships, especially in unstructured time on the playground. Testimony of FPS Administrator.

9. Child was able to make academic progress at FPS with a substantial amount of intervention, including small group instruction and one-on-one attention from the teachers.

Testimony of Educational Consultant.

10. In the fall of 2009, Parents referred Child to LICENSED PSYCHOLOGIST for a neuropsychological assessment. Licensed Psychologist administered a battery of tests to Child. On the Wechsler Intelligence Test for Children-Fourth Edition (WISC-IV). Child scored a high average on the Verbal Comprehension Index and superior on the Perceptual Reasoning Index. She scored in the average range on the Working Memory index. Her Processing Speed index was significantly weaker than her reasoning levels. Licensed Psychologist reported weakness in math fluency, spelling, writing fluency, reading rate, written expression and reading comprehension. Exhibit P-29.

11. Licensed Psychologist concluded that Child's weak executive functioning significantly hampers Child in her academics and social interactions. Licensed Psychologist diagnosed Child with ADHD, Combined Type, Expressive Language Disorder and Learning Disorder, Not Otherwise Specified. Exhibit P-29.

12. Parents visited NEIGHBORHOOD ELEMENTARY SCHOOL ("NES") in March 2009, where they met with the principal and classroom teachers. Testimony of Mother.

13. In January 2010, Parents met with SPED Coordinator at NES. Testimony of Mother.

14. On April 23, 2010, Parents initiated a referral to DCPS to evaluate Child for eligibility for special education services. Parents provided existing evaluation data on Child to Neighborhood School. Exhibit P-21, Testimony of Mother.

15. In July 2010, NES staff requested the Parents' consent to evaluate Child in her classroom. Testimony of Mother. Child was not attending school during the summer break. On August 16, 2010, Parents executed a consent for DCPS to evaluate Child at SPS. Exhibit R-1.

16. On the Gray Oral Reading Tests-Fourth Edition (GORT-4) administered by SPS to Child in July 2010, Child scored in the below average range, for her age, in Rate and Accuracy.

17. SPS is a private school in the District of Columbia for children with moderate to severe learning disabilities. There are no nondisabled students at SPS. Testimony of Curriculum Coordinator.

18. Parents enrolled Child in GRADE at SPS for the 2010-2011 school year. Testimony of Mother.

19. Parents decided to send Child to SPS in the spring of 2010 when they signed an enrollment contract and paid a deposit. Testimony of Mother.

20. There are 13 students in Child's classroom at SPS. Child's class at SPS is staffed with a teacher certified in Special Education, a masters level assistant and a teaching intern. At SPS, child is pulled out for services in Speech/Language four times per week and for Occupational Therapy three times per week. Testimony of Curriculum Coordinator.

21. DCPS convened an IEP meeting at DCPS's Central Office on August 13, 2010 to determine Child's eligibility for special education services. Participants included both Parents, their attorney, Special Education Advocate, SPED Coordinator, a DCPS psychologist, a DCPS social worker, a DCPS speech language pathologist, a general education teacher and special education teachers. Child was found eligible for special education services under the disability,

Other Health Impaired – Attention Deficit Hyperactivity Disorder (“OHI-ADHD”). No member of the IEP team objected to this eligibility determination. Exhibit P-8.

22. Educational Consultant requested additional education assessments. The IEP team agreed that DCPS would conduct additional educational assessments and an OT evaluation. Exhibit P-8.

23. At the time of the August 13, 2010 eligibility meeting, Parents had already decided that Child would attend SPS and they wanted DCPS to pay for the private placement. Testimony of Mother.

24. SPS would allow only one evaluator from DCPS to observe at the school. Exhibit R-1, Testimony of SPED Coordinator. OT visited SPS to observe Child on September 15, 2010. Testimony of OT. SPED Coordinator, DCPS S/P and School Psychologist did not observe Child at SPS because of SPS’s one observation policy. Testimony of SPED Coordinator, Testimony of School Psychologist, Testimony of DCPS S/P.

25. SPED Coordinator administered the Woodcock Johnson III Test of Achievement (WJ-III) to Child on August 16-17, 2010 at NES. Testimony of Sped Coordinator.

26. After she administered the WJ-III, SPED Coordinator had Child read aloud a couple of pages from a story. SPED Coordinator observed that Child’s comprehension and decoding were fine and Child did not have a problem following the story. Testimony of SPED Coordinator.

27. On the WJ-III Reading Cluster, Child scored at 3.0<sup>2</sup> grade equivalent in Broad Reading, at 3.5 in Basic Reading Skills and at 2.6 in Reading Comprehension. Exhibit R-3.

28. On WJ-III mathematics subset, Child scored in the average to high average range in broad mathematics (GE 2.7), brief mathematics (GE 2.8) and math calculation skills (GE 2.3). In math fluency, Child scored lower (GE 1.6).

29. On September 14, 2010, SPED Coordinator sent an email to Parents' attorney to schedule a meeting to review the additional assessments and develop an initial IEP for Child. SPED Coordinator offered to meet as early as September 21, 2010. The first date available both to Parents and DCPS staff was October 13, 2010. Exhibit P-10.

30. The IEP Team convened on October 13, 2010. Parents, Educational Advocate and Parents' attorney were present. At the meeting, OT reported that after evaluating Child, she did not recommend Occupational Therapy services. The Parents did not agree. Exhibit P-12.

31. The SPED Coordinator reported that based upon the Child's WJ-III scores, Child did not need IEP goals in mathematics or reading. The Parents did not agree. Exhibit P-12.

32. On the request of Parents' attorney, the IEP team added social-emotional goals to the IEP. Exhibit P-12.

33. For Special Education and Related Services, the October 13, 2010 IEP provided:

Written Expression – General Education Setting – 14 Hours per Month  
Written Expression – Outside General Education – 6 Hours per Month  
Speech Language Pathology – General Education Setting – 2 Hours per Month  
Speech Language Pathology – Outside General Education – 2 Hours per Month  
Behavioral Support Services – General Education Setting – 1 Hour per Month  
Behavioral Support Services – Outside General Education – 1 Hour per Month

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<sup>2</sup> The grade equivalent score indicates a student's performance relative to the average performance of students at a given grade level. For example, a student who obtains a grade equivalent score (GE) of 7.3 indicates that he/she has achieved at the third month of the seventh grade level in that subject.

Exhibit P-11. The Parents did not agree that these services were adequate. The DCPS representatives on the IEP team agreed with the IEP's contents. Exhibit P-12.

34. At the October 13, 2010 IEP meeting, Parents' attorney informed the IEP Team that the Parents rejected the IEP and planned for Child to continue at SPS at the expense of DCPS. Exhibit P-12.

35. The Child's tuition at SPS for the 2010-2011 school year is plus for psychological services. Exhibit P-32, Testimony of Mother.

### CONCLUSIONS OF LAW

Based upon the above Findings of Fact, the argument and legal memoranda of counsel, as well as this Hearing Officer's own legal research, the Conclusions of Law of this Hearing Officer are as follows:

### DISCUSSION

In this case, the Parents seek reimbursement for Child's private school tuition incurred prior to the due process hearing and an order for DCPS to pay for Child's attendance at SPS for the remainder of the 2010-2011 school year. Under the IDEA, parents who unilaterally decide to place their disabled child in a private school, without obtaining the consent of local school officials, "do so at their own financial risk." *Florence County Sch. Dist. Four v. Carter*, 510 U.S. 7, 15, 114 S.Ct. 361, 126 L.Ed.2d 284 (1993) (quoting *Sch. Comm. v. Dep't of Educ.*, 471 U.S. 359, 374, 105 S.Ct. 1996, 85 L.Ed.2d 385 (1985)). Parents may only receive tuition reimbursement if a court concludes that (1) "the public school placement violated the IDEA" and (2) "the private school placement was proper under the Act." *Id.* at 15, 114 S.Ct. 361. Importantly, the first factor is a threshold question: if the public school placement would have

been appropriate, the hearing officer's analysis ends, and a disabled child's parents are not entitled to reimbursement. 20 U.S.C. § 1412(a)(10)(C)(i) (“[The IDEA] does not require a local educational agency to pay for the cost of education, including special education and related services, of a child with a disability at a private school or facility if that agency made a [FAPE] available to the child and parents elected to place the child in such private school or facility.”); *M.C. ex rel. Mrs. C v. Voluntown Bd. of Educ.*, 226 F.3d 60, 66 (2d Cir.2000) (“Only if a court determines that a challenged IEP was inadequate should it proceed to the second question.”) *N.S. v. District of Columbia*, 709 F.Supp.2d 57, 67 (D.D.C. 2010).

The burden of proof in an administrative hearing challenging an IEP is properly placed upon the party seeking relief. *Schaffer ex rel. Schaffer v. Weast*, 546 U.S. 49, 62, 126 S.Ct. 528, 536, 163 L.Ed.2d 387 (2005); *Hester v. District of Columbia*, 433 F.Supp.2d 71, 76 (D.D.C. 2006). Parents bear the burden of proof in this case to establish that DCPS’s proposed IEP for Child would deny her a FAPE and that their proposed private placement at SPS is proper under the IDEA.

1. DID DCPS FAIL TO COMPLETE CHILD’S SPECIAL EDUCATION EVALUATION AND IEP DEVELOPMENT WITHIN IDEA TIMELINES?

Under District of Columbia law, DCPS must assess a student who may require special education services within 120 days from the date that the student was referred for an evaluation. D.C. Code Ann. § 38-2561.02(a). Within 30 days from the eligibility determination, the LEA must conduct a meeting to develop an IEP for a the child. 34 CFR 300.323(c). In this case, the Parents requested a special education eligibility evaluation on April 23, 2010. The IEP Team met on August 13, 2010, within 120 days, and determined that Child was eligible for special education services under the classification OHI-ADHD. Under the federal regulation, the Child’s

IEP should have been developed by September 12, 2010. However, the OT observation at SPS was not made until September 15, 2010 and DCPS did not propose to reconvene the IEP team until September 21, 2010. In order to accommodate the schedules of the Parents and their attorney, the meeting to develop Child's IEP was deferred to October 13, 2010.

DCPS's failure to reconvene Child's IEP team to develop her IEP within 30 days of the eligibility determination was a procedural violation of the IDEA. However, not all procedural violations are actionable. *See Lesesne ex rel. B.F. v. District of Columbia*, 447 F.3d 828, 834 (D.C. Cir. 2006) (Only procedural violations which result in loss of educational opportunity or seriously deprive parents of their participation rights are actionable.) The Parents have identified no loss of educational opportunity to the Child because of the delay in reconvening the IEP team. In this case, the Child attended SPS from the beginning of the 2010-2011 school year, and according to the Parents, was receiving educational benefit there. When the IEP team met on October 13, 2010, the Parents rejected DCPS's IEP and Child continues to attend SPS. Therefore the Child suffered no loss of educational opportunity due to DCPS's failure to develop its IEP within 30 days. *See O.O. ex rel. Pabo v. District of Columbia*, 573 F.Supp.2d 41, 49 (D.D.C. 2008) (Child not harmed by delay because he was receiving a beneficial education throughout the process.) The Parents, who with their attorney and advocate were active participants in the August 13, 2010 eligibility meeting and the October 13, 2010 IEP meeting, do not contend that they were deprived of their participation rights. Therefore, the Parents are not entitled to relief for this procedural violation. DCPS prevails on this issue.

2. WAS OMISSION OF IEP GOALS AND SERVICES FOR READING, MATHEMATICS, SOCIAL AND OT A DENIAL OF FAPE?

In their due process complaint, the Parents contend that the October 13, 2010 IEP is inadequate because it lacks annual goals or special education services in the following areas:

- Reading Decoding, Comprehension and Fluency,
- Math Calculation, Reasoning and Fluency,
- Social Comprehension and Problem Solving, Social Skills, Behavior Regulation,  
and
- Fine or Gross Motor Development.

Due Process Complaint Notice, ¶ 17.

Under the IDEA, every IEP must include “[a] statement of measurable annual goals, including academic and functional goals designed to—

(A) Meet the child's needs that result from the child's disability to enable the child to be involved in and make progress in the general education curriculum; and

(B) Meet each of the child's other educational needs that result from the child's disability.

34 CFR § 300.320(a)(2).

With regard to Child’s reading needs, Educational Consultant observed Child in a reading class at FPS and noted that, although Child could read word lists, she struggled with passages. Child also had difficulty answering questions posed by the teacher about what she had read. The SPS Curriculum Coordinator testified that Child struggles with comprehension, multi-syllabic words, and has slow fluency and lack of inflection when she reads. Both of these experts opined that an IEP that does not includes services in reading will not meet the Child’s needs.

DCPS’s experts testified that the Child’s need for goals and services in reading was fully considered at the October 13, 2010 IEP team meeting. SPED Coordinator, who no longer works for DCPS, testified that she administered the WJ-III to Child on August 16-17, 2010. Although the Child, had not yet started second grade, she scored above grade level on all parts of the WJ-III Reading Cluster. During her August 16-17, 2010 evaluation, Special Education Teacher also had Child read a couple of pages from a story to her. The teacher observed that Child’s comprehension and decoding were fine and the Child did not have a problem following the story.

The Parents argued that the WJ-III scores should be discounted because on the GORT-4 administered by SPS to Child in July 2010, Child scored in the below average range, for her age, in Rate and Accuracy. However School Psychologist opined that the scores from the WJ-III were a more appropriate measure of Child's achievement because the GORT-4 results were based on age equivalent norms. Child had repeated First Grade at FPS and, unlike her age equivalent peers, had not yet been exposed to Second Grade reading instruction. Both the School Psychologist and Special Education Teacher opined that, based upon the testing and Special Education Teacher's observations, the Child did not need IEP reading goals as a result of her disability.

Under the IDEA, some deference is due to the expertise of the school officials responsible for the child's education. *See, e.g., Lyons by Alexander v. Smith*, 829 F.Supp. 414, 418 (D.D.C. 1993). In this case, the opinions of the DCPS experts is supported both by objective testing – the WJ-III – and by Special Education Teacher's two-day evaluation of Child. Even Parents' expert from SPS agreed that Child's reading score on the WJ-III was "impressive." Testimony of SPS Curriculum Coordinator. Although the GORT-4 results showed lower achievement, they were based on Child's age group norms rather than her school grade level. As the parties challenging the IEP, the Parents carry the burden of proof. After considering the evidence and weighing the testimony of the "dueling experts," I find that Parents have not established that Child requires reading goals or services in her IEP as a result of her disability. DCPS prevails on this issue.

I reach the same conclusion with regard to the need for mathematics goals and services in the Child's IEP. On the mathematics subset of the WJ-III achievement test administered in August 2010, Child scored in the average to high average range in broad mathematics (GE 2.7),

brief mathematics (GE 2.8) and math calculation skills (GE 2.3). She scored lower in math fluency (GE 1.6). These scores were consistent with the WJ-III administered by Licensed Psychologist in the fall of 2009. In her October 2009 report, Licensed Psychologist concluded that Child's math fluency was hampered by her weak executive functioning associated with ADHD. Although not directed specifically to math fluency, the IEP addresses Child's ADHD disability with a number of annual goals, services and accommodations.

SPED Coordinator and School Psychologist opined, based upon the WJ-III scores, that goals in mathematics were not necessary for Child's IEP. Educational Consultant, who observed Child at FPS and at SPS, testified that Child has difficulties applying math skills and has a weakness in math fluency. SPS Curriculum Coordinator testified that Child needs small group instruction to make progress in mathematics. While this evidence supports the Child's need for ADHD accommodations and small group instruction, I find that the evidence does not establish that the Child requires mathematics goals in her IEP as result of her disability. DCPS prevails on this issue.

In their due process complaint, Parents also contend that Child's IEP should have a goal for Social Comprehension and Problem Solving, Social Skills, Behavior Regulation. The October 13, 2010 IEP does in fact have a goal for Emotional, Social and Behavior Development and Child would receive two hours per month of Behavioral Support Services, one hour in the classroom and one hour of pull-out services. School Psychologist testified that the social/emotional goals were appropriate, as were the proposed services to be provided by the school social worker. The Parents' Educational Advocate did not directly address the adequacy of the IEP Behavioral Support Services although she opined that the goals were not comprehensive and that Child needed to develop strong social thinking skills before she could make progress on the IEP

social/emotional goals. I find that the Parents have not established that the social/emotional goals and services specified in the IEP are inadequate. DCPS prevails on this issue.

With regard to Child's fine or gross motor development, DCPS's contract OT made an observation of Child at SPS in September 2010. She concluded that, except for handwriting speed, Child performed well in terms of standardized testing. Child's handwriting speed was slow, but in the opinion of OT, not impaired by any visual-motor factor. In the Occupational Therapist's opinion, Child does not require OT services. The evidence does not establish a need for OT goals or services due to the Child's disability. DCPS prevails on this issue.

3. IS THE IEP'S PROVISION FOR SPEECH-LANGUAGE SERVICES INSUFFICIENT TO PROVIDE FAPE?

The October 10, 2010 IEP provides a total of four hours per month of Speech-Language Pathology services, including two hours in the General Education setting and two hours of pull-out services. Based solely on her review of the Child's records, DCPS S/P opined that the Speech-Language services in the IEP were appropriate for Child's needs. Parent's expert, PSLP, testified that Child could best be served by being taught by a speech language professional all day. She further recommended a minimum of 120 minutes per week of speech language services for Child. I discount PSLP's opinion because it appears that her focus was on "best serving" the Child rather than providing a "basic floor of opportunity." *See Bd. Ed. Hendrick Hudson Sch. Dist. v. Amy Rowley*, 458 U. S. 176, 198, 102 S.Ct. 3034, 73 L.Ed.2d 690 (1982). I also discount the opinion of DCPS S/P, because she testified that to form a first hand opinion, she needs to observe a child functioning in her current school environment. Child has never attended DCPS schools and SPS did not allow DCPS S/P to observe Child in the classroom. The Parents initiated the special education evaluation and I believe they must bear some responsibility for ensuring that

the DCPS evaluators would be reasonably able to conduct observations in the Child's classroom.<sup>3</sup> On the current record, I find that the Parents have not met their burden of proof to establish that the DCPS IEP provides inadequate Speech-Language services.

4. IS THE PROPOSED PROVISION OF SERVICES IN THE GENERAL EDUCATION SETTING A DENIAL OF FAPE TO STUDENT?

The October 13, 2010 IEP provides that, except for six hours per month of pull out services, all of Child's academic instruction would be provided in the General Education setting. (Student would also receive two hours per month for speech language and one hour per month for Behavioral Support Services outside of General Education.) Parent contends that the proposed placement fails to meet Child's need to be instructed in a small group setting.

The IDEA requires that DCPS ensure that a continuum of alternative placements is available to meet the needs of children with disabilities for special education and related services. The continuum of alternative placements must include instruction in regular classes, special classes, special schools, home instruction, and instruction in hospitals and institutions. 34 CFR § 300.115. Under the IDEA's Least Restrictive Environment requirement, "[t]o the maximum extent appropriate, children with disabilities . . . are educated with children who are nondisabled" and "[s]pecial classes, separate schooling, or other removal of children with disabilities from the regular educational environment occurs only if the nature or severity of the disability is such that education in regular classes with the use of supplementary aids and services cannot be achieved satisfactorily. 34 CFR § 300.114(a)(2).

The overwhelming evidence in this case establishes that due to her OHI-ADHD disability, Child needs to be educated in a small group setting for all of her core academic subjects. FPS

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<sup>3</sup> There was no indication that Parents failed to cooperate with regard to in-school observations. The decision to allow only one DCPS evaluator to observe Child at SPS was attributed solely to a SPS administrative policy.

Administrator observed that Child had more difficulty with larger group instruction. Educational Consultant opined that there was too much activity in a general education classroom and that Child could not keep up; and that because of her distractibility issues, the Child cannot learn except in a small group setting in close physical proximity to the teacher. The Curriculum Coordinator at SPS similarly opined that Child needs a small group setting to make progress in mathematics; that the size of the instructional group matters because of Child's difficulty focusing and that Child often needs redirection from the teacher. The DCPS SPED Coordinator agreed that Child had not been successful in school except when in small group settings. Significantly, in her August 20, 2010 Report on administering the WJ-III to Child, NES Special Education teacher recommended that Child "should continue to receive instruction in small groups where immediate feedback can be provided and distractions can be minimized." Exhibit P-22, Recommendation 2. Only School Psychologist questioned Child's need for small group instruction. I discount School Psychologist's opinion on this issue, because it is at odds with the opinions of the other experts and because School Psychologist never met Child or observed her in school.

Under the proposed IEP, Child would be placed in a general education classroom at NES, with approximately 22 students. According to the SPED Coordinator, most of the time, the students in the class would be instructed in small groups at their level. However, there is no provision in the IEP for Child to be taught in a small group settings. If, in fact, DCPS intended to provide small group instruction to Child, it was incumbent upon DCPS to specify that service in the IEP. *See N.S. v. Dist. of Columbia*, 709 F. Supp. 2d 57, 70 54 IDELR ¶ 188 (D.D.C. 2010) (IEP must be specific enough to allow parents to understand what services will be provided and make a determination about whether the proposed placement is adequate.)

A child's IEP must be tailored to meet the child's needs that result from the child's disability and to enable the child to be involved in and make progress in the general education curriculum. *See* 34 CFR 300.320(a)(4)(2). Because the IEP offered by DCPS does not provide for small group instruction for all of Child's core academic subjects, it does not meet the Child's needs that result from her OHI-ADHD disability. I find, therefore, that Child's placement under the October 13, 2010 IEP violated the IDEA. Parents prevail on this issue.

Parents also contend that the totality of special education and related services specified in the October 13, 2010 IEP are not adequate to meet the Child's needs due to her disability. Because Child's IEP must be revised to provide for small group instruction in all core academic subjects, I do not reach the overall sufficiency of the time and frequency of services specified in the existing IEP.

5. WAS THE CHILD'S PLACEMENT AT SPS PROPER UNDER THE IDEA?

Having found that Child's placement under the October 13, 2010 IEP violated the IDEA, it is necessary to address the second inquiry from *N.S. v. District of Columbia, supra*: Was the Child's placement at SPS proper under the IDEA? DCPS contends Parents' placement is not proper because at SPS, Child would not be educated with any nondisabled students. As noted in the previous section, the IDEA mandates that "[t]o the maximum extent appropriate," children with disabilities be educated with their nondisabled peers. *See* 34 CFR § 300.114(a)(2). "The IDEA requires school districts to place disabled children in the least restrictive environment possible." *Roark ex rel. Roark v. District of Columbia*, 460 F.Supp.2d 32, 43 (D.D.C. 2006) (citing 20 U.S.C. § 1412(a)(5); 34 C.F.R. 300.550; D.C. Mun. Regs. tit. 5, § 3011 (2006)). "In determining the least restrictive environment, consideration is given to the types of services that the child requires." *Id.* (citing 34 C.F.R. § 300.552(d)). "Mainstreaming of handicapped children

into regular school programs where they might have opportunities to study and to socialize with nonhandicapped children is not only a laudable goal but is also a requirement of the Act.”

*DeVries by DeBlacy v. Fairfax County Sch. Bd.*, 882 F.2d 876, 878 (4th Cir.1989). *See, also, JN v. District of Columbia*, 677 F. Supp.2d 314, 324 n.1 (D.D.C. 2010). “The least restrictive environment is the one that confers some educational benefit but most closely approximates education with nonhandicapped children in the school that the handicapped child would attend if he had no handicap.” *Kerkam v. Superintendent, D.C. Pub. Schs.*, 931 F.2d 84, 86 (D.C.Cir.1991).

Here, Child attended FPS for five years before enrolling at SPS. FPS is an “inclusion” school where a small number of children with hearing loss are instructed in the same classroom with mostly nondisabled peers. The evidence in this case establishes that Child was able to receive educational benefit while enrolled in the inclusion program at FPS. According to Parents’ Educational Consultant, Child made educational progress in the FPS program with substantial intervention, including small group instruction and frequent one-on-one teaching reinforcement. This is substantiated by periodic written reports from FPS, which detail Child’s educational progress as well as her struggles. For example, in the Narrative Summary Report dated June 23, 2010, covering Child’s last term at FPS, her teachers reported, *inter alia*, that “[Child] continues to show improvement during English Language Arts” and “While [Child] is becoming more successful in math, if she is unsure of a solution, she is comfortable asking her teaches for help and is open to suggestions for problem solving.” Exhibit P-15.

SPS is a school for children with moderate to severe learning disabilities. Unlike FPS and NES, SPS accepts no nondisabled students. At SPS, Child has no opportunity to study or to socialize with her nondisabled peers. Parents’ Education Consultant opined that Child should not

be exposed to nondisabled peers at all in the school day, because Child reacts negatively when nondisabled peers are able to respond more appropriately in class. I find this opinion unpersuasive, especially considering that Child received educational benefit in FPS's inclusion program, where she was enrolled for five years. Moreover, Educational Consultant's opinion regarding exposure to nondisabled peers is clearly at odds with Congress' explicit preference for mainstreaming set out in the IDEA. The evidence in this case establishes that Child is able to receive educational benefit in an inclusion environment. *See Kerkam, supra.* Because Child is not being educated with nondisabled peers at SPS, that school is not the least restrictive environment for her. Therefore, I find that Child's placement at SPS is not proper under the IDEA and Parents are not entitled to reimbursement from DCPS for Child's tuition expenses. DCPS prevails on this issue.

#### SUMMARY

In summary, I find that DCPS's October 13, 2010 IEP would not provide the Child a FAPE because it fails to meet the Child's need for instruction in a small group setting. I further find that Parents' placement of Child at SPS is not proper under the IDEA's Least Restrictive Environment requirement. I will order DCPS to revise the Child's IEP to provide for small group instruction. I will deny Parents' request for payment of Child's tuition expenses at SPS.

#### ORDER

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

Within 15 school days of the date of this Order, DCPS shall convene Child's IEP Team to develop an IEP which conforms to this decision and specifically provides for small group settings for all of Child's core academic instruction. All other relief requested by the Parents in their Due Process Complaint is denied.

Date: January 27, 2011

s/ Peter B. Vaden  
Peter B. Vaden, Hearing Officer

**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).