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**DISTRICT OF COLUMBIA**  
**OFFICE OF THE STATE SUPERINTENDENT OF EDUCATION**  
Student Hearing Office  
1150 Fifth Street, S.E.  
Washington, DC 20003

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<b>STUDENT,<sup>1</sup></b>	)	
	)	
<b>Petitioner,</b>	)	Case Number:
	)	
<b>v.</b>	)	Hearing Dates: July 20 and 21, 2010
	)	Hearing Room 1
<b>THE DISTRICT OF COLUMBIA</b>	)	
<b>PUBLIC SCHOOLS,</b>	)	Hearing Officer: Frances Raskin
	)	
<b>Respondent.</b>	)	

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**HEARING OFFICER DETERMINATION**

**Counsel for Petitioner:** Zachary Nahass, Attorney at Law  
James E. Brown & Associates  
1220 L Street, N.W.; Suite 700  
Washington, D.C. 20005

**Counsel for DCPS:** Daniel McCall, Attorney at Law  
Office of the Attorney General  
1200 First Street, N.E., 10th floor  
Washington, D.C., 20002

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<sup>1</sup> Personal identification information is provided in Attachment A.

## I. JURISDICTION

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

## II. BACKGROUND

Petitioner is an \_\_\_\_\_ year-old resident of the District of Columbia who has been determined to be eligible for special education as a student with multiple disabilities (“MD”).<sup>2</sup> Since August 14, 2009, Petitioner has attended a non-public school (“Non-Public School”) in Virginia at the expense of the District of Columbia Public Schools (“DCPS”).<sup>3</sup>

Petitioner’s individualized educational program (“IEP”) provides that she is to receive 27.25 hours of specialized instruction outside the general education setting, 1.5 hours of behavioral support services, and one hour of speech and language therapy each week.<sup>4</sup>

At an IEP team meeting on May 12, 2010, all of the members of Petitioner’s IEP team agreed that Petitioner has made academic and non-academic progress at the Non-Public School.<sup>5</sup> The team also discussed Petitioner’s participation in vocational activities, including working in a beauty salon and as a teacher’s aide two to three times a week.<sup>6</sup>

On May 20, 2010, Petitioner filed a Due Process Complaint against DCPS pursuant to the Individuals with Disabilities Education Act. On May 21, 2010, this Hearing Officer was appointed to preside over this case.

The parties participated in a resolution meeting on June 30, 2010, which was ten days after the expiration of the resolution period.<sup>7</sup> The parties were unable to reach an agreement on any of the claims in the Complaint and agreed to proceed to a due process hearing. Accordingly, the parties agreed that the 45-day timeline started to run on June 20, 2010.

On June 24, 2010, this Hearing Officer held a prehearing conference in the above matter. During the prehearing conference, both counsel agreed that Petitioner’s IEP would remain in effect, and that she would remain at the Non-Public School for extended school year (“ESY”) services, during the pendency of the proceedings.<sup>8</sup> Counsel also agreed that the due process

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<sup>2</sup> Stipulation of parties.

<sup>3</sup> *Id.*

<sup>4</sup> *Id.*

<sup>5</sup> *Id.*

<sup>6</sup> *Id.*

<sup>7</sup> See 34 C.F.R. § 300.510 (specifying that resolution period is a maximum of thirty days unless parties agree to engage to mediation after the expiration of the thirty-day period).

<sup>8</sup> See, e.g., 34 C.F.R. § 300.518; D.C. Mun. Reg. tit. 5-E § 3033.1 (unless parties agree on alternative placement, student shall remain in present educational placement during pendency of administrative proceeding).

hearing would be held on July 20-21, 2010, and that it would be closed to the public. On July 13, 2010, this Hearing Officer issued a Prehearing Conference Order.

The due process hearing commenced on July 20, 2010. Petitioner's exhibits 5,6,8, and 9 and DCPS exhibits 1-6 were admitted into evidence at the inception of the hearing. After the parties presented oral closing arguments, the due process hearing concluded on July 21, 2010.

### **III. RECORD**

Due Process Complaint Notice, filed May 20, 2010;  
DCPS Response, filed June 4, 2010;  
Prehearing Notice, issued June 24, 2010;  
Resolution Meeting Confirmation, filed June 24, 2010;  
Prehearing Conference Order, issued July 13, 2010;  
Petitioner's Five-Day Disclosure Statement, listing six witnesses and including nine proposed exhibits, filed July 13, 2010; and  
DCPS Five-Day Disclosure; listing six witnesses and including six proposed exhibits, filed July 13, 2010.

### **IV. ISSUES PRESENTED**

A. Whether DCPS denied Petitioner a free, appropriate, public education ("FAPE") by failing to propose an appropriate placement and location of services on May 12, 2010; and

B. Whether DCPS denied Petitioner a FAPE by failing to provide her and her (adoptive) mother with sufficient information about the placement and location of services for the 2010-2011 school year to allow her an opportunity to participate in the decision-making process regarding the provision of FAPE to Petitioner.

### **V. FINDINGS OF FACT**

1. Petitioner is an -year-old, special-education student who attends a Non-Public School where she is enrolled in a certificate program.<sup>9</sup> She was diagnosed with attention deficit hyperactivity disorder as a young child,<sup>10</sup> and was later diagnosed with mild mental retardation as she has a full-scale IQ of 54.<sup>11</sup>

2. In December 2009, Petitioner was performing at grade level 2.2 in mathematics, grade level 2.7 in reading, and grade level 2.4 in written expression.<sup>12</sup> Her low proficiency in

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<sup>9</sup> Stipulation of parties; Petitioner Exhibit 8 (November 2009 Comprehensive Psychological Evaluation); DCPS Exhibit 1, p. 33 (December 1, 2009, IEP); DCPS Exhibit 2, p. 36 (May 12, 2010, Reintegration Plan).

<sup>10</sup> Petitioner Exhibit 8.

<sup>11</sup> Petitioner Exhibit 5, p. 19 (December 1, 2009, IEP Meeting Notes of DCPS Placement Specialist).

<sup>12</sup> DCPS Exhibit 1.

math prevents her from advancing to a higher level of math and from solving the everyday problems of a consumer.<sup>13</sup> Her deficiencies in reading prevent her from comprehending at a higher level and impact her ability to solve problems of everyday life.<sup>14</sup> Her written expression limitations prevent her from writing at more than a very basic level and will prevent her from getting a job that requires writing.<sup>15</sup>

3. Petitioner exhibits notable difficulties with attention and learning.<sup>16</sup> She has trouble keeping up in class, demonstrates significant reading and math deficiencies, is easily distracted, has difficulty paying attention, and has a short attention span.<sup>17</sup> Petitioner also loses her temper, and exhibits aggression and defiance.<sup>18</sup> She has frequent problems with self-control, and often disrupts other students' activities and schoolwork.<sup>19</sup>

4. Petitioner experiences notable symptoms of psychological distress, including symptoms of sadness, somatization, irritability, and withdrawal.<sup>20</sup> She often complains about her health, gets sick, has headaches and stomach problems, and complains of pain.<sup>21</sup> She may unconsciously convert her distress into physical symptoms as a way of coping with her psychological difficulties and to keep the pain associated with her experiences at bay.<sup>22</sup>

5. Petitioner frequently is sad, plays alone, refuses to join groups, has trouble making new friends, is negative and pessimistic, and seems lonely.<sup>23</sup> Most of Petitioner's feelings of sadness and withdrawal, as well as her behavioral issues, are related to her awareness of her cognitive, language, and academic challenges, her lack of academic success, and past negative experiences.<sup>24</sup> She is aware that her speech is unclear and has difficulty thinking because her birth mother exposed her to alcohol and drugs in utero.<sup>25</sup> Her friends sometimes tease her for being "retarded."<sup>26</sup>

6. Petitioner exhibits low frustration tolerance in response to emotionally and thought-provoking topics.<sup>27</sup> She typically tries to avoid these topics or deny that these issues are a concern, which inhibits her ability to express her thoughts and emotions, appropriately self-

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<sup>13</sup> *Id.*

<sup>14</sup> *Id.*

<sup>15</sup> *Id.*

<sup>16</sup> Petitioner Exhibit 8.

<sup>17</sup> *Id.*

<sup>18</sup> *Id.*

<sup>19</sup> *Id.*

<sup>20</sup> *Id.*

<sup>21</sup> *Id.*

<sup>22</sup> *Id.*

<sup>23</sup> *Id.*

<sup>24</sup> *Id.*

<sup>25</sup> *Id.* Petitioner's parent adopted her when she was an infant. *See* Petitioner Exhibit 8, p. 2.

<sup>26</sup> *Id.*

<sup>27</sup> *Id.*

advocate, and seek support.<sup>28</sup> Petitioner is socially immature and sometimes maintains inappropriate boundaries with other students, particularly male students.<sup>29</sup>

7. Petitioner requires constant supervision.<sup>30</sup> She is an attractive young woman and extremely vulnerable to suggestion due to her low self-esteem, limited cognitive abilities, and emotional issues.<sup>31</sup> Petitioner understands that she has cognitive deficits.<sup>32</sup> She tries to hide her disabilities, and tries to fit in by complying with the demands of her peers.<sup>33</sup>

8. Petitioner is sexually active,<sup>34</sup> preoccupied with men, and extremely susceptible to their advances.<sup>35</sup> For example, Petitioner was in her backyard for about five minutes and, in that short time, she had a sexual interaction with a young man who happened to be playing basketball nearby.<sup>36</sup> On another occasion, a young man knocked on the door of the family home and asked to speak to Petitioner's brother.<sup>37</sup> Within seconds, the young man had followed Petitioner into the home and upstairs before the Parent interceded.<sup>38</sup>

9. A similar incident occurred at the Non-Public School. When Petitioner was allowed to go to the bathroom unescorted, she encountered a male student in the hallway.<sup>39</sup> Even though they were alone for only a few seconds, Petitioner's interactions with the male student prompted the Non-Public School staff to become concerned about her safety and vulnerability.<sup>40</sup>

10. Due to her cognitive, emotional, and behavioral challenges, Petitioner must receive her special education services in a highly structured, individualized environment.<sup>41</sup> She needs one-to-one assistance in reading, writing, and mathematics.<sup>42</sup> She also requires a structured classroom setting that has a low student-teacher ratio, individualized instruction, and therapeutic services.<sup>43</sup> She must be supervised at all times and cannot be left alone.<sup>44</sup>

11. Petitioner's severe expressive and receptive language deficits, as well as her impulsivity and difficulty attending to tasks, impact her academic functioning across the entire

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<sup>28</sup> *Id.*

<sup>29</sup> *Id.*; testimony of Petitioner's adoptive mother ("Parent").

<sup>30</sup> Petitioner Exhibit 6; Testimony of Parent.

<sup>31</sup> *Id.*; Petitioner Exhibit 6 (May 12, 2010, IEP meeting notes).

<sup>32</sup> Testimony of Parent.

<sup>33</sup> *Id.*

<sup>34</sup> Petitioner Exhibit 5 at p. 24 (Meeting Notes of DCPS Placement Specialist).

<sup>35</sup> Petitioner Exhibit 6.

<sup>36</sup> Testimony of Parent.

<sup>37</sup> *Id.*

<sup>38</sup> *Id.*

<sup>39</sup> *Id.* Testimony of Non-Public School Psychologist. The Non-Public School no longer allows that Student to go to the lavatory without adult supervision. Testimony of Parent.

<sup>40</sup> Testimony of Non-Public School Psychologist.

<sup>41</sup> Petitioner Exhibit 8.

<sup>42</sup> *Id.*

<sup>43</sup> DCPS Exhibit 1.

<sup>44</sup> Testimony of Non-Public School Psychologist, Parent.

curriculum.<sup>45</sup> As a result, she requires highly visual, structured, program that focuses on functional life skills.<sup>46</sup>

12. Petitioner requires individual counseling in a non-talk modality such as art therapy to help increase her coping skills, tolerance, and insight and decrease her frustration.<sup>47</sup> She also should participate in a support group for adolescent girls who are at a similar cognitive level to address her feelings of being different from other students her age.<sup>48</sup>

13. Petitioner also requires a program that will prepare her for the transition from school to a vocational program that includes life skills training.<sup>49</sup> She should explore various jobs that are a good fit for individuals with her cognitive limitations and receive training in a vocation of her choosing.<sup>50</sup>

14. Petitioner's IEP was developed at a December 1, 2009, IEP meeting.<sup>51</sup> The IEP prescribes 27.25 hours of specialized instruction per week outside the general education setting.<sup>52</sup> The IEP also provides Petitioner 1.5 hours of behavioral support services (45 minutes of individual counseling and 45 minutes of art therapy),<sup>53</sup> one hour of speech-language pathology, and fifteen minutes of occupational therapy each week outside the general education setting.<sup>54</sup>

15. The placement (30 hours of specialized instruction and related services) and setting (outside general education) prescribed by the IEP are appropriate and addresses Petitioner's needs.<sup>55</sup> The IEP is reasonably calculated to enable Petitioner to receive educational benefit.<sup>56</sup>

16. Petitioner's least restrictive environment is a separate school.<sup>57</sup> In developing the December 1, 2009, IEP, the IEP team rejected placing Petitioner in a separate class, instead finding that she requires a full-time placement in an educational environment specifically

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<sup>45</sup> DCPS Exhibit 1.

<sup>46</sup> *Id.*

<sup>47</sup> Petitioner Exhibit 8.

<sup>48</sup> *Id.*

<sup>49</sup> *Id.*

<sup>50</sup> *Id.*

<sup>51</sup> Petitioner Exhibit 5. Petitioner and her mother ("Parent") participated in the development of this IEP. Petitioner Exhibit 5. Although Petitioner was only three months shy of her eighteenth birthday, the IEP team did not transfer educational decision-making rights from the Parent to Petitioner. *See* 34 C.F.R. § 300.520; D.C. Mun. Reg. tit. 5-E § 3023 (When a child with a disability, except a child with a disability who has been determined to be incompetent under District law, reaches the age of eighteen the LEA shall provide notice to both the child and her parents and all other rights accorded to parents under IDEA transfer to the child).

<sup>52</sup> DCPS Exhibit 1.

<sup>53</sup> DCPS Exhibit 4, p. 47 (DCPS Compliance Case Manager's May 12, 2010, IEP meeting notes).

<sup>54</sup> *Id.*

<sup>55</sup> Stipulation of parties.

<sup>56</sup> *Id.*

<sup>57</sup> DCPS Exhibit 1.

designed to address the needs of students with disabilities within a special educational school.<sup>58</sup> Petitioner is currently in a class of four students and two instructors.<sup>59</sup>

17. The IEP contains numerous, detailed goals in speech-language, motor skills and physical development, reading, written expression, and mathematics.<sup>60</sup> It also provides numerous goals in emotional, social, and behavioral development, including goals to assist her in building relationships with peers, self-advocating her wants and needs, developing social skills, coping, problem-solving, and conflict resolution.<sup>61</sup> These goals also address Petitioner's weaknesses in expressing her thoughts and feelings instead of shutting down, deficits in interpersonal skills and maintaining appropriate personal boundaries, and difficulties maintaining attention.<sup>62</sup>

18. Petitioner's IEP contains three social-emotional-behavioral goals that incorporate art therapy.<sup>63</sup> These goals require Petitioner to demonstrate adaptive interpersonal skills by depicting emerging roles in adult sexuality, peer relationships, and adolescent pressures.<sup>64</sup> They also address Petitioner's weaknesses in regulating emotional drives by using the art process as a stress reduction technique and to assist her in identifying her areas of difficulty and addressing these difficulties on her own.<sup>65</sup> These goals also require Petitioner to demonstrate adaptive coping skills by identifying personal strengths through her artwork, completing multi-step projects, and by using challenging art tasks to learn problem-solving and decision-making skills.<sup>66</sup>

19. The IEP contains a transition plan that indicates that Petitioner would like to obtain a job after high school graduation, including in the field of hairdressing.<sup>67</sup> The transition plan further indicates that Petitioner would like to share an apartment with roommates.<sup>68</sup> The transition plan specifies courses of student to enable Petitioner to achieve these transition goals.<sup>69</sup> The transition plan adequately addresses Petitioner's needs.<sup>70</sup>

20. Pursuant to her transition plan, Petitioner has participated in the clothing and textiles class at the Non-Public School.<sup>71</sup> She also works in the school store, which was a tool for teaching organizational, money handling, and social skills, and accompanies her job coach to

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<sup>58</sup> *Id.*

<sup>59</sup> DCPS Exhibit 4.

<sup>60</sup> DCPS Exhibit 1.

<sup>61</sup> *Id.*

<sup>62</sup> *Id.*

<sup>63</sup> DCPS Exhibit 1.

<sup>64</sup> *Id.*

<sup>65</sup> *Id.*

<sup>66</sup> *Id.*

<sup>67</sup> DCPS Exhibit 1.

<sup>68</sup> DCPS Exhibit 1.

<sup>69</sup> *Id.*

<sup>70</sup> Stipulation of parties.

<sup>71</sup> DCPS Exhibit 1.

a local grocery store to assist with purchasing items for the school store.<sup>72</sup> She works at a health care center where she delivers mail, arranges flowers, and stamps patient records, and at a hair salon, where she washes hair and sweeps.<sup>73</sup>

21. Petitioner's reintegration plan includes transitional services and supports in the form of increased supervision, monitoring for proper interactions with the opposite sex, and life skills training.<sup>74</sup> The reintegration plan indicates that these services and supports are being or will be provided by the Rehabilitative Services Agency, the Non-Public School, and in the home.<sup>75</sup>

22. At the Non-Public School, Petitioner has made visible gains academically, although she requires a lot of repetition and additional reinforcements.<sup>76</sup> She also is making progress on her socio-emotional goals, and is building rapport in counseling.<sup>77</sup> She has more self-confidence, especially in performing some job functions.<sup>78</sup>

23. Petitioner has benefited from her current placement.<sup>79</sup> She has gained confidence and a sense of relief from being in a setting where the staff understands her needs and vulnerabilities and she is acquainted with all the other students.<sup>80</sup> She also has made improvements in asserting herself and maintaining personal boundaries.<sup>81</sup>

24. In terms of her academic progress, Petitioner is now able to follow multi-step instructions with the use of visual aids.<sup>82</sup> Due to her deficits in audio and visual memory, she has not made a lot of progress in reading comprehension and still requires a lot of assistance in answering questions after passages are read to her.<sup>83</sup> She also has difficulty with tasks requiring her to use a pencil and paper.<sup>84</sup> She requires a great deal of support, including cues and redirection, to stay on task in the classroom.<sup>85</sup>

25. Petitioner has been receptive to art therapy.<sup>86</sup> Petitioner has difficulties with peer relationships, and the art therapist encourages Petitioner to identify aspects of these relationships and her identity within them.<sup>87</sup> The art therapist also works on Petitioner's self-esteem and

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<sup>72</sup> *Id.*; Petitioner/DCPS Exhibit 6 (May 12, 2010, IEP meeting notes).

<sup>73</sup> *Id.*

<sup>74</sup> DCPS Exhibit 1.

<sup>75</sup> DCPS Exhibit 2, p. 40.

<sup>76</sup> *Id.*; Testimony of Parent.

<sup>77</sup> DCPS Exhibit 4.

<sup>78</sup> Testimony of Parent.

<sup>79</sup> DCPS Exhibit 4.

<sup>80</sup> Testimony of Parent.

<sup>81</sup> *Id.*

<sup>82</sup> DCPS Exhibit 4; Petitioner/DCPS Exhibit 6.

<sup>83</sup> DCPS Exhibit 4.

<sup>84</sup> Petitioner/DCPS Exhibit 6.

<sup>85</sup> *Id.*

<sup>86</sup> Petitioner Exhibit 5 (December 1, 2009, IEP Meeting Notes).

<sup>87</sup> *Id.*

managing her frustrations with her self-perceived mistakes in her art process.<sup>88</sup> Finally, the art therapist helps Petitioner focus on identifying her personal strengths and problem solving.<sup>89</sup>

26. On May 12, 2010, the IEP team met to review Petitioner's speech-language evaluation, review her IEP, and discuss the location at which she would receive specialized instruction and related services.<sup>90</sup> The speech-language evaluation recommended an increase Petitioner's speech-language therapy, but the IEP team found that the speech-language services prescribed by her IEP were sufficient.<sup>91</sup>

27. At the May 12, 2009, IEP meeting, all of the IEP team members, including the DCPS placement specialist ("Placement Specialist"), expressed their satisfaction regarding Petitioner's progress and growth at the Non-Public School.<sup>92</sup> The Placement Specialist then announced that, because Petitioner was eighteen years old and had made progress at the Non-Public School, she should be placed in the "least restrictive environment," i.e., her neighborhood school ("DCPS School"), for ESY and the 2010-2011 school year.<sup>93</sup>

28. The IEP team disagreed with the Placement Specialist's recommendation to transition Petitioner to the DCPS School.<sup>94</sup> They expressed concerns about Petitioner being integrated with non-disabled peers due to her vulnerability, and low cognitive and emotional functioning.<sup>95</sup>

29. The Placement Specialist then provided a Prior to Action Notice ("Prior Notice") to the IEP team.<sup>96</sup> She explained that the DCPS School has an MR cluster program that has a low student-teacher ratio.<sup>97</sup> She did not provide any further details about the DCPS School program that would be offered to Petitioner, stating that this was not possible because the DCPS School Special Education Coordinator ("SEC") was not present at the meeting.<sup>98</sup> The Placement Specialist suggested instead that the Parent visit the DCPS School.<sup>99</sup>

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<sup>88</sup> *Id.*

<sup>89</sup> *Id.*

<sup>90</sup> Petitioner/DCPS Exhibit 6; DCPS Exhibit 4.

<sup>91</sup> DCPS Exhibit 4.

<sup>92</sup> Petitioner/DCPS Exhibit 6; Testimony of Non-Public School Psychologist, Petitioner's Educational Advocate. The parties also stipulated that Petitioner has made progress at the Non-Public School.

<sup>93</sup> Petitioner/DCPS Exhibit 6.

<sup>94</sup> Petitioner/DCPS Exhibit 6; DCPS Exhibit 4.

<sup>95</sup> Petitioner/DCPS Exhibit 6.

<sup>96</sup> *Id.*; DCPS Exhibit 4; DCPS Exhibit 3 ("Prior to Action Notice").

<sup>97</sup> Petitioner Exhibit 6 (IEP team, Advocate notes); DCPS Exhibit 4.

<sup>98</sup> Testimony of Advocate; Petitioner Exhibit 6 (Advocate notes).

<sup>99</sup> *Id.*

30. The Prior Notice states that the proposed change being made to Petitioner's IEP was a "change in location of services."<sup>100</sup> It indicates that Petitioner's placement would be changed but fails to specify what that change will be.<sup>101</sup>

31. The Prior Notice does not provide a description and explanation of the proposed action.<sup>102</sup> It does not provide a description of other options considered and the reasons each option was rejected or any other factors relevant to the decision.<sup>103</sup> Finally, the Prior Notice incorrectly indicates that the Parent was present at the May 12, 2010, IEP meeting.<sup>104</sup>

32. The Parent was not present at the May 12, 2010, IEP meeting.<sup>105</sup> She had planned to attend by phone, and provided the IEP team the times at which she was available.<sup>106</sup> However, she never received a call from the IEP team.<sup>107</sup>

33. At the end of June 2010, the Parent visited the DCPS School.<sup>108</sup> She met with the SEC and mentioned that DCPS decided that Petitioner would attend the DCPS School for the 2010-2011 school year.<sup>109</sup> The SEC indicated that she was not familiar with Petitioner and had not reviewed her IEP.<sup>110</sup>

34. At the DCPS School, all students in the MR cluster program have full time IEPs that provide 27.5 hours of specialized instruction and related services.<sup>111</sup> The classes in the MR cluster have a maximum of twelve students, one teacher, and a teacher's aide.<sup>112</sup> Students in the MR cluster receive their related services, such as speech-language therapy, occupational therapy, and counseling, outside the classroom.<sup>113</sup> The DCPS School does not offer art therapy.<sup>114</sup>

35. The DCPS School is not a separate, special-education school.<sup>115</sup> Last year, about 500 students were enrolled at the DCPS School, including 179 special education students.<sup>116</sup> Students in the MR cluster program are integrated with non-disabled and other special education

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<sup>100</sup> DCPS Exhibit 3.

<sup>101</sup> *Id.*

<sup>102</sup> *Id.*

<sup>103</sup> *Id.*

<sup>104</sup> *Id.* at p. 45 (DCPS signature sheet); Petitioner Exhibit 6, p. 7 (IEP Meeting Participants sign-in sheet).

<sup>105</sup> Testimony of Parent, Advocate. DCPS Exhibit 3 (DCPS signature sheet); Petitioner Exhibit 6 (IEP Meeting Participants sign-in sheet).

<sup>106</sup> Testimony of Parent, Advocate.

<sup>107</sup> *Id.*

<sup>108</sup> *Id.*

<sup>109</sup> *Id.*

<sup>110</sup> *Id.*

<sup>111</sup> Testimony of DCPS SEC.

<sup>112</sup> *Id.*

<sup>113</sup> *Id.*

<sup>114</sup> *Id.*

<sup>115</sup> *Id.*

<sup>116</sup> *Id.*

students in the hallways between classes and during lunch in the cafeteria.<sup>117</sup> A special education teacher or teacher's aide accompanies the MR cluster students at all times, including when they enter or exit the school building at the beginning and end of each school day.<sup>118</sup>

## VI. CREDIBILITY DETERMINATIONS

The testimony of all the witnesses at the hearing was credible with the exception of portions of the testimony of the DCPS SEC. While the SEC had a general familiarity with the DCPS School, she had limited knowledge of the instruction provided students in the MR cluster program. Her testimony also revealed her lack of knowledge of Petitioner's cognitive abilities, academic performance, vocational, and transition needs. Thus, her testimony regarding the ability of the DCPS School to meet Petitioner's needs was not credible.

## VII. CONCLUSIONS OF LAW

IDEA guarantees children with disabilities the right to a free and appropriate public education with services designed to meet their individual needs.<sup>119</sup> FAPE is defined as:

[S]pecial education and related services that are provided at public expense, under public supervision and direction, and without charge; meet the standards of the SEA...include an appropriate preschool, elementary school, or secondary school education in the State involved; and are provided in conformity with the individualized education program (IEP)...<sup>120</sup>

In deciding whether DCPS provided Petitioner a FAPE, the inquiry is limited to (a) whether DCPS complied with the procedures set forth in IDEA; and (b) whether Petitioner's IEP is reasonably calculated to enable Petitioner to receive educational benefit.<sup>121</sup>

In matters alleging a procedural violation, a hearing officer may find that the 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.<sup>122</sup> In other words, an IDEA claim is viable only if those procedural violations affected the student's *substantive* rights.<sup>123</sup>

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<sup>117</sup> *Id.*; Testimony of Parent.

<sup>118</sup> Testimony of DCPS SEC.

<sup>119</sup> 20 U.S.C. §§ 1400(d) (1)(A), 1412 (a) (1); *Bd. of Educ. v. Rowley*, 458 U.S. 176, 179-91 (1982); *Shaffer v. Weast*, 546 U.S. 49, 51 (2005).

<sup>120</sup> 20 U.S.C. § 1401 (9); 34 C.F.R. § 300.17.

<sup>121</sup> *Rowley*, 458 U.S. at 206-207.

<sup>122</sup> 34 C.F.R. § 300.513 (a)(2).

<sup>123</sup> *Lesesne v. District of Columbia*, 447 F.3d 828, 834 (D.C. Cir. 2006) (emphasis in original; internal citations omitted).

Once a procedurally proper IEP has been formulated, a reviewing court should be reluctant indeed to second-guess the judgment of education professionals.<sup>124</sup> The court should not “disturb an IEP simply because [it] disagree[s] with its content.”<sup>125</sup> The court is obliged to “defer to educators' decisions as long as an IEP provided the child the basic floor of opportunity that access to special education and related services provides.”<sup>126</sup>

The burden of proof is properly placed upon the party seeking relief.<sup>127</sup> Petitioner must prove the allegations in the due process complaint by a preponderance of the evidence.<sup>128</sup>

## VIII. DISCUSSION

### A. Petitioner Proved that DCPS Failed to Provide Her an Appropriate Educational Placement for the 2010-2011 School Year.

FAPE “consists of educational instruction specially designed to meet the unique needs of the handicapped child, supported by such services as are necessary to permit the child to benefit from the instruction.”<sup>129</sup> The IEP is the centerpiece of special education delivery system.<sup>130</sup>

The term “educational placement” refers to the type of educational program prescribed by the IEP.<sup>131</sup> “Educational placement” refers to the general educational program, such as the classes, individualized attention, and additional services a child will receive, rather than the “bricks and mortar” of the specific school.<sup>132</sup>

An appropriate educational program begins with an IEP that accurately reflects the results of evaluations to identify the student's needs,<sup>133</sup> establishes annual goals related to those needs,<sup>134</sup> and provides appropriate specialized instruction and related services.<sup>135</sup> The program must be implemented in the least restrictive environment (“LRE”).<sup>136</sup> For an IEP to be “reasonably

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<sup>124</sup> *Tice v. Botetourt County School Board*, 908 F.2d 1200, 1207 (4th Cir. 1990) (internal citation and quotations omitted).

<sup>125</sup> *Id.*

<sup>126</sup> *Id.*

<sup>127</sup> *Schaffer v. Weast*, 546 U.S. 49, 56-57 (2005).

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

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

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

<sup>131</sup> *T.Y. v. N.Y. Dept. of Educ.*, 584 F.3d 412, 419 (2d Cir. 2009) (citation omitted).

<sup>132</sup> *Id.*

<sup>133</sup> 34 C.F.R. § 300.320 (a) (1).

<sup>134</sup> 34 C.F.R. § 300.320 (a) (2).

<sup>135</sup> 34 C.F.R. § 300.320 (a) (4).

<sup>136</sup> 20 U.S.C. § 1412 (a) (5); 34 C.F.R. §§ 300.114 (a) (2), 300.116 (a) (2).

calculated to enable the child to receive educational benefits,” it must be “likely to produce progress, not regression.”<sup>137</sup>

The considerations relevant to determining whether a particular placement is appropriate for a particular student include the nature and severity of the student's disability; the student's specialized educational needs; the link between those needs and the services offered by the school; the placement's cost; and the extent to which the placement represents the least restrictive environment.<sup>138</sup>

Here, there is no dispute that Petitioner's December 1, 2009, IEP is reasonably calculated to enable her to receive educational benefit.<sup>139</sup> There also is no dispute that this IEP has enabled Petitioner to progress both academically and socially.<sup>140</sup> Thus, the parties stipulated that the sole issue is whether the DCPS School can implement Petitioner's December 1, 2009, IEP.

This Hearing Officer finds that DCPS cannot implement Petitioner's IEP. First, the DCPS SEC admitted that DCPS provides the MR cluster students only 27.5 hours of specialized instruction and related services. Petitioner's IEP requires that she receive 30 hours of specialized instruction and related services. Additionally, the DCPS School does not provide art therapy, which is integral to Petitioner's academic and social progress in that it addresses her difficulties with peer relationships and her low self-esteem, and helps her manage her frustrations. Thus, the DCPS School cannot implement Petitioner's IEP.

Second, the DCPS School is not Petitioner's LRE.<sup>141</sup> Petitioner established that the Petitioner requires a full-time, self-contained educational environment with a very low student-teacher ratio, in a *separate special-education school*.<sup>142</sup> Petitioner is extremely vulnerable to peer pressure, has difficulty establishing personal boundaries, and must be supervised at all times, both within and outside school.<sup>143</sup>

The DCPS School is not a separate special education school, and Petitioner would be exposed to non-disabled peers. This would be an especially treacherous environment for Petitioner due to her low cognitive functioning and social vulnerability. Additionally, the DCPS School does not provide the small, structured environment that has allowed Petitioner to feel confident and secure.

Petitioner proved by a preponderance of the evidence that DCPS failed to provide an appropriate educational placement for Petitioner for the 2010-2011 school year by placing her in

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<sup>137</sup> *Walczak v. Florida Union Free Sch. Dist.*, 142 F.3d 119, 130 (2d Cir. 1998) (internal quotation marks and citation omitted).

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

<sup>139</sup> Stipulation of parties.

<sup>140</sup> Stipulation of parties.

<sup>141</sup> See D.C. Mun. Reg. tit. 5-E § 3013 (in selecting the LRE, consideration shall be given to any potential harmful effect on the child or on the quality of services that the child needs).

<sup>142</sup> See DCPS Exhibit 1, p. 18.

<sup>143</sup> Testimony of Parent, Non-Public School Psychologist.

a school that cannot implement her IEP. Thus, Petitioner proved by a preponderance of the evidence that DCPS denied Petitioner a FAPE.<sup>144</sup>

**B. Petitioner Proved that DCPS Failed to Allow the Parent to Participate in the Decision-Making Process Regarding Petitioner's Educational Placement.**

In enacting IDEA, "Congress sought to protect individual children by providing for parental involvement in . . . the formulation of the child's individual educational program."<sup>145</sup> The statute's emphasis on the full participation of parent(s) in the IEP process demonstrates that "adequate compliance with the procedures prescribed would in most cases assure much if not all of what Congress wished in the way of substantive content in an IEP."<sup>146</sup>

IDEA guarantees parents of disabled children the opportunity to participate in the evaluation and placement process.<sup>147</sup> One of the important policies underlying the need for an accurate written IEP is "to serve a parent's interest in receiving full appraisal of the educational plan for her child, allowing a parent both to monitor her child's progress and determine if any change to the program is necessary."<sup>148</sup>

Thus, DCPS must ensure that a parent of each child with a disability is a member of any group that makes decisions on the educational placement of the parent's child.<sup>149</sup> Procedural inadequacies that seriously infringe the parents' opportunity to participate in the IEP formulation process clearly result in the denial of a free and appropriate public education ("FAPE").<sup>150</sup>

Before a local education agency ("LEA") proposes to initiate or change the identification, evaluation, or educational placement of the child or the provision of FAPE to the child, it must provide prior written notice to the parent of a child with a disability.<sup>151</sup> This notice shall include a description of the action proposed or refused by the agency; an explanation of why the agency proposes or refuses to take the action; a description of each evaluation procedure, assessment, record, or report the agency used as a basis for the proposed or refused action; a description of other options that the IEP Team considered and the reasons why those options were rejected; and a description of other factors that are relevant to the agency's proposal or refusal.<sup>152</sup>

In determining whether a "change in educational placement" has occurred, the LEA must

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<sup>144</sup> Petitioner is the prevailing party on this claim.

<sup>145</sup> *Rowley*, 458 U.S. at 208.

<sup>146</sup> *Hinson v. Merritt Educational Ctr.*, 579 F. Supp. 2d 89, 102 (D.D.C. 2008) (citing *Rowley*, 458 U.S. at 206).

<sup>147</sup> 34 C.F.R. § 300.327; D.C. Mun. Reg. tit. 5-E § 3013.

<sup>148</sup> *Alfano v. District of Columbia*, 442 F. Supp. 2d 1, 6 (D.D.C. 2006) (citing *Mewborn v. Dist. Of Columbia*, 360 F. Supp. 2d 138, 143 (D.D.C. 2005)).

<sup>149</sup> 34 C.F.R. § 300.501 (c)(1).

<sup>150</sup> See, e.g., *W.G. v. Board of Trustees*, 960 F.2d 1479, 1484 (9th Cir. 1992).

<sup>151</sup> 34 C.F.R. § 300.503 (a). See also *Letter to Lieberman*, 52 IDELR 18 (August 15, 2008) (proposal to change the type, amount, or location of the special education and related services being provided to a child, would trigger the notice requirements of 34 CFR § 300.503).

<sup>152</sup> 34 C.F.R. § 300.503 (b); D.C. Mun. Reg. tit. 5-E § 3025.

determine whether the proposed change would substantially or materially alter the child's educational program.<sup>153</sup> In determining whether the change in location would substantially or materially alter the child's educational program, the LEA must examine the following factors: whether the educational program set out in the child's IEP has been revised; whether the child will be able to be educated with nondisabled children to the same extent; whether the child will have the same opportunities to participate in nonacademic and extracurricular services; and whether the new placement option is the same option on the continuum of alternative placements.<sup>154</sup> In other words, if the proposed change substantially or materially affects the composition of the educational program and services provided the student, it triggers the notice requirement.<sup>155</sup>

In contrast, a simple change in location is limited to the physical characteristics associated with a particular site. A transfer of a student from one school to another school, which has a comparable educational program, is generally considered a change in location only.<sup>156</sup> Simple changes in the location of a building or facility are not generally viewed to be a change in placement where there are no significant changes in the educational program.<sup>157</sup>

The Prior Notice DCPS issued on May 12, 2009, states that the proposed change was simply a "change in location of services."<sup>158</sup> In fact, the proposed change in location also would effect a change in Petitioner's placement because it would require a substantial change in Petitioner's IEP. These changes would include reducing the hours of specialized instruction and related services from 30 hours to 27.5 hours; diluting Petitioner's LRE-compliant setting from a separate, special-education school to the less restrictive setting of a separate special-education class within a general education school; and eliminating the 45 minutes of art therapy on her IEP.

As a result, DCPS was required to issue a prior written notice that complies with the requirements of IDEA. DCPS failed to do so. The Prior Notice DCPS issued lacked an explanation of why DCPS proposed changing Petitioner's placement; a description of each evaluation procedure, assessment, record, or report DCPS used as a basis for removing the Student from her current placement; a description of other options that the IEP Team considered and the reasons why those options were rejected; and a description of other relevant factors.<sup>159</sup>

Moreover, DCPS failed to ensure that the Parent participated in the May 12, 2010, IEP meeting. Even after the meeting, DCPS failed to, provide Petitioner any information about the

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<sup>153</sup> *Letter to Fisher*, 21 IDELR 992 (OSEP, July 6, 1994).

<sup>154</sup> *Id.*

<sup>155</sup> *Letter to Flores*, 211 IDELR 233 (OSEP Aug. 18, 1980); *Letter to Fisher*, 21 IDELR 992.

<sup>156</sup> *See, e.g., Concerned Parents & Citizens for the Continuing Educ. at Malcolm X (P.S. 79) v. New York City Bd. of Educ.*, 629 F.2d 751, 753-54 (2d Cir. 1980), *cert. denied*, 449 U.S. 1078 (1980).

<sup>157</sup> *Letter to Flores*, 211 IDELR 233. *See also A.W. v. Fairfax County Sch. Bd.*, 372 F.3d 674, 682 (4th Cir. 2004) (where a change in location results in a dilution of the quality of a student's education or a departure from the student's LRE-compliant setting, a change in "educational placement" occurs.)

<sup>158</sup> DCPS Exhibit 3.

<sup>159</sup> 34 C.F.R. § 300.503.

programs offered at the DCPS School, the class in which Petitioner would be placed, the type of instruction Petitioner would receive at the DCPS School, her vocational program, or proposed schedule.

Petitioner proved by a preponderance of the evidence that DCPS failed to ensure the Parent participated in the decision-making process regarding Petitioner's placement for the 2010-2011 school year. Thus, Petitioner proved that DCPS denied the Student a FAPE.<sup>160</sup>

### ORDER

Based upon the Findings of Fact and Conclusions of Law herein, it is this 31st day of July 2010 hereby:

**ORDERED** that DCPS shall bear all expenses of the Petitioner's attendance at the Non-Public School for the 2010-2011 school year; and

**IT IS FURTHER ORDERED** that this Order is effective immediately.

By: /s/ Frances Raskin  
Frances Raskin  
Hearing Officer

### NOTICE OF APPEAL RIGHTS

The decision issued by the Hearing Officer is final, except that any party aggrieved by the findings and decision of the Hearing Officer shall have 90 days from the date of the decision of the hearing officer to file a civil action with respect to the issues presented at the due process hearing in a district court of the United States or a District of Columbia court of competent jurisdiction, as provided in 20 U.S.C. § 415(i)(2).

Distributed to:

Zachary Nahass, counsel for Petitioners  
Daniel McCall, counsel for Respondent  
Hearing Office  
dueprocess@dc.gov

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<sup>160</sup> Petitioner is the prevailing party on this claim.