

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

Student Hearing Office
810 First Street, N.E.; Second Floor
Washington, D.C. 20002

Petitioner , on behalf of STUDENT,¹)	Case Number:
)	
Petitioner,)	Hearing Date: October 14, 2010
)	Room:
v.)	
)	Date Issued: October 24, 2010
DISTRICT OF COLUMBIA PUBLIC SCHOOLS,)	
)	Hearing Officer: Frances Raskin
Respondent.)	

HEARING OFFICER DETERMINATION

I. JURISDICTION

This proceeding was invoked in accordance with the rights established under the Individuals With Disabilities Education Improvement Act of 2004 (“IDEA”), 20 U.S.C. §§ 1400 *et seq.*; federal regulations implementing IDEA, 34 C.F.R. Part 300; D.C. Code § 38-2561.01 *et seq.*; and D.C. Mun. Reg. § 5e-3000 *et seq.* On September 21, 2010, this Hearing Officer was appointed to preside over this case, consistent with 34 C.F.R. § 300.511.

II. BACKGROUND

Petitioner is the mother of a -year-old, special-education student (“Student”). On August 5, 2010, Petitioner filed a Due Process Complaint (“Complaint”) against the District of Columbia Public Schools (“DCPS”) pursuant to IDEA alleging that DCPS denied the Student a free, appropriate, public education by failing to provide the Student an appropriate placement/location of services for the 2010-2011 school year. Petitioner is seeking relief in the form of an order requiring DCPS to provide funding for the Student to attend a non-public school (“Non-Public School”), including transportation.

¹ Personal identification information is provided in Attachment A.

In its Response to the Complaint (“Response”), filed on August 19, 2010, DCPS asserts that it has proposed an appropriate location of services for the 2010-2011 school year.

The parties participated in a resolution session meeting on August 31, 2010. This Hearing Officer was appointed to administer this case on September 27, 2010.² The hearing officer previously assigned to this case held a prehearing conference on September 23, 2010, and issued a prehearing order on September 27, 2010. On September 30, 2010, this Hearing Officer held a second prehearing conference to discuss the five-day disclosure requirements. This Hearing Officer issued a second prehearing order the same day.

The due process hearing convened on October 4, 2010.³ At the outset of the hearing, this Hearing Officer entered into evidence the exhibits in both parties’ five-day disclosures.⁴

IV. ISSUE PRESENTED

Whether DCPS denied the Student a FAPE by failing to provide the Student a location of services that can implement the Student’s IEP.

V. FINDINGS OF FACT

1. Petitioner is the mother of a _____-year-old, special-education student (“Student”).⁵ During 2008-2009 and 2009-2010 school years, the Student attended a

² Another Hearing Officer administered this case until September 27, 2010.

³ The forty-fifth day of the due process hearing timeline was October 15, 2010. On September 29, 2010, counsel for Petitioner filed a Motion to Continue the due process hearing until October 14, 2010. This Hearing Officer is issuing this Hearing Officer Determination on the tenth day following the due process hearing.

⁴ Without objection by the parties, this Hearing Officer did not admit Petitioner’s Exhibits 1-5, as they were pleadings and other documents that are already in the record and not probative of the issues in this case; Petitioner’s Exhibit 8, pages 1-6, as these pages are duplicative of DCPS Exhibit 1; Petitioner Exhibit 10, pages 4-9, as these pages also are duplicative of DCPS Exhibit 1; and Respondent’s Exhibit 2 as it is duplicative of Petitioner’s Exhibit 8. This Hearing Officer admitted into evidence Petitioner’s Exhibits 6, 7, 8 (pages 7-11), 9, 10 (pages 1-3), and 11-16. This Hearing Officer entered into evidence Respondent’s Exhibits 1 and 3-5. This Hearing Officer also admitted into evidence Hearing Officer Exhibit 1.

⁵ Testimony of Petitioner; Petitioner Exhibit 6 (January 19, 2010, Individualized Educational Program (“IEP”).

non-public school ("Prior School").⁶ At the end of the 2009-2010 school year, the Student finished the last grade offered at the school.⁷

2. The Student's general cognitive ability is within the low average range of intellectual functioning.⁸ His full scale IQ is 81, and his overall thinking and reasoning abilities exceed those of about 10 percent of children his age.⁹

3. The Student's verbal reasoning abilities are in the borderline range and above only 6 percent of his peers.¹⁰ His nonverbal reasoning abilities are in the low average range and above those of only 12 percent of his peers.¹¹ His general verbal comprehension abilities are in the borderline range.¹²

4. The Student's working memory (his ability to sustain attention, concentrate, and exert mental control) is in the average range.¹³ His working memory is superior to about 55 percent of his same-age peers.¹⁴ His working memory is better developed than his nonverbal and verbal reasoning abilities.¹⁵

5. His processing speed (ability to process simple or routine visual material without making errors) is in the low average range.¹⁶ His processing speed exceeds that of only 16 percent of his peers.¹⁷

6. The Student's overall reading skills are in the average range, and exceed those of about 30 percent of his same-age peers.¹⁸ He performs much better in this area than would be anticipated for a child with his cognitive ability.¹⁹ This appears to be an area of considerable strength for him.²⁰

7. His skills in oral language also are in the average range, and exceed those of about 27 percent of his peers.²¹ In written language, the Student performs in the low

⁶ Testimony of Petitioner. Petitioner testified that the Student "aged-out" of the Prior School.

⁷ *Id.*

⁸ Hearing Officer Exhibit 1 (October 17, 2008, report of Comprehensive Psychological Evaluation).

⁹ *Id.*

¹⁰ *Id.*

¹¹ *Id.*

¹² *Id.*

¹³ *Id.*

¹⁴ *Id.*

¹⁵ *Id.*

¹⁶ *Id.*

¹⁷ *Id.*

¹⁸ *Id.*

¹⁹ *Id.*

²⁰ *Id.*

²¹ *Id.*

average range, and his achievement in this area is better than that of only about 12 percent of students his age.²²

8. His skills in mathematics are diverse.²³ He performs much higher on numerical operations (tasks that involve addition, subtraction, multiplication, and division of one- to three-digit numbers) than on math reasoning (tasks that require him to understand consumer math concepts, geometric measurement, and basic graphs, and to solve on-step word problems).²⁴ His numerical operations abilities are in the average range and exceed those of about 42 percent of his peers.²⁵ In numerical operations, he performs significantly higher than would be expected for a child with his cognitive ability.²⁶ Thus, numerical operations are an area of strength for him.²⁷ His skills in math reasoning are in the low average range and are better than those of only about 13 percent of his peers.²⁸

9. The Student has an average attitude toward his teachers, and it appears that he is satisfied with most but not all of his teachers.²⁹ He has exhibited dissatisfaction with many aspects of his school experience.³⁰ He is sensation seeking, which indicates that he is willing to take physical and social risks.³¹ His attention problems indicate that he also is at risk for attention deficit disorder.³²

10. His emotional functioning is average and not an area of concern.³³ However, he exhibits clinically significant hyperactivity and verbal aggression (name calling, blaming, and verbal threats).³⁴ The Student exhibits at-risk conduct problems.³⁵ He exhibits clinically significant signs of depression and anxiety, although he is in the normal range for depression.³⁶ He also appears at risk for atypical behavior (a tendency to behave in ways that are considered odd, or are commonly associated with psychosis).³⁷ He has been diagnosed with an antisocial personality disorder.³⁸

²² *Id.*

²³ *Id.*

²⁴ *Id.*

²⁵ *Id.*

²⁶ *Id.*

²⁷ *Id.*

²⁸ *Id.*

²⁹ *Id.*

³⁰ *Id.*

³¹ *Id.*

³² *Id.*

³³ *Id.*

³⁴ *Id.*

³⁵ *Id.*

³⁶ *Id.*

³⁷ *Id.*

³⁸ *Id.*

11. The Student is easily angered, annoyed, and upset by comments from peers.³⁹ He is constantly angry and disrupts his classes by being verbally aggressive.⁴⁰ He does not follow instructions and tends to be defiant.⁴¹ He will not do any work but will disrupt the classroom instruction.⁴²

12. The Student's level of concentration depends on the activity in which he is engaged.⁴³ His general activity level is hyperactive and he fidgets.⁴⁴ When on task, he engages in activities and learns quickly.⁴⁵

13. The Student's current individualized educational program ("IEP"), developed on January 19, 2010, provides that he is to receive 28.5 hours per week of specialized instruction and 1.5 hours per week of behavioral support services.⁴⁶ It also includes a functional behavior assessment and behavior implementation plan.⁴⁷ The IEP provides that the specialized instruction and behavioral support services should be provided outside the general education setting because his disability, manifested in a lack of impulse control, disruptive behavior, and poor social skills affects his ability to access the general education curriculum without specialized instruction.⁴⁸

14. The Student's IEP also indicates that he is to receive this specialized instruction and behavioral support services in a separate day school.⁴⁹ At the time this IEP was developed, a general education setting with the special education services required to support the IEP was not available.⁵⁰ The IEP further provides that the Student requires a behavior modification program, small structured classes, and on staff therapists to enable the Student to make academic, social, and behavioral progress.⁵¹

15. On July 28, 2010, DCPS convened a meeting of the Student's IEP team to discuss the school he would attend for the 2010-2011 school year.⁵² Petitioner and her educational advocate ("Educational Advocate") participated in this meeting.⁵³ During the meeting, the special education coordinator of the DCPS School ("SEC") shared her

³⁹ Petitioner Exhibit 6 (January 19, 2010, IEP).

⁴⁰ *Id.*

⁴¹ *Id.*

⁴² *Id.*

⁴³ *Id.*

⁴⁴ *Id.*

⁴⁵ *Id.*

⁴⁶ *Id.*

⁴⁷ *Id.*

⁴⁸ *Id.*

⁴⁹ *Id.*

⁵⁰ *Id.*

⁵¹ *Id.*

⁵² DCPS Exhibit 1 (July 28, 2010, IEP Meeting Notes); Petitioner Exhibit 8 (July 28, 2010, Educational Advocate Meeting Notes).

⁵³ *Id.*

observations of the Student in at his Prior School.⁵⁴ She also provided information on the classes, teachers, and behavioral supports available at the DCPS School.⁵⁵ The DCPS placement specialist explained that the DCPS School could implement the Student's IEP.⁵⁶ The DCPS placement specialist proposed the DCPS School as the Student's location of services for the 2010-2011 school year.⁵⁷ DCPS issued a prior written notice that the Student's location of services for the 2010-2011 school year would be the DCPS School.⁵⁸

16. Petitioner and the Educational Advocate informed the IEP team that they disagreed with the DCPS proposed location of services for the 2010-2011 school year.⁵⁹ They informed the IEP team that the Student had been accepted at a non-public school for the 2010-2011 school year.⁶⁰

17. The Non-Public School would place the Student in a classroom with a total of six learning disabled students ranging in age from fourteen to fifteen, one teacher, and one assistant teacher.⁶¹ The Student's teacher is certified in special education but not in any content areas.⁶² The classroom also would include a related service provider to assist students with reading instruction.⁶³

18. The Non-Public School has a behavior modification system to make students responsible for their behaviors and completing their schoolwork.⁶⁴ All of the Non-Public School staff is trained in behavior intervention.⁶⁵

19. All of the teachers at the Non-Public School either have a certification in a content area with a special education endorsement or are certified in special education.⁶⁶ Most of the teacher's assistants have a bachelor's degree and are working toward their special education certifications.⁶⁷

⁵⁴ DCPS Exhibit 1; Testimony of Educational Advocate.

⁵⁵ *Id.* The SEC informed the IEP team that in each special education class at the DCPS School, there are twelve to fifteen students, a special education teacher, a general education teacher, and a behavioral specialist. DCPS Exhibit 1.

⁵⁶ *Id.*

⁵⁷ *Id.*

⁵⁸ DCPS Exhibit 4; Petitioner Exhibit 10 (July 28, 2010, Prior Written Notice).

⁵⁹ Petitioner Exhibit 8.

⁶⁰ *Id.*; Petitioner Exhibit 9 (July 28, 2010, Acceptance Letter from Non-Public School).

⁶¹ Testimony of Non-Public School Representative.

⁶² *Id.*

⁶³ *Id.*

⁶⁴ *Id.*

⁶⁵ *Id.*

⁶⁶ *Id.*

⁶⁷ *Id.*

20. All of the Students at the Non-Public School may earn a District of Columbia High School diploma.⁶⁸

21. The Student began attending the DCPS School at the end of August 2010.⁶⁹ Since then, he has been suspended twice.⁷⁰ He received an in-school suspension for an argument with a teacher, and an out-of-school suspension for fighting with another student.⁷¹ Each suspension was for one day.⁷²

22. The Educational Advocate observed the Student at the DCPS School on September 10, 2010, and again during the first week of October 2010.⁷³ Her first observation was for 2.5 hours and she observed the Student in his math and science classes.⁷⁴ During this observation, the Educational Advocate did not discuss the Student's progress with his teachers.

23. On September 10, 2010, the Student sat near the back of the room in his math class.⁷⁵ He was off-task, did not engage in the classroom assignment, and reading an "action" book.⁷⁶ He also was engaging in disruptive behavior.⁷⁷ There was only one teacher present in the classroom and he did not redirect the Student or instruct him to work on the assignment.⁷⁸

24. In the science class, the Student again sat at the back of the classroom.⁷⁹ He worked on the classroom assignment intermittently but spent most of the time talking to another student.⁸⁰ He and the other student distracted the other students.⁸¹

25. During the observation in the first week of October 2010, the Educational Advocate observed the Student for about 1.5 hours in his math class.⁸² There were twelve students in the class.⁸³ The Student was not working on the classroom assignment but instead had his head on his desk and covered with his jacket.⁸⁴ The teacher repeatedly tried to encourage the Student to work on the assignment, but as soon

⁶⁸ *Id.*

⁶⁹ Testimony of Petitioner.

⁷⁰ *Id.*

⁷¹ *Id.*; Testimony of Student.

⁷² Testimony of Petitioner.

⁷³ Testimony of Educational Advocate.

⁷⁴ *Id.*

⁷⁵ *Id.*

⁷⁶ *Id.*

⁷⁷ *Id.*

⁷⁸ *Id.*

⁷⁹ *Id.*

⁸⁰ *Id.*

⁸¹ *Id.*

⁸² *Id.*

⁸³ *Id.*

⁸⁴ *Id.*

as she walked away, he again put his head on his desk.⁸⁵ He spent the entire class with his head on the desk or doodling.⁸⁶

26. The Student's schedule has changed twice since the beginning of the 2010-2011 school year.⁸⁷ At first, he was in all general education classes.⁸⁸ He then received a schedule with all new teachers.⁸⁹ These classes were in the DCPS School's learning disabled program.⁹⁰ The Student's behaviors were preventing him from accessing the curriculum and preventing his academic growth.⁹¹ The Student was then transferred to classes in the DCPS School's emotional disturbance ("ED") program, other than for mathematics.⁹² The Student remained in the learning-disabled mathematics class because he said he enjoyed it.⁹³

27. In the ED program, students remain in one room for all their classes.⁹⁴ The classes are taught by a special education teacher and a content-area certified teacher.⁹⁵ The content-area teachers rotate from class to class.⁹⁶ A behavioral professional also is assigned to each ED class.⁹⁷ Although eleven students are assigned to the Student's class, only eight regularly attend.⁹⁸ These students may earn a DCPS diploma.⁹⁹

28. At the DCPS School, the Student initially was allowed to have lunch with non-disabled peers.¹⁰⁰ He now has lunch with only with his ED classmates.¹⁰¹

29. At the DCPS School the Student is receiving all his instruction outside the general education setting.¹⁰² He receives support from a social worker as provided by his

⁸⁵ *Id.*

⁸⁶ *Id.*

⁸⁷ Testimony of Student, SEC; Testimony of Student.

⁸⁸ *Id.*

⁸⁹ Testimony of Student.

⁹⁰ Testimony of SEC.

⁹¹ *Id.*

⁹² *Id.*

⁹³ *Id.*

⁹⁴ *Id.*

⁹⁵ *Id.*

⁹⁶ *Id.*

⁹⁷ *Id.*

⁹⁸ *Id.*

⁹⁹ *Id.*

¹⁰⁰ *Id.*

¹⁰¹ *Id.*

¹⁰² *Id.*

IEP, as well as whenever he is experiencing difficulty.¹⁰³ The DCPS School also has implemented a behavioral plan for the Student that includes rewards for good behavior.¹⁰⁴

30. Each class period at the DCPS School is 83 minutes.¹⁰⁵ The Student has four classes per day.¹⁰⁶ Thus, the Student receives 27.6 hours of specialized instruction per week.¹⁰⁷ The DCPS School is not a separate day school.¹⁰⁸

VI. CREDIBILITY DETERMINATIONS

The testimony of all the witnesses at the hearing was credible, with the exception of the Educational Advocate who was only partially credible. The Educational Advocate provided testimony that appeared to be based on speculation, particularly in regards to whether the adults in the Student's classes were special education teachers and whether the other students were special education students.¹⁰⁹ She speculated that, during one of her observations, two adults in the room were teacher's assistants or teachers, despite never having spoken to them. She also speculated that the other students in the classroom were not special education students.¹¹⁰

VII. CONCLUSIONS OF LAW

The burden of proof is properly placed upon the party seeking relief.¹¹¹ Under IDEIA, a Petitioner must prove the allegations in the due process complaint by a preponderance of the evidence.¹¹²

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."¹¹³

An LEA is obligated to provide a FAPE "for all children residing in the state

¹⁰³ *Id.*

¹⁰⁴ *Id.*

¹⁰⁵ *Id.*

¹⁰⁶ *Id.*

¹⁰⁷ *Id.*

¹⁰⁸ Testimony of SEC.

¹⁰⁹ The Advocate admitted that she never talked to any of the Student's teachers. She testified that she "surmised" that the teacher was not a special education teacher because the classroom room was on the third floor, which is the location of the ninth-grade academy.

¹¹⁰ The Advocate admitted that she had no knowledge of whether these students had IEPs and had never seen their IEPs.

¹¹¹ *Schaffer v. Weast*, 546 U.S. 49, 56-57 (2005).

¹¹² 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).

¹¹³ *Bd. of Education v. Rowley*, 458 U.S. 176, 188-89 (1982) (citation omitted).

between the ages of 3 and 21, inclusive.”¹¹⁴ In deciding whether an LEA provided the Student a FAPE, the inquiry is limited to (a) whether the LEA complied with the procedures set forth in IDEA; and (b) whether the Student’s IEP reasonably calculated to enable the Student to receive educational benefits.¹¹⁵

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.¹¹⁶ In other words, an IDEA claim is viable only if those procedural violations affected the student’s *substantive* rights.¹¹⁷

VIII. DISCUSSION

Petitioner Failed to Prove that DCPS Denied the Student a FAPE by Changing his Location of Services from a Non-Public School to a DCPS School.

An appropriate educational program begins with an IEP that accurately reflects the results of evaluations to identify the student’s needs,¹¹⁸ establishes annual goals related to those needs,¹¹⁹ and provides appropriate specialized instruction and related services.¹²⁰ For an IEP to be “reasonably calculated to enable the child to receive

¹¹⁴ 34 C.F.R. § 300.101.

¹¹⁵ *Rowley* at 206-207.

¹¹⁶ 20 U.S.C. § 1415 (f)(3)(E)(ii); *Roland M. v. Concord Sch. Comm.*, 910 F.2d 983, 994 (1st Cir. 1990) (en banc) (“[P]rocedural flaws do not automatically render an IEP legally defective”) (citations omitted).

¹¹⁷ *Lesesne v. District of Columbia*, 447 F.3d 828, 834 (D.C. Cir. 2006) (emphasis in original; internal citations omitted). *Accord, Kruvant v. District of Columbia*, 99 Fed. Appx. 232, 233 (D.C. Cir. 2004) (denying relief under IDEA because “although DCPS admits that it failed to satisfy its responsibility to assess [the student] for IDEA eligibility within 120 days of her parents’ request, the [parents] have not shown that any harm resulted from that error”). *See also M.M. ex rel. D.M. v. Sch. Dist.*, 303 F.3d 523, 533-34 (4th Cir. 2002) (“If a disabled child received (or was offered) a FAPE in spite of a technical violation of the IDEA, the school district has fulfilled its statutory obligations.”); *W.G. v. Bd. of Trustees*, 960 F.2d 1479, 1484 (9th Cir. 1992) (rejecting the proposition that procedural flaws “automatically require a finding of a denial of a FAPE”); *Thomas v. Cincinnati Bd. of Educ.*, 918 F.2d 618, 625 (6th Cir. 1990) (rejecting an IDEA claim for technical noncompliance with procedural requirements because the alleged violations did not result in a “substantive deprivation” of student’s rights); *Burke County Bd. of Educ. v. Denton*, 895 F.2d 973, 982 (4th Cir. 1990) (refusing to award compensatory education because procedural faults committed by Board did not cause the child to lose any educational opportunity).

¹¹⁸ 34 C.F.R. § 300.320 (a) (1).

¹¹⁹ 34 C.F.R. § 300.320 (a) (2).

¹²⁰ 34 C.F.R. § 300.320 (a) (4).

educational benefits,” it must be “likely to produce progress, not regression.”¹²¹

However, IDEA “imposes no clear obligation upon an LEA beyond the requirement that [disabled] children receive some form of specialized education.”¹²² An LEA is required only to make available a “basic floor of opportunity” that is “reasonably calculated to enable the child to receive educational benefits . . . sufficient to confer some educational benefit upon the [disabled] child,” or a program “individually designed to provide educational benefit.”¹²³ IDEA does not require the LEA to “maximize the potential” of a special education student.¹²⁴

In determining whether a “change in educational placement” has occurred, one must determine whether the proposed change would substantially or materially alter the child's educational program.¹²⁵ 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.¹²⁶ In other words, whether the proposed change substantially or materially affects the composition of the educational program and services provided the student determines whether a change in placement has occurred.¹²⁷

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.¹²⁸ 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.¹²⁹ Parents

¹²¹ *Walczak v. Florida Union Free Sch. Dist.*, 142 F.3d 119, 130 (2d Cir. 1998) (internal quotation marks and citation omitted). The term “educational placement” refers to the type of educational program prescribed by the IEP, i.e., 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. *T.Y. v. N.Y. Dep't. of Educ.*, 584 F.3d 412, 419 (2d Cir. 2009) (citation omitted).

¹²² *Kerkam v. McKenzie*, 882 F.2d 884, 886 (D.C. Cir. 1988) (citing *Rowley*, 458 U.S. at 195).

¹²³ *Id.*

¹²⁴ *Id.* (noting that the Supreme Court stressed the lack of any such requirement four separate times in *Rowley*, 458 U.S. at 189, 197 n. 21, 198, 199).

¹²⁵ *Letter to Fisher*, 21 IDELR 992 (OSEP, July 6, 1994).

¹²⁶ *Id.*

¹²⁷ *Letter to Flores*, 211 IDELR 233 (OSEP Aug. 18, 1980); *Letter to Fisher*, 21 IDELR 992.

¹²⁸ 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).

¹²⁹ *Letter to Flores*, 211 IDELR 233. See also *A.W. v. Fairfax County Sch. Bd.*, 372 F.3d

are not entitled to veto a local education agency's choice of schools for a student; they are only entitled to participate in the discussion regarding the location of services.¹³⁰

Here, Petitioner has proved that DCPS is not providing the Student the exact number of hours of specialized instruction required by his IEP. While the Student's IEP requires that he receive 28.5 hours per week of specialized instruction and 1.5 hours per week of behavioral support services, the DCPS School is providing him only 27.6 hours of specialized instruction. The Student is being educated with nondisabled children to the same extent as he was at the Prior School, with the possible exception of when he enters and leaves the DCPS School building. This is not a material change from what the Student's IEP requires.¹³¹

Petitioner failed to prove that the Student requires a non-public day school in order to make academic progress. In fact, the Student's IEP states only that he requires a non-public day school only because a general education setting with the special education services required to support the IEP was not available.¹³² At the DCPS School, DCPS is providing the Student an out-of-general education setting, is essentially providing the Student the specialized and behavioral supports required by his IEP. Thus, the change in location does not appear to have substantially or materially affected the composition of the Student's educational program and services.¹³³ While DCPS changed the Student's schedule of classes several times in his first month at the DCPS School, Petitioner has failed to prove that this prevented the Student from accessing the curriculum.

Finally, IDEA imposes no clear obligation upon DCPS other than assuring the Student receives some form of specialized education.¹³⁴ DCPS is required only to make available a "basic floor of opportunity" that is "reasonably calculated" to enable the Student to receive "educational benefit." Petitioner has failed to prove that the Student is not receiving educational benefit at the DCPS School.

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.)

¹³⁰ *T.Y.*, 584 F.3d at 419; *Letter to Flores*, 211 IDELR 233; *Letter to Fisher*, 21 IDELR 992.

¹³¹ See *Letter to Fisher*, 21 IDELR 992.

¹³² Petitioner Exhibit 6, p. 9.

¹³³ *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.)

¹³⁴ *Kerkam v. McKenzie*, 882 F.2d 884, 886 (D.C. Cir. 1988) (citing *Rowley*, 458 U.S. at 195).

ORDER

Upon consideration of the exhibits and the testimony admitted at the due process hearing, it is this 24th day of October 2010 hereby:

IT IS ORDERED that the Complaint is **DISMISSED WITH PREJUDICE**.

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:
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