

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

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

OSSE
Office of Dispute Resolution
September 17, 2014

STUDENT, ¹)	
through the Parent,)	
)	Date Issued: September 12, 2014
Petitioner,)	
)	Hearing Officer: John Straus
v.)	
)	
District of Columbia Public Schools (“DCPS))	
)	
Respondent.)	
)	
)	
)	

HEARING OFFICER DETERMINATION

Background

The Petitioner, who is the grandmother of the student, filed a due process complaint notice on June 19, 2014, alleging that the student had been denied a free appropriate public education (“FAPE”) under the Individuals with Disabilities Education Act (“IDEA”).

The Petitioner alleged DCPS denied the Student a FAPE by failing to provide an appropriate IEP on May 28, 2013 and December 6, 2013 that would provide academic benefit; specifically, the IEP has no OT goals, no Speech and Language (“SL”) goals, no ESY goals and services; failing to evaluate Student in all areas of suspected disability when DCPS refused to allow the Petitioner’s independent evaluator to access to the school to conduct a Functional Behavioral Assessment (“FBA”) and failing to provide an IEP placement for the 2013-2014 and 2014-2015 school years which was reasonably calculated to enable the student to make progress in the general education curriculum because the student required a less restrictive placement.

DCPS asserted that the determination to exit the Student from occupational services (“OT”) at the May 28, 2013 IEP meeting was affirmed at December 6, 2013 and December 13, 2013 meeting and the student’s IEP was appropriate. DCPS further argues the student’s IEP was implemented in a self-contained Autism classroom at Middle School A where the student accessed the general education curriculum and made academic progress during the 2013-2014

¹ Personal identification information is provided in Appendix A.

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school year and the classroom at Middle School A was appropriate and the classroom at Middle School B is appropriate for the 2014-2015 school year.

Subject Matter Jurisdiction

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

Procedural History

The due process complaint was filed on June 19, 2014. This Hearing Officer was assigned to the case on June 24, 2014. The Petitioner waived the resolution meeting; however the Respondent did not. The resolution meeting took place on July 11, 2014. At the resolution meeting, DCPS opted to keep the 30-day resolution period open. The 30-day resolution period ended on July 19, 2014, the 45-day timeline to issue a final decision began on July 20, 2014. The hearing was scheduled on August 20, 2014. At the hearing, the Petitioner presented five witnesses and closed her case. Thereafter, the Respondent presented two witnesses but did not conclude its case. The Respondent had made a motion to continue the case prior to convening the August 20, 2014 due process hearing. That motion was granted over objection and the hearing was continued to September 4, 2014. The Hearing Officer Determination due date is September 12, 2014. 34 C.F.R. §§ 300.510 and .515.

The Petitioner presented four witnesses: an Education Advocate (“EA”); a Special Education Expert (“SEE”), an independent speech and language pathologist (“SLP”) and an independent occupational therapy therapist registered (“OTR”).

DCPS presented five witnesses: a Special Education Teacher (“SET”), a Special Education Coordinator (“SEC”), a School SLP, a School OTR and an Autism Coordinator (“AC”).

The Petitioner’s disclosures dated August 13, 2014, containing a witness list and Exhibits P-1 through P-25, were timely filed and admitted into evidence.

DCPS’ disclosures dated August 13, 2014, containing a witness list and Exhibits R-1 through R-20, were timely filed and admitted into evidence.

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

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1. Whether DCPS denied the Student a FAPE by failing to provide an appropriate IEP on May 28, 2013 that would provide academic benefit; specifically, the IEP has no OT goals and no SL goals
2. Whether DCPS denied the Student a FAPE by failing to provide an appropriate IEP on December 6, 2013 that would provide academic benefit; specifically, the IEP has no OT goals
3. Whether DCPS denied the Student a FAPE by failing to provide an IEP placement for the 2013-2014 school year which was reasonably calculated to enable the student to make progress in the general education curriculum because the student required a less restrictive placement.
4. Whether DCPS denied the Student a FAPE by failing to provide an IEP placement for the 2014-2015 school year which was reasonably calculated to enable the student to make progress in the general education curriculum because the student requires a less restrictive placement.

A fifth issue, whether DCPS denied the Student a FAPE by failing to evaluate Student in all areas of suspected disability when DCPS refused to allow the Petitioner's independent evaluator to access to the school to conduct a FBA, was withdrawn by the Petitioner at the conclusion of the hearing.

For relief, Petitioner requested the Hearing Officer to order DCPS to revise the student's IEP to include appropriate academic, SL, OT and social emotional goals; DCPS to place the Student in a less restrictive placement and location of services for the 2014-2015 school year; award the student compensatory education to redress the denial of FAPE from July 1, 2013 to August 1, 2014² with one hour of social skills per week for 12 months and 2 hours of tutoring per week for 12 months provided by an independent provider.

Findings of Fact³

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

1. The student is a student with Autism under the IDEA who lives with his grandmother in the District of Columbia. He currently attends a separate special education class in Middle School A for students with Autism under the IDEA. The student has attended Middle School A during the 2013-2014 school year and this current school year.

² DCPS objected to a prospective finding of a denial of FAPE until the end of the ESY period for the summer of 2014.

³ Footnotes in these Findings of Fact refer to the sworn testimony of the witness indicated or to an exhibit admitted into evidence. To the extent that the Hearing Officer has declined to base a finding of fact on a witness's testimony that goes to the heart of the issue(s) under consideration, or has chosen to base a finding of fact on the testimony of one witness when another witness gave contradictory testimony on the same issue, the Hearing Officer has taken such action based on the Hearing Officer's determinations of the credibility and/or lack of credibility of the witness(es) involved.

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Previously, the student attended Nonpublic School. The student does not have regular contact with nondisabled peers other than in the hallways and school wide activities at Middle School A.⁴

2. In October 2012, while the student was attended Nonpublic School, the student received a SL assessment that included a Clinical Evaluation of Language Fundamentals-Fourth Edition (“CELF-4”). The assessment yielded the following standardized composite scores:

Core Language	82
Receptive Language	88
Expressive Language	80
Language Memory	80

The average mean score is 100 and the student’s scores were all below average. The evaluator noted the student has trouble reading and interpreting facial cues and body language of his peers and inferring their desires based on nonverbal messages. The evaluator recommended that SL services be reduced from 90 minutes per week to 60 minutes per week on his IEP.⁵

3. On October 23, 2012, the IEP team convened. The team noted the Student is on grade level in Math and Reading. In SL, the team noted the Student needs to work on figurative language, especially making inferences. The team noted that the student mastered and exceeded his OT goals; therefore, the team dismissed the student from OT services. The team agreed the student required a less restrictive environment. However, the parent did not agree.⁶
4. On February 22, 2013, the IEP team convened again. The SLP at the Non Public School stated the student would benefit from exposure to peers at his social level to enhance his social skills and his language needs primarily revolve around pragmatics. The team determined that no further assessments were necessary and he needed a less restrictive environment. The Petitioner expressed concern about moving to a less restrictive environment.⁷
5. On May 28, 2013, the IEP team convened a third time. The team determined the student requires 30.75 hours per week of specialized instruction outside the general education setting, 60 minutes of SL pathology per week outside the general education setting to work on pragmatic skills and 45 minutes of behavior support services outside the general education setting. The team determined the student should transfer to a less restrictive setting for the 2013-2014 school year.⁸

⁴ Petitioner, SEC

⁵ R-16, P-3

⁶ R-13, R-14

⁷ R-12, P-4

⁸ R-11, P-5

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6. On August 6, 2013, the student received an OT assessment. The assessment included the Bruininks Oseretsky Test of Motor Proficiency (“BOT-2”). The assessment yielded below average scores in five areas evaluated with the exception of average scores in manual dexterity. This impacts the student’s ability to copy forms and stay between lines. The student was given informal writing activities. His rate of writing was 23.73 letters per minute (“lpm”) when the average handwriting speed for his grade and age is 50.6 lpm. The evaluator recommended the student receive individual OT services for 60 minutes per week and group OT services. The evaluator further recommended the student receive increased practice with typing.⁹
7. On August 15, 2013, the student received a SL assessment. The assessment yielded a high average score on the Peabody Picture Vocabulary Test and a low average score on the Expressive Vocabulary Test. The student was administered the Clinical Evaluation of Language Fundamentals-Fourth Edition (“CELF-4”). The assessment yielded the following standardized composite scores:

Core Language	87
Receptive Language	93
Expressive Language	85
Language Content	92
Language Memory	86 ¹⁰

8. The student scored below average in all areas again; however, his scores improved since October 2012. The evaluator stated that his deficits impact writing and math. The student’s pragmatic skills were measured by the CELF-4 Pragmatics Profile. The CELF Pragmatics Profile is a criterion based assessment because pragmatic skills cannot be measured objectively. On the CELF-4 Pragmatics Profile which was administered to the parent, the student scored 102 when the expected score for his age was 136. He exhibited decreased pragmatic language skills with respect to his same age peers. His pragmatic skills are still emerging. For example, the Student has difficulty with turn taking and unstructured situations where peers might joke with him.¹¹
9. The evaluator recommended the student continue to receive SL services outlined on his IEP (one hour per week outside the classroom) with an additional goal added to address auditory memory deficits. The evaluator also recommended the SLP among other things focus on understanding and using nonverbal communication skills such as body language, facial cues and reading into social situations and responding appropriately. The evaluator stated that SL services will be more critical in a less restrictive setting.¹²
10. The student attended Middle School A for the 2013-2014 school year. He enrolled in a self-contained class for students with Autism. There were seven students and three staff in his class; including the SET and two classroom aides. The student also went to

⁹ P-6, OTR

¹⁰ P-7, SLP

¹¹ P-7, SLP

¹² P-7, SLP

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resource classes to prepare for the DCCAS test. The class would go to the cafeteria to take their lunch and eat their lunch in the classroom. The student's opportunities to interact with nondisabled students included walking in the hallways and an extra period one day a week for the students to engage in activities such as playing basketball, bocce or step dancing. The student received SL services at the beginning of the school year until December 6, 2013. The SLP did not work on his pragmatic SL goals because she believes that pragmatics have no educational impact on the student.¹³

11. The student received a psychoeducational assessment, dated October 2, 2013. The evaluator noted that he is somewhat academically beyond his classmates at the Nonpublic School. His teachers reported that he would benefit from more peers that are at his social level to enhance his social skills. The team at the Nonpublic School was in full agreement that the student would benefit from a school environment in which he could access grade level curriculum and a more socially appropriate peer group at his age level. The assessment included a Woodcock-Johnson III Test of Achievement (WJ-III) that measures his academic achievement and yielded the following standard scores:

Broad Reading	101
Letter-Word Identification	108
Reading Fluency	101
Passage Comprehension	93
Broad Math	80
Calculation	76
Math Fluency	92
Applied Problems	85
Broad Writing	94
Spelling	104
Writing Fluency	74
Writing Samples	105
Oral Language	80
Story Recall	86
Understanding Directions	81

The average mean score is 100. The evaluator noted that his Writing Fluency was in the beginning of the third grade level indicating that it takes him a long time to get his ideas on paper and his Oral Language scores represent an area of relative weakness for him. The student has some friends, but tends to veer towards adults and young children. When he is alone with just peers, he sometimes gets in conflicts.¹⁴

12. The evaluator recommended that the student be placed in a school environment with a more socially appropriate peer group at his age level, the student should be taught to use a word processor more efficiently to help improve his speed with getting his thoughts on paper, he should be permitted to use the computer on all written assignments and one-to-

¹³ SET, SLP

¹⁴ P-8

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one and small group instruction in mathematics calculation and word problems as he is two to three grades behind his same aged peers.¹⁵

13. On October 10 and 15, 2013, the student received an educational assessment. The assessment included a Brigance criterion referenced test conducted by the SET. The assessment stated the student was performing on a fifth grade level in word recognition, lower second grade level in reading comprehension even though he is able to read and decode many unfamiliar words, four grade level in spelling and below grade level in computation of whole numbers.¹⁶
14. On November 22, 2013, the student was observed in his SL therapy session. The student worked on synonyms and vocabulary. The student stated that he would like to interact with his non-disabled peers.¹⁷
15. On December 2, 2013, DCPS reviewed the August 15, 2013 SL assessment. The reviewer noted the student's score on his pragmatic profile indicated inadequate communication abilities. The School SLP determined the assessment was valid and reliable and the results of the assessment procedures selected for use with a student with impaired sensory, manual, or speaking skill accurately reflect the student's potential or achievement level. The School SLP recommended the assessment be considered by the IEP team in conjunction with other tests and relevant data to determine the student's continued eligibility for SL services. The CELF-4 Pragmatics Profile was administered to the SET and SEC. The assessment indicated the student had adequate communication abilities. The student exhibited appropriate interpersonal spacing, eye contact and appropriately requested help. The School SLP believes the student should be with nondisabled peers.¹⁸
16. On December 6, 2014, the School OTR reviewed the August 6, 2013 OT assessment. The School OTR determined the assessment was valid and reliable, the results of the assessment procedures selected for use with a student with impaired sensory, manual, or speaking skill accurately reflect the student's potential or achievement level and all conclusions were supported by the data provided. However, the SET reported that the student did not exhibit motor, perceptual or sensory weakness that significantly impact his ability to access or participate in the classroom environment.¹⁹
17. On December 6, 2013, the IEP team convened without the parent present. The team reviewed the OT assessment conducted on August 6, 2013 and determined that school based OT services are not recommended due to an absence of educational impact. The school SLP stated the Student made progress on his SL goals. The team also reviewed the SL assessment. The team noted that the SL assessment stated that pragmatic language was a concern and that the student's language limitations may negatively

¹⁵ P-8

¹⁶ P-9

¹⁷ P-10

¹⁸ P-7

¹⁹ P-6

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impact his academic performance in terms of his ability to take notes, complete comprehension tasks, communicate with peers, and to provide appropriate responses to questions. The team noted that the Petitioner was most concerned with social language skills. Notwithstanding the results of the assessment and the Petitioner's concerns,

The team determined the student will no longer receive SL services.

18. On May 30, 2014, the Student was observed for a Functional Behavioral Assessment ("FBA"). The evaluator noted the student did not interact with his peers in his reading class and then the evaluator observed the student receive a math test. The evaluator recommended the student have more opportunities for appropriate interactions with peers in a less restrictive setting, more opportunities to learn academic subjects in a less restrictive setting where he can learn self-management skills and emotional processing, add push in services and consultation services in his IEP and provide social skills instruction focusing on handling conflict in an age appropriate manner. The evaluator recommended another FBA in six weeks after the student is placed in a less restrictive setting.²¹
19. The Student received five Bs and one A during the 2013-2014 school year. However, he is significantly below grade level in Math.²²
20. On July 23, 2014, DCPS offered another program for the student at Middle School B. Middle School B is the student's neighborhood school. The program at Middle School B is a self-contained class for students with Autism. However, the students attending this program are higher functioning than the student's attending Middle School A. The class engages in community outings and has a more rigorous curriculum. The students are mainstreamed for art class and lunch with general education students and can be mainstreamed for academic classes. DCPS provided a prior notice of placement to Middle School B on July 23, 2014; however, the Petitioner enrolled the student in Middle School A.²³
21. The SEE believes the student requires compensatory services due to the harm caused by the lack of speech and language services impacting the student's self-confidence and performance in academics. She recommends the student receive at least one hour of social skills instruction in a group setting outside of the school day and 2 hours of academic tutoring per week, focusing on math. The SEE opined that the student has a reasonable chance to achieve a high school diploma as well as becoming a functioning and contributing adult with this compensatory service. However, she did not quantify the amount of harm. For example, she did not state how many grade levels that the student's

²⁰ P-6, P-11

²¹ P-16, SEE

²² R-4, SET

²³ R-1, AC

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academic achievement fell. Further, no specific programs were offered to the hearing officer to provide social skills instruction.²⁴

Conclusions of Law

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

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

Free appropriate public education or FAPE means special 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)...

DCPS denied the Student a FAPE by failing to provide an IEP placement on December 6, 2013 which was reasonably calculated to enable the student to make progress in the general education curriculum because the student required a less restrictive placement (“LRE”).

The LRE requirement is one of the central concepts of appropriate placement under the IDEA. Compliance with the IDEA's LRE provision essentially requires that students with disabilities receive their education in the regular classroom environment to the maximum extent appropriate or, to the extent such placement is not appropriate, in an environment with the least possible amount of segregation from the students' nondisabled peers and community.

School districts must offer a continuum of alternative placements for students who require special education and related services. The continuum should provide the range of potential placements in which a district can implement a student's IEP. It begins with the regular classroom and continues to get more restrictive at each placement on the continuum. 34 C.F.R. § 300.115 (a).²⁵

²⁴ P-21, SEE

²⁵ Pursuant to 34 C.F.R. § 300.115(a), DCPS “must ensure that a continuum of alternative placements is available to meet the needs of children with disabilities for special education and related services.” The comments to the regulations clarify that

The Act does not require that every child with a disability be placed in the regular classroom regardless of individual abilities and needs. This recognition that regular class placement may not be appropriate for every child with a disability is reflected in the requirement that LEAs make available a range of placement options, known as a continuum of alternative placements, to meet the unique educational needs of children with disabilities. This requirement for the continuum

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The LRE mandate demands that students be educated in regular classroom settings to the maximum extent appropriate. 34 C.F.R. § 300.114 (a); and *OSEP Memorandum 95-9*, 21 IDELR 1152 (OSEP 1994). The IDEA requires each public agency to ensure that:

1. To the maximum extent appropriate, children with disabilities, including children in public or private institutions or other care facilities, are educated with children who are nondisabled; and
2. Special 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. [emphasis added]

34 C.F.R. § 300.114 (b).

"First consideration" must be given to placement in a regular classroom with any necessary supplemental aids and services to make that placement successful before considering more restrictive placement options. *Letter to Cohen*, 25 IDELR 516 (OSEP 1996). The most-often articulated formulation of the test for whether a child with a disability can be "educated satisfactorily" in a regular class with supplementary aids and services used by courts and due process hearing officers in LRE disputes includes a consideration of the following factors:

1. Whether the district has made reasonable efforts to accommodate the child in a regular classroom.
2. The educational benefits available to the child in a regular class, with appropriate supplementary aids and services, as compared to the benefits provided in a special class. Educational benefits are considered to be both academic in nature, as well as encompassing socialization opportunities, which can include the development of social and communication skills, increased sense of self-esteem, and language and role modeling.
3. The possible negative effects, including those the child would have on other students in the class.

Oberti v. Board of Educ., 19 IDELR 908 (3d Cir. 1993).

reinforces the importance of the individualized inquiry, not a "one size fits all" approach, in determining what placement is the LRE for each child with a disability. The options on this continuum must include the alternative placements listed in the definition of special education under Sec. 300.38 (instruction in regular classes, special classes, special schools, home instruction, and instruction in hospitals and institutions). These options must be available to the extent necessary to implement the IEP of each child with a disability.

See 71 Fed. Reg. 46,587 (2006). As stated above, the continuum, in general, ranges from the least restrictive to the most restrictive: instruction in regular classes, special classes, special schools, home instruction, and instruction in hospitals and institutions. 34 C.F.R. § 300.115(b)(1) and *H.H. v. Indiana Bd. of Special Educ. Appeals*, 50 IDELR 131 (N.D. Ind. 2008).

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In this case, it is clear that DCPS has not made efforts to accommodate the student in a regular classroom. While the student would struggle in a general education Math class, his academic achievement indicates that he can perform well in English and Language Arts. He has solidly average scores in Broad Reading, Letter-Word Identification, Reading Fluency and Passage Comprehension. Although it would be an adjustment for the student to be around his general education peers, the student would receive educational benefits including development of social and communication skills and language and role modeling. The student may increase his sense of self-esteem with appropriate supports. This should be weighed against possible negative effects as follows:

1. The student is not receiving a sufficient educational benefit in a regular classroom, even with the provision of supplementary aids and services. *Pachl v. Seagren*, 46 IDELR 1 (8th Cir. 2006).
2. The student requires so much of the teacher's time and attention that he substantially interferes with the learning of others in the classroom. *Greenwood v. Wissahickon Sch. Dist.*, 50 IDELR 280 (E.D. Pa. 2008), *aff'd*, 54 IDELR 113 (3d Cir. 2010).
3. The student will require so much modification in the curriculum that the regular program has to be altered beyond recognition. See *Lachman v. Illinois State Bd. of Educ.*, 441 IDELR 156 (7th Cir. 1988), *cert. denied*, 111 LRP 7412, 488 U.S. 925 (1988).
4. The student threatens the safety of other students or poses a danger to himself. See *Clyde K. v. Puyallup Sch. Dist.*, 21 IDELR 664 (9th Cir. 1994).
5. The student engages in significantly disruptive behavior which interferes with the education of classmates. See *Renollett v. Independent Sch. Dist. No. 11, Anoka-Hennepin*, 45 IDELR 117 (8th Cir. 2006).

Here, the evidence indicates the student would receive sufficient educational benefit in a regular class as long as the student is enrolled in classes where he demonstrate academic achievement such as English and Language Arts. The student currently does not require an undo amount of the teacher's time and attention so it is unlikely he will require more attention in his general education class as long as he received appropriate supplemental aides and services. Although the student may require supplemental aides and services, the curriculum itself does not need to be modified. Finally, the evidence indicates the student does not present a safety threat or engage in significantly disruptive behavior which interferes with the education of classmates

If a student is not learning from exposure to other children and is isolated from classmates, interaction with peers should be considered an academic benefit weighing in favor of inclusion.²⁶ The student expressed an interest in attended general education classes. The student's pragmatic skills were measured on several occasions and the results of the assessments

²⁶ In *Hudson v. Bloomfield Hills Public School*, 23 IDELR 613 (E.D. Mich. 1995), *aff'd*, 25 IDELR 607 (6th Cir. 1997), *cert. denied*, 109 LRP 34838, 522 U.S. 822 (1997), the U.S. District Court, Eastern District of Michigan of Appeals held, and the 6th Circuit affirmed, that the LRE for the student was the special education classroom given that the student had not received a "true social benefit" in her prior year's fully inclusive placement. Conversely, if a student shows awareness and some positive reaction to being with nondisabled peers, then such interaction weighs in favor of inclusion (assuming the student can receive a meaningful educational benefit and is not unduly disruptive). *Daniel R. R. v. State Bd. of Educ.*, 441 IDELR 443 (5th Cir. 1989); *Sacramento City Unified Sch. Dist., Bd. of Educ. v. Rachel H.*, 20 IDELR 812 (9th Cir. 1994), *cert. denied*, 109 LRP 34833, 512 U.S. 1207 (1994); and *Katherine G. v. Kentfield Sch. Dist.*, 39 IDELR 63 (N.D. Cal. 2003), *aff'd*, 42 IDELR 29 (9th Cir. 2004).

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varied depending on the respondent. The evidence indicates that in the context of a self-contained class for students with Autism Impairment, the student performed adequately; however, in other setting such as camp the student had more difficulty with pragmatic skills. It is clear that the student will not develop pragmatic skills unless he receives more exposure to his nondisabled peers.

A student's removal from the regular education environment cannot be based on configuration of the delivery system, availability of educational or related services, availability of space, or administrative convenience. *Letter to Van Wart*, 20 IDELR 1217 (OSEP 1993). *Accord Letter to Boschwitz*, 213 IDELR 215 (OSERS 1988). The LRE for a child with a disability must be determined on an individual basis, based on the child's IEP. Categorical decisions clearly violate IDEA's requirement for individualized educational planning. *Letter to Van Wart*, 20 IDELR 1217 (OSEP 1993). The student is currently in a class for students with Autism Impairment. Although the student is a student with Autism Impairment under the IDEA, the team must look at the student's need, rather than the disability category in determining the student's LRE.

Placement decisions can be made only after the development of an IEP and in accordance with its terms. Only after the IEP has been developed does a district have a basis for determining where the student's needs can be served. If that process is reversed, then there is a danger of denying the student FAPE by developing an IEP to meet a predetermined setting. *Spielberg v. Henrico County Pub. Sch.*, 441 IDELR 178 (4th Cir. 1988). In this case, the evidence indicates the Petitioner could not dispute placement until after the IEP team convened on December 6, 2013 because it was not until after the IEP team reviewed the October 2, 2013 psychoeducational assessment that the team would have cause to consider reduction of the student's hours of specialized instruction.

Many factors may be considered in making a placement determination, the most important of which are the conformity with the LRE considerations of 34 C.F.R. § 300.114 through 34 CFR 300.118. What is pertinent in making the placement decision will vary, at least to some extent, based upon the child's unique and individual needs. *Letter to Anonymous*, 21 IDELR 674 (OSEP 1994). In this case, the student's academic achievement in reading clearly indicates the student is performing on grade level and should be included with his general education peers in English class. At the same time the student requires remediation in Math and should remain in a separate class for students with Autism. His current IEP does not afford him the ability to be in general education classes. Therefore, the December 6, 2013 IEP team erred in its failure to decrease hours of specialized instruction.

Finally, the IDEA requires that the child is educated in the school he would attend if not disabled. 34 C.F.R. § 300.116. A child with a disability should not be removed from education in age-appropriate regular classrooms solely because of needed modifications in the general curriculum. 34 C.F.R. § 300.116 (e). The IDEA states that the educational placement of a student with a disability shall be "as close as possible to the child's home" and that "unless the

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IEP of a child with a disability requires some other arrangement, the child is educated in the school he or she would attend if nondisabled." 34 C.F.R. § 300.116.²⁷

The student's home school is Middle School B and DCPS offered the autism program at Middle School B for the student. The program at Middle School B engages in community outings and has a more rigorous curriculum. The student are mainstreamed for art class and lunch with general education students and can be mainstreamed for academic classes. The student requires a less restrictive setting; therefore, the student should attend Middle School B.

The Hearing Officer finds that the student requires a less restrictive environment and should attend mainstream classes such as English and Language Arts. Based on the evidence presented, the Hearing Officer concludes that the Petitioner met her burden of proof on issues 3 and 4 above.

DCPS did not deny the Student a FAPE by failing to provide an appropriate IEP on May 28, 2013 that would provide academic benefit; however, DCPS did deny the Student a FAPE by failing to provide an appropriate IEP on December 6, 2013 because the IEP has no OT goals and no SL goals

The IDEA requires that a child's IEP contain a statement of the special education and related services²⁸ and supplementary aids and services, based on peer-reviewed research to the extent practicable, to be provided to the child, or on behalf of the child, and a statement of the program modifications or supports for school personnel that will be provided for the child. 34 C.F.R. § 300.320 (a)(4). As a result, the appropriate related services are determined in the IEP

²⁷ In determining the educational placement of a child with a disability...[DCPS] must ensure that--

- (a) The placement decision-- (1) Is made by a group of persons, including the parents, and other persons knowledgeable about the child, the meaning of the evaluation data, and the placement options; and (2) Is made in conformity with the LRE provisions...;
 - (b) The child's placement-- (1) Is determined at least annually; (2) Is based on the child's IEP; and (3) Is as close as possible to the child's home;
 - (c) Unless the IEP of a child with a disability requires some other arrangement, the child is educated in the school that he or she would attend if nondisabled
 - (d) In selecting the LRE, consideration is given to any potential harmful effect on the child or on the quality of services that he or she needs; and
 - (e) A child with a disability is not removed from education in age-appropriate regular classrooms solely because of needed modifications in the general education curriculum.
- 34 C.F.R. § 300.116.

²⁸ The term "related services" means

transportation and such developmental, corrective, and other supportive services as are required to assist a child with a disability to benefit from special education, and includes *speech-language pathology* and audiology services, interpreting services, psychological services, physical and *occupational therapy*, recreation, including therapeutic recreation, early identification and assessment of disabilities in children, counseling services, including rehabilitation counseling, orientation and mobility services, and medical services for diagnostic or evaluation purposes. Related services also include school health services and school nurse services, social work services in schools, and parent counseling and training." [emphasis added]

34 C.F.R. § 300.34 (a).

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process. Each student's need for related services, like his need for special education, must be determined on an individual basis as part of the IEP process and must be based on an assessment of the student's individual needs. *Letter to Ackerhalt*, 112 LRP 51286 (OSEP 09/06/12); and *Letter to Rainforth*, 17 IDELR 222 (OSEP 1990).

The IDEA requires that the statement of related services must be "based on peer-reviewed research"²⁹ to the extent practicable, to be provided to the child, or on behalf of the child, and a statement of the program modifications or supports for school personnel that will be provided to enable the child:

1. To advance appropriately toward attaining the annual goals;
2. To be involved in and make progress in the general education curriculum in accordance with 34 C.F.R. § 300.320 (a)(1), and to participate in extracurricular and other nonacademic activities; and
3. To be educated and participate with other children with disabilities and nondisabled children in the activities described in this section.

34 C.F.R. § 300.320 (a)(4).

In this case, the most recent August 6, 2013 OT assessment yielded below average scores on the BOT-2. The assessment was reviewed by the school OTR and agreed with the results of the assessment. Likewise, the August 15, 2014 SL assessment yielded low scores in pragmatic language. The School SLP reviewed the assessment and agreed with the results. However, the SET did not note an impact in her classroom in either OT skills or pragmatic language skills. The evidence indicates that it is unlikely the student would demonstrate deficits in either OT or pragmatic skills in his current classroom because he performs well above the other students who are low functioning student is autism.

However, it is more likely that the deficits evinced by the normed referenced assessments would show up in general education classes. As stated above, providing supplemental aides and services must not bar the student from being placed in a less restrictive setting.³⁰ Therefore, the student requires related services in order to benefit from his general education classes.

The Hearing Officer finds the student requires both OT and SL services to support the student in the general education setting as well as aides and services such as use of a word processor for written assignments. Based on the evidence presented, the Hearing Officer concludes that the Petitioner met her burden of proof on issues 1 and 2 above.

Compensatory Education

Under the theory of compensatory education, "courts and hearing officers may award educational services ... to be provided prospectively to compensate for a past deficient program.

²⁹ Peer-reviewed research is "research that is reviewed by qualified and independent reviewers to ensure that the quality of the information meets the standards of the field before the research is published." 71 Fed. Reg. 46,664 (2006).

³⁰ *Pachl v. Seagren*, 46 IDELR 1 (8th Cir. 2006).

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

The Hearing Officer concludes based on the evidence offered at hearing that tutoring would serve to place the student in the stead he would have been had received an appropriate IEP. However, the evidence did not support the amount of services Petitioner requested because the proposed plan was open ended. Despite the conclusion that Petitioner's proposed amount of services was inappropriate the Hearing Officer concludes that to award the student no compensation for the inappropriate IEP would be inequitable and therefore concludes that the student should be awarded at least nominal services as compensation. Consequently, the Hearing Officer directs that the student be provided academic tutoring in the order below.

ORDER

- (1) The Petitioner shall immediately enroll the student in Middle School B;
- (2) DCPS shall convene an IEP team meeting at Middle School B within 30 school days to determine the amount of specialized instruction that the student requires in the general education setting, the amount of SL services outside of the general education setting, the amount of OT services outside of the general education setting, pragmatic goals for SL services and OT goals;
- (3) For everyday of delay by the Petitioner, DCPS shall have one day to convene the meeting;
- (4) As compensatory education DCPS shall within 20 calendar days of the issuance of this Order provide the student 20 hours of independent tutoring at the prescribed rate set by the Office of the State Superintendent. The Petitioner shall use and complete this award by December 31, 2014.

SO ORDERED.

NOTICE OF RIGHT TO APPEAL

This is the final administrative decision in this matter. Any party aggrieved by this Hearing Officer Determination may bring a civil action in any state court of competent jurisdiction or in a District Court of the United States without regard to the amount in controversy within ninety (90) days from the date of the Hearing Officer Determination in accordance with 20 U.S.C. §1415(i).

Date: September 12, 2014

/s/ John Straus
Hearing Officer

Copies to: