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STUDENT HEARING OFFICE
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DISTRICT OF COLUMBIA
OFFICE OF THE STATE SUPERINTENDENT OF EDUCATION

Student Hearing Office
810 First Street, N.E.
Washington, DC 20002

Student,[1] by and through his Parents,	Date Issued: August 28, 2012
	Hearing Officer: Michael Lazan
Petitioners,	Case No: 2012-0433
v.	Hearing Dates: August 7/8, 2012
District of Columbia Public Schools,	
Respondent.	Room: 2003

HEARING OFFICER DETERMINATION

INTRODUCTION

This matter comes before the undersigned Hearing Officer on Petitioners' Notice of Due Process Complaint ("Complaint") received by Respondent on June 14, 2012. This IHO was appointed to hear this matter shortly thereafter, on June 18, 2012. Respondent filed a Response to the Complaint on June 25, 2012. A resolution meeting was held on June 28, 2012. The parties were not able to resolve the matter. The parties did not agree in writing to shorten the resolution period. The resolution period expired on July 14, 2012. The HOD was due on August 28, 2012.

The Response was filed together with a motion to dismiss. On June 25, 2012, Petitioners filed a motion to strike Respondent's motion to dismiss, contending that the motion to dismiss had misidentified facts. On June 26, 2012, Respondent filed a revised motion to

[1] Personal identification information is provided in Appendix A.

dismiss. On June 28, 2012, Petitioners filed opposition papers to Respondent's motion to dismiss. On July 3, 2012, this Hearing Officer sent a correspondence to the parties asking for clarification on the motions. Petitioners then informed this Hearing Officer that it was withdrawing its motion to strike. Respondent indicated that it was not seeking an immediate ruling on the motion and was instead seeking a ruling on the arguments in the motion in the HOD.

A Prehearing Conference was held on July 25, 2012. A Prehearing Conference Summary and Order was issued on July 30, 2012. After transmission of this order, Petitioners' counsel sought to further clarify issues. Another conference call was held on August 3, 2012. A revised Prehearing Conference Summary and Order was issued on August 6, 2012.

Disclosures were submitted by the parties to each other and the Hearing Officer on July 31, 2012.

Hearings were held on August 7, 2012 and August 8, 2012. These were closed hearing days. Petitioners were represented by Paula Rosenstock, Esq. Respondent was represented by Daniel McCall, Esq. Respondent moved to strike Petitioner's disclosure on the grounds that it was not properly served, but this Hearing Officer denied the motion because this Hearing Officer received a copy of the email containing the disclosure from Petitioners in timely fashion. Petitioners entered into evidence exhibits 1-22; Respondent entered into evidence exhibits 1-17. Petitioners presented as witnesses: the parent; Case Supervisor, X, Inc.; Sheila Iseman, Educational Advocate, SCI Educational Consultants; Marlene Gustafson, Director, School B. Respondent presented as witnesses: special education teacher; general education teacher; Toni Carroll Wills, speech and language

pathologist; Special Education Coordinator; Special Education Coordinator for School C.

At the end of the first hearing day, Respondent moved for dismissal on the grounds that Petitioners had not met their burden. This motion was denied because issues of fact remained for this Hearing Officer. Closing statements were given by the parties orally on August 8, 2012. The parties supplemented their closing statements with accompanying emails. Petitioners submitted an email with case citations on August 8, 2012. Respondent submitted three emails with case citations on August 9, 2012. No objection was raised to any such email.

JURISDICTION

This due process hearing was held, and a decision in this matter is being rendered, pursuant to the Individuals with Disabilities Improvement Act ("IDEIA"), 20 U.S.C. Sect. 1400 et seq., its implementing regulations, 34 C.F.R. Sect. 300 et seq., Title 38 of the D.C. Code, Subtitle VII, Chapter 25, and the District of Columbia Municipal Regulations, Title 5-E, Chapter 30.

BACKGROUND

The Student is male, eleven years old, and eligible for services as a student with autism. The Complaint raises the following issues relating to the educational placement offered by the District through the Prior Written Notice dated May 24, 2012: : 1) was the Student denied a FAPE by the DCPS recommendation to place the Student in a full-time self-contained program at School C for the 2012-2013 school year? 2) was the Student denied a FAPE by the DCPS recommendation to propose a program where the Student would have little access to "non-Autistic" peers? 3) was the Student denied a FAPE because the School C program and placement was inappropriate? 4) was the Student denied a FAPE because the parent was denied

a meaningful opportunity to participate in the decision-making process when it proposed placement at School D? 5) Is School B the least restrictive proper placement for the Student?

In the Prehearing Conference, the parties agreed that School D would not be an issue for the litigation. The parties agreed that this issue is moot and should not be material to the findings of fact and conclusions of law in the HOD. (PHC Order, p. 5)

ISSUES

The issues to be determined are as follows:

1. Did DCPS deny the Student a FAPE by offering an educational placement at School C for the Student in connection to the IEP meeting dated May 18, 2012?

a. Would the placement at School C inappropriately group the Student with students who are lower functioning than the Student and are not diploma bound?

b. Would the placement at School C provide the Student with an inappropriate "life skills" curriculum that is designed to address of the needs of low-functioning students who are not diploma bound?

c. Would the placement at School C fail to provide the Student with a "consistent" learning environment?

d. Would the placement at School C fail to provide the Student with an education in the least restrictive environment?

FINDINGS OF FACT

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 an eleven year old boy that has been determined to be eligible for special education as a student with autism. (PHC Order stipulation; P-11-1)

2. The Student can be perseverative, and has features consistent with presentation of ADHD. The Student is distractable, impulsive. The Student has deficient eye contact, topic initiation, topic maintenance, has poor narrative skills, pragmatic language. (Testimony of Iseman; P-5-9)

3. The Student's deficit areas prevent him from accessing or gaining benefit from the general education curriculum in the area of pragmatic language. The Student would benefit from social interactions out of school. (P-5-9-11)

4. The Student's counting, basic fact, and computation skills are an area of strength in math. The Student's decoding skills are an area of relative strength in reading. Comprehension of text is variable, and the Student struggles with inferencing, understanding the character, and understanding the main idea. The Student is good at learning rote information, but struggles with comprehension, using new information in a new context. (Testimony of Petrosky; P-8-3)

5. The Student expresses a sadness and a desire to be typical. (P-4-16)

6. The Student needs work on functional skills in terms of academics. This includes work on making change, getting around properly, functional math, functional communication. (Testimony of Petrosky)

7. The Student needs to be provided with an opportunity to practice skills across multiple contexts. (Testimony of Petrosky)

8. The Student participated in a psychoeducational evaluation on October 21, 2008. The Student demonstrated low average verbal skills, average non verbal skills, and low average overall cognitive ability. The Student's full scale IQ was tested at 81. (P-5-2)

9. The Student was at School A since the beginning of second grade, in a general education classroom with a full-time aide from X, Inc. The Student received ABA services through the X Inc. therapists. (Testimony of parent)

10. During the 2011-2012 school year, as part of his educational program, the Student received 40 hours a week of Applied Behavioral Analysis (ABA) through X, Inc. (PHC Order stipulation)

11. During the 2011-2012 school year, the Student received his ABA services both in the classroom setting and in the home setting. (PHC Order stipulation)

12. As a result of testing on March 11, 2011 and/or March 28, 2011, the Student met the ADOS (Autism Diagnostic Observation Schedule) criteria for classification as Autistic Spectrum. (P-4-3)

13. As a result of testing on March 11, 2011 and/or March 28, 2011, the Student scored in the autistic range in the ASQ (Autism Symptoms Questionnaires)(P-4-4)

14. As a result of WISC-IV testing on March 11, 2011 and/or March 28, 2011, the Student scored a Full Scale IQ of 60 on the WISC-IV. (P-4-6)

15. As a result of CELF-4 testing on March 11, 2011 and/or March 28, 2011, the Student received an overall standard score of 44, in the extremely low range. CELF-4 testing focuses on the student's language fundamentals. (P-4-7)

16. As a result of TOPS-3 testing on March 11, 2011 and/or March 28, 2011, the Student received an overall standard score of below 55, in the extremely low range. TOPS-3 testing focuses on the Student's linguistic ability to think and reason. (P-4-8)

17. As a result of Vineland-II testing on March 11, 2011 and/or March 28, 2011, the Student received a standard score on the "Adaptive Behavior Composite" of 69, in the low range, in the second percentile. (P-4-9)

18. As a result of BRIEF (Behavior Rating Inventory of Executive Function) testing on March 11, 2011 and March 28, 2011, the Student received a Behavioral Regulation Index score of 65, significantly elevated. The Metacognition Index, involving testing on planning, organizing, working memory, revealed a score of 73, significantly elevated. The Global Executive Composite, providing an overall measure of executive functioning, revealed a score of 71, significantly elevated. (P-4-11)

19. During the assessment, the Student appeared focused and attentive. (P-4-14)

20. By speech and language assessment dated September 27 and October 3, 2011 by Delisa Green, MS, CCC-SLP, the Student scored a 74 (below average) on the EVT-2 Test, which measures expressive vocabulary and word retrieval. (P-5-4)

21. By speech and language assessment dated September 27 and October 3, 2011 by Delisa Green, MS, CCC-SLP, the Student scored a 55 on the CASL test, which measures spoken language functioning. (P-5-4)

22. By speech and language assessment dated September 27 and October 3, 2011 by Delisa Green , MS, CCC-SLP, the Student scored below the criterion score for his age which relative strength in making and responding to farewells, using media such as telephones appropriately, and using appropriate strategies for gaining attention. (P-5-9)

23. During the fifth grade at School A, work became more difficult for the Student. The Student did most of his learning through the X, Inc. aide. He was included in several

groups, but he had a hard time with reciprocal conversations with peers and adults and he needed a lot of cueing from his aide to attend. (Testimony of

24. The Student benefitted from being with general education peers at School A. (Testimony of I Testimony of testimony of Carroll Wills)

25. The Student began initiating greetings during the fifth grade year. His sentence structure, ability to include details, and ability to shift topics increased. Gains were a function of many factors, including speech and language therapy, maturity, work at home, and 1:1 work with a therapist from X. Inc. (Testimony of Carroll Wills; Testimony of

26. The Student wants to socialize but a difficult time socializing and using pragmatic language. (Testimony of Divelbiss)

27. In or about 2012, the parents approached School B, a private school, to look into the possibility of placement at School B for the 2012-2013 school year. (Testimony of parent)

28. An observation of the Student dated March 30, 2012 indicates that the Student was easily distracted by his classmates, would become restless in his seat, and had to be continuously redirected. (R-6-2)

29. On March 16, 2012, the Student was accepted at School B. (Testimony of parent; Testimony of

30. On May 18, 2012, an IEP meeting was held for the Student. (Testimony of parent; Exh. 11-1)

31. At the time of the IEP meeting, the Student required a 1:1 dedicated aide to complete math tasks. The Student could add and subtract numbers to the tens, but could not apply his math knowledge to new situations or word problems without a specific controlled context. He could not time on an analog clock, compute elapsed time, or add or subtract money

amounts. He needed to work on math as it applies to life skills. He required curriculum to be significantly modified and needed to practice skills to the point of "over learning." (P-11-2; Testimony of Petrosky)

32. At the time of the IEP meeting, the Student could read single words but could not use these words in sentences. He needed 1:1 support in reading, especially to cue him to read aloud and to attend to him as he read. He needed to work on functional reading comprehension and needed to be able to recognize if he has decoded a word incorrectly. He also needed to work on developing his ability to learn new vocabulary. (P-11-4)

33. At the time of the IEP meeting, the Student wrote in a "stream of consciousness" style without sentence or paragraph structure. He required 1:1 support throughout the writing process. He was not able to write relevant answers to questions. Spelling was a relative strength. The Student's handwriting was that of a kindergartener or a first grader. (Testimony of Iseman; P-11-6)

34. At the time of the IEP meeting, the Student was able to perform daily living skills such as dressing himself, brushing his teeth, washing dishes, putting his clothes away. He needed assistance in learning how to function in the community, such as independently navigate the transportation system or making purchases in stores. (P-11-7)

35. At the time of the IEP meeting, the Student demonstrated age-appropriate articulation skills. He had difficulty with social language, particularly in the area of initiating conversations. He also had difficulty playing games and working independently. (P-11-9)

36. At the time of the IEP meeting, the Student was not able to sustain a conversation with peers or adults. He needed to be able to label his feelings, to recognize others' personal space, learn names, to be able to learn the importance of body language. (P-11-10-11)

37. At the time of the IEP meeting, to improve pragmatic language, the Student would have benefited from a "customized set of strategies" that should be incorporated into his overall educational plan. Strategies include attending to the source of information, visualizing the instructions, using visual cues. (P-5-9-10)

38. At the time of the IEP meeting, the Student would have benefited from "social stories," from being taught more vocabulary words, from learning to listen to and ask appropriate questions, from memory drills. (P-4-14-15)

39. As a result of the IEP meeting of May 18, 2012, the Student was recommended for full-time self contained special education classes without access to general education peers. (PHC Order)

40. The IEP recommends 14 hours of specialized instruction outside general education peer week, with one hour a day of reading outside general education, one hour a day of written expression outside of general education, and one hour a day of mathematics outside of general education. Related services of occupational therapy (160 minutes per month), speech and language pathology outside general education (60 minutes per week), behavioral support services (60 minutes per week). (P-11-13)

41. The IEP also recommends a part time dedicated aide for support in general education. The IEP indicates that the Student will be given support to attend general education specials of art, PE as appropriate and supervised by an aide. The IEP also recommends that the Student may be integrated into general education classes as appropriate for writing and reading. (P-11-14)

42. The IEP also recommends repetition of directions, simplification of oral directions, oral response to tests, location with minimal distractions, preferential seating, individual testing, extended time on subtests, flexible scheduling. (P-11-15)

43. The IEP Math goals relate to telling time, counting money, identifying money, computing whole numbers up to 4 digits. (P-11-2-4)

44. The IEP Reading goals relate to retelling main events in texts, stating the main idea and details in nonfiction texts, identifying new vocabulary, and attributing feelings and traits to characters, reading functional texts. (P-11-4-6)

45. The IEP Writing goals relate to writing non-fiction paragraphs, writing relevant answers to "wh" questions, independently writing letters and emails that communicate thoughts appropriately. (P-11-6-7)

46. The IEP Adaptive/Daily Living Skills goals relate to attending to another speaker, independently following three step directions, independently purchasing items in a store, navigating the public transit system, requesting attention by independently raising his hand or using words. (P-11-8-9)

47. An IEP Communication/Speech and Language goals relate to increasing pragmatic language skills through initiating verbal social interactions spontaneously, maintaining conversations with statements and questions, on a topic, maintaining appropriate eye contact, reciting personal information relating to such items as address or phone number, inviting a peer or adult to participate in the game. (P-11-9)

48. Additional IEP Communication/Speech and Language goals relate to increasing receptive language and increasing expressive language. (P-11-10)

49. The IEP Emotional, Social and Behavioral Development goal relates to learning the importance of communicating feelings through body language, facial expression, tone of voice and words. It also relates to the Student being able to label his feelings during emotionally charged situations, recognizing others' personal space, learning the names of other people in his life. (P-11-10-11)

50. A Prior Written Notice dated May 24, 2012, offered the Petitioner placement at School C. (P-12-1)

51. Petitioner's counsel sent the Respondent a letter dated June 12, 2012 indicating they were rejecting the placement at School C and were seeking funding for School B. (P-13-1)

52. Petitioners did not object to the goals in the IEP or to any other details of the IEP. Petitioners did object to the placement that the Respondent had designated for the Student, School C. (Testimony of parent; PHC Order stipulation)

53. The parent and Ms. Divelbiss visited School C and the parent was initially excited about the school. She met a from the school who showed her around the school. The parent and were shown classes. The parent felt the classes were "great" but was concerned that children were not talking or socializing and some of the children in the class were non-verbal. (Testimony of parent; Testimony of l

54. At School C, the Student would have a choice of going into an autism classroom with students on the autistic spectrum or a "non-categorical" classroom with a mixture of students including students with intellectual disability, learning disability, autism, students with other health impairment. (Testimony of

55. At School C, there are students with verbal skills that are similar to the Student in the autism and classroom and in the non-categorical classroom. Group instruction is provided in each classroom. Classwork is differentiated in each classroom. (Testimony of

56. At School C, computer-based reading programs called Read 180 and System 44 are used for students. Instruction includes "verbalizing and visualizing" curriculum. (Testimony of

57. The School C classrooms work with general education teachers to try and expand opportunities for student mainstreaming. (Testimony of

58. The School C classrooms contains a life skills component that is "adaptable" with the Student. Students can have such life skills lessons as lessons working on travel training. (Testimony of

59. The School C classrooms promote the use of "hand raising" by students. (Testimony of

60. If consistent with the IEP, the School C classrooms will observe a student, assess a student, and then if appropriate will try to start the student in a co-taught general education class or a "special." Such a student would start off with an aide. (Testimony of

61. The School C classrooms have autism coaches, who come to the classroom 1-2 times a week to consult with teachers, work on behavior strategies, environmental strategies. (Testimony of

62. In the School C autism classroom, there is one teacher, two instructional aides, and one dedicated aide. (Testimony of

63. In the School C autism classroom, the reading levels of the students ranges from kindergarten level to 4.9 grade level, with math levels ranging from pre-kindergarten to fourth or fifth grade level. (Testimony of

64. In the School C autism classroom, there are nine "slots" for students.

65. For the 2012-2013 school year, in the School C autism classroom, one student will be reading on grade level but has difficulty with conversation. This student is mainstreamed for math and social studies with an aide. A second student has communication issues. A third student has communication issues, requiring assistive technology to communicate. A fourth student communicates well, has behavioral concerns, and is able to complete fourth grade work. A fifth student has communication issues. A sixth student goes to general education in art, is on the first and second grade level academically. Other "slots" in the classroom are open. (Testimony of

66. For the 2012-2013 school year, in the School C non-categorical classroom, there are 8 "slots" for students.

67. For the 2012-2013 school year, in the School C non-categorical classroom, one student will have a genetic syndrome. This student can read on the 4th grade level. This student's math is on the first to the second grade level. This student's socialization ability is at grade level. A second student is at grade level in math, at fifth grade level in reading. A third student is at the first grade level in reading, third grade level in math. A fourth student is at the kindergarten level in reading, and at the second grade level in math. A fifth grade student is at the fourth grade level in reading, seventh grade level in math. (Testimony of

68. Of the students in the non-categorical classroom, one is in the self-contained classroom for three hours a day because this student is mainstreamed for a portion of the day.

Another student is also mainstreamed for a portion of the day. A third student is mainstreamed for one class per day. (Testimony of Fields)

69. Changes during the day in regard to peer grouping would not have a material impact on the work in the classroom. (Testimony of l

70. The classrooms at School C operate with students from 8:45am to 3:15pm. (Testimony of '

71. The Student has been at School B during the summer. The Student has been socially curious and has initiated contact with other children, both in a structured situation and in an unstructured situation such as the after care program. (Testimony of

72. At School B's summer program, the Student worked on elapsed time concepts, counting money, computing 4 digit problems, writing non-fiction, stating the main idea, identifying new vocabulary words . He required scaffolding and prompts. (P-19-1-3)

73. At School B for the 2012-2013 year, the self-contained class designated for the Student has eight children, two girls and six boys. (Testimony of

74. At School B for the 2012-2013 year, a social skills curriculum is provided, including "social stories" which center on conflicts. (Testimony of

75. At School B for the 2012-2013 school year, classes run for seven hours days except for Wednesday, when the school has a 5 hour day. (Testimony of

76. At School B for the 2012-2103 school year, the Student would be provided with a graded sixth grade program. (Testimony of

77. The designated classroom at School B for 2012-2013 school year contains one autistic student. The remainder of the students are learning disabled or learning disabled/other health impaired. These students have reading levels on the second grade level to the fourth

grade level. They have math levels on the second grade level to the high fourth grade level. (Testimony of

78. Instruction is differentiated at School B. Lessons tend to be more project oriented than lecture oriented. (Testimony of

79. Students tend to break into small groups with an aide or related services provider. (Testimony of

80. I found the testimony of all the witnesses credible, except that I found Dr. Iseman only partly credible because I found her testimony about the environment at School C to be in part inaccurate. In particular, Dr. Iseman indicated that there were two autism classes at School C for the 2012-2013 school year, which assertion was convincingly rebutted by

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:

The burden of proof in a special education due process hearing lies with the party seeking relief. 5 DCMR 3030.3; Schaffer v. Weast, 546 U.S. 49 (2005); see Hinson v. Merritt Educ. Center, 51 IDELR 65 (D.D.C. 2008)(inadequate number of witnesses called by Petitioner at hearing).

A. Contentions Relating to the Peer Group and Instruction Provided by School C.

The central purpose of the IDEA is to ensure that all children with disabilities have available to them special education and related services designed to meet their unique needs and provided in conforming with a written IEP (i.e., free and appropriate public education, or "FAPE"). 20 U.S.C. Sects. 1400(d)(1(A), 1401(9)(D); 1414(d); 34 C.F.R. Sects. 300.17(d), 300.320; Shaffer v. Weast, 546 U.S. 49, 51 (2005). Pursuant to the Supreme Court's decision in Board of Education of the Hendrick Hudson Central School District, Westchester County v. Rowley, 458 U.S. 176, (1982), the IEP must, at a minimum, "provid[e] personalized instruction with sufficient support services to permit the child to benefit educationally from that instruction." Branham v. District of Columbia, 427 F.3d 7 (D.C. Cir. 2005). The standard set out by the Supreme Court in determining whether a child is receiving a FAPE, or the "basic floor of opportunity," is whether the child has "access to specialized instruction and related services which are individually designed to provide educational benefit to the handicapped child." Rowley, 458 U.S. at 201. The IDEA, according to Rowley, imposes "no additional requirement that the services so provided be sufficient to maximize each child's potential commensurate with

the opportunity provided other children." Id. at 198; A.I. ex rel. Iapalucci v. Dist. of Columbia, 402 F. Supp. 2d 152, 167 (D.D.C. 2005)

The focus on an IDEA claim is the impact on a student's substantive rights. Lesesne ex rel. B.F. v. District of Columbia, 447 F.3d 828, 834 (D.C.Cir.2006); Smith v. District of Columbia, 2010 WL 4861757 (D.D.C. 2010); Holdzclaw v. District of Columbia, 524 F.Supp.2d 43, 48 (D.D.C.2007); Kruvant v. District of Columbia, 99 Fed. Appx. 232, 233 (D.C.Cir.2004).

Courts hold that school districts may designate schools for students as long as the District assigns a school that may appropriately implement a Student's IEP. T.Y. v. New York City Department of Educ., 584 .3d 412 (2d Cir. 2009). Although the LEA has the discretion with respect to the location of services, that discretion cannot be exercised in such a manner to deprive a Student of a FAPE. Gellert v. District of Columbia, 435 F. Supp.2d 18 (D.D.C. 2006); Holmes v. District of Columbia, 680 F. Supp. 40 (D.D.C. 1988).

Petitioners contend that the Student would not be placed with an appropriate peer grouping at the proposed educational placement of School C. Petitioners contend that School C would inappropriately group the Student with students who are lower functioning than the Student and are not diploma bound. Petitioners contend that a peer group such as at School B would be appropriate for the Student, where the Student would be placed in a class with mostly learning disabled or "other health impaired" students.

In support, Dr. Iseman testified that there would be two separate autism classes at School C and a "non-categorical" classroom. Dr. Iseman indicated that higher functioning students would not be left in the Student's classroom for the bulk of the school day. Dr. Iseman based this testimony on a visit to the school. Dr. Iseman did not identify the particular students who were to be grouped with the Student for 2012-2013. testified that she did

not see peer interactions during her visit to the school. Petitioners' witnesses concluded that the Student would be too high functioning for the School C classes, suggesting also that the Student would not have appropriate peer models for speech in the classes.

the School C Special Education Coordinator, testified differently. indicated that there was only one autism class at School C and that there was a "non-categorical" class that the Student could attend for 2012-2013. also indicated the characteristics of the children in the autism and "non-categorical" classes for 2012-2013. indicated that the Student would have been placed with some children who are at or above his level in terms of speech and language in either of the proposed classrooms. Though some of the higher functioning students would be mainstreamed for a portion of the day, indicated that such higher functioning students would also spend a significant portion of time in the self-contained classroom. This would be true for the non-categorical classroom and the autism classroom.

This Hearing Officer found more credible than Ms. Divelbiss or Dr. Iseman on these issues. provided more detail on the peer grouping and demonstrated greater knowledge of the school than or Dr. Iseman. explained that the "non-categorical" classroom will include a number of other students who are at or above the Student's levels in a variety of areas. One student in the "non-categorical" class has grade level socialization ability. Another student can read on the 4th grade level, above the Student's level. Another student is at the fourth grade level in reading, seventh grade level in math, both above the Student's levels. In regard to the autism classroom at School C, this classroom will also contain children also who are at or above the Student's level. One Student in the classroom

communicates well and is able to complete fourth grade work. Another will be reading on grade level, above the Student's level.

While there are some students in these classes who function below the Student's levels, I have found that the special education teachers in both the non-categorical classroom and the autism classrooms differentiate instruction to support all students in the classroom. Oversight by an autism coach assists in providing the special education teacher with appropriate strategies on differentiation. Differentiation extends to the life skills work that students perform in such classes. The record indicates, and I find, that the special education teacher would differentiate the "adaptable" life skills instruction at School C so that it would suit the Student's special education needs. For instance, the Student could work on travel training, which is discussed as a need in the IEP that is concededly appropriate.

Petitioners also suggest that, because some students are low functioning in the classroom, that no group instruction is possible. Petitioners indicate that the Student requires group instruction to be appropriately educated.

First, I find that both the "non-categorical" classroom and the autism classrooms do include group instruction, as indicated by Moreover, the record indicates, and I find, that the Student mainly requires 1:1 instruction on functional skills to progress academically. from School A testified that the Student did not do well in small group instruction in fifth grade and recommended functional 1:1 work in reading and math. The IEP also indicates that the Student requires 1:1 instruction in reading, writing and math. Moreover, in the observation of the Student on March 12, 2012, the Student was not observed to have been participating well in group instruction.

Petitioners also contend that the Student requires a "consistent" learning environment, and that the changes in peer groupings during the day would be disruptive to the Student. However, the record does not indicate that the Student is sensitive to a change in peers during the school day. Moreover, the record indicates, and I find, that any changes during the day in regard to peer grouping would not have a material impact on the work in the classroom.

Throughout their presentation, Petitioners and their witnesses suggest that the Student benefits from peer modeling, and would benefit from "more verbal" peers in the classroom in terms of social language and pragmatic language. Petitioners also indicate that the Student would not benefit from peer models in the classes at School C. While this Hearing Officer can certainly understand this position, Petitioners have not presented supporting reports or testimony in support from a speech and language expert or speech and language pathologist. Respondent, on the other hand, presented testimony from the Student's speech and language pathologist from School A, This therapist did not indicate that the Student needed to be grouped with an entire classroom of "more verbal" students to make adequate progress in pragmatic and social communication. The therapist also did not indicate that the Student's progress in speech during fourth and fifth grade was due to his proximity to typically developing students. Instead, Ms. Carroll Wills indicated, and I find, that any of the Student's recent pragmatic language gains were a function of many factors, including speech and language therapy, maturity, work at home, and 1:1 work with a therapist from X., Inc. A speech and language report in the record is consistent with this testimony. The report, by Delisa L. Green, does not suggest that the Student has made gains because of his proximity to typically developing peers and does not recommend that the Student be grouped with any particular kind of student for the forthcoming period. Nowhere in the report is there a suggestion that the

Student should be grouped with peers who have learning disabilities or are "other health impairment" to work on the Student's pragmatic language skills.

It should be underscored that there is no testimony to the effect that the Student worked together with typical peers during the 2011-2012 school year at School A. On the contrary, the record reflects, and I find, that the Student was largely working apart from the other students with a 1:1 aide from X, Inc. during this school year. As a result of the foregoing, I agree with Respondent that the educational placement at School C would provide the Student with an appropriate peer group and appropriate instruction for 2012-2013.

B. Contentions Regarding Least Restrictive Environment (LRE)

The IDEA requires that children with disabilities be placed in the "least restrictive environment. This means, "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 not disabled, and special classes, separate schooling, or other removal of children with disabilities from the regular educational environment occurs only when the nature or severity of the disability of a child is such that education in regular classes with the use of supplementary aids and services cannot be achieved satisfactorily." N.T. v. District of Columbia, 839 F. Supp.2d 29, 34-35 (D.D.C. 2012); Dist. of Columbia v. Nelson, 811 F. Supp. 2d 508, 514-15 (D.D.C. 2011); 20 U.S.C. § 1412(a)(5)(A); 5 DCMR 3011.1.

Mainstreaming is not only a "laudable goal" but is also a requirement of the Act." Devries v. Fairfax County Sch. Bd., 882 F.2d 876, 878 (4th Cir.1989). However, mainstreaming is not proper for every disabled child. Schoenbach v. Dist. of Columbia, CIV.A.05-1591(RMC), 2006 WL 1663426 (D.D.C. 2006)

In Oberti v. Board of Educ., 995 F.2d 1204 (3d Cir. 1993), the Third Circuit Court of Appeals explained the duties of school districts to provide an education to students with disabilities in the least restrictive environment. The Third Circuit set forth a test to determine whether students have been appropriately mainstreamed by a District: (1) whether the District has made reasonable efforts to accommodate the child in a regular education classroom; (2) whether there are 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 education class; and (3) whether there are possible negative effects of the inclusion of the child on the education of the other students in the class. Id., at 1217-1218. The Oberti court continued to explain that, if after considering these factors, the court determines that the District was justified in removing the child from the regular classroom and providing education in a segregated, special education class, the court must consider whether the school has included the child in school programs with nondisabled children to the maximum extent appropriate.

Here, Petitioners do not argue that Respondents failed to mainstream the Student. Instead, Petitioners argue that Respondents failed to put the Student in a classroom that contains "higher functioning" learning disabled and/or other health impaired students who are eligible for services pursuant to the IDEA.

Petitioners do not present authority to the effect that LRE requirements can be construed to support such an argument. A review of the precedent in the District of Columbia reveals no support for the contention that LRE requirements can support a claim that an autistic Student should be placed in a classroom with other students who are learning disabled and/or other health impaired.

The Oberti court's widely cited test also does not provide the basis for relief in this situation. On the contrary, the Oberti test supports the position of Respondent. Where students cannot be mainstreamed, the Oberti test looks to consider whether the school has included the child in school programs with nondisabled children to the maximum extent appropriate. School B would not provide the Student with any exposure to typically developing peers. However, the Student would be exposed to typically developing peers at School C. The Student's hours in special education classes are extensive but do not amount to the entire school day, and the IEP promises that the Student will receive aide support to provide the Student with exposure to typically developing peers during any "leftover" time. Moreover, part of the overall pedagogical approach at School C is to look for opportunities for the staff to mainstream its autistic population. Jennifer D. v. New York City Dep't of Educ., 550 F. Supp.2d 420 (S.D.N.Y. 2008) (where District's self-contained placement included no access to typically developing peers, and where parents' self-contained placement did include access to typically developing peers, District deemed to deny FAPE and reimbursement ordered).

As a result of the foregoing, I find that the District offered the Student a FAPE in the LRE for 2012-2013.

C. Unilateral Placement at School B.

Assuming arguendo that the District did deny the Student a FAPE through its designation of School C, this Hearing Officer will consider whether School B is an appropriate setting for the Student for the 2012-2013 school year.

In Branham v. District of Columbia, 427 F.3d 7 (D.C. Cir. 2005), the Circuit laid forth rules for determining when it is appropriate for IHOs to order funding of non-public placements. First, the court indicated that "(i)f no suitable public school is available, the [school system] must

pay the costs of sending the child to an appropriate private school." Id. At 9 (citing Jenkins v. Squillacote, 935 F.2d 303, 305 (D.C.Cir.1991)). The Circuit then explained that such relief "must be tailored" to meet a student's "unique needs." Id. At 11-12 (citing to Florence County School Dist. v. Carter, 510 U.S. 7, 16 (1993)). To inform this individualized assessment, courts must consider "all relevant factors" including 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 private school, the placement's cost, and the extent to which the placement represents the least restrictive educational environment. Id. at 12.

Applying the standards articulated in Branham, I find that School B would not be appropriate for the Student for the 2012-2013 school year. In particular, the record does not indicate that the student would have sufficient individualized support at the school. Petitioners agreed with the IEP, which states that the Student requires 1:1 support in reading, math and writing. I have found that the bulk of the Student's gains last year were as a result of services provided by the X, Inc. therapist. Moreover, I have found that the Student does not do well in group instruction. The testimony of indicates that School B largely works on group projects. There is no clear testimony or evidence that there would be sufficient individualized support for the Student to benefit from instruction at School B.

Additionally, I find that School B is not the least restrictive environment for the Student. As already noted in this HOD, School B is a special education school that does not contain any typically developing students. School C contains general education students, which the Student will be able to encounter while in the building and during "leftover" time as per his IEP.

Finally, recent caselaw in the District of Columbia underscores the point that an IHO need not grant relief for a non-public school if a public school is available. In N.T. v. District

of Columbia, 839 F. Supp.2d 29, 34 (D.D.C. 2012), where there was a finding of FAPE denial, the Court found that a non-public placement was not justified because, inter alia, the parents "have not argued, let alone demonstrated," that a public school could not meet the student's educational needs. Here, Petitioners have not argued or demonstrated that any public school could not meet the Student's educational needs.

ORDER

Based upon the above Findings of Fact and Conclusions of Law, it is hereby ordered that the Due Process Complaint in this matter is dismissed with prejudice.

Dated: August 28, 2012

Michael Lazan
Impartial Hearing Officer

NOTICE OF RIGHT TO APPEAL

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

Date: August 28, 2012

Michael Lazan
Impartial Hearing Officer