

**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
October 23, 2014

STUDENT, ¹)	
through the Parent,)	
)	Date Issued: October 22, 2014
Petitioner,)	
)	Hearing Officer: John Straus
v.)	
)	
District of Columbia Public Schools (“DCPS”))	
)	
Respondent.)	
)	
)	
)	

HEARING OFFICER DETERMINATION

Background

The Petitioner, who is the mother of the student, filed a due process complaint notice on August 8, 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 conduct a triennial occupational therapy assessment and a speech and language assessment of the student; thereby, failing to evaluate the student in all areas of suspected disability and determine the student’s special education and related services needs by August 8, 2012. The Petitioner also stated DCPS failed to provide an appropriate IEPs on April 9, 2013 and February 6, 2014; specifically, the disability category is not correct, the related service goals are not based on current assessments, the placement is in a full time separate classroom and the IEPs do not include a one to one aide. Additionally, the Petitioner asserted DCPS failed to propose an IEP for the 2014-2015 school year that is reasonably calculated to enable the student to make progress in the general education curriculum because the student requires a less restrictive placement. Finally, the Petitioner alleged DCPS failed to provide the Petitioner a prior written notice when placing the student in a more restrictive setting on February 6, 2014.

DCPS asserted that it was provided a Psychoeducational Evaluation completed on December 10, 2012. The MDT convened on February 5, 2013 to review the evaluation. The

¹ Personal identification information is provided in Appendix A.

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MDT reconvened on March 5, 2013 to complete the student's reevaluation. The MDT met again on April 9, 2013 and February 6, 2014 to review and revise the student's IEP. An Independent Comprehensive Psychological Assessment was completed on April 27, 2014 and the MDT convened on June 20, 2014 to review the evaluation. DCPS requested the speech language pathologist and occupational therapist be excused from the meeting and both practitioners provided written reports regarding the student's progress. Neither the parent nor her attorney disagreed with the excusal of the team members. The student's IEP requires 25 hours of specialized instruction and related services outside the general education setting. The team agreed the student should be placed in a self-contained classroom for students with Intellectual Disabilities. DCPS asserts the student's disability classification, goals and objectives, placement and services as outlined in the IEP are appropriate. Petitioner participated in person and was represented by counsel at the February 6, 2014 IEP meeting. Finally, DCPS states the Petitioner was informed at the meeting that the student's IEP would require a more restrictive setting.

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 August 8, 2014. This Hearing Officer was assigned to the case on August 11, 2014. The Petitioner waived the resolution meeting; however the Respondent did not. The resolution meeting took place on August 22, 2014. At the resolution meeting, DCPS opted to keep the 30-day resolution period open. The 30-day resolution period ended on September 7, 2014, 2014, the 45-day timeline to issue a final decision began on September 8, 2014. The hearing was scheduled on September 11, 2014. At the hearing, the Petitioner presented three witnesses and closed her case. Thereafter, the Respondent presented four witnesses but did not conclude its case. The hearing was scheduled on October 8, 2014 to allow the Respondent to complete its case. A final decision is due by October 22, 2014.

The Petitioner presented three witnesses: an Education Advocate ("EA"); a Special Education Expert ("SEE") and the Petitioner.

DCPS presented five witnesses: a Special Education Teacher ("SET"), a Special Education Coordinator ("SEC"), a Speech and Language Pathologist ("SLP"), an Occupational Therapist ("OTR") and a School Psychologist.

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The Petitioner's disclosures dated September 4, 2014, containing a witness list and Exhibits P-1, P-3 through P-16, P-19, P-20 and P-22 through P-24 were timely filed and admitted into evidence. Exhibits P-2, P-17, P-18 and P-21 were admitted into evidence over objection.

DCPS' disclosures dated September 4, 2014, containing a witness list and Exhibits R-1 through R-18, were timely filed and admitted into evidence.

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

1. Whether DCPS denied the student a FAPE by failing to conduct a triennial evaluation of the student and failing to evaluate the student in all areas of suspected disability and determine the student's special education and related services needs by August 8, 2012; specifically, the student requires an occupational therapy ("OT") assessment and a speech and language ("SL") assessment.
2. Whether the Respondent denied the Student a FAPE by failing to provide an appropriate IEPs on April 9, 2013 and February 6, 2014; specifically, the disability category is not correct, the related service goals are not based on current assessments, the placement is in a full time separate classroom and the IEPs do not include a one to one aide.
3. Whether the Respondent denied the Student a FAPE by failing to propose an IEP for the 2014-2015 school year that is reasonably calculated to enable the student to make progress in the general education curriculum because the student requires a less restrictive placement.
4. Whether the Respondent denied the student a FAPE by failing to provide the Petitioner a prior written notice when placing the student in a more restrictive setting on February 6, 2014.

For relief, Petitioner requested the Hearing Officer to order DCPS to fund independent assessments consisting of a speech and language assessment, an occupational therapy assessment and any assessment determined necessary by the independent evaluators; the Hearing Officer to determine the student is a student with Autistic Impaired under the IDEA; within 10 business days of the receipt of the last of the independent assessments, Respondent to convene a meeting to review the assessments, and review and revise Student's individualized education program consistent with the recommendations in the assessment reports; and DCPS to place the student in a less restrictive placement.

The Respondent made a Motion for a Directed Finding at the conclusion of the Petitioner's case in chief regarding the first issue. The Motion was overruled due to the hearing officer finding the Petitioner presented enough evidence to make a *prima facie* case on the issue.

Findings of Fact

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After considering all the evidence, as well as the arguments of both counsel, this Hearing Officer's Findings of Fact² are as follows:

1. The student lives with his mother in the District of Columbia. He attended Education Campus from Kindergarten to the middle of his 6th grade year. He left Education Campus in the middle of the 2012-2013 school year.³
2. On September 30, 2009, the IEP team at Education Campus convened to evaluate the Student to determine whether the Student is a student with a disability under the IDEA. The team reviewed an audiological assessment, DC Benchmark Assessment System, Brigance, SL Pathology assessment (including a Goldman-Fristoe Test of Articulation, Auditory Processing Skills and Test of Auditory Processing), classroom observation, psychological assessment and observation in an OT session. The team noted the student exhibits odd behavioral traits, fleeting eye contact, rocking back and forth, tangential or off topic conversations and he appears to be unaware of others and his environment and he can at times be aggressive. The team further noted that the student is a student with autism spectrum disorder and within the autism spectrum disorder, the student specifically has been identified with Pervasive Developmental Disorder, Not Otherwise Specified ("PDD-NOS").⁴
3. On September 20, 2012, the IEP team at Education Campus convened again. The team determined the student continues to be a student with autism spectrum disorder and that the student requires 5 hours per week of specialized instruction outside the general education setting, 15 hours per week of specialized instruction in the general education setting, 180 minutes per month of occupational therapy outside the general education setting, 240 minutes per month of speech and language pathology outside the general education setting and 120 minutes per month of behavior support services in the general education setting. The team determined the student does not require the services of a dedicated aide.⁵
4. On December 10, 2012, the student received a psychoeducational assessment. The assessment included a Wechsler Intelligence Scale for Children-4th Edition ("WISC-IV"). The assessment yielded the following standard scores:

Verbal Comprehension Index	63
Perceptual Organization Index	82
Working Memory Index	65
Processing Speed Index	78

² 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.

³ Petitioner

⁴ P-3

⁵ P-5, Petitioner

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Full Scale Intelligence Quotient (“IQ”) 66

The perceptual organization index is low average, the processing speed index is borderline and the verbal comprehension index, working memory index and full scale IQ are extremely low. The student received the Woodcock Johnson 3rd Edition, Test of Achievement (“WJ-III achievement”). The assessment yielded mildly impaired to moderately impaired scores in academic achievement.⁶

5. The evaluator noted the student WJ-III achievement scores were somewhat consistent with the WISC-IV scores. The evaluator stated the student is a student with PDD-NOS. The evaluator further stated the Student’s nonverbal capacities were developing at a significantly faster rate than his verbal capacities which suggests he is suffering from a Learning Disorder, Not Otherwise Specified. The evaluator recommended the student receive school based therapeutic services, mathematics interventions and social skills training.⁷
6. The Student transferred to Middle School on January 7, 2013 when he was in the sixth grade. He was placed in a program for students with high functioning autism.⁸
7. On January 31, 2013, the school psychologist provided the student with a psychological assessment. The school psychologist reviewed the December 10, 2012 psychoeducational assessment. The student was observed in his English class for 30 minutes. The student completed his assignment with the assistance of his teacher. The student received a Comprehensive Test of Nonverbal Intelligence-Second Edition (“CTONI-2”). The assessment does not require the use of expressive language skills. The assessment yielded an overall Nonverbal Intelligence Quotient of 63; which falls in the Extremely Low range of functioning. This score represents a significant decline in cognitive functioning of 17 points. The school psychologist interviewed the Petitioner, the student’s grandmother and classroom teacher to complete the Gilliam Autism Rating Scale-Second Edition (“GARS-II”). The Petitioner and classroom teacher’s scores indicate an unlikely range for exhibiting behaviors consistent with Autism Spectrum Disorder while his grandmother rated him very likely to exhibit behaviors consistent with Autism Spectrum Disorder in communication and social interaction and possibly in stereotyped behaviors. The school psychologist provided the Vineland Adaptive Behavioral Scales, Second Edition (“Vineland II”) to his teachers but not to the parent. The assessment yielded a standard score range of 72-80 which is moderately low adaptive functioning.⁹
8. The school psychologist noted that the Student demonstrated “cognitive slippage”. Although the evaluator could not offer an explanation for the cognitive slippage, he stated that some factors that may attribute to this decline are exposure to heavy metals, such as lead or mercury; seizure disorder; depressed mood or compromised emotional

⁶ P-6, R-8, school psychologist

⁷ P-6, R-8, school psychologist

⁸ R-5, Petitioner

⁹ P-7, school psychologist

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functioning or head trauma. The exposure to metals and seizure disorder suggests an Other Health Impairment (“OHI”) under the IDEA; the depression suggests emotionally disturbed (“ED”) under the IDEA and the head trauma suggests Traumatic Brain Injury (“TBI”) under the IDEA. However, the school psychologist did not have any evidence of these disability categories due to the lack of medical assessments. Therefore, the school psychologist stated the student aged out of the PDD-NOS classification and that the student is a student with an Intellectual Disability (“ID”) under the IDEA.¹⁰

9. On February 5, 2013, the IEP team at Middle School convened. The team noted the Student got into trouble shortly after enrolling in Middle School by demonstrating inappropriate sexual language toward females and negative behaviors on the bus. The team also noted the student requires concrete modifications and heavy prompting to successfully complete assignments. The Petitioner requested the student receive a psychological assessment.¹¹
10. On April 9, 2013, the IEP team at Middle School convened again. The team did not reviewed any existing data or assessments. The team determined the student is a student with ID under the IDEA. The team further determined that the student continues to require 5 hours per week of specialized instruction outside the general education setting, 15 hours per week of specialized instruction in the general education setting, 180 minutes per month of occupational therapy outside the general education setting, 240 minutes per month of speech and language pathology outside the general education setting and 120 minutes per month of behavior support services in the general education setting and the student continues to not require the services of a dedicated aide.¹²
11. On May 29, 2013, the student received a psychological assessment to determine the student’s disability. The assessment included the Woodcock Johnson 3rd Edition, Tests of Cognitive Abilities, Brief Intellectual Ability (“WJ-III brief”) which measures intelligence quotient. The assessment yielded the following standard scores:

Brief Intellectual Ability	71
Verbal Comprehension	81
Concept Formation	76
Visual Matching	63

All of these scores fall within the Mildly Impaired range. The student also received the Adaptive Behavior Assessment System, Second Edition, Parent Form (“ABAS-II”) which measures adaptive functioning. That assessment yielded average scores in all areas except low average in community use and extremely low in social. The evaluator stated the student does not display symptomology consistent with a diagnosis of Autistic Disorder or Intellectual Disability. Rather the evaluator stated the student is a student with PDD-NOS and a Learning Disorder using the Diagnostic and Statistical Manual of mental disorders 4th edition (“DSM-IV”). The evaluator noted that if he used the

¹⁰ P-7, school psychologist

¹¹ R-5, SEC, SET, Petitioner

¹² P-8, SEC, SET, Petitioner

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Diagnostic and Statistical Manual 5th edition, the student would be identified as a student with Autism Spectrum Disorder.¹³

12. On February 6, 2014, the IEP team at Middle School convened. The team added the WJ-III achievement scores from the December 10, 2012 psychoeducational assessment to the student's present levels of performance. The Speech pathologist stated the Student was able to answer comprehension questions from a third grade reading text with 80% accuracy. The Math teacher stated the student is able to do basic addition and subtraction problems; however, he requires heavy prompts and supports to complete most or all assignments aligned with the 7th grade math curriculum. The Petitioner requested additional independent assessments because she disagreed that the Student is a student with ID under the IDEA. The team determined the student continues to be a student with ID under the IDEA and placed student in a full time placement due to his disability category of ID. The team further determined that the student requires 25 hours per week of specialized instruction outside the general education setting, 180 minutes per month of occupational therapy outside the general education setting, 240 minutes per month of speech and language pathology outside the general education setting and 120 minutes per month of behavior support services in the general education setting and the student continues to not require the services of a dedicated aide. The team did not consider any harmful effect of placing the student in a more restrictive setting. No transition plan was developed for the student. However, the student remained in his general education classes until the end of the 2013-2014 school year.¹⁴
13. On March 19 and 21, 2014, the student received a Comprehensive Psychological Assessment. The evaluator interviewed the Petitioner, general education math teacher, general education history teacher and SET. The assessment included a Woodcock Johnson 3rd Edition, Tests of Cognitive Abilities ("WJ-III") which yielded the following scores:

Intellectual Ability	64
Verbal Ability	81
Thinking Ability	71
Cognitive Efficacy	48

The Intellectual Ability and Cognitive Efficacy scores were in the very low range; the Verbal Ability score was in the low average range and the Thinking Ability was in the low range. The student also received a Beery-Buktenica Developmental Test of Visual-Motor Integration ("VMI") which yielded a standard score of 87 which is in the Low Average range. The evaluator also interviewed the SET and Petitioner to complete the GARS-II. The SET score suggests that there is an unlikely probability of Autism, while the Petitioner's scores suggest that there is a possible probability of Autism and the Student displayed symptoms prior to age 3. The SEE opined that the disparity between the scores is due to the SET did not know the Student prior to age 3.¹⁵

¹³ P-9, SEE

¹⁴ P-10, SET, SEC, Petitioner

¹⁵ P-12, SEE

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14. The evaluator noted that this was consistent with a diagnosis of PDD-NOS because the student exhibits developmentally inappropriate symptoms present in communication, perseveration and cognitive inflexibility. However, he does not exhibit all symptoms for Autism Disorder under DSM-IV such as motility symptoms, stereotyped behaviors and extreme deficits with reciprocity. The evaluator further noted the student's low cognitive score does not mean that the student is a student with an intellectual disability because the previous Mildly Impaired score cannot be overlooked unless there is a medical problem to explain the disparity. The evaluator stated the student is a student with PDD-NOS and Mixed Receptive-Expressive Language Disorder. The evaluator recommended the student continue to receive OT and SL Therapy.¹⁶
15. A Vineland II was completed a second time by the Student's English teacher, SET and the Petitioner before April 27, 2014. The assessment yielded adaptive behavior composite scores of 69 or low by the English Teacher, 76 or moderately low by the SET and 79 or moderately low by the Petitioner.¹⁷
16. The school psychologist assessed the student after the March 19 and 21, 2014 Comprehensive Psychological Assessment was completed on April 27, 2014 but before the June 19, 2014 IEP team meeting. The school psychologist reviewed the March 19 and 21, 2014 Comprehensive Psychological Assessment and Vineland assessment. The school psychologist interviewed the Student's teachers. The SET noted the student is capable of completing his work when class assignments are modified. The Science teacher stated the student requires one to one instruction or he will just socialize with his peers. The school psychologist observed the student in his computer application class where the student was observed talking with his peers across the room. He was also observed in his science class where he did not complete his assignment and was talking to peers instead.¹⁸
17. The school psychologist noted the student did not age out of the PDD-NOS diagnosis. However, he stated that the Petitioner's interventions at home may account for the student being able to compensate for some of the Student's symptoms as related to PDD-NOS. The school psychologist noted the student's assessment yielded an IQ of 89 in 2009 and the subsequent IQ scores have dropped significantly. He suggested that this may be explained by when he was hit in the head with a door handle in 2011 and hit in the head with a metal belt buckle in either 2012 or 2013. However, because the Student never lost consciousness, it is unlikely due to a TBI. Also it is not likely the student is a student with ED even though he displays a fair amount of behavioral dysregulation in school. The school psychologist stated the Student exhibits salient features that are consistent with an Autism Spectrum Disorder, and/or PDD-NOS. However, he recommended the IEP team continue to determine the student is a student with ID under

¹⁶ P-12, SEE

¹⁷ P-13

¹⁸ R-7, school psychologist

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the IDEA because it is the disability code that will primarily impact him within the school environment.¹⁹

18. On June 19, 2014, the IEP team at Middle School convened to review the March 19 and 21, 2014 Comprehensive Psychological Assessment. The Petitioner was informed that the high functioning autism program was moving from Middle School at the end of the 2013-2014 school year and that a new program for students with ID would take its place. The Petitioner did not request a SL or OT assessment.²⁰
19. The student made progress on his IEP goals during the 2013-2014 school year.²¹ The student was in general education classes on a full time basis during the 2013-2014 school year. He was promoted to the eighth grade after receiving a B in World History and Geography, a C in English 7, a B in Test Taking, an A in Health and Physical Education, a C- in Mathematics 7, a C in Science 7, a D in Intermediate Band, a D- in Art and a D in Computer Apps.²²
20. The SET stated the teacher gave leniency on grades for the student's effort. The paraprofessional in the high functioning autism program worked with the Student often during the 2013-2014 school year. The student didn't regress; however, he made minimal progress. If the material is presented to him in a very concrete way, he can participate. The SET chunked the material and made modifications that brought the material down to his grade level.²³
21. At the beginning of the 2015-2015 school year, the Student was placed in a separate special education class in Middle School for students with ID under the IDEA. The ID class was placed at Middle School at the beginning of the 2013-2014 school year. The SEC believes the student is understanding his school work better because his subjects can be broken down for him.²⁴ The Petitioner believes the student is not happy in his current program because he is stuck in class all day and not learning. The Petitioner would like the Student to graduate from High School even though he is reading at the third grade level.²⁵
22. According to the SLP, the student does not require formal assessments because his areas of strength and weakness are evident from the data during his weekly sessions which provides the baselines for the present levels in his IEP. The student's SL goals and objectives are based on current data and are appropriate as written.²⁶
23. According to the Student's OTR, data regarding the student's progress in OT is collected continuously throughout the school year in the student's weekly OT sessions. The data

¹⁹ R-7, school psychologist

²⁰ R-2, SET, SEC, Petitioner

²¹ P-17, R-12, SLP

²² P-20

²³ SET

²⁴ SEC

²⁵ Petitioner

²⁶ SLP

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that would be generated through formal assessment of the student is the same as the data collected in her daily work with the student. The OT goals and objectives are appropriate.²⁷

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 did not deny the student a FAPE by failing to conduct a triennial evaluation of the student and failing to evaluate the student in all areas of suspected disability and determine the student's special education and related services needs by August 8, 2012

A triennial assessment is required under 34 C.F.R. § 300.303(b). Pursuant to 34 C.F.R. § 300.303(b), a reevaluation must occur at least once every 3 years, unless the parent and DCPS agree that a reevaluation is unnecessary. Here, it is clear that the student did not receive any formal SLP and OT assessments since the September 30, 2009 evaluation. The Petitioner argues that a reevaluation must include a review of a formal assessment every three years unless the parent agrees the assessment is unnecessary.

A reevaluation is described under 34 C.F.R. § 300.305(a). Pursuant to 34 C.F.R. § 300.305(a), the IEP Team and other qualified professionals, as appropriate, must review existing evaluation data on the child, including evaluations and information provided by the parents of the child; current classroom-based, local, or State assessments, and classroom-based observations; and observations by teachers and related services providers; and on the basis of that review, and input from the child's parents, identify what additional data, if any, are needed to determine whether the child continues to have such a disability, and the educational needs of the child; the present levels of academic achievement and related developmental needs of the child; whether the child continues to need special education and related services; and whether any additions or modifications to the special education and related services are needed to enable the

²⁷ OTR

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child to meet the measurable annual goals set out in the IEP of the child and to participate, as appropriate, in the general education curriculum.²⁸

In this case, the Student was evaluated or reevaluated by the IEP team as required under 34 C.F.R. § 300.305(a) on September 30, 2009, February 6, 2014 and June 19, 2014. Although the student did receive some formal SLP assessment as part of the September 30, 2009 evaluation. He has not received any further SLP assessments and has not received any OT assessment other than an observation as part of the September 30, 2009 evaluation.

The IDEA is silent with regard to formal evaluations. Pursuant to D.C. MUN. REGS. Tit. 30, § 3005.7, DCPS shall ensure that “the child is assessed in all areas related to the suspected disability including, if appropriate, health, vision, hearing, social and emotional status, general intelligence, academic performance, communicative status, and motor abilities [and] in evaluating each child with a disability...the evaluation is sufficiently comprehensive to identify all of the child’s special education and related services needs...” There is nothing under the IDEA that states that a formal assessment must be part of the triennial reevaluation.

Here, the Petitioner did not provide evidence that a formal assessment is necessary. No speech and language pathologist or occupation therapist testified on behalf of the Petitioner. However, the SLP testified that reevaluation of a student’s SL needs does not require a formal assessment to determine the student’s SL needs at this time. The OTR testified that formal assessments are not required for reevaluation of the student’s OT needs at this time either. The OTR also testified that progress notes, teacher input, parent input, and service trackers provide sufficient information regarding the student’s OT strengths and weaknesses. The Hearing Officer finds the student does not require a formal OT or SL assessment. Based on the evidence presented, the Hearing Officer concludes that the Petitioner did not meet her burden of proof.

DCPS did not deny the Student a FAPE by failing to provide an appropriate IEP on April 9, 2013 and February 6, 2014 by changing the student’s disability category, developing related service goals that are not based on current assessments or not providing a one to one aide; however, DCPS did deny the student a FAPE by placing the student in a full time class

"The IEP is the "centerpiece" of the IDEA's system for delivering education to disabled children," D.S. v. Bayonne Bd. of Educ., 54 IDELR 141 (2010) (quoting Polk v. Cent. Susquehanna Intermediate Unit 16, 853 F.2d 171, 173 (3d Cir. 1988), and the centerpiece for the implementation of FAPE is the IEP. S.H. v. State-Operated Sch. Dist. of the City of Newark, 336 F.3d 260, 264 (3d Cir. 2003).

²⁸ In response to a detailed inquiry setting out various reevaluation scenarios, the Office of Special Education Programs, U.S. Department of Education (“OSEP”) provided some guidance on the actions a district must take with regard to the IDEA’s three-year reevaluation requirement. OSEP explained that the review of existing data is not an independent process in itself, but is part of the general reevaluation process. “The reevaluation commences with the review of existing data in accordance with 34 C.F.R. § 300.305(a),” Assistant Secretary John H. Hager wrote in 2007. Letter to Anonymous, 48 IDELR 136 (OSEP 2007).

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The Petitioner asserts that DCPS erred in changing the student's disability category on April 9, 2013 from Autism Spectrum or Autism to Intellectually Disabled ("ID").²⁹ Pursuant to 34 C.F.R. § 300.8(a), a child with a disability means a child evaluated as having ID, a hearing impairment (including deafness), a speech or language impairment, a visual impairment (including blindness), a serious emotional disturbance, an orthopedic impairment, autism, traumatic brain injury, an other health impairment, a specific learning disability, deaf-blindness, or multiple disabilities, and who, by reason thereof, needs special education and related services. Pursuant to 34 C.F.R. § 300.8(c)(1), ID means significantly subaverage general intellectual functioning, existing concurrently with deficits in adaptive behavior and manifested during the developmental period, that adversely affects a child's educational performance. Intelligence quotient ("IQ") is a measure of intellectual capacity.

In this case, the student's IQ score was measured at 89 in 2009 which was solidly average; however, subsequent IQ scores have dropped significantly on assessments where IQ was measured on December 10, 2012, January 31, 2013, May 29, 2013 and March 19 and 21, 2014. The adaptive behavior scores also dropped from January 31, 2013 to May 29, 2013. The school psychologist could not explain the significant drop in IQ. He ruled out the ED category under the IDEA but not the OHI category or the TBI category under the IDEA because a medical assessment is necessary to rule out those disability categories.³⁰ Therefore, the Hearing Officer finds that because the school psychologist cannot rule out other causes for the drop in the student's IQ, it is premature to determine the student is a student with Mental Retardation under the IDEA.

Pursuant to 34 C.F.R. § 300.8(c)(1), Autism means a developmental disability significantly affecting verbal and nonverbal communication and social interaction, generally evident before age three, that adversely affects a child's educational performance. Other characteristics often associated with autism are engagement in repetitive activities and stereotyped movements, resistance to environmental change or change in daily routines, and unusual responses to sensory experiences.

The September 30, 2009, IEP team noted the student exhibits odd behavioral traits, fleeting eye contact, rocking back and forth, tangential or off topic conversations and he appears to be unaware of others and his environment. These behaviors are consistent with Autism. Autism is a lifetime disabling condition. All of the student's evaluators found that the Student is a student with PDD-NOS, which is part of the Autism Spectrum Disorder; including the school

²⁹ On Oct. 5, 2010, President Obama signed federal legislation, titled Rosa's Law, to require the use of the term "intellectual disability" instead of "mental retardation" and "individual with an intellectual disability" instead of "mentally retarded" in health, education, and labor policy. The law changes references in The Individuals With Disabilities Education Act (20 USC 1400 (c)(12)(C), 20 USC 1401 (3)(A)(i), and 20 USC 1401 (30)(C)). Rosa's Law provides that for purposes of regulations issued to carry out the provisions amended by the act "a reference in the regulations to mental retardation shall be considered to be a reference to an intellectual disability; and a reference in the regulations to the mentally retarded, or individuals who are mentally retarded, shall be considered to be a reference to individuals with intellectual disabilities."

³⁰ If a public agency believes that a medical evaluation by a licensed physician is needed as part of the evaluation to determine whether a child suspected of having ADD meets the eligibility criteria of the OHI category, or any other disability category under Part B, the school district must ensure that this evaluation is conducted at no cost to the parents. Letter to Williams, 21 IDELR 73 (OSEP 1994).

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psychologist who stated the Student exhibits salient features that are consistent with an Autism Spectrum Disorder. Therefore, the Hearing Officer finds the student is a student with Autism under the IDEA.

However, the Hearing Officer does not find that DCPS denied the student a FAPE by changing the disability category. The 7th U.S. Circuit Court of Appeals observed in *Heather S. v. State of Wisconsin*, 26 IDELR 870 (7th Cir. 1997), that the label affixed to a child's disability is not as important as the education and services the child receives under the IDEA. Thus, a district offers FAPE if it provides education and services that meet a student's unique needs, regardless of the student's specific category of eligibility. Therefore, the Hearing Officer finds that DCPS did not deny the Student a FAPE by changing the Student's disability category.

With respect to the related services goals not based on current assessments, as stated above, the SLP and OTR shared current data from the student's SL and OT sessions with the IEP team. The student's SL and OT present level of performance data is based on current information. Therefore, although the current information is not derived from formal assessments, the hearing officer concludes that DCPS did not deny the student a FAPE by failing to develop related service goals based on current assessments.

With respect to the omission of the services of a dedicated aide on the student's IEP, the Petitioner alleges that the student was provided the services of a dedicated aide even though the IEP does not state the student requires a dedicated aide. However, the SET credibly testify that the individual that the Petitioner thought was the Student's dedicated aide was the classroom aide. Therefore, Hearing Officer concludes the Student was not denied a FAPE by DCPS' failure to provide a dedicated aide.

However, as stated below, the Hearing Officer finds DCPS denied the student a FAPE by placing the student in a full time class.

DCPS denied the Student a FAPE by failing to propose an IEP for the 2014-2015 school year that is reasonably calculated to enable the student to make progress in the general education curriculum because the student requires a less restrictive placement

The Least Restrictive Environment ("LRE") is the legal mandate of the IDEA requiring 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 student's nondisabled peers and community. 34 C.F.R. § 300.114 (2)(i). 34 C.F.R. § 300.114 (a)(2)(ii) provides that "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." 34 C.F.R. § 300.114 (a)(2)(ii).³¹ In this case, the student was in general

³¹ Placement teams must first consider the placement of a student with a disability in the regular classroom. Based on the student's abilities and needs, they must take into account the full range of supplementary aids and services

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education classes on a full time basis during the 2013-2014 school year and made progress. The student had been in general education classes his entire academic career. He was then placed in a full time separate special education class for students with ID at the beginning of the 2014-2015 school year.

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. 34 C.F.R. § 300.115(a). "Because placement decisions must be determined on an individual case-by-case basis depending on each child's unique educational needs and circumstances and based on the child's IEP, [it is not] appropriate to require...that the continuum of alternative placements include a progressively more intensive level of [specialized] instruction and related services." 71 Fed. Reg. 46,587 (2006).

In this case, the February 6, 2014, IEP team revised the Student's IEP from 15 hours per week in the general education setting and 5 hours per week in the special education setting to 25 hours per week in the special education setting. This is a significant change in the student's special education programming. However, the change was not warranted because the student did make progress in the general education setting to pass his courses. The student remained in the general education setting, notwithstanding the IEP team's determination. If the team was so concerned about the student's progress in the general education setting, the student would have been placed in the separate classroom immediately after the February 6, 2014 IEP meeting. Instead, the student remained in his general education classes and was promoted to the eighth grade. He did not fail any of his classes at the end of the 2013-2014 school year.

A child's categorized disability cannot form the basis for removal from the regular educational environment. 71 Fed. Reg. 46,586 (2006). Here, the February 6, 2014 IEP team determined that the student should be placed in a full time placement due to his disability category of ID. The team not only erred by making a placement decision based on the student's disability category; the student's disability category is not ID.

In selecting the LRE, consideration must be given to any potential harmful effect on the child or on the quality of services that she needs. 34 C.F.R. § 300.116 (d).³² In this case, the February 6, 2014 IEP team did not consider any harmful effects of placing the student in a full time setting. In fact, the SET testified that the student didn't regress while in the general education setting. By placing the student in a class of students with ID, the student may not have the opportunity to develop appropriate social skills to successfully interact with nondisabled peers.

that could be provided to facilitate the student's placement in the regular education environment. Letter to Cohen, 25 IDELR 516 (OSEP 1996).

³² An IEP team's failure to document the specific reasons underlying its decision to remove a grade schooler with SLDs from her general education classroom for a portion of each school day, such as the types of supplementary aids and services that it considered and rejected, as well as an explanation of why they would not allow the student to make progress in her general education class prevented a District Court from holding that the district offered the student FAPE in the LRE. "The Hearing Officer found that the District provided only lip-service to the IDEA's mainstreaming requirement," the court wrote. *Hannah L. v. Downingtown Area Sch. Dist.* 63 IDELR 254 (E.D. Pa. 2014).

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Oberti v. Board of Education of the Borough of Clementon School District, 19 IDELR 908 (3d Cir. 1993), set forth the following test³³ for determining whether a child with a disability can be educated satisfactorily in a regular class with supplementary aids and services:

1. Whether the district has made reasonable efforts to accommodate the child in a regular classroom.³⁴
2. The academic and nonacademic 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.
3. The possible negative effects of the inclusion of the child on the education of the other students in the class.

Here, DCPS was making reasonable efforts to accommodate the student in the regular classroom and he was making progress in his classes; however the February 6, 2014 IEP team did not consider the benefits of the student being with his nondisabled peers such as social skills development and there is nothing in the record regarding any negative effects on the Student's classmates. The student did require excessive support and prompts to be successful in his general education classes. However, he worked hard and made enough progress to pass his classes. Therefore, the Hearing Officer finds that DCPS denied the student a FAPE by placing the student in a full time separate classroom.

DCPS did not deny the student a FAPE by failing to provide the Petitioner a prior written notice when placing the student in a more restrictive setting on February 6, 2014.

Pursuant to 34 C.F.R. §300.503(a), written notice must be given to the parents of a student with a disability when the public agency proposes to initiate or change the identification, evaluation or placement of a child or refuses to initiate or change the identification, evaluation, or educational placement of a child. The purpose of the Prior Written Notice ("PWN") "is to provide sufficient information to protect the parents' rights under the [IDEA] and to enable parents to make an informed decision whether to challenge the DCPS' determination and to prepare for meaningful participation in a due process hearing on their challenge. Taylor v. District of Columbia, 770 F.Supp.2d 105, 109-110 (D.D.C.2011). The PWN protects parents' rights by ensuring they are made aware of the decisions regarding their children.

DCPS did not fail to provide the parent PWN of the student's change in placement. The Petitioner presented no evidence that DCPS failed to provide the parent a PWN or that the parent

³³ When applied, the multifactor test used by courts to determine whether regular education is an appropriate placement for a student with disabilities has more often than not resulted in placement in the regular classroom with supplemental aids and services for students with severe cognitive disabilities. Daniel R. R. v. State Bd. of Educ., 441 IDELR 433 (5th Cir. 1989); Greer v. Rome City Sch. Dist., 18 IDELR 412 (11th Cir. 1991), remanded, 18 IDELR 830 (11th Cir. 1992), reinstated by, 19 IDELR 100 (11th Cir. 1992), reh'g denied, 110 LRP 51788, 974 F.2d 173 (11th Cir. 1992); and Sacramento City Unified Dist. Bd. of Educ. v. Rachel H., 20 IDELR 812 (9th Cir. 1994), cert. denied, 109 LRP 34833, 512 U.S. 1207 (1994). Still, LRE must always be an individualized analysis, the outcome of which will vary depending on the student's unique needs.

³⁴ A child with a disability cannot be removed from education in age-appropriate regular classrooms solely because of needed modifications in the general education curriculum. 34 C.F.R. § 300.116 (e). This requirement also extends to nonacademic settings. 34 C.F.R. § 300.117.

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student and parent were harmed by any failure to provide a PWN. The Petitioner participated in person in IEP meetings on February 5, 2013; April 9, 2013; February 6, 2014 and June 19, 2014. At each of these meetings she participated in discussions regarding the change in the student's disability classification and the changes to his IEP and placement. The parent was represented by counsel in the first three meetings. The parent was also provided copies of and signed the IEPs dated April 9, 2013 and February 6, 2014 IEPs. The parent was on notice of the proposed changes to the student's IEP and placement before the changes were first made in the April 9, 2013 IEP. DCPS ensured her participation throughout the entire decision-making process. Therefore, the Hearing Officer finds that DCPS did not deny the student a FAPE by failing to provide the Petitioner a prior written notice when placing the student in a more restrictive setting on February 6, 2014.

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. 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 the student was denied a FAPE by being placed in a separate class. However, the evidence did not support any compensatory services to redress the failure to place the student appropriately. Therefore, the Hearing Officer concludes that to award the student no compensation for the inappropriate IEP would be equitable.

ORDER

- (1) The student is a student with Autism under the IDEA;
- (2) DCPS shall place the student in general education classes and special education classes so that he may receive five hours of specialized instruction outside the general education setting and fifteen hours of specialized instruction in the general education setting;
- (3) DCPS shall convene an IEP team meeting at Middle School within 10 school days to determine the student's supplementary aides and services and determine an appropriate program where the student's IEP may be implemented;
- (4) For everyday of delay by the Petitioner, DCPS shall have one day to convene the meeting;

SO ORDERED.

NOTICE OF RIGHT TO APPEAL

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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: October 22, 2014

/s/ John Straus
Hearing Officer