

District of Columbia
Office of the State Superintendent of Education
Office of Dispute Resolution
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Parents, on behalf of Student,¹)	Room: 2006
Petitioner,)	Hearings: April 6/7, 2016
)	HOD Due: April 25, 2016
v.)	Hearing Officer: Michael Lazan
)	Case No.: 2016-0029
District of Columbia Public Schools,)	
)	
Respondent.)	

HEARING OFFICER DETERMINATION

I. Introduction

This is a case involving an X year old student who is eligible for services as a student with Other Health Impairment. (the “Student”)

A Due Process Complaint (“Complaint”) was received by District of Columbia Public Schools (“DCPS” or “Respondent”) pursuant to the Individuals with Disabilities Education Act (“IDEA”) on February 10, 2016 in regard to the Student. On February 22, 2016, Respondent filed a response. The resolution period ended on March 11, 2016.

II. Subject Matter 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.

¹Personally identifiable information is attached as Appendix A and must be removed prior to public distribution.

III. Procedural History

On March 1, 2016, this Hearing Officer held a prehearing conference. Attorney A, Esq., and Attorney C, Esq., counsel for Petitioner, appeared. Attorney B, counsel for Respondent, appeared. A prehearing conference order issued on March 4, 2016, summarizing the rules to be applied and the issues in the case.

There were two hearing dates, on April 6 and 7, 2016. This was a closed proceeding. Petitioner was represented by Attorney A, Esq. and Attorney C, Esq. Respondent was represented by Attorney B, Esq. Petitioner moved in Exhibits 1-40. Respondent objected to the use of “hyperlinks” within Exhibit 33. This objection was overruled. Exhibits 1-40 were admitted. Respondent moved into evidence Exhibits 1-8. Petitioner objected to pages 23-26 of Exhibit 2 because on authentication grounds. These objections were overruled. Exhibits 1-8 were admitted.

The parties presented written closing statements on April 15, 2016, and then additional “responsive” papers on April 19, 2016.

Petitioner presented as witnesses: Witness A, Consultant (Expert: Special Education, more specifically in the evaluation and identification of disability and the programming for and instruction of educationally disabled students); Witness B, Director, School C (Expert: Special education specifically the instruction of and programming for disabled students); Witness C, a teacher at School C; and the Student’s mother, a Petitioner. Respondent presented: Witness F, a physical therapist; Witness D, teacher, School B; and Witness E, a Compliance Specialist.

IV. Credibility.

I found all the witnesses in this case to be credible. No material inconsistencies were found with respect to any witness.

V. Issues

As identified in the Prehearing Conference Summary and Order and in the Due Process Complaint, the issues to be determined are as follows:

1. Did DCPS fail to provide the Student with a “full-time” special education IEP, i.e., an IEP which provides for all classes (including “specials” and lunch and free time) outside general education, for the 2015-2016 school year? If so, did DCPS violate 34 CFR 300.320 and act in contravention of some of the principles in such cases as Hendrick Hudson Bd. Of Educ. v. Rowley, 458 U.S. 176 (1982), Leggett and K.E. v. District of Columbia, 793 F.3d 59 (D.C. Cir. 2015), and Knight ex rel. Knight v. District of Columbia, 877 F.2d 1025, 1026-27 (D.C. Cir. 1989)? If so, did DCPS deny the Student a FAPE?

2. Did DCPS provide the Student with an inappropriate educational placement when it recommended placement at School B? If so, did DCPS violate 34 CFR Sect. 300.116 and the principles in such cases as Gellert v. District of Columbia, 435 F. Supp.2d 18 (D.D.C. 2006) and also the principles in such cases as Savoy v. District of Columbia, 844 F.Supp.2d 23 (D.D.C. 2012)? If so, did DCPS deny the Student a FAPE?

Petitioner contends that the school is very large, does not have enough science classes, provides the Student with an enrichment period that she does not need, that students work too independently, and that the students work with too many time constraints. They also contend that students at the school behave inappropriately, which takes away from instruction at the school. They contend that this is because, at least in

part, the school uses ineffectual behavior management techniques. It also contends that blocks of time for classes are too long for the Student. They also contend that the school does not provide Spanish, which the Student requires. They contend that the instructional format at the school is inappropriate since teachers speak too fast, that differentiation at the school is improper, that the school provides unnecessary instruction to students, and that the school's reading programs are inappropriate.

3. Did DCPS fail to assess provide the student with a timely physical therapy assessment? If so, did DCPS fail to assess the Student in all areas of suspected disability and thereby violate 34 CFR Sect. 300.304(a)(4)? If so, did DCPS deny the Student a FAPE?

4. Is the recommended location of services/placement a site where DCPS cannot implement its IEP? If so, did DCPS violate 34 CFR Sect. 300.350, 34 CFR Sect. 323(a), and precedent such as Van Duyn ex rel Van Duyn v. Baker School Dist. 5J, 502 F.3d 811 (9th Cir. 2007)? If so, did DCPS deny the Student a FAPE? Petitioner contends that the placement/location of services cannot implement the special education hours on the IEP.

Issue # 3 was withdrawn on the record prior to the testimony.

As relief, Petitioner seeks tuition reimbursement/payment at School C.

DCPS contends that Petitioners' claim is really a speculative "location of services" claim. They do not agree that parents can challenge methodology or the way they provide science instruction, do not understand what special education could mean in regard to lunch and recess, contend that "location of services" is a function of LEA

discretion, and that a failure to provide a physical therapy assessment does not rise to the level of FAPE denial.

VI. Findings of Fact

1. The Student is an X year old who is eligible for services as a student with Other Health Impairment. She was born in [REDACTED] and was adopted by her parents when she was very young, and is a compliant child with no behavioral issues who works very hard to learn. She has been diagnosed with Attention Deficit Disorder and Learning Disabilities, and has particular issues in the higher level skill areas. Notably, her work output and processing speed are slow. She also has some pragmatic language issues, difficulties with multi-step directions, and her oral formulation is labored and sometimes not precise. (Testimony of Witness A; Testimony of mother; P-14-4)

2. In 2009, she had two brain viruses and a partial agenesis of the corpus callosum was found, causing an inability to walk and talk. She has since regained most of her functioning, though she has some minor motor problems as a result. (Testimony of Witness A)

3. The neuropsychological evaluation from Center A dated March 23, 2012 showed that the Student scored in the low average range in terms of her overall intellectual abilities, with average receptive skills, verbal learning, and memory. There were significant deficits in processing speed, fine motor skills, sustained attention, executive functioning, and expressive language skills. Working memory issues were noted. Basic academic skills ranged from average to borderline, and she needed significantly more time to process information and come up with a response. (P-2-5)

4. Testing by DCPS in March 24, 2014 found that the Student was in the borderline range in terms of full scale intelligence at the 3rd percentile. Achievement testing on the WIAT-III found that the Student tested at the 6th percentile in oral language, at the 8th percentile in total reading, at the 12th percentile in broad reading, at the 7th percentile in reading comprehension and fluency, at the 4th percentile in math, and at the 39th percentile in overall math. (P-5-6, 8)

5. Speech and language testing from March, 2014 by DCPS found that the Student received average scores in receptive and expressive vocabulary, but showed below level critical thinking skills, below average reading level, and atypical processing speed and prosody. Another speech and language evaluation by DCPS in December 2014-January, 2015, found her to be in the mildly impaired area of functioning in terms of receptive and pragmatic language skills, with mostly average phonological processing abilities except in “rapid naming.” (P-6-7; P-8-8)

6. For the 2014-2015 school year, the Student attended School A, a non-public school. Petitioners were concerned about the Student’s attendance at this school because, in their view, her classmates were having behavioral issues and expectations were low. During an observation by Witness E from DCPS at this school, the Student was a “little bit” quiet but her teacher said she is motivated works hard. The teacher also mentioned that she has relative strengths in math and did not seem concerned about her social interactions. The Student made good progress on her math skills and her speech and language production and understanding at School A. (Testimony of Witness A; Testimony of Witness E; Testimony of mother; P-14)

7. In or about March, 2015, Witness A, the parents' educational consultant, visited School B for a different client. The visit lasted approximately sixty to seventy-five minutes. Witness A also spoke to Witness D, a teacher at the school. (Testimony of Witness A)

8. An evaluation of the Student by Witness A from March, 2015, on selected subtests of the Woodcock-Johnson III Tests of Cognitive Ability-Third Edition, found that the student scored in the average to high average range in all areas where the testing was not timed. When she was under a time constraint, the scores were extremely low, such as on the Retrieval Fluency subtest, where she scored at the .3 percentile. (P-10)

9. In anticipation of an IEP meeting in June, 2015, the parents were sent a draft IEP. Witness A sent it back with notes and discussed additions. Witness A sent her evaluation of the Student to the school district a day before the meeting. (Testimony of Witness A; Testimony of Witness E)

10. At the June, 2015 IEP meeting, the number of special education hours for the Student were discussed. The mother said that lunch and recess needed to be included in special education hours, and mother was concerned about the size of the school at School B. Witness A was active at this meeting, and talked about the Student's social and pragmatic language issues. School A personnel appeared by phone. The parents ended up unhappy with the hours of service in the final IEP, though DCPS did change goals because of the input of Witness A. (P-14; Testimony of Witness A; Testimony of mother)

11. The IEP recommends 25.5 hours per week of specialized instruction outside general education, with 260 minutes per month in occupational therapy, 120

minutes per month in speech-language pathology, and 120 minutes per month in physical therapy. The IEP contained goals in math, reading, writing, speech and language, cognitive, health/physical, and motor skills/physical development. It called for, among other things, review and repetition of previously learned skills, written prompts for math, a vocabulary reference sheet for math, pictorial representation, manipulatives, fading verbal and visual prompts, small group instruction, text presentation, graphic organizers, word processing software, editing checklist, extended time, supportive seating with back and trunk support, guided notes, pencil grip, chunked assignments, reference sheets, word banks, sentence starters, verbal and visual cues, teacher modeling, step by step directions, a slant board, guided notes, class notes, a calculator, scheduled breaks, testing accommodations, location with minimal distractions, and scaffolding. (P-14)

12. Several weeks after the IEP meeting, DCPS proposed [REDACTED] school for the Student which was inappropriate. Thereafter, DCPS proposed School B, a school which the parents knew nothing about. (Testimony of mother; P-15)

13. The mother went to the school and observed it. She also went to the school's website, and then visited again in the end of June/beginning of July (when there was a camp going on at the school). Witness D from the school was there and she described the nature of the program to the mother including the size of the classrooms and the curriculum. There was also a tour of the physical setting. (Testimony of mother)

14. Initially, Petitioners' biggest concern was that the length of the classes seemed very long and the lack of science instruction. There was also concern about the large physical plant and the Student's inability to functionally maneuver a lock because

she has a tremor in her hand. Petitioners also thought that the Student would “do poorly” in the [REDACTED] school cafeteria. (Testimony of mother)

15. Without a meeting, the IEP was amended on July 9, 2015 to add access to a key lock and to early dismissal. (Testimony of Witness A)

16. The Student was accepted at School C, a non-public school, during the summer. On August 5, 2015, the parents rejected School B and stated that they would send the child to School C. (P-19; Testimony of mother)

17. School B is a large building with multiple floors, and the Student would be assigned to the BOOST program at the school. This program uses behavioral supports such as a “pride position,” there is a points system, and the teachers “count down” if students are unruly. There are students with behavior problems in the classes that would be assigned to the Student. The school uses a block scheduling model (110 minutes long) for humanities and math, with two built-in breaks during this period. Science is provided weekly. All academic classes assigned to the Student would contain a maximum of twelve students, all of whom receive special education services in all academic classes. There is a special education teacher with an instructional aide in all academic classes. The Student would use the “Read 180” program for reading, which requires fifteen minutes of computer work, then fifteen minutes of small group instruction, then fifteen minutes of independent reading. (Testimony of Witness D; Testimony of Witness A; P-33-3)

18. The Read 180 program has not been shown to be effective by an organization called What Works Clearinghouse. (Testimony of Witness A)

19. All students in the BOOST classes have lunch and recess together. The Student would have lunch and recess with the ■ grade class, with a total of five adults at lunch every single day. (Testimony of Witness D)

20. School at School B starts at 8:45am and ends at 3:15pm, with 45 minutes of lunch. There is a thirty-minute general education advisory period daily. There is an aide that travels with the students to “specials.” (Testimony of Witness E; Testimony of Witness A)

21. Witness A again observed School B in October, 2015, again for a different client. She then observed the school for Petitioners and the Student on November 13, 2015. The November, 2015 observation showed that some children in the classroom were not doing their work, that there were students doing individual work, and there were interruptions of instruction by disruptive students. Witness A concluded that many of the students in the BOOST program are not ready for learning and exhibit a high degree of disruptive, non-complaint behaviors. She also concluded that the behavioral techniques used in the class did not sufficiently address these issues so as to restore a calm learning environment. (P-33-4-8)

22. School C contains grades kindergarten to twelve, 66 students, and has class sizes that are no larger than eight students. Instruction is individualized and there is small group instruction in the classes. Administrators at the school create IEPs for students, and all academic teachers are special education certified. The Lexia computer-based reading program is used to give students independent practice at home. All academic classes are in the morning. The Student herself does not receive any related

services during the school day, but receives speech and language therapy after school.

(Testimony of Witness B)

23. During the 2015-2016 school year, the Student has demonstrated processing and attentional issues at School C. She takes longer to complete certain assignments than the other students in class, and it can take her awhile to “pull up” language and to complete assignments. As accommodations, she received extended time, prompting and cueing on different assignments, and access to charts. Teachers also accommodate her by providing her with prompts and cues. (Testimony of Witness B)

24. She is good at doing homework, and she asks more questions in recent months. She will ask for repetition of information, and has increased her self-advocacy this year because she is becoming more confident with herself. She needs a break at times for work and gets extended time on assignments. (Testimony of Witness C; Testimony of Witness B)

25. She is making progress at School C in all areas, though in some areas there is more struggle than in others. She has received good grades during her time at the school, with A or A- in academic areas. (Testimony of Witness B; P-21)

VII. 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 Sect. 3030.3; Schaffer v. Weast, 546 U.S. 49 (2005).

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 conformance 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, 546 U.S. at 51.

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 District may be required to pay for educational services obtained for a student by a student's parent if the services offered by the District are inadequate or inappropriate ("first prong,") the services selected by the parent are appropriate ("second prong"), and equitable considerations support the parent's claim ("third prong"), even if the private school in which the parents have placed the child is unapproved. School Committee of the Town of Burlington v. Dep't of Education, Massachusetts, 471 U.S. 359 (1985); Florence County School District Four et al. v. Carter by Carter, 510 U.S. 7 (1993).

On the first prong, the Petitioner should show that the District denied the Student a FAPE. A FAPE is offered to a student when (a) the District complies with the procedural requirements set forth in the IDEA, and (b) the IEP developed by its CSE through the IDEA's procedures is reasonably calculated to enable the student to receive educational benefits. While Districts are required to comply with all IDEA procedures, not all procedural errors render an IEP legally inadequate under the IDEA. Pursuant to

the IDEA, when procedural violations are alleged, an administrative officer may find that a child did not receive a FAPE only if the procedural inadequacies (a) impeded the child's right to a FAPE, (b) significantly impeded the parents' opportunity to participate in the decision making process regarding the provision of a FAPE to the child, or (c) caused a deprivation of educational benefits. 20 U.S.C. Sect. 1415(f)(1)(E)(ii); 34 C.F.R. Sect. 300.513(a)(2).

Issue 1. Did DCPS fail to provide the Student with a “full-time” special education IEP, i.e., an IEP which provides for all classes (including “specials” and lunch and free time) outside general education, for the 2015-2016 school year? If so, did DCPS violate 34 CFR 300.320 and act in contravention of some of the principles in such cases as Hendrick Hudson Bd. Of Educ. v. Rowley, 458 U.S. 176 (1982), Leggett and K.E. v. District of Columbia, 793 F.3d 59 (D.C. Cir. 2015), and Knight ex rel. Knight v. District of Columbia, 877 F.2d 1025, 1026-27 (D.C. Cir. 1989)? If so, did DCPS deny the Student a FAPE?

Petitioners' argument is that the student needed special education instruction for lunch and recess given the Student's slow processing speed and its impact on her social interactions². This argument was presented to the IEP team in June, 2015, yet the team failed to increase the Student's special education hours to include special education services during lunch and recess. In support, Petitioners pointed out that, pursuant to 34 C.F.R. Sect. 300.117, the supplemental aids and services to be provided by the IEP team

² There is no testimony or evidence specific to the claim that the Student required a special education teacher during “specials,” and Petitioners did not so argue during closing argument. It is noted that 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. Sect. 1412(a)(5)(A); 5-E 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). Accordingly, even where students have had such profound special needs as Down Syndrome, courts have found it important for there to be some mainstreaming, albeit with supplemental aids and services. See, e.g., Oberti v. Board of Educ., 995 F.2d 1204 (3d Cir. 1993).

must address supplementary aids and services during non-academic times such as meals and the recess period. They also argued that the IEP must allow for the child, "to be involved in and make progress in the general education curriculum in accordance with paragraph (a)(1) of this section, and to participate in extracurricular and other nonacademic activities." 34 C.F.R. Sect. 300.320 (a)(4).

There is testimony and evidence to the effect that the Student is quiet and sensitive, and she does have some social issues. However, it is speculative for Petitioners to surmise that this Student would have such material difficulties at lunch and recess at School B that she would be denied a FAPE. First, there is nothing in the record to establish that the Student has severe issues with peers. There is nothing to establish that she has gotten into physical altercations with peers, or even verbal conflicts with peers, in any setting at all. Also, there is nothing the record to establish that the lunch and recess at School B is particularly anarchic or dangerous. Instead, the record establishes that the lunchroom at School B is a typical public school lunchroom, staffed with five adults. There is nothing in the record to establish that this is an unreasonable number of adults for a school lunchroom, and Witness A did not so testify. In fact, Witness A is not familiar with the school lunchroom at School B. Her observation of the school did not include a visit to the school's lunchroom, at least during lunch.

Moreover, the standard for judging the appropriateness of an IEP is to determine whether the document allows the student to gain some *educational* benefit. Leggett v. District of Columbia, 793 F.3d 59, 70 (D.C. Cir. 2015)(emphasis added). It is unclear how any difficulties that the Student might have at lunch or recess would impact on her academically. Petitioners also did not provide *any* caselaw in support of their position

that the lack of special education lunch and recess supervision can amount to a FAPE violation in this kind of scenario. My research, also, did not turn up any cases where a FAPE violation was found in a similar fact pattern. While there are cases that discuss difficulties that students have at lunch, they tend to involve students with severe allergies that are inappropriately exposed to food that would necessarily disrupt their whole day. D.C. ex rel. E.B. v. New York City Dep't of Educ., 113 LRP 12931 (S.D.N.Y. 2013).

Finally, it is not very clear from Petitioner's argument exactly what services they might be requiring for this student during lunch and recess. The pointed out that the lunch and recess at School C were appropriate because it is a small school, but there is no clear mention of what special education supports are provided at School C in this connection.

The contentions in Issue #1 have no merit and must be dismissed.

Issue # 2. Did DCPS provide the Student with an inappropriate educational placement when it recommended placement at School B? If so, did DCPS violate 34 CFR Sect. 300.116 and the principles in such cases as Gellert v. District of Columbia, 435 F. Supp.2d 18 (D.D.C. 2006) and also the principles in such cases as Savoy v. District of Columbia, 844 F.Supp.2d 23 (D.D.C. 2012)? If so, did DCPS deny the Student a FAPE?

Petitioners contends that the school is very large, does not have enough Science classes, provides the Student with an enrichment period that she does not need, that students work too independently, and that the students work with too many time constraints. They also contend that students at the school behave inappropriately, which takes away from instruction at the school. They contend that this is because, at least in part, the school uses ineffectual behavior management techniques. They also contend that blocks of time for classes are too long for the Student, and that the school does not provide Spanish, which the Student requires. They contend that the instructional format at

the school is inappropriate since teachers speak too fast, that differentiation at the school is improper, that the school provides unnecessary instruction to students, and that the school's reading programs are inappropriate.

Most cases involving FAPE denial focus on the IEP, the “centerpiece” of the Act. Honig v. Doe, 484 U.S. 305, 311 (1988). Nevertheless, Petitioners may bring claims based upon an inappropriate placement³ in certain situations. Although the LEA has some discretion with respect to school selection,⁴ 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). Courts can accordingly rule that school assignments violate the IDEA if, for instance, the school contains an environment that allows bullying. Shore Regional High School Board of Education v. P.S., 381 F.3d 194 (3d Cir. 2004)(denial of FAPE based on the likelihood that a proposed placement would subject a student with an emotional disability to continued bullying because of his perceived effeminacy); M.L. v. Federal Way School District, 394 F.3d 634 (9th Cir. 2005)(if a teacher is deliberately indifferent to the teasing of child with a disability and the abuse is so severe that the child can derive no benefit from the services that he or she is offered by the school district, the child has been denied FAPE).

In their brief, Petitioners' main argument related to School B was that it provides the Student with an inappropriate reading methodology. They argued that the primary reading instruction at School B is established through the Read 180 and Lexia computer-

³ As pointed out in Eley v. District of Columbia, 47 F. Supp. 3d 131 (D.D.C. 2014), the Student's educational placement includes the school, or location of services.

⁴ See Jalloh v. District of Columbia, 968 F.Supp.2d 203 (despite complaints about, among other things, the school's use of computers for instruction, school deemed able to implement the IEP and placement claims denied).

based reading programs, and pointed out that, according to the What Works Clearinghouse, that these programs have not been proven to be effective. They also pointed out that this reading instruction is not tailored to the Student's needs.

Districts are not required to put a particular methodology on the IEP. Rowley, 458 U.S. at 204. However, as stated in the comments to the 1999 IDEA regulations:

In light of the legislative history and case law, it is clear that in developing an individualized education there are circumstances in which the particular teaching methodology that will be used is an integral part of what is "individualized" about a student's education and, in those circumstances will need to be discussed at the IEP meeting and incorporated into the student's IEP. For example, for a child with a learning disability who has not learned to read using traditional instructional methods, an appropriate education may require some other instructional strategy.

Fed. Reg. Vol. 64, No. 48 (March 12, 1999) at 12552.

The record indicated that the Student would be assigned the Read 180 program were she to have attended School B. Witness A criticized this program as being too reliant on individual work and that it should be used only as a supplement to the main reading program.

While Witness A's comments about Read 180 are concerning, and while I agree that students should be taught by teachers throughout the school day instead of being left alone for long periods of time on computers where their minds might well wander, I do not believe, on this record, that Petitioners have sustained this argument. First, the program itself was not characterized by credible DCPS witnesses as one where the students would spend long periods of time on a computer. The record establishes only that the students would spend fifteen minutes a time on the computer in the Read 180 program. Second, the record does not clearly establish that Read 180 would be the sole

reading intervention for this student. Instead, the record established that reading would be taught through the use of Read 180 “hand in hand” with the content that the students are taught. It is noted that School C asks the Student to support her homework with another computer-based reading program, the Lexia computer program.

Moreover, Petitioners have pointed to no caselaw, in this jurisdiction or elsewhere, where a FAPE denial claim has been sustained on this basis. The language in the comments to the regulations suggest that methodology can be the basis of a FAPE denial claim only where the Student requires a specific methodology to be placed on an IEP and the school district refuses to do so. Otherwise, methodology questions are generally left to the discretion of states. As the Supreme Court put it in Rowley:

Congress' intention was not that the Act displace the primacy of States in the field of education, but that States receive funds to assist them in extending their educational systems to the handicapped. Therefore, once a court determines that the requirements of the Act have been met, questions of methodology are for resolution by the States.

Id., 458 U.S. at 208.

Petitioners also argued that the school environment at School B is inappropriate for the Student, pointing out that, when Witness A observed in November, the classrooms contained students who interrupted instruction. Petitioners contended that this disruption was in part because students were not ready to learn, and in part because of ineffective strategies employed by DCPS. Petitioners also contend that the school is too large for the student, who would do poorly in a large school with multiple floors. They point out further that the classes last 110 minutes, which are too long for the Student, and that the school would not provide regular Science instruction for the student.

The one somewhat similar case I have found in this connection in this circuit is Gellert, where a school was found to be too large for a student. In that case, Judge Kessler determined that the student had sensory issues that would make it impossible for him to do well in the classes, which could have as many as thirty children. She also noted that DCPS had the burden of proof, and had only called one witness, who testified on the phone.

Here, there is mixed testimony on whether the classes at School B were as chaotic as they were characterized by Witness A. Witness D, a teacher at the school, indicated that though some students had behavioral issues, those behavioral issues did not get in the way of student instruction. Witness D, a teacher of the class, knew the class better than did Witness A, who was there for a limited amount of time in November. It is noted that Witness A apparently did not come to her conclusion about student behavior at the school as a result of earlier visits in the school, where, apparently, students were better behaved.

Moreover, while I can certainly understand Petitioners' concern along these lines, especially given that the student was pulled from School A for precisely this reason, Petitioners did not become aware of this issue until well after the decision to place the Student at School C. Courts, at least in other Circuits, find this to be a material distinction in determining whether a particular school should be the subject of FAPE denial claims based on placement. See, e.g., P.F. and C.F. v. Bedford Cent. Sch. Dist., 2016 WL 1181712, at *9 (March 25, 2016, S.D.N.Y.) Moreover, while Gellert is good

authority, this case is something of an outlier in the caselaw. It has only been cited by courts once, and then on a procedural point, not for the proposition at issue here.⁵

With respect to the issue of “block” classes that run for over an hour, the testimony is that there were two breaks within the classes so that students would not have to focus non-stop for 110 minutes. There is no evidence that the Student has attempted to attend such classes, especially with the supports offered in the IEP. Nor do Petitioners present any evidence of the Student having difficulty in analogous situations, in or out of school. With respect to remaining issues raised in regard to the school setting, Petitioners’ arguments are also unavailing. While there is some testimony that the Student has some minor physical issues, the record does not establish that she could not traverse multiple floors in a large school setting or would otherwise be bothered by the school’s size. No physical therapist was called as a witness by Petitioners, whose conclusory testimony in this regard was not convincing. Petitioners’ contention that the lack of Science on a daily basis is inappropriate is more a question for a SEA rather than the basis of a Due Process Complaint against an LEA.⁶ Petitioner did not point to any

⁵ This was by Judge Walton while analyzing an argument as to whether plaintiffs could raise issues outside the Due Process Complaint. Judge Walton discussed the Gellert case and denied the request. M.O. v. District of Columbia, 20 F.Supp.3d 31, 39 (D.D.C., 2013)

⁶ While not specifically enumerated in the Prehearing Order, Petitioners’ brief also alleged that there was inadequate parental participation in the process to select the placement at School B, i.e., that the school was not selected at the IEP meeting. A.K. ex rel. J.K. v. Alexandria City Sch. Bd., 484 F.3d 682 (4th Cir. 2007). While A.K. does in fact stand for the proposition that school selection be made at the IEP meeting, there is little authority elsewhere to support this view. On the contrary, most cases find that the school does not have to be selected at the IEP meeting. See, e.g., See, e.g., T.Y. v. N.Y.C. Dep’t of Educ., 584 F.3d 412, 419 (2d Cir. 2009); A.W. ex rel. Wilson v. Fairfax Cnty. Sch. Bd., 372 F.3d 674, 683 n.10 (4th Cir. 2004); White v. Ascension Parish School Board, 343 F.3d 373 (5th Cir. 2003). Within the Circuit, I have reviewed Eley v. District of Columbia, 2012 WL 3656471 (D.D.C. 2012), where the court, in a slip opinion, did rule that the school should have been selected at the IEP meeting. However, in Eley, as in A.K., the court was influenced by the fact that – unlike here -- the student did not have a school to attend at the beginning of the school year. Eley has not, as yet, been influential in this Circuit. In fact, there is no reported case that cites to the decision in Eley, at least for the proposition at issue here.

caselaw in support of this contention. Finally, there is insufficient support in the record to sustain contentions that the instructional format at the school is inappropriate since teachers speak too fast, or that differentiation at the school is improper, or that the school provides unnecessary instruction to students. Indeed, none of those three arguments were clearly addressed in Petitioners' brief.

In sum, I find that I am constrained to dismiss Petitioners' claims in Issue #2.

Issue # 4. Is the recommended location of services/placement a site where DCPS cannot implement its IEP? If so, did DCPS violate 34 CFR Sect. 300.350, 34 CFR Sect. 323(a), and precedent such as Van Duyn ex rel Van Duyn v. Baker School Dist. 5J, 502 F.3d 811 (9th Cir. 2007)? If so, did DCPS deny the Student a FAPE?

Petitioners contend that School B cannot implement the IEP because it cannot provide enough special education hours. Petitioners base this claim on the calculations of Witness A, who testified that, because of the need for advisory and recess, the Student would receive 26.25 hours of specialized instruction and related services weekly although the IEP calls for 27.5 hours of specialized instruction per week.

"Failure to implement" claims are actionable if the school district cannot materially implement an IEP. A party alleging such a claim must show more than a de minimis failure, and must show substantial or significant portions of the IEP could not be implemented. Savoy v. District of Columbia, 844 F. Supp.2d 23 (D.D.C. 2012)(holding no failure to implement where District's school setting provided ten minutes less of specialized instruction per day that was on the IEP); see also Van Duyn ex rel Van Duyn v. Baker School Dist. 5J, 502 F.3d 811 (9th Cir. 2007). The undisputed testimony established that the school day at School B lasts 6.5 hours per day, which amounts to 32.5

hours per week. There is testimony that approximately 6.15 hours of that week would be taken up by advisory and lunch/recess. This leaves approximately 26.35 hours per week for specialized instruction. The IEP requires 25.5 hours of specialized instruction per week and approximately two hours of related services,⁷ amounting to 27.5 hours per week. According to my calculation, this leaves the Student about an hour and fifteen minutes shy of her required hours.

DCPS does not address this issue in its brief or in its response to Petitioners' brief. During the hearing, Witness E testified that DCPS could fulfill the entire mandate, but it is unclear how they could do this given that the advisory period is mandatory at School B. The question, then, is whether the lack of the hour and fifteen minutes per week amounts to a FAPE denial under the applicable law.

A review of the caselaw tends to support the school district. In Savoy, for instance, Judge Kollar-Kottelly found that the lack of ten minutes per day of specialized instruction, amounting to about fifty minutes per week, did not result in FAPE denial. Reviewing the caselaw, the Court noted that cases finding FAPE denial on a "failure to implement" theory tended to require a more significant deprivation, such as the failure to provide half of the hours on the IEP. Sumter County School District 17 v. Heffernan ex rel. T.H., 642 F.3d 478, 484-486 (4th Cir. 2011)(student, who was moderately to severely autistic, received only seven and one half to ten of the fifteen hours of instruction dictated by his IEP); Van Duyn, 502 F.3d at 823-824 (school failed to implement the student's IEP by denying him five of the eight to ten hours of math instruction required in the student's IEP).

⁷ For the sake of this analysis, each month is assumed to have four weeks in it, which is the most favorable calculation for Petitioners (since the related services mandate would be easier to meet in a month like March, 2016, which contained almost five weeks of school).

Petitioners bear the burden here, and they have not shown that the failure to provide the additional hour to hour and fifteen minutes per week would materially affect the student here. As a result, I find that I must dismiss this claim as well.

In sum, I empathize with these parents. Petitioners raise issues that would concern any good parent in this situation. Nevertheless, I find that I am constrained by law to dismiss these claims, which have not been found to be actionable in special education proceedings. I therefore need not go on to discuss the appropriateness of remedy, i.e., “prong two” and “prong three” of the Carter/Burlington analysis.

IX. Order

As a result of the foregoing, this matter is dismissed with prejudice.

Dated: April 25, 2016

Michael Lazan
Impartial Hearing Officer

cc: Office of Dispute Resolution
Attorney A, Esq.
Attorney B, Esq.
Attorney C, Esq.
OSSE Division of Specialized Education
Contact.resolution@dc.gov
Chief Hearing Officer

X. Notice of Appeal Rights

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: April 25, 2016

Michael Lazan
Impartial Hearing Officer