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Confidential

<p>Parents on Behalf of Student,</p> <p>Petitioners,</p> <p>v.</p> <p>District of Columbia Public Schools (“DCPS”) [“LEA”]</p> <p>Respondent.</p> <p>Case # 2017-0188</p> <p>Date Issued: November 27, 2017</p>	<p>CORRECTED HEARING OFFICER’S DETERMINATION¹</p> <p>Hearing Date(s): October 13, 2017, & November 6, 2017</p> <p><u>Representatives:</u></p> <p>Counsel for Each Party listed in Appendix A</p> <p><u>Hearing Officer:</u> <u>Coles B. Ruff, Esq.</u></p>
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¹ This “Corrected” HOD is issued to only make typographical and/or grammatical changes and/or to remove personally identifiable information; no substantive changes have been made. The HOD issuance date, November 27, 2017, remains unchanged, as does the applicable appeal date. Personally identifiable information is in the attached Appendices A & B.

JURISDICTION:

The hearing was conducted, and this decision was written, pursuant to the Individuals with Disabilities Act (“IDEA”), P.L. 101-476, as amended by P.L. 105-17 and the Individuals with Disabilities Education Improvement Act of 2004, the District of Columbia Code, Title 38 Subtitle VII, and the District of Columbia Municipal Regulations, Title 5 Chapter E30. The Due Process Hearing was convened on October 13, 2017, and November 6, 2017, at the District of Columbia Office of the State Superintendent of Education (“OSSE”) Office of Dispute Resolution, 810 First Street, N.E., Washington, D.C. 20003, in Hearing Room 2006.

BACKGROUND AND PROCEDURAL HISTORY:

The student or “Student” is age _____ and in grade _____.² Student resides with Student’s parents in the District of Columbia and is a child with a disability pursuant to IDEA, with a disability classification of Autism Spectrum Disorder (“Autism”). Student attends a non-public separate special education school (“School A”) and District of Columbia Public Schools (“DCPS”) is Student’s local educational agency (“LEA”).

Student’s parents (“Petitioners”) filed the current due process complaint on July 6, 2017, alleging, inter alia, that DCPS denied Student a free appropriate public education (“FAPE”) by failing to propose an appropriate individualized educational program (“IEP”) dated May 3, 2017, based on an IEP meeting convened on April 27, 2017.

The parties participated in resolution and did not resolve the complaint. The parties did not mutually agree to proceed directly to hearing. The 45-day period began on August 6, 2017, and originally ended and the Hearing Officer’s Determination (“HOD”) was due] on September 21, 2017.

The undersigned Impartial Hearing Officer (“Hearing Officer”) convened a pre-hearing conference (“PHC”) and issued a pre-hearing order (“PHO”) on October 5, 2017, outlining, inter alia, the issues to be adjudicated.

The parties agreed to a 42-day continuance and extension of the HOD due date to allow additional time for the parties to attempt resolution of the complaint. The Hearing Officer granted the motion to continue extending the HOD due date to October 31, 2017.

The hearing was convened on October 13, 2017, but not completed. The parties agreed to a second continuance and extension of the HOD due date by 27 calendar days to allow for additional hearing date(s). The HOD is due November 27, 2017.

² The student’s current age and grade are indicated in Appendix B.

RELIEF SOUGHT:

Petitioners seek as relief that the Hearing Officer find that DCPS has denied the student a FAPE by developing an inappropriate IEP. Petitioners ask that the Hearing Officer order DCPS to convene an IEP meeting with the parents to review and revise the IEP to include the parents' requested changes. In the complaint, Petitioners also requested that DCPS place and fund the student at School A and reimburse the cost of instruction and services privately provided to the student during the 2017-2018 school year. However, prior to the hearing DCPS issued a location of services letter noting it would place and fund Student at School A. Therefore, this relief is no longer sought by Petitioners.

DCPS Response to the Complaint:

DCPS filed a timely response to the complaint on July 24, 2017, and denies that there has been any failure to provide the student with a FAPE. DCPS specifically denies any failure to provide the student with an appropriate IEP. DCPS contends that in response to the HOD issued on April 3, 2017, DCPS convened the student's IEP meeting with Petitioners and Petitioners' counsel participating via telephone from School A, thereby implementing the April 3, 2017, HOD order.

DCPS asserts that during the IEP meeting, DCPS indicated that it required additional education data on the student and requested that Petitioners sign the consent for DCPS to observe the student and gather records at School A. DCPS contends Petitioners, through their counsel, refused to allow the requests unless DCPS agreed to various conditions. DCPS asserts that despite a directive from the Office of the State Superintendent of Education ("OSSE") to School A, DCPS has been prevented from observing the student and gaining information about the student's educational needs. DCPS contends Petitioners' refusal to cooperate should bar any of the relief they have requested.

ISSUE:³

The issue adjudicated is:⁴

Whether DCPS denied the student a FAPE by failing to develop an appropriate IEP on May 3, 2017, because the IEP: (a) prescribes too large a class size; (b) prescribes too high a student-to-

³ The Hearing Officer restated the issue at the outset of the hearing and the parties agreed that this was the issue to be adjudicated.

⁴ The PHO outlined the nine elements that Petitioner alleged were not addressed or inappropriately addressed in the May 3, 2017, IEP. At the outset of the Hearing, Petitioner withdrew one of these elements: insufficient 1:1 instruction. In addition, the parties stipulated that the IEP would be amended to address a second element: Student's supervision during lunch. Therefore, Student's supervision during lunch is not adjudicated in this HOD, but the HOD directs DCPS to amend the IEP to reflect the parties' agreement in that regard. Accordingly, there are six remaining elements Petitioner alleges are not addressed or inappropriately addressed in the "Other Classroom Aids and Services" section of the May 3, 2017, IEP, as well as the seventh element of a location of services.

adult classroom ratio; (c) does not prescribe a quiet classroom and limited noise and distractions outside the classroom; (d) does not appropriately limit group sizes outside of the classroom; (e) does not appropriately limit the busyness of hallways; (f) does not prescribe that the student will attend all specials with the same small group as the student's academic class; (g) does not prescribe a location for instruction and services.⁵

RELEVANT EVIDENCE CONSIDERED:

This Hearing Officer considered the testimony of the witnesses and the documents submitted in the parties' disclosures (Petitioner's Exhibits 1 through 51 and Respondent's Exhibits 1 through 11) that were admitted into the record and are listed in Appendix A.⁶ Witnesses' identifying information is listed in Appendix B.⁷

SUMMARY OF DECISION:

Petitioner had the burden of production on the issue to be adjudicated. Respondent held the burden of persuasion on the issue. Petitioner established a prima facie case on at least some of the elements in the issue to be adjudicated. Respondent sustained the burden of persuasion by a preponderance of the evidence that the May 3, 2017, IEP was reasonably calculated to provide Student educational benefit. Nonetheless, in light of the parties stipulation that Student's IEP be amended to address Student's supervision at lunch, and because there was uncertainty and need for verification that the level of restriction that Petitioners sought in the IEP, and School A is currently providing Student, are actually required for Student's success in an educational setting, the Hearing Officer directs in the order below that DCPS amend Student's IEP to reflect the parties' stipulation and that DCPS conduct an observation of Student at School A to consider the additional changes Petitioner seeks to the IEP, and to conduct an annual review of Student's IEP.

⁵ (a) The March 3, 2017, IEP prescribes a classroom size of 8 and (b) student/adult ratio of 4 to 1; Petitioners assert the IEP should prescribe a class size of 4 students and a student/adult ratio of 2 to 1; (c) The IEP prescribes that instruction and independent work time will be in a quiet area of the classroom and that teacher and adults in the classroom will speak in low, calm tones to the student. Petitioners assert the IEP should prescribe a quiet classroom and that Student not be placed with noisy students and students likely to have outbursts and take out teacher and adults in the second sentence and add the following: maximum group size of 25 when outside of the classroom, except for special school assemblies; (d) & (e) The IEP prescribes that there needs to be minimal risk of noise and distraction from outside of the classroom. Petitioner asserts the IEP should prescribe that during transitions there be no more than 10 students in the hallway at the time Student is in the hallway; (f) Petitioners assert that Student must attend specials classes with the same small group as Student's academic class; (g) Petitioners assert that the IEP must include the location of services.

⁶ Any items disclosed and not admitted or admitted for limited purposes were noted on the record and summarized in Appendix A.

⁷ Petitioner presented two witnesses: Petitioner and Student's former special education teacher at School A. Respondent presented two witnesses: a DCPS special education teacher and non-public monitor for School A, and a DCPS compliance manager.

FINDINGS OF FACT:⁸

1. Student resides with Petitioners in the District of Columbia and is a child with a disability pursuant to IDEA, with a disability classification of Autism. Student attends School A, a non-public separate special education school, and DCPS is Student's LEA. Student has attended School A since the start of school year ("SY") 2014-2015 when Student's parents unilaterally placed Student. (Respondent's Exhibits, 4-10, 5-1)
2. On July 15, 2015, Petitioners filed a due process complaint against DCPS that resulted in an HOD issued October 5, 2015, that ordered, inter alia, DCPS to convene a meeting and update Student's IEP and to reimburse Petitioners for Student's attendance at School A up to and until DCPS issued a prior written notice ("PWN") and/or location of services ("LOS") letter informing Petitioners of the educational placement and location of services that was being offered by DCPS to Student for SY 2015-2016. (Respondent's Exhibit 4-3, 4-19)
3. DCPS and Petitioners participated in IEP meetings in November 2015 and February 2016 and developed an IEP dated February 3, 2016. DCPS proposed an educational placement at a DCPS school. On April 20, 2016, Petitioners filed a due process complaint. An HOD issued on July 22, 2016, ordering DCPS to reimburse Petitioners for Student attending School A for the remainder of SY 2015-2016, and directed the parties to reconvene the IEP meeting to develop an "appropriate education program that reflects genuine deliberation by the team." (Respondent's Exhibit 4-28, 4-30, 4-43, 4-45)
4. DCPS and Petitioners participated in an IEP meeting and developed an IEP dated August 31, 2016. Petitioners challenged the IEP in a due process complaint filed October 31, 2016. Student continued to attend School A based on Petitioners' unilateral placement. On April 3, 2017, an HOD was issued that determined, inter alia, that the IEP DCPS proposed on August 31, 2016, denied Student a FAPE. The HOD ordered DCPS to, among other things, reimburse Petitioners for the cost of Student attending School A for SY 2016-2017 and to convene an IEP meeting to "revise Student's IEP, by (a) increasing Student's occupational therapy ("OT") and Speech Language services, (b) providing a specified minimum amount of 1:1 instruction, (c) providing a maximum student-teacher ratio, (d) defining a quiet instructional environment, and (e) providing a maximum class size and other necessary aspects of a school environment." Student continued to attend School A based on Petitioners' unilateral placement. (Respondent's Exhibit 4-46, 4-48, 4-49, 4-64, 4-70, 4-71)
5. Prior to convening the IEP meeting that the April 3, 2017, HOD ordered, DCPS wanted its DCPS placement monitor for School A and a DCPS autism specialist to observe

⁸ The evidence (documentary and/or testimony) that is the source of the Findings of Fact ("FOF") is noted within a parenthesis following the finding. A document is noted by the exhibit number. The second number following the exhibit number denotes the page of the exhibit (or the page number of the entire disclosure document) from which the fact was extracted. When citing an exhibit that has been submitted by more than one party separately the Hearing Officer may only cite one party's exhibit.

Student at School A to ascertain the level of restriction Student actually needed in light of the directives in the HOD. DCPS was not permitted to observe Student by School A because Student remained a privately funded student at School A. (Witness 2's testimony)

6. Although the April 3, 2017, HOD urged Petitioners and DCPS to meet together in person at a location chosen by DCPS for the IEP meeting, the HOD did not require it. DCPS had concerns about School A's ability to program for Student and, as result, wanted the IEP meeting held at DCPS central office. Petitioner and her counsel chose to meet at School A. Ultimately, the parties were not able to agree to meet together in the same location. DCPS personnel chose not to meet at School A, but chose to participate in a meeting at DCPS central office. Student's mother ("Petitioner"), her counsel and School A personnel participated by telephone from School A. The IEP meeting was held on April 27, 2017. (Witness 2's testimony, Respondent's Exhibit 4-70)
7. During the April 27, 2017, meeting the DCPS non-public monitor for School A expressed concerns that at School A, Student was not receiving instruction from teachers who are specifically trained in autism, and suggested that Student's IEP include that requirement. However, there was no agreement to include that provision. (Witness 2's testimony, Petitioner's Exhibit 7-8)
8. Student's former special education teacher, from August 2016 to February 2017, found that Student was not able to do without one-to-one attention. When the teacher worked with Student and another student together, she found it difficult to keep Student seated. During group work Student was not attentive. Student would not come to the table with the group and would be standing at the back of the classroom. Because of that difficulty, the teacher recommended that Student be in a class with a maximum of 4 students and with a student to adult ratio of 2 to 1 in the classroom. However, the teacher had never been in a classroom with Student with only 4 students. (Witness 1's testimony)
9. In addition, because of difficulties Student displayed in noisy environments, Student's former School A teacher also was of the opinion that Student should be in a classroom that was entirely quiet, and should not be in a room with noisy students. That teacher believes that Student simply being in a quiet section of a classroom was not sufficient. The teacher also found Student did not fair well with cancelling headphones in more noisy and crowded areas such as a lunchroom, since Student would remove the headphones. (Witness 1's testimony)
10. Student's former teacher also found that Student had difficulty when Student was with unfamiliar students, which resulted in the School A teacher suggesting that Student have special classes with the same students as academic classes so that Student has instruction with the same students throughout the day. (Witness 1's testimony, Petitioner's Exhibit 7-35, 7-36)
11. Student's School A teacher found that Student had difficulty being in a setting in with large numbers of students, such as school-wide assemblies of more than 25 students.

Generally, Student would not attend assemblies because Student could not tolerate them. When Student was in environments with more than 25 students, Student would run away or throw a tantrum, screaming, crying on the ground, covering Student's face and almost hyperventilating. Student would take an inordinate amount of time to calm down after such an incident, and get back on task. (Witness 1's testimony)

12. The section of School A, where Student's classroom is, has no more than 15 students, and there is rarely, if ever, an instance where all 15 students are in a hallway at one time, unless there is a fire drill. (Witness 1's testimony)
13. During the April 27, 2017, meeting, Student's current and former School A teachers shared their recommendations for the student's class size and the student-to-adult ratio of 2 students to 1 adult. The DCPS special education teacher participating in the meeting expressed that that low of a student to adult ratio was difficult to justify without confirming through her own observation of Student that what the teachers were reporting was truly what Student required to be successful in the classroom. (Petitioner's Exhibit 7-16, 7-17)
14. The April 27, 2017, IEP meeting resulted in an amended IEP that is dated May 3, 2017. Petitioners and DCPS agreed on the IEP goals, the level and setting of the specialized instruction and related services in Student's IEP. DCPS also agreed with Petitioner requests for the amount of one-to-one instruction. DCPS also proposed language in the "Other Classroom Aides and Services" section of the IEP to address Petitioner's concern about Student's class size, the student-to-adult ratio in the classroom and level of noise in the classroom. DCPS did not agree to all the specific items Petitioner and the School A personnel suggested regarding these items. DCPS also did not agree to a request that Student not be in a classroom with students prone to outbursts or the number of students Student would be around at any one time in the hallway or during school gatherings. DCPS believed there was insufficient documented data to support this level of specificity without DCPS conducting an observation of Student at School A to verify that the level of restriction was necessary. (Witness 2's testimony, Petitioner's Exhibits 6-1, 6-26, 7-17, 7-21, 7-23, Respondent's Exhibit 11-2, 11-3, 11-4, 11-5)
15. DCPS believed that the class size, student-to-adult ratio, and language addressing the quiet classroom environment for Student, placed in the "Other Classroom and Aides and Services" section of the IEP was sufficient to meet Student's needs, absent an observation by DCPS of Student at School A to verify the need for additional levels of restrictions. DCPS did not have data beyond the statements of the Student's School A teachers to support any additional limitation of the number of students Student could be with in a hallway, and at school gatherings, or the stated necessity that Student remain with the same students for special and academic subjects. During the April 27, 2017, IEP meeting, the parties discussed an observation, but ultimately did not agree on the specific language of a release document that would allow DCPS to conduct an observation of Student at School A. (Witness 2's testimony, Respondent's Exhibit 5-26, Petitioner's Exhibit 7-17)

16. In pertinent part, the “Other Classroom Aides and Services” section of the May 3, 2017, amended IEP states the following: “Maximum classroom size is 8 students with a ratio of 4 students to 1 adult. Instruction and independent work time will be a quiet area of the classroom. To assist with keeping noise down in the classroom, a rug needs to be used to decrease noise from tapping/walking feet. The teacher and adults in the classroom will speak in low calm tones to the student. Noise cancelling headphones need to be available while [Student] is working on independent tasks. To assist in decreasing noise, there needs to be minimal risk of noise and distraction from outside the classroom.” (Petitioner’s Exhibit 6-26)
17. The May 3, 2017, IEP prescribed on the “Least Restrictive Environment” (“LRE”) section of the IEP that all Student’s specialized instruction and related services be provided outside general education and includes the following statement on that page: “[Student] has been enrolled within [School A] receiving specialized instruction with a special education teacher for the instructional day.” (Petitioner’s Exhibit 6-27)
18. The IEP also prescribed extended school year (“ESY”) services and included ESY goals. (Petitioner’s Exhibit 6-29)
19. DCPS issued a PWN dated May 4, 2017, which noted the following: “DCPS disagreed with the ratio of 2 students to 1 adult. And Parent disagrees with DCPS’ ratio of 4 students to 1 adult. DCPS disagrees with the language concerning the removal of noisy children or with those prone to outbursts. DCPS disagrees with parent on having no more than ten students in the hallway when [Student] is present. DCPS disagrees with Student being with the same group of students during all instruction including specials. Parent believes Student should be with same peers throughout the day. Parent disagrees with DCPS that the student needs teachers with autism training. DCPS is requesting quantitative evaluation data for each of the speech language goals for each of the nine weeks as agreed upon on the published IEP and information about the purpose, goals, and outcomes of the speech consultation.” DCPS noted in the PWN the following explanation of reasons for proposal or refusal of action: “DCPS requires written documentation of behaviors and observations before setting these restrictive environments.” (Respondent’s Exhibit 7-1)
20. Following the IEP amendment, DCPS sought assistance from OSSE to conduct an observation of Student at School A. DCPS was scheduled to observe Student at School A during ESY. Student did not attend ESY, despite the IEP prescribing ESY services. Since Student has attended School A, Student has never attended the School A’s summer session. (Petitioner’s testimony, Witness 2’s testimony, Respondent’s Exhibits 5-29, 12-1, 12-2)
21. Student’s annual IEP review date was August 24, 2017. After Petitioner’s current due process complaint was filed, DCPS and Petitioner agreed at a resolution meeting on August 2, 2017, that because DCPS had concerns that School A could not effectively address the needs of students with Autism, particularly a student with Student’s level of need, DCPS would explore other non-public schools for Student to attend, and the parties

would conduct Student's annual IEP review once Student was attending a different school. (Witness 2's testimony, Petitioner's Exhibit 6-1, Respondent's Exhibit 6-3)

22. On October 5, 2017, DCPS issued a PWN that changed Student's LRE placement category to a separate day school. The PWN stated the following: "Due to the changes made in related service hours and the supplemental aides and services section of [Student's] IEP on May 3rd, 2017, [Student's] IEP is no longer to be services in the general education setting. [Student] now requires a separate day school placement to meet [Student's] needs as outlined on the amended IEP dated May 3rd, 2017." (Respondent's Exhibit 9-1)
23. On October 5, 2017, DCPS issued Petitioners a letter informing them that DCPS agreed to fund Student's "location of service at [School A] from the start of SY 2017-2018 starting August, 22nd 2017 until an appropriate location of service is found." The letter went on to state that "DCPS continued to have concerns about [Student's] location at [School A] as DCPS does not see [School A] as being able to meet the needs as indicated on [Student's] IEP. DCPS is currently undergoing a referral process for [Student] and working to find a location of service that can implement [Student's] Individualized Education Program and provide [Student] with the special education services [Student] needs. DCPS is currently working through the referral process through additional non-public schools and encourage[s] your continued cooperation in finding an appropriate location for [Student]. (Respondent's Exhibit 9-3)
24. DCPS has referred Student to other non-public schools that DCPS deems appropriate. However, as of the due process hearing no other school had yet accepted Student that the parties agreed can meet Student's needs. (Witness 3's testimony)
25. During the hearing, the parties agreed that Student's IEP is to be amended to include the following additional language under "Other Classroom Aides and Services" section of the IEP: "An adult from Student's classroom will supervise Student during lunch." (Stipulation)

CONCLUSIONS OF LAW:

Pursuant to IDEA §1415 (f)(3)(E)(i) a decision made by a hearing officer shall be made on substantive grounds based on a determination of whether the child received a free appropriate public education ("FAPE").

Pursuant to IDEA §1415 (f)(3)(E)(ii), in matters alleging a procedural violation, a hearing officer may find that a child did not receive FAPE only if the procedural inadequacies impeded the child's right to FAPE, significantly impeded the parent's opportunity to participate in the decision-making process regarding provision of FAPE, or caused the child a deprivation of educational benefits. An IDEA claim is viable only if [DCPS'] procedural violations affected the student's substantive rights." *Lesesne v. District of Columbia*, 447 F.3d 828, 834 (D.C. Cir. 2006)

34 C.F.R. § 300.17 provides:

A free appropriate public education or FAPE means special education and related services that--
(a) Are provided at public expense, under public supervision and direction, and without charge;
(b) Meet the standards of the SEA, including the requirements of this part; (c) Include an appropriate preschool, elementary school, or secondary school education in the State involved;
and (d) Are provided in conformity with an individualized education program (IEP) that meets the requirements of Sec. 300.320 through 300.324.

Pursuant to 5E DCMR 3030.14 the burden of proof is the responsibility of the party seeking relief.⁹ *Schaffer v. Weast*, 546 U.S. 49, 126 S.Ct. 528 (2005). In this case, as noted in the PHO and at the hearing, Petitioner had the burden of production on the issue to be adjudicated and Respondent held the burden of persuasion after Petitioner established a prima facie case.¹⁰ The normal standard is preponderance of the evidence. See, e.g. *N.G. V. District of Columbia* 556 f. Sup. 2d (D.D.C. 2008) se also 20 U.S.C. §1451 (i)(2)(C)(iii).

ISSUE: Whether DCPS denied the student a FAPE by failing to develop an appropriate IEP on May 3, 2017, because the IEP: (a) prescribes too large a class size; (b) prescribes too high a student/adult classroom ratio; (c) does not prescribe a quiet classroom and limited noise and distractions outside the classroom; (d) does not appropriately limit group sizes outside of the classroom; (e) does not appropriately limit the busyness of hallways; (f) does not prescribe that the student will attend all specials with the same small group as the student's academic class; (g) does not prescribe a location for instruction and services.

Conclusion: Respondent sustained the burden of persuasion by a preponderance of the evidence on this issue.

⁹ The burden of proof shall be the responsibility of the party seeking relief. Based solely upon the 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.

¹⁰ DC Code § 38-2571.03 (6) provides:

(A) In special education due process hearings occurring pursuant to IDEA (20 U.S.C. § 1415(f) and 20 U.S.C. § 1439(a)(1)), the party who filed for the due process hearing shall bear the burden of production and the burden of persuasion; except, that:

(i) Where there is a dispute about the appropriateness of the child's individual educational program or placement, or of the program or placement proposed by the public agency, the public agency shall hold the burden of persuasion on the appropriateness of the existing or proposed program or placement; provided, that the party requesting the due process hearing shall retain the burden of production and shall establish a prima facie case before the burden of persuasion falls on the public agency. The burden of persuasion shall be met by a preponderance of the evidence.

(ii) Where a party seeks tuition reimbursement for unilateral placement, the party seeking reimbursement shall bear the burden of production and the burden of persuasion on the appropriateness of the unilateral placement; provided, that the hearing officer shall have the authority to bifurcate a hearing regarding a unilateral placement; provided further, that if the hearing officer determines that the program offered by the public agency is appropriate, it is not necessary to inquire into the appropriateness of the unilateral placement.

(B) This paragraph shall apply to special education due process hearings resulting from complaints filed after July 1, 2016.

In *Board of Education v. Rowley* the United States Supreme Court set forth a two-part inquiry for determining whether a school district has satisfied the FAPE requirement. First, the state must have "complied with the procedures set forth in the Act." *Rowley*, 458 U.S. at 206. Second, the IEP that is developed must be "reasonably calculated to enable the child to receive educational benefits." *Rowley*, 458 U.S. at 206-07. To be appropriate under 34 C.F.R. § 300.324, the IEP must consider the (i) strengths of the child; (ii) concerns of the parents; (iii) results of the initial or most recent evaluation; and (iv) academic, developmental, and functional needs of the child.

Pursuant to the recent Supreme Court decision, *Andrew F. v. Douglas County School District Re-1*, a district must provide "an IEP reasonably calculated to enable a child to make progress appropriate, in light of the child's circumstances." 137 S. Ct. 988, 999 (2017).

"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).

Pursuant to *Schaefer v. Weast*, 554 F.3d 470 (U.S. App. 2009), the Hearing Officer must "focus on the adequacy of the IEP at the time it was created, and ask if it was reasonably calculated at that time to enable the student to receive educational benefits." *Schaefer v. Weast*, 554 F.3d 47. The "reasonably calculated" qualification reflects a recognition that crafting an appropriate program of education requires a prospective judgment by school officials, informed by their own expertise and the views of a child's parents or guardians; any re-view of an IEP must appreciate that the question is whether the IEP is reasonable, not whether the court regards it as ideal.

Removing a child with disabilities "from the regular education environment occurs only when the nature or severity of the disability is such that education in regular classes cannot be achieved satisfactorily." 34 C.F.R. § 300.550; 34 C.F.R. §300.114 see also 20 U.S.C. § (a)(5)(A) (a disabled child is to participate in the same activities as non-disabled children to the "maximum extent appropriate"); *Roark ex rel. Roark v. District of Columbia*, 460 F.Supp.2d 32, 43 (D.D.C. 2006) ("The IDEA requires school districts to place disabled children in the least restrictive environment possible.")

Petitioners assert the student's IEP is inappropriate because it does not prescribe a location of services. The Hearing Officer notes that the LRE section of the May 3, 2017, amended IEP states: "[Student] has been enrolled within [School A] receiving specialized instruction with a special education teacher for the instructional day." In addition, the evidence demonstrates that on October 5, 2017, DCPS issued Petitioners a letter informing them that DCPS agreed to fund Student's "location of service at [School A] from the start of SY 2017-2018 starting August, 22nd 2017 until an appropriate location of service is found." Petitioners assert that the IEP itself should identify the location of service. Unlike the LRE, which the IEP should describe,¹¹

¹¹ See *Brown v. District of Columbia* 179 F. Supp. 3d 15, April 13, 2016, "[I]t appears that no provision of the statute or regulations, by express terms, requires that an IEP include a determination of a student's least restrictive environment and appropriate placement [along the continuum of placements]. However, the undersigned finds that the statute and regulations, read in context, in fact impose such requirement. 20 U.S.C. § 1414(d)(1)(A)(i)(V)

Petitioners have not cited, and the Hearing Officer has not found, sufficient authority to support the proposition that the IEP should specifically state the location of service where the IEP is to be implemented. Nonetheless, the notation in the May 3, 2017, IEP referencing School A accompanied with the October 5, 2017, letter DCPS sent to Petitioners, is sufficient to put Petitioner on notice where Student's IEP is to be implemented. Absent any authority as to a basis for Student's IEP to specifically identify a location of services, the Hearing Officer concludes that Student's May 3, 2017, amended IEP sufficiently identifies the student's LRE and educational placement as required pursuant to IDEA, and in this regard the IEP is reasonably calculated to provide Student educational benefit.

In addition, Petitioner asserts Student's May 3, 2017, amended IEP is inappropriate because it: (a) prescribes too large a class size; (b) prescribes too high a student-to-adult classroom ratio; (c) does not prescribe a quiet classroom and limited noise and distractions outside the classroom; (d) does not appropriately limit group sizes outside of the classroom; (e) does not appropriately limit the busyness of hallways; (f) does not prescribe that the student will attend all specials with the same small group as the student's academic class.

The IEP prescribes a classroom size of 8. Petitioners assert the IEP should prescribe a class size of 4 students. As to student-to-adult ratio, The IEP prescribes student/adult ratio of 4 to 1. Petitioners assert the IEP should prescribe student-to-adult ratio of 2 to 1. As to a quiet environment for student both inside and outside the classroom, the IEP provides that instruction and independent work time will be in a quiet area of the classroom, and that teachers and adults in the classroom will speak in low, calm tones to the student. Petitioners assert the IEP should prescribe a quiet classroom and that Student not be placed with noisy students and students likely to have outbursts.

The Other Classroom Aides and Services section of the IEP does not speak to any limitation of group sizes Student should be in outside of the classroom. Petitioner asserts the IEP should add the following: maximum group size of 25 when outside of the classroom, except for special school assemblies. The IEP also does not speak to the number of students that should be in the School A hallway, when Student is present. The IEP prescribes that there needs to be minimal risk of noise and distraction from outside of the classroom. Petitioner asserts the IEP should prescribe that during transitions there be no more than 10 students in the hallway at the time Student is in the hallway. The IEP does not prescribe that Student should attend classes with the same students. Petitioners claim Student should attend specials classes with the same small group as Student's academic class. The representations of Petitioners' counsel at hearing is that School A is providing the level of specificity of services and restrictions that Petitioner is requesting be in Student's IEP.

The transcript of the April 27, 2017, IEP meeting and Student's former School A teacher's testimony regarding her observations or impressions as to what Student required when she

(providing that an IEP must include "an explanation of the extent, if any, to which the child will not participate with nondisabled children in the regular class and in activities described in subclause (IV)(cc)[.]"); see also A.I. ex rel. Iapalucci, 402 F. Supp. 2d at 159 (holding that an IEP must include, among other things, a statement regarding "the child's ability to interact with non-disabled children")."

instructed Student from August 2016 to February 2017, supported Petitioner requests that Student's IEP include the provisions listed above. On the other hand, there is evidence that the DCPS non-public monitor for School A expressed concerns during the April 27, 2017, meeting as to whether School A had teachers specifically trained in Autism which might be a factor impacting the level of restriction School A was suggesting was needed for Student to be successful. There was also credible testimony from the DCPS non-public monitor for School A that during the meeting she expressed a legitimate concern about whether the level of restriction that was being requested, and used at School A, was really required for Student to be successful. Thus, she wanted to perform a formal observation of Student herself before concluding that the level, and specificity, of restriction being requested in Student's IEP was reasonable. The Hearing Officer concludes that the request for such a verification was appropriate.

The evidence demonstrates that DCPS, in its efforts to comply with the April 3, 2017, IEP fashioned language in the IEP to address the concerns that the HOD directed be addressed. It is clear from the evidence that the resulting IEP did not meet the expressed demands of Petitioners as to the language Petitioners required to address all of their concerns about Student's IEP. However, aside from the testimony of Petitioners' witness from School A, there is no documented data, which supports the necessity or appropriateness of all the changes Petitioners want made to Student's IEP.

In light of DCPS' responsibility for ensuring that Student's IEP adequately meets Student's needs and is not overly restrictive, the Hearing Officer concludes that the May 3, 2017, amended IEP was reasonably calculated to provide Student educational benefit based upon the information available to the full IEP team at the time it was developed. Consequently, the Hearing Officer concludes DCPS sustained the burden of persuasion by a preponderance of the evidence on this issue.

Nonetheless, because an observation has yet to be conducted by DCPS, and Student's IEP is now due for an annual review and the parties are actively engaged in considering other school placement options for Student in addition to School A, the Hearing Officer directs in the order below that DCPS conduct an observation of Student at School A, that DCPS convene a meeting and that Petitioner(s) and DCPS personnel attend the meeting together in person at School A, to consider and determine each of the items listed in the Order regarding the level of restriction required to meet Student's needs, and then update Student's IEP as appropriate.

ORDER:¹²

1. DCPS shall within five (5) school days of the issuance of this order amend Student's IEP to include the following language under the "Other Classroom Aides and Services" section of Student's IEP: "An adult from Student's classroom will supervise Student during lunch."

¹² Any delay in Respondent meeting the timelines of this Order that is the result of action or inaction by Petitioners shall extend the timelines on a day for day basis.

2. DCPS shall, within ten (10) school days of this issuance of this order, conduct an observation of Student at School A to determine whether the following requirements are necessary to be included in Student's IEP: (a) a class size of 4 students, (b) a classroom student-to-adult ratio of 2 to 1, (c) a quiet classroom and that Student not be placed with noisy students and students likely to have outbursts, (d) that Student be in a maximum group size of 25 when outside of the classroom except for special school assemblies, (e) that during transitions there be no more than 10 students in the hallway at the time Student is in the hallway, and (f) Student attend special classes with the same small group as Student's academic class. DCPS shall create an Observation Report that responds to all of the above-listed items and explains DCPS' determination as to each item. Said Observation Report shall be provided to Petitioners' counsel within five (5) business days before the meeting directed to be convened in paragraph #4 below.
3. Petitioners and School A shall make Student available for formal observation by DCPS for DCPS to make determinations regarding items outlined in paragraph #2 above.
4. DCPS shall, within twenty (20) school days of the issuance of this order, convene, a multi-disciplinary team ("MDT") meeting with DCPS personnel and Petitioner(s) and School A personnel all together, in person, and in the same room at School A, to: (a) consider and determine whether each of the items listed in paragraph #2 above of this order, should be included in Student's IEP, to (b) conduct an annual review of Student's IEP, and (c) to revise and update Student's IEP as appropriate.
5. At the MDT meeting directed to be convened pursuant to the provision above, following an update of the student's IEP, the MDT shall determine an educational placement for Student, and DCPS shall within five (5) school days of the MDT meeting determine a location of services for Student where Student's IEP will be implemented.
6. DCPS shall issue a PWN and/or a location of service letter within five (5) school days of the MDT meeting described in paragraph # 4 above indicating Student's educational placement and location of services where Student's IEP will be implemented.
7. All other relief requested by Petitioners is denied.

APPEAL PROCESS:

The decision issued by the Hearing Officer is final, except that any party aggrieved by the findings and decision of the Hearing Officer shall have ninety (90) days from the date of the decision of the Hearing Officer to file a civil action with respect to the issues presented at the due process hearing in a District Court of the United States or a District of Columbia court of competent jurisdiction, as provided in 20 U.S.C. §1415(i)(2).

/S/ Coles B. Ruff

Coles B. Ruff, Esq.

Hearing Officer

Date: November 27, 2017

Copies to: Counsel for Petitioner
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