**District of Columbia**
**Office of the State Superintendent of Education**
Office of Dispute Resolution
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| **Parents, on behalf of Student,[1]** | ) | **Rooms: 2006 (1/19), 2003 (1/26)** |
| **Petitioner,** | ) | **Hearings: 1/19, 1/27 (2015)** |
| | ) | **HOD Due: February 4, 2016** |
| **v.** | ) | **Hearing Officer: Michael Lazan** |
| | ) | **Case No.: 2015-0280** |
| **District of Columbia Public Schools,** | ) | |
| | ) | |
| **Respondent.** | ) | |

# HEARING OFFICER DETERMINATION

## I. Introduction

This is a case involving a [redacted]-year-old student who is eligible for services as a Student with a Specific Learning Disability. (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 August 21, 2015 in regard to the Student. On September 1, 2015, Respondent filed a response. A resolution meeting was held on September 1, 2015. The resolution period expired on September 20, 2015.

The 45-day timeline to issue a final decision began on September 21, 2015, and the final decision was due by November 4, 2015. An Interim Order on Continuance Motion dated September 24, 2015 extended the decision date eight days to November 12, 2015. An Amended Due Process Complaint notice was filed on October 7, 2015. An order dated

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

October 14, 2015 permitting such amendment without objection. The HOD due date was then reset to December 21, 2015. A second Interim Order on Continuance Motion dated November 19, 2015 extended the timelines forty-five days to February 4, 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.

## III. Procedural History

A prehearing conference took place by telephone on September 15, 2015. Participating in the prehearing conference were Petitioner's Representative, Attorney B, and Respondent's Representative, Attorney A.

A second prehearing conference took place on December 8, 2015. Participating in the prehearing conference were Petitioners' Representative, Attorney B, and Respondent's Representative, Attorney A.

A prehearing conference order issued on September 18, 2015, summarizing the rules to be applied in this hearing and identifying the issues in the case. A revised order was issued on September 29, 2015, December 11, 2015, and December 16, 2015 because of requests by Petitioners, and because of the added claim in the amended complaint.

There were two hearing dates in this case, January 19, 2016 and January 27, 2016. This was a closed proceeding. Petitioners were represented by Attorney C and Attorney B. Respondent was represented by Attorney A. Petitioner moved into evidence

Exhibits 1-51. Respondent objected to 9, 14-18, 25, 35-38, and 46-47 on relevance grounds. These objections were overruled. Exhibits 1-51 were admitted. Respondent moved into evidence Exhibits 2-17. Petitioners objected to Exhibit 5 on redundancy grounds, and Exhibit 8 on authenticity grounds. The objection to Exhibit 5 was sustained. The objection to Exhibit 8 was overruled. Exhibits 2-4, and 6-17 were admitted. The parties presented written closing briefs on January 29, 2016.

Petitioners presented as witnesses: Petitioners; Witness A, special education consultant (expert: special education); Witness B, Director of Speech and Language Services at School A; Witness C, Director of Occupational Therapy at School A (expert: occupational therapy); Witness D, Associate Head at School A.

Respondent presented as witnesses: Witness E, a social worker (expert: social work and the provision of behavior support services for disabled students); Witness F, a special education coordinator (expert: special education programming and placement); Witness G, transition specialist and teacher, School B (expert: special education transition programming); Witness H, teacher (expert: reading services and the provision of reading interventions); Witness I, LEA representative, School B (expert: special education programming and placement); Witness J, Resolution Specialist (expert: provision of specialized instruction).

## IV. Credibility.

I found all the witnesses to be credible in this case. There were no material inconsistencies revealed in the testimony or in the documents, and the statements made by each witness were reasonable.

## 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") outside general education? If so, did DCPS violate 34 CFR Sect. 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?

DCPS contends that the IEP provides, in effect, a "full-time" placement and that this case is really a question of "location of services."

2. Did DCPS provide the Student with an inappropriate educational placement when it recommended placement at School B? If so, did DCPS violate 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 contend that School B is an inappropriate school for the Student. Petitioners contend the school's environment is inappropriate for the Student and that the school cannot implement the IEP faithfully. Petitioners point to the fact that School B does not have a social worker that can assist the Student if she needs it during the day. They also argue that School B is a large building with many students, large classrooms, provides an unnecessary class in self-advocacy, and contains inappropriate reading instruction.

Respondent contends that any objections to School B are too speculative to form the basis of a FAPE claim.

3. Did DCPS deny the parents meaningful participation in the decision-making process relating to the Student's educational and school placement? If so, did DCPS violate 34 CFR Sect. 300.513(a) and 300.501(b)? If so, did DCPS deny the Student a FAPE?

Petitioners say that they did not participate in the decision-making that resulted in the selection of School B as a location of services. Respondent says that they have discretion to pick a school for the Student.

4. Did DCPS refusal to allow the Petitioners' educational consultant to observe the proposed program in October, 2015? If so, did DCPS violate DC Act 20-486, Sect. 103(5)(a)-(h)? If so, did DCPS deny the Student a FAPE?

As relief, Petitioners seeks tuition reimbursement, placement and funding for School A for the 2015-2016 school year.

## VI. Findings of Fact

1. The Student is a [redacted] grader who is eligible for services as a student with Multiple Disabilities. She has been diagnosed with Attention Deficit Hyperactivity Disorder ("ADHD"), executive functioning issues, anxiety, and mixed expressive and receptive language disorder. Her cognitive ability is the normal range. (Testimony of Witness A)

2. She has difficulty with higher level skills. In written language, her output is slower than is typical. She cannot, for instance, write a five to seven paragraph essay.

In math, she fares adequately in regard to basic calculations, but has difficulties with fluency. With respect to language, she has slow processing speed. She also presents in language weaknesses in "contextualized tasks" such as listening, speaking, social pragmatics, and reading and writing. She has difficulty formulating her thoughts in a cohesive way. She requires "on the spot" interventions by teachers and social workers given her anxiety and social issues. She also requires additional time for processing and needs help with executive functioning since she will get lost in the task of getting organized. (Testimony of Witness B; Testimony of Witness C)

3. She began her elementary school education at a general education private school in Washington. The parents had been advised that she would need more attention than she could get at a public school, and the private school offered smaller classes and more individualized attention. Nevertheless, she ended up having difficulty keeping up with the work. She also had behavior issues, especially at lunch and in the hallways. (Testimony of mother; Testimony of father)

4. As a result of her difficulties, the Student transferred to the School A in or around September, 2009. This school has approximately 375 students, all of whom have disabilities. The classes range from four to nine students, and are forty-five to forty-eight minutes long. The school costs approximately $45,000 to $48,000, more with related services. All teachers at the school have special education certification or content area certification. (Testimony of Witness B; Testimony of Witness C; Testimony of Witness D; Testimony of mother; P-16-3)

5. Because of the structure and favorable teacher-student ratio at School A, she has been able to make academic progress, develop and maintain appropriate

interactions with peers, and has been improving her use of self-advocacy. She remains at-risk for classroom-based and interpersonal conflicts because of her attention issues, distractibility, and because she misses social cues. (P-37-1)

6. For the 2014-2015 school year, the Student continued at School A. On or about October 2, 2014, she was observed by the parent's consultant, Witness A. This observation revealed that the student was having some trouble keeping up with the material in a reading class. Witness A also observed the Student in her in a math class, where she attended to instruction well. Finally, she observed her in an English class, where she also fared well. (P-29-15-18)

7. Respondent conducted a Functional Behavior Assessment ("FBA") of the Student on or about October 31, 2014. This FBA was conducted by Witness E, who interviewed the Student, teachers, and observed the classroom at School A. According to one teacher, the Student's inappropriate behavior can occur for no reason at all, and occurs "all the time," particularly when work is not interesting to her. Her teachers were primarily concerned with her making noises in class. During observations conducted by Witness E, the Student's behavior was appropriate 70 percent of the time, she asked inappropriate questions 25 percent of the time, and made inappropriate sounds 5 percent of the time. The Student responded to redirection during these observations. The Student told Witness E that a behavior chart was working for her, and that she liked the classes at the school because they were "hands on." The Student also said that she was aware of her behavioral issues, which are mainly asking too many unnecessary questions. The Student said that she is getting better at not asking too many unnecessary questions. (Testimony of Witness E; P-28-1-5)

8. Woodcock-Johnson IV Tests of Achievement, Form B and Extended testing from November 1, 2014 found that the Student was at the 21th percentile rank in broad reading, the 11th percentile rank in basic reading skills, the 15th percentile rank in reading comprehension, the 10th percentile rank in mathematics, the 9th percentile rank in broad mathematics and mathematics calculation skills, the 32nd percentile rank in written language, the 22nd percentile rank in broad written language, and the 24th percentile rank in written expression. (P-29-21)

9. A draft IEP for the 2015-2016 school year was sent to the parents on or about January 26, 2015. An IEP meeting was scheduled for January 27, 2015, and was then cancelled to give the parents and their representatives an opportunity to review the IEP. Modifications were suggested by the parents on or about February 20, 2015, per the input of Witness A. (P-32; P-33)

10. A speech and language evaluation was conducted of the Student on or about March, 2015 by a therapist from the School A. Clinical Evaluation of Language Fundamentals – Fifth Edition Metalinguistics (CELF-5 Metalinguistics) testing found that the Student was in the average range in all domains except "multiple meanings." In the Gray Silent Reading Tests, Form A, the Student was below average, but on the Oral and Written Language Scales, Second Edition (OWLS-II) test, she was in the average range for written expression. The report stated that she has done better with social pragmatics. The report also stated that she has made good progress in understanding the perspective of others, and will often defer to a group partner in making joint decisions. It stated she has significantly reduced the number of questions that she asks during the class period, and that the remaining questions are more likely to reflect a true need for

clarification and assistance. She can distinguish between good and "rude" questions, but needs cues to ask questions to balance the conversation. (P-35)

11. An IEP meeting was held for the Student on March 12. 2015. The IEP meeting was attended by both parents, a special education teacher, an evaluator, an LEA representative, an occupational therapist, a compliance case manager, a psychologist, and a range of other people including the parents' attorney and consultant. (P-34-1-2)

12. At the meeting, there was agreement in many areas. In particular, the parents agreed that the IEP's "present levels of performance" were an appropriate reflection of this Student, and the IEP goals were appropriate. The parents and their advocate also participated in the meeting, making comments about the present levels of performance. DCPS adopted many of the suggestions made by the parents and the consultant. (Testimony of Witness A; Testimony of Witness F; Testimony of mother)

13. The IEP indicated that the Student's broad math was in the low average range and that she has difficulty in applying calculation skills to problem solving situations, particularly those with multiple operations within the problem. The IEP contained seven math goals. In reading, the Student was considered to be in the low average range, and it was noted that she needed significant supports to access the general curriculum. The IEP contained seven reading goals. The IEP indicated that the Student's writing is a relative strength, but that she has trouble expressing herself in longer writing tasks and with occupational therapy deficits. The IEP contained three writing goals. The IEP stated that the Student's speech and language deficits negatively affect her ability to recall spoken directions, follow multi-step oral directions, and formulate sentences. The IEP contained five speech goals. In regard to social and emotional issues,

the IEP describes her as being distractible, engaging in attention seeking behavior, and indicated that she needs clear expectations, consistent routines, explicit teaching and a behavior management plan. It also stated that she needed help in organizing her belonging and space and reminders to keep her area clean. The IEP contained six emotional, social and behavioral development goals. Finally, the IEP indicated that the student has motor skills/physical development needs, in particular that it is difficult for her to write, leading to five goals. (P-34)

14. In regard to services for the 2015-2016 school year, DCPS originally proposed 22 hours per week of specialized instruction outside general education, which would assign the Student to classes with non-disabled peers for specials/resource classes such as art, music, and Spanish. Witness A, the parents and the parents' attorney disagreed, arguing that a smaller class size would be needed for "specials" as well. As a result, DCPS increased the specialized instruction hours to 25 hours per week outside general education. Nevertheless, the parents continued to object to the recommendation, expressing concern about lunch in a large group setting given her social issues. Witness A asked for 32.5 hours of specialized instruction, less related services hours, but DCPS would not place this number of hours on the IEP. (Testimony of Witness A; R-8; P-34)

15. The final IEP recommended 25 hours per week of specialized instruction outside general education, with 180 minutes per month of occupational therapy, 180 minutes per month of behavioral support services, and 300 minutes per month of speech-language pathology. It also recommended small group instruction, enlarged font, auditory cuing, extra processing time, graphic organizers, a visual schedule, tools or strategies to monitor comprehension, place markers, manipulatives, explicit instruction in

critical thinking skills, adult modeling, checklists, behavior chart, fidget toys, chunking of assignments, extra time, a social skills group, chunking of assignments, direct instruction in executive functioning, and a check-in with the teacher. The parents agreed with the classroom aids and services but did not agree with the speech and language services, feeling that the Student needed more. (Testimony of mother; P-34-18)

16. An amended IEP was written in May, 2015. This meeting was to add baseline data, in particular a fluency measure, without any objection from either side. (Testimony of Witness J)

17. The IEP was then sent to an "LOS team" to determine a school for the Student. The "LOS team" then determined that School B, her neighborhood school, was the best place for her. (Testimony of Witness J)

18. On or about June 5 or 6, 2015, the parents found out what school was offered. On June 9, the parents sought to visit School B by emailing DCPS. Within an hour, Witness J from DCPS sent back an email to facilitate a visit at a mutually agreeable date and time. The parents and Witness A, however, did not visit the school at the end of June, which is after the school year was over. As a result, there were no students in the classes during the visit. After the visit, Witness A was concerned because 1) there were no electives at the school; 2) there were some classes that lasted for a long time, which the Student might find difficult to attend to; 3) there are about 1800 students in the school building; and 4) they were concerned about the student transitioning in the school. Witness A did feel the school was "beautiful." (Testimony of mother; Testimony of Witness A; P-39-1; P-40-1)

20. On August 5, 2015, the parents provided notice that the student would attend School A for the 2015-2016 year. (P-41-1)

21. She has struggled some this year. She has had dress code issues, and several times has gotten into "drama" with peers. There were inappropriate images on her iPad and she engaged in inappropriate texting. (Testimony of Witness D)

22. The social worker has seen her six or seven times during the year, often because of anxiety-related issues relating to misperceived communications. She does not see a regular counselor. Instead, she has a therapist outside of school hours. (Testimony of Witness D; Testimony of mother)

23. The Student continues to have some issues with social problem solving, social inferencing, and asking questions. She needs repetition and review of the academic content to be able to succeed in class. (Testimony of Witness B; Testimony of Witness C; Testimony of Witness D)

24. The small class size at the school helps her manage her organizational issues, and the individualized attention insures that her homework is completed. For the 2015-2016 school year, Quarter 1, the Student's grades ranged from a C- in English 9, to an A- in Pre-Algebra/Algebra. (Testimony of Witness C; P-46)

25. In early October, 2015, the mother again visited School B, this time without Witness A and when classes were in session. DCPS did not allow Witness A to observe because they felt that she had a financial interest in the litigation. The mother met teachers and went to classes. She went to an earth science class of fourteen to fifteen students, and the parent was very impressed, feeling that the class was "quiet and controlled." She went to a reading class, and the teacher seemed "great." Still, she was

concerned that her daughter would not be able to process some information and that there would be distractions in class given the transitions from computer to desk. The parent also went to an English class with maybe twenty children, and a Spanish class of four to five children. (Testimony of mother)

27. If she went to School B, the Student would get a reading class with System 44, a software program. This class would have small group reading instruction with a teacher, independent reading with novels, and then software practice. Instruction in the classroom rotates between the three modalities. The Student would also receive English, Algebra, Biology, Social Studies, physical education and lunch. In physical education, the Student would attend classes with children with disabilities. (Testimony of Witness H; Testimony of Witness I)

28. School B can provide the services in the IEP, including all related services and all classroom aids and services. It has five social workers for student support during the day. For lunch, it has a large space, and students sit where they want, though there is supervision by the dean of students. There is a program whereby students can go have lunch with her teacher in the classroom, which is called STEP. (Testimony of Witness I)

## 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-EDCMR 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 v. Weast, 546 U.S. 49, 51 (2005). Pursuant to the Supreme Court's decision in Board of Education of the Hendrick Hudson Central School District, Westchester County v. Rowley, 458 U.S. 176, (1982), the IEP must, at a minimum, "provid[e] personalized instruction with sufficient support services to permit the child to benefit educationally from that instruction." Branham v. District of Columbia, 427 F.3d 7 (D.C. Cir. 2005).

In matters alleging a procedural violation, a hearing officer may find that a child did not receive a FAPE only if the procedural inadequacies: (i) Impeded the child's right to a FAPE; (ii) Significantly impeded the parent's opportunity to participate in the decision-making process regarding the provision of a FAPE to the parent's child; or (iii) Caused a deprivation of educational benefit. 34 C.F.R. Sect. 300.513(a).

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 criterion,") the services selected by the parent are appropriate ("second criterion"), and equitable considerations support the parent's claim ("third criterion"), 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).

**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") outside**

**general education? 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?**

Under the Supreme Court's decision in Rowley, a public school district need not guarantee the best possible education or even a "potential-maximizing" one. 458 U.S. at 197 n. 21. Instead, an IEP is generally "proper under the Act" if "reasonably calculated to enable the child to receive educational benefits." Id. at 207.

Petitioners' main argument here is that the Student has not been provided with an appropriate lunchroom. In Petitioners' brief, there is no mention of any claim that the Student was improperly denied a special education teacher during any "specials" such as art or music.[2]

There is testimony that the Student is sensitive to peer interactions and can have difficulty picking up social cues. The Student's mother testified that she makes poor judgments and poor decisions and offends people, and that this can get her into trouble.

[2] Additionally, there is no testimony or evidence specific to the claim that the Student required a special education teacher during "specials." The school district's position was reasonable in this regard. 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). There are considerable supplemental aids and supports in this IEP. Among other things, it recommends small group instruction, enlarged font, auditory cuing, extra processing time, graphic organizers, a visual schedule, tools or strategies to monitor comprehension, place markers, manipulatives, explicit instruction in critical thinking skills, adult modeling, checklists, behavior chart, fidget toys, chunking of assignments, extra time, and a check-in with the teacher.

Petitioners argue that "(t)he public agency must ensure that each child with a disability has the supplementary aids and services determined by the child's IEP Team to be appropriate and necessary for the child to participate in nonacademic settings" which includes times such as "meals, recess periods" 34 C.F.R. Sect. 300.117. 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)(l) of this section, and to participate in extracurricular and other nonacademic activities." 34 C.F.R. Sect. 300.320 (a)(4).

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 would impact on her academically. Petitioners did not present evidence of any analogous situations involving large settings which resulted in problems for the Student. Petitioners also did not provide caselaw in support of their position that the lack of lunch supervision here amounts to a FAPE violation. 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).

It is also noted that this specific issue (regarding lunch) is not raised in the Due Process Complaint or in the prehearing order. 34 C.F.R. Sect. 300.511(d)(that no new

matters may be raised at the hearing unless the other party agrees). Given the above, I find this claim to have no merit.

**Issue #2: Did DCPS provide the Student with an inappropriate educational placement when it recommended placement at School B? If so, did DCPS violate 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?**

Most cases involving FAPE denial focus on the IEP, the "centerpiece" of the Act. Honig v. Doe, 484 U.S. 305, 311 (1988); cf. T.Y. v. New York City Department of Educ., 584 F.3d 412 (2d Cir. 2009). Nevertheless, Petitioners may bring claims based upon an inappropriate placement[3] in certain situations. Although the LEA has some discretion with respect to school selection, 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).

[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.

Here, Petitioners contest the appropriateness of School B. Petitioners do not contest whether the school can implement the Student's IEP. Instead, the claim here is one like that of the plaintiffs in Gellert, i.e., that the environment of the school is inappropriate for the Student. In particular, Petitioners object to the overall school size and class size at School B, also pointing out that the school offers some classes would be too long in duration for her. Petitioner also contends that the physical education class that would be provided is inappropriate because, per the testimony, the Student would be grouped with low functioning peers.

In Gellert, the court found that the school was too large for a student. Relying in particular on a witness that testified that the student's sensory issues made it difficult for him to focus in a large group, 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.

While there are similarities here, I find this case distinguishable from Gellert. First, DCPS does not bear the burden of proof in this case, where they also called multiple witnesses in person. Second, there is no clear testimony explaining why she would not be able to focus in a classroom with six to twenty students, as School B was reported to have. The court in Gellert cited expert testimony that the student withdrew when previously placed in public school classrooms more than ten. In those classes, he "exhibited extremely poor academic motivation and received poor grades." The record does not establish that there have been any attempts to try to place the Student in this

kind of school or classroom environment, particularly with the kind of supports that were offered in the IEP.

Similarly, while Petitioners object to "block" classes that run over an hour, 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, where she had to sit for ninety minutes at a time.

Petitioners also contend, pointing to testimony, that the Student's physical education classes would be inappropriate, noting that the classes would be held with low functioning students. This issue was not raised in the Due Process Complaint and was not mentioned in the prehearing order. Accordingly, it is not appropriate for me to address it in this decision. 34 C.F.R. 300.511(d) states that no new matters may be raised at the hearing unless the other party agrees. See also M.O. v. District of Columbia, 20 F.Supp.3d 31, 39 (D.D.C., 2013) Moreover, while I agree that the physical education classes might be somewhat awkward for the Student, there is no evidence that such classes would make limit progress in physical education and Petitioners have submitted no caselaw in support of their proposition that placement in a physical education class with such a functional grouping can rise to the level of FAPE denial.

Two more points should be mentioned. First, it is noted that Gellert 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.[4] Other than Gellert, there are very

[4] 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)

few reported cases in the District of Columbia where courts have found FAPE denial on the basis of the school setting alone.

Second, both Petitioners and their main expert presented some positive testimony about the school. Witness A testified that the school was "beautiful." The mother testified she went to an earth science class and she was very impressed, mentioning that the class was quiet and "controlled." She then went to a reading class, and again appeared impressed because the teacher seemed "great."

Accordingly, I find that Petitioners' placement claims must be denied.[5]

**Issue #3: Did DCPS deny the parents meaningful participation in the decision-making process relating to the Student's educational and school placement? If so, did DCPS violate 34 CFR Sect. 300.513(a) and 300.501(b)? If so, did DCPS deny the Student a FAPE?**

Petitioners argued that they did not participate in the decision-making process that resulted in the selection of School B. In this connection, Petitioners point to cases which suggest that the school selection be made at the IEP meeting. A.K. ex rel. J.K. v. Alexandria City Sch. Bd., 484 F.3d 682 (4th Cir. 2007). Mainly, though, Petitioners argue that they were not allowed to visit the school prior to the start of the school year.

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.,

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[5] While not mentioned in the brief, Petitioners also have argued that School B does not have a social worker that can assist the Student if she needs it during the day, that it provides an unnecessary class in self-advocacy, and contains inappropriate reading instruction. However, the record indicated that the school does have social workers that can assist the student if she needs it during the day. A witness was presented in regard to the class in self-advocacy, suggesting that it would benefit the Student given her executive functioning issues. Moreover, reading instruction is appropriate for this Student, who is below grade level in that subject.

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).

Petitioner's more compelling argument is that they should have the right to visit the recommended school in order to be able to make a decision on whether they should send their child to it. C.U. v. New York City Dept. of Educ., 23 F.Supp.3d 210, 227-28 (S.D.N.Y.2014). In C.U., cited by both sides, the court premised its findings on Supreme Court decisions specifically recognizing that parents have a broad right to participate in decisions affecting a child's education. The court accordingly found that parents have a procedural right to evaluate the school assignment, i.e., the right to acquire relevant and timely information as to the proposed school.

A review of the facts in C.U. is illustrative. In C.U., upon the parents' return from vacation on June 27 of the year in question, they immediately tried to contact the recommended school to determine its appropriateness. They were unable to leave a message with the school, "possibly because it was changing its voicemail software." They then sent letters to the school, but the school did not respond to any of these letters. Having been unable to arrange a visit, the parents only then unilaterally enrolled the student in a private placement. The court found that these delays, and lack of response by the district, violated the Parents' procedural right to evaluate the school placement so that they could make an informed decision about the child's school.

Those are different facts than the facts in this case. Here, after the parents received the school assignment, they contacted DCPS on June 9, 2015 to arrange to view the placement. Within an hour, Ms. McFarland from DCPS responded and indicated a

willingness to arrange the observation. The observation was then conducted on June 30, 2015, after the school year had ended.

Petitioners argued that they were forced to see the placement after school was over, but it is not clear from the record why the observation was conducted several weeks after Ms. McFarland's response[6]. The mother's testimony did not explain why the observation was delayed three weeks. The parent's expert, Witness A, testified briefly to the effect that she "thinks" she tried to go to School B to visit at this time, but this testimony was too speculative and abbreviated to support a finding of FAPE denial.

Petitioners' brief does not explain why there was a three-week time lag between Ms. McFarland's response and the observation. Instead, Petitioners argue a different issue -- the fact that the school was assigned several months after the March, 2015 IEP meeting. However, the issue is why there was no school visit during the second and third week of June, 2015. Petitioners bear the burden of proof in the District of Columbia at the present time. It was incumbent upon Petitioners to clearly show that the District prevented them from observing the school before school ended. To this IHO, they did not do so. Accordingly, I find that Petitioners did not prove they were denied meaningful participation in the process to determine a placement for the Student.

**Issue # 4. Did DCPS refusal to allow the Petitioner's educational consultant to observe the proposed program in October, 2015? If so, did DCPS violate DC Act 20-486, Sect. 103(5)(a)-(h)? If so, did DCPS deny the Student a FAPE?**

This is an issue about legislation that was passed by the District in Columbia in 2014. The act in question is the "Special Education Student Rights Act of 2014," and it

[6] There is no testimony in the record to the effect that school was over by June 9, 2015, and Petitioners do not so argue.

contains a title called: “Special Education Procedural Protections Expansion Act of 2014.” (Title 1, Sect. 101).

Sect. 103(5)(A) provides that, “(u)pon request, an LEA shall provide timely access, either together or separately, to the following for observing a child’s current or proposed special educational program:

(i) The parent of a child with a disability; or

(ii) A designee appointed by the parent of a child with a disability who has professional expertise in the area of special education being observed or is necessary to facilitate an observation for a parent with a disability or to provide language translation assistance to a parent; provided, that the designee is neither representing the parent’s child in a litigation related to the provision of free and appropriate public education for that child nor has a financial interest in the outcome of such litigation”[7].

[7] The statute contains specific rules and limitations in Sections (B) though (H). Those sections read as follows:

(B) The time allowed for a parent, or the parent’s designee, to observe the child’s program shall be of sufficient duration to enable the parent or designee to evaluate a child’s performance in a current program or the ability of a proposed program to support the child.

(C) A parent, or the parent’s designee, shall be allowed to view the child’s instruction in the setting where it ordinarily occurs or the setting where the child’s instruction will occur if the child attends the proposed program.

(D) The LEA shall not impose any conditions or restrictions on such observations except those necessary to:

(i) Ensure the safety of the children in a program;

(ii) Protect other children in the program from disclosure by an observer of confidential and personally identifiable information in the event such information is obtained in the course of an observation by a parent or designee; or

(iii) Avoid any potential disruption arising from disclosure by multiple observations occurring in a classroom simultaneously.

(E) An observer shall not disclose nor use any information obtained during the course of an observation for the purpose of seeking or engaging clients in litigation against the District or the LEA.

(F) The LEA may require advance notice and may require the designation of a parent’s observer in writing.

(G) Each LEA shall make its observation policy publicly available.

(H) Nothing in this paragraph shall be construed to limit or restrict any observational rights established by IDEA or other applicable law.

The record is clear that the parents sought to have Witness A visit the school in October, 2015. DCPS denied Witness A access because they felt that Witness A had a financial interest in this litigation. In an apparent admission that the denial in October was improper, DCPS later allowed Witness A to visit the school. DCPS did not defends its actions in regard to this issue in their brief.

There is nothing in the record to establish that Witness A has a financial interest in the litigation. She is simply an expert hired by the parents to observe the placement. This is obviously the reason the provision in the Special Education Student Rights Act of 2014 was passed – to allow parents and their experts to observe proposed school settings. DCPS violated the Special Education Student Rights of 2014 when it denied Witness A access to School B in October, 2014.

The main question here is whether this violation rises to the level of FAPE denial that would satisfy the test under Carter. I do not believe it does, given the context. The request for an observation came in October, 2015, well after the Student had been placed at School A for the 2015-2016 school year. The testimony is clear that Petitioners had already committed to School A by this time. There is nothing in the record to suggest that Petitioners were willing to take their child out of School B in the middle of the school year if they were allowed to bring Witness A to the observation in October, 2015. Petitioners do not so assert. Accordingly, I cannot find that this violation "significantly impeded the parent's opportunity to participate in the decision-making process." 34 C.F.R. Sect. 300.513(a).

**SUMMARY**

In sum, I can certainly understand Petitioners' position in this matter. They are conscientious parents trying, admirably, to do what is best for their child. Moreover, I can appreciate the desire to keep the Student at same school where she has done well in the past several years. Still, as stated Supreme Court Justice Ruth Bader Ginsburg while she was on the D.C. Circuit: "resources are not infinite, and many other demands compete for limited public funds. The [Act] does not secure the *best* education money can buy; it calls upon government, more modestly, to provide an *appropriate* education for each child." Lunceford v. District of Columbia Bd. of Educ., 745 F.2d 1577, 1583, (D.C. Cir. 1984)(emphasis in original). Accordingly, I must find that Respondent has offered the Student a FAPE for the 2015-2016 school year[8].

**XIII. Order**

As a result of the foregoing, Petitioners' requests for relief are hereby denied.

Dated: February 4, 2016

Michael Lazan
Impartial Hearing Officer

cc: Office of Dispute Resolution
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Attorney B, Esq.
Attorney A, Esq.
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Chief Hearing Officer

[8] As a result, I need not address "prong two" and "prong three" of the Carter test. See, e.g., D.S. v. District of Columbia, 962 F.Supp.2d 216, 218 (D.D.C.,2013)

## IX. 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: February 4, 2016

Michael Lazan
Impartial Hearing Officer