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 Office of Dispute Resolution  
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**Confidential**

<p>Parents on Behalf of Student,</p> <p>Petitioners,</p> <p>v.</p> <p>District of Columbia Public Schools          (“LEA”)</p> <p>Respondent.</p> <p>Case # 2017-0292</p> <p>Date Issued: February 14, 2018</p>	<p>CORRECTED HEARING          OFFICER’S          DETERMINATION <sup>1</sup></p> <p>Hearing Dates:          February 1, 2018          February 2, 2018</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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<sup>1</sup> 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, February 14, 2018, 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 February 1, 2018, and February 2, 2018, at the District of Columbia Office of the State Superintendent of Education (“OSSE”) Office of Dispute Resolution 1050 First Street, N.E., Washington, D.C. 20003, in Hearing Room 112.

**BACKGROUND AND PROCEDURAL HISTORY:**

The student or (“Student”) is age \_\_\_\_\_ and in grade \_\_\_\_\_.<sup>2</sup> The student resides with Student’s parents (“Petitioners”) in the District of Columbia. Student has been determined eligible for special education and related services pursuant to IDEA with a disability classification of multiple disabilities (“MD”) including specific learning disability (“SLD”) and other health impairment (“OHI”) due to Attention Deficit Hyperactivity Disorder (“ADHD”). District of Columbia Public Schools (“DCPS”) is Student’s local educational agency (“LEA”).

Student attends a non-public special education separate day school (“School A”) where Student has attended since school year (“SY”) 2014-2015 when Petitioners unilaterally placed Student at School A. Student has remained at School A pursuant to two Hearing Officer’s Determinations adjudicating two previous due process complaints.

As result of a February 20, 2017, Hearing Officer Determination (“HOD”), DCPS developed an individualized education program (“IEP”) for Student on May 1, 2017, for SY 2017-2018 and proposed that Student attend a DCPS school (“School B”). Petitioners declined the IEP and placement DCPS proposed and maintained Student at School A for SY 2017-2018.

On August 17, 2017, Petitioners filed a due process complaint that they withdrew without prejudice. On October 27, 2017, Petitioners filed the current due process complaint asserting DCPS had denied Student a free appropriate public education (“FAPE”) alleging, inter alia, the IEP and placement DCPS proposed for Student for SY 2017-2018 are inappropriate.

**Relief Sought:**

Petitioners seek as relief that the Hearing Officer conclude DCPS denied Student a FAPE, that School A is an appropriate placement for Student, and that the Hearing Officer order DCPS to place and fund Student at School A for SY 2017-2018.

**LEA Response to the Complaint:**

The LEA filed a timely response to the complaint on November 6, 2017. The LEA denies that there has been any failure to provide the student with a FAPE and asserts, among other things, that the February 20, 2017, HOD concluded that the IEP DCPS proposed on August 15, 2016,

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was inappropriate because it did not prescribe “full-time” specialized instruction in a small classroom setting. DCPS asserts that in crafting a remedy, the Hearing Officer was not persuaded that Student’s least restrictive environment (“LRE”) is non-public special education separate day school, like School A. DCPS also asserted DCPS met its burden of persuasion with regard to the IEP team’s decision not to include speech-language pathology services in the proposed August 15, 2016, IEP and the HOD stated that “after the date of this decision, DCPS shall not be required to pay for speech and language services for Student.”

DCPS asserts that the IEP developed for Student on May 1, 2017, is reasonably calculated to enable the Student to make appropriate progress in light of Student’s circumstances, places Student in Student’s LRE, and School B can implement the IEP. DCPS asserts that Petitioners’ allegation about School B are not legitimate challenges to the school location and should have been alleged by Petitioners as possible deficiencies to the IEP, but were not.

### **Resolution Meeting and Pre-Hearing Conference:**

The parties participated in a resolution meeting on November 9, 2017, and did not resolve the complaint. The parties did not mutually agree to proceed directly to hearing. The 45-day period began November 26, 2017, and ended [and the HOD was originally due] on January 10, 2017.

The undersigned Hearing Officer (“Hearing Officer”) convened a pre-hearing conference (“PHC”) on November 29, 2017, and issued a pre-hearing order (“PHO”) on December 4, 2017, outlining, inter alia, the issues to be adjudicated.

Petitioner filed a consent motion to extend the HOD due date, because the parties and/or witnesses were not available on the scheduled hearing dates. The motion was granted extending the HOD due date to January 31, 2018. The parties filed an additional motion to extend the HOD due date to accommodate another change in hearing dates. The motion was granted extending the HOD due date to February 14, 2018. The hearing was held on February 1, 2018, and February 2, 2018. The parties submitted written closing arguments on February 9, 2018.

### **ISSUES:**<sup>3</sup>

The issues adjudicated are:

1. Whether DCPS denied the student a FAPE by failing to find Student eligible for and proposing speech/language services for SY 2017-2018.
2. Whether DCPS denied the student a FAPE by failing to propose an appropriate IEP and placement with a sufficient type and amount of special education hours for SY 2017-2018.<sup>4</sup>

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<sup>3</sup> The Hearing Officer restated the issues at the hearing and the parties agreed that these were the issues to be adjudicated.

<sup>4</sup> Specifically, Petitioner asserts the IEP and placement is inappropriate because DCPS proposes that the student spend lunch, electives, and any remaining time outside of Student’s 25.5 hours of specialized instruction, in the

3. Whether DCPS denied the student a FAPE by proposing an inappropriate placement at School B for SY 2017-2018.<sup>5</sup>

### **RELEVANT EVIDENCE CONSIDERED:**

This Hearing Officer considered the testimony of the witnesses and the documents submitted in each party's disclosures (Petitioner's Exhibits 1 through 26 and Respondent's Exhibits 1 through 19 and Hearing Officer Exhibit 1) that were admitted into the record and are listed in Appendix A.<sup>6</sup> The witnesses testifying on behalf of each party are listed in Appendix B.<sup>7</sup>

### **SUMMARY OF DECISION:**

Petitioners had the burden of production on all issues adjudicated and burden of persuasion on issue #1. The Hearing Officer concluded based on the evidence adduced that Petitioner did not sustain the burden of persuasion by a preponderance of the evidence on issue #1. The burden of persuasion fell to Respondent on issues #2 and 3 after Petitioners met a prima facie case. The Hearing Officer concluded Respondent sustained the burden of persuasion by a preponderance of the evidence on issues #2 and #3 and dismissed the due process complaint with prejudice.

### **FINDINGS OF FACT:<sup>8</sup>**

1. Student resides with Petitioners in the District of Columbia. Student has been determined eligible for special education and related services pursuant to IDEA with a disability classification of MD including SLD and OHI due to ADHD. DCPS is Student's LEA. (Respondent's Exhibit 13-1, 13-4)

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general education setting.

<sup>5</sup> Specifically, Petitioner asserts that the classes at School B are inappropriate for the student given the type of instruction provided, the lack of integration of technology, the pace of instruction, the peer group, and the expected level of independence/participation required of students.

<sup>6</sup> Any item disclosed and not admitted or admitted for limited purposes was noted on the record and is noted in Appendix A.

<sup>7</sup> Petitioner presented five witnesses: (1) Student's mother (Petitioner) and the following individuals who were designated as expert witnesses: (2), an educational consultant, (3) a School A speech language pathologist, (4) a School A occupational therapist, and (5) a School A curriculum and technology coordinator. Respondent presented five witnesses: (1) a DCPS general educator, (2) a DCPS speech language pathologist, (3) the principal of DCPS School B, (4) the School B special education coordinator, (5) DCPS' progress monitor for School A.

<sup>8</sup> 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 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.

2. Student attends School A, a non-public special education separate day school where Student has attended since SY 2014-2015, when Petitioners unilaterally placed Student at School A. (Respondent's Exhibit 1-8)
3. Student has remained at School A pursuant to two previous HODs resulting from due process complaints Petitioners filed. The first HOD issued January 3, 2016, concluded, inter alia, that Student did not have a speech language disability, but the HOD directed DCPS to fully evaluate Student and determine Student's eligibility for special education. That HOD directed DCPS to fund Student's enrollment at School A through the end of SY 2015-2016. Student was subsequently found eligible on July 20, 2016, under the MD disability classification for OHI and SLD. (Respondent's Exhibits 1-17, 1-20, 6-1, 6-2, 6-8, 6-14)
4. In May 2016 DCPS conducted a speech and language re-evaluation of Student. The evaluation included assessments of Student's receptive and expressive language skills, phonology, phonological processing, voice, fluency, articulation, and pragmatic language. Based upon the assessments the evaluator concluded Student's speech language skills were in normal limits and on par with typically developing same age peers. The evaluator noted Student had some hoarseness of voice that could be best addressed by Student seeing a physician. There was little in the evaluation that would support a finding the student required speech language services. (Witness 9's testimony, Respondent's Exhibit 4)
5. Petitioners filed another due process complaint on August 19, 2016, challenging, among other things, Student's initial IEP that DCPS developed. In the resulting HOD, issued February 20, 2017, the Hearing Officer considered DCPS' May 2016 speech and language re-evaluation and concluded, inter alia, that Student did not have a speech language disability and did not require speech language services. Nonetheless, the Hearing Officer found that the student's initial DCPS IEP was inappropriate because the amount of specialized instruction it prescribed was insufficient. The HOD directed DCPS to fund Student at School A through the end of SY 2016-2017. (Respondent's Exhibits 1-17, 1-20, 6-1, 6-2, 6-8, 6-14, 6-18, 6-19, 6-24)
6. With regard to speech language services, the February 20, 2017, HOD specifically ordered that DCPS not pay for speech language services for Student, "to the extent that [School A] charges added fees for such services." (Respondent's Exhibit 6-19, 6-24)
7. The February 20, 2017, HOD also directed that by no later than May 31, 2017, DCPS convene an IEP team to review and revise Student's DCPS IEP in conformity with 34 C.F.R. 300.320, et seq. and the HOD. (Respondent's Exhibit 6-24)
8. Pursuant to a February 20, 2017, HOD, DCPS developed an IEP for Student on May 1, 2017, for SY 2017-2018. The May 1, 2017, IEP provides for 25.5 hours of specialized instruction per week outside of general education, 120 minutes per month of behavioral support services outside of general education and 360 minutes per month of occupational therapy ("OT") outside of general education. The IEP also prescribes the following

classroom aids and services: extended time, advance notice of tests, calculator, extra processing/wait time, mark on test, location with minimal distractions, preferential seating close to the point of instruction and with minimal distractions, repetition of oral and written directions, small group setting, word processing software with spell-check features, word bank, flexibility in scheduling, frequent breaks, grid paper for math, simplified visual field, cues to wear eye glasses. (Respondent's Exhibit 13-1, 13-24)

9. The May 1, 2017, IEP further notes that Student has been diagnosed with ADHD as well as treated for anxiety and depression, and exhibits problems with paying attention, listening well, staying focused, organized, making careless mistakes, disrupting others, having poor self-control, and not waiting Student's turn. The IEP indicates that Student requires the following accommodations as a result: clarification and repetition of directions, use of a calculation device, preferential seating, location with minimal distractions, individual testing, extended time, flexibility in scheduling and frequent breaks. (Respondent's Exhibit 13-26, 13-27)
10. Student's mother participated in the May 1, 2017, IEP meeting along with her attorney. A DCPS LEA representative and special education teacher participated. School A staff also participated. Petitioners and the School A staff expressed their belief regarding Student's need of speech language services, and that the services should be added to Student's IEP. School A agreed to send DCPS an updated speech language progress report that DCPS was provided before the IEP meeting concluded. (Petitioner's Exhibit 11-2)
11. The DCPS members of the team determined Student did not need speech language services but would require behavioral support services and OT services along with 25.5 hours of specialized instruction per week outside general education. A DCPS representative stated that level of services would allow Student 1 hour per day for lunch and elective classes in a general education setting. Petitioner's attorney and the School A staff disagreed and asserted that Student required support and redirection throughout the school day including during lunch. (Petitioner's Exhibits 11-2, 11-9, 11-10, 12-2)
12. Petitioner's educational consultant participated in the May 1, 2017, meeting by telephone and agreed with the all aspects of the IEP DCPS developed except hours of specialized instruction, the lack of speech language services, and the behavior support services. She believes that Student's impulsivity impacts Student across the school day and did not support DCPS' position that Student could have electives classes in general education. (Witness 1's testimony)
13. A DCPS special education teacher who participated in the May 1, 2017, IEP meeting had observed Student at School A during SY 2016-2017. During the observation in a reading class, Student was able to read and keep up with the class and used fingers to guide on the page. Student participated in the class without incident. There was one time when the teacher had to direct the Student to a particular page. (Witness 8's testimony)

14. DCPS provided a draft IEP to Petitioner prior to the May 1 2017, meeting. Neither Petitioners, nor School A, provided any input regarding the draft IEP prior to the meeting and there was no concerns raised during the meeting that Student needed assistive technology (“AT”). (Witness 8’s testimony)
15. During the meeting there were no concerns by any of the team members, including Petitioner and her representatives about the Student’s present levels of performance or the IEP goals. There was general consensus regarding the IEP goals. School A reported Student to be operating one grade level below in all academic areas. There were concerns that were raised about Student’s frustration and managing behaviors, therefore, DCPS added social emotional goals and services to the IEP, even though Student was not receiving direct behavioral support at School A. Student’s executive functioning was discussed and are addressed in the classroom aides and services section of the IEP. (Witness 8’s testimony)
16. Student has OT deficits in visual and fine motor skills including handwriting and using measuring devices. At School A, Student is provided accommodations such as typing as an alternative to hand written notes and Student uses an iPad. Student’s executive functioning impacts Student’s ability to organize plan and use Student’s time wisely. Student tends to pay attention to everything around Student and many times Student needs one to one assistance. (Witness 3’s testimony)
17. The May 1, 2017, IEP initially proposed 24.5 of specialized instruction per week that was increased by one hour to 25.5 hours per week. The team discussed that student’s electives and lunch could be with general education peers. The DCPS team members concluded that based on the evaluation data and observations, Student should have no problem during transitions and lunch or in non-academic areas such that Student needed to be totally removed from non-disabled peers. A school location where Student’s DCPS IEP would be implemented was not discussed during the May 1, 2017, meeting. (Witness 8’s testimony)
18. School A prepared a March 2017 annual speech language progress report for Student. The report noted Student received one session of individual speech language therapy per week at School A. The report noted Student historically presented with strengths in semantics, aspects of social pragmatics (use of humor, conversation skills) and language formulation at the sentence level. The report also noted Student had deficits in auditory processing, language organization, reading fluency, encoding, articulation and voice. The report included an assessment of Student’s oral language skills using the Listening Comprehension Test-Adolescent (“LCT-A”) and an assessment of Student’s reading and written expression using the Gray Oral Reading Tests-Fifth Edition (GORT-5). Student scored within the Average range on both assessments. (Petitioner’s Exhibit 9-2, 9-2, 9-4)
19. While Student has attended School A, School A has developed its own internal annual IEP for Student, prescribing Student’s educational goals and services. School A’s IEP dated May 25, 2017, prescribes 32.75 hours per week of specialized instruction in a special education setting. The IEP also prescribes integrated speech language and

occupational therapy services as a part of the 26 hours of instruction. In addition, the IEP prescribes 2/25 hours per week of related services: 180 minutes per month of individual speech language therapy per week and 360 minutes per month of individual occupational therapy. The School A IEP has two speech language goals, one related to rephrasing and multi-step directions, and one regarding formulating responses to questions and revising written work. The goals did not address pragmatic language skills. Rather, the School A noted this as an area of strength. The School A IEP does not include any behavioral support services. (Petitioners' Exhibit 15-1, 15-4, 15-15)

20. School A is a separate special education day school and provides services exclusively to students with disabilities. School A grants DCPS diploma and the majority of students go on to college. School A has 120 students in its high school. At School A, Student is in classes with approximately 7 to 10 students with one teacher. Some of Student's School A teachers are certified special education teachers and some are not. Children in Student's current grade stay in school for the lunch period that is approximately 35 minutes, but they are allowed take lunch in various parts of the building. Other students are allowed to leave the campus for lunch. (Witness 2's testimony)
21. In the School A classroom, teachers usually need to prod Student and scaffold instruction, and when that is done Student refocuses and resumes classwork. Student has been successful academically at School A. Student will occasionally blurt out in class and has difficulty following multistep directions. However, School A is seeing an improvement in Student's ability to self-regulate. (Witness 2's testimony, Petitioner's Exhibit 21)
22. DCPS proposed that the May 1, 2017, IEP be implemented at School B. Petitioners declined the IEP and placement proposed by DCPS and maintained Student at School A for SY 2017-2018. (Respondent's Exhibits 13-1, 16-1, 17-1, Petitioner's Exhibit 19)
23. School B is able to implement the IEP DCPS offered for SY 2017-2018, including the specialized instruction and related services prescribed. School B can create a "full-time" special education program based on Student's needs. (Witness 5's testimony)
24. If Student attended School B during SY 2017-2018, Student would be in a self-contained Specific Learning Supports ("SLS") program with only special education students with a variety of disability classifications and special education teachers. There are approximately 40 students in the School B SLS program to which Student would be assigned. Student would have the opportunity electives in the self-contained program or in general education if it was determined that it was appropriate. Student would be provided math, English, social studies, science, reading intervention, and a self-advocacy class in special education. There is a range of academic skill levels of students in the SLS program, including "twice exceptional students" who are operating above grade level. Each class would have 12 to 15 special education students, and sometimes fewer, who are all on track to obtain a high school diploma. Every grade level at School B has a social worker and psychologist assigned. School B also has an assigned occupational therapist to provide OT services. (Witness 5's testimony, Witness 6's testimony)

25. School B has approximately 200 special education students and most are in inclusion classes. The student will be provided a foreign language course to meet graduation requirements, which can be taught by a certified special education teacher. (Witness 5's testimony)
26. School B's has 32.5 hours in its weekly schedule. School B's bell schedule has eight periods of approximately 40 minutes per period only on Mondays. Every other day of the week, the lunch period is 45 minutes and there are only 4 other class periods of approximately 80 minutes each alternating on odd and even days so that all 8 periods are held three times per week. Based on Student's May 1, 2017, DCPS IEP Student would be provided approximately 27.25 hours per week of services outside general education, excluding lunch, which is approximately 3.5 hours per week. That would leave Student 2 hours per week of services or instruction that would be provided inside general education. (Hearing Officer's Exhibit 1)
27. The DCPS progress monitor recently observed Student in an English class at School A. During the observation Student on task and completed work. Student did not call out in the classroom, behaved appropriately and was not in need of any redirection during the class. The teacher mentioned to the DCPS monitor that Student could be distractible but was making progress. The teacher shared some of Student's writing work as an example of Student's progress. As a result of her observation, the DCPS monitor concluded that Student engaged appropriately with same age students. (Witness 7's testimony, Respondent's Exhibit 18)
28. Petitioner's educational consultant developed a report of her observation of the Student at School A and observed the school DCPS proposed for Student for SY 2016-2017. The consultant asserted in the report that Student required all instruction outside general education. The consultant recently observed Student at School A again opined that nothing had changed in her opinion about the type of program she believes Student needs. (Witness 1's testimony)
29. Petitioner's consultant has never observed Student in a setting outside School A and has not observed Student during lunch. The consultant was also not sure whether Student takes physical education ("PE") at School A and has not observed Student in PE. (Witness 1's testimony)
30. In June 2017 Student mother and her educational consultant went to School B and met with the School B special education coordinator ("SEC") and went again in October 2017 and observed a self-contained special education class for approximately 45 minutes. The class had 6 students and half the students were actively participating in the class and the other students were disengaged and the teacher did not encourage them to participate. Based upon their time in the classroom Petitioner and her educational consultant concluded that the class would not be appropriate for Student because they believed Student would not be engaged. The consult generated two reports based on her visits to

School B in which she expressed her opinion that School B would be an inappropriate school placement for Student. While visiting School B, the consultant was told that School B would conduct a 30 day review of Student's IEP and make any needed modifications. (Witness 1's testimony, Petitioner's Exhibits 18, 20)

31. Student's mother believes Student suffers from low self-esteem and does not like school. However, Student now goes to school willingly and does Student's homework willingly, which is a change from previous school years. Student has a few good friends outside of school. Student's parent is concerned that if Student attends an elective class with a large number of general education students, Student would quickly be lost and she is concerned that at School B Student might take cues from other students and do the least amount work required. (Mother's testimony)

### **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. *Schaffer v. Weast*, 546 U.S. 49, 126 S.Ct. 528 (2005). In this case, as noted in the PHO and during the hearing, Petitioner had the burden of production on both issues. Petitioner had both the burden persuasion on both issues after Petitioners established a prima facie case.<sup>9</sup> The

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<sup>9</sup> 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

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 1:** Whether DCPS denied the student a FAPE by failing to find Student eligible for and proposing any speech/language services for SY 2017-2018.

**Conclusion:** Petitioner did not sustain the burden of persuasion by a preponderance of the evidence on this issue.

To be eligible for special education services a child must be evaluated as having mental retardation, a hearing impairment (including deafness), a speech or language impairment, a visual impairment (including blindness), a serious emotional disturbance, an orthopedic impairment, autism, traumatic brain injury, an other health impairment, a specific learning disability, deaf-blindness, or multiple disabilities, and who, by reason thereof, needs special education and related services. 34 CFR § 300.8 (emphasis supplied.) See *Parker v. Friendship Edison Public Charter School*, 577 F.Supp.2d 68, 74 (D.D.C.2008).

The IDEA’s implementing regulations define speech or language impairment as a “communication disorder, such as stuttering, impaired articulation, a language impairment or a voice impairment that adversely affects a child’s educational performance.” 34 CFR 300.8(c)(11).

Although Petitioners did not in the current complaint specifically allege that Student has a speech language impairment (“SLI”) such that Student’s disability classification should include SLI, Petitioners are asserting for a third time in a due process hearing that Student requires speech language as a related service. In the previous determinations, Impartial Hearing Officers (“IHOs”) ruled that Student did not require speech language services. There are no facts presented in this case which would support a different outcome than that reached by two previous IHOs. Simply put, the Student does not require speech and language services and Student’s average scores on the LCT-A and GORT-5 in School A’s May 2017 speech language progress report support this finding.

Assuming arguendo, DCPS had the burden of persuasion on the issue of whether the Student requires speech language services, DCPS would have met the burden of persuasion because the evidence, including the credible testimony of the DCPS speech language pathologist, overwhelmingly supported the fact that the Student does not require speech language services.

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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.

The Hearing Officer was far from convinced by the testimony of the School A speech language pathologist because the School A speech language report indicated the language issues Student had were more a product of Student's attention problems rather than manifestation of a speech and language deficit. The School A speech language pathologist testified that the student has difficulty with executive functioning and occasionally demonstrates excellent social pragmatics and other times does not. However, she acknowledged that there are no social pragmatic goals in Student's School A IEP. Consequently, the Hearing Officer concludes that there was insufficient evidence presented to support a finding that Student requires speech language services and that DCPS denied Student a FAPE because the services are not prescribed in Student's May 1, 2017, DCPS IEP.

**ISSUE 2:** Whether the DCPS denied the student a FAPE by failing to propose an appropriate IEP and placement with a sufficient type and amount of special education hours for SY 2017-2018.

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

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.

"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."

To meet its substantive obligation under the IDEA, a school must offer an IEP that is reasonably calculated to enable a child to make progress appropriate in light of the child's circumstances. *Andrew F. ex rel. Joseph F. v. Douglas Cty. Sch. Dist. RE-1*, 137 S.Ct. 988 (2017). Any review of an IEP must appreciate that the question is whether the IEP is reasonable, not whether the court regards it as ideal. *Id.*; See also *A.H. ex rel. J.H. v. Dept. of Educ. Of City of New York*, 394 Fed. App's 718, 721 (2d. Cir. 2010) (holding that a school district fulfilled its substantive obligations under the IDEA to provide an IEP likely to produce progression even though it failed to account for student's distractibility during transitions and difficulty interacting with large groups of children in lunch and recess environments). Even where students have profound special needs, 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).

Petitioner asserts Student's May 1, 2017, DCPS IEP and placement are inappropriate because DCPS proposes that Student spend lunch, electives, and any remaining time outside of Student's 25.5 hours of specialized instruction and related services, in the general education setting.

At Student's May 1, 2017, meeting DCPS included services that were not provided for at School A, specifically direct behavioral support services to address goals related to impulse control, sustaining attention, improving peer relationships and developing organizational skills.

Pursuant to the IEP providing for 25.5 hours per week of specialized instruction, Student would receive core academic classes outside of the general education setting and would likely have lunch and some electives with non-disabled peers. Petitioners and School A decided they wanted to withhold student from any, and all, contact with nondisabled peers. This was not a decision supported by evidence. Since School A's lunch is unstructured, as the students can eat at various places around the building, the Hearing Officer finds no reason why Student's lunch cannot take place with non-disabled peers.

Petitioner's witnesses from School A, as well as Petitioner's educational consultant, expressed an opinion that student had difficulty negotiating social setting, reading social cues, and a tendency to be distracted and blurt out in class. Yet, the two separate observations conducted by DCPS personnel of Student at School A did not reveal any of these behaviors. To the contrary, during the observations Student was engaged in the instruction and displayed appropriate behavior in the classroom and with peers.

Although most of Petitioner's witnesses have worked with the student over the last few years and presumably are well acquainted with Student's academic and social emotional functioning, none of them have apparently ever been with or observed Student with non-disabled peers, including Petitioner's educational consultant. As DCPS aptly points out in its closing argument, Petitioners put forth speculative evidence in an effort to assert Student would be academically unsuccessful in any elective class such as Art or Music in general education even with accommodations and supplementary aids and services prescribed in Student DCPS IEP. Yet, the evidence demonstrates that at School A, Student is in some classes where there is no certified special educator.

The evidence demonstrates that Student is operating approximately one grade level below the current grade. There were no challenges by Petitioners to any components of the May 1, 2017, IEP other than the amount of services hours and thus, Student's LRE. It was previously determined by the IHO in the February 20, 2018, HOD that although Student requires a small structured classroom, the IHO was not convinced that Student's LRE was a school like School A where there are no typically developing peers. The HOD directed DCPS to develop an IEP that was consistent with the findings of the HOD. I find, based on the evidence presented, that DCPS did just that.

The May 1, 2017, DCPS IEP provides Student 25.5 hours per week of specialized instruction outside general education. Evidence presented tends to indicate that if the IEP is implemented at

School B the student would have two hours per week, other than lunch, that are outside a special education setting. There was no indication what classes or services would fulfill these two hours at School B. However, the School B SEC testified that School B could build an appropriate program that provided Student the services needed. In addition, the evidence demonstrated that at School B, there would be a 30 day review to determine if the IEP needed to be modified to better meet Student's needs.

Accordingly, I conclude based on the evidence adduced that DCPS satisfied its burden of persuasion that the IEP it developed for Student on May 1, 2017, was reasonably calculated to enable Student to make appropriate educational progress in light of Student's circumstances.

**ISSUE 3:** Whether DCPS denied the student a FAPE by proposing an inappropriate placement at School B for SY 2017-2018.

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

In determining the educational placement of a child with a disability, each public agency must ensure that the placement decision is made by a group of persons, including the parents, and other persons knowledgeable about the child, the meaning of the evaluation data, and the placement options; and is made in conformity with the Least Restrictive Environment provisions of the IDEA; and the public agency must ensure that the child's placement is determined at least annually, is based on the child's IEP, and is as close as possible to the child's home. See 34 C.F.R. § 300.116.

As IDEA demands, 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." 34C.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.")

Petitioner asserts that the classes at School B are inappropriate for the student given the type of instruction provided, the lack of integration of technology, the pace of instruction, the peer group, and the expected level of independence/participation required of students.

As DCPS in its closing argument aptly states teaching methodologies are generally a matter for districts to decide. *See Board of Educ. of the Hendrick Hudson Cent. Sch. Dist. v. Rowley*, 458 U.S. 176 (U.S. 1982) (Precise teaching methodologies are generally a matter for districts to decide.); 71 Fed. Reg. 46,665 (2006) (The Department of Education's "longstanding position on including instructional methodologies in a child's IEP is that it is an IEP Team's decision. Therefore, if an IEP Team determines that specific instructional methods are necessary for the child to receive FAPE, the instructional methods may be addressed in the IEP").

As DCPS also points out in its closing argument, Petitioners *did not* allege that School A cannot provide the services mandated by Student's IEP, which must be shown to demonstrate a proposed

school is inappropriate. *See Johnson v. D.C.*, 962 F. Supp. 2d 263, 269 (D.D.C. 2013). In *Johnson*, the court held that the appropriateness of a proposed school must be assessed by determining whether it is capable of “substantially implementing” a student’s IEP, not whether it offers “perfect compliance with a student’s IEP.” *Id.* In that case, the court concluded that DCPS did not deny the student a FAPE when it proposed that he transfer from a non-public school with an IEP that required 31 hours of specialized instruction per week to a DCPS high school that could provide about twenty-eight hours of specialized instruction per week. The court found that a 3.5 hour per week deviation was *de minimis* and that the DCPS school could substantially implement Student’s IEP, even where it could not offer P.E. or Spanish as special education classes.

The evidence demonstrates that at the May 1, 2017, IEP meeting there was no concern raised about assistive technology for Student and there is no AT listed in Student’s IEP. Likewise, there was scant evidence to support Petitioner’s contention that the peer group Student would encounter in School B’s SLS program would not be at or near Student’s academic functioning level. Albeit the School B SEC first stated that the students in the program are far below grade level, she later corrected her testimony and the School B principal credibly testified that the program includes student of various academic abilities including students operating above grade level.

Petitioner evidence regarding School B consisted of one to two classroom observations by Petitioner and/or her educational advocate and from that the consultant concluded that the expected level of independence and participation required would be beyond Student’s capabilities. To contrary, there was evidence based on observations of Student at School A by DCPS representatives that student was able to function in the classroom appropriately and meet the classroom demands. I was unconvinced by the consultant’s testimony that Student would be unable to answer questions and function in a special education classroom at School B.

As DCPS points out in its closing argument, Petitioners *did not* allege that School B cannot provide the services mandated by Student’s IEP, which must be shown to demonstrate a proposed school is inappropriate. *See Johnson v. D.C.*, 962 F. Supp. 2d 263, 269 (D.D.C. 2013). In *Johnson*, the court held that the appropriateness of a proposed school must be assessed by determining whether it is capable of “substantially implementing” a student’s IEP, not whether it offers “perfect compliance with a student’s IEP.” *Id.* In that case, the court concluded that DCPS did not deny the student a FAPE when it proposed that he transfer from a non-public school with an IEP that required 31 hours of specialized instruction per week to a DCPS high school that could provide about twenty-eight hours of specialized instruction per week. The court found that a 3.5 hour per week deviation was *de minimis* and that the DCPS school could substantially implement Student’s IEP, even where it could not offer P.E. or Spanish as special education classes.

The evidence demonstrates that School B can offer Student the appropriate math class, English, science, social studies, reading intervention and a self-advocacy class outside the general education setting. In addition, as stated earlier, the School B SEC testified that School B could build an appropriate program that provided Student the services needed. In addition, the evidence demonstrated that at School B, there would be a 30 day review to determine if the IEP needed to be modified to better meet Student’s needs. Accordingly, based on the evidenced adduced, I conclude that DCPS sustained the burden of persuasion by a preponderance of the evidence that the school location DCPS offered at School B, can implement Student’s DCPS IEP and is otherwise appropriate.

**Remedy:**

A hearing officer may award appropriate equitable relief when there has been an actionable violation of IDEA. *See* 20 U.S.C. § 1415(f)(3)(E)(ii)(II); *Eley v. District of Columbia*, 2012 WL 3656471, 11 (D.D.C. Aug. 24, 2012) (citing *Branham v. District of Columbia*, 427 F.3d at 11–12.) The Hearing Officer has concluded that DCPS offered Student an appropriate IEP on May 1, 2017, and that School B is an appropriate school placement to implement that IEP. Consequently, because I did not find any denial of FAPE in this matter, I will not grant Petitioner’s request that DCPS be ordered to place and fund Student at School A for SY 2017-2018.

**ORDER:** <sup>10</sup>

Petitioners due process complaint filed on October 27, 2017, is hereby dismissed with prejudice and all 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*

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**Coles B. Ruff, Esq.**  
**Hearing Officer**  
**Date: February 14, 2018**

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<sup>10</sup> 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.