

**District of Columbia**  
**Office of the State Superintendent of Education**  
Office of Dispute Resolution  
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<b>Parent, on behalf of Student,<sup>1</sup></b>	)	
<b>Petitioner,</b>	)	
	)	
v.	)	<b>Hearing: January 23, 2018</b>
	)	<b>Issue Date: January 30, 2018</b>
	)	<b>Hearing Officer: Michael Lazan</b>
	)	<b>Case No.: 2017-0306</b>
<b>District of Columbia Public Schools,</b>	)	
	)	
<b>Respondent.</b>	)	

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**HEARING OFFICER DETERMINATION**

**I. Introduction**

This is a case involving a student who is currently eligible for services as a student with Autism (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 November 9, 2017. Petitioner is the parent of the Student. On November 17, 2017, Respondent filed a response. The resolution period expired on December 9, 2017.

**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

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

the D.C. Code, Subtitle VII, Chapter 25, and the District of Columbia Municipal Regulations, Title 5-E, Chapter 30.

### **III. Procedural History**

On December 13, 2017, the Hearing Officer held a prehearing conference. Attorney A, Esq., counsel for Petitioner, appeared. Attorney B, Esq., counsel for Respondent, appeared. A prehearing conference order was issued on December 18, 2017, summarizing the rules to be applied in this hearing and identifying the issues in the case.

The Hearing Officer Determination (“HOD”) was due on January 23, 2018. Because of the unavailability of counsel and witnesses, a motion for continuance by Respondent was granted on January 22, 2018, extending the HOD due date to January 30, 2018.

There was one hearing date: January 23, 2018. This was a closed proceeding. Petitioner was represented by Attorney A, Esq. Respondent was represented by Attorney B, Esq. Petitioners moved into evidence Exhibits 1-24. Without objection, Exhibits 1-24 were admitted. Respondent moved into evidence Exhibits 1-12. Without objection, Exhibits 1-12 were admitted. At the close of testimony, both sides presented oral closing statements.

Petitioner presented as witnesses: Petitioner; Witness A, an advocate; and Witness C, admissions director, School C. Respondent presented as witnesses: Witness B, a “specialist” in the CES program; Witness D, a psychologist; Witness E, a special education teacher; and Witness F, a monitoring specialist.

### **IV. Credibility**

The main credibility issue in this case is the extent to which Petitioner was told that the Student's "specials" and lunch were to be provided with *only* special education students. This was the testimony of Witness A, who wrote a statement to that effect after a meeting of the parties at the school. However, Witness A's testimony was questionable. During testimony, Witness A said that during her observation of the school, she saw "chaos" in the school cafeteria and during student transitions between classes. However, there was no "chaos" mentioned in Witness A's written statement relating to the school observation. Witness B suggested that the Student might receive "specials" and lunch with only special education students, but this was different from the testimony of Witness D, who testified that the Student would be together with a "cohort" of other special education students within a general education environment during "specials" and lunch (except during art class). Finally, Petitioner's testimony was unpersuasive because it was largely bereft of meaningful detail.

## **V. Issues**

As identified in the Prehearing Conference Summary and Order and in the Due Process Complaint, the Free Appropriate Public Education ("FAPE") issues to be determined were as follows:

1. Did Respondent fail to comply with the requirements of the HOD dated October 6, 2017? If so, did Respondent deny the Student a FAPE?
2. Did Respondent fail to provide an appropriate placement/location of services for the Student for the 2017-2018 school year? In particular, did Respondent fail to provide the Student with a placement that could comply with the October 6, 2017 HOD and/or fully implement the Student's IEP and/or provide the "supports" that the

Student required to address the Student’s significant deficits and vulnerabilities arising from the Student’s disability? If so, did Respondent act in contravention of principles in such cases as Gellert v. District of Columbia, 435 F. Supp.2d 18 (D.D.C. 2006)? If so, did Respondent deny the Student a FAPE?

Petitioner contended that the Student requires a school day: 1) without any general education classes; 2) with peers who are on the Student’s level and do not have any behavioral problems; and 3) with “supports” during periods that are unstructured. As relief, Petitioner is seeking placement at School C, in the form of compensatory education.

## **VI. Findings of Fact**

1. The Student is a shy, timid child with a flat affect, and is not verbally expressive. The Student likes to attend school but is withdrawn, especially with students who are aggressive. The Student has low academic skills, but no behavioral concerns. The Student is compliant with rules. The Student has difficulty with receptive and expressive language skills, eye contact, recalling sentences of increasing length and complexity, understanding sentences, vocabulary, and articulation. (P-2-2; Testimony of Witness A)

2. For the 2016-2017 school year, the Student attended School X, the Student’s local school, in a self-contained class with twenty-five hours of specialized instruction with related services of occupational therapy and behavioral support. (Testimony of Witness A)

3. As of February, 2017, the Student was functioning in the “very low” range in all tested domains in math. Test results indicated that the Student would

benefit from intensive intervention in math, focused on skills and concepts related to quantitative reasoning and representation. Testing also indicated that the Student would benefit from instruction that connects understanding of number relationships, computation, and problem-solving skills. The Student was responsive to one-on-one support from teachers in math, and participated in small group math activities. The Student did, however, have difficulty comprehending many of the concepts presented in math lessons. (P-2-3)

4. As of February, 2017, the Student was functioning in the “very low” range in reading. Test results indicated that the Student was able to read short passages with below grade-level/basic vocabulary, and was able to answer “fill in the blank” questions with assistance. The Student experienced a “large degree” of difficulty with reading comprehension. (P-2-5)

5. As of February, 2017, the Student was functioning in the “very low” range in writing. Testing indicated that the Student was able to copy words and sentences from the board independently, but could not convey a complete thought when writing. (P-2-8)

6. As of February, 2017, the Student was functioning in the “very low” range in speech and language. The Student had difficulty with following directions, recalling sentences, and assembling sentences with visual supports. The Student’s expressive vocabulary was reported to be slightly more advanced than the Student’s receptive vocabulary. (P-2-11)

7. On May 16, 2017, an IEP team determined that the Student was eligible for services as a student with Autism. The IEP included goals in: mathematics; reading;

written expression; adaptive/daily living skills; communication/speech and language; emotional, social and behavioral development; and motor skills/physical development. It provided for twenty-five hours per week of specialized instruction outside the general education setting, 120 minutes per month of occupational therapy services outside the general education setting, 120 minutes per month of behavioral support services outside the general education setting, 240 minutes per month of speech-language pathology services outside the general education setting, thirty minutes per month of consultative speech-language pathology services, and thirty minutes per month of consultative occupational therapy. The IEP stated that the Student “requires a small structured environment outside of the general education classroom” in areas of deficit “inclusive of core content classes and electives.” The IEP indicated that the Student required assistance and supports in less-structured environments, such as electives and lunch. The IEP also indicated that, during electives, the Student benefitted from having class with a small group outside of the general education classroom. (P-2-18)

8. The May, 2017, IEP was challenged through a Due Process Complaint filed on July 17, 2017. On October 6, 2017, Impartial Hearing Officer (“IHO”) NaKeisha Sylver Blount issued an HOD on the issues raised in the Due Process Complaint. IHO Blount ruled that the Student “needs an educational setting that provides ABA (“Applied Behavioral Analysis”) therapy and that does not generate significant externalized behavioral difficulties, as Student is ill-equipped to defend against aggression.” IHO Blount added that “DCPS has CES classrooms that offer ABA and focus on students with Autism; however, despite requests, Parent had not been

provided the opportunity to visit or enroll Student in such a program. It is possible that a DCPS CES program could meet Student's needs. . .” (P-1-12-13)

9. Hearing Officer Blount therefore ordered that: “(w)ithin eight (8) school days of this Order, DCPS shall identify for Student a tentative location of services that can: implement Student’s May 2017 (or any more recent) IEP; provide ABA therapy; and meet Student’s needs for a small, low student-teacher ratio setting with minimal likelihood of interaction with students with tendencies to exhibit behavioral challenges.” IHO Blount also ordered that: “DCPS shall promptly provide Parent an opportunity to tour any such proposed program, and consider any feedback Parent may wish to offer, provided that Parent promptly provides such feedback.” IHO Blount added that, as an alternative, “DCPS may within twenty (20) school days of this Order fund Student at Nonpublic School, with transportation, for the remainder of the 2017-2018 school year.” (P-1-14-15)

10. Thereafter, DCPS offered Petitioner an opportunity to tour School A, which contained a CES classroom that was proposed for the Student. On or about October 24, 2017, Petitioner, together with Witness A, met DCPS representative Witness B at the school. (Testimony of Witness A; Testimony of Witness B)

11. Petitioner, Witness A, and Witness B then walked through the school while Witness B provided an overview of the program at School A. During this time, Petitioner and Witness A saw the school cafeteria twice. They also saw students transitioning from class to class. Witness B told Petitioner and Witness A that classes would consist of one special education teacher and two aides, and that the main classroom had five male students in it. Petitioner and Witness A were told that the CES program supports students

with communication and education deficits, and that the population of students in the CES program consisted primarily of students with autism. Witness B also indicated that ABA was reflected in the classroom environment, as evidenced by teacher planning, scaffolds, and supports. (Testimony of Witness A; Testimony of Witness B; R-7)

12. During the tour of School A, while Witness B was providing an overview of the CES program at the school, Petitioner interrupted and asked about the behavior of the other students in the proposed classroom. Witness B told Petitioner that she would discuss the specifics of the classroom following the overview. Petitioner then stopped walking. Witness B asked Petitioner if she wanted to continue the tour, and Petitioner did not answer. Witness B then asked Petitioner if she had any questions. Petitioner indicated that the only thing she wanted to know was whether there were misbehaving students in the proposed classroom. Witness B explained that one student in the room engaged in mild behaviors but was often outside the room. Petitioner was then introduced to a school psychologist and the proposed classroom teacher, but would not engage with either individual. Petitioner was also given an opportunity to view the proposed CES classroom, but Petitioner was not interested in seeing the classroom or continuing the tour. Instead, Petitioner talked about the Student's history of being bullied, thanked the school staff for their time, and left with Witness A. (R-7; Testimony of Witness A; Testimony of Witness B; Testimony of Petitioner)

13. Thereafter, Petitioner contacted Respondent and proposed that the Student spend a day at School A to see if the Student was comfortable with the CES program. DCPS declined this offer. (Testimony of Witness A)

14. At School A, the school staff “push” for students to access the general education curriculum. In music, theater, art, and physical education, the CES students stay together in a cohort. In art, the cohort is provided instruction by an art teacher without general education students in the room. The CES students have an aide who transitions with them and stays with them during their elective classes and lunch.

(Testimony of Witness B)

15. On October 27, 2017, School A was named the Student’s location of service. (P-9-1)

16. For the first marking period of the 2017-2018 school year, the Student’s IEP progress report at School X showed “some” progress in one of three math goals, progress in one reading goal, and a “little” progress in another reading goal. Progress was noted in speech and language goals, particularly in regard to the Student’s use of volume in speech. The progress report indicated that the Student did not exhibit any expressions of anxiety or stress during this marking period. (R-11)

## **VII. Conclusions of Law**

Based upon the above Findings of Fact, the arguments of counsel, and the Hearing Officer’s own legal research, the Conclusions of Law of the Hearing Officer are as follows:

The burden of proof in District of Columbia special education cases was changed by the local legislature through the District of Columbia Special Education Student Rights Act of 2014. That burden is expressed in statute as the following:

Where there is a dispute about the appropriateness of the child’s individual educational program or placement, or of the program or placement proposed by the public agency, the public agency shall hold the burden of persuasion on the appropriateness of the

existing or proposed program or placement; provided, that the party requesting the due process hearing shall retain the burden of production and shall establish a prima facie case before the burden of persuasion falls on the public agency. The burden of persuasion shall be met by a preponderance of the evidence.

See D.C. Code § 38-2571.03(6)(A)(i)

Issue #1 involves a challenge to the implementation of the HOD issued by Hearing Officer Blount. Though this issue implicates the appropriateness of the Student's placement, it is framed as a violation of the HOD. Under the circumstances, the burden should be on Petitioner on this issue, since it does not directly relate to the appropriateness of the Student's existing or proposed IEP or placement. Schaffer v. Weast, 546 U.S. 49 (2005). The burden should be on Respondent with respect to Issue #2, which relates directly to placement, except insofar as this contention relates to the failure to implement the Student's May, 2017, IEP. With respect to the alleged failure to implement the IEP, the burden should be on Petitioner.

**1. Did Respondent fail to comply with the requirements of the HOD dated October 6, 2017? If so, did Respondent deny the Student a FAPE?**

On October 6, 2017, Hearing Officer Blount issued an HOD that determined that the Student "needs an educational setting that provides ABA therapy and that does not generate significant externalized behavioral difficulties, as Student is ill-equipped to defend against aggression." IHO Blount added that "DCPS has CES classrooms that offer ABA and focus on students with Autism; however, despite requests, Parent had not been provided the opportunity to visit or enroll Student in such a program. It is possible that a DCPS CES program could meet Student's needs. . ." Hearing Officer Blount therefore ordered that: "(w)ithin eight (8) school days of this Order, DCPS shall identify for Student a tentative location of services that can: implement Student's May 2017 (or any

more recent) IEP; provide ABA therapy; and meet Student's needs for a small, low student-teacher ratio setting with minimal likelihood of interaction with students with tendencies to exhibit behavioral challenges." IHO Blount also ordered that: "DCPS shall promptly provide Parent an opportunity to tour any such proposed program, and consider any feedback Parent may wish to offer, provided that Parent promptly provides such feedback."

In addition to compliance with the current IEP (to be discussed in connection to Issue #2), IHO Blount's decision required four discrete acts from Respondent. It required Respondent to provide the Student with a placement that provides ABA instruction, a low student-teacher ratio, and an environment that does not generate significant "externalized" behavioral difficulties; and it required Respondent to provide Petitioner with an opportunity to tour the proposed school.

The record is clear that DCPS offered the Student a classroom with a low teacher-student ratio, and that Petitioner received an opportunity to tour the proposed school. It is also clear that DCPS offered the Student a classroom that would have provided the Student with instruction in the ABA methodology. Petitioner found fault with the type of ABA instruction that was offered by DCPS, suggesting that the CES program at School A did not provide ABA instruction but instead provided a program "based on ABA principles." However, the record does suggest that the CES program offered the Student ABA instruction. This was the testimony of Witness B, who stated that, in effect, ABA instruction was provided to the CES class at School A, as reflected by teacher planning, scaffolding, and supports. Witness B also mentioned that data was recorded in regard to

the ABA instruction. Petitioner did not call an expert in ABA to explain why the instruction at School A should not be considered ABA instruction.

The main question is whether DCPS offered the Student a placement that did not “generate significant externalized behavioral difficulties.” The concern, as stated by Petitioner repeatedly, was that the Student needed to be protected from violent or dangerous students in the school. However, there is no evidence that the Student’s prospective placement at School A would result in exposure to students with “significant” behavioral problems. Witness B testified that one of the students had minor behavioral issues, but also indicated that those issues tended to be verbalizations directed toward the teacher. There is nothing in the record to suggest that this student had issues with other students. Moreover, the student with minor behavioral issues was mainstreamed for part of the day, meaning such student would have limited exposure to the Student in any event.

It must be stressed that IHO Blount specifically suggested in her decision that DCPS propose the CES program. IHO Blount stated: “DCPS has CES classrooms that offer ABA and focus on students with Autism; however, despite requests, Parent had not been provided the opportunity to visit or enroll Student in such a program. It is possible that a DCPS CES program could meet Student’s needs.”

As a result of the foregoing, this claim is dismissed.

**2. Did Respondent fail to provide an appropriate placement/location of services for the Student for the 2017-2018 school year? In particular, did DCPS fail to provide the Student with a placement that could comply with the October 6, 2017, HOD and/or fully implement the Student’s IEP and/or provide the Student with the supports that the Student required to address significant deficits and vulnerabilities arising from the Student’s disability? If so, did DCPS act in contravention of principles in such cases as Gellert v. District of Columbia, 435 F. Supp.2d 18 (D.D.C. 2006)? If so, did Respondent 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). Nevertheless, Petitioners may bring claims based upon an inappropriate placement in certain situations. Although a school district has some discretion with respect to school selection,<sup>2</sup> that discretion cannot be exercised in such a manner as 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).

This placement claim also implicates “failure to implement” issues. “Failure to implement” claims are actionable if the school district cannot materially implement an IEP. A party alleging such a claim must show more than a de minimis failure, and must show substantial or significant portions of the IEP could not be implemented. Savoy v. District of Columbia, 844 F. Supp.2d 23 (D.D.C. 2012)(holding no failure to implement where District’s school setting provided ten minutes less of specialized instruction per

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

day that was on the IEP); see also Van Duyn ex rel Van Duyn v. Baker School Dist. 5J, 502 F.3d 811 (9<sup>th</sup> Cir. 2007)(failure where fifty percent of the IEP mandate was not implemented).

As indicated in regard to Issue #1, DCPS provided the Student with a placement that complied with the Blount HOD irrespective of IEP compliance. The main remaining question is whether DCPS provided the Student with a placement that complied with the May, 2017, IEP. Petitioner contended that the CES placement at School A did not provide the Student with self-contained special education classes in “specials” such as art, music, and physical education, and did not provide the Student with a room containing only special education students during lunch.

The May, 2017, IEP stated that the Student required assistance and supports in less-structured environments, such as electives and lunch. There is testimony that the Student and other CES students benefitted from an aide during electives and lunch. The addition of an aide during electives and lunch is a support that satisfies the requirement in the IEP. Again, the testimony of Witness A was not credible in regard to “chaos” in the cafeteria and halls since her contentions were inconsistent with the written statement she provided after she toured the school.

The IEP also stated that, during electives, “the Student benefitted from having class with a small group outside of the general education classroom.” There is no argument from DCPS that this language was merely suggestive, and it is clear that DCPS did not precisely follow this directive. Witness D testified that the Student would receive electives with other CES students in a cohort with an aide, *but inside the general*

*education classroom* except for art class. The record indicates that these electives included theater, music, and physical education.

Still, even if there is not perfect compliance with an IEP, a school district is not necessarily liable for FAPE denial. DCPS pointed to Johnson v. D.C., 962 F. Supp. 2d 263, 269 (D.D.C. 2013), where Judge Reggie Walton held that the appropriateness of a proposed school is assessed by determining whether it is capable of “substantially implementing” a student’s IEP, not “perfect compliance with a student’s IEP.” Judge Walton stated that a deviation in hours of instruction can, in certain circumstances, be a substantial deviation resulting in the denial of a FAPE, citing to two cases where a 50% or more deprivation of hours was material. Judge Walton then found that the twenty-eight hours of specialized instruction that were offered by DCPS satisfied the IEP mandate to provide the student at issue with thirty-one hours of specialized instruction.

This case is similar to Johnson, where the issue was the unavailability of Spanish and physical education classes. The difference here is that, unlike in Johnson, Petitioner’s main concern was that the Student needed to be *protected* from the general education students. Petitioner and her witnesses did not clearly express any concern about whether the Student could otherwise benefit from the electives if they were provided to the CES cohort by a general education teacher with other general education students in the room.

Petitioner’s concern is certainly reasonable, and she should be applauded for being protective of her sensitive child in the urban public-school environment. Still, one cannot simply presume that an urban public school is dangerous. Here, there was no credible testimony or evidence to suggest that the Student would be at any risk in

electives such as theater, music, and physical education while in the CES program at School A. Moreover, if there were any such issues, Witness D was clear that the Student's cohort would be led by an aide when the group was integrated into general education elective classes. Given that there are currently only five students in the subject CES program at School A, that aide should be able to intervene if issues should arise. Unlike the fact pattern in Shore Regional, there is no basis to find that the Student is likely to be bullied in the CES program at School A.

It is noted that the Student never attended the CES program at School A, and that the contentions here are therefore "speculative" in nature. R.E. v. New York City Dept. of Educ., 694 F.3d 167, 195 (2d Cir. 2012). While Petitioner suggested that the Student conduct a trial visit of the school for a day, DCPS was under no obligation to provide such a visit under the applicable law and regulations.

In sum, while the evidence indicated that DCPS did not completely comply with the IEP when it recommended that the Student attend the CES program at School A, the placement was consistent with the directives of Hearing Officer Blount. Any failure by Respondent to implement the May, 2017, IEP was not a "substantial deviation" from the IEP and did not deny the Student a FAPE. This contention is dismissed.

### VIII. Order

As a result of the foregoing, the Due Process Complaint is hereby dismissed with prejudice.

Dated: January 30, 2018

*Michael Lazan*  
Impartial Hearing Officer

cc: Office of Dispute Resolution  
Petitioner's Representative: Attorney A, Esq.  
Respondent's Representative: Attorney B, Esq.  
OSSE Division of Specialized Education  
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### **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: January 30, 2018

*Michael Lazan*  
Impartial Hearing Officer