



## **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.

## **BACKGROUND AND PROCEDURAL HISTORY:**

The student who is the subject of this due process hearing ("Student") resides with Student's parent ("Petitioner") in the District of Columbia, and the District of Columbia Public Schools ("DCPS") is Student's local education agency ("LEA").

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"). Student was first found eligible for special education in January 2017 when Student attended Montgomery County Public Schools ("MCPS"). Student currently attends a non-public special education day school ("School A") with parental funding. Student began attending School A in November 2018.

On January 8, 2019, Petitioner submitted a referral to DCPS to evaluate Student's special education needs and eligibility and offer an individualized educational program ("IEP") and school placement. On February 6, 2019, Petitioner submitted residency documents to DCPS.

On June 26, 2019, DCPS convened an eligibility meeting and found Student eligible for special education with the MD classification. On July 24, 2019, DCPS developed an IEP for Student that prescribed 20 hours per week of specialized instruction outside general education and related services. Petitioner did not agree with the IEP.

On August 1, 2019, DCPS sent Petitioner a letter notifying her that a DCPS school ("School B") had been identified by DCPS as the location of services for Student for school year ("SY") 2019-2020 as it was the closest DCPS school to Student's home that could implement Student's DCPS IEP.

On August 7, 2019, Petitioner's attorney sent DCPS a letter stating that Student would be attending School A for SY 2019-2020, and requesting that DCPS place and fund Student at School A. DCPS refused, and Student continued to attend School A.

On February 19, 2020, Petitioner filed her due process complaint against DCPS alleging, inter alia, that the IEP and placement DCPS proposed for Student are inappropriate.

## **Relief Sought:**

Petitioner seeks as relief that DCPS reimburse Petitioner for the expenses already paid for Student's tuition and related costs at School A for SY 2019-2020 and declare School A Student's educational placement.

### **LEA Response to the Complaint:**

The LEA filed a response to the complaint on February 28, 2020. The LEA denies that there has been any failure to provide Student with a free appropriate public education (“FAPE”), and stated, inter alia, the following in its response:

DCPS issued a prior written notice (“PWN”) on February 21, 2019, notifying Petitioner that Student is no longer eligible for special education due to Petitioner’s failure to consent to DCPS conducting evaluations. On March 19, 2019, Petitioner filed a due process complaint (“DPC”), and DCPS responded to it on April 3, 2019. Petitioner withdrew the DPC on April 4, 2019, and the matter was dismissed without prejudice on April 22, 2019.

Petitioner sent DCPS an independent psychological report on April 8, 2019. On April 9, 2019, DCPS acknowledged the initial referral for Student, and on June 26, 2019, found Student eligible and on July 24, 2019, proposed an IEP. The IEP team determined that the placement was the least restrictive environment (“LRE”) for Student and offered an appropriate school placement. Petitioner’s attorney informed DCPS Student would attend School A. Petitioner gave no genuine consideration to Student attending a DCPS school.

There has been no allegation that Petitioner paid all tuition and fees to School A and should be required to confirm all amounts paid and whether there has been a scholarship or contingency provided by School A to help facilitate litigation against DCPS.

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

The parties participated in a resolution meeting and did not mutually agree to proceed directly to hearing. The 45-day period began on March 21, 2020, and ended, and the Hearing Officer's Determination (“HOD”) was originally due, on May 4, 2020. The parties agreed to hearing dates beyond the HOD due date and submitted motions of continuance that were granted. The HOD is now due on July 8, 2020.

The undersigned Hearing Officer (“Hearing Officer”) conducted a pre-hearing conference on March 9, 2020, and issued a pre-hearing order (“PHO”) on March 15, 2020, outlining, inter alia, the issues to be adjudicated.

### **ISSUES:<sup>2</sup>**

The issues adjudicated are:

1. Whether DCPS denied Student a FAPE by failing to provide Student with an appropriate IEP for SY 2019-2020 because the IEP lacked sufficient hours of specialized instruction and the inclusion of a reading intervention or methodology. Petitioner alleges Student

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<sup>2</sup> The Hearing Officer restated the issues at the hearing, and the parties agreed that these were the issues to be adjudicated.

requires 32.5 hours per week of specialized instruction outside general education rather than the 20 hours per week of specialized instruction outside general education that Student's July 24, 2019, DCPS IEP prescribed.<sup>3</sup> Petitioner also alleges that the IEP did not prescribe a specific reading intervention program such as Orton-Gillingham.

2. Whether DCPS denied Student a FAPE by failing to provide Student with an appropriate placement for SY 2019-2020 because the school DCPS proposed (School B) could not provide Student a program with 32.5 hours per week of specialized instruction outside general education and because the school lacked an appropriate reading intervention program.
3. Whether DCPS denied Student a FAPE by failing to allow Petitioner meaningful participation in the decision-making process regarding Student's educational placement, specifically, the location of service decision.
4. Whether DCPS denied Student a FAPE by failing to allow Petitioner and her educational consultant to observe the general education classroom at the DCPS proposed school (School B).
5. Whether School A is a proper placement for Student.

#### **DUE PROCESS HEARING:**

The Due Process Hearing was convened on May 4, 2020, May 12, 2020, May 18, 2020, and June 19, 2020. Due to the COVID-19 emergency, the hearing was conducted via video-teleconference. The parties made oral closing arguments on June 26, 2020.

#### **Petitioner's Motion for Summary Judgment**

On March 16, 2020, Petitioner's counsel filed a Motion for Summary Decision asserting that Petitioner is entitled to summary decision because of DCPS's failure to propose a specific and clearly required reading program or methodology for Student as well as failure to allow Petitioner meaningful input into the decision-making process regarding the educational placement or "location of services." Petitioner counsel alleged that these are undisputed facts. On April 21, 2020, DCPS counsel filed an Opposition to Motion, asserting that the facts are in dispute. The Hearing Officer, after reviewing both the motion and opposition, concluded that there are material facts in dispute and denied Petitioner's Motion for Summary Decision.

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<sup>3</sup> Petitioner asserts that the IEP that DCPS proposed for Student lacked sufficient hours of specialized instruction outside general education. Petitioner asserts that the specialized instruction and related services that are provided outside general education should consume Student's full school day with no time in general education. In addition, Petitioner asserts that the IEP does not specifically state that Student will be provided a reading intervention program to address Student reading deficits.

## **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 55 and Respondent's Exhibits 1 through 26) that were admitted into the record and are listed in Appendix 2.<sup>4</sup> The witnesses testifying on behalf of each party are listed in Appendix B.<sup>5</sup>

## **SUMMARY OF DECISION:**

Respondent held the burden of persuasion on issues #1 and #2 after Petitioner established a prima facie case. Petitioner had both the burden of production and persuasion on issues # 3, #4, and #5. Based on the evidence adduced, the Hearing Officer concluded that Respondent sustained the burden of persuasion by a preponderance of the evidence on issues #1 and #2. Petitioner did not sustain the burden of persuasion on issues #3, #4, and #5. Consequently, the Hearing Officer dismissed Petitioner's due process complaint with prejudice.

## **FINDINGS OF FACT:**<sup>6</sup>

1. Student resides with Petitioner in the District of Columbia, and DCPS is Student's LEA. 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"). (Respondent's Exhibit 17-1)
2. Student currently attends a non-public special education day school ("School A") with parental funding. Student began attending School A in November 2018. School A specializes in instructing students with language-based learning differences and provides students specialized instruction and related services. School A has an OSSE Certificate of Approval. (Witness 3's testimony, Respondent' Exhibit 14-3)

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<sup>4</sup> Any item disclosed and not admitted or admitted for limited purposes was noted on the record and is noted in Appendix A.

<sup>5</sup> Petitioner presented five witnesses: (1) Student's parent ("Petitioner") and the following individuals who were designated as expert witnesses: (2), an Educational Consultant, (3) an Independent Psychologist, (4) a School A Administrator, (5) a School A Occupational Therapist. Respondent presented seven witnesses designated as expert witnesses: (1) a DCPS Psychologist, (2) a DCPS Occupational Therapist, (3) a DCPS Speech Language Pathologist, (4) a DCPS Special Education Teacher/LEA Representative, (5) DCPS Resolution Specialist, (6) a DCPS Manager of SLS Programs, and (7) a DCPS Instructional Coach/Teacher. The Hearing Officer found the witnesses credible unless otherwise noted in the conclusions of law. Any material inconsistencies in the testimony of witnesses that the Hearing Officer found are addressed in the conclusions of law.

<sup>6</sup> The evidence (documentary and/or testimony) that is the source of the Findings of Fact ("FOF") is noted within parenthesis following the finding. A document is noted by the exhibit number. If there is a second number following the exhibit number, that number denotes the page of the exhibit from which the fact was obtained. When citing an exhibit that has been submitted by more than one party separately, the Hearing Officer may only cite one party's exhibit.

3. Student was first found eligible for special education in January 2017 when Student attended Montgomery County Public Schools ("MCPS"). ( Respondent's Exhibit 3-3).
4. Student had an individualized educational program ("IEP") in MCPS during school year ("SY") 2016-2017. Student's disability classification at the time was SLD affecting reading, written expression, and math. That IEP prescribed that Student would be provided 2 hours of specialized instruction per week in reading, written expression, and math in general education and 1.5 hours of specialized instruction per week in reading outside general education. Student was to spend 28.5 hours per week in general education. (Respondent's Exhibit 3-1, 3-27, 3-28)
5. During SY 2017-2018, while at the MCPS school, Student's report card reflected that Student earned passing grades in academic courses and "As" in Art, Music, and Physical Education ("P.E."). Most of Student's instruction was in general education, including the special courses of Art, Music, and P.E. Despite the grades Student earned on the report card, Petitioner had concerns that Student was having difficulty with reading and spelling, was not making academic progress and was being bullied by peers. Student would participate minimally with other students during recess. Petitioner engaged the services of a tutor to assist Student in reading. (Petitioner's testimony, Petitioner's Exhibit 8)
6. Petitioner later engaged the services of an educational consultant to assist in addressing Student's academic needs and to assist in finding a more appropriate school for Student. In June 2018, the consultant conducted a diagnostic educational evaluation of Student in which she reviewed Student's evaluations and education records; however, she did not review Student's MCPS report card. She noted Student's significant deficits in the areas of inattention, hyperactivity/impulsivity, and executive functioning. The consultant noted that in prior assessments, Student's intellectual function was Average. She administered assessments, including the Woodcock-Johnson Tests of Achievement-Fourth Edition Form B (WJ-4). The consultant assessed Student's academic functioning in reading, math, and written expression and conducted an observation of Student at the MCPS school. She concluded that Student's reading skills were poor and consistent with dyslexia. Student's math skills were in the Low range and written expression in the Low Average range. She concluded that Student had begun to have self-doubt about Student's academic abilities. The consultant recommended that Student be enrolled in a separate special education day school, School A. (Petitioner's testimony, Witness 1's testimony, Petitioner's Exhibit 9)
7. Petitioner continued Student's enrollment in MCPS at the start of SY 2018-2019 but enrolled Student in School A in November 2018. Student felt more comfortable at School A and was able to ask teachers for help without feeling looked down upon. Petitioner and Student moved to the District of Columbia in December 2018. (Petitioner's testimony)
8. On January 8, 2019, Petitioner submitted a referral to DCPS to evaluate Student's special education needs and eligibility and to offer an IEP and school placement. This referral form included an authorization for School A to share Student's information with DCPS. (Respondent's Exhibit 4)

9. On January 15, 2019, a DCPS Central Office representative reached out to Petitioner to schedule an initial data review meeting to address Petitioner's expressed concerns about Student's speech/language, attention, and academic concerns and her desire for DCPS to offer Student a FAPE. The representative also contacted School A about attending the meeting. That meeting was convened on February 6, 2019, and Petitioner and her attorney attended. Following that meeting, DCPS requested that Petitioner sign a consent form to allow DCPS to evaluate Student. (Respondent's Exhibits 6, 8)
10. On February 6, 2019, Petitioner submitted residency documents to DCPS. (Respondent's Exhibit 2)
11. On February 13, 2019, DCPS issued a prior written notice ("PWN") to Petitioner which stated that after review of the data review meeting DCPS's team proposes to move forward with the evaluation process to make FAPE available to Student, by conducting a psychological evaluation speech/language assessment, and occupational therapy evaluation, motivation assessment scales, and strengths and difficulties questionnaire. The PWN noted DCPS's repeated attempt to gain consent to evaluate Student. (Respondent's Exhibit 7-1, 7-2)
12. On February 21, 2019, DCPS issued a PWN to Petitioner, noting that it would not proceed with the evaluation process because Petitioner had refused to provide DCPS consent to conduct evaluations of Student. (Respondent's Exhibit 7-4)
13. In March 2019 Petitioner engaged an independent psychologist to conduct a psychological evaluation of Student. The psychologist administered a wide array of assessments, reviewed records, and observed Student. She confirmed Student's ADHD and SLD in reading, written expression, and math. She also concluded that Student met the criteria of Adjustment Disorder with Mixed Anxiety and Depressed Mood. She recommended that Student continued to need a small non-traditional classroom setting that provides, among other things, "full-time special education services and accommodations," with on-site occupational therapy ("OT") and psychotherapy and multi-sensory learning. She also recommended that Student have daily direct evidence-based reading and writing instruction and one to one or small group math instruction. (Witness 2's testimony, Petitioner's Exhibit 20)
14. On May 1, 2019, DCPS convened an Analysis of Existing Data ("AED") meeting. Petitioner and her attorney participated along with several DCPS team members. DCPS expressed that it wanted to proceed with the evaluations that it had previously requested to conduct. Petitioner provided DCPS the independent psychological evaluation that Petitioner had conducted in March 2019 that Petitioner's educational consultant recommended be conducted. Petitioner granted written consent for DCPS to conduct evaluations of Student and set a tentative date to review all the findings on June 26, 2019. (Respondent's Exhibit 9, 10)
15. On May 15, and 23, 2019, a DCPS speech-language pathologist conducted a speech/language evaluation of Student with a report dated June 15, 2019. Based on the

assessments the evaluator conducted, she concluded Student's oral language abilities were average when compared with same-age peers, but Student's listening skills were largely dependent on Student's focus and attention. She did not expressly recommend in her evaluation report that Student required speech-language services. (Respondent's Exhibit 12)

16. On May 28, 2019, a DCPS social worker conducted a classroom observation of Student at School A. (Respondent's Exhibit 11)
17. On June 26, 2019, DCPS convened an eligibility meeting at DCPS's Central Office. Petitioner and her attorney participated along with several members of School A staff. DCPS team members included those who had observed and evaluated Student. The team reviewed and considered the evaluations DCPS conducted and the independent evaluation that Petitioner provided DCPS. The team found Student eligible for special education with the MD classification, including SLD and OHI for Attention Deficit Hyperactivity Disorder ("ADHD"). The team concluded it would move to the next step of developing an IEP for Student on July 24, 2019. (Respondent's Exhibits 13, 15)
18. On July 24, 2019, DCPS convened an IEP meeting at DCPS's Central Office. Petitioner and her attorney participated by telephone. Members of School A staff were also in attendance, along with Petitioner's educational consultant. The DCPS team members agreed to update the proposed IEP goals with input from School A staff and Petitioner's consultant. Petitioner's consultant made certain Student's academic and other needs were reflected in the IEP. During the meeting, there was no mention of or request that any specific reading methodology or intervention program be included in the IEP. (Witness 1's testimony, Witness 6's testimony, Respondent's Exhibit 16)
19. The team agreed on the related services of occupational therapy ("OT") and behavioral support services ("BSS") of 240 minutes per month and 180 minutes per month, respectively. DCPS proposed that Student be provided 20 hours per week of specialized instruction outside general education, with the remainder of instructional hours inside general education. Petitioner, School A staff members, and Petitioner's consultant all disagreed and expressed their belief that Student should be placed in a "full-time" day school program based on Student's current needs. Petitioner's consultant offered an explanation as to why Student required specialized instruction during lunch and recess. DCPS indicated that the IEP would be finalized in five days. (Witness 1's testimony, Witness 6's testimony, Respondent's Exhibit 16)
20. DCPS completed an IEP for Student on July 31, 2019. The IEP notes that Student has a history of becoming disengaged, especially in reading, and becoming fidgety at times and is not always aware of Student's body in space regarding peers. The IEP also notes that Student's oral language abilities were average, and Student did not require assistive technology to access the educational program. The IEP includes goals in the areas of math, reading, written expression, behavioral development, and OT. The IEP prescribes the following services outside general education: 20 hours per week of specialized instruction, 180 minutes per month of BSS, and 240 minutes per month of OT. There is also 30 minutes

per month of OT consultative services. (Respondent's Exhibit 17-1 through 17-21)

21. The IEP includes a litany of Other Classroom Aids and Services to be implemented in all core subjects throughout Student's educational program. These included: Multi-Sensory Learning, Using Student's Strengths and Prompting Student, One to One and Small Group Work, Social Support with small social group support, allowing Student to doodle and Movement to help Student focus, Frequent Breaks, Monitoring Student when tackling new material for signs of overload and stress, Preferential Seating, and Emailing Assignments. (Respondent's Exhibit 17-23)
22. The IEP least restrictive environment ("LRE") page states the services that Student will be provided outside general education. Also, it states the following: "Given [Student's] ADHD and LDs, [Student] continues to require a small, non-traditional classroom setting that provides full-time special education services and accommodations. Although the type of educational program that Student would attend in DCPS was discussed, the specific school that Student would be attending was not identified at the IEP meeting. (Witness 6's testimony, Respondent's Exhibit 17-2)
23. On August 1, 2019, DCPS sent Petitioner a letter notifying her that a DCPS school ("School B") had been identified by DCPS as the location of services for Student for SY 2019-2020 as it was the closest DCPS school to Student's home that could implement Student's DCPS IEP. (Respondent's Exhibit 18)
24. On August 7, 2019, Petitioner's attorney sent DCPS a letter stating that Student would be attending School A for SY 2019-2020, and requesting that DCPS place and fund Student at School A, and if DCPS refused Petitioner's request, they would reserve the right to seek funding. The letter expressed that Petitioner's counsel did not believe that DCPS had offered Student an appropriate IEP and special education program and requested that DCPS move forward to develop one and that the School A staff be involved. (Respondent's Exhibit 19)
25. On August 8, 2019, DCPS issued a PWN stating that School B had been identified as Student's location of services for SY 2019-2020 in School B's Learning Support classroom. (Respondent's Exhibit 20)
26. On August 14, 2019, DCPS sent a letter to Petitioner acknowledging the August 7, 2019, letter from her attorney stating that DCPS did not agree to fund Student's placement at School A. The letter asked when Petitioner decided to place Student at School A, when was the deposit made to School A, when was the financial agreement signed between Petitioner and School A, and whether Petitioner had received any scholarship from School A. The letter expressed DCPS's position that it had made an offer of FAPE available to Student with an appropriate IEP and placement in School B's Student Learning Support ("SLS") classroom. The letter went on to state that if Petitioner chose not to enroll Student at School B, DCPS would consider Student a parentally-placed private school student. (Respondent's Exhibit 21)

27. On September 13, 2019, a DCPS psychologist performed a formal review of the independent educational evaluation conducted by the independent psychologist that Petitioner provided DCPS. She also interviewed Student's School A teacher and conducted a classroom observation. The DCPS psychologist noted that Student's cognitive functioning scores were scattered ranging from Borderline to Average. Student scored in the Borderline range for Fluid Reasoning, Working Memory, and Processing Speed. In academic achievement, Student's performance on functional reading tasks, math calculation, and writing were below age and grade expectations. Student's reading subtest scores ranged from Low Average to Impaired. Likewise, in Written Expression, Student's subtest scores ranged from Low Average to Impaired. Student's Math scores were borderline. Student was inconsistent in the ability to interpret graphs, struggled to read a clock, identify place value, respond to a word problem, and had weak calculation skills. The teacher noted that Student had considerable challenges with attention and focus affecting Student's task initiation when completing classwork. During the observation, Student struggled to complete tasks in the classroom independently. (Witness 5's testimony, Respondent's Exhibit 14)
28. At School A, Student is receiving one to one reading instruction nearly one hour per day using the Orton Gillingham reading intervention program. Student's current reading level is at least three grade levels below Student's current grade. Student also receives related services, including OT and one to one therapy with a psychologist. Student has other classes with as many as 10 to 15 students in non-academic subjects. Student is frequently on School A playground with other students, and there is no instruction provided to Student at School A during recess and lunch periods. Student has made academic and social/emotional progress since attending School A. School A staff participated in the development of Student's DCPS IEP. The School staff believe that the IEP goals in Student's DCPS IEP are appropriate to meet Student's needs. Their disagreement about the IEP was that it only provides 20 hours of specialized instruction rather than Student being in a separate special education school. (Witness 3's testimony, Witness 4's testimony)
29. On October 10, 2019, a DCPS special educator conducted a 50-minute classroom observation of Student at School A to collect data to inform placement considerations. She observed Student in homeroom and in a structured reading intervention session. She observed that Student was highly distracted, friendly, easily redirected, and playful. The accommodations she observed included small group instruction, direct reading intervention by a speech-language pathologist, and clarification and repetition of directions. There were several accommodations that she noticed were not being used during the time of her observation. Based upon this observation, the DCPS educator concluded that Student was not being provided any services at School A that could not be met at a DCPS school. (Witness 6's testimony, Respondent's Exhibit 22)
30. Petitioner did not enroll Student in School B, but she did visit School B along with her educational consultant twice. After each observation, the School B staff had a debrief with Petitioner and the consultant. The consultant asked how instruction would be delivered. She was told that instruction in the SLS program and reading and math interventions would be available and tailored to meet Student's needs. Petitioner also asked about the

demographics of the school. (Witness 6's testimony)

31. Petitioner and her educational consultant were not satisfied with what they observed at School B and did not think the program and the school were appropriate for Student. They observed only the SLS program and were not allowed to observe any general education classes, although Student's DCPS IEP prescribes that Student is to spend some time with general education students. The consultant did not observe presentation of grade-level work in the classroom she observed. She did not ask about the specific reading intervention program that would be implemented for Student at School B. (Witness 1's testimony)
32. Petitioner and her consultant spent about 45 minutes observing School B. Petitioner was concerned that Student could not do what she observed other students doing in the SLS classroom, as a lot of instructions were given to the students at once, and Student would not be able to follow. She asked where Student would be during the time Student was not in the SLS classroom, but was not shown any classes outside the SLS classroom. The Schools staff informed her that Student would be in Art, Music, P.E., and lunch with general education students. Petitioner later reviewed the school ranking on OSSE's website and became concerned that School B was a low performing school. Student has continued to progress at School A in reading, writing, and math. Student does not take Music at School A, and Petitioner has never had an all-day formal observation of Student at School A, yet she is satisfied with Student's progress and wants Student to remain at School A. (Petitioner's testimony)
33. A DCPS staff member was with Petitioner during the observation and conducted a debriefing with Petitioner and her consultant after the observation. During the observation, there were approximately 10 students and three adults in the classroom. Some were working on computers, and some were engaged in small group instruction with the teacher. During the debrief, Petitioner asked about the intervention programs that were provided at School B, and they were explained. However, neither Petitioner nor her consultant asked detailed questions about the intervention programs. Petitioner asked about the diversity of the school. Although it was not defined at the time of Petitioner's visit what classes other than the SLS classroom Student would have been, that choice would have been made had Student enrolled. (Witness 9's testimony, Witness 11's testimony)
34. DCPS SLS program provides special education intervention and modification of curriculum to address the needs of students with learning disabilities. Each SLS classroom has a teacher and teacher's aide and no more than 12 students. Instruction is provided one on one and in small groups. There are morning academics of reading or math based on the individual teacher's decision. Students are with general education students for lunch and recess and may have special classes of Music, Art, and P.E. with general education students if the individual IEP allows. Otherwise, those classes are also provided outside general education, depending on the number of hours that a student has outside general education. (Witness 10's testimony, Witness 11's testimony)
35. School B's SLS program provides a variety of reading and math intervention programs that are implemented based on a student's instructional level, including Wilson Reading, and

Eureka Math. School B does not use Orton Gillingham, but Wilson Reading is a well-recognized evidence-based reading intervention program. (Witness 11's testimony, Witness 1's testimony)

36. School B's SLS program offers guided reading instruction and small group instruction for students with difficulties in reading and writing. There are adaptive supports in the classroom. School B can email assignments to students. The classroom teacher and teacher's aide accompany students during lunch and recess. School B has two full-time social workers who can implement BSS services and other related service providers who can implement the related services on Student's DCPS IEP. School B and its SLS program can fully and effectively implement Student's DCPS IEP. (Witness 11'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 the 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). Respondent held the burden of persuasion on issues #1 and #2 after Petitioner established a prima facie case. Petitioner had both the burden of production and persuasion on issues # 3, #4, and #5.<sup>7</sup> The burden of persuasion shall be met by

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<sup>7</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 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

a preponderance of the evidence. The normal standard is a preponderance of the evidence. See, e.g., *N.G. V. District of Columbia* 556 f. Sup. 2d (D.D.C. 2008) see also 20 U.S.C. §1451 (i)(2)(C)(iii).

**ISSUE 1:** Whether DCPS denied Student a FAPE by failing to provide Student with an appropriate IEP for SY 2019-2020 because the IEP lacked sufficient hours of specialized instruction and the inclusion of a reading intervention or methodology.

**Conclusion:** Respondent sustained the burden of persuasion by a preponderance of the evidence that the IEP DCPS developed on July 24, 2019, was reasonably calculated to provide Student educational benefit in light of Student’s unique circumstances.

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.”

The second, substantive, prong of the *Rowley* inquiry is whether the IEP DCPS developed was reasonably calculated to enable Student to make progress appropriate in light of Student’s individual circumstances.

In *Andrew F. ex rel. Joseph F. v. Douglas Cty. Sch. Dist.* RE-1, 137 S. Ct. 988 (2017), the U.S. Supreme Court elaborated on the “educational benefits” requirement pronounced in *Rowley*: To meet its substantive obligation under the IDEA, a school must offer an IEP reasonably calculated to enable a child to make progress appropriate in light of the child’s circumstances. . . . Any review of an IEP must appreciate that the question is whether the IEP is reasonable, not whether the court regards it as ideal. . . . When a child is fully integrated in the regular classroom, as the Act prefers,

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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.

what that typically means is providing a level of instruction reasonably calculated to permit advancement through the general curriculum. . . . If that is not a reasonable prospect for a child, his IEP need not aim for grade-level advancement. But his educational program must be appropriately ambitious in light of his circumstances, just as advancement from grade to grade is appropriately ambitious for most children in the regular classroom. The goals may differ, but every child should have the chance to meet challenging objectives. *Endrew F.*, supra, 137 S. Ct. at 999–1000 (citations omitted).

The key inquiry regarding an IEP’s substantive adequacy is whether, taking account of what the school knew or reasonably should have known of a student’s needs at the time, the IEP offered was reasonably calculated to enable the specific student’s progress. . . . “Any review of an IEP must appreciate that the question is whether the IEP is reasonable, not whether the court regards it as ideal.” *Z.B. v. District of Columbia*, 888 F.3d 515 (D.C. Cir. 2018) citing *Endrew F.*, supra, 137 S. Ct. 988.

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

“The IDEA requires that children with disabilities receive education in the regular classroom whenever possible” *Z.B. v. District of Columbia*, 888 F.3d 515 (D.C. Cir. 2018) citing *Endrew F.*, supra, 137 S. Ct. at 999 (quoting *Rowley*, 458 U.S. at 202)

Petitioner alleges that the June 24, 2019, IEP is inappropriate because it lacks sufficient hours of specialized instruction and the inclusion of a reading intervention or methodology.

Petitioner alleges Student requires 32.5 hours per week of specialized instruction outside general education rather than the 20 hours per week of specialized instruction outside general education that Student’s July 24, 2019, DCPS IEP prescribes, and Petitioner also alleges that the IEP did not prescribe a specific reading intervention program such as Orton-Gillingham.

The evidence demonstrates that when the IEP was developed Petitioner, her attorney, her educational consultant, and School A staff members fully participated in the development of the IEP. The consultant ensured that the IEP goals and other services met Student's needs. The only disagreement that was raised about the IEP at that IEP meeting was the difference in the amount of specialized instruction and the resulting LRE that the IEP prescribed. Petitioner and her representatives and the School A staff believed Student should have an IEP that proposed all services outside general education such that Student’s LRE was a separate special education day school. The IEP meeting notes do not reflect that during the IEP meeting, there was any mention of or request for any specific reading methodology or intervention program to be included in the IEP.

In addition to the 20 hours per week of specialized instruction outside general education that the July 24, 2019, IEP prescribes, it also prescribes an additional 1.75 hours per week outside general education for related services. Petitioner asserts that the number hours in Student's full school week is 32.5 and that Student's full school week should be outside general education. Assuming this number of hours to be correct, Student would have 10.25 hours of the school week with general education students, or approximately 2 hours and 5 minutes per day. Petitioner asserts that Student should thus have specialized instruction during lunch and recess and all classes, including specials such as Music, Art, and P.E., which would occupy the remainder of Student's school week.

At School A, Student is with no general education students. And neither of the witnesses from School A who testified on Petitioner's behalf had ever observed Student in any general education setting. The only evidence presented that reflects Student's time and performance in a general education setting was when Student attended MCPS. Although Petitioner and her consultant testified that Student struggled while in MCPS, neither of them could effectively explain how Student could have received passing grades while in MCPS and obtained excellent grades in all special non-academic courses. Neither of them had observed Student in those classes at MCPS.

Understandably, Petitioner would want the best education for her child that met all Student's needs. And understandably, based on the assessments, observations, and recommendations of her educational consultant, Petitioner believed that Student would be best served by attending School A and enrolled Student there in November 2018.

Once Petitioner moved to the District of Columbia in December 2018, Petitioner initiated the eligibility process in January 2019 with DCPS for DCPS to provide Student an appropriate school placement. There is no indication that Petitioner intended to withdraw Student from School A after she placed Student there. But she was entitled, as a District of Columbia resident, to make a request to DCPS for a provision of FAPE for Student. DCPS began the eligibility process and requested that Petitioner grant DCPS authorization to evaluate Student. Initially, Petitioner refused. Petitioner then obtained an independent psychological evaluation that recommended Student be in a small non-traditional classroom setting that provides, among other things, "full-time special education services and accommodations." Petitioner presented that evaluation to DCPS and then agreed for DCPS to conduct other evaluations.

DCPS ultimately found Student eligible and developed, with Petitioner's and her representatives' assistance, the July 24, 2020, IEP. As stated, at the time of the IEP meeting, the only disagreement that was raised about the IEP was the difference in the amount of specialized instruction and the resulting LRE that the IEP prescribed. Although Petitioner's consultant asserted that Student would need specialized instruction during lunch and recess and testified that she stated that during the IEP meeting, this portion of her testimony was unbelievable. There is no evidence that Student currently receives specialized instruction during lunch and recess at School A.

There is no indication that Student cannot effectively interact with general education students during lunch and recess, which would presumably be an hour of Student's school day in DCPS. The other hour of Student's school day outside general education would be for special classes such as Art, Music, and P.E. The only documentary evidence of how Student is likely to function in such classes with general education students is the report card that Student had while attending

MCPS. In those classes, Student had excellent grades. There was no credible testimony that disputed this evidence of Student's ability to function successfully in those classes with general education students. And this was reasonable evidence of Student's ability for DCPS to consider.

As to Petitioner's assertion that the July 24, 2019, IEP is inappropriate because it lacks a specific reading intervention or methodology, the case law that is most compelling and recent clearly states that the specific instructional methodology is the proper purview of the school district.

As the Court points out in *R.B vs. the District of Columbia* 75 IDELR 102 (September 30, 2019) "Plaintiffs' additional concerns go to the methodology of special education instruction at [Public School] but the methodology to be employed in the future execution of an IEP is not a question for courts to decide. As the Supreme Court stated in *Rowley*, "courts must be careful to avoid imposing their view of preferable educational methods upon the States." 458 U.S. at 207. "The primary responsibility for formulating the education to be accorded ... and for choosing the educational method most suitable to the child's needs, was left by [IDEA] to state and local education agencies in cooperation with the parents or guardian of the child." *Id.* "Therefore, once a court determines that the requirements of the Act have been met, questions of methodologies are for resolution by the States." *Id.* at 208."

The evidence presented by Petitioner did not sufficiently demonstrate, when countered by the evidence presented by Respondent, that Student is in need of specialized instruction throughout Student's school day for a total of 32.5 hours per week. Nor was there sufficient evidence that the IEP was lacking because it did not prescribe a specific reading intervention program such as Orton-Gillingham.

The evidence adduced supports the finding that the level of specialized instruction both inside and outside general education that DCPS proposed for Student in the July 24, 2019, IEP was appropriate, and the IEP was reasonably calculated to enable Student to make progress appropriate in light of Student's circumstances. Consequently, the Hearing Officer concludes that Respondent sustained the burden of persuasion by a preponderance of the evidence on this issue.

**ISSUE 2:** Whether DCPS denied Student a FAPE by failing to provide Student with an appropriate placement for SY 2019-2020 because the school DCPS proposed (School B) could not provide Student a program with 32.5 hours per week of specialized instruction outside general education and because the school lacked an appropriate reading intervention program.

**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.

Removing a child with disabilities "from the regular education environment occurs only when the

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

"The IDEA requires that children with disabilities receive education in the regular classroom whenever possible" *Z.B. v. District of Columbia*, 888 F.3d 515 (D.C. Cir. 2018) citing *Endrew F.*, supra, 137 S. Ct. at 999 (quoting *Rowley*, 458 U.S. at 202)

Pursuant to D.C. Code § 38-2561.02(c) Special education placements shall be made in the following order of priority; provided, that the placement is appropriate for the student and made in accordance with the IDEA and this chapter: (1) DCPS schools, or District of Columbia public charter schools pursuant to an agreement between DCPS and the public charter school; (2) Private or residential District of Columbia facilities; and (3) Facilities outside of the District of Columbia.

The legal standard under the IDEA is that DCPS "must place the student in a setting that is capable of fulfilling the student's IEP." *Johnson v. Dist. of Columbia*, 962 F. Supp. 2d 263, 267 (D.D.C. 2013). See also *O.O. ex rel. Pabo v. Dist. of Columbia*, 573 F. Supp. 2d 41, 53 (D.D.C. 2008) (placement must be in a school that can fulfill the student's IEP requirements).

As discussed in the issue above, the evidence in this case supports the finding that the level of specialized instruction both inside and outside general education that DCPS proposed for Student in the July 24, 2019, IEP was appropriate and reasonably calculated to enable Student to make progress appropriate in light of Student's circumstances.

There was insufficient evidence presented that Student requires special education throughout the school day or that Student's academic and/or social/emotional or other challenges support a conclusion that Student's unique circumstances require that Student be totally removed from the general education setting such that Student's LRE is a separate special education school.

After the July 24, 2019, IEP was developed, DCPS informed Petitioners that the IEP could be and would be implemented at School B. The evidence sufficiently demonstrates, through the credible testimony of the School B staff member that School B can provide Student specialized instruction both inside and outside of general education and can provide Student with a specialized reading program and the accommodations in the IEP to help support Student's academic challenges as well as Student's challenges with attention related to ADHD.

Although Petitioner and Petitioners' educational advocate were of the opinion that School B was not an appropriate setting for Student because Petitioner was concerned that Student could not do what she observed other students doing in the SLS classroom, and there was a lot of instruction given to the students at once that Student would not be able to follow. Her visit was one class for approximately 30 minutes with a 15 minute debrief meeting. Petitioner also asked about the diversity of students at School B and later reviewed the school ranking on OSSE's website and became concerned that School B was a low performing school. However, her and the consultant's

testimony about School B was sufficiently outweighed by the DCPS witnesses who explained the make-up and resources available at School B and in the SLS classroom that would support Student's unique needs, including the academic interventions that are available.

There was no material failure or discrepancy between the services proposed for the disabled child and the services required by that child's IEP. *N.W. v. Dist. of Columbia*, 253 F. Supp. 3d 5, 17 (D.D.C. 2017), quoting *James v. Dist. of Columbia*, 194 F. Supp. 3d 131, 139 (D.D.C. 2016).

Based upon the evidence adduced, the Hearing Officer concludes that School B could effectively implement the IEP that DCPS developed for Student on July 24, 2019, and could otherwise appropriately address the academic and social/emotional and other concerns noted in Student's evaluations and IEP. Consequently, the Hearing Officer concludes that Respondent sustained the burden of persuasion by a preponderance of the evidence that the educational placement that DCPS offered, both in the IEP and in the school proposed to implement the IEP, was appropriate.

**ISSUE 3:** Whether DCPS denied Student a FAPE by failing to allow Petitioner meaningful participation in the decision-making process regarding Student's educational placement, specifically, the location of service decision.

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

The purpose of IDEA is to "ensure that all children with disabilities have available to them a free and appropriate public education that emphasizes special education and related services designed to meet their unique needs and prepare them for further education, employment, and independent living." *M.G. v. District of Columbia*, 246 F.Supp.3d 1,7 (D.D.C. 2017) (citing 20 U.S.C. § 1400(d)(1)(A)).

Parents must have an opportunity to participate in the IEP process, and "procedural inadequacies that "seriously infringe upon the parents' opportunity to participate in the IEP formulation process ... clearly result in the denial of a FAPE." *Cooper v. District of Columbia*, 77 F.Supp.3d 32, 37 (D.D.C. 2014) (quoting *A.I. 3ex rel. Iapalucci v. District of Columbia*, 402 F.Supp.2d 152, 164 (D.D.C. 2005)) (alteration in original). To ensure these requirements are followed, IDEA established procedural safeguards that allow parents to seek a review of IEP decisions they disagree with. See *Middleton v. District of Columbia*, 312 F.Supp.3d 113, 122 (D.D.C. 2018). Section 1415(f)(1)(A) provides "the parents or the local education agency involved in such a complaint shall have an opportunity for an impartial due process hearing ..."

The evidence demonstrates that Petitioner and her representatives had a full and unbridled opportunity to contribute to development Student's IEP at the July 24, 2019, IEP meeting. Petitioner's consultant took efforts to ensure that Student's needs were addressed in the IEP and save the hours of specialized instruction in the IEP, and thus the LRE, Petitioner had no disagreements with the IEP when it was developed. Although Petitioner disagreed with the LRE or placement decision, she had a full opportunity to and did express her disagreement.

Having already addressed above the issues with regard to the hours of specialized instruction and the total time Student would be inside and outside general education, and having found that

appropriate, Petitioner's assertion that she was excluded from the determination of the location of services or what school the IEP would be implemented remains.

The evidence demonstrates that after the IEP was developed Petitioner was sent both a letter and a PWN informing her that DCPS was offering School B as the school where Student's IEP could be implemented. This offer of School B was made well before the start of SY 2019-2020. Although Petitioner was not involved in choosing the actual school that would implement the IEP, she was given ample time to visit the school, and it appears that if she wanted to request another DCPS school location, that would likely have been considered. As pointed out in the case law that DCPS counsel submitted following the hearing, the case law generally supports the proposition that the actual school location where a student's IEP will be implemented is the purview of the school district.

In *Sanchez v. District of Columbia*, No. 19-7048, 2020 U.S. App. LEXIS 15834 (D.C. Cir. May 15, 2020) the Court stated:

"First, the Court concludes that Z.B. was not denied a FAPE on this ground because the decision to refer Z.B. to Kennedy Krieger was a change in location of services not a change in educational placement, which would have necessitated parental involvement. The IDEA requires that a student's parents be part of the team that creates the student's IEP and determines the student's educational placement. *See* 20 U.S.C. § 1414(d)(1)(A)-(B). However, [\*\*33] the IDEA does not "explicitly require parental participation in site selection." *James*, 949 F. Supp. 2d at 138 (quoting *White ex rel. White v. Ascension Parish School Bd.*, 343 F.3d 373, 379 (5th Cir. 2003)). Plaintiff has failed to cite any case, from this Circuit or another, requiring parental involvement in site selection. Instead, all of the cases cited by Plaintiff in support of her argument refer to parental participation in the development of the student's IEP and educational placement. *See e.g.*, *Doug C. v. Hawaii Dep't of Educ.*, 720 F.3d 1038, 1044-45 (9th Cir. 2013) (requiring parental participation in the student's IEP development and educational placement); *Anchorage Sch. Dist. v. M.P.*, 689 F.3d 1047, 1055 (9th Cir. 2012) (same); *Deal v. Hamilton Cty. Bd. of Educ.*, 392 F.3d 840, 857-59 (6th Cir. 2004) (explaining that a predetermination of services can violate the parents' right to participate in the IEP process)."

Based on the evidence adduced and consideration of the case law, the Hearing Officer concludes that DCPS's action of selecting the school location where Student's IEP would be implemented did not impede Student's right to FAPE, or significantly impede Petitioner's opportunity to participate in the decision-making process regarding the provision of FAPE, or cause Student a deprivation of educational benefits.

**ISSUE 4:** Whether DCPS denied Student a FAPE by failing to allow Petitioner and her educational consultant to observe the general education classroom at the DCPS proposed school (School B).

**Conclusion:** The Hearing Officer concludes that Petitioner did not sustain the burden of persuasion by a preponderance of the evidence on this issue.

IDEA allows states to create additional procedural and substantive protections if they are consistent with IDEA. *Middleton*, 312 F.Supp.3d at 122. If a state creates a higher standard, "an individual may bring an action under the federal statute seeking to enforce the state standard." *Id.* (quoting *Gill v. Columbia* 93 Sch. Dist., 217 F.3d 1027, 1035).

In 2014, the District of Columbia passed the Student Rights Act. The Act "provides district parents with additional procedural safeguards to help make sure parents have the tools they need to stay informed, engaged, and empowered throughout the special education process." See D.C. Council Comm. Rep. on B 20-723 (D.C. 2014) at 1. Recognizing that "parents who do not have a specific background in the subject area ... often cannot adequately evaluate whether their child's instruction is sufficient [and that] parents are concerned that an LEA may limit such access to the point that the observation is unable to provide meaningful input into their child's educational progress," the Student Rights Act expanded on a parent's "right to observe" under the IDEA...<sup>8</sup>

The Act (D.C. Code § 38-2571.03) states in pertinent part the following:

5(A) Upon request, an LEA shall provide timely access, either together or separately, to the following for observing a child's current to proposed special education 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 litigation related to the provision of a free and appropriate public education for that child nor has a financial interest in the outcome of such litigation.

(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 the 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 a designee, or

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<sup>8</sup> *Woodson, et al., v. District of Columbia*, 119 LRP 28316

(iii) Avoid any potential disruption arising from 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.

Generally, a school district has the discretion to determine the actual school location where a Student's IEP is to be implemented, and parents are generally allowed to visit that location before a student's enrollment. The evidence demonstrates that Petitioner and her consultant were allowed to visit School B and to observe the SLS program that Student would have attended if Petitioner chose to enroll Student at School B. She and her consultant requested to see the general education setting but were not allowed to see a general education classroom during the visit. However, there is no indication that Petitioner or her consultant were denied the opportunity to visit other parts of the school, like the cafeteria, the gym or other locations in the building where Student would have spent the school day.

Although Student's full educational program would have included some contact with general education students, what classes other than the SLS class was not defined at the time of Petitioner's visit. That choice would have been made had Student enrolled.

The evidence in this case demonstrates that DCPS provided Petitioner and her educational advocate an adequate opportunity to visit and observe instruction at School B. And the fact that they did not see a general education classroom during that visit did not impede Student's right to FAPE, or significantly impede Petitioner's opportunity to participate in the decision-making process regarding the provision of FAPE, or cause Student a deprivation of educational benefits. Petitioner did not sustain the burden of persuasion by a preponderance of the evidence on this issue.

**ISSUE 5:** Whether School A is a proper placement for Student.

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

A student's IEP determines whether an educational placement is appropriate; the placement does not dictate the IEP. *See Roark v. District of Columbia*, 460 F.Supp.2d 32, 44 (D.D.C. 2006); *Spielberg v. Henrico Cty. Public Sch.*, 853 F.2d 256, 258 (4th Cir. 1988) ("Educational placement is based on the IEP, which is revised annually."); 34 C.F.R. § 300.116(b)(2).

Under the IDEA, parents who unilaterally decide to place their disabled child in a private school, without obtaining the consent of local school officials, "do so at their own financial risk." *Florence County Sch. Dist. Four v. Carter*, 510 U.S. 7, 15, 114 S.Ct. 361, 126 L.Ed.2d 284 (1993) (quoting *Sch. Comm. of the Town of Burlington v. Dep't of Educ.*, 471 U.S. 359, 374, 105 S.Ct. 1996, 85 L.Ed.2d 385 (1985)). "As interpreted by the Supreme Court, IDEA requires school districts to reimburse parents for their private-school expenses if (1) school officials failed to offer the child a free appropriate public education in a public or private school; (2) the private-school placement

chosen by the parents was otherwise “proper under the Act”; and (3) the equities weigh in favor of reimbursement—that is, the parents did not otherwise act “unreasonabl[y].” *Leggett v. District of Columbia*, 793 F.3d 59, 66–67 (D.C. Cir. 2015) (citing *Carter*, supra, 510 U.S. at 15–16, 114 S.Ct. 361; 20 U.S.C. § 1412(10)(C)(iii)(III)).

Albeit the evidence demonstrates that since Student has attended School A, Student has made progress and that Petitioner is pleased with and wants Student to remain at School A, based upon the evidence adduced, the Hearing Officer did not conclude that Student's appropriate LRE at the time the July 24, 2019, IEP was developed was a separate special education day school, like School A, where Student is totally removed from non-disabled peers.

As already discussed in issues #1 and #2 above, there was sufficient evidence that the IEP DCPS proposed for Student for SY 2019-2020 was reasonably calculated to enable Student to make progress appropriate in light of Student’s circumstances, and there was sufficient evidence that the IEP could be implemented at School B and that School B was an appropriate placement.

The Hearing Officer, therefore, concludes that despite the progress Student has made at School A, School A is not a placement that DCPS is obligated to fund and therefore, does not grant Petitioner's requested relief of reimbursement for Student’s attendance at School A for SY 2019-2020 or Student's prospective placement at School A.

**ORDER:**

Petitioner’s Due Process Complaint is hereby Dismissed with Prejudice, and all relief requested by Petitioner 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: July 8, 2020**

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