DISTRICT OF COLUMBIA
OFFICE OF THE STATE SUPERINTENDENT OF EDUCATION
Office of Dispute Resolution
810 First Street, N.E., 2nd Floor
Washington, DC 20002

PETITIONERS, on behalf of STUDENT,[1]	)	Date Issued: March 15, 2016
Petitioners,	)	Hearing Officer: Peter B. Vaden
v.	)	Case No: 2015-0281
DISTRICT OF COLUMBIA PUBLIC SCHOOLS,	)	Hearing Dates: March 3-4, 2016
Respondent.	)	Office of Dispute Resolution, Room 2006 Washington, D.C.

HEARING OFFICER DETERMINATION

INTRODUCTION AND PROCEDURAL HISTORY

This matter came to be heard upon the Administrative Due Process Complaint Notice filed by Petitioners under the Individuals with Disabilities Education Act, as amended (the IDEA), 20 U.S.C. § 1400, *et seq*., and Title 5-E, Chapter 5-E30 of the District of Columbia Municipal Regulations (D.C. Regs.). In their due process complaint, Petitioners seek payment by DCPS for Student's enrollment in a private special education day school.

Student, an AGE child, is a resident of the District of Columbia. Petitioners' Due Process Complaint, filed on August 21, 2015, named DCPS as respondent. The undersigned Hearing Officer was appointed on August 25, 2015. The parties convened for a resolution session on September 3, 2015, which did not result in an agreement. On

[1] Personal identification information is provided in Appendix A.

September 2, 2015, I convened a prehearing telephone conference with counsel to discuss the hearing date, issues to be determined and other matters. By order entered October 13, 2015, I granted Petitioners' request for Student's stay-put placement at NONPUBLIC SCHOOL during the pendency of these administrative proceedings.

The 45-day period for issuance of this Hearing Officer Determination initially began on September 21, 2015. However, at the request of Petitioners, the Chief Hearing Officer granted continuance requests on October 5, 2015 (due to witness unavailability), December 10, 2015 (to allow Petitioners' expert to visit proposed classroom) and February 1, 2016 (due to weather closings). As a result of these continuances, the due date for the final decision was ultimately extended to March 18, 2016.

On November 12, 2015, Petitioners filed a motion to shift the due process hearing burden of proof to DCPS on the grounds that DCPS had allegedly not complied with D.C. Code § 38-2571.03, which assures that the parents' expert may observe a special educational program proposed by DCPS. By orders entered November 18 and November 19, 2015, I denied Petitioners' motion, but indicated I would entertain a motion to continue the hearing date to allow more time for DCPS to review the request for Petitioners' expert to visit the proposed classroom. A continuance was granted and Petitioners' expert was able to observe the proposed educational setting.

The due process hearing was held before this Impartial Hearing Officer on March 3 and 4, 2016 at the Office of Dispute Resolution in Washington, D.C. The hearing, which was closed to the public, was recorded on an electronic audio recording device. The Petitioners appeared in person and were represented by PETITIONERS' COUNSEL and CO-COUNSEL. Respondent DCPS was represented by LEA REPRESENTATIVE and by DCPS' COUNSEL. Petitioners' Counsel made an opening

statement.

Petitioners called as witnesses EDUCATIONAL CONSULTANT, Nonpublic School SPEECH LANGUAGE PATHOLOGIST, Nonpublic School CURRICULUM COORDINATOR, INDEPENDENT OT CONSULTANT and MOTHER. DCPS called as witnesses RESOLUTION SPECIALIST, DCPS OT CONSULTANT, SPECIFIC LEARNING SUPPORTS SPECIALIST and LEA REPRESENTATIVE. Petitioners' Exhibits P-1 through P-75 were admitted into evidence, with the exceptions of Exhibits P-30 and P-61 which were withdrawn and Exhibits P-71 and P-75, to which DCPS' objections were sustained. DCPS' objections to Exhibits P-64, P-65 and P-74 were overruled. DCPS' Exhibits R-1 through R-16 were admitted into evidence, with the exceptions of Exhibit R-13, pages 86 through 96 and 98 through 100, and Exhibit R-15, pages 4 through 5 and 10 through 11, which pages were withdrawn. DCPS' Exhibit R-3 was admitted over Petitioners' objection.

Due to time constraints, counsel for the parties elected not to make closing oral argument. At the request of Petitioners' counsel, the parties were granted leave to file written argument by March 7, 2016. Only the Petitioners filed a post-hearing brief.

JURISDICTION

The Hearing Officer has jurisdiction under 20 U.S.C. § 1415(f) and D.C. Regs. tit. 5-E, § 3029.

ISSUES AND RELIEF SOUGHT

The following issues for determination were certified in the September 2, 2015 Prehearing Order:

> – Did DCPS deny Student a FAPE by failing to develop an appropriate IEP for the 2015-2016 school year in that DCPS' proposed IEP does not provide a restrictive, outside general education, setting for Student at

lunch and recess?

– Did DCPS deny Student a FAPE by preventing parental participation in the selection of an educational placement for her for the 2015-2016 school year?

– Did DCPS deny Student a FAPE by failing to propose an appropriate placement/location of services for the 2015-2016 school year?

For relief, the Petitioners requested in the August 21, 2015 due process complaint that the Hearing Officer order DCPS to fund Student's placement at Nonpublic School for the 2015-2016 school year.

FINDINGS OF FACT

After considering all of the evidence admitted at the March 3-4, 2016 due process hearing in this case, as well as the arguments and legal memorandum of counsel, this Hearing Officer's Findings of Fact are as follows:

1. Student is an AGE resident of the District of Columbia, where she resides with FATHER, Mother and a sibling. Testimony of Mother. Student is eligible for special education and related services as a child with a Specific Learning Disability (SLD). Exhibit R-8.

2. On October 30, 2013, in a prior special education due process case, former Hearing Officer Jim Mortenson issued a Hearing Officer Determination, in which he ordered, *inter alia*, that DCPS fund Student's attendance at Nonpublic School for the 2013-2014 school year. Exhibit P-11. For the 2014-2015 school year, DCPS funded Student's enrollment at Nonpublic School pursuant a settlement agreement with the parents dated October 16, 2014. Exhibit P-37. Under this hearing officer's October 13, 2015 stay-put order, DCPS has been required to fund Student's enrollment at Nonpublic School, from the beginning of the current school year through the pendency of this

administrative proceeding. Hearing Officer Notice.

3. In September 2014, INDEPENDENT PSYCHOLOGIST conducted a comprehensive psychological reevaluation of Student upon the referral of DCPS. Independent Psychologist administered a battery of cognitive, educational and social-emotional assessments, conducted a clinical interview and observed Student in her Nonpublic School classroom. Independent Psychologist reported that Student's cognitive abilities varied significantly by domain. Student's General Ability Index (GAI) score, calculated from the General Ability Sum, fell within the Average range, indicating that when working memory and processing speed demands were removed, Student's cognitive skills were comparable to those of her typically functioning peers. Student's verbal comprehension abilities were in the Average range. Her perceptual reasoning abilities were in the Low Average range. Student's working memory abilities were in the Low Average range. Student's processing speed score fell in the Borderline range, her performance in this area being negatively impacted by her poor graphomotor control. Student's visual motor integration skills were assessed in the Very Low range. Achievement testing revealed the presence of academic weaknesses in several areas. Student's scores indicated that her Listening Comprehension skills were Average and her Oral Expression skills ranged from Low to Average. Her alphabet writing ability was Average while her sentence writing skills and spelling skills were Low. Student's math skills ranged from Low to Below Average. Student's scores on tests of reading fluency, accuracy, rate and comprehension were Very Low to Low. Independent Psychologist reported that Student's academic difficulties reflected neurological differences in the way that she learns. Her pattern of cognitive and achievement scores was consistent with Specific Learning Disorders in the areas of Reading, Written Expression, and

Mathematics. On tests of social-emotional and behavioral functioning, no behavioral issues were reported by Student or her teachers. Socially, Student was reported to be immature and her behavior often resembled that of a younger child. Independent Psychologist reported that Mother's report, behavioral observations, the outcome of multiple behavioral rating scales, as well as Student's conduct during the testing all strongly supported her previous diagnosis of Attention Deficit-Hyperactivity Disorder, Combined Presentation. Exhibit P-31.

4. Independent Psychologist diagnosed Student with Attention Deficit-Hyperactivity Disorder, Combined Presentation; Developmental Coordination Disorder; Language Disorder; Speech Sound Disorder; Specific Learning Disorder, with Impairment in Reading (impairments in word reading accuracy, reading fluency, and reading comprehension), Severe; Specific Learning Disorder, with Impairment in Written Expression (impairments in spelling accuracy, grammar and punctuation accuracy, and clarity & organization of written expression), Severe and Specific Learning Disorder, with Impairment in Mathematics (impairments in number sense, memorization of arithmetic facts, accurate calculation, and accurate math reasoning), Severe. Exhibit P-31.

5. In late April 2015, DCPS provided Petitioners' counsel a draft IEP for review prior to an upcoming IEP team meeting. On May 26, 2015, Petitioners' counsel provided to DCPS Educational Consultant's detailed critique of the draft IEP. Student's IEP team met on June 9, 2015 to review the proposed IEP. Student's parents, Educational Consultant and Petitioners' Co-Counsel all attended the meeting. The parents and DCPS representatives were in agreement on Student's SLD disability classification and on IEP Present Levels of Performance and Annual Goals. The DCPS

representatives stated that Student was able to be supported in a full-time SLD program in a regular public school. The parents and DCPS were in disagreement as to whether Student should participate with nondisabled peers at lunch and in other extracurricular and nonacademic activities. Educational Consultant questioned how DCPS could propose not providing supports to Student during unstructured times. The DCPS representatives stated that Student would be supervised during unstructured times. One of the DCPS case managers stated that the data did not indicate that Student was so pervasively disabled that she would not be able to function independently during lunch and recess. Exhibit R-9. The DCPS team members decided that Student could benefit from exposure to non-disabled peers during unstructured times. The parents disagreed and argued that Student should continued to be educated in a separate day school. Exhibit P-52.

6. In the final June 9, 2015 IEP, the IEP team proposed to provide Student full-time, 24 hours per week, Specialized Instruction for all academic activities, in addition to 360 minutes per month of speech-language pathology, 360 minutes per month of occupational therapy and 120 minutes per month of behavioral support services. All of the Special Education and Related Services would be provided outside of general education. The June 9, 2015 IEP did not state the extent to which Student would participate with nondisabled peers in extracurricular and nonacademic activities. Exhibit R-8. The parents stated that they disagreed with the proposed IEP. Testimony of Mother, Exhibit R-11.

7. By letter of June 22, 2015, DCPS notified the parents that the Specific Learning Supports program at City Elementary School, which is Student's neighborhood school, had been identified as Student's location of services to implement Student's IEP

for the 2015-2016 school year. Exhibit R-10. The parents did not participate in the selection of City Elementary School to implement Student's IEP. Testimony of Mother.

8. By letter of August 6, 2015, Petitioners' counsel notified DCPS that Student would continue to attend Nonpublic School for the 2015-2016 school year and requested that DCPS place and fund Student at Nonpublic School. Exhibit R-12. By letter of August 12, 2015, DCPS' Director, Resolution responded that DCPS had made FAPE available to Student at City Elementary School with an appropriate IEP, and that DCPS would not agree to fund Student's placement at Nonpublic School. Exhibit R-12.

9. Nonpublic School is a private day school in Washington, D.C. for students with learning disabilities and ADHD. Nonpublic School holds a current Certificate of Approval from the D.C. Office of the State Superintendent of Education (OSSE). Testimony of Curriculum Coordinator. The annual tuition is $39,240 plus the costs of related services. Stipulation of Counsel. Student is in a classroom of seven students staffed by a teacher, a teaching assistant and, usually, an intern. The school has speech-language pathologists, occupational therapists and social workers on staff to provide related services. Testimony of Curriculum Coordinator.

10. At Nonpublic School, Student receives specialized support throughout the school day, including for lunch, recess and other nonacademic activities. Testimony of Curriculum Coordinator.

11. Student is making really nice progress at Nonpublic School. Testimony of Curriculum Coordinator. She is doing really well there. Testimony of Mother.

12. At City Elementary School, Student would be placed in a Specific Learning Support (SLS) classroom of 7 students, staffed by a special education teacher and a paraprofessional. The school has service providers for OT, speech and language,

physical therapy and behavioral support. Children in the SLS classroom start the school year eating lunch in their classroom, but are allowed to transition to a separate table in the school lunch room when the classroom teacher determines they are ready for the move. This transition follows a successful "test run" accompanied by the special education paraprofessional. At recess, SLS classroom students go out to the playground at the same time as nondisabled peers. A paraprofessional accompanies the SLS students at recess to support them as needed. Testimony of LEA Representative.

13. Educational Consultant has known Student for some 18 months. She has conducted a formal educational evaluation of Student and observed her in the classroom. Testimony of Educational Consultant. Nonpublic School Speech Language Pathologist has informally observed Student in every setting at Nonpublic School. Testimony of Nonpublic School Speech Language Pathologist. Curriculum Coordinator sees Student every day at Nonpublic School and meets every week with Student's provider team. Testimony of Curriculum Coordinator. OT Consultant has observed Student at Nonpublic School for over three years. Testimony of OT Consultant.

14. None of DCPS' witnesses has ever met Student. Testimony of DCPS' Witnesses. Resolution Specialist observed Student at Nonpublic School for a 35 minute reading lesson in December 2014. Testimony of Resolution Specialist, Exhibit R-6.

CONCLUSIONS OF LAW

Based upon the above Findings of Fact and argument and legal memorandum of counsel, as well as this Hearing Officer's own legal research, the Conclusions of Law of this Hearing Officer are as follows:

Burden of Proof

The burden of proof in a due process hearing is the responsibility of the party seeking relief – the Petitioners in this case. *See* D.C. Regs. tit. 5-E, § 3030.3. *See, also, Schaffer ex rel. Schaffer v. Weast*, 546 U.S. 49, 62, 126 S.Ct. 528, 536, 163 L.Ed.2d 387 (2005); *Hester v. District of Columbia*, 433 F.Supp.2d 71, 76 (D.D.C. 2006).

Analysis

A.

– Did DCPS deny Student a FAPE by preventing parental participation in the selection of an educational placement for her for the 2015-2016 school year?

– Did DCPS deny Student a FAPE by failing to develop an appropriate IEP for the 2015-2016 school year in that DCPS' proposed IEP does not provide a restrictive, outside general education, setting for Student at lunch and recess?

At the June 9, 2015 IEP meeting for Student, the IEP team adopted most of the IEP recommendations made by Petitioners' expert, Educational Consultant. However, the DCPS representatives refused the parents' request to provide in the IEP that Student would not participate with nondisabled peers in extracurricular and nonacademic activities – specifically for lunch and recess. The parents, who have at all times sought for Student to remain at Nonpublic School, maintain that the IEP team's failure to provide Student an outside of general education setting for lunch and recess makes the proposed June 9, 2015 IEP inappropriate. DCPS responds that the IEP is appropriate as written. The parents also allege that DCPS violated their right to participate in the educational placement decision for Student, by determining, without their input, that the June 9, 2015 IEP would be implemented at City Elementary School. DCPS responds that the physical school location alone does not constitute an "educational placement" and that the parents did participate in – and disagreed with – the IEP team's

educational placement decision to place Student in a full-time SLD program in a DCPS public school.

To determine whether an IEP is adequate to provide a FAPE, a hearing officer must determine "[f]irst, has the [District] complied with the procedures set forth in the [IDEA]? And second, is the individualized educational program developed through the Act's procedures reasonably calculated to enable the child to receive educational benefits? If these requirements are met, the [District] has complied with the obligations imposed by Congress and the courts can require no more." *A.M. v. District of Columbia*, 933 F. Supp. 2d 193, 203-04 (D.D.C. 2013), quoting *Bd. of Educ. of the Hendrick Hudson Cent. Sch. Dist., Westchester County v. Rowley*, 458 U.S. 176, 206-07, 102 S.Ct. 3034, 73 L.Ed.2d 690 (1982).

The Petitioners' complaint that they were not allowed to participate in the school location decision raises an IDEA procedural issue. The Act requires that the District ensure that the educational placement decision for a child with a disability be 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[.]" 34 CFR § 300.116(a). Although there are several court decisions in this jurisdiction which analyze the meaning of the term "educational placement" in the context of stay-put disputes, *see, e.g., Wimbish v. District of Columbia*, 2015 WL 9412108 (D.D.C. Dec. 22, 2015), I have not found a controlling decision which addresses the issue here, namely whether the IDEA requires that a school district allow parents to participate in selecting the school location to implement their child's IEP. *But see A.M. v. District of Columbia*, 933 F. Supp. 2d 193, 199 (D.D.C. 2013) (District correctly observes that plaintiffs tend to blur the distinctions between the development of an IEP, the determination of an

educational "placement" under the IDEA, and the selection of a particular school location for the implementation of that program.) The Second Circuit Court of Appeals analyzed a closely-related issue in *T.Y. v. New York City Dep't of Educ.*, 584 F.3d 412 (2d Cir. 2009). In that case, the parents argued that the New York City Department of Education's policy of not specifying a particular school in the IEP deprived them of their right to meaningful participation in the IEP's development. The Court of Appeals disagreed:

> As we have previously stated, the term "educational placement" in the regulations "refers only to the general type of educational program in which the child is placed." *Concerned Parents v. N.Y. City Bd. of Educ.*, 629 F.2d 751, 756 (2d Cir.1980). "Educational placement" refers to the general educational program—such as the classes, individualized attention and additional services a child will receive—rather than the "bricks and mortar" of the specific school.
>
> Further, the requirement that an IEP specify the "location" does not mean that the IEP must specify a specific school site. The United States Department of Education ("USDOE") expressly considered this question in its commentary to the 1997 amendments to the IDEA. In that commentary, the USDOE noted,
>
> > Some commenters requested that the term "location" be defined as the placement on the continuum and not the exact building where the IEP service is to be provided. . . . Other commenters similarly stated that a note be added clarifying that "location" means the general setting in which the services will be provided, and not a particular school or facility.
>
> Assistance to States for the Education of Children with Disabilities and the Early Intervention Program for Infants and Toddlers with Disabilities, 64 Fed.Reg. 12406, 12594 (Mar. 12, 1999). In resolving this issue, the USDOE concluded that "[t]he location of services in the context of an IEP generally refers to the type of environment that is the appropriate place for provision of the service. For example, is the related service to be provided in the child's regular classroom or resource room?" *Id.*
>
> This conclusion comports with the Senate's commentary, which states that "[t]he location where special education and related services will be provided to a child influences decisions about the nature and amount of these services and when they should be provided to a child." S.Rep. No. 105–17, at 21 (1997). "For example, the appropriate place for the related service may be the regular classroom, so that the child does not have to choose between a needed service

> and the regular educational program." *Id*. "For this reason," the commentary continues, "in the bill the committee has added 'location' to the provision in the IEP that includes 'the projected date for the beginning of services and modifications, and the anticipated frequency, location, and duration of those services.' " *Id*. (emphasis omitted). We interpret these statements to indicate that the term "location" does not mean the specific school location, but the general environment of the overall program.
>
> Therefore, we conclude that because there is no requirement in the IDEA that the IEP name a specific school location, T.Y.'s IEP was not procedurally deficient for that reason. We emphasize that we are not holding that school districts have carte blanche to assign a child to a school that cannot satisfy the IEP's requirements. We simply hold that an IEP's failure to identify a specific school location will not constitute a *per se* procedural violation of the IDEA. *See White ex rel. White v. Ascension Parish Sch. Bd.*, 343 F.3d 373, 379 (5th Cir.2003). *But see A.K. ex rel J.K. v. Alexandria City Sch. Bd.*, 484 F.3d 672, 682 (4th Cir.2007).

T.Y., supra, 584 F.3d at 419-20.

In the present case, the evidence establishes that the parents participated in the June 9, 2015 IEP meeting where the IEP team decided that Student would be placed in a full-time SLD program in a DCPS public school. Further the parents voiced their objection to that placement because of alleged lack of special education supports during lunch and recess. Subsequent to the IEP meeting, DCPS made a unilateral determination to implement the June 9, 2015 IEP at City Elementary School. Following the logic of the *T.Y.* analysis, I conclude that DCPS did not deprive the parents of their right to meaningful participation in Student's educational placement decision because the parents participated in, without agreeing to, the IEP team's decision to place Student in a full-time SLD program in a District public school and to provide all of Student's special education and related services in an outside of general education setting.

Turning next to the substantive prong of the *Rowley* inquiry, was DCPS' proposed June 9, 2015 IEP reasonably calculated to enable Student to receive educational benefits? In *K.S. v. District of Columbia*, 962 F.Supp.2d 216 (D.D.C.2013),

U.S. District Judge Boasberg reviewed case law precedents on the requirements for an appropriate IEP:

> The IEP must be formulated in accordance with the terms of IDEA and "should be reasonably calculated to enable the child to achieve passing marks and advance from grade to grade." *Rowley*, 458 U.S. at 204, 102 S.Ct. 3034. IDEA also requires that children with disabilities be placed in the "least restrictive environment" so that they can be educated in an integrated setting with children who do not have disabilities to the maximum extent appropriate. See [20 U.S.C.] § 1412(a)(5)(A). . . . IDEA provides a "basic floor of opportunity" for students, *Rowley*, 458 U.S. at 201, 102 S.Ct. 3034, rather than "a potential-maximizing education." *Id.* at 197 n. 21, 102 S.Ct. 3034; *see also Jenkins v. Squillacote*, 935 F.2d 303, 305 (D.C.Cir.1991) (inquiry is not whether another placement may be " more appropriate or better able to serve the child") (emphasis in original); *Houston Indep. Sch. Dist. v. V.P. ex rel. Juan P.*, 582 F.3d 576, 583 (5th Cir.2009) (IDEA does not guarantee "the best possible education, nor one that will maximize the student's educational potential"; instead, it requires only that the benefit "'cannot be a mere modicum or de minimis; rather, an IEP must be likely to produce progress, not regression or trivial educational advancement.'") (quoting *Cypress–Fairbanks Indep. Sch. Dist. v. Michael F. ex rel. Barry F.*, 118 F.3d 245, 248 (5th Cir.1997)). Consistent with this framework, "[t]he question is not whether there was more that could be done, but only whether there was more that had to be done under the governing statute." *Houston Indep. Sch. Dist.*, 582 F.3d at 590.

K.S., 962 F.Supp.2d at 200-221.

The IDEA requires that every IEP include an explanation of the extent, if any, to which the child will not participate with nondisabled children in extracurricular and other nonacademic activities such as lunch and recess. *See* 34 CFR § 300.320(a). DCPS' proposed June 9, 2015 IEP did not explain the extent to which Student would interact with nondisabled peers during lunch or recess, despite Educational Consultant's having voiced express concerns at the IEP meeting about not providing IEP supports to Student during these unstructured times. The query here is whether the failure of the IEP team to provide for Student's placement in an outside of general education settling for lunch and recess made the proposed June 9, 2015 IEP inappropriate for Student.

This evidence on this issue took the form of a battle of experts, opining as to whether Student did, or did not, require lunch and recess in an outside of general

education setting. Petitioners' experts testified, uniformly, that Student requires special education and/or related services support for school lunch and recess. Educational Consultant opined that Student needs special education services during lunch and recess to promote language and social emotional skills. Nonpublic School Speech-Language Pathologist noted that Student has a huge deficit in inferencing, that is the ability to listen, remember information and combine it with what Student already knows. She opined that it is essential for Student to receive speech and language services in a variety of settings, including at lunch and recess to generalize her skills in peer interactions and socialization. Curriculum Coordinator testified that due to her ADHD and language deficits, Student is most affected in the social arena. She opined that Student needs specialized support for the entire school day, and absolutely at lunch and recess. Independent OT Consultant opined that Student needs an OT provider to periodically observe how Student manages during lunch, when Student can get distracted and forget to eat, and at recess, because recess time is more free-flowing and louder.

Three of DCPS' witnesses, who also qualified as experts in IEP programming and placement, opined that the setting proposed for Student in the June 9, 2015 IEP was appropriate, without provision for special education support at lunch or recess. LEA Representative opined that the June 9, 2015 IEP would provide Student a FAPE. Resolution Specialist observed that she had not seen anything in Student's profile that indicated she should have no contact with nondisabled peers. Specific Learning Supports Specialist opined that the June 9, 2015 IEP was appropriate for Student and that the SLS program at City Elementary School would be an excellent location of services for her.

In weighing the competing opinions of these experts, I found Petitioners' experts to be more credible. Each of Petitioners' experts had close ties to Nonpublic School, either as an employee, service provider or referral source. Notwithstanding, I credited their knowledge of Student's needs based upon the depth and duration of their involvement with the child. Educational Consultant has known Student for some 18 months. She has conducted a formal educational evaluation of Student and observed her in the classroom. Nonpublic School Speech Language Pathologist has informally observed Student in every setting at Nonpublic School. Curriculum Coordinator sees Student every day at Nonpublic School and meets every week with Student's provider team. OT Consultant has observed Student at Nonpublic School for over three years. By contrast, none of DCPS' witnesses had ever met Student and only Resolution Specialist had seen her in the school setting. Resolution Specialist observed Student for a 35 minute Reading lesson in December 2014. She did not report having observed Student at lunch or recess.

Significantly, Resolution Specialist and LEA Representative testified that children who are new to the SLS program at City Elementary School have lunch in the SLS classroom and are only allowed to transition to having lunch in the school lunchroom following a successful "test run" accompanied by the special education paraprofessional. These witnesses also testified that the paraprofessional accompanies the SLS students to recess on the school playground. However, evidence that school staff may regularly provide supports beyond what is called for by a student's IEP, does not rehabilitate an IEP that was inadequate as drafted. *See, e.g.*, *N.S. v. District of Columbia*, 709 F. Supp. 2d 57, 72 (D.D.C. 2010) ("Because the purpose of the due process hearing is to contest the adequacy of the IEP and the placement, the Hearing Officer should not consider

evidence about services not prescribed by the IEP or discussed at the IEP meeting."); *A.K. v. Alexandria City Sch. Bd.*, 484 F.3d 672, 682 (4th Cir.2007) ("In evaluating whether a school district offered a FAPE, a court generally must limit its consideration to the terms of the IEP itself.")

Crediting the opinions of Petitioners' experts, I conclude that the parents have established by a preponderance of the evidence that, at the time the June 9, 2015 IEP was developed, Student required special education and/or related services support during lunch and recess. I find that the failure of the IEP team to provide for these services in the June 9, 2015 IEP made the proposed IEP inappropriate to provide a FAPE to Student.

B.

– Did DCPS deny Student a FAPE by failing to propose an appropriate placement/location of issues for the 2015-2016 school year?

Petitioners also contend that City Elementary School was not an appropriate placement or location of services for Student. Every special education placement must be "based on the child's IEP," 34 C.F.R. § 300.116(b)(2), and be "capable of fulfilling the student's IEP," *Lofton v. District of Columbia*, 7 F.Supp.3d 117, 123 (D.D.C. 2013). *Joaquin v. Friendship Pub. Charter Sch.*, No. CV 14-01119 (RC), 2015 WL 5175885, at 4 (D.D.C. Sept. 3, 2015). DCPS' assignment of Student to City Elementary School was based upon the proposed June 9, 2015 IEP, which I have determined to be inappropriate. It follows that, until DCPS provides Student an appropriate IEP, the District cannot offer Student a suitable educational placement whether at City Elementary School or another location. Nonetheless, for completeness, I next address the Petitioners' claim that City Elementary School is not an appropriate location of

services for Student.

In addition to critiquing the failure of Student's IEP to provide special education support during lunch and recess, Petitioners' expert, Educational Consultant, opined that the SLS program at City Elementary School was unsuitable because it groups together children with differing disabilities and of different grade years, and because Educational Consultant considers the Lexia Reading program, which she observed being used in the SLS classroom, not to meet Student's needs. However, LEA Representative credibly testified that with the "huge" amount of support available in the SLS classroom, the teacher is able to assess the children and provide individualized interventions for each child. This would include offering alternative reading support programs if Lexia Reading were not suitable for Student. I conclude that Petitioners did not meet their burden of proving that the SLS program at City Elementary School is not capable of implementing the June 9, 2015 IEP, assuming, *arguendo,* that the IEP were appropriate for Student.

Remedy

On August 6, 2015, Petitioners' counsel notified DCPS that the parents did not believe that Student had been offered a FAPE in the June 9, 2015 IEP or by the proposed placement at City Elementary School and that Student would continue to attend Nonpublic School. The parents requested DCPS to fund Student's private school placement for the 2015-2016 school year, which DCPS refused. For their remedy in this case, the Parents seek an order for DCPS to fund their unilateral enrollment of Student at Nonpublic School for the 2015-2016 school year.

The U.S. Court of Appeals for the District of Columbia recently enunciated the IDEA standard for tuition reimbursement to parents who unilaterally enroll their child

in a private school:

> Although Congress envisioned that children with disabilities would normally be educated in "the regular public schools or in private schools chosen jointly by school officials and parents," *Florence County School District Four v. Carter By and Through Carter*, 510 U.S. 7, 12, 114 S.Ct. 361, 126 L.Ed.2d 284 (1993), it provided that parents who believe that their child's public school system failed to offer a free appropriate public education—either because the child's IEP was inadequate or because school officials never even developed one—may choose to enroll the child in a private school that serves her educational needs. *Id.* Specifically, IDEA provides that if parents "enroll the child in a private . . . school without the consent of [the school district], a court or a hearing officer may require the [school district] to reimburse [them] for the cost of that enrollment. . . ." 20 U.S.C. § 1412(10)(C)(ii). The statute requires reimbursement, however, only where the school district has failed to "ma[k]e a free appropriate public education available to the child." *Id.* Reimbursement, moreover, may be "reduced or denied" if the parents fail to notify school officials of their intent to withdraw the child, *id.* § 1412(10)(C)(iii)(I), deny them a chance to evaluate the student, *id.* § 1412(10)(C)(iii)(II), or . . . otherwise act "unreasonabl[y]," *id.* § 1412(10)(C)(iii)(III).

Leggett v. District of Columbia, 793 F.3d 59, 63 (D.C.Cir. 2015). The *Leggett* decision further explained that, "[a]s 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*, 793 F.3d at 66-67 (citing *Carter*, 510 U.S. at 15–16, 114 S.Ct. 361; 20 U.S.C. § 1412(10)(C)(iii)(III)).

In this decision, I have determined that DCPS' proposed June 9, 2015 IEP was inadequate and failed to offer Student a FAPE. The parents' private placement, Nonpublic School, holds a certificate of approval from OSSE and the hearing evidence was undisputed that Student has received educational benefit there. I find, therefore, that the private placement chosen by the parents was proper under the IDEA. *See*

Leggett, supra, 793 F.3d at 71 (Parent's unilateral private placement is proper under the Act so long as it is "reasonably calculated to enable the child to receive educational benefits.") Finally, DCPS does not contend that the parents acted unreasonably in maintaining Student's enrollment at Nonpublic School for the 2015-2016 school year. In sum, I conclude that the parents have established that DCPS failed to offer Student a FAPE for the 2015-2016 school year in the proposed June 9, 2015 IEP and that their private placement of Student at Nonpublic School was proper under the IDEA. Therefore, under the standards set by the D.C. Circuit in the *Leggett* decision, the parents are entitled to reimbursement from DCPS of their costs for Student to attend the private school for the 2015-2016 school year. (Under my October 13, 2015 stay-put order, DCPS has already been ordered to fund Student's enrollment at Nonpublic School through the pendency of these administrative proceedings. I deem the parents' claim now to be for funding for Student's expenses to attend Nonpublic School for the remainder of the current school year. To the extent those expenses have not been advanced by the parents, DCPS may remit payment to Nonpublic School directly.)

ORDER

Based upon the above Findings of Fact and Conclusions of Law, it is hereby ORDERED:

1. Upon receipt of documentation of payment by the parents, as may be reasonably required, DCPS shall, without undue delay, reimburse the parents the costs of tuition and related covered expenses for Student's enrollment at Nonpublic School for the 2015-2016 regular school year. To the extent any portion of the approximately $39,240 tuition amount for the 2015-2016 school year remains due to Nonpublic School, DCPS may, in the alternative, pay the remaining sum directly to Nonpublic School;

2. DCPS is ordered to ensure that Student's IEP is reviewed and revised without undue delay, in accordance this decision and with 34 CFR § 300.320 *et seq.*, after obtaining any reevaluations and other data

concerning Student needed by the IEP team and

3. All other relief requested by the Petitioners herein is denied.

Date: March 15, 2016

s/ Peter B. Vaden
Peter B. Vaden, Hearing Officer

NOTICE OF RIGHT TO APPEAL

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 U.S.C. § 1415(I).

cc: Counsel of Record
Office of Dispute Resolution
Chief Hearing Officer
OSSE - SPED
DCPS Resolution Team