

**DISTRICT OF COLUMBIA  
OFFICE OF THE STATE SUPERINTENDENT OF EDUCATION**

Office of Dispute Resolution  
810 First Street, N.E., 2<sup>nd</sup> Floor  
Washington, D.C. 20002

OSSE  
Office of Dispute Resolution  
May 4, 2016

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<i>Student</i> , <sup>1</sup>	)	Date Issued: 5/4/16
through her <i>Parent</i> ,	)	
<i>Petitioner</i> ,	)	Case No.: 2016-0033
	)	
v.	)	Hearing Officer: Keith L. Seat, Esq.
	)	
District of Columbia Public Schools	)	Hearing Date: 4/20/16, 4/21/16, 4/22/16
("DCPS"),	)	Hearing Location: ODR Room 2006
Respondent.	)	
	)	

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**HEARING OFFICER DETERMINATION**

**Background**

Petitioner, Student’s mother, filed a due process complaint alleging that Student had been denied a free appropriate public education (“FAPE”) in violation of the Individuals with Disabilities Education Improvement Act (“IDEA”) because the placement/location of services that DCPS proposed for Student could not appropriately implement her Individualized Education Program (“IEP”); DCPS also prevented Petitioner from adequately observing the proposed school. DCPS responded that its proposed location of services could implement Student’s IEP appropriately and was sufficiently observed by Petitioner.

**Subject Matter Jurisdiction**

Subject matter jurisdiction is conferred pursuant to IDEA, 20 U.S.C. § 1400, *et seq.*; the implementing regulations for IDEA, 34 C.F.R. Part 300; Title V, Chapter E-30, of the District of Columbia Municipal Regulations (“D.C.M.R.”) and 38 D.C. Code 2561.02.

**Procedural History**

Following the filing of the due process complaint on 2/19/16, the case was assigned to the undersigned on 2/22/16. Respondent’s timely response to the complaint was filed on

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<sup>1</sup> Personally identifiable information is provided in Appendix A, including terms initially stated in italics.

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2/29/16 and did not challenge jurisdiction apart from the lack of subject matter jurisdiction to enforce or modify prior HODs.

The Resolution Session Meeting (“RSM”) took place on 3/9/16, but the parties neither settled the case nor terminated the 30-day resolution period, which ended on 3/20/16. A final decision in this matter must be reached no later than 45 days following the end of the resolution period, which requires a Hearing Officer Determination (“HOD”) by 5/4/16.

The due process hearing took place on 4/20/16, 4/21/16, and 4/22/16, and was closed to the public. Petitioner was represented by *Petitioner’s counsel*. DCPS was represented by *Respondent’s counsel*. Counsel discussed settlement near the beginning of the hearing without success. Both parents were present all three days of the hearing.

Neither party objected to the testimony of witnesses by telephone. The parties agreed on no stipulations.

Petitioner’s Disclosure statement, submitted on 4/12/16, consisted of a witness list of eight witnesses and documents P1 through P33, which were admitted into evidence without objection. Petitioner sought to add three emails as a supplementary disclosure on 4/19/16 to which Respondent objected. The objection was sustained pursuant to the terms of the Prehearing Order, so the supplementary disclosure was not admitted into evidence.

Respondent’s Disclosure statement, submitted on 4/12/16, consisted of a witness list of eight witnesses and documents R1 through R12, which were admitted into evidence without objection, except for R8 which was admitted over objection. Petitioner also raised objections to the listed expert designations of some of Respondent’s proposed experts, none of whom was called to testify, so the objections were moot.

Petitioner’s counsel presented eight witnesses in Petitioner’s case-in-chief (*see* Appendix A):

1. *Director of Occupational Therapy Department at Nonpublic School* (qualified without objection as an expert in Occupational Therapy for Children with Disabilities) (“Director of OT”)
2. *Senior Speech-Language Pathologist at Nonpublic School* (qualified without objection as an expert in Speech-Language Pathology for Children with Disabilities) (“Speech-Language Pathologist”)
3. *Special Education Coordinator at Public School* (adverse witness)
4. *Principal at Public School* (adverse witness)
5. *Head of Intermediate Division at Nonpublic School* (qualified without objection as an expert in Programming and Instruction for Children with Learning Disabilities and Attentional Deficits)

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6. Parent
7. *Educational Consultant* (qualified without objection as an expert in Special Education Programming for Children with Learning Disabilities and Attentional Challenges)
8. *Compliance Case Manager* (adverse witness)

Respondent's counsel presented one witness in Respondent's case (*see Appendix A*): *Resolution Specialist*.

Petitioner's counsel did not call any rebuttal witnesses.

The issues<sup>2</sup> to be determined in this Hearing Officer Determination are:

**Issue 1:** Whether Respondent denied Student a FAPE by failing to comply with the 11/19/15 HOD, and specifically failing to issue a written notice by 12/18/15 identifying a placement/location of services that could in fact implement Student's December 2015 IEP.

**Issue 2:** Whether Respondent denied Student a FAPE by failing to implement her December 2015 IEP and to identify a suitable placement/location of services, where Public School is not appropriate for Student and could not implement her December 2015 IEP for numerous reasons, including (a) proposing a program where she would be the only student at her grade level with others two years behind, (b) providing an instructional level that would be too low, (c) not being able to meet the details of her IEP relating to lunch, recess and specials, (d) proposing a physical setting that is too small, cluttered, and inadequate, and (e) disruption caused by multiple moves in school location.

**Issue 3:** Whether DCPS denied Student a FAPE by preventing her Parent and advocate from observing Public School for more than 60 minutes, when more time was needed to evaluate the proposed program for Student across the school day.

**Issue 4:** Whether placement of Student at Nonpublic School is proper and appropriate.

Petitioner seeks the following relief:

1. A finding that Student was denied a FAPE.

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<sup>2</sup> An additional issue was expressly withdrawn by Petitioner's counsel during the Prehearing Conference, which was, "Whether Respondent denied Student a FAPE by failing to provide an IEP in December 2015 that was reasonably calculated to enable Student to receive educational benefits."

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2. DCPS shall provide reimbursement for Student's tuition, related services and transportation for Nonpublic School from 1/1/16 through the end of the 2015/16 school year.<sup>3</sup>
3. Any other relief that is just and appropriate.

Respondent's counsel orally moved to dismiss Issue 1 above at the due process hearing, asserting a lack of jurisdiction of the undersigned to enforce a prior HOD. The motion was denied on the record for the reasons explained in the discussion of Issue 1 below.

An oral opening statement was made by Petitioner's counsel and waived by Respondent's counsel. Oral closing statements were made by both Petitioner's counsel and Respondent's counsel.

### **Findings of Fact**

After considering all the evidence, as well as the arguments of both counsel, the Findings of Fact<sup>4</sup> are as follows:

1. Student is a resident of the District of Columbia; Petitioner is Student's Parent.<sup>5</sup> Student is *Age* and in *Grade*; she repeated ■ grade due to insufficient progress.<sup>6</sup>

2. Student is classified as having Multiple Disabilities (Specific Learning Disability and Other Health Impairment ("OHI") due to Attention Deficit Hyperactivity Disorder ("ADHD")).<sup>7</sup> Student has had serious challenges from birth, with her first days in neonatal intensive care, her first assessments and therapy before she was two years old, pharyngeoplasty (surgery to tighten the pharynx) when she was six, and many other challenges.<sup>8</sup>

3. Student was diagnosed with ADHD, Expressive Language Disorder, Mathematics Disorder, and Reading Disorder.<sup>9</sup> Student's significant oral weaknesses impact her social

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<sup>3</sup> All dates in the format "2015/16" refer to school years.

<sup>4</sup> Footnotes in these Findings of Fact refer to the sworn testimony of the witness indicated or to an exhibit admitted into evidence. To the extent that the Hearing Officer has declined to base a finding of fact on a witness's testimony that goes to the heart of the issue(s) under consideration, or has chosen to base a finding of fact on the testimony of one witness when another witness gave contradictory testimony on the same issue, the Hearing Officer has taken such action based on the Hearing Officer's determinations of the credibility and/or lack of credibility of the witness(es) involved.

<sup>5</sup> Parent.

<sup>6</sup> Parent; R2-5.

<sup>7</sup> R2-5,7.

<sup>8</sup> Parent; P6-1,2,3; P7-2.

<sup>9</sup> P6-27.

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skills and classroom performance in every area.<sup>10</sup> Student's intellectual functioning is low average, as measured by the WISC-IV; her academic achievement was average for her age in 2012.<sup>11</sup> Student has been on various medications for her attention issues since she was three years old, but even with medication continues to be significantly challenged.<sup>12</sup>

4. Following a very detailed HOD concerning this Student issued on 11/19/15, a revised IEP to implement the HOD was developed for Student on 12/3/15 (the "12/3/15 IEP"), which requires 25 hours/week of special education services outside general education, along with 6 hours/month of speech-language pathology services outside general education, 180 minutes/month of Occupational Therapy ("OT") outside general education, 30 minutes/month of Behavior Support Services ("BSS") outside general education, 120 minutes/month of BSS inside general education, and 60 minutes/month of consultation in each OT and speech-language pathology.<sup>13</sup> In addition, the 12/3/15 IEP contains 28 paragraphs of Other Classroom Aids and Services to incorporate other requirements of the HOD, ranging from the size and student-teacher ratios of classes to adaptive seating and noise-cancelling headphones.<sup>14</sup>

5. DCPS's LOS Team selected Public School as the location for Student.<sup>15</sup> DCPS's Central Office can simply assign children to the Specific Learning Support ("SLS") class as long as there is room in the class.<sup>16</sup> Neither Public School's Special Education Coordinator nor Principal were asked whether Public School could implement the HOD.<sup>17</sup> Principal stated that a lot of the special education work and implementation at Public School is delegated to Special Education Coordinator.<sup>18</sup> Special Education Coordinator was concerned about whether Public School had all the resources needed for the IEP, but was simply told to set up an observation for Parent.<sup>19</sup>

6. At the 12/3/15 IEP team meeting, Resolution Specialist told Parent that Public School would be Student's LOS and that she would be in the SLS class; no one from Public School was at the meeting and Resolution Specialist provided little information beyond telling Parent to go visit Public School.<sup>20</sup> Parent asked about Public School and the SLS

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<sup>10</sup> P8-22.

<sup>11</sup> P6-25,26.

<sup>12</sup> Parent.

<sup>13</sup> R2-27.

<sup>14</sup> R2-33,34,35. The 12/3/15 IEP, incorporating the requirements of the 11/19/15 HOD, is not at issue in this case. This HOD follows the convention of the parties at the due process hearing by often referring directly to the underlying requirements in the 11/19/15 HOD.

<sup>15</sup> Compliance Case Manager.

<sup>16</sup> Principal.

<sup>17</sup> Special Education Coordinator; Principal.

<sup>18</sup> Principal.

<sup>19</sup> Special Education Coordinator; Educational Consultant.

<sup>20</sup> Resolution Specialist; Parent.

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program and was told it was a good school and the program had a good teacher.<sup>21</sup> When Parent asked how Public School would implement the HOD, she was told that she must see the program.<sup>22</sup> At the 12/3/15 IEP meeting, Parent asked for a full day to observe all aspects of the school day at Public School.<sup>23</sup>

7. Observation. Parent sought a full day of observation at Public School to be able to see everything there, including lunch, recess, and PE.<sup>24</sup> After exchanging scheduling communications back and forth, DCPS limited the observation to one hour the night before it was scheduled for Parent and Educational Consultant.<sup>25</sup> There had been three observations of the SLS program within two weeks; too much time by strangers in the classroom is disruptive to the children.<sup>26</sup> Resolution Specialist made the decision to limit the observation for Student to one hour.<sup>27</sup> It is not possible to see all settings in one hour, including specials, lunch, recess, and academics.<sup>28</sup>

8. Parent was not able to observe all she wanted at Public School in the allotted hour on 12/15/15 and had insufficient time to talk with Special Education Coordinator.<sup>29</sup> Special Education Coordinator did state during the observation that Public School was unable to fulfill all the requirements of the 12/3/15 IEP with the SLS program as it existed at that time.<sup>30</sup> While at Public School on 12/15/15, Parent attempted to speak to Principal, but Public School was not helpful in scheduling a time to meet with him; Parent was told Principal was probably out for the week.<sup>31</sup> After the observation, Parent and Educational Consultant were told that Special Education Coordinator was the contact person at Public School.<sup>32</sup>

9. The observation of Public School left Parent and Educational Consultant with many questions and concerns about how the 12/3/15 IEP could be implemented, which they addressed to Special Education Coordinator and others.<sup>33</sup> Special Education Coordinator never got back to them with any additional information as requested.<sup>34</sup> Special Education Coordinator received written questions from Educational Consultant (P33), but did not

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<sup>21</sup> Parent.

<sup>22</sup> *Id.*

<sup>23</sup> *Id.*

<sup>24</sup> Parent; R6-1; P28d-1; R2-38.

<sup>25</sup> P28f-1,2.

<sup>26</sup> Special Education Coordinator; Resolution Specialist.

<sup>27</sup> Resolution Specialist.

<sup>28</sup> *Id.*

<sup>29</sup> P28d-1; P33; Parent.

<sup>30</sup> R6-3.

<sup>31</sup> Parent.

<sup>32</sup> *Id.*

<sup>33</sup> P28d-1.

<sup>34</sup> Parent.

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respond as he was told that others at DCPS would take care of it.<sup>35</sup> Special Education Coordinator saw Parent's detailed 12/30/15 letter (P28d) raising many concerns, but never responded, as Resolution Specialist and Compliance Case Manager said they would respond.<sup>36</sup>

10. Educational Consultant concluded after the observation that Public School did not have sufficient resources and was not appropriate to implement the 12/3/15 IEP, so recommended to Parent that Student continue at Nonpublic School.<sup>37</sup>

11. LOS Letter and Waiver Letter. To meet the 11/19/15 HOD requirements, DCPS formally notified Parent by letter dated 12/16/15 and emailed on 12/18/15 that Public School would be Student's LOS (the "LOS Letter").<sup>38</sup> The LOS Letter stated without elaboration that Public School could provide Student with the special education services needed and suggested that Parent contact Special Education Coordinator for more information.<sup>39</sup>

12. At the same time DCPS transmitted the LOS letter, it transmitted a second letter dated 12/16/15 asking that certain provisions in the HOD be waived by Parent (the "Waiver Letter").<sup>40</sup> Parent's counsel responded on 12/23/15 that the Waiver Letter appeared to be a concession that DCPS could not implement Student's 12/3/15 IEP at Nonpublic School.<sup>41</sup> Respondent's counsel later stated that there was no need for the waiver.<sup>42</sup> Parent understood the waiver to be an indication that Public School couldn't implement Student's IEP as required.<sup>43</sup> For instance, the Waiver Letter proposed having PE with a student-teacher ratio of 23 to 1, although Parent was clear that Student needed a smaller arrangement.<sup>44</sup> Parent never agreed to the Waiver Letter.<sup>45</sup>

13. Concerns About Implementation. Parent and Educational Consultant had many concerns about implementation of the 12/3/15 IEP to which they were not able to obtain responses.<sup>46</sup> DCPS provided very little information about how it would implement the IEP;

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<sup>35</sup> Special Education Coordinator.

<sup>36</sup> *Id.*

<sup>37</sup> R6-4; Educational Consultant.

<sup>38</sup> P28a-1,2.

<sup>39</sup> P28a-1.

<sup>40</sup> P28b; P28g-2.

<sup>41</sup> P28c-1.

<sup>42</sup> R10-5.

<sup>43</sup> Parent.

<sup>44</sup> P28d-2; Parent.

<sup>45</sup> Parent.

<sup>46</sup> *Id.*

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Parent questioned whether anything was in place to implement the HOD at the time of her observation.<sup>47</sup>

14. Special Education Coordinator told Parent and Educational Consultant at the observation that placing Student at Public School was like “fitting a square peg in a round hole.”<sup>48</sup> Educational Consultant agreed with the metaphor – which she testified is a meaningful expression among those in the special education field – as an accurate characterization of Student at Public School.<sup>49</sup> Given the difference in grade and ability, Student would be treated differently from the other children in the SLS class many times a day.<sup>50</sup>

15. There is only one SLS class at Public School.<sup>51</sup> In the SLS class, four of the children were two grades behind Student and the other two were one grade behind.<sup>52</sup> The children two grades behind were functioning at a much lower level than their grade.<sup>53</sup>

16. The children in the SLS class appeared to be functioning well below Student; two of the six appeared to be Intellectually Disabled (“ID”).<sup>54</sup> Special Education Coordinator testified that there are ID students in the SLS classroom, although at the time of the observation Special Education Coordinator could not provide details to Parent and Educational Consultant.<sup>55</sup> Student is of average intelligence and not ID, so Parent was concerned that having ID students in her class would not provide an appropriate challenge for Student, given her learning profile.<sup>56</sup>

17. Educational Consultant’s primary concern was that there were no children in Student’s Grade in the SLS class, so she would have no cohort of peers.<sup>57</sup> Instruction in the SLS class was aligned two grades below Student’s Grade, even though one-third of the class was only one grade below.<sup>58</sup> Social studies in the SLS class was at a level two grades below Student, and Parent was unable to find out what is done for science.<sup>59</sup> Student has many general education standards at her Grade level throughout her 12/3/15 IEP.<sup>60</sup> As a child in

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<sup>47</sup> *Id.*

<sup>48</sup> P28d-2; Educational Consultant.

<sup>49</sup> Educational Consultant.

<sup>50</sup> P28d-4.

<sup>51</sup> Special Education Coordinator.

<sup>52</sup> P28d-3.

<sup>53</sup> Parent.

<sup>54</sup> P28d-3.

<sup>55</sup> Special Education Coordinator; Educational Consultant.

<sup>56</sup> Parent.

<sup>57</sup> Educational Consultant.

<sup>58</sup> *Id.*

<sup>59</sup> P28d-3.

<sup>60</sup> R2-9,10,11,14,15,16,17,18,19.

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Grade, Student would be taking the PARCC assessment in the spring, so would suffer if she was receiving instruction two grades behind her Grade.<sup>61</sup>

18. Special Education Coordinator stated that the highest functioning children in the SLS class have difficulty writing three full sentences, so Student would have no peers at her writing level.<sup>62</sup> In Student's Grade, as in others, children engage in editing the writing of their peers.<sup>63</sup> The story read aloud in the SLS class (Hansel & Gretel) and its discussion were below Student's level.<sup>64</sup>

19. The SLS class attends so-called specials (Geography, Spanish, Art, Music and PE) with their grade in the general education setting.<sup>65</sup> The content of specials varies by grade; even specials like Art tie-in with grade level content.<sup>66</sup> Parent found out nothing from Special Education Coordinator about how specials would be implemented for Student.<sup>67</sup> Special Education Coordinator didn't know if Student would go with her Grade or with those in the SLS class one or two years behind Student; it was very confusing.<sup>68</sup> The timing of general education specials at Public School differ by grade throughout the day.<sup>69</sup> The SLS class teacher gets her planning period during the specials for the younger children in the class, so Public School would have to figure out who would be teaching if Student was in the SLS classroom at that time.<sup>70</sup>

20. SLS is the only class at Public School that is capped at 12 children.<sup>71</sup> The general education classes in Student's Grade all have 20-24 children, which would be too large for PE and academic specials classes under the HOD, which are limited to 12 children including Student.<sup>72</sup> Special Education Coordinator did not see how Public School could meet the IEP requirement for general education with only 12 students for other academics.<sup>73</sup>

21. Special Education Coordinator did not see how outdoor recess could be implemented without limiting Student to a Pre-K area where she would be alone.<sup>74</sup> The HOD requires Student to be with no more than 11 other peers during recess, and to be assisted with her

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<sup>61</sup> Educational Consultant; R6-4,5.

<sup>62</sup> P28d-3.

<sup>63</sup> Resolution Specialist.

<sup>64</sup> P28d-3; Parent; Educational Consultant.

<sup>65</sup> P28d-3; R6-4; P29-2.

<sup>66</sup> P29-7; Special Education Coordinator.

<sup>67</sup> Parent.

<sup>68</sup> *Id.*

<sup>69</sup> P29-1.

<sup>70</sup> Special Education Coordinator; P28d-4.

<sup>71</sup> Special Education Coordinator.

<sup>72</sup> HOD Ordering ¶ 2(c),(j) at P24-64,65; P28d-4; R6-4.

<sup>73</sup> Special Education Coordinator; Educational Consultant.

<sup>74</sup> P28d-2; R6-4; Parent.

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social pragmatics by the supervising teacher or staff member.<sup>75</sup> For outdoor recess, Student's Grade goes to recess with the grade below; the two grades below that go together at a different time.<sup>76</sup> Student's Grade and the grade below total about 90-100 children who would be at recess at the same time, with no way to provide the specialized area and grouping with general education children required by the HOD.<sup>77</sup> There was not time during the observation to find out about indoor recess.<sup>78</sup> Special Education Coordinator was not sure what period Student's lunch and recess would be.<sup>79</sup>

22. Special Education Coordinator did not know how Public School would implement the detailed lunchtime provisions, as all children eat lunch in their classrooms, but Student is supposed to be with a few general education children in her Grade.<sup>80</sup> There is no cafeteria at Public School.<sup>81</sup> The HOD requires Student to have lunch in a room with three to 24 other children, at a table with one to three other children, with a supervising teacher or staff member to assist with Student's social pragmatics.<sup>82</sup>

23. Student has social goals in her IEP and would not make progress in the existing SLS class at Public School.<sup>83</sup> Student is now doing very well at Nonpublic School socially and a change might cause regression, especially in the absence of a comparable peer group for Student at Public School.<sup>84</sup>

24. Public School did not know how field trips would work for Student and whether she would go with the younger SLS children, since field trips are theme-based and related to what the children are learning.<sup>85</sup> Student takes regular field trips with her class at Nonpublic School which are aligned with what she is learning.<sup>86</sup>

25. Parent was unable to find out when the adaptive seating required for Student would be available at Public School.<sup>87</sup>

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<sup>75</sup> HOD Ordering ¶ 2(j) at P24-65. The HOD does not expressly state at this point that Student is to be with nondisabled peers at recess, but both sides in the due process hearing referred to that as a requirement for recess and lunch, possibly due to the social pragmatics requirements.

<sup>76</sup> Principal.

<sup>77</sup> Educational Consultant.

<sup>78</sup> P28d-2.

<sup>79</sup> Parent.

<sup>80</sup> P28d-3.

<sup>81</sup> Special Education Coordinator.

<sup>82</sup> HOD Ordering ¶ 2(k) at P24-65.

<sup>83</sup> Educational Consultant.

<sup>84</sup> *Id.*

<sup>85</sup> Parent.

<sup>86</sup> *Id.*

<sup>87</sup> P28d-3; P27-25.

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26. Parent's Conclusion. The program proposed at Public School was not appropriate for Student academically or socially, Parent concluded.<sup>88</sup> In the SLS class, Parent expected social regression rather than growth for Student, and thinks that Student would receive no educational benefit from large general education classes.<sup>89</sup> Educational Consultant agreed that Student being at Public School would result in “probable plateau if not regression of skills”; having same age/grade peers is of “critical importance to her developing identity and self-esteem.”<sup>90</sup>

27. Parent wrote DCPS on 12/30/15 stating that she was not willing to enroll Student at Public School on 1/4/16 and giving her reasons.<sup>91</sup> Parent did not receive any answers to that letter from Compliance Case Manager or anyone else.<sup>92</sup> Parent had to base her decision on 12/30/15 on the information she had at that time.<sup>93</sup> If DCPS had answers about how to implement the IEP they would have shared them, Parent assumed and Compliance Case Manager confirmed.<sup>94</sup> Parent understood the lack of answers to mean that DCPS did not know how the 12/3/15 IEP would be implemented and could not implement it in a timely fashion.<sup>95</sup>

28. Later Information about Implementation. DCPS repeatedly said that Public School could implement the 12/3/15 IEP, but said little about how, even in January 2016 and later.<sup>96</sup> Additional information was provided by DCPS at the 3/9/15 IEP team meeting/RSM and during the due process hearing where, for instance, Morning Meeting was raised for the first time by Principal.<sup>97</sup>

29. Principal had no reservations about implementing the 12/3/15 IEP and would do whatever needed to make it work, even if that required getting the IEP team back together and adjusting the IEP.<sup>98</sup> Public School didn't request anything in December 2015 to be able to make the IEP work, but Principal noted that an aide would be a “strong want.”<sup>99</sup>

30. Curriculum in Student's Grade is not being taught in the SLS class now, but Principal stated that it could be if needed for Student.<sup>100</sup> Principal testified that while there are no general education classes with only 12 children at Public School, room dividers could

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<sup>88</sup> P28d-4.

<sup>89</sup> *Id.*

<sup>90</sup> R6-5; Educational Consultant.

<sup>91</sup> P28d-1.

<sup>92</sup> Parent.

<sup>93</sup> *Id.*

<sup>94</sup> Parent; Compliance Case Manager.

<sup>95</sup> Parent.

<sup>96</sup> Parent; P28g-13; P28h-1.

<sup>97</sup> Parent.

<sup>98</sup> Principal.

<sup>99</sup> *Id.*

<sup>100</sup> *Id.*

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be brought in to subdivide the classroom into smaller classes.<sup>101</sup> A new approach of “co-teaching” two separate groups with differentiated instruction is being implemented now at Public School.<sup>102</sup> A co-teaching model was never discussed by DCPS before.<sup>103</sup> Trying to work in a subdivided classroom would be very difficult for Student as she has great difficulty filtering out noise and distractions.<sup>104</sup> At the 3/9/16 RSM, Resolution Specialist stated that there were other special education teachers in the building who could assist to meet the class size requirements in the 12/3/15 IEP.<sup>105</sup> At the due process hearing, Resolution Specialist suggested a new option for including Student in a general education science class with “parallel teaching” using aides.<sup>106</sup>

31. Resolution Specialist stated at the 3/9/16 RSM meeting that an aide would be available to assist Student.<sup>107</sup> The educational aide would have been added to permit the correct ratios required by the 12/3/15 IEP.<sup>108</sup> DCPS never said anything to Parent about adding an aide prior to the RSM meeting.<sup>109</sup> Nothing in Student’s IEP requires an aide and adding an aide suggests regression, as Student didn’t need one-to-one support in the past.<sup>110</sup> Use of an aide in the classroom to prompt Student would result in dependency on external supports, rather than successfully self-regulating as in her current learning environment at Nonpublic School.<sup>111</sup>

32. Resolution Specialist explained at the due process hearing that if Student enrolled, Public School would take a “holistic” look at the situation to see how to work everything out.<sup>112</sup> Some issues, such as whether Student would be with general education children for specials in her Grade or two grades below with other SLS children, would be decided in consultation with Parent.<sup>113</sup> Similarly, Resolution Specialist was unsure and would seek Parent’s input on whether Student should go to lunch and recess with the rest of the SLS class, which goes as a group, or at a different time of day with Student’s Grade, when she would be out of step with her class.<sup>114</sup> For recess, a social worker or another adult could get

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<sup>101</sup> Principal.

<sup>102</sup> *Id.*

<sup>103</sup> Parent.

<sup>104</sup> Educational Consultant.

<sup>105</sup> R10-7.

<sup>106</sup> Resolution Specialist.

<sup>107</sup> R10-6.

<sup>108</sup> Special Education Coordinator.

<sup>109</sup> Parent.

<sup>110</sup> Educational Consultant.

<sup>111</sup> P9-12; Educational Consultant.

<sup>112</sup> Resolution Specialist.

<sup>113</sup> *Id.*

<sup>114</sup> *Id.*

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a dozen nondisabled kids together with Student to meet the HOD requirement, Principal testified.<sup>115</sup>

33. Even by the end of the 3/9/16 RSM it was not clear to Parent how the HOD could be implemented at Public School.<sup>116</sup> Principal and Special Education Coordinator provided additional information about how to implement the IEP at the due process hearing, but it was conflicting and confusing.<sup>117</sup>

34. Other Issues. Director of OT testified to concerns about the size of the SLS classroom in a portable trailer at Public School, but had never seen the classroom or been given other information on which to make a factual analysis of its size.<sup>118</sup> Educational Consultant commented on the size of the classroom in her written observation summary, noting that “students navigated around the classroom without difficulty.”<sup>119</sup> Other portables of about the same size may have three times as many children as the SLS class.<sup>120</sup>

35. Student had to change locations within Nonpublic School at the beginning of 2015/16.<sup>121</sup> Student changing schools in the middle of the school year would be “devastating” for her.<sup>122</sup>

36. Appropriateness of Nonpublic School. Student is appropriately served at Nonpublic School and she is making good progress there.<sup>123</sup> Resolution Specialist agreed that Student was making progress in OT at Nonpublic School and did not dispute that Student was also making progress at Nonpublic School on her academic goals and speech-language therapy.<sup>124</sup> Through an experiential model in a personalized learning environment, Student can gain information and concepts from her classwork at Nonpublic School; in the absence of these supports, her distractibility and anxiety would result in minimal learning.<sup>125</sup>

37. Nonpublic School holds a current Certificate of Approval from OSSE.<sup>126</sup> Parent has been paying for Nonpublic School out of pocket and incurring costs for transportation of

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<sup>115</sup> Principal.

<sup>116</sup> Parent.

<sup>117</sup> *Id.*

<sup>118</sup> Director of OT.

<sup>119</sup> R6-2.

<sup>120</sup> Special Education Coordinator.

<sup>121</sup> Head of Intermediate Division.

<sup>122</sup> R2-38; Head of Intermediate Division.

<sup>123</sup> Educational Consultant; Head of Intermediate Division; R6-5; P9-12; P18 (2/11/16 Individual Learning Plan for Student); P15 (3/20/15 Individual Learning Plan for Student); P17 (Annual Speech-Language Report dated February 2016); P19 (Occupational Therapy Annual Progress Report dated March 2016).

<sup>124</sup> Resolution Specialist.

<sup>125</sup> P9-12.

<sup>126</sup> P12.

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Student to Nonpublic School.<sup>127</sup> Student's 2015/16 tuition has already been paid in full; the total for related services will be known at the end of the school year.<sup>128</sup>

### Conclusions of Law

Based on the Findings of Fact above, the arguments of counsel, as well as this Hearing Officer's own legal research, the Conclusions of Law are as follows:

The overall purpose of the IDEA is to ensure that "all children with disabilities have available to them a free 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." 20 U.S.C. § 1400(d)(1)(A). *See Boose v. Dist. of Columbia*, 786 F.3d 1054, 1056 (D.C. Cir. 2015) (the IDEA "aims to ensure that every child has a meaningful opportunity to benefit from public education").

"[T]o further Congress' ambitious goals for the IDEA, the Supreme Court has focused on the centrality of the IEP as 'the centerpiece of the statute's education delivery system for disabled children.'" *Harris v. Dist. of Columbia*, 561 F. Supp. 2d 63, 67 (D.D.C. 2008), *quoting Honig v. Doe*, 484 U.S. 305, 311, 108 S. Ct. 592, 98 L. Ed. 2d 686 (1988).

Once a child who may need special education services is identified and found eligible, DCPS must devise an IEP, mapping out specific educational goals and requirements in light of the child's disabilities and matching the child with a school capable of fulfilling those needs. *See* 20 U.S.C. §§ 1412(a)(4), 1414(d), 1401(a)(14); *Sch. Comm. of Town of Burlington, Mass. v. Dep't of Educ. of Mass.*, 471 U.S. 359, 369, 105 S. Ct. 1996, 2002, 85 L. Ed. 2d 385 (1985); *Jenkins v. Squillacote*, 935 F.2d 303, 304 (D.C. Cir. 1991); *Dist. of Columbia v. Doe*, 611 F.3d 888, 892 n.5 (D.C. Cir. 2010).

As discussed below, the Act's FAPE requirement is satisfied "by providing personalized instruction with sufficient support services to permit the child to benefit educationally from that instruction." *Smith v. Dist. of Columbia*, 846 F. Supp. 2d 197, 202 (D.D.C. 2012), *citing Bd. of Educ. of Hendrick Hudson Cent. Sch. Dist. v. Rowley*, 458 U.S. 176, 203, 102 S. Ct. 3034, 73 L. Ed. 2d 690 (1982). The IDEA imposes no additional requirement that the services so provided be sufficient to maximize each child's potential. *Rowley*, 458 U.S. at 198. Congress, however, "did not intend that a school system could discharge its duty under the [Act] by providing a program that produces some minimal academic advancement, no matter how trivial." *Hall ex rel. Hall v. Vance County Bd. of Educ.*, 774 F.2d 629, 636 (4th Cir. 1985).

In addition, PCS must ensure that to the maximum extent appropriate, children with disabilities are educated with children who are nondisabled, and special classes, separate schooling, or other removal of children with disabilities from the regular educational

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<sup>127</sup> Parent.

<sup>128</sup> Parent; P20 (cost); P21 (payments); P22 (transportation).

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environment occurs only if the nature or severity of the disability is such that education in regular classes with the use of supplementary aids and services cannot be achieved satisfactorily. 34 C.F.R. 300.114.

A Hearing Officer's determination of whether a child received a FAPE must be based on substantive grounds. In matters alleging a procedural violation, a Hearing Officer may find that a child did not receive a FAPE only if the procedural inadequacies (i) impeded the child's right to a FAPE; (ii) significantly impeded the parent's opportunity to participate in the decision-making process regarding the provision of a FAPE to the parent's child; or (iii) caused a deprivation of educational benefit. 34 C.F.R. 300.513(a). In other words, an IDEA claim is viable only if those procedural violations affected the child's *substantive* rights.

"Based solely upon evidence presented at the hearing, an impartial hearing officer shall determine whether the party seeking relief presented sufficient evidence to meet the burden of proof that the action and/or inaction or proposed placement is inadequate or adequate to provide the student with a FAPE." 5-E D.C.M.R. § 3030.3. The burden of proof is on the party seeking relief. *Schaffer ex rel. Schaffer v. Weast*, 546 U.S. 49, 62, 126 S. Ct. 528, 537, 163 L. Ed. 2d 387 (2005).

**Issue 1:** *Whether Respondent denied Student a FAPE by failing to comply with the 11/19/15 HOD, and specifically failing to issue a written notice by 12/18/15 identifying a placement/location of services that could in fact implement Student's December 2015 IEP.*

This case arises from a detailed HOD issued on 11/19/15 mandating that Student's IEP be updated in specified ways and requiring DCPS to propose by 12/18/15 an appropriate location of services that could implement the updated IEP. The 11/19/15 HOD, which was not appealed and is now final, in Ordering ¶ 5 at P24-66 also provided that DCPS's failure to comply would result in payment by DCPS for Nonpublic School for Student for the period from 1/1/16 to the end of 2015/16 (not including summer 2016). While Public School was proposed by the deadline, the parties sharply disagree about whether that location of services is capable of implementing the 12/3/15 IEP.

As noted above, Respondent's counsel at the beginning of the due process hearing moved to dismiss Issue 1, asserting that the undersigned lacks jurisdiction to enforce the terms of a prior HOD. The motion was denied on the record based on the general authority by which any "matter relating to the identification, evaluation, or educational placement of the child, or the provision of a free appropriate public education to such child" can be the basis of a due process complaint and hearing. See 20 U.S.C. § 1415(b)(6) & (f)(1). Further, as explained in the concurrence of Circuit Judge Millett in *B.D. v. Dist. of Columbia*, 2016 WL 1104846, at \*11 (D.C. Cir. Mar. 22, 2016), the U.S. Department of Education, which has responsibility for the federal administration and enforcement of the IDEA, asserts that a school district's failure to comply with an HOD comes within the general authority quoted above and thus, "parents facing a lack of compliance might be able to bring another due process complaint to enforce the prior decision." *Id.* See also *Letter to Kohn*, 17 IDELR 522 (OSERS 1991) ("OSEP's position is that, based upon the facts and circumstances of

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each individual case, an impartial hearing officer has the authority to grant any relief he/she deems necessary, inclusive of compensatory education, to ensure that a child receives the FAPE to which he/she is entitled”). Thus, the allegation that DCPS failed to comply with the 11/19/15 HOD, resulting in a denial of FAPE to Student, is an appropriate claim for a due process hearing on which the undersigned does have jurisdiction and can proceed.

On the merits of Issue 1, this Hearing Officer concludes that DCPS did not identify a location of services capable of implementing the 12/3/15 IEP on 1/4/16, the first school day after the winter break, for all the reasons discussed in detail in Issue 2 below.<sup>129</sup> Thus, by the terms of the 11/19/15 HOD at Ordering ¶ 5 (P24-66), DCPS is ordered below to reimburse Petitioner for tuition to Public School, related services, and transportation within 30 days after providing receipts to DCPS.

**Issue 2:** *Whether Respondent denied Student a FAPE by failing to implement her December 2015 IEP and to identify a suitable placement/location of services, where Public School is not appropriate for Student and could not implement her December 2015 IEP for numerous reasons, including (a) proposing a program where she would be the only student at her grade level with others two years behind, (b) providing an instructional level that would be too low, (c) not being able to meet the details of her IEP relating to lunch, recess and specials, (d) proposing a physical setting that is too small, cluttered, and inadequate, and (e) disruption caused by multiple moves in school location.*

Petitioner met her burden of demonstrating by a preponderance of evidence that Public School could not appropriately implement Student’s 12/3/15 IEP in order to make a FAPE available to Student as required by 34 C.F.R. 300.148(a),(c). DCPS did propose Public School as the location for Student, but did not address or explain the many concerns and questions about implementation of the 12/3/15 IEP, as discussed below. For if an “appropriate” public school program were available for Student, *i.e.*, one “reasonably calculated to enable the child to receive educational benefits,” DCPS need not consider nonpublic placement, even though a nonpublic school might be more appropriate or better able to serve the child. *Jenkins v. Squillacote*, 935 F.2d 303, 304-305 (D.C. Cir. 1991) (*citing Rowley*, 458 U.S. at 207).

The focus here is whether DCPS could implement the 12/3/15 IEP by 1/4/16 when Student was expected to begin Public School after the winter break. Any explanations and proposed solutions after Parent had to make her decision about sending Student to Public School on 12/30/15 are not relevant and cannot remedy the lack of implementation in December 2015. Parents are not obliged to put their children into situations that do not

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<sup>129</sup> This Hearing Officer does not construe the Waiver Letter as a concession by DCPS that it could not fully implement the 12/3/15 IEP, but simply an indicator of which provisions DCPS found most burdensome or difficult to meet. DCPS conceivably could have had solutions that it was ready to implement when Parent was unwilling to agree to modify the provisions in the Waiver Letter, so the implementation issues are considered below on their merits.

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appear viable in order to prove a denial of FAPE. As the Court explained in *N.S. ex rel. Stein v. Dist. of Columbia*, 709 F. Supp. 2d 57, 72 (D.D.C. 2010),

[P]arents are not required to wait and see a proposed IEP in action before concluding that it is inadequate and choosing to enroll their child in an appropriate private school. *See Forest Grove Sch. Dist. v. T.A.*, 557 U.S. 230, 129 S.Ct. 2484, 2492–93, 174 L.Ed.2d 168 (2009) (holding that parents may be reimbursed for private-school placement when a school district fails to provide a FAPE even where the student has never received instruction in the public school); *see also Union Sch. Dist. v. Smith*, 15 F.3d 1519, 1526 (9th Cir. 1994) (“a school district cannot escape its obligation under the IDEA to offer formally an appropriate educational placement by arguing that a disabled child’s parents expressed unwillingness to accept that placement”).

But even considering new information that was provided to Parent at the 3/9/16 RSM meeting and additional explanations at the due process hearing, this Hearing Officer concludes that DCPS could not appropriately implement Student’s 12/3/15 IEP at any time, as discussed below.

When Respondent fails to provide a FAPE, the legal framework for nonpublic school reimbursement was recently set forth by the Court in *Pinto v. Dist. of Columbia*, 69 F. Supp. 3d 275, 284–85 (D.D.C. 2014), as follows:

It is settled that IDEA’s “broad remedial reach” encompasses “requir[ing] an LEA to provide tuition reimbursement as compensation when a parent enrolls a disabled child in a private school due to the LEA’s deficiencies in providing a FAPE.” *L.R.L. ex rel. Lomax v. Dist. of Columbia*, 896 F. Supp. 2d 69, 76 (D.D.C. 2012) (citation omitted); *see also Oliver*, 2014 WL 686860, at \*5 (“[T]he remedial authority for which the Act provides ‘includes tuition reimbursement for parents who unilaterally place their child in private school [.]’”) (citing 20 U.S.C. § 1412(a)(10)(C)(ii)); *cf. Dist. of Columbia v. Vinyard*, 971 F. Supp. 2d 103, 115 (D.D.C. 2013) (“Tuition reimbursement for private school tuition when the school district denied a child a FAPE was first recognized by the Supreme Court as part of the courts’ broad authority to ‘grant such relief as the court determines [is] appropriate.’”) (quoting *Sch. Comm. of Town of Burlington, Mass. v. Dep’t of Educ. of Mass.*, 471 U.S. 359, 368, 105 S. Ct. 1996, 85 L. Ed. 2d 385 (1985)) (citation omitted).

However, this Court has commented that “parents who unilaterally place their child at a private school without the consent of school officials [do] so at their own financial risk.” *K.E. v. Dist. of Columbia*, No. 13–0084, 19 F.Supp.3d 140, 146, 2014 WL 242986, at \*5 (D.D.C. Jan. 23, 2014) (citation omitted). “Parents in such situations may be reimbursed only if ‘the court or hearing officer finds that the agency had not made FAPE available to the child in a timely manner prior to that enrollment and that the private placement is appropriate.’” *Id.* (citations omitted); *see also* 20 U.S.C. § 1412(a)(10)(C)(ii) (stating that reimbursement may be appropriate if “the agency had not made a free appropriate public education available

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to the child in a timely manner prior to [the private-school] enrollment”). Put another way, “[t]he reviewing court may grant tuition reimbursement if: ‘(1) the public placement violated the IDEA and (2) the private school placement was proper under the Act.’” *Jalloh v. Dist. of Columbia*, 968 F. Supp. 2d 203, 210 (D.D.C.2013) (citation omitted); *see also Oliver*, 2014 WL 686860, at \*5 (“[W]hen a public school system has defaulted on its obligations under the Act, a private school placement is ‘proper under the Act’ if the education provided by the private school is ‘reasonably calculated to enable the child to receive educational benefits [ ]’—the same standard by which the appropriateness of a public school’s IEP is assessed.”) (citation omitted). Thus, parents are not entitled to tuition reimbursement where “the educational program and site proposed by DCPS comply with IDEA’s FAPE requirement.” *James v. Dist. of Columbia*, 949 F.Supp.2d 134, 139 (D.D.C.2013); *see also Walker v. Dist. of Columbia*, 2014 WL 3883308, at \*5 (D.D.C. Aug. 6, 2014).

In short, tuition reimbursement may be considered only if DCPS did not offer Student a FAPE and Nonpublic School is proper under the IDEA. Here, DCPS failed to offer Student a FAPE as it did not provide an appropriate program for Student with peers at her intellectual level and could not implement her IEP in a variety of other ways.

Inappropriate Program Level. DCPS proposed to put Student into a program where she would have no cohort of peers, with no other children in Student’s Grade, and where, due to the differences in grade and ability, Student would be treated differently from the other children in the class many times a day. The proposed SLS class for Student – which was the only SLS class at Public School – contained four children two grades behind Student and two others one grade behind. Moreover, the children two grades behind were functioning at a much lower level than their grade, and at least two of the six children in the class appeared to be ID. Student is of average intelligence and not ID, so having younger children and ID children in her class would not provide an appropriate challenge for Student, given her learning profile.

Instruction in the SLS class was aligned two grades below Student’s Grade. Principal explained that curriculum in Student’s Grade is not being taught in the SLS class now, but it could be if needed for Student. However, this Hearing Officer found that argument less than fully persuasive since the evidence was that the SLS class was being taught curriculum two grades below Student, even though one-third of the class is only one grade below. Special Education Coordinator further explained that the highest functioning children in the SLS class have difficulty writing three full sentences, so Student would have no peers at her writing level. In Student’s Grade, children engage in editing the writing of their peers as part of their learning process, but Student would be unable to do that in the SLS class.

Student also has social goals in her IEP and would not make progress at Public School with only younger and lower functioning children in her classroom. Student is now doing very well socially, but a change might cause regression in the absence of a comparable peer group for Student at Public School. Further, Student has many general

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education standards at her Grade level throughout her 12/3/15 IEP, which could not be achieved with lower level instruction. As a child in Grade, Student would be taking the PARCC assessment in the spring, so would suffer if she was receiving instruction two grades below her Grade.

Certainly there is no requirement for school districts to place only students with similar disabilities together or to ensure that all students in a classroom are in the same grade, when the specialized instruction is differentiated. A student's identified needs, not her disability category, are to determine the services that must be provided to her. *Letter to Anonymous*, 48 IDELR 16 (OSEP 2006); *Heather S. v. State of Wis.*, 125 F.3d 1045, 1055 (7th Cir. 1997) (the "IDEA charges the school with the responsibility of developing an appropriate education, not with coming up with a proper label").

A classroom of students with differing intellectual, social, and behavioral needs may satisfy the IDEA as long as "a core group [is] operating at an intellectual level sufficiently comparable" to Student's to permit her to continue making academic progress. *S.F. v. New York City Dept. of Educ.*, 2011 WL 5419847, at 17 (S.D.N.Y. 2011), *quoting Walczak v. Fla. Union Free Sch. Dist.*, 142 F.3d 119, 133-34 (2d Cir. 1998). Here, DCPS proposed to put Student in an SLS class where there was not a "core group" at a comparable intellectual level. This inappropriate program level alone is sufficient to establish a denial of FAPE in the view of this Hearing Officer.

Other IEP Implementation Concerns. A second area of serious concern that was not worked out in December 2015 – or even by the time of the due process hearing – was how specials (Geography, Spanish, Art, Music and PE) would be handled for Student. The SLS class attends specials with their grade in the general education setting. But the content of specials varies by grade, with even classes like Art incorporating grade-level content. Also, the various grades have specials at different times of the day. So whether Student would attend specials with her Grade or with the other SLS children was not an easy question and was never determined. This would not only impact Student's schedule but also the SLS teacher's, as her planning period was during the younger children's specials and someone would need to teach Student if she was not going to specials then. Resolution Specialist testified at the due process hearing that whether Student would be with general education children for specials in her Grade or two grades below with other SLS children would be decided in consultation with Parent. But if DCPS wanted to work through any details with Parent, the time to do it was in December 2015, when Parent repeatedly asked how these aspects of the IEP could be carried out and was urgently seeking to work through the practical concerns, but heard nothing back from DCPS.

More importantly for IEP implementation, however, the general education classes in Student's Grade all have 20-24 children, which is too large for PE and the academic specials classes, which pursuant to the HOD are limited to 12 children including Student. Special Education Coordinator did not see how Public School could meet the IEP requirement for general education with only 12 students. At the due process hearing, Principal testified that while there are no general education classes with only 12 children at Public School, room dividers could be brought in to subdivide the classroom into smaller classes. A new

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approach of “co-teaching” two separate groups with differentiated instruction is being implemented now at Public School, although never discussed with Parent before. However, trying to work in a subdivided classroom would be very difficult for Student as she has great difficulty filtering out noise and distractions. Alternatively, at the 3/9/16 RSM, Resolution Specialist had stated that there were other special education teachers in the building who could assist to meet the class size requirements in the 12/3/15 IEP, although no specifics were provided in March 2016, much less in December 2015.

Recess and lunch raised similar difficulties for implementation of the IEP, which were never resolved in December or even by the due process hearing. The HOD requires Student to be with no more than 11 other peers during recess and to be assisted with her social pragmatics by the supervising teacher or staff member. For outdoor recess, Student’s Grade goes to recess with the grade below; the two grades below that go together at a different time. Special Education Coordinator was not sure what period Student’s lunch and recess would be. Student’s Grade and the grade below total about 90-100 children who would be at recess at the same time. Special Education Coordinator did not see how outdoor recess could be implemented without limiting Student to a Pre-K area where she would be alone. Principal suggested at the hearing – but not before – that for recess a social worker or another adult could get a dozen nondisabled kids together with Student to meet the HOD requirement, which seems to the undersigned to be an approach that has obvious challenges but might have been viable if it had been worked through in December 2015.

It was never clear how Public School would implement the HOD’s lunchtime provisions. All children eat lunch in their classrooms because there is no cafeteria at Public School, but Student is supposed to be with a few general education children in her Grade. The HOD specifically requires Student to have lunch in a room with three to 24 other children, at a table with one to three other children, with a supervising teacher or staff member to assist with Student’s social pragmatics. Resolution Specialist was unsure how to implement lunch and recess and suggested that DCPS would also seek Parent’s input on whether Student should go to lunch and recess with the rest of the SLS class, which goes as a group (and would result in Student being with children three grades behind her, who share recess with the SLS class), or go at a different time of day with Student’s Grade, when she would be out of step with her class. As noted above, every indication from the evidence in this case was that Parent was very interested in providing input and working through these issues in December, but DCPS was not.

In addition, there were other smaller – but nontrivial – issues, such as how field trips would work for Student (whether she would go with the younger SLS children, since field trips are theme-based and related to what the children are learning) and whether or when the adaptive seating and other specific HOD requirements needed for Student would be available at Public School. DCPS failed to provide answers or explanations.

On the other hand, Petitioner failed to prove element (d) in Issue 2, which alleges that DCPS proposed a physical setting that was too small, cluttered, and inadequate. The witness who testified to concerns about the size of the SLS classroom in a portable trailer at Public School had never seen the classroom and did not know its dimensions. By contrast,

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Educational Consultant reported that “students navigated around the classroom without difficulty.” Educational Consultant’s overall credibility was enhanced by her observation and report at Public School, and especially by her past knowledge of and work with Student, as Educational Consultant had observed her twice at Nonpublic School.

Petitioner also failed to prove element (e) in Issue 2, alleging disruption to Student caused by multiple moves in her school location. While changing schools may well be a significant challenge for Student, this Hearing Officer holds that it is not DCPS’s fault that Student had to change locations at the beginning of this school year at Nonpublic School, nor could DCPS change the fact that the best location it could offer does not continue past Student’s current Grade. If Public School could otherwise appropriately implement Student’s IEP, it would not be reasonable to prevent DCPS from offering a FAPE at Public School for half a year in order to decrease the number of moves by Student, especially when she might move on with other children she would know from her Grade at Public School to a new location next year.

In sum, this Hearing Officer was persuaded that the perspectives of Parent and Educational Consultant (an expert in Special Education Programming for Children with Learning Disabilities and Attentional Challenges) were correct; that Student being at Public School would result in a plateau or regression of her skills and that having similar age/grade peers is critical to her developing her identity and meeting the social emotional aspects of her IEP. This Hearing Officer concludes that DCPS failed to offer a FAPE to Student by proposing the SLS program at Public School to implement Student’s IEP. It is not sufficient for DCPS and Public School to plan to work out implementation problems down the road and expect parents to simply trust them and sign up for whatever happens. *See, e.g., N.S. ex rel. Stein v. Dist. of Columbia*, 709 F. Supp. 2d 57, 73 (D.D.C. 2010) (“Plaintiffs cannot be penalized for refusing to rely on a hope that appropriate services would be provided”).

**Issue 3:** *Whether DCPS denied Student a FAPE by preventing her Parent and advocate from observing Public School for more than 60 minutes, when more time was needed to evaluate the proposed program for Student across the school day.*

The law is now clear in the District of Columbia that parents and their designees have the right to observe proposed educational settings, pursuant to the Special Education Student Rights Act of 2014, D.C. Code § 38-2571.03.<sup>130</sup> In this case, Parent sought a full

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<sup>130</sup> D.C. Code § 38-2571.03, which took effect on 3/10/15, provides in relevant part:

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

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

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day of observation in order to be able to see everything at Public School that would impact Student, including lunch, recess, and PE or other specials, and made arrangements for Educational Consultant to observe as well. However, due to internal concerns about observers in the classroom being disruptive to the children, DCPS limited the observation to one hour, which was not sufficient for Parent to be able to observe all she needed at Public School. Indeed, DCPS acknowledged that it is not possible to see all settings in one hour, including specials, lunch, recess, and academics.

The Special Education Student Rights Act clearly provides that the “LEA shall not impose any conditions or restrictions on such observations” except for three listed exceptions, of which the only relevant one permits DCPS to avoid potential disruption from “multiple observations occurring in a classroom simultaneously.” Here, the evidence was that there had been only three observations of the SLS program within two weeks, which is far from multiple simultaneous observations on the day Parent was scheduled to visit. Further, DCPS arbitrarily prevented Parent from seeing other aspects of the school day at Public School, which she could have done outside the classroom without any impact on the SLS children.

This Hearing Officer concludes that Petitioner proved that DCPS improperly prevented adequate observation of the proposed educational program as permitted by statute. However, the Special Education Student Rights Act does not contain any remedy, so viewing it as a clarifying regulation,<sup>131</sup> this Hearing Officer concludes that not being able to observe Public School for an adequate period was a procedural violation, which did not impede Parent’s opportunity to participate in decision-making relating to Student’s location in the circumstances of this case. Thus it was not a substantive violation or a denial of FAPE pursuant to 34 C.F.R. 300.513(a)(2)(ii). Parent was able to see enough of Public School to know that she was not willing to enroll Student in the SLS program there. Further observation would not have changed Parent’s conclusion that Public School was not

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

- (i) Ensure the safety of the children in a program;
- (ii) Protect other children in the program from disclosure by an observer of confidential and personally identifiable information in the event such information is obtained in the course of an observation by a parent or a designee; or
- (iii) Avoid any potential disruption arising from multiple observations occurring in a classroom simultaneously.

*See also* 34 C.F.R. 300.121. This right of observation by Parent or designee is tantamount to a regulation clarifying what is required to provide Parent the right to participate meaningfully in determining Student’s placement. *See Cano-Angeles v. Puerto Rico (Dept. of Educ.)*, 2015 WL 6133130, at \*4 (D.P.R. 2015) (“hearing officers [are to] consider both state and federal law to ensure that the [IDEA] is properly being implemented”).

<sup>131</sup> *Id.*

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appropriate, as there were no answers to her concerns that additional observation could have revealed.

**Issue 4:** *Whether placement of Student at Nonpublic School is proper and appropriate.*

Finally, Petitioner readily demonstrated that Nonpublic School, where Student has been thriving, is a proper and appropriate placement for Student. “The baseline, then, is this: a 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.” *Rowley*, 458 U.S. at 207, 102 S. Ct. 3034.” *Leggett v. Dist. of Columbia*, 793 F.3d 59, 71 (D.C. Cir. 2015). Similarly, “[w]here a public school system has defaulted on its obligations under the IDEA, a private school placement is ‘proper under the Act’ if the education provided by said school is ‘reasonably calculated to enable the child to receive educational benefits.’” *Wirta v. Dist. of Columbia*, 859 F. Supp. 1, 5 (D.D.C. 1994), *quoting Rowley*, 458 U.S. at 176, 102 S. Ct. at 3034. *See also N.G. v. Dist. of Columbia*, 556 F.Supp.2d 11, 37 (D.D.C. 2008).

Not only did Petitioner’s witnesses emphasize that Student is appropriately served at Nonpublic School and making good progress there, even DCPS’s Resolution Specialist agreed that Student is making progress in OT at Nonpublic School and did not dispute that Student is also making progress at Nonpublic School in her academic goals and speech-language therapy.

Indeed, while the 11/19/15 HOD found that Student should have some exposure to nondisabled children as her LRE, there was no hesitation to provide reimbursement for the second half of 2014/15 and the first half of 2015/16, or to require DCPS to reimburse the second half of 2015/16 at Nonpublic School if DCPS failed to provide an appropriate location to implement the IEP. Further, vague assertions of “sexting,” sale of marijuana, and bullying at Nonpublic School, none of which were even alleged to involve Student, and none of which were found to be relevant or substantiated facts by the undersigned, would not – even if true – eliminate the educational benefits that Student is clearly receiving at Nonpublic School.

For these reasons, this Hearing Officer concludes that Nonpublic School is a proper and appropriate location for Student pursuant to 34 C.F.R. 300.148 and, based on the denial of FAPE above, orders reimbursement of the costs of Nonpublic School below.

### **ORDER**

Petitioner has met her burden of proof as set forth above. Accordingly, **it is hereby ordered that:**

- (1) Upon receipt of documentation of payment by Parent, DCPS shall within 30 days reimburse Parent the costs of Nonpublic School tuition, related services, and transportation for Student from 1/1/16 through the end of the 2015/16 school year (not including summer 2016).

**Hearing Officer Determination**

Case No. 2016-0033

(2) Any and all other claims and requests for relief are **dismissed with prejudice**.

**IT IS SO ORDERED.**

Dated in Caption

*/s/ Keith Seat*

Keith L. Seat, Esq.  
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).

Copies to:

Counsel of Record (Appendix A, by email)

OSSE-SPED (due.process@dc.gov)

ODR (hearing.office@dc.gov)

Contact.resolution@dc.gov

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