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OSSE
Office of Dispute Resolution
April 15, 2021

Confidential

Parents on Behalf Student,

Petitioners,

v.

District of Columbia Public Schools (“DCPS”)
Local Education Agency (“LEA”)

Respondent.

CORRECTED
HEARING OFFICER’S
DETERMINATION ¹

Hearing Date:
March 19, 2021

Counsel for Each Party listed in
Appendix A

Case # 2021-0003

Date Issued: March 28, 2021

Hearing Officer:
Coles B. Ruff, Esq.

¹ This Corrected HOD includes typographical and grammatical changes and eliminates personally identifiable information. The issuance date, March 28, 2021, remains unchanged. Personally identifiable information is in the attached Appendices A & B.

JURISDICTION:

The due process hearing was conducted, and this decision was written, pursuant to the Individuals with Disabilities Act (“IDEA”), P.L. 101-476, as amended by P.L. 105-17 and the Individuals with Disabilities Education Improvement Act of 2004, the District of Columbia Code, Title 38 Subtitle VII, and the District of Columbia Municipal Regulations, Title 5 Chapter E30.

BACKGROUND AND PROCEDURAL HISTORY:

The student who is the subject of this due process hearing (“Student”) resides with Student’s parents (“Petitioners”) in the District of Columbia and the District of Columbia Public Schools (“DCPS”) is Student’s local educational agency (“LEA”). Student is currently age ___² and attends a DCPS school (“School A”). Student is eligible for special education and related services pursuant to IDEA with a disability classification of Multiple Disabilities (“MD”) including Autism Spectrum Disorder (“ASD”) and Other Health Impairment (“OHI”) due to Attention Deficit Hyperactivity Disorder (“ADHD”).

DCPS developed an initial individualized education program (“IEP”) for Student on September 2, 2020, that was amended on December 22, 2020, to include goals and specialized instruction in math. School A initially proposed that specialized instruction in math be provided to Student in a “support” math class that was a different math class than Student was assigned to at the time. DCPS denied a request that Petitioners observe the proposed class.

In early January 2021, School A stated that Student's special instruction in math could be delivered in either Student's current math class or the proposed math. DCPS declined Petitioners' request to observe both classes.

Petitioners filed their current due process complaint against DCPS on January 25, 2021, alleging the DCPS denied Student a free appropriate public education (“FAPE”) by failing to allow Petitioners to observe either Student’s existing math class or the proposed math support class.

Relief Sought:

Petitioner seeks the following as relief: a finding that Student has been denied a FAPE; that the Hearing Officer order DCPS to allow Student’s parents and/or their designee to virtually observe the proposed and/or current math placements for Student; and that the Hearing Officer preserve an award of compensatory education to be determined at a later date.

LEA Response to the Complaint:

The LEA filed a response to the complaint on January 25, 2021. The LEA denies that there has been any failure to provide Student with a FAPE. In its response DCPS asserts, inter alia, the following:

² Student’s age and grade are listed in Appendix B.

The agency is not, at this time, able to provide confidentiality compliance for observers in virtual learning; therefore, virtual learning observations are not available. Further, the virtual distance learning that is taking place in any "classroom" is not a proposed or current placement on any student's IEP. It is an emergency response provision for U.S. Department of Education guidance and IDEA requirements to maintain FAPE provision, to the extent possible. Student's placement was determined by due process and decisions in 2019 and 2020, ordering Student's IDEA eligibility and IEP requirements.

Resolution Meeting and Pre-Hearing Conference and Order:

The parties participated in a resolution meeting on February 19, 2021, and did not resolve the complaint. The parties did not mutually agree to shorten the 30-day resolution period. The 45-day period began on February 25, 2021, and ended, and the Hearing Officer's Determination ("HOD") is due] on March 28, 2021.

The undersigned hearing officer ("Hearing Officer") conducted a pre-hearing conference on February 11, 2021, and issued a pre-hearing order ("PHO") on February 17, 2021, outlining, inter alia, the issue to be adjudicated.

Issue Adjudicated:

Whether DCPS denied Student a FAPE by failing to allow Petitioners meaningful participation in the provision of a FAPE to Student by not allowing Petitioners and/or their designee to observe the current and proposed placements for math for Student.

DUE PROCESS HEARING:

Due to the COVID-19 emergency, the hearing was conducted via video teleconference on March 19, 2021.

RELEVANT EVIDENCE CONSIDERED:

This Hearing Officer considered the following as evidence and are the sources of the findings of fact: (1) the testimony of the witnesses, and (2) the documents submitted in the parties' disclosures (Petitioner's Exhibits 1 through 24 and Respondent's Exhibits 1 through 35) that were admitted into the record and are listed in Appendix A. Witnesses' identifying information is in Appendix B.³

³ The Hearing Officer found the witnesses credible unless otherwise noted in the Conclusions of Law. Any material inconsistencies in the testimony of witnesses that the Hearing Officer found are addressed in the Conclusions of Law. Petitions presented three witnesses: (1) Student's mother, (2) Petitioners' Educational Consultant, and (3) Petitioners' Second Educational Consultant. Both consultants testified as expert witnesses. DCPS presented one witness who testified as an expert witness: (1) Special Education Coordinator and LEA Representative at School A.

SUMMARY OF DECISION:

Petitioners held the burden of persuasion on the issue adjudicated. The Hearing Officer concludes, based on the evidence adduced, that Petitioners sustained the burden of persuasion by a preponderance of the evidence on the issue adjudicated. Having found a denial of a FAPE, the Hearing Officer directed DCPS to allow Petitioners and/or their designee to observe the two choices of classes at School A proposed by School A for Student's specialized math instruction.

FINDINGS OF FACT:⁴

1. Student resides with Student's parent, Petitioner, in the District of Columbia and DCPS is Student's LEA. Student attends School A, a DCPS school. Student is eligible for special education and related services with a disability classification of MD, including ASD and OHI due to ADHD. (Parent's testimony, Petitioner's Exhibit 4)
2. DCPS evaluated Student for special education eligibility in spring 2019 and on June 3, 2019, DCPS found Student ineligible. Student's mother requested and was provided an independent education evaluation ("IEE") with DCPS funding. (Respondent's Exhibit 6)
3. Student began attending School A at the start of school year ("SY") 2019-2020. A team at School A reviewed the IEE on September 25, 2019, and reconsidered Student's eligibility for special education. The School A team members did not consider Student in need of specialized instruction. School A held another eligibility meeting on December 12, 2019, and the team considered additional data. Again, DCPS found Student ineligible. (Respondent's Exhibit 6)
4. Since March 2020 and thus far during SY 2020-2021, due to the COVID-19 pandemic, DCPS has delivered instruction to its students, including Student, through an online distance learning platform. (Respondent's Exhibit 6, Witness 3's testimony)
5. On May 26, 2020, DCPS issue a prior written notice ("PWN") to Petitioners stating that a team reviewed existing data on Student; teachers and related service providers did not agree with the Student's parent that Student was in need of specialized instruction, and the data had not changed since the previous eligibility meeting for Student on December 12, 2019. DCPS refused to move forward with a new eligibility evaluation of Student after analyzing existing data. The parents disagreed with this and filed a due process complaint on June 15, 2020. (Respondent's Exhibit 6)
6. Following a due process hearing on Petitioners' complaint, an HOD issued on August 18, 2020, that concluded DCPS had erred in finding Student ineligible for special education on December

⁴ The evidence (documentary and/or testimony) that is the source of the Findings of Fact ("FOF") is noted within parenthesis following the finding. Documents cited are noted by the exhibit number. If there is a second number following the exhibit number, it denotes the page of the exhibit (or the page number of the entire disclosure document) from which the fact was extracted. When citing an exhibit that has been submitted by more than one party separately, the Hearing Officer may only cite one party's exhibit. One of the exhibits Petitioner disclosed and adopted a significant number of Findings of Fact from the HOD issued on March 17, 2020, from the previous due process complaint Petitioner filed.

12, 2019, and declared Student to be a child with a disability pursuant to IDEA. The HOD directed DCPS to develop an individualized education program ("IEP") for Student. (Respondent's Exhibit 6)

7. Student's initial IEP is dated September 2, 2020, with a disability classification of MD, including ASD and OHI for ADHD. It prescribed 2 hours per week of specialized instruction in written expression in general education and behavioral support services. (Respondent's Exhibit 20)
8. On September 4, 2020, Petitioners filed a second due process complaint against DCPS alleging that Student's initial IEP was inappropriate because, among other things, it lacked goals and specialized instruction in math. Petitioners filed for Stay Put during the pendency of their due process complaint. The Hearing Officer assigned to Petitioners' second due process complaint concluded that Student's Stay-Put placement was the general education setting, and Student's placement in classes co-taught by a general education teacher and a special education teacher with some of the students having IEPs, did not constitute a change in placement that warranted a Stay Put order. (Respondent's Exhibit 34)
9. Petitioners' September 4, 2020, due process complaint resulted in an HOD issued December 14, 2020, concluding that the September 2, 2020, IEP denied the Student a FAPE because it did not contain math goals and services. The Hearing Officer ordered DCPS rewrite Student's IEP to include specialized instruction and goals in math. (Respondent's Exhibit 28)
10. In their September 4, 2020, due process complaint, Petitioners had also alleged "they should have received more specific information at the September 2, 2020, IEP meeting, such as the teachers that the Student would be assigned to, the students who would be assigned to the proposed classrooms, and the grade levels that the proposed classes would be taught at." The Hearing Officer did not agree. In the December 14, 2020, HOD, Citing *Letter to Wessels*, 16 IDELR 735 (OSEP 1990), the Hearing Officer stated: "Though of course this kind of information could be helpful, Petitioners presented no authority from any jurisdiction supporting the proposition that school districts must provide parents with this degree of detail during an IEP meeting. To the contrary, a placement decision does not need to include a determination of the specific classroom within the Student's designated school, including information about the other students in the classroom or the teachers who might be assigned to that classroom." (Respondent's Exhibit 28)
11. DCPS convened an IEP meeting on December 22, 2020, to comply with the directives of the December 14, 2020, HOD. Student's mother, along with her attorney and educational consultant, participated in the meeting. DCPS representatives at the meeting included, among others, School A's special education coordinator ("SEC") and a DCPS attorney. The December 22, 2020, meeting resulted in an amended IEP dated December 22, 2022, adding math goals and 3.75 hours per week of specialized instruction in math in general education in addition to the specialized instruction in written expression and behavioral support services. School A proposed during the meeting that Student's specialized instruction in math be delivered in a "math support class" that was different from the math class Student had been attending. Petitioner's attorney requested to observe the proposed math class. The DCPS attorney responded that observation of

the class was not available because of confidentiality concerns. (Respondent's Exhibits 14, 22, Petitioners' Exhibits 1, 4)

12. The DCPS IEP meeting notes from the December 22, 2020, IEP meeting state in pertinent part:

[Petitioners' consultant] proposed 3.75 hours a week for services in the general education setting for math. [SEC] asked parent if she felt [Student] was in correct math placement. Parent thinks [Student] should stay in [Student's] current math class. Parents wanted to discuss this matter with [Petitioners' consultant]. [SEC] suggested Student take a math support class to help [Student] broach some of the deficits to help [Student] build [Student's] skills and self-confidence. Then in [next grade], [Student] will resume [next grade] math.

[Petitioners' attorney] asked for clarification for math support class in general education. [SEC] explained that it helps to build students' skills in identified areas of concern. Parent asked how many students had IEPs? Would a special education teacher be in the support class? Can the math support class be observed?

[DCPS's attorney] suggested DCPS consider a proposed evaluation and/or plan for adjustments. [Petitioners' attorney] explained why parent and DCPS went to hearing in November 2020. [SEC] asked parent if she accepted the hours suggested by [Petitioners' educational consultant]. Parent agreed to hours proposed by [Petitioners' educational consultant]. [Petitioners' attorney] asked if parent can observe the math support class. [DCPS' attorney] stated not at this time and asked [SEC] to address resistance concerns through an evaluation. Mom expressed that she has concerns about a transition plan because [Student] has had suicidal ideations. The team asked if these were current and should we call Child Protective Services or Champs (not named but explained the service). Parent suggested [Student] was stable at this time. Team agreed to transition plan with [Staff] to meet with teacher to get [Student] into classes. (Petitioner's Exhibit 14)

13. DCPS issued three PWNs⁵ dated December 22, 2020. One of the PWNs stated in pertinent part:

“[School A's special education coordinator (“SEC”)] stated that any change in services or placement may impact [Student's] location, teachers, and schedule. The Team agreed to the proposal of 3.75 hours inside the general education setting. [SEC] asked [Student's mother] whether she believed Student was in the proper level of math and explained that he heard her concerns during the hearing about [Student's] math placement. [SEC] suggested a correction to [Student's] math sequence and that [Student] begin a general education math support class instead of [Next grade Math] at this time in an attempt to solidify Student's math skills before moving forward in the curriculum. [Student's mother] expressed concerns about another transition for [Student] and the Team discussed a transition plan. This plan is outlined in another prior written notice. [SEC] provided a description of the general education math support class and that the class is a support for students to attain math skills necessary to move forward with the math

⁵ DCPS later issued a correction of the PWNs at Petitioners' request that substituted language related to statements Student's mother made during the December 22, 2020, meeting regarding Student's anxiety related to class schedule changes. (Petitioner's Exhibit 7)

curriculum. DCPS agreed to a transition plan to implement the new IEP and the schedule change as discussed in another PWN.” (DCPS Exhibit, Petitioners’ Exhibit 7)

14. Another PWN noted that School A would implement a transition plan to support Student through any anxiety from changes to Student's class schedule from the additional services in the Student's amended IEP. (Respondent's Exhibit 16)
15. Student’s mother prepared her own notes regarding the December 22, 2020, meeting and the notes state in pertinent part :

It is not correct that “the team” agreed to place [Student] in a math support class. I specifically stated that I did not consent. [SEC] stated that he did not need my consent and that he would be placing [Student] in this class in order to implement [Student’s] IEP. No explanation was given as to why the IEP could not be implemented in [Student’s] current class. [SEC] denied me the opportunity to consult with [Student’s] educational consultant, [Petitioners' educational consultant], before finalizing the IEP. Please make this correction to reflect that I did not consent to this change. I did agree to a transition plan based on [SEC's] statements that he did not need my consent to make the change. Because DCPS has already made several changes to [Student's] schedule during the first term of this school year without my consent, I agreed to a transition plan expecting DCPS to move ahead with yet another schedule change without my consent. Even though I believe this change will be extremely harmful to [Student], just as the past changes this year have been, I agreed to the transition plan to try to minimize the harm to [Student].

16. On December 23, 2020, Student’s mother emailed School A’s SEC reiterating the request made during the December 22, 2020, IEP meeting that she be allowed to observe the support class that the SEC proposed to place Student in for the math, and asked to observe the class when school resumed the first week of January 2021. (Petitioners’ Exhibit 8-2)
17. On January 7, 2021, Petitioners' attorney, in an email to School A's SEC, asked for a class schedule that showed how Student's IEP would be implemented. (Petitioner's Exhibit 9)
18. On January 8, 2021, School A's SEC sent an email to Student's mother and copied her attorneys. The email stated the SEC's concern that Student had not been attending two of Student's assigned classes. He also expressed concern that Student was currently enrolled in a general education math class above Student's current grade level, and a correction in the sequence of Student's math instruction was needed given Student's needs in math and requests for help. The email provided a chart of four class schedule options from which Student's mother could choose. Three options had a math support class. The other was Student's existing class schedule without the math support class. The SEC noted that Student's specialized instruction in math could be provided in either math class. The SEC asked in the email for the Student's mother to decide whether she wanted Student to remain in Student's current math class which was a grade level above Student's current grade and to choose which of the four class schedule options she preferred. He also asked when she and her representatives were available to meet to discuss and develop a transition plan to present to Student before any changes in Student’s class schedule was made. (Witness 3's testimony, Petitioner's Exhibit 10)

19. In a January 11, 2021, email to Petitioners' attorney, School A's SEC stated that Student's specialized instruction in math could be delivered in Student's current math class or the math support class. As a result, Petitioner's counsel stated in a responding email that Student's mother would like an opportunity to observe both math classes. The SEC responded in an email stating, among other things, that observation of the classes was not an option during distance learning. (Witness 3's testimony, Petitioner's Exhibit 11-1)
20. Petitioner's request is the first and only request for a classroom observation during distance learning that the School A SEC is aware of at School A since distance learning began in DCPS. The SEC is not aware of any DCPS policy about virtual classroom observations during the COVID-19 emergency. The SEC is also unaware of any DCPS policy that an outside observer needs additional security features on the observer's computer. If an observer were provided an internet link to observe a virtual classroom, that link could remain active and available for use beyond that single observation. The link to the classroom can be changed after the observation. However, such a change can disrupt the log-in routine of all the students in the classroom after the observation is completed. (Witness 3's testimony)
21. Student's mother believes that School A has not sufficiently explained how the math support class being proposed would benefit Student. It was not clear what Student would work on in the class and whether the work would be at the same grade level as Student's current math class. In addition, she is concerned about Student's emotional well-being. As a result of previous changes to Student's School A class schedule, Student has experienced anxiety that is related to Student's disability. (Mother's testimony)
22. Petitioners have engaged the services of two educational consultants. One of the consultants assisted with Student. The other assisted with Student's sibling. Both consultants have conducted classroom observations of students in DCPS schools with DCPS' authorization since DCPS initiated distance learning. One observation was as recent as December 2020. The consultant working with Student has met with Student, and part of the time they met was when Student was engaged in a distance learning class. The consultant did not obtain authorization to do so from DCPS or anyone else other than Student's mother. The other consultant conducted a classroom observation of Student's sibling at another DCPS school and did so pursuant to a confidentiality agreement that Student's parent signed with DCPS. Both consultants gave assurances that they have not and would not disclose identifiable information to anyone or in their education reports, other than the student they observed. (Witness 1's testimony, Witness 2's testimony, Petitioner's Exhibit 21)
23. Student's mother has found in the past that classroom observations by the educational consultant she has hired to be valuable in making informed decisions about her children's educational needs. DCPS provided Student's mother a confidentiality agreement document for observations in the past that she signed. To date, DCPS has not allowed Student's mother or her designee to observe the math support class that has been proposed for Student by School A. She has observed the classroom for one of Student's siblings at another DCPS school and has assisted in the classroom as she and other parents are expected to do. When doing so, she does not see any personal information of other students except perhaps their names. She has not disclosed any information about any students. (Mother's testimony)

CONCLUSIONS OF LAW:

Pursuant to IDEA §1415 (f)(3)(E)(i), a decision made by a hearing officer shall be made on substantive grounds based on a determination of whether the child received a free appropriate public education (“FAPE”).

Pursuant to IDEA §1415 (f)(3)(E)(ii), in matters alleging a procedural violation, a hearing officer may find that a child did not receive FAPE only if the procedural inadequacies impeded the child’s right to FAPE, significantly impeded the parent’s opportunity to participate in the decision-making process regarding the provision of FAPE, or caused the child a deprivation of educational benefits. An IDEA claim is viable only if [DCPS’] procedural violations affected the student’s substantive rights.” *Lesesne v. District of Columbia*, 447 F.3d 828, 834 (D.C. Cir. 2006)

34 C.F.R. § 300.17 provides:

A free appropriate public education or FAPE means special education and related services that--
(a) Are provided at public expense, under public supervision and direction, and without charge;
(b) Meet the standards of the SEA, including the requirements of this part; (c) Include an appropriate preschool, elementary school, or secondary school education in the State involved; and (d) Are provided in conformity with an individualized education program (IEP) that meets the requirements of Sec. 300.320 through 300.324

Pursuant to 5E DCMR 3030.14, the burden of proof is the responsibility of the party seeking relief. *Schaffer v. Weast*, 546 U.S. 49, 126 S.Ct. 528, (2005). In this case, Petitioner had the burden of persuasion on the issue adjudicated. ⁶ The normal standard is the preponderance of the evidence. See, e.g., *N.G. V. District of Columbia* 556 f. Sup. 2d (D.D.C. 2008) see also 20 U.S.C. §1451 (i)(2)(C)(iii).

Issue: Whether DCPS denied Student a FAPE by failing to allow Petitioners meaningful participation in the provision of a FAPE to Student by not allowing Petitioners and/or their designee to observe the current and proposed placements for math for Student.

⁶ Pursuant to DC Code § 38-2571.03 (6):

(A) In special education due process hearings occurring pursuant to IDEA (20 U.S.C. § 1415(f) and 20 U.S.C. § 1439(a)(1)), the party who filed for the due process hearing shall bear the burden of production and the burden of persuasion; except, that: (i) Where there is a dispute about the appropriateness of the child’s individual educational program or placement, or of the program or placement proposed by the public agency, the public agency shall hold the burden of persuasion on the appropriateness of the existing or proposed program or placement; provided, that the party requesting the due process hearing shall retain the burden of production and shall establish a prima facie case before the burden of persuasion falls on the public agency. The burden of persuasion shall be met by a preponderance of the evidence. (ii) Where a party seeks tuition reimbursement for unilateral placement, the party seeking reimbursement shall bear the burden of production and the burden of persuasion on the appropriateness of the unilateral placement; provided, that the hearing officer shall have the authority to bifurcate a hearing regarding a unilateral placement; provided further, that if the hearing officer determines that the program offered by the public agency is appropriate, it is not necessary to inquire into the appropriateness of the unilateral placement.

(B) This paragraph shall apply to special education due process hearings resulting from complaints filed after July 1, 2016.

Conclusion: Petitioners sustained the burden of persuasion by a preponderance of the evidence.

The IDEA requires each LEA to ensure that the parents of each child with a disability participate in meetings with respect to the educational placement of their child. 20 U.S.C. Sect. 1414(e); 34 C.F.R. § 300.501. The placement decisions must 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 C.F.R. §300.116(a). The IDEA does not define “educational placement,” but courts have interpreted it as extending beyond the specific location of the school at which the student is enrolled. *Lunceford v. D.C. Bd. of Educ.*, 745 F.2d 1577, 1582 (D.C. Cir. 1984); *D.K. ex rel. Klein v. D.C.*, 962 F. Supp. 2d 227, 233 (D.D.C. 2013) (physical school location alone does not constitute an educational placement); *Johnson v. District of Columbia*, 839 F. Supp. 2d 173, 177 (D.D.C. 2012) (the “fundamental flaw” of the parent’s argument was the underlying assumption that the student’s educational placement is the physical school the student attends).

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

In 2014, the District of Columbia passed the Student Rights Act. The Act "provides district parents with additional procedural safeguards to help make sure parents have the tools they need to stay informed, engaged, and empowered throughout the special education process." See D.C. Council Comm. Rep. on B 20-723 (D.C. 2014) at 1. Recognizing that "parents who do not have a specific background in the subject area ... often cannot adequately evaluate whether their child's instruction is sufficient [and that] parents are concerned that an LEA may limit such access to the point that the observation is unable to provide meaningful input into their child's educational progress," the Student Rights Act expanded on a parent's "right to observe" under the IDEA...⁷

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

5(A) Upon request, an LEA shall provide timely access, either together or separately, to the following for observing a child's current to proposed special education program:

- (i) the parent of a child with a disability; or
- (ii) a designee appointed by the parent of a child with a disability who has professional expertise in the area of special education being observed or is necessary to facilitate an observation for a parent with a disability or to provide language translation assistance to a parent; provided, that the designee is neither representing the parent's child in litigation

⁷ *Woodson, et al., v. District of Columbia*, 119 LRP 28316

related to the provision of a free and appropriate public education for that child nor has a financial interest in the outcome of such litigation.

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

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

(i) Ensure the safety of the children in the program;

(ii) Protect other children in the program from disclosure by an observer of confidential and personally identifiable information in the event such information is obtained in the course of an observation by a parent or a designee, or

(iii) Avoid any potential disruption arising from multiple observations occurring in a classroom simultaneously.

(E) An observer shall not disclose nor use any information obtained during the course of an observation for the purpose of seeking or engaging clients in litigation against the District or the LEA.

(F) The LEA may require advance notice and may require the designation of a parent's observer to be in writing.

(G) Each LEA shall make its observation policy publicly available.

The evidence demonstrates that at the December 22, 2020, IEP meeting, Petitioner's attorney requested an opportunity to observe the math support class being proposed by the School A SEC to implement Student's specialized math instruction. DCPS' attorney declined the request and noted that DCPS had had some confidentiality issues in the past with an observation of a DCPS class during the COVID-19 distance learning. There was no further discussion during the meeting of options available to Student's mother or a designee to observe the proposed math class.

In an email to School A's SEC, Petitioner reiterated the request made by her attorney in the meeting to observe the proposed math support classroom in January 2021, after School A's winter break. Petitioners' attorney followed that request with an email to the SEC on January 7, 2021, asking how Student's IEP would be implemented.

The SEC responded with a January 8, 2021, email to Student's mother and copied her attorney, providing, among other things, four proposed class schedules for Student from which Student's mother could choose. Three of the choices included the math support class, and one choice was for Student's class schedule to remain unchanged with specialized instruction being provided in Student's current math class.

In a January 11, 2021, email to the SEC, Petitioners' attorney requested that Student's mother be allowed to observe both Student's current math class and the proposed math support class. In response, the SEC stated that he had provided options that included Student staying in Student's current math class and that Student's specialized math instruction could be provided in Student's current math class or the proposed math support class. Petitioners' attorney, in a return email, asked that Student's mother be allowed to observe both classes. The SEC responded that classroom observations during distance learning were not an option.

In neither the December 22, 2020, IEP meeting, nor in the subsequent emails between School A's SEC, Student's mother or her attorney, save the DCPS attorney stating that there were confidentiality issues, did DCPS provide any explanation of its denial of Petitioners' observation requests.

The evidence demonstrates that DCPS has allowed classroom observations at other DCPS schools during the COVID-19 distance learning, one of which was conducted as recently as December 2020. Albeit the School A SEC believes that Petitioners' request for observation of a virtual classroom during distance learning is a case of first instance for School A, there has been no compelling explanation for DCPS' refusal to allow such observations at School A.

Student's IEP has been amended to include specialized instruction in math as a result of a previous due process complaint Petitioners filed and on which they prevailed. Beyond the decision of whether the instruction is provided inside or outside of general education, the specific classroom, and in some instances, the school, in which specialized instruction is delivered is generally a decision left to the LEA. Failure of an LEA to have a parent participate in such a decision is, at best, a procedural violation. See *Sanchez v. District of Columbia*, 815 F. App'x 559, 561 (D.C. Cir. 2020),

Nonetheless, Student's mother participated in the IEP meeting and, subsequent to the meeting, has been provided several class schedule options from which to choose for Student's math instruction to be implemented. This was an opportunity for Petitioners to participate in the decision-making of the implementation of Student's IEP.

However, under D.C. law, the parental protections of IDEA have been expanded. D.C. Code § 38-2571.03) states that the LEA shall provide timely access either together or separately, to the parent or his or her qualified designee, to observe a child's current or proposed special education program. This mandate for timely access includes the opportunity 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.

In addition to timely access upon request, the LEA cannot impose conditions or restrictions on the observations except to ensure the safety of the children in the program, protect other children in the program from disclosure by an observer of confidential and personally identifiable information, and to avoid any potential disruption arising from multiple observations occurring in a classroom simultaneously. Also, an observer shall not disclose nor use any information

obtained during the course of an observation for the purpose of seeking or engaging clients in litigation against the LEA.

In this instance, DCPS has imposed a restriction on Petitioners' access to observe Student's current math class and the proposed math class, both having been presented as an option for Student's specialized instruction to be delivered. Petitioner presented credible testimony from both Student's mother and the two educational consultants that DCPS has allowed other classroom observations in other DCPS schools during COVID-19 distance learning, including observations by Student's mother and at least one of the consultants at another DCPS school. In addition, they testified that there have been no issues raised regarding any breach of confidentiality associated with their observations. Petitioners produced evidence sufficient to counter DCPS' claim that School A class observations during virtual learning are "not an option."

Neither, at the December 22, 2020, meeting, nor in the correspondence from the School A SEC has any specific concern regarding confidentiality been described. There was insufficient evidence presented by DCPS during this due process hearing that justified the restriction on observations that School A has imposed. DCPS' witness testified that there was no written DCPS policy regarding observations during distance learning, and there was no policy presented during the hearing. If there is such a policy, then the evidence did not demonstrate that DCPS complied with D.C. Code § 38-2571.03 (5) (G) that requires DCPS to make its observation policy publicly available.

In addition, DCPS has presented no options that would allow Petitioners to observe the School A classes that might address confidentiality concerns, such as a confidentiality agreement or a technological option that would prevent subsequent access to the distance learning platform by an observer after the observation. These are at least two options that would seem reasonable.

In sum, the evidence of this case demonstrates that DCPS in denying Petitioners request for observation violated D.C. Code § 38-2571.03, and impeded Petitioners' opportunity to participate in the decision-making process regarding the provision of FAPE to Student.

Remedy:

A hearing officer may award appropriate equitable relief when there has been an actionable violation of IDEA. *See* 20 U.S.C. § 1415(f)(3)(E)(ii)(II); *Eley v. District of Columbia*, 2012 WL 3656471, 11 (D.D.C. Aug. 24, 2012) (citing *Branham v. District of Columbia*, 427 F.3d at 11–12.) The Hearing Officer has concluded that Student was denied a FAPE by DCPS and has directed that DCPS in the order below remedy that denial.

Under the theory of compensatory education, "courts and hearing officers may award educational services to be provided prospectively to compensate for a past deficient program. The inquiry must be fact-specific and, to accomplish IDEA's purposes, the ultimate award must be reasonably calculated to provide the educational benefits that likely would have accrued from special education services the school district should have supplied in the first place." *Reid*, 401 F.3d 522 & 524. To aid the court or hearing officer's fact-specific inquiry, "the parties must have some opportunity to present evidence regarding [the student's] specific educational deficits

resulting from his loss of FAPE and the specific compensatory measures needed to best correct those deficits." Id. at 526.

Petitioners presented no evidence regarding compensatory education but requested that such a request be "reserved." There is no evidence from which the Hearing Officer can award compensatory education. Thus, none is granted in the order below. Petitioner has a right to pursue any compensatory education that Student might be due as a result of the denial of FAPE determined in this HOD in a subsequent due process complaint if necessary.

ORDER:⁸

1. DCPS shall, within ten (10) business days of the issuance of this order, grant Petitioners and or their qualified designee the opportunity to observe both Student's current math classroom and the math resource classroom that has been proposed by School A for Student's specialized math instruction to be provided.
2. DCPS may, at its discretion, require that an observer sign as a confidentiality agreement and/or grant Petitioners and/or their qualified designee access to the distance learning platform to observe the classes mentioned in provision #1 above at a location of DCPS' choosing and/or with log-in credentials that will address DCPS' concerns regarding maintaining confidentiality consistent with D.C. Code § 38-2571.03 (5)(D).

APPEAL PROCESS:

The decision issued by the Hearing Officer is final, except that any party aggrieved by the findings and decision of the Hearing Officer shall have ninety (90) days from the date of the decision of the Hearing Officer to file a civil action concerning the issues presented at the due process hearing in a District Court of the United States or a District of Columbia court of competent jurisdiction, as provided in 20 U.S.C. §1415(i)(2).

/S/ Coles B. Ruff

Coles B. Ruff, Esq.
Hearing Officer
Date: March 28, 2021

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⁸ Respondent's deadlines for compliance with any of the provisions of this order shall be extended on a day for day basis for any delay in compliance caused by Petitioner.