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Confidential

1Parents on Behalf Student, Petitioners, v. District of Columbia Public Schools ("DCPS") Local Education Agency ("LEA") Respondent. Case # 2020-0197 Date Issued: August 6, 2021	CORRECTED HEARING OFFICER'S DETERMINATION [1] Hearing Dates: May 24, 2021, May 26, 2021, June 25, 2021, July 20, 2021 Counsel for Each Party listed in Appendix A Hearing Officer: Coles B. Ruff, Esq.

[1] This Corrected HOD includes typographical and grammatical changes and eliminates personally identifiable information. The issuance date, August 6, 2021, remains unchanged. Personal 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 is eligible for special education pursuant to IDEA with a disability classification of Autism Spectrum Disorder ("ASD")

DCPS developed an individualized educational program ("IEP") for Student dated July 30, 2020. That IEP was amended on October 29, 2020. It prescribes a least restrictive environment ("LRE") in a separate non-public special education school. DCPS has made attempts to place Student in a non-public school with an OSSE certificate of approval ("COA"). However, Petitioners have challenged the school placement proposed.

Petitioners and DCPS agreed that Student would be provided instruction and related services virtually on an interim basis during the Covid emergency, starting with extended school year ("ESY") during summer 2020 and during SY 2020-2021, pending a final determination of an appropriate non-public separate school that could meet Student's needs. Student has continued to attend that DCPS program ("School A") virtually since ESY during summer 2020.

Petitioners filed a due process complaint against DCPS on January 26, 2021. In the complaint, Petitioners alleged that Student's amended IEP dated October 29, 2020, prescribes an inappropriately large class size and does not include necessary transportation accommodations.

Petitioners assert that before October 30, 2020, DCPS did not assign Student to any non-public separate school for school year ("SY") 2020- 2021. On October 30, 2020, DCPS placed Student at a non-public separate special education school ("School B"). Petitioners assert that before placing Student at School B, DCPS did not ask Petitioners for their input into that decision and did not offer to hold a meeting to discuss an appropriate placement for Student. Petitioners assert that School B is not an appropriate placement for Student.

Finally, Petitioners assert that on July 16, 2020, Petitioners' counsel requested access to Student's education records, specifically a communications log, and DCPS has not provided that requested access.

[2] Student's age and grade are listed in Appendix B.

RELIEF SOUGHT:

Petitioners seek the following as relief: a finding that Student has been denied a free appropriate public education ("FAPE") by developing an inappropriate IEP, failing to properly determine an appropriate school placement, and failing to provide access to Student's education records. Petitioners request that DCPS be ordered to revise Student's IEP to limit the class size to four students, including Student, and prescribe appropriate transportation accommodations. Petitioners also seek an order directing DCPS to fund, at market rates, Student's instruction and services, including access to all standard and necessary materials and resources, at home until DCPS provides Student with an appropriate school placement. Finally, Petitioners request that DCPS fund an independent compensatory education evaluation, and Petitioners' request for compensatory education to be dismissed without prejudice to allow for the issue to be litigated, if necessary, after the completion of that evaluation.

LEA Response to the Complaint:

The LEA filed a timely response to the complaint on February 8, 2021. The LEA denies that there has been any failure to provide Student with a FAPE. In its response, DCPS alleged, inter alia, the following:

Petitioners filed a due process complaint ("DPC") on April 26, 2017, and alleged that DCPS denied Student a FAPE in scheduling an IEP meeting. The independent hearing officer ("IHO") issued his HOD on June 13, 2017, and dismissed the DPC. The Petitioners filed the next DPC on July 6, 2017, alleging that the IEP from May 3, 2017, was not appropriate. The IHO issued his HOD on November 27, 2017, and ruled in favor of the LEA. But the IHO also included in the HOD a specific order for the next IEP meeting.

DCPS alleged that it could not get the parent to cooperate and attend the ordered meeting, and DCPS filed a DPC against Petitioners on March 1, 2018. The IHO issued an HOD on April 15, 2018, requiring the parent to attend an IEP meeting within 30 days. The parent appealed all three HODs to the United States District Court for District of Columbia. The Court consolidated the cases and entered an order on August 1, 2019, dismissing Petitioners' case as moot. Petitioners appealed that ruling to the United States Court of Appeals for the District of Columbia, and on December 29, 2020, the Circuit Court issued an order affirming the District Court decision.

Petitioners' next due process complaint was filed on October 12, 2018, and complained that DCPS' decision to place Student at a particular non-public separate school was inappropriate and denied Petitioners access to the placement process. The IHO issued his HOD on January 11, 2019, dismissing all the parents' claims and denying all relief. Petitioners' next DPC was filed on December 20, 2018, alleging that DCPS' decision to place Student at a different non-public separate school was not appropriate and denied Petitioners access to the placement process. The IHO issued his HOD on March 21, 2019, in which he dismissed the Petitioners' DPC and denied

all relief. On April 9, 2019, Petitioners filed an appeal of the March 21, 2019, HOD and the January 11, 2019, HOD.

On September 6, 2019, Petitioners filed their tenth DPC. On November 20, 2019, the IHO determined that Petitioners met their burden in the hearing on Petitioner's September 6, 2019, DPC and issued the following analysis in his HOD:

> "DCPS has apparently made diligent and fairly consistent efforts to provide Student a FAPE with an IEP and an appropriate school placement at which Student's IEP can be implemented. Nonetheless, the facts indicate that due to no fault of Petitioners, DCPS did not finalize Student's IEP prior to the start of SY 2019-2020 and did not offer Student an educational placement at the start of SY 2019-2020." … "Consequently, the Hearing Officer must conclude that the failure to provide Student both an IEP and educational placement by the start of SY 2019-2020 rests with DCPS, and resulted in a denial of FAPE to Student."

On July 25, 2019, an IEP meeting was held but not completed. On September 25, 2019, the team met and reviewed new assessment data and proposed an IEP. Petitioners' eleventh (11th) DPC was filed on October 23, 2019, and in it, Petitioners asserted only one issue "[f]ailure to develop an appropriate IEP." The Petitioner withdrew the DPC on December 31, 2019. DPC number twelve (12) was filed on December 27, 2019. Petitioners amended DPC twelve (12) with DPC thirteen (13) on or about January 9, 2020. DPC number thirteen (13) stayed on the docket until April 24, 2020, when the parent again withdrew the DPC.

On May 11, 2020, Petitioner filed DPC fourteen (14), with the same issues and brief factual allegations as prior DPCs. On September 14, 2020, the day before the scheduled hearing date, Petitioners' counsel filed a formal request to dismiss the complaint without prejudice.

Finally, on January 26, 2021, Petitioners served DCPS with the fifteenth DPC and challenges the appropriateness of the October 2, 2019, and August 21, 2020, IEPs and the location of service ("LOS") at School B offered for Student. This is the same LOS determined to be appropriate by the IHO and the U.S. District Court.

DCPS denies the allegations that it has failed to offer the student a FAPE. DCPS continued to offer instruction for the student at School A.

DCPS received the order from the US District Court in civil action 19-cv-989, which ordered DCPS to find a new "placement" (LOS), which acted as an override to Petitioners' refusal to provide consent for DCPS to send out referral packets. DCPS complied with that order by continuing the LOS search process and sending referrals to seven additional non-public schools.

On or about October 29, 2020, DCPS obtained an acceptance at School B and provided Petitioners a copy of the acceptance letter and the LOS letter on October 30, 2020. Petitioners never enrolled Student at School B. However, DCPS has continued to gain Petitioners' cooperation in the search process and even held an IEP with School B and Student's mother and her attorney on December 2, 2020, to attempt to get her to enroll Student.

DCPS has offered Student appropriate IEPS, has tried to get Petitioners to cooperate in the LOS referral process, and has complied with all orders issued.

DCPS has always provided access to the student's education records and is not aware of any education records not provided. If Petitioners have specific records they believe were missed, DCPS is more than happy to look again.

Resolution Meeting, Pre-Hearing Conference, and Order:

The parties participated in a resolution meeting and did not mutually agree to proceed directly to a hearing in this matter. The 45-day period begaan on February 26, 2021, and ended [and the Hearing Officer's Determination ("HOD") was originally due] on April 11, 2021. The parties agreed to hearing dates beyond the HOD due date and submitted multiple continuance motions that were granted. The HOD is now due on August 6, 2021.

The undersigned hearing officer ("Hearing Officer") conducted a pre-hearing conference ("PHC") in this matter on February 12, 2021, and issued a pre-hearing order on February 18, 2021, outlining, inter alia, the issues to be adjudicated.

The issues adjudicated are: [3]

1. Whether DCPS denied Student a FAPE by failing to provide Student an appropriate IEP dated October 29, 2020.

2. Whether DCPS denied Student a FAPE by failing to determine a school placement via valid legal procedures designed to ensure full parental participation in decision making on October 30, 2020, for SY 2020-2021.

3. Whether DCPS denied Student a FAPE by failing to provide Student an appropriate school placement at School B on October 30, 2020, for SY 2020-2021.

4. Whether DCPS denied Student a FAPE by failing to provide Petitioner access to Student's education records, specifically the communications log.

DUE PROCESS HEARING:

Due to the COVID-19 emergency, the hearing was conducted via video teleconference on May 24, 2021, May 26, 2021, June 25, 2021, July 20, 2021. DCPS filed a consent motion to continue the hearing and extend the HOD due date, which was granted. The HOD is now due on August 6, 2021.

[3] Petitioner's counsel withdrew the issues with regard to Student's 2019 IEP without prejudice on the record at the outset of the hearing and was not adjudicated in this due process hearing even though this issue, as stated in the PHO, included the 2019 IEP.

RELEVANT EVIDENCE CONSIDERED:

This Hearing Officer considered the following as evidence and the source of findings of fact: (1) the testimony of the witnesses, and (2) the documents submitted in the parties' disclosures (Petitioners' Exhibits 1 through 74 and Respondent's Exhibits 1 through 46) that were admitted into the record and are listed in Appendix A.[4] Witnesses' identifying information is in Appendix B.[5]

SUMMARY OF DECISION:

The burden of persuasion fell to Respondent on issues #1 and #3, once Petitioners established a prima facie case on those issues. Petitioners held the burden of persuasion on issues # 2 and # 4. Respondent, DCPS, met its burden of persuasion by a preponderance of the evidence on issues #1 and #3. Petitioners did not sustain the burden of persuasion by a preponderance of the evidence on issues #2 and #4. The Hearing Officer dismissed Petitioners' due process complaint with prejudice.

FINDINGS OF FACT: [6]

1. Student resides with Petitioners in the District of Columbia and is a child with a disability pursuant to IDEA, with a disability classification of Autism Spectrum Disorder ("ASD"). (Petitioners' Exhibit 3)

2. DCPS developed an IEP for Student dated July 30, 2020. That IEP was amended on October 29, 2020. Student most recent IEP prescribes an LRE in a separate non-public special education school. DCPS has made attempts to place Student in a non-public school with an OSSE COA. However, Petitioners have challenged the school placement proposed. (Witness 1's testimony, Petitioner's Exhibit 3)

3. Petitioners and DCPS agreed that Student's would be provided instruction and related services virtually on an interim basis during the Covid emergency, starting with ESY during summer 2020 and during SY 2020-2021, pending a final determination of an

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[4] Any item disclosed and not admitted, or admitted for limited purposes, was noted on the record and is noted in Appendix A.

[5] Petitioners presented Student's Mother, an independent psychologist, and several DCPS staff members, some of whom were also called by DCPS in its case in chief. The witnesses who testified are listed in Appendix B. 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.

[6] 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.

appropriate non-public separate school that could meet Student's needs. Student has continued to attend that DCPS program, School A, virtually since ESY during summer 2020. (Witness 1's testimony, DCPS Exhibits 38, 39)

4. Student's prior IEP was developed in July 2018, following a collaborative meeting. Petitioners and DCPS created an IEP acceptable to Petitioners. The IEP, dated July 10, 2018, provided for twenty-four hours per week of specialized instruction, twelve hours per week of speech-language pathology, eight hours per month of occupational therapy, four hours per month of behavioral support services, 120 minutes per month of consultation divided among related services, the Classroom Aids and Services section of the IEP stated that Student was to have a maximum classroom size of six students, and several methods for avoiding audio overload. The IEP also prescribed a dedicated aide for 6 hours per day. Despite efforts to place Student in a non-public school that could implement the agreed-upon IEP, Student did not ever attend a school during SY 2018-2019 to implement the IEP. (Petitioners' Exhibits 3, 13)

5. Petitioner filed two due process complaints against DCPS related to SY 2018-2019 and another related to SY 2019-2020. Their due process complaints resulted in HODs that dismissed their due process complaints. Petitioners appealed each of the three HODs, which were considered in a single appeal decision by the U.S. District Court for the District of Columbia. Petitioners contended that DCPS twice unilaterally determined which school Student would attend without ensuring their participation as required by IDEA and that the schools selected were substantively inappropriate because they were unable to satisfy the requirements of Student's IEPs. Petitioners also contended that DCPS failed to place Student in any school for SY 2019–2020. (Petitioners' Exhibit 13)

6. U.S. District Court Chief Judge Beryl A. Howell, in her October 1, 2020, opinion, noted that although SY 2019–2020 was over, Student had yet to be placed in a school placement. The Court determined that DCPS did not deny Student a FAPE for SY 2018-2019 either by denying Petitioners' procedural rights under the IDEA or because its proposed placements failed to comport with Student's July 10, 2018, IEP. One of the school placements that DCPS had proposed was a non-public separate special education school, School B, located in a suburb of the District of Columbia. The Court noted that Student was entitled to compensatory education for DCPS's failure to identify an appropriate placement for SY 2019-2020. The Court directed DCPS to identify a new placement that complies with Student's current IEP within one month of the date of her decision, or else provide Student compensatory education for the time that Student is not placed after that date. (Petitioners' Exhibit 13)

7. Petitioners appealed that ruling to the United States Court of Appeals for the District of Columbia, and on December 29, 2020, the Circuit Court issued an order affirming the District Court decision. In that opinion, the Court also addressed an allegation raised by Petitioners about Student's appropriate class size as stated in Student's IEP. The Court noted the following:

> "The third issue—the appropriate maximum class size for [Student]—is the only purportedly repetitive issue alleged in [Petitioners'] complaint. The appropriate maximum class size is plainly a factual question, the answer to which is likely to change both (i) over time in response to V.T.'s development and (ii) in response to other changes in [Student's] IEP (e.g., providing a dedicated aide to [Student]). Accordingly, this dispute is not the type of legal question that is capable of repetition as it is "sharply focused on a unique factual context." Gittens, 396 F.3d at 424 (internal quotations omitted).
>
> (12/29/20 Court of Appeals Opinion)

8. Prior to the District Court issuing its decision, DCPS developed an IEP for Student on July 30, 2020, that prescribed specialized instruction and related services and an LRE with all services provided outside general education. The Classroom Aids and Services section of the IEP stated that Student's "Educational environment should limit distractions and include 6-9 students in the classroom, during the delivery of specialized instruction." The IEP was amended as of October 29, 2020, extend Student's dedicated aide provision to July 2021. The IEP also provided for Student's transportation on an OSSE school bus. Although the IEP did not provide a limitation on the distance Student could travel by school bus, the lack of such a statement did not mean that Student could travel an unlimited distance to school on a school bus. (Petitioner's Exhibit 5)

9. The DCPS' s notes from the July 30, 2020, IEP meeting state, inter alia, the following:

> "Dedicated aide – student requires a dedicated aide, everyone in agreement. Least restrictive environment – student's LRE is a separate day school, everyone in agreement. Transportation – student requires transportation, but currently, there is no in-person school with the global pandemic. [Petitioners' attorney] brings up that this is the other area of standing disagreement (in addition to the class size) that [Student] cannot be transported on a bus. [DCPS representative] asks if there is any new information for this? [Petitioners' attorney] says there is not. Extended School Year (ESY) – [Student] qualifies for ESY and is currently in ESY [at School A]." (DCPS Exhibit 37)

10. On October 30, 2020, DCPS provided Petitioners a letter notifying them that School B had been identified as Student's location of service ("LOS") for SY 2020-2021, that School B was able to implement Student's IEP and provide Student with specialized instruction and related services to which Student was entitled. The letter included the address of School B and stated that School B's selection had been based on previous interviews, review of updated referral documents, and available space in the appropriate program was also considered in determining the LOS. (Petitioner's Exhibit 6)

11. On December 2, 2020, DCPS convened a meeting by video teleconference to discuss School B's ability to implement Student's IEP. Student's mother and her attorney, staff members from School B, and DCPS staff participated in the meeting. DCPS later issued

a prior written notice ("PWN") recounting the meeting and decisions made therein. The PWN notice stated, among other things, the following:

> "On 6/30/2020, the family enrolled [Student] at School A, and [redacted] started Extended School Year (ESY) services there in a virtual format. Then on August 31st, 2020, [Student] started the 2020-2021 School Year virtually at [School A]. As of this Prior Written Notice, [Student] continues to receive specialized instruction and related services at [School A] in a virtual format at schools continue to be virtual due to the COVID-19 pandemic. [School B] was reaffirmed as an appropriate location by Judge Howell on 10/1/2020. Judge Howell ordered that DCPS "shall identify, by November 1, 2020, a new placement that complies with [Student's] operative IEP." DCPS issued a location letter for [Student] to attend School B on 10/30/2020. School B is now known as [new name]. School B is the same school that the previous HODs and district court orders found as appropriate and able to implement Student's IEP. DCPS held an IEP meeting on 12/2/2020 with the family and the [School B] team to discuss IEP Implementation and enrollment at [School B]." (Petitioners' Exhibit 7)

12. DCPS attempted to comply with the Court's October 1, 2020, Order directing DCPS to determine a placement for Student within one month of the Order. During the December 2, 2020, IEP meeting, School B staff answered most questions asked by Student's mother and attorney. School B did, however, reveal the disability categories of the other students in the class that was proposed class for Student at School B. School B does serve some students with a classification of emotional disability. They also asked about how transportation would work once in-person school started. The DCPS representative answered that OSSE transportation would be provided, but beyond that could not provide specifics about the number of stops and route of the school bus for Student to be transported to School B. (Witness 6's testimony)

13. Student needs accommodations in an educational environment because Student is especially sensitive to auditory input and should have limited visual distractions; otherwise, Student becomes unavailable for learning. Petitioners' consulting psychologist observed Student during distance learning and noticed that Student is highly distracted. As a result, the consultant was wary of whether Student would be successful today in a classroom of six students, but he was certain that Student would have exponentially problematic reactions in a classroom where the number of students was more than six. (Witness 2's testimony)

14. Student's July 10, 2020, IEP indicates a classroom of 6 to 9 students. During ESY in summer 2020, Student was in a virtual classroom of 9 students. At the time of the hearing, Student was in a virtual classroom at School A with 4 students. Since participating in virtual instruction with School A, Student is progressing with all of Student's IEP goals. (Witness 4's testimony)

15. Student's mother has discovered that Student suffers from motion sickness when she drives Student in a car for more than twenty minutes. She has mentioned the problem to Student's physician, who provided her a letter that spoke to the concern and Petitioner provided the letter to DCPS. However, the letter noted that Student's motion sickness was reported by Student's parent and never independently verified. There is no medication for motion sickness that Student's mother is aware of. Student is also easily overstimulated by loud noises that can occur while driving in traffic. Student's mother is concerned with Student being on a school bus for any distance beyond twenty minutes because of motion sickness and Student's overstimulation. (Mother's testimony)

16. Because the motion sickness has never been independently verified, DCPS requested updated documentation regarding this condition, but Petitioners have been unable to obtain any other verification. (Witness 1's testimony)

17. A DCPS occupational therapist can prescribe accommodations that may assist a student who experiences motion sickness on a school bus, including the student wearing some type of device that would assist. (Witness 3's testimony)

18. DCPS provided Petitioners the communications log that Petitioners had requested. (DCPS Exhibit 46)

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). The burden of persuasion fell to Respondent on issues #1 and #3, once Petitioners established a prima facie case on those issues.

Petitioner held the burden of persuasion on # 2 and # 4. [7] 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 1: Whether DCPS denied Student a FAPE by failing to provide Student an appropriate IEP dated October 29, 2020.

Conclusion: Respondent sustained the burden of persuasion by a preponderance of the evidence on this issue.

A free appropriate public education is available to all children with disabilities residing in the State between the ages of 3 and 21." 20 U.S.C. § 1412(a)(1)(A). A "child with a disability" is defined by statute as a child with intellectual disabilities, physical impairments, or serious emotional disturbance "who, by reason thereof, needs special education and related services." *Id*. § 1401(3)(A). The District is required to enact policies and procedures to ensure that "[a]ll children with disabilities residing in the State, including ... children with disabilities attending private schools, regardless of the severity of their disabilities, and who are in need of special education and related services, are identified, located, and evaluated." *Id*. § 1412(a)(3)(A).

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").

In *Board of Education v. Rowley,* the United States Supreme Court set forth a two-part inquiry for determining whether a school district has satisfied the FAPE requirement. First, the state must have "complied with the procedures set forth in the Act." *Rowley*, 458 U.S. at 206. Second, the IEP that is developed must be "reasonably calculated to enable the child to receive educational benefits." *Rowley*, 458 U.S. at 206-07. To be appropriate under 34 C.F.R. § 300.324, the IEP must consider the (i) strengths of the child; (ii) concerns of the parents; (iii) results of the

[7] 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.

initial or most recent evaluation; and (iv) academic, developmental, and functional needs of the child.

The second substantive prong of the *Rowley* inquiry is whether the IEP DCPS developed was reasonably calculated to enable Student to make progress appropriate in light of Student's individual circumstances. In *Endrew F. ex rel. Joseph F. v. Douglas City. Sch. Dist*. RE-1, 137 S. Ct. 988 (2017), the U.S. Supreme Court elaborated on the "educational benefits" requirement pronounced in *Rowley*: To meet its substantive obligation under the IDEA, a school must offer an IEP reasonably calculated to enable a child to make progress appropriate, in light of the child's circumstances. . . . Any review of an IEP must appreciate that the question is whether the IEP is reasonable, not whether the court regards it as ideal. . . . When a child is fully integrated in the regular classroom, as the Act prefers, what that typically means is providing a level of instruction reasonably calculated to permit advancement through the general curriculum. . . . If that is not a reasonable prospect for a child, his IEP need not aim for grade-level advancement. But his educational program must be appropriately ambitious, in light of his circumstances, just as advancement from grade to grade is appropriately ambitious for most children in the regular classroom. The goals may differ, but every child should have the chance to meet challenging objectives. *Endrew F*., supra, 137 S. Ct. at 999–1000 (citations omitted).

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

Pursuant to 34 C.F.R. § 300.324 (b) (1) Each public agency must ensure that, subject to paragraphs (b)(2) and (b)(3) of this section, the IEP Team— (i) Reviews the child's IEP periodically, but not less than annually, to determine whether the annual goals for the child are being achieved; and (ii) Revises the IEP, as appropriate, to address— (A) Any lack of expected progress toward the annual goals described in § 300.320(a)(2), and in the general education curriculum, if appropriate; (B) The results of any reevaluation conducted under § 300.303; (C) Information about the child provided to, or by, the parents, as described under § 300.305(a)(2); (D) The child's anticipated needs; or (E) Other matters.

Pursuant to 34 C.F.R. § 300.323 at the beginning of each school year, each public agency must have an IEP effect for each child with a disability within its jurisdiction. The legal standard under the IDEA is that DCPS "must place the student in a setting that is capable of fulfilling the student's IEP." *Johnson v. Dist. of Columbia*, 962 F. Supp. 2d 263, 267 (D.D.C. 2013). *See also O.O. ex rel. Pabo v. Dist. of Columbia*, 573 F. Supp. 2d 41, 53 (D.D.C. 2008) (placement must be in a school that can fulfill the student's IEP requirements).

Petitioner contends that the IEP developed for Student on July 30, 2020, and amended on October 29, 2020, is inappropriate because it prescribes an inappropriately large class size and does not include necessary transportation accommodations.

The evidence in this case demonstrates that Student's prior IEP prescribed a class size limit of 6 students. In the October 29, 2020, IEP that allowable class size has been expanded to allow from 6 to 9 students. Since the time the IEP was developed Student has participated in virtual learning. The evidence demonstrates that Student has made progress on IEP goals with virtual instruction and related services. Student was in a class size of 9 students during ESY summer 2020 when Student first engaged in virtual learning and, based on Student's teacher's testimony, did fine.

In SY 2020-2021, Student has participated with fewer students in virtual learning, as low as 4 students. Although there was testimony from Petitioners' expert witness who observed Student in virtual learning, that witness apparently has never seen student participate with more than 4 students in virtual learning and based upon that brief observation, opined that he was unsure Student could function in a class of six students and strongly advised against any more students in the classroom beyond six. Although this witness was qualified as an expert, his experience with Student is limited when compared with the DCPS witness who had instructed Student in virtual learning and testified that Student functioned well with nine students in a classroom during ESY. The Hearing Officer consequently grants more weight to the DCPS witness. Student's parent even testified that Student has benefited from the virtual learning since Student has been participating.

Although Student's current IEP allows for up to 9 students in Student's classroom, the weight of the evidence supports a finding that the change in Student's IEP from a limitation of 6 students in a classroom to "6 to 9" students has produced no recognizable harm to Student and a result the Hearing Officer concludes that there is insufficient evidence to support a finding of a denial of a FAPE in this regard.

With regard to the transportation accommodations, Petitioners asserts that Student cannot ride in a vehicle for more than 20 minutes without motion sickness and is easily distracted and becomes upset at typical noises that occur during traffic. Since the IEP was developed, there has been no in-person instruction provided to Student and, thus, no need for transportation. Therefore, there is no indication that there has been any harm to Student as a result of anything related to transportation. It is unclear from the evidence what type of transportation accommodation that Petitioners are seeking to be placed in Student's IEP, other than perhaps that Student cannot travel in a vehicle for more than 20 minutes to and from school. In any case, the evidence demonstrates that DCPS would rely upon OSSE transportation to determine details of the transportation, and there is time for that to be yet determined before in-person instruction becomes available.

Consequently, the Hearing Officer concludes, based on the evidence adduced that DCPS sustained its burden of persusion with regard to the appropriateness of Student's IEP dated October 29, 2020, and that the IEP was reasonably calculated to enable Student to make progress appropriate in light of Student's individual circumstances.

The Hearing Officer directs in the HOD below that DCPS take steps to address Petitioners' concerns regarding class size and transportation for Student when in-person learning resumes.

Issue 2: Whether DCPS denied Student a FAPE by failing to determine a school placement via valid legal procedures designed to ensure full parental participation in decision making on October 30, 2020, for SY 2020-2021.

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

In determining the educational placement of a child with a disability, each public agency must ensure that the placement decision is made by a group of persons, including the parents, and other persons knowledgeable about the child, the meaning of the evaluation data, and the placement options; and is made in conformity with the Least Restrictive Environment provisions of the IDEA; and the public agency must ensure that the child's placement is determined at least annually, is based on the child's IEP, and is as close as possible to the child's home. See 34 C.F.R. § 300.116.

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

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

34 C.F.R. § 300.325(a), provides: (1) Before a public agency places a child with a disability in, or refers a child to, a private school or facility, the agency must initiate and conduct a meeting to develop an IEP for the child in accordance with §§ 300.320 and 300.324. (2) The agency must ensure that a representative of the private school or facility attends the meeting. If the representative cannot attend, the agency must use other methods to ensure participation by the private school or facility, including individual or conference telephone calls.

The evidence demonstrates that when Student's July 30, 2020, IEP was developed, Student's mother and attorney participated in the meeting and did so fully and completely. Save the elements of the IEP that were challenged above, there is no evidence that Petitioners' disagreed with any other parts of Student's IEP and agreed to the October 29, 2020, amendment to that IEP. The U.S. District Court directed DCPS to determine a placement for Student based on Student's current IEP at the time of the Court's October 1, 2020, Order. DCPS thereafter issued a LOS assignment to School B, a school challenged by Petitioners in its appeal to the District Court, which the Court had found to be appropriate.

Although the school had changed its name, the evidence demonstrates that this was otherwise the same school that Petitioners had previously visited and was familiar with. Then, in December 2020, DCPS convened an IEP meeting with School B, Student's mother, and her attorney, and they were allowed to ask questions of the school personnel and how it could meet Student's needs. School B answered all questions save the disability classifications of the other students in the classroom to which Student would be assigned. The fact that this question was not

answered by School B does not render Petitioners otherwise significant participation in the process ineffectual.

Although Petitioners now challenge the appropriateness of School B, the evidence demonstrates that Petitioners had significant input into the process in which School B was selected as the location assignment where Student's IEP would be implemented. Consequently, the Hearing Officer concludes that there is no denial of a FAPE in this regard.

Issue 3. Whether DCPS denied Student a FAPE by failing to provide Student an appropriate school placement at School B on October 30, 2020, for SY 2020-2021.

Conclusion: Respondent sustained the burden of persuasion by a preponderance of the evidence on this issue.

As previously stated, in determining the educational placement of a child with a disability, each public agency must ensure that the placement decision is made by a group of persons, including the parents, and other persons knowledgeable about the child, the meaning of the evaluation data, and the placement options; and is made in conformity with the Least Restrictive Environment provisions of the IDEA; and the public agency must ensure that the child's placement is determined at least annually, is based on the child's IEP, and is as close as possible to the child's home. See 34 C.F.R. § 300.116.

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

As previously stated, the evidence demonstrates DCPS issued a LOS assignment to School B, a school challenged by Petitioners in its appeal to the District Court, which the Court had found to be appropriate.

Although the school had changed its name, the evidence demonstrates that this was otherwise the same school that Petitioners had previously visited and was familiar with. Then, in December 2020, DCPS convened an IEP meeting with School B, Student's mother, and her attorney, and they were allowed to ask questions of the school personnel and how it could meet Student's needs. School B answered all questions save the disability classifications of the other students in the classroom to which Student would be assigned. The fact that this question was not answered by School B does not render Petitioners otherwise significant participation in the process ineffectual. The weight of the evidence demonstrates that School B can implement Student's IEP, holds an OSSE COA, and is appropriate. There is no evidence of a denial of a FAPE by DCPS's selection of School B as the location assignment for Student and where Student's IEP would implemented.

Issue 4: Whether DCPS denied Student a FAPE by failing to provide Petitioner access to Student's education records, specifically the communications log.

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

IDEA regulations provide that each agency "must permit parents to inspect and review any education records relating to their children that are collected, maintained, or used by the agency under [IDEA]." 34 C.F.R. § 300.613 (a). "The agency must comply with a request without unnecessary delay and before any meeting regarding an IEP, or any hearing .... or resolution session ... , and in no case more than 45 days after the request has been made." Id. In addition, a parent's right to inspect and review includes: (1) the "right to a response from the participating agency to reasonable requests for explanations and interpretations of the records"; (2) the "right to request that the agency provide copies of the records containing the information if failure to provide those copies would effectively prevent the parent from exercising the right to inspect and review the records"; and (3) the "right to have a representative of the parent inspect and review the records." Id. § 300.613 (b).

Petitioners Counsel acknowledged at the outset of the hearing that the education record that Petitioners sought, namely the communications log, had been provided to Petitioners by DCPS. Nonetheless, Petitioners maintained their claim on this issue. However, there was no evidence of harm to the Student as a result of any untimely response to Petitioners' request for this document and no evidence that Petitioners' opportunity to participate in the decision-making process regarding the provision of FAPE was impeded.

ORDER: [8]

1. Petitioners' January 26, 2021, due process complaint is hereby dismissed with prejudice.

2. Within twenty (20) calendar days of the issuance of this Order, DCPS shall request a transportation study from OSSE regarding Student's transportation to and from Student's school location for SY 2021-2022 and Student's home for in-person instruction when it resumes and consider any propensity for motion sickness or sensitivity to traffic sounds that Student might encounter while on a school bus or car that might limit the length of a bus trip that Student can endure. DCPS shall also engage a DCPS occupational therapist to assist in this study to provide input as to what equipment and/or accommodations might be used to assist in addressing any transportation concerns Student might have.

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

[8]Any delay in Respondent meeting the timelines of this Order that is the result of action or inaction by Petitioner shall extend the timelines on a day for day basis.

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: August 6, 2021

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