District of Columbia
Office of the State Superintendent of Education
Office of Dispute Resolution
1050 First Street, NE, 2nd Floor, Washington, DC 20002
(202) 698-3819 www.osse.dc.gov

Parents, on behalf of Student,[1]	)	
Petitioners,	)	
	)	**Hearings: January 3, 8, 17, 2018**
v.	)	**Date: January 20, 2018**
	)	**Hearing Officer: Michael Lazan**
	)	**Case No.: 2017-0274**
District of Columbia Public Schools,	)	
	)	
Respondent.	)	

HEARING OFFICER DETERMINATION

I. Introduction

This is a case involving a student who is currently eligible for services as a student with Autism (the "Student").

A Due Process Complaint ("Complaint") was received by District of Columbia Public Schools ("DCPS" or "Respondent") pursuant to the Individuals with Disabilities Education Act ("IDEA") on October 4, 2017. Petitioners are the parents of the Student. On October 12, 2017, Respondent filed a response. The resolution period expired on November 3, 2017.

II. Subject Matter Jurisdiction

This due process hearing was held, and a decision in this matter is being rendered, pursuant to the Individuals with Disabilities Improvement Act ("IDEIA"), 20 U.S.C. Sect. 1400 et seq., its implementing regulations, 34 C.F.R. Sect. 300 et seq., Title 38 of

[1]Personally identifiable information is attached as Appendix A and must be removed prior to public distribution.

the D.C. Code, Subtitle VII, Chapter 25, and the District of Columbia Municipal Regulations, Title 5-E, Chapter 30.

III. Procedural History

On November 15, 2017, the Hearing Officer held a prehearing conference. Attorney A, Esq., counsel for Petitioners, appeared. Attorney B, Esq., counsel for Respondent, appeared. A prehearing conference order was issued on November 20, 2017, summarizing the rules to be applied in this hearing and identifying the issues in the case.

The original Hearing Officer Determination ("HOD") was due on December 18, 2017. Because of the unavailability of counsel and witnesses, a motion for continuance by Petitioners, on consent, was granted on November 28, 2017, extending the HOD due date to January 8, 2017. A hearing date was scheduled for December 19, 2017, but this was cancelled due to the illness of Respondent's counsel. Because of the cancellation, a motion for a continuance was filed by Respondent, on consent. This motion was granted on January 2, 2018, extending the HOD due date to January 20, 2018.

There were three hearing dates: January 3, 2018; January 8, 2017; and January 17, 2018. These were closed proceedings. Petitioners were represented by Attorney A, Esq. Respondent was represented by Attorney B, Esq. Petitioners moved into evidence Exhibits 1-38. Objections were made to Exhibits 1, 13, 20, 21, 27, 32, 33, 34, and 36. Objections were overruled except for Exhibit 33 and pages 20-27 of Exhibit 20. Exhibits 1-32 and 34-38, excepting pages 20-27 of Exhibit 20, were admitted. Respondent moved into evidence Exhibits 1-32. There were no objections. Exhibits 1-32 were admitted. At the close of testimony, both sides presented oral closing statements.

Petitioners presented as witnesses: Petitioners; Witness H, an advocate; Witness A, a teacher; Witness F, a Board Certified Behavior Analyst ("BCBA"); Witness G, Head of School at School D; Witness E, a former teacher; and Witness B, a manager at Respondent. Respondent presented as witnesses: Witness B; Witness D, a Resolution Specialist; and Witness C, a Special Education Coordinator.

IV. Credibility

As pointed out elsewhere in this HOD, the credibility of Respondent's position overall was compromised by the failure to present the Student's former teacher, Teacher B, as a witness. According to the unrebutted testimony of the mother, this teacher was strongly opposed to Respondent's May, 2017, IEP and the Student's placement at School A, in general. Accordingly, the testimony of Witness B and Witness C, in support of the subject IEP and placement, was questionable. Additionally, the failure to call Teacher B and Dr. B (another employee of Respondent who was opposed to the IEP and placement) bolstered the testimony of Petitioners and their witnesses that the recommended IEP and placement were incompatible with the Student's educational needs.

V. Issues

As identified in the Prehearing Conference Summary and Order and in the Due Process Complaint, the Free Appropriate Public Education ("FAPE") issues to be determined were as follows:

1. Did Respondent fail to provide the Student with "comparable services" to those described in the Student's previous IEP from another public agency, before Respondent created an IEP? If so, did Respondent change the Student's educational placement and thereby deny the student a FAPE?

2. Did Respondent fail to develop an appropriate IEP on May 5, 2017, because the IEP failed to adequately describe the nature of the student's disability, removed Extended School Year ("ESY") services without justification, and failed to identify an appropriate educational placement and corresponding location of services for the Student? If so, did Respondent deny the Student a FAPE?

3. Did Respondent fail to substantially implement the Student's May, 2017, IEP by removing the Student from the Student's "CES" program on an ad-hoc basis? If so, did Respondent deny the Student a FAPE?

4. Did Respondent deny the Student a FAPE by failing to provide an appropriate educational placement and corresponding location of services from March/April of 2017 through the summer of 2017, because the Student's parents were not involved in the placement decision and because the placement was not able to meet this Student's individual needs? If so, did Respondent deny the Student a FAPE?

5. Did Respondent deny the Student a FAPE by providing the Student with an inappropriate educational placement and corresponding location of services for 2016-2017 and 2017-2018? If so, did Respondent deny the Student a FAPE?

As a remedy, Petitioner is seeking tuition reimbursement/payment for School D for 2017-2018, plus appropriate ESY services, with reimbursement for all associated costs, including transportation.

VI. Findings of Fact

1. The Student is an X year old who is eligible for services as a student with Autism. The Student is below level in academic and social emotional functioning compared to other students of the same age, but higher-functioning than many students

on the autism spectrum. The Student is verbal and expressive but rigid, requires special education support in the classroom, and can function in the mainstream environment for a portion of the school day. (Testimony of father; Testimony of Witness A)

2. Testing conducted on the Student on May 13, 2015, found that the Student's intellectual functioning was low, with a Full-Scale IQ of 75. The Student's expressive speech was also considered below average, and the Student's school readiness was considered low. The Student's adaptive functioning was considered "moderately" low. The Student's responses were consistent with students with Autism Spectrum Disorder. (P-23-4-10)

3. During the 2015-2016 school year, the Student went to school in the state of Florida, in X County. The Student was placed in an "ASD" classroom for higher-functioning students with autism, with recess and lunch with general education students. For the 2015-2016 school year in Florida, the Student was productive at school. The Student needed prompting and encouragement, but worked independently, was a leader in the classroom, and enjoyed peers. The Student knew upper and lower-case letters, basic letter sounds, could write his/her name, and knew numbers from one to ten. The Student needed to work on patience because of a refusal to engage in non-preferred activities. (R-4-9; Testimony of mother)

4. An IEP from X County, Florida, dated February 12, 2016, recommended that the Student receive specialized instructional techniques for all subjects, five days a week, with related services of: language, twice a week, for sixty minutes; speech, once a week, for thirty minutes; occupational therapy, once a week, for thirty minutes; and specially designed physical education, twice a week, for sixty minutes. The IEP included

accommodations such as: extended time and breaks; individual/small group settings; preferential seating; reduced sources of distractions; increased movement opportunities; repeating, clarifying, and summarizing directions; verbal encouragement; allowing for increased wait time; and shortened assignments. This IEP recommended an "ASD" classroom and lunch, recess, and assembly with general education peers. It also recommended supervision at all times by a behavioral health aide, due to the Student's inability to understand danger and impulsivity. (R-4-1-2, 9; Testimony of mother)

5. The Student continued to be educated in X County, Florida, for the 2016-2017 school year, through approximately March, 2017. A new IEP was written for the Student on or about February 10, 2017. This IEP continued the services recommended in the IEP dated February 12, 2016, though it did not reference the "ASD" program. The IEP reported noticeable improvements in speech and language, particularly in the Student's ability to follow directions and use appropriate tone and loudness. The Student continued to make off-topic remarks, repeated questions, and needed ten to twenty seconds of wait-time to answer. The Student required repetition and review for comprehension, benefitted from visual presentations, liked to see work broken up into steps, needed movement breaks, and also liked having the classroom door closed during the day. The Student could count to thirty-nine, recognize numbers from one to twenty, and read Z grade "Dolsch" words at 80 percent accuracy. The Student could also state the setting and differentiate between major and minor characters in a story. The Student was beginning to understand verbs and adjectives and the conventions of writing. In terms of social emotional issues, the Student could become aggressive when faced with changes to his/her schedule, but responded well to positive reinforcement. The Student

needed close monitoring throughout the day for his/her own safety, and for the safety of others. (P-1-1-12)

6. Petitioners and the Student moved to the District of Columbia from Florida in or about March, 2017. At that point, Petitioners were working with Mr. A, who worked on issues relating to location services. Petitioners forwarded documents to Mr. A, who sent the documents to Witness B, who worked with Respondent's "CES" program. This "CES" classroom was designed specifically for autistic students. The program used the "verbal behavior" approach to Applied Behavioral Analysis ("ABA") to develop skills. It is noted that many "CES" classrooms have non-verbal students and, overall, the program is geared toward students with significant communication needs. The class involves the use of work stations for such areas as attention skills, eye contact, "table top" training, adaptive life skills, and using visual schedules. It is designed for children with "classic" autism. (Testimony of Witness B; Testimony of mother)

7. In or about April, 2017, Respondent held a "comparable services" meeting for the Student. Petitioners indicated at this meeting that the Student was a higher-functioning autistic child who was formerly in an "ASD" classroom. Respondent "expedited" this case and determined that the Student needed a self-contained autism program. On April 2, 2017, a "comparable services" plan offered 27 hours of specialized instruction, with speech and language therapy for 240 minutes per month, and occupational therapy for 120 minutes per month. (R-6; P-6; P-7; P-8; Testimony of Witness B; Testimony of mother)

8. To implement the "comparable services" plan, the Student was placed at School A, a public school within Respondent's jurisdiction. Within days, the Student's

teacher, Teacher, B, suggested that the Student needed to be with higher-functioning children in a more challenging classroom. Other staff at the school, including Dr. A, Dr. B, and Dr. C, agreed. (Testimony of mother)

9. Thereafter, there was an eligibility meeting for the Student. On April 6, 2017, Respondent determined the Student to be eligible for services as a Student with Autism Spectrum Disorder. (P-4; P-5; Testimony of Witness C; Testimony of mother)

10. Respondent felt it had enough information to create the IEP. The IEP was written approximately two weeks after the "comparable services" plan was issued. The IEP team felt that twenty-seven hours of specialized instruction outside general education in the IEP was appropriate for the Student because the IEP from X County, Florida recommended the same hours. The team did the best that it could to create an IEP, but it was hard to gather data quickly and it was a challenge to write it. Outside the IEP meeting, Teacher B and Dr. B told Petitioners that the IEP and the corresponding placement were inappropriate. (R-14-2-11; Testimony of Witness C; Testimony of mother)

11. The IEP, published on May 5, 2017, reduced the Student's related services hours. The Student was now to receive 180 minutes of speech language pathology and 120 minutes of occupational therapy per week. The IEP contained language stating the Student was able to communicate verbally, use a wide range of vocabulary, express all of his/her wants and needs with an adult, and communicate with peers. It also indicated that the Student was able to receptively understand and follow directions within a classroom with little to no modifications, as well as comprehend "wh" questions. The IEP stated: "[the Student] is higher than [the Student's] peers and has a significantly higher aptitude

than [the] current class and will benefit from more inclusion in a general education setting." The IEP provided for classroom accommodations including location with minimal distractions, individual testing, extended time, flexibility in scheduling, and frequent breaks. The IEP originally provided for ESY services, but the IEP team eliminated those services because Petitioners did not want them in the current setting. (P-10-13; P-11-2, 10, 11; Testimony of mother)

12. Thereafter, Respondent sent Petitioners Prior Written Notice of the Student's placement at School A. The Prior Written Notice indicated that the Student should be in a more inclusive environment. (R-14-11; Testimony of Witness C)

13. The Student felt very upset by the environment in the classroom because the Student did not understand why the other children would not talk to him/her. This was the first time that the Student did not want to go to school. The school attempted to "push" the Student into general education settings for art, physical education, library, and lunch, but Dr. B continued to indicate that the Student needed a different placement. Teacher B, the Student's teacher, agreed. She told the parent that "(n)ow that you have an advocate, they'll take you seriously, which is unfortunate." The teacher also said that School B may have a decent program. (P-14-1, 14; P-28-2; Testimony of mother; Testimony of father)

14. Thereafter, Respondent sought to provide the Petitioner with another location of services. On May 12, 2017, Witness B indicated that the Petitioner could tour School C. Then on June 7, 2017, Witness B indicated that Petitioner could tour School B. The mother had conducted her own research and suggested a number of other sites, which were unavailable. (P-13-10, 11, 17; P-14-6; Testimony of Witness B)

15. The program at School C was also a "CES" classroom, though this classroom had children who were verbal and higher-functioning. This was a "pilot" program, though this was not communicated to the parent at the time. There were then five children in this program. The students received a modified curriculum, which was a "little bit" more challenging that the usual "CES" classroom. A "social skills" portion of the program had not yet been implemented as of the date of the hearing. (Testimony of Witness D; Testimony of Witness B)

16. The program at School B contained more verbal than non-verbal children. This was a "CES" program using "verbal behavior" ABA. Some of the students in this class went to some general education classes and were "higher-functioning." (Testimony of Witness B)

17. Petitioners toured School B and School C and felt that the programs were exactly the same as the program at School A. Witness B did not disagree with that conclusion. Petitioners then sent Respondent a letter on June 20, 2017, providing notice of the unilateral placement of the Student at School D. (R-20; Testimony of Witness B)

18. During summer, 2017, the Student attended a program with forty-five minute English and Math general education classes in the morning and typical camp activities, such as swimming, in the afternoon. This camp was not for students with disabilities, and camp staff never saw the Student's IEP. (Testimony of Witness E)

19. School D was designed for children who have issues with peers, rigidity, and changes in schedule. Some students did not have an IEP. The school offered visual schedules on the wall, "fidgets," break areas, a "points" system, a "social learning" class

once a week, a social learning specialist, a BCBA (who "pushed" into the classroom when necessary), and an occupational therapy classroom. (Testimony of Witness F)

20. Some of the teachers at School D were not certified. There were six children in the Student's classroom, ranging from grades XX through YY, and fifty-eight children in the school. There were two adults in the classroom, including a teaching assistant. The school day ran 6.5 hours per day, five days a week. (Testimony of Witness F; Testimony of Witness G)

21. The Student adjusted well to the new school. Initially, the Student did not engage verbally, and exhibited a resistance to school, but then integrated into the school setting and did particularly well in groups of two. The Student improved in writing. The Student's biggest deficit was a lack of flexibility and talking out of turn. The Student required breaks throughout the day. (Testimony of Witness F; Testimony of Witness G; Testimony of Witness A)

22. The Student received a scholarship to attend School D. The tuition was ordinarily $40,000 per year, but Petitioners were charged approximately $15,000. Petitioners have paid "a little" over $3,000 to the school. (Testimony of mother)

VII. Conclusions of Law

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

The burden of proof in District of Columbia special education cases was changed by the local legislature through the District of Columbia Special Education Student Rights Act of 2014. That burden is expressed in statute as the following:

> 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.

See D.C. Code § 38-2571.03(6)(A)(i)

Issues #1, #2, and #5 involve a challenge to the Student's existing or proposed IEP or placement. Accordingly, on those issues, the burden of persuasion is with Respondent. Issues #3 and #4 do not directly relate to the Student's existing or proposed IEP or placement. For those issues, the burden of proof lies with the party seeking relief. Schaffer v. Weast, 546 U.S. 49 (2005).

Respondent may be required to pay for educational services obtained for a student by a student's parent if the services offered by the school district are inadequate or inappropriate ("first prong"), the services selected by the parent are appropriate ("second prong"), and equitable considerations support the parents' claim ("third prong"), even if the private school in which the parents have placed the child is unapproved. School Committee of the Town of Burlington v. Dep't of Education, Massachusetts, 471 U.S. 359 (1985); Florence County School District Four et al. v. Carter by Carter, 510 U.S. 7 (1993).

On the first prong, the Petitioner should show that the school district denied the student a FAPE. A FAPE is offered to a student when (a) the school district complies with the procedural requirements set forth in the IDEA, and (b) the IEP developed through the IDEA's procedures is reasonably calculated to enable the student to receive educational benefits. While school districts are required to comply with all IDEA

procedures, not all procedural errors render an IEP legally inadequate under the IDEA. Pursuant to the IDEA, when procedural violations are alleged, an administrative officer may find that a child did not receive a FAPE only if the procedural inadequacies (a) impeded the child's right to a FAPE, (b) significantly impeded the parents' opportunity to participate in the decision-making process regarding the provision of a FAPE to the child, or (c) caused a deprivation of educational benefits. 20 U.S.C. Sect. 1415(f)(1)(E)(ii); 34 C.F.R. Sect. 300.513(a)(2).

1. Did DCPS fail to provide the Student with "comparable services" to those described in the Student's previous IEP from another public agency before DCPS created an IEP? If so, did DCPS change the Student's educational placement and thereby deny the student a FAPE?

If a child with a disability (who previously had an IEP in effect with a public agency in another state) transfers to a public agency in a new state, and enrolls in a new school within the same school year, the new public agency must provide the child with a FAPE, including services comparable to those described in the child's IEP from the previous public agency, until the new public agency conducts an evaluation, if necessary, and develops, adopts, and implements a new IEP. 34 CFR 300.323(f).

The United States Department of Education declined to define "comparable services" in the 2006 Final Part B regulations. 71 Fed. Reg. 46,681 (2006). Whether the services provided by the new LEA are "comparable" to those provided by the former district depends on the facts of the case. See, e.g., Sterling A. v. Washoe County Sch. Dist., 2008 WL 4865570 (D. Nev. 2008)(school district could provide school-based services to a child with a cochlear implant who received home-based services from his former district; Metro Nashville Pub. Schs., 51 IDELR 116 (SEA TN 2008)(reading services provided in a transfer student's "Learning Strategies" class were similar to those

provided in her former district's "Resource Reading" class). When the new school district cannot implement the IEP designed by the old district, the new district must provide services that approximate, as closely as possible, those called for in the IEP of the old district. Letter to Campbell, 213 IDELR 265 (OSEP 1989).

Petitioners contend that the Student's classes at School A were materially different than the classes in X County, Florida, because the Florida classes were in an "ASD" program, which provided different instruction and supports than the classroom at School A. The uncontroverted testimony indicated that the ASD program is for "high functioning" autistic children who speak and can function when provided academics without significant modifications. In Alvord Unified Sch. Dist., 50 IDELR 209 (SEA CA 2008), which involved a six-year-old child who was cognitively impaired, the student was placed in a new school district with students who were at a lower cognitive level, some of whom did not speak. The hearing officer in that case ruled that the services at the new placement were not comparable to the prior placement, since it served students who functioned on a much lower level and did not provide opportunities to interact with typically developing peers.

This case is similar to Alvord. Petitioners claim, without rebuttal, that School A had significantly lower functioning students than the "high-functioning" autistic students at the placement in Florida. The Students at School A could not perform academic tasks without significant modifications to the curriculum, and could not speak. Moreover, the record indicated that the low academic and speech levels at School A drove the instruction in the classroom. At School A, the focus in the classroom was getting students to speak, which was unnecessary for the Student.

In Florida, the Students were presented with a curriculum that was similar to the curriculum provided to general education students. The February, 2016, IEP from X County, Florida referenced an "ASD" program, which is a name given to a program for students with "high-functioning" autism. Respondent did not consider this fact when initially placing the Student. Instead, Respondent characterized the transfer as "expedited," suggesting that not much analysis was undertaken, and that Respondent just wanted to get the Student placed. If the placement was wrong, Witness C indicated, they would catch it at a "thirty-day review" and change the program based on the teacher reports from School A.

As a result of the foregoing, Respondent changed the Student's educational placement in or about March, 2017, when it placed the Student in a classroom designed for students who were struggling to speak. Respondent therefore denied the Student educational benefit and a FAPE.

2. Did DCPS fail to develop an appropriate IEP on May 5, 2017, because the IEP failed to adequately describe the nature of the student's disability, removed ESY services without justification, and failed to identify an appropriate educational placement, and corresponding location of services for the Student? If so, did DCPS deny the Student a FAPE?

The role of a hearing officer is to determine if the individualized educational program developed through the Act's procedures is reasonably calculated to enable the child to receive additional benefits. Hendrick Hudson Bd. Of Educ. v. Rowley, 458 U.S. 176 (1982). The IEP should be both comprehensive and specific, and targeted to the Student's "unique needs." McKenzie v. Smith, 771 F.2d 1527, 1533, D.C. Cir. 1985); N.S. ex rel. Stein v. District of Columbia, 709 F.Supp.2d 57, 60 (D.D.C. 2010); 34 CFR Sect. 300.320(a)(2)(B)(the IEP must contains goals that meet each of the child's

educational needs that result from the child's disability); 34 CFR Sect. 300.324(a)(1)(iv)(the IEP must address the academic, developmental, and functional needs of the child).

In S.S. ex rel. Shank v. Howard Road Academy, 585 F. Supp.2d 56, 66-67 (D.D.C. 2008), the Court found that the measure and adequacy of an IEP decision must be determined as of the time it was offered to the student. Citing circuit court decisions, the Court found that an IEP should be judged prospectively to avoid "Monday morning quarterbacking." See Thompson R2-J Sch. Dist. v. Luke P., 540 F.3d 1143, 1149 (10th Cir. 2008); Adams v. Oregon, 195 F.3d 1141, 1149 (9th Cir. 1999); Carlisle Area Sch. V. Scott P., 62 F.3d 520, 530 (3d Cir. 1995); Roland M. v. Concord Sch. Comm., 910 F.2d 983, 992 (1st Cir. 1990).

In 2017, the Supreme Court addressed a split amongst the circuit courts regarding what the IDEA means when it requires school districts to provide an "appropriate" level of education to children with disabilities. Endrew F. ex rel. Joseph F. v. Douglas County School Dist. RE-I, 137 S. Ct. 988 (2017). In Endrew F., the Court held that an IEP must be "reasonably calculated to enable a child to make progress appropriate in light of the child's circumstances." Id. at 1001. The Court made clear that the standard is "markedly more demanding than the 'merely more than de minimis' test" applied by many courts. Id. at 1000.

Respondent's witnesses indicated that the "comparable services" placement was on an "expedited" interim basis, and that the Student would receive a "thirty-day" review thereafter to make sure that the placement at School A was appropriate. On this record, that "thirty-day review" should have resulted in a change to the Student's placement.

The mother testified that Teacher B told her that the Student was in the wrong place when the Student was placed in School A. Petitioners presented texts in support of this assertion, indicating that Teacher B told the mother she needed to secure representation to get her child an appropriate placement. The mother also presented a text from Dr. B stating that the Student was inappropriately placed at School A.

However, there was no change to the Student's program. On the contrary, Respondent proceeded to write an IEP memorializing the program that was being provided at School A. At the IEP meeting, Teacher B and Dr. B talked to the parent outside the earshot of the other staff at the meeting, again telling the parent that the program and placement were inappropriate because the Student was too high-functioning for the classroom. However, they did not speak their minds at the IEP meeting, which resulted in an IEP that provided for twenty-seven hours of specialized instruction outside general education.

Respondent did not call either Teacher B or Dr. B as a witness to rebut any of these assertions by the mother. Nor did Respondent deny that both Teacher B and Dr. B made these assertions, or that Teacher B and Dr. B believed that the Student's IEP and placement was improper. Instead, Respondent called administrators as witnesses who lacked significant knowledge of the Student's work in the classroom. These witnesses, Witness B, and Witness C, were not convincing.

Instead of an IEP that did not provide clear direction about the classes the Student needed, the Student needed an IEP that assured instruction for a "high-functioning" autistic student, as the Student had received in Florida. Such an IEP would have required a classroom that provided challenging academics for the Student, as well as work on

pragmatic language, such as how to speak "in turn" during a conversation.[2] The IEP also should have included a mandate for the Student to receive some instruction with non-disabled peers. The IEP does state that the Student "is higher than [the Student's] peers and has a significantly higher aptitude than [the Student's] current class and will benefit from more inclusion in a general education setting." Still, no "inclusion" classes were specifically recommended by the IEP. Applying Endrew F., Respondent did not reasonably calculate the Student's IEP to allow the Student to make "markedly more" than minimal progress at School A.

Respondent pointed to caselaw where courts rejected arguments that schools and/or programs had inadequate peer groups for students and therefore denied the students a FAPE. However, in those cases, parents tended to bring "speculative" claims, i.e., claims that were based on conjecture that the Student's peer groups were inappropriate. J.C. v. New York City Dep't of Educ., 643 Fed. Appx. 31, 33, (2d Cir. 2016). Here, the parents knew of the peer groupings in the classroom at School A, since the Student was already placed there. Moreover, the claim here goes beyond a complaint about peer grouping. The claim is also that the instruction in the assigned classroom was inappropriate. This claim is supported by the record.[3]

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[2] Additionally, the record supports the argument that the decision to eliminate the Student's ESY services was inappropriate. ESY Services are necessary to a FAPE when the benefits a disabled child gains during a regular school year will be jeopardized during the summer months. Shank, 585 F.Supp.2d at 68–69; see also Johnson v. D.C., 873 F. Supp. 2d 382, 386 (D.D.C. 2012). It is noted that the Student received ESY services in Florida and ESY services were originally on the IEP. Moreover, Respondent did not present any evidence or argument on the issue of whether the Student needed ESY services, though Respondent bears the burden on this issue.

[3] Parenthetically, Respondent did not have any obligation to place the location of services on the IEP. While there is some difference of opinion on this issue, the better reasoned decisions allow school districts some discretion in assigning schools to students, as long as those schools can provide an appropriate placement and implement the IEP. There are some cases in support of Petitioner's argument, such as A.K. ex rel. J.K. v. Alexandria City Sch. Bd., 484 F.3d 682 (4th Cir. 2007), and there are also cases to the

As a result of the foregoing, Respondent denied the Student educational benefit, and therefore a FAPE, when it provided the Student with the May, 2017, IEP.

3. Did DCPS fail to substantially implement the Student's May, 2017, IEP by removing the Student from the Student's "CES" program on an ad-hoc basis? If so, did DCPS deny the Student a FAPE?

"Failure to implement" claims are actionable if the school district cannot materially implement an IEP. A party alleging such a claim must show more than a de minimis failure, and must show substantial or significant portions of the IEP could not be implemented. Savoy v. District of Columbia, 844 F. Supp.2d 23 (D.D.C. 2012)(holding no failure to implement where District's school setting provided ten minutes less of specialized instruction per day that was on the IEP); see also Van Duyn ex rel Van Duyn v. Baker School Dist. 5J, 502 F.3d 811 (9th Cir. 2007).

The record indicated that the Student was removed from the "CES" program for inclusion classes on some occasions, but was not clear on how long the Student was removed, when the Student was removed, or what the Student missed as a result of being removed. Moreover, the IEP itself did not prohibit the Student from being removed from

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contrary, such as T.Y. v. N.Y.C. Dep't of Educ., 584 F.3d 412, 419 (2d Cir. 2009). Cf. A.W. ex rel. Wilson v. Fairfax Cnty. Sch. Bd., 372 F.3d 674, 683 n.10 (4th Cir. 2004)(suggesting parents do not have rights to select school); White v. Ascension Parish School Board, 343 F.3d 373 (5th Cir. 2003)(same). Within the Circuit, I have reviewed Eley v. District of Columbia, 2012 WL 3656471 (D.D.C. 2012), where the court, in a slip opinion, did rule that the Student's school should have been selected by the IEP team at the IEP meeting. However, in Eley, as in A.K., the court was influenced by the fact that the student did not have a school to attend at the beginning of the school year. In Lunceford v. District of Columbia, 745 F.2d 1577, 1583, (D.C. Cir. 1984) in a decision written by now-Supreme Court Justice Ruth Bader Ginsburg, Judge Ginsburg found that, in certain circumstances, students can be transferred from school to school even during "stay-put" so long as the educational placement is the same, i.e., that the services at the schools are fundamentally the same.

the "CES" program for inclusion classes. It only required that the Student receive twenty-seven hours per week of specialized instruction outside of general education. There was inadequate testimony and evidence in the record to establish that twenty-seven hours a week of specialized instruction outside general education precluded the addition of occasional "inclusion" classes to the weekly schedule. Accordingly, Petitioners did not show that there was any failure to implement the May, 2017, IEP.

This claim is dismissed.

4. Did DCPS deny the Student a FAPE by failing to provide an appropriate educational placement and corresponding location of services from March/April of 2017 through the summer of 2017 because the Student's parents were not involved in the placement decision and because the placement is not able to meet this Student's individual needs? If so, did DCPS deny the Student a FAPE?

Congress sought to protect individual children by providing for parental involvement in the formulation of a child's individual educational program. Hendrick Hudson Dist. Bd. of Educ. v. Rowley, 458 U.S. 176, 208 (1982). Accordingly, the regulations require that parents of a child with a disability be afforded an opportunity to participate in meetings with respect to the educational placement of the child. 34 C.F.R. Sect. 300.501(b)(1); 34 C.F.R. Sect. 513(a);20 U.S.C. Sect. 1414(e). To this end, school districts have a duty to ensure that parents meaningfully participate in an IEP review. Paolella ex rel. Paolella v. Dist. of Columbia, 210 F. App'x 1, 3 (D.C. Cir. 2006); A.M. v. Dist. of Columbia, 2013 WL 1248999 (D.D.C. Mar. 28, 2013); T.T. v. Dist. of Columbia, 2007 WL 2111032 (D.D.C. July 23, 2007).

The record indicated that Petitioners did participate in the IEP meeting, and also participated in the Student's "comparable services" meeting and eligibility meeting. At these meetings, the mother testified that she had an opportunity to state her position that

the Student's classes were for students who are lower-functioning. Respondent did not have to agree with Petitioners to ensure that the parents meaningfully participated in the meetings. While the mother credibly contended that she did not understand the nature of the Student's specialized instructional hours, she did not explain whether she tried to get clarification from Respondent on that issue. Petitioners also did not submit any authority in support of their position, though they bear the burden on this claim.

This claim is dismissed.

5. Did DCPS deny the Student a FAPE by providing the Student with an inappropriate educational placement and corresponding location of services for 2016-2017 and 2017-2018? If so, did DCPS deny the Student a FAPE?

Most cases involving FAPE denial focus on the IEP, the "centerpiece" of the Act. Honig v. Doe, 484 U.S. 305, 311 (1988). Nevertheless, Petitioners may bring claims based upon an inappropriate placement in certain situations. Although a school district has some discretion with respect to school selection,[4] that discretion cannot be exercised in such a manner as to deprive a Student of a FAPE. Gellert v. District of Columbia, 435 F. Supp.2d 18 (D.D.C. 2006); Holmes v. District of Columbia, 680 F. Supp. 40 (D.D.C. 1988). Courts can accordingly rule that school assignments violate the IDEA if, for instance, the school contains an environment that allows bullying. Shore Regional High School Board of Education v. P.S., 381 F.3d 194 (3d Cir. 2004)(denial of FAPE based on the likelihood that a proposed placement would subject a student with an emotional disability to continued bullying because of his perceived effeminacy); M.L. v. Federal Way School District, 394 F.3d 634 (9th Cir. 2005)(if a teacher is deliberately indifferent to the teasing of child with a disability and the abuse is so severe that the child can derive

[4] See Jalloh v. District of Columbia, 968 F.Supp.2d 203 (despite complaints about, among other things. the school's use of computers for instruction, the school was deemed able to implement the IEP and placement claims were denied).

no benefit from the services that he or she is offered by the school district, the child has been denied FAPE).

As pointed out in regard to Issue #1, the facts are particularly persuasive in regard to the claim that School A was an inappropriate placement for the Student. The Student's teacher indicated that the school was not appropriate because it was geared toward a population of lower-functioning autistic students. The School A speech and language pathologist voiced the same opinion.

However, after Petitioners complained, Respondent allowed the parents to tour two other sites, School B, and School C. There is little in the record about either such school, both of which have "CES" programs. There is a reference in the record from Teacher B indicating that School B may have been appropriate for the Student, and there are other references in the record to the effect that the "CES" classroom in School B had higher-functioning students in it. However, Teacher B did not testify to explain further about her statement (P-14-14), and no witness was called from School B to explain why the school would allow the Student to make meaningful education progress. Similarly, there was little testimony about School C, which also had higher-functioning students. Witness B described it as a pilot program for higher-functioning students, and indicated that a social skills component of the program had not yet been developed. No witness was called from School C to explain its curriculum, *and the parent was not told about the pilot program while she was exploring the school in spring, 2017*. Instead, the parent was led to believe that the School C "CES" program was just like the other programs. It is noted that Witness B testified at the hearing that most "CES" programs would be the same as the School A program, *including the one at School C*.

In sum, there is insufficient evidence in the record to establish that Respondent offered the Student an appropriate educational placement for the 2017-2018 school year. Since Respondent bears the burden of persuasion on this placement issue, Petitioner prevails in regard to this claim.

Relief

Parents who unilaterally place their child at a private school without the consent of school officials do so at their own financial risk. Florence Cnty. Sch. Dist. 4 v. Carter, 510 U.S. 7, 15 (1993). 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." 34 C.F.R. Sect. 300.148(c) (2012); see also Florence Cnty., 510 U.S. at 15 (parent may only receive tuition reimbursement "if a federal court concludes both that the public placement violated IDEA and that the private school placement was proper under the Act"); Holland v. District of Columbia, 71 F.3d 417, 420 n. 3 (D.C.Cir.1995) (noting that the circuit has ordered reimbursement "where the public agency violated [the IDEA] and the parents made an appropriate placement").

School D is designed for children like the Student, who are able to perform traditional academics but have issues with peers, rigidity, and changes in schedule. Some of the students at the school do not have an IEP, which is an appropriate way for the Student to get exposure to non-disabled peers. The school offers a variety of modifications, including a visual schedule on the wall, "fidgets," and areas where children can take a quick break. There is a "points" system that is used to address behavioral issues, a "social learning" class, and a social learning specialist is integrated

into the classroom. A BCBA is also on staff to address issues, especially in regard to autistic students.

The school is small, with only fifty-eight children in it, and the Student's classroom is very small, with only five other students and an aide in the room. The other students are functioning at a similar level to the Student, who is able to work on pragmatic language issues during the school day. The Student started by not engaging verbally and exhibiting a resistance to school, a product of the experiences at School A. The Student has since adjusted to the school and has been doing particularly well in groups of two. The Student is doing well in all academic areas, particularly writing, and benefits from breaks throughout the day. The Student also receives a scholarship to attend the school. With the scholarship, the tuition at the school is $15,000 per year.

The main argument against reimbursement for this placement is that, since the pilot program at School C appears to be at least partially up and running, the Student could theoretically be transferred to School C now, in the middle of the school year. However, as pointed out by the Circuit in Leggett v. District of Columbia, 793 F.3d 59, 70-73 (D.C. Cir. 2015), this change is premised on an appropriate IEP, and the Student's IEP continues to be so vague as to allow education in virtually any self-contained special education classroom for twenty-seven hours per week. Additionally, District of Columbia precedent warns against moving disabled students in the middle of the school year. Holmes, 680 F. Supp. at 42 (noting that the proposed District school was in a start-up posture and indicating that "to send the plaintiff to a new school to complete the last semester of schooling would be "insensitive").

The parent also seeks reimbursement for costs due in connection to the Student's summer program. The record revealed that the summer program only involved an hour-and-a-half of academics in a general education environment, without any special education supports, which are necessary for this Student. Otherwise, the camp provided children with typical summer activities, such as swimming. This camp was not a camp for students with disabilities, and camp staff never saw the Student's IEP. Accordingly, the Student's unilateral placement was appropriate only for the 2017-2018 school year, exclusive of the summer months.

The IDEA allows that tuition reimbursement may be reduced or denied when parents fail to raise the appropriateness of an IEP in a timely manner, fail to make their child available for evaluation by the district, or upon a finding of unreasonableness with respect to the actions taken by the parents. 20 U.S.C. Sect. 1412(a)(10)(C)(iii). With respect to a parent's obligation to raise the appropriateness of an IEP in a timely manner, the IDEA provides that tuition reimbursement may be denied or reduced, if parents neither inform the CSE of their disagreement with its proposed placement and their intent to place their child in a private school at public expense at the most recent CSE meeting prior to their removal of the child from public school, nor provide the school district with written notice stating their concerns and their intent to remove the child within ten business days before such removal. 34 CFR Sect. 148(d)(i), (ii). Under 20 U.S.C. Sect. 1412(a)(10)(C)(iii), a denial or reduction in reimbursement is discretionary.

The Supreme Court has suggested that the statutory factors are a non-exhaustive list. Forest Grove Sch. Dist. v. T.A., 557 U.S. 230, 241 (2009) ("(t)he clauses of Sect. 1412(a)(10)(C) are . . . best read as elucidative rather than exhaustive"). In addition,

courts have broad discretion to consider the range of all relevant facts in determining whether and to what extent awarding relief is equitable. See Florence County, 510 U.S. at 16. Among the most important of these is "whether the parents have cooperated with the [District] throughout the process to ensure their child receive a FAPE." Bettinger v. N.Y.C. Bd. of Educ., 2007 WL 4208560, at *6 (S.D.N.Y. Nov. 20, 2007).

The equities favor the parents. The mother did her own research to try to find schools within the public school system, provided the school district with notice of the unilateral placement, actively participated in all meetings involving the Student, and allowed the school district to evaluate her child. As a result, Petitioners should be awarded tuition reimbursement through to the end of the 2017-2018 school year.

VIII. Order

As a result of the foregoing, the following is hereby ordered:

1. Respondent shall pay School D for tuition and related expenses for the 2017-2018 school year, except for money already paid to School D by Petitioners for the year. In regard to such money already paid, Respondent shall reimburse Petitioners. Respondent shall also reimburse Petitioners for all actual transportation costs associated with travel to and from the school;

2. Petitioners' other requests for relief are hereby denied.

Dated: January 20, 2018

Michael Lazan
Impartial Hearing Officer

cc: Office of Dispute Resolution
Petitioner's Representative: Attorney A, Esq.
Respondent's Representative: Attorney B, Esq.
OSSE Division of Specialized Education
Contact.resolution@dc.gov

IX. Notice of Appeal Rights

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 USC §1415(i).

Date: January 20, 2018

Michael Lazan
Impartial Hearing Officer