

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

Office of Dispute Resolution
1050 First Street, N.E., Third Floor
Washington, D.C. 20002

OSSE
Office of Dispute Resolution
January 11, 2019

<i>Student</i> , ¹)	Case No.: 2018-0264
through <i>Parents</i> ,)	
<i>Petitioners</i> ,)	Date Issued: 1/11/19
)	
v.)	Hearing Officer: Keith L. Seat, Esq.
)	
District of Columbia Public Schools)	Hearing Date: 1/2/19
("DCPS"),)	ODR Hearing Room: 112
Respondent.)	
)	

HEARING OFFICER DETERMINATION

Background

Petitioners, Student's Parents, pursued a due process complaint alleging that Student had been denied a free appropriate public education ("FAPE") in violation of the Individuals with Disabilities Education Improvement Act ("IDEA") because Student had not been provided an adequate placement/location of services and the process lacked meaningful parental participation. DCPS responded that it had provided an appropriate location of services and sought parental participation.

Subject Matter Jurisdiction

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

Procedural History

Following the filing of the due process complaint on 10/12/18, the case was assigned to the undersigned on 10/15/18. Respondent filed a response on 10/24/18 that Petitioners agreed not to consider late, and which did not challenge jurisdiction. The resolution session meeting ("RSM") took place on 10/30/18, but the parties neither settled the case nor

¹ Personally identifiable information is provided in Appendix A, including terms initially set forth in italics.

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terminated the 30-day resolution period, which ended on 11/11/28. A final decision in this matter must be reached no later than 45 days following the end of the resolution period, as extended by a 20-day continuance, which requires a Hearing Officer Determination (“HOD”) by 1/15/19.

The due process hearing took place on 1/2/19 and was closed to the public. Petitioners were represented by *Petitioners’ counsel*. DCPS was represented by *Respondent’s counsel*. Parent participated in the entire hearing.

Petitioners’ Disclosures, submitted on 11/13/18, contained documents P1 through P28, of which Petitioners’ counsel offered only P2, P3, P4, P6, P14, P15, P19 and P20, all of which were admitted into evidence without objection. Respondent’s Disclosures, submitted on 11/13/18, contained documents R1 through R13, which were admitted into evidence without objection.

Petitioners’ counsel presented two witnesses in Petitioners’ case-in-chief (*see Appendix A*):

1. *Monitoring Specialist* (called as an adverse witness)
2. Parent

Respondent’s counsel presented one witnesses in Respondent’s case (*see Appendix A*): *Monitoring Specialist* (qualified over objection as an expert in Special Education Programming and Placement).

Petitioners’ counsel recalled Parent as the sole rebuttal witness.

The issues to be determined in this Hearing Officer Determination are:

Issue 1: Whether DCPS denied Student a FAPE by failing to provide an appropriate placement/location of services for 2018/19.² *Respondent has the burden of persuasion if this is an issue of placement and Petitioners establish a prima facie case; but Petitioners have the burden if a mere matter of “location of services.”*

Issue 2: Whether DCPS denied Student a FAPE by preventing meaningful parental participation in the placement/location of services decision. *Petitioners have the burden of persuasion on this issue.*

The relief requested by Petitioners is:

1. A finding that Student was denied a FAPE.

² All dates in the format “2018/19” refer to school years.

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2. DCPS shall fund at market rates Student's home instruction and services, including all standard and necessary materials and resources, until DCPS provides Student an appropriate placement/location of services.
3. DCPS shall (a) provide compensatory education for any denial of FAPE³ or, in the alternative, (b) fund an independent compensatory education evaluation in order to determine appropriate compensatory education through agreement at an IEP meeting or in a subsequent proceeding (with Petitioners' current request for compensatory education being dismissed without prejudice).⁴
4. Any other just and appropriate relief.

At the beginning of the due process hearing, in response to assertions by Petitioners' counsel that Student was not in school and not receiving services, Respondent's counsel inquired whether Student was receiving educational services from Parent, as Respondent's counsel understood Petitioners' counsel had represented to the U.S. District Court in a hearing over documents in November 2018. Petitioners' counsel did not clarify what educational services, if any, Student has received in 2018/19 beyond stating that Student is "not sitting around watching TV." Consequently, Respondent's counsel asked this Hearing Officer to order DCPS to act to enforce the compulsory education requirements so that Student would receive appropriate education, in an attempt to shield DCPS from any assertion that it was taking action with a retaliatory motive. As discussed in the ordering paragraph below, if Parents do not cooperate in working through any concerns with Proposed School or other nonpublic school(s) in the future, DCPS should consider whether action is necessary to enforce the requirements of compulsory school attendance.

Immediately following Petitioners' case-in-chief, Respondent's counsel orally moved for a partial directed finding that the parties had agreed to a nonpublic day school as Student's placement in which Parent fully participated, and the remaining issue of the choice of Location of Services ("LOS") was within the discretion of DCPS as the Local

³ Petitioners' counsel was put on notice at the prehearing conference that Petitioners must introduce evidence supporting the requested compensatory education, including evidence of specific educational deficits resulting from Student's alleged denial of FAPE and the specific compensatory measures needed to best correct those deficits, *i.e.*, to elevate Student to the approximate position Student would have enjoyed had Student not suffered the alleged denial of FAPE. Respondent was also encouraged at the prehearing conference to be prepared to introduce evidence contravening the requested compensatory education in the event a denial of FAPE was found.

⁴ At the beginning of the due process hearing, Petitioners' counsel elected to proceed under subpart (b) and not attempt to put on a compensatory education case under subpart (a). At the prehearing conference, DCPS had disagreed that subpart (b) was appropriate under the IDEA, and at the due process hearing reiterated its objection to a compensatory education evaluation and reserving any claim for compensatory education for future determination.

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Education Agency (“LEA”). The motion was taken under advisement by the undersigned and is hereby denied for the reasons discussed below.

Findings of Fact

After considering all the evidence, as well as the arguments of both counsel, the Findings of Fact⁵ are as follows:

1. Student is a resident of the District of Columbia; Parent is one of Student’s parents and one of the Petitioners in this case.⁶ Student is *Age*, *Gender* and in *Grade*, but has not attended school in 2018/19.⁷ Student has a disability classification of Autism Spectrum Disorder.⁸ Student previously attended Previous School for multiple years; Previous School did not have an intensive autism program available to continue serving Student.⁹

2. Student’s current Individualized Education Program (“IEP”) is dated 7/10/18 and provides for 24 hours/week of specialized instruction, 12 hours/month of speech-language pathology, 8 hours/month of occupational therapy, and 4 hours/month of behavioral support services, all outside general education, along with 120 minutes/month of consultation divided among the related services.¹⁰ The IEP contains Other Classroom Aids and Services that are crucial for Student, specifically, a maximum classroom size of six students, and steps to assist in decreasing noise: (a) minimal risk of noise and distraction from inside and outside the classroom, (b) a quiet area in the classroom for instruction and independent work, (c) use of a rug to decrease noise from tapping/walking, (d) adults speaking in low, calm tones to Student, and (e) noise cancelling headphones for use while Student is working on independent tasks.¹¹ The IEP also provides for a dedicated aid six hours/day and for special education transportation on a DOT vehicle.¹² Student’s Least Restrictive Environment (“LRE”) is a separate school with no interaction with non-disabled peers; Student’s IEP team, including Parent, agreed on the LRE and the entire IEP.¹³

⁵ Footnotes in these Findings of Fact refer to the sworn testimony of the witness indicated or to an exhibit admitted into evidence. To the extent that the Hearing Officer has declined to base a finding of fact on a witness’s testimony that goes to the heart of the issue(s) under consideration, or has chosen to base a finding of fact on the testimony of one witness when another witness gave contradictory testimony on the same issue, the Hearing Officer has taken such action based on the Hearing Officer’s determinations of the credibility and/or lack of credibility of the witness(es) involved.

⁶ Parent.

⁷ *Id.*

⁸ P4-1.

⁹ Parent; R6-10.

¹⁰ P4-1,20.

¹¹ P4-21.

¹² P4-22, 26.

¹³ P4-23,24; Monitoring Specialist; Parent.

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3. Delay in Developing IEP. DCPS had difficulty getting Petitioners to meet to update Student's IEP throughout 2017/18.¹⁴ An HOD issued by Hearing Officer Coles Ruff on 11/27/17 (the "Ruff HOD") in a case between the parties required observation of Student and then a Multi-disciplinary Team ("MDT") meeting.¹⁵ DCPS made repeated attempts to schedule an MDT/IEP meeting with Petitioners, including emails on 12/11/17, 12/19/17, 1/3/18, 3/28/18, 5/30/18, 5/31/18, 6/4/18, 6/15/18.¹⁶ Parents refused to meet with DCPS, at least initially because they appealed the Ruff HOD and asserted that any discussion of Student's IEP was premature until Student's needs were finally determined by the courts.¹⁷

4. On 3/1/18 DCPS filed a due process complaint seeking an order directing Parents to attend an MDT/IEP meeting; DCPS prevailed after a hearing on 4/11/18, with an HOD issued by Hearing Officer Michael Lazan (the "Lazan HOD") on 4/15/18.¹⁸ That HOD ordered an MDT/IEP meeting within 30 school days, after addressing defenses including Petitioners' counsel's argument that the Ruff HOD did not actually require Parents to attend any meeting, since the formal Order only directed DCPS to convene the meeting but did not expressly direct Parents to attend, even though the Conclusions of Law in the HOD specifically required Parents and DCPS personnel to "attend the meeting together in person" at Previous School.¹⁹

5. The Lazan HOD ordered Petitioners to meet with DCPS to update Student's IEP, but Petitioners' counsel continued to reject proposed dates, saying a meeting "would not be useful" because Petitioners were going to challenge the Lazan HOD, among other previously stated reasons.²⁰ Monitoring Specialist testified that Petitioners' counsel further delayed Student's IEP by waiting until 6/13/18 to respond to emails from early June, as that shifted the possible meeting times beyond the end of the school year and required delay until the Previous School teachers were available during Extended School Year ("ESY") in July.²¹

6. IEP Meeting. Student's IEP meeting was held on 7/10/18 and 7/13/18; the meeting notes (taken by DCPS and not disputed by Petitioners' counsel) reflect that Parent directly participated in the two-day meeting, by both asking questions and providing input in a collaborative manner; the parties reached full agreement on the IEP.²²

7. During the IEP meeting, school staff noted that Student was using noise cancelling headphones and an assigned quiet area within the classroom.²³ There were only four other

¹⁴ Monitoring Specialist.

¹⁵ R4-4,5.

¹⁶ R4-5; R8-6.

¹⁷ R4-4,5.

¹⁸ R4-1,3,12.

¹⁹ R4-11.

²⁰ R13-1.

²¹ Monitoring Specialist.

²² R6; Monitoring Specialist; Parent.

²³ R6-3.

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children in the class at Previous School (for a total of five with Student), one of which was “unpredictable”; Parent said that noise and the number of people were crucial for Student.²⁴ Previous School teachers reported that programming for Student was more the issue than the number of children in the classroom.²⁵ The school psychologist stated that learning the ways of new groups and new children was difficult for Student.²⁶ In 2017/18, Student was able to tolerate a larger class size from a sensory perspective; a teacher had seen Student be successful with five other children; tolerance was increasing but the number of kids depended on whether they were quiet or not.²⁷ Student could go to school assemblies and participated in field day and went on a field trip.²⁸

8. Previous School previously recommended 12 hours/month of speech-language services, but at the IEP meeting recommended 7 hours/month; Monitoring Specialist noted her concerns about whether potential nonpublic schools could provide so much service; Petitioners’ counsel responded that Parent could work with the school on what it could provide and see if hours needed to be altered then.²⁹ Four possible nonpublic schools – including Proposed School – were raised in the IEP meeting as “potential spots” for Student (without any concerns or discussion from Petitioners’ counsel or Parent stated in the notes).³⁰ Student’s eligibility for ESY and ESY transportation was raised, but the notes reflect no concerns about transportation being raised.³¹

9. After the 7/10/18 and 7/13/18 IEP meeting, Monitoring Specialist sent an updated IEP incorporating all the edits discussed, with which Petitioners’ counsel agreed (apart from one small issue) and the IEP was finalized on 7/31/18.³² On 8/1/18, Monitoring Specialist circulated the final IEP and indicated she was sending referrals to three nonpublic schools, including Proposed School.³³ Monitoring Specialist asked Parents and Petitioners’ counsel if there were other schools that they were interested in.³⁴ Petitioners’ counsel responded on 8/8/18, promising to respond quickly to any schools that contact Petitioners, but not suggesting any preferred schools.³⁵

10. Proposed School. After reviewing the referral information, Proposed School sought to observe Student to see if the autism program at the school could meet Student’s needs.³⁶ Proposed School contacted Parent on 8/6/18 seeking to observe Student at Previous School

²⁴ *Id.*

²⁵ R6-10.

²⁶ R6-6.

²⁷ R6-10.

²⁸ *Id.*

²⁹ R6-7.

³⁰ *Id.*

³¹ R6-10.

³² P14-2; Monitoring Specialist.

³³ P14-1.

³⁴ *Id.*

³⁵ *Id.*

³⁶ Monitoring Specialist.

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and inviting Parent to come visit Proposed School again.³⁷ Student was no longer at Previous School so could not be observed there; Parent could not bring Student to Proposed School for a visit with only three days' notice, so Proposed School was not able to see Student prior to its break on 8/17/19.³⁸ Parent reached out to Proposed School on 8/29/18 and set up a meeting which occurred on 9/6/18, followed by a second meeting with Student on 9/12/18.³⁹

11. Parent sent Monitoring Specialist a cordial email on 9/12/18 to let her know that Student had been observed at Proposed School and had attended art and math classes, thanking Monitoring Specialist for the referral and stating that Proposed School would decide about Student's enrollment in a week or two.⁴⁰ Parent gave no indication of concern about Proposed School in her email to Monitoring Specialist and sent no other emails to DCPS raising any concerns.⁴¹

12. On 9/13/18, Monitoring Specialist responded that she was glad to hear "the visit went well," noted that Proposed School had already accepted Student, and asked whether Student needed bus transportation.⁴² Proposed School determined that it could meet Student's IEP based on the referral documents and meeting Student and Parent; DCPS saw that Proposed School could service Student's IEP, asked for a start date, and assigned Student to Proposed School without having another IEP meeting.⁴³

13. On 9/14/18, Proposed School emailed asking Parent to come in to complete the admissions paperwork.⁴⁴ Parent and Monitoring Specialist had been directly talking in the weeks leading up to 9/13/18 when Proposed School accepted Student, at which point Parent was silent, so Monitoring Specialist called Parent on 9/17/18 before sending the LOS letter; Parent didn't want Proposed School and told Monitoring Specialist to contact Petitioners' counsel.⁴⁵ On 9/17/18, Monitoring Specialist forwarded to Parent the Proposed School acceptance letter and the DCPS Location of Services letter, both dated 9/17/18.⁴⁶

14. Concerns from Petitioners' counsel. On 9/18/18, Petitioners' counsel emailed Monitoring Specialist rejecting Proposed School as failing to "meet the fundamentals" of Student's IEP and "plainly inappropriate," as well as "procedurally illegal."⁴⁷ Monitoring Specialist responded within an hour that she had called Parent on 9/17/18 to discuss Proposed School, but Parent refused to speak with her; Monitoring Specialist stated that she

³⁷ P15-5.

³⁸ P15-4,5; Monitoring Specialist.

³⁹ P15-1.

⁴⁰ R7-3.

⁴¹ Monitoring Specialist; R7-3.

⁴² R7-2.

⁴³ Monitoring Specialist.

⁴⁴ R7-1.

⁴⁵ Monitoring Specialist; R8-6.

⁴⁶ R7-1,4,5,6.

⁴⁷ P19-2.

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would “like an opportunity to hear her concerns” and asked if Parent’s concerns could be sent in writing, conveyed by telephone with Petitioners’ counsel on the line, or provided in a meeting with Proposed School.⁴⁸ Monitoring Specialist noted that the start date at Proposed School was 9/24/18 and that transportation had already been set up.⁴⁹

15. Petitioners’ counsel responded by email on 9/20/18 that Parent had not simply refused to talk to Monitoring Specialist but had referred Monitoring Specialist to Petitioners’ counsel, and that he and Parent were “happy to discuss the problems” but felt DCPS was “forcing our hand” by placing Student at Proposed School prior to the discussion.⁵⁰ Monitoring Specialist responded in turn on 9/21/18, noting the obligation to provide a FAPE to Student, so that once Proposed School was identified as a location that could provide a FAPE, efforts were “completed as quickly as possible”; Monitoring Specialist asked how Parents would like to proceed with discussing concerns about Proposed School.⁵¹

16. Rather than any discussion of concerns, Petitioners’ counsel responded on 9/25/18 that he could “easily” list the most obvious problems at Proposed School: (a) the class size was too large, (b) almost all of the children in the class were non-verbal, (c) at least one child in the class was prone to frequent loud outbursts, and (d) the distance from Student’s home to Proposed School, which Petitioners’ counsel stated was an additional large problem as it is 45-60 minutes away even without stops for other children, so “likely” unworkable even by car.⁵² Parent testified that she had these concerns after her meeting at Proposed School; Parent wanted counsel to speak to DCPS in her stead (but did not say why).⁵³

17. Monitoring Specialist responded on 9/28/18 that DCPS had reviewed the concerns that Petitioners’ counsel raised on 9/25/18; Monitoring Specialist had spoken with Proposed School, which reasserted that it was able to implement Student’s IEP; Proposed School was the closest appropriate location to Student’s home, so OSSE transportation could be used for transport.⁵⁴ Monitoring Specialist noted that Proposed School would hold the spot for Student until 10/3/18 and that Student “needs to be in school.”⁵⁵

18. Student was never enrolled and never attended Proposed School.⁵⁶ Although English is not her first language, Parent was clear and articulate in testimony about her concerns with Proposed School, raising several issues; Parent did not discuss or propose any plan for addressing concerns about transportation or the Proposed School classroom.⁵⁷ It

⁴⁸ P19-1.

⁴⁹ *Id.*

⁵⁰ R9-5.

⁵¹ R9-4.

⁵² P20-1.

⁵³ Parent.

⁵⁴ R9-3; Monitoring Specialist.

⁵⁵ R9-3.

⁵⁶ Parent.

⁵⁷ Parent; Administrative Notice.

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would have been very helpful for Monitoring Specialist and DCPS to know Parent's concerns about Proposed School, but they only received Petitioners' counsel's emails and so didn't hear the specifics until Parent's testimony during the due process hearing.⁵⁸ DCPS was willing to consider parental input about Proposed School and very much wanted Student to be in school.⁵⁹

19. Transportation. Parent was certain Student could not ride a school bus with other children, regardless of trip length; Student has never ridden a bus to school.⁶⁰ Parent noted that it took 45 minutes to drive from home to Proposed School; Parent also checked Google maps, which indicated it would take 30-60 minutes at the time Student would go to school and 45-60 minutes at the time Student would return from school.⁶¹ Parent stated that Student cannot tolerate trips that long without stopping to get hugs and reassurance, or else will scream, yell, kick, and have severe tantrums; an hour-long trip would require two stops of up to 10-15 minutes.⁶²

20. Parent had driven Student to Previous School each school day, which was about 10-15 minutes from home at the time they drove, which was prior to rush hour.⁶³ Parent readily acknowledged that if the arrival time at school could be adjusted for Student, Parent driving Student to Proposed School would eliminate her transportation concern, as long as Parent otherwise liked the school.⁶⁴ Parent stated that she had not looked at any other school options for Student and did not know of any school that she liked for Student.⁶⁵

21. Size of Class. Parent saw the classroom intended for Student at Proposed School, which contained seven children (without Student), even though Student's IEP very carefully determined that Student could only be in a classroom of no more than six children total.⁶⁶ Parent testified that the classroom also included dedicated aides for six of the seven children, plus two teachers, so with Student and Student's dedicated aide there would be eight children and nine adults.⁶⁷

22. Monitoring Specialist credibly testified that Proposed School had a limit of six children in the classroom intended for Student; Monitoring Specialist had been a DCPS monitor at Proposed School for two years and had observed the classroom intended for Student and knew it to be limited to six children.⁶⁸ After receiving the 9/25/18 email from Petitioners' counsel, Monitoring Specialist called Proposed School that day and confirmed

⁵⁸ Monitoring Specialist.

⁵⁹ *Id.*

⁶⁰ Parent.

⁶¹ *Id.*

⁶² *Id.*

⁶³ *Id.*

⁶⁴ *Id.*

⁶⁵ *Id.*

⁶⁶ *Id.*

⁶⁷ *Id.*

⁶⁸ Monitoring Specialist.

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that Student would be the sixth in the classroom and that there were five students in the classroom as of 9/25/18, when Student would have begun at Proposed School.⁶⁹ Monitoring Specialist received no information confirming Parent's concern about the class being too large; Parent and Petitioners' counsel never provided the specific number of children at issue prior to testimony at the due process hearing.⁷⁰ The size of the class had been a "big deal" at the IEP meeting; Proposed School reassured Monitoring Specialist that Student's IEP could be followed despite Petitioners' counsel's concerns.⁷¹

23. Classroom Noise. Noise disturbs Student and was the topic most discussed in the two-day July 2018 IEP meeting.⁷² Parent described the level of noise in the Proposed School classroom as "overwhelming" for Student, as most children were nonverbal and noisy; one child triggered Student and Student began yelling back.⁷³ The Proposed School teacher offered headphones, which are on Student's IEP.⁷⁴

24. Intellectual/Academic Levels. Parent had concerns that the intellectual and academic levels of the other children in the proposed classroom at Proposed School were well below Student's level.⁷⁵ Parent observed a math class in which the children were working on addition and subtraction using numbers from 1-10, while Student is capable of 1-1000; the classroom tasks on the electronic board in the classroom were also too basic.⁷⁶

25. School Options. Monitoring Specialist credibly testified that a FAPE was made available to Student at Proposed School where Student's IEP could be implemented with fidelity.⁷⁷ Parent testified that she didn't know or couldn't remember that there was a deadline for Student to accept a spot at Proposed School.⁷⁸ Monitoring Specialist did not know what has happened at Proposed School since the spot for Student was lost on 10/3/18 and whether Proposed School might have another spot open at this time.⁷⁹

26. The other two nonpublic schools contacted at the same time as Proposed School both rejected Student (on 8/14/18 and 8/29/18), so DCPS sent out referrals to additional schools.⁸⁰ One of those additional schools, Second Proposed School, responded by letter dated 10/17/18 that it would like to accept Student into its day school program; DCPS issued another LOS letter to Parents on 10/18/18.⁸¹ Second Proposed School provided a 30-

⁶⁹ *Id.*

⁷⁰ *Id.*

⁷¹ *Id.*

⁷² Parent.

⁷³ *Id.*

⁷⁴ *Id.*

⁷⁵ *Id.*

⁷⁶ *Id.*

⁷⁷ Monitoring Specialist.

⁷⁸ Parent.

⁷⁹ Monitoring Specialist.

⁸⁰ Monitoring Specialist; R8-6.

⁸¹ R10-1; R10-2.

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day period for accepting the spot offered; Petitioners rejected the school, filing another due process complaint on 12/20/18 which has been assigned to the undersigned, asserting legal issues similar to this case.⁸² Monitoring Specialist understood that Petitioners refused to consider Second Proposed School because there was not a diploma program available there, even though that would not be an issue for Student for many years.⁸³ Parent did not enroll Student in Second Proposed School and testified that she didn't recall that there was a deadline by which Student must accept that spot or lose it.⁸⁴

27. Monitoring Specialist testified that she does not know what education Student has received at home in 2018/19, although she understood Petitioners' counsel's representations in District Court to be that some education was being provided at home.⁸⁵ Student is required to attend school and needs to be in school, which is a great concern to DCPS.⁸⁶

28. Collaboration/Credibility. Parent and Petitioners' counsel were not working collaboratively with DCPS, as seen by the extended refusal to meet to update Student's IEP throughout 2017/18, refusing to provide the details of Parent's concerns about Proposed School in an effort to resolve them together, and Petitioners' counsel's emails in the last half of September 2018 in which Monitoring Specialist perceived a pattern of not working to meet Student's needs and get Student back in school.⁸⁷ Monitoring Specialist has been involved in three due process hearings involving Student thus far; the newly filed case involving Second Proposed School will be her fourth.⁸⁸

29. Parent lost credibility with the undersigned by (a) testifying that she didn't have any chance to express her opinion about Proposed School to DCPS, and then stating a few moments later that Monitoring Specialist asked Parent about her concerns when she refused Proposed School, (b) asserting that she (Parent) gave no more information in her testimony than Petitioners' counsel provided in his 9/25/18 email, despite the specifics about class size, transportation and the entirely new concern about the intellectual and academic levels of the class, and (c) testifying that DCPS never inquired about what Petitioners' counsel meant in his 9/25/18 email, and that if DCPS had questions they "could have asked me."⁸⁹

Conclusions of Law

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

⁸² Administrative Notice.

⁸³ Monitoring Specialist.

⁸⁴ Parent.

⁸⁵ Monitoring Specialist.

⁸⁶ *Id.*

⁸⁷ *Id.*

⁸⁸ *Id.*

⁸⁹ Parent; P20-1; Administrative Notice.

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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”).

“The IEP is ‘the centerpiece of the statute’s education delivery system for disabled children.’” *Endrew F. ex rel. Joseph F. v. Douglas County Sch. Dist. RE-1*, 137 S. Ct. 988, 994, 197 L. Ed. 2d 335 (2017), *quoting Honig v. Doe*, 484 U.S. 305, 311, 108 S. Ct. 592, 98 L.Ed.2d 686 (1988). “The IEP is the means by which special education and related services are ‘tailored to the unique needs’ of a particular child.” *Endrew F.*, 137 S. Ct. at 994, *quoting Bd. of Educ. of Hendrick Hudson Cent. Sch. Dist. v. Rowley*, 458 U.S. 176, 181, 102 S. Ct. 3034, 73 L. Ed. 2d 690 (1982).

Once a child who may need special education services is identified and found eligible, Respondent must devise an IEP, mapping out specific educational goals and requirements in light of the child’s disabilities and matching the child with a school capable of fulfilling those needs. *See* 20 U.S.C. §§ 1412(a)(4), 1414(d), 1401(a)(14); *Endrew F.*, 137 S. Ct. at 994; *Sch. Comm. of Town of Burlington, Mass. v. Dep’t of Educ. of Mass.*, 471 U.S. 359, 369, 105 S. Ct. 1996, 2002, 85 L. Ed. 2d 385 (1985); *Jenkins v. Squillacote*, 935 F.2d 303, 304 (D.C. Cir. 1991); *Dist. of Columbia v. Doe*, 611 F.3d 888, 892 n.5 (D.C. Cir. 2010).

The IEP must be “reasonably calculated to enable a child to make progress appropriate in light of the child’s circumstances.” *Endrew F.*, 137 S. Ct. at 1001. The Act’s FAPE requirement is satisfied “by providing personalized instruction with sufficient support services to permit the child to benefit educationally from that instruction.” *Smith v. Dist. of Columbia*, 846 F. Supp. 2d 197, 202 (D.D.C. 2012), *citing Rowley*, 458 U.S. at 203. The IDEA imposes no additional requirement that the services so provided be sufficient to maximize each child’s potential. *Rowley*, 458 U.S. at 198. In its decision, the Supreme Court made very clear that the standard is well above *de minimis*, however, stating that “[w]hen all is said and done, a student offered an educational program providing ‘merely more than *de minimis*’ progress from year to year can hardly be said to have been offered an education at all.” *Endrew F.*, 137 S. Ct. at 1001.

A Hearing Officer’s determination of whether a child received a FAPE must be based on substantive grounds. In matters alleging a procedural violation, a Hearing Officer may find that a child did not receive a FAPE only if the procedural inadequacies (i) impeded the child’s right to a FAPE; (ii) significantly impeded the parent’s opportunity to participate in the decision-making process regarding the provision of a FAPE to the parent’s child; or (iii) caused a deprivation of educational benefit. 34 C.F.R. § 300.513(a). In other words, an IDEA claim is viable only if those procedural violations affected the child’s *substantive* rights. *Brown v. Dist. of Columbia*, 179 F. Supp. 3d 15, 25-26 (D.D.C. 2016), *quoting N.S. ex rel. Stein v. Dist. of Columbia*, 709 F. Supp. 2d 57, 67 (D.D.C. 2010).

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Petitioners carry the burden of production and persuasion, except on issues of the appropriateness of an IEP or placement on which Respondent has the burden of persuasion, if Petitioners establish a prima facie case. D.C. Code Ann. § 38-2571.03(6); *Z.B. v. Dist. of Columbia*, 888 F.3d 515, 523 (D.C. Cir. 2018) (party seeking relief bears the burden of proof); *Schaffer ex rel. Schaffer v. Weast*, 546 U.S. 49, 62, 126 S. Ct. 528, 537, 163 L. Ed. 2d 387 (2005). “Based solely upon evidence presented at the hearing, an impartial hearing officer shall determine whether . . . sufficient evidence [was presented] to meet the burden of proof that the action and/or inaction or proposed placement is inadequate or adequate to provide the student with a FAPE.” 5-E D.C.M.R. § 3030.3.

Issue 1: *Whether DCPS denied Student a FAPE by failing to provide an appropriate placement/location of services for 2018/19. (Respondent has the burden of persuasion if this is an issue of placement and Petitioners establish a prima facie case; but Petitioners have the burden if a mere matter of “location of services.”)*

The undersigned considers this issue as one of placement and not just location of services, given the seriousness of Student’s needs and the inability to simply put Student in a variety of possible schools without carefully considering Student’s sensitivities. *See, e.g., Eley v. Dist. of Columbia*, 47 F. Supp. 3d 1, 16-17 (D.D.C. 2014); *Lunceford v. Dist. of Columbia Bd. of Educ.*, 745 F.2d 1577, 1582 (D.C. Cir. 1984); *Eley v. Dist. of Columbia*, 2012 WL 3656471, at *8 (D.D.C. 2012). Petitioners did establish a prima facie case through the testimony of Parent, shifting the burden of persuasion to DCPS, which met its burden as discussed below.

The applicable legal standard for educational placement under the IDEA requires “school districts to offer placement in a school and in programming that can fulfill the requirements set forth in the student’s IEP.” *Middleton v. Dist. of Columbia*, 312 F. Supp. 3d 113, 143 (D.D.C. 2018), *citing O.O. ex rel. Pabo v. Dist. of Columbia*, 573 F. Supp. 2d 41, 53 (D.D.C. 2008). *See also Johnson v. Dist. of Columbia*, 962 F. Supp. 2d 263, 267 (D.D.C. 2013) (DCPS “must place the student in a setting that is capable of fulfilling the student’s IEP”). The appropriateness of Student’s proposed placement at Proposed School is analyzed by considering the specific concerns raised by Petitioners, which are considered in turn.

As an initial matter, however, Petitioners’ counsel is quite correct that the obligation to provide a FAPE rests with DCPS and not Petitioners. DCPS cannot simply settle on a school that cannot meet Student’s IEP, simply because there are no better options. On the other hand, the IDEA hearing process certainly should not be viewed as a game of “gotcha,” where a petitioner can lay back and decline to participate in trying to ensure the appropriateness of a setting in order to file another due process complaint if an LEA has been unable to resolve problems about which it was not provided necessary details. In addition to the inequity of such an approach, the stakes are too high with the educational future of students on the line.

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Here, Parent gave no indication to DCPS that she had any concerns with Proposed School after visiting twice, failing to seek action either directly or through her counsel to address the several concerns that months later she articulately describe in the due process hearing for the first time, including the following:

Transportation. At the due process hearing, Parent raised serious concerns about the distance Student would have to travel to Proposed School and Student's inability to take a school bus due to Student's need for hugs and reassurance along the way. While seeming to present a serious barrier to attending Proposed School, just a short inquiry during cross-examination revealed that Parent would be willing to drive Student to school as long as the start time for Student could be adjusted, which would eliminate transportation as a concern for Parent (as long as she otherwise found the school acceptable). This ready solution to a serious problem illustrates the need for details about each concern to be shared and the parties to work together to find solutions, as DCPS sought to do.

Size of Class. A class size of no more than six children was a very important element of Student's IEP. Yet Parent testified that she saw seven children (other than Student) in the Proposed School classroom intended for Student, which was the first time that DCPS had heard a specific number from Parent or Petitioners' counsel. By only raising concerns days later about the class being "too large" and not providing the number of children observed, Monitoring Specialist only received general assurances from Proposed School that Student's classroom would not have too many children. If the specific number had been provided (*i.e.*, in the email Parent sent the day of her visit), Monitoring Specialist could have asked right away to see if there was a more specific explanation that might have reassured Parent. (It is possible to imagine explanations, such as other children having IEPs permitting them to be in a class of eight and the classroom size decreasing when Student arrived due to children shifting classes or the presence of other visitors when Parent was there.) It is also possible that, with more than a dozen people in the classroom by Parent's testimony, Parent might simply have miscounted the children. The undersigned views a miscount as much more likely than Proposed School not meeting this objective requirement of Student's IEP over which extensive negotiations had occurred and which certainly would not have escaped future scrutiny. Further, Monitoring Specialist credibly testified that Proposed School did have a limit of six children for the classroom and that as of 9/25/18, the day after Student was to begin, there were only five children in the classroom where Student was to have been the sixth.

Classroom Noise. Noise was a big concern of Student's IEP, but here again Parent failed to raise her concerns to see what Proposed School could do to address the issue. Parent described the level of noise in the Proposed School classroom as overwhelming for Student, who did not have a smooth time on the classroom visit, as one child triggered Student and Student began yelling back. A Proposed School teacher did offer headphones, which are included in Student's IEP. Adjusting to a new school can be challenging for any child in the best of circumstances, and the school psychologist of Previous School explained at the IEP meeting that learning the ways of new groups and new children was particularly

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difficult for Student. So a visit to a new classroom in which Student encountered challenges does not mean the school was automatically inappropriate, but that the parties need to work through the issues and see what could be done to make the situation viable so Student could get back to school. A trial period may have been necessary to see what Student could get used to as Student settled into a new classroom and got to know the other children. As shown by the children who were reportedly less verbal, Proposed School had the ability to deal with more challenging situations than Student's and needed the chance to work with Parent to get Student in the right situation to become comfortable.

Intellectual/Academic Levels. Finally, Parent was concerned that the intellectual and academic levels of the proposed classroom at Proposed School were well below Student's level, but did not raise the issue at all prior to the due process hearing to see how instruction could be tailored for Student or otherwise addressed, or even if Student might fit better with another class or group at Proposed School. This was an area that was not on Petitioners' counsel's list of concerns, and could have been addressed in various ways if Parent had raised it with Proposed School or Monitoring Specialist, either directly or by providing details through Petitioners' counsel. Holding back until hearing is not appropriate.

The undersigned favorably noted the expertise and exercise of judgment of Monitoring Specialist, the school authority involved with Proposed School personnel in determining that school would be suitable for Student. *See Endrew F.*, 137 S. Ct. at 1001 (deference to school authorities is "based on application of expertise and the exercise of judgment"). Accordingly, this Hearing Officer concludes that on balance DCPS met its burden of persuasion on educational placement, for with suitable adjustments the proposed placement at Proposed School would afford Student the opportunity to attend school and make appropriate progress in Student's circumstances. *See N.W. v. Dist. of Columbia*, 253 F. Supp. 3d 5, 17 (D.D.C. 2017) (school need not perfectly satisfy the IEP, as long as no "material failure"), *quoting James v. Dist. of Columbia*, 194 F. Supp. 3d 131, 139 (D.D.C. 2016).

Issue 2: *Whether DCPS denied Student a FAPE by preventing meaningful parental participation in the placement/location of services decision. (Petitioners have the burden of persuasion on this issue.)*

Petitioners failed to meet their burden of persuasion on this issue, for DCPS did not prevent meaningful parental participation, but affirmatively sought participation.

The IDEA clearly requires parental involvement in "decisions on the educational placement of their child." 34 C.F.R. § 300.327; 34 C.F.R. § 300.116(a)(1) (requiring public agency to ensure that the educational placement decision is made by a group that includes parents); 34 C.F.R. § 300.501(c) (same). Indeed, just as the Supreme Court held in crafting an appropriate program of education, determining a suitable educational placement "contemplates that this fact-intensive exercise will be informed not only by the expertise of school officials, but also by the input of the child's parents or guardians." *Endrew F.*, 137

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S. Ct. at 999. *See also Aikens v. Dist. of Columbia*, 950 F. Supp. 2d 186, 190 (D.D.C. 2013); *A.M. v. Dist. of Columbia*, 933 F. Supp. 2d 193, 198 (D.D.C. 2013).

Here, Parent and Petitioners' counsel had a lengthy IEP meeting over two-days with Student's IEP team in July 2018, in which the numerous aspects of the IEP were addressed and key issues discussed at length. Among other things, there was mention of four possible nonpublic schools that were being considered as potential spots for Student, including Proposed School. That was a time when Parent and Petitioners' counsel could have raised questions or concerns or provided other input about educational placement as desired, but from the testimony and ten pages of IEP meeting notes, they apparently did not do so. Similarly, special education transportation was an issue in the IEP which would have provided a time for Parent or Petitioners' counsel to provide any concerns about the fact that Student apparently had never ridden on a bus and could not handle long trips, but the IEP simply reflects that Student requires transportation on a DOT vehicle. Next on the IEP was Student's eligibility for ESY transportation, which was also included in the IEP meeting notes, but no concerns about such transportation by Parent or Petitioners' counsel were mentioned in the notes.

More specifically, Parent testified that she had concerns about Proposed School from her visits on 9/6/18 and 9/12/18, but sent a cordial email to Monitoring Specialist on 9/12/18 to let her know that Student had been observed at Proposed School and to thank her for the referral, without giving any indication of concern about Proposed School. Parent then went silent. Parent did not correct Monitoring Specialist's positive response on 9/13/18 that she was glad the visit had gone well, and did not respond to Proposed School's request to come in to complete admissions paperwork. Finally, Monitoring Specialist called Parent on 9/17/18 before sending the LOS letter, only to find that Parent rejected Proposed School but refused to talk about why, and directed her to Petitioners' counsel.

In response to an email from Petitioners' counsel the next day, 9/18/18, Monitoring Specialist emphasized that she wanted to hear Parent's concerns, whether that be in writing, by telephone with Petitioners' counsel on the line, or in a meeting with Proposed School. Petitioners' counsel responded two days later to say that he and Parent were happy to discuss the problems. Monitoring Specialist asked how Parents would like to proceed with discussing concerns, but heard nothing further until Petitioners' counsel summarized the concerns four days later on 9/25/18, the day after Student could have begun school at Proposed School. Monitoring Specialist investigated the concerns raised and responded to Parent and Petitioners' counsel on 9/28/18 that Proposed School had reiterated that it was able to implement Student's IEP. Proposed School was also the closest appropriate school to Student's home for purposes of minimizing transportation issues.

At the end of the day, the IDEA only guarantees an opportunity to participate in the placement process, and this Hearing Officer concludes that there was more than sufficient opportunity here for Parent to participate to satisfy the requirement of parental participation. *See Middleton*, 312 F. Supp. 3d at 136 (IDEA guarantees "opportunity to participate" in

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placement process, even though parent ultimately may not agree with decision); *A.M.*, 933 F. Supp. 2d at 199 (noting relevance of support of advocates and receptiveness of DCPS). Procedural requirements were met by the consideration of educational placement at Proposed School or other nonpublic schools being discussed at the July IEP meeting. Because the delays over the months in 2017/18 had kept Student from having an educational placement when school began in September, and only one of the schools accepted Student and could implement Student's IEP in September, it was reasonable for DCPS to move forward as quickly as possible, even while trying to obtain further input and participation from Parent about the proposed placement.

ORDER

Petitioners have not prevailed on any of their claims in this case. Accordingly, **it is hereby ordered that** any and all claims and requests for relief are **dismissed with prejudice**. However, Student remains without an educational placement, so DCPS is encouraged to contact Proposed School promptly to determine if there is now space for Student in a classroom that can implement Student's IEP with fidelity. Parents are strongly encouraged to cooperate in working through any concerns about any proposed classroom(s) with DCPS and nonpublic school(s). If Parents do not cooperate, DCPS should consider whether action is necessary to enforce the requirements of compulsory school attendance.

IT IS SO ORDERED.

Dated in Caption

/s/ *Keith Seat*

Keith L. Seat, Esq.
Hearing Officer

NOTICE OF RIGHT TO APPEAL

This is the final administrative decision in this matter. Any party aggrieved by this Hearing Officer Determination may bring a civil action in any state court of competent jurisdiction or in a District Court of the United States without regard to the amount in controversy within ninety (90) days from the date of the Hearing Officer Determination in accordance with 20 U.S.C. § 1415(i).

Copies to:

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