

**DISTRICT OF COLUMBIA**  
**OFFICE OF THE STATE SUPERINTENDENT OF EDUCATION**  
Office of Dispute Resolution  
810 First Street, N.E., 2<sup>nd</sup> Floor  
Washington, DC 20002

OSSE  
Office of Dispute Resolution  
March 16, 2016

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STUDENT, <sup>1</sup>	)	
through the PARENTS,	)	Hearing Officer: NaKeisha Sylver Blount
<i>Petitioners,</i>	)	
	)	Case No: 2015-0279
v.	)	
	)	<b>Date Issued:</b> March 16, 2016
District of Columbia Public Schools,	)	
<i>Respondent.</i>	)	

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**Hearing Officer Determination**

**SUBJECT MATTER JURISDICTION**

Subject matter jurisdiction is conferred pursuant to the Individuals with Disabilities Education Act (“IDEA”), as modified by the Individuals with Disabilities Education Improvement Act of 2004, 20 U.S.C. Section 1400 et. seq.; the implementing regulations for the IDEA, 34 Code of Federal Regulations (“C.F.R.”) Part 300; Title V, Chapter E-30, of the District of Columbia Municipal Regulations (“D.C.M.R.”); and D.C. Code 38-2561.02(a).

**PROCEDURAL BACKGROUND**

This is a due process complaint (“DPC”) proceeding pursuant to the Individuals with Disabilities Education Act (“IDEA”), as amended, 20 U.S.C. §§1400 *et seq.*

The DPC was filed on August 21, 2015 by Petitioners (Student’s parents), residents of the District of Columbia, against Respondent, District of Columbia Public Schools (“DCPS”). On August 31, 2015, Respondent filed its timely Response, denying that Respondent denied Student a free appropriate public education (“FAPE”).

The parties convened a Resolution Session Meeting (“RSM”) in this matter on September 3, 2015. The parties did not reach an agreement during the RSM; however, they agreed to keep the resolution process open for the entire 30-day resolution period. The undersigned Impartial Hearing Officer (“IHO” or “Hearing Officer”) held a Pre-hearing Conference (“PHC”) on September 8, 2015, during which the parties discussed and clarified the issues and the requested relief. At the PHC, the parties agreed that five-day disclosures would be filed by December 8, 2015 and that the DPH would be held on December 15, 2015 and December 16, 2015. The PHC was summarized in the Pre-Hearing Conference Summary and Order (the “PHO”) issued on September 8, 2015, amended on November 3, 2015.

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<sup>1</sup> Personal identification information is provided in Appendix A.

## Hearing Officer Determination

The 45-day timeline for the Hearing Officer's Determination ("HOD") in this matter originally began to run on September 21, 2015 and was set to conclude on November 4, 2015. However, on October 16, 2015, Petitioners filed an amended DPC, resulting in the DPH timeline beginning anew on October 16, 2015, set to conclude on December 31, 2015. At the start of the second day of what had been scheduled as a two-day DPH, subsequent to Petitioners resting their case in chief and prior to Respondent calling its first witness, Petitioners orally and via a brief document requested recusal of the Hearing Officer. The DPH was recessed at Petitioners' request, so they could file a formal written motion. On December 16, 2015, Petitioners filed two pleadings arguing that the Hearing Officer had a lack of understanding of how to enforce the Standard Operating Procedures and/or demonstrated a bias toward the Respondent. On December 17, 2015, Respondent filed an opposition to the requests for disqualification, asserting that Petitioners interrupted the proceedings unnecessarily, and in a manner that prejudices Respondent. On December 18, 2015, the Hearing Officer denied the motion to disqualify, and the matter proceeded to the Chief Hearing Officer for review and consideration. On December 24, 2015, the Chief Hearing Officer issued an order denying the motion for disqualification, finding that Petitioners' claims of incompetence and/or bias were not substantiated, and indicating that there was no reason to further delay or change the direction of the proceedings. On December 18, 2016, the Chief Hearing Officer granted Petitioners' motion for continuance and set the HOD deadline for February 10, 2016. The second day of the DPH was scheduled to resume on January 22, 2016; however, on January 20, 2016, the parties mutually agreed not to resume the DPH on January 22, 2016, due to an anticipated major snow storm. The parties tentatively (pending each party confirming availability of their participants) agreed to reconvene the second day of the DPH on January 29, 2016, which would not have necessitated an additional continuance in order for the Hearing Officer to issue the HOD by February 10, 2106. On January 28, 2016, prior to either party confirming availability, Respondent indicated that one of its witnesses would be unavailable on January 29, 2016 due to the witness' child's school being closed. Counsel for Petitioners indicated that Petitioners would not object to not going forward on January 29, 2016. On February 1, 2016, the parties agreed that March 2, 2016 was a mutually agreeable date on which to resume the due process hearing. On February 1, 2016, counsel for Petitioners indicated that Petitioners would in fact oppose Respondent's continuance motion. On February 9, 2016, the Chief Hearing Officer granted Respondent's motion for continuance, setting the second date of the DPH to resume on March 2, 2016, setting the HOD deadline for March 16, 2016, and indicating that no further continuances would be granted in this matter.

The DPH was held on December 15, 2015, briefly on December 16, 2015, and on March 2, 2016 at the Office of Dispute Resolution, 810 First Street, NE, Room 2006. Petitioner elected for the hearing to be closed. Petitioners were represented by [PETITIONERS' COUNSEL A], Esq. and [PETITIONERS' COUNSEL B], Esq. and DCPS was represented by [RESPONDENT'S COUNSEL], Esq.

Petitioner's and Respondent's disclosures were timely filed. At the DPH, Petitioner's exhibits P-1 through P-73 were admitted without objection. Respondent's exhibits R-1 through R-65 and R-67 were admitted without objection. Respondent's exhibit R-66 was admitted over Petitioners' objection. On March 2, 2016, Petitioners sought to have supplemental disclosures admitted, which they had filed and served on February 24, 2016. Respondent objected to the admission of the supplemental disclosures, as Petitioners had rested their case in chief on

December 15, 2016. Petitioners requested the opportunity to provide authority to the Hearing Officer in support of their argument that the supplemental disclosures should be permitted. The Hearing Officer took under advisement the request for the admission of supplemental disclosures. Having reviewed the citation Petitioners' provided in support of their request, *Letter to Steinke*, 18 IDELR 739 (OSEP 1992), supplemental disclosures P-74 and P-75 are not admitted, as Petitioners had rested their case when the documents were offered, and they were not offered as rebuttal evidence.

Petitioners called the following witnesses at the DPH:

- (a) Parent
- (b) Educational Consultant<sup>2</sup>
- (c) Special Education Teacher (Nonpublic School)<sup>3</sup>
- (d) Social Worker (Nonpublic School)<sup>4</sup>

Respondent called the following witnesses at the DPH:

- (a) DCPS Program Specialist for the Education Support Team ("Program Specialist")<sup>5</sup>
- (b) Special Education Coordinator (District School)<sup>6</sup>
- (c) Special Education Teacher (District School)<sup>7</sup>
- (d) Resolution Specialist

Petitioners and Respondent gave oral closing arguments.

### ISSUES

As discussed at the PHC and reflected in the PHO, the following issue was presented for determination at the DPH.

- (a) Whether DCPS denied Student a FAPE by failing to propose an appropriate educational program for him on July 22, 2015, including by proposing an IEP that fails to include a sufficient amount of specialized instruction.
- (b) Whether DCPS denied Student a FAPE on July 22, 2015, by failing to propose an appropriate placement for him.
- (c) Whether DCPS denied Student a FAPE by failing to propose a location of services that could implement his IEP as of the start of the 2015-2016 school year.
- (d) Whether DCPS denied the student a FAPE by failing to allow the student's educational advocate to observe the student's proposed placement at District School, at Parents' requests in October 2015.

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<sup>2</sup> Qualified as an expert in programming and placement for special education students, without objection.

<sup>3</sup> Qualified as an expert in programming and placement for special education students, without objection.

<sup>4</sup> Qualified as an expert in social work, without objection.

<sup>5</sup> Qualified as an expert in special education programming and placement, with an emphasis in working with students with autism spectrum disorder, over Petitioners' objection.

<sup>6</sup> Qualified as an expert in special education programming and placement, without objection.

<sup>7</sup> Qualified as an expert in special education programming and placement, with an emphasis in specialized instruction for students on the autism spectrum, without objection.

### **RELIEF REQUESTED**

Petitioners requested the following relief:

- (a) an Order that DCPS place and fund Student at Nonpublic School for the 2015-2016 school year, with all related fees and costs.

### **FINDINGS OF FACT**

1. Student is [AGE] years old, and is [GRADE] grade student. Student resides with his Petitioners/Parents in Washington, D.C. and is eligible for special education and related services under the disability classification "Autism Spectrum Disorder."<sup>8</sup>
2. Student has difficulty with reading and the language process. His working memory and processing speed are impaired, and needs time and minimal distractions in order to complete tasks.<sup>9</sup>
3. Student needs to receive instruction individually or in a small group setting, with frequent teacher prompts and check-ins, peer and adult models and visual cues.<sup>10</sup> When prompted to answer questions, it may take him several tries to do so. He sometimes requires visual aids to answer questions.<sup>11</sup>
4. Student has made academic progress at Nonpublic School in reading comprehension, reading decoding, mathematics, and written expression; however, he continues to have needs in each of these areas.<sup>12</sup>
5. Student has made social emotional progress while at Nonpublic School, as evidenced by more smiling and asking the teacher questions when he does not understand, engaging with others and gaining friendship skills. However, he continues to need support in these areas, including with adult prompting during instructional periods and social interactions.<sup>13</sup>

### ***Nonpublic School***

6. Nonpublic School offers small, structured classroom settings.<sup>14</sup>
7. Nonpublic School has students from preschool through twelfth grade. All of its students are special education learners. Most of its students have language based learning differences, and a majority of its students are on the autism spectrum.<sup>15</sup>

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<sup>8</sup> Testimony of Parent; P-53; P-69.

<sup>9</sup> Testimony of Educational Consultant; P-10-10; P-18.

<sup>10</sup> Testimony of Social Worker (Nonpublic School); R-65-20.

<sup>11</sup> Testimony of Program Specialist.

<sup>12</sup> Testimony of Special Education Teacher (Nonpublic School); testimony of Educational Consultant] P-70; P-73.

<sup>13</sup> Testimony of Special Education Teacher (Nonpublic School); testimony of Educational Consultant; testimony of Social Worker (Nonpublic School). P-67.

<sup>14</sup> Testimony of Social Worker (Nonpublic School).

<sup>15</sup> Testimony of Special Education Teacher (Nonpublic School).

8. Nonpublic School has related service providers on staff at all times to provide occupational therapy, social work support, and physical therapy. It provides its students related services on a pullout/push-in model whereby it teaches students the skills they need right in the classroom setting, as well as pull the students out of the classroom setting for services.<sup>16</sup>

9. Nonpublic School has a certificate of approval from the Office of State Superintendent of Education.<sup>17</sup>

10. At Nonpublic School, Student is a part of a class with nine students. There are two special education teachers assigned to the classroom.

11. During specials at Nonpublic School, a related service provider and/or teaching assistant, along with a content provider is with the students. There is generally not a special education teacher with the students during specials.<sup>18</sup>

12. At Nonpublic School, students receive adult support during lunch and recess. As of the July 22, 2015 IEP meeting DCPS, social workers and speech language therapists provided support to the students during these times.<sup>19</sup> As of the 2015-2016 school year, a special education teacher also supports the students during lunch and recess; however, DCPS was not advised of this change in approach.<sup>20</sup>

13. When Student arrives at Nonpublic School each morning, staff are positioned in the hallways when he comes through the door, and they help prompt him to give appropriate morning greetings, which he is getting better at remembering to do on his own.<sup>21</sup>

***July 22, 2015 IEP Meeting and IEP***

14. On July 22, 2015, DCPS convened an IEP meeting that was ordered by an HOD issued a previous hearing officer issued on May 29, 2015 (“May 2015 HOD”). The May 2015 HOD ordered that DCPS reimburse Parents for Student’s attendance at Nonpublic School for the 2014-2015 school year, that DCPS convene an IEP meeting to review and revise Student’s IEP to provide occupational therapy and full time special education services, and that if DCPS “provides a less restrictive placement for the Student that can implement the full time IEP for the 2015-2016 school year, the [IEP] team shall develop a transition plan for the Student.” The May 2015 HOD stated that “[m]ost full time programs provided by DCPS are 27.5 ours of specialized instruction and related services per week.”<sup>22</sup>

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<sup>16</sup> *Id.*

<sup>17</sup> *Id.*

<sup>18</sup> *Id.*

<sup>19</sup> P-53A-2.

<sup>20</sup> Testimony of Special Education Teacher (Nonpublic School).

<sup>21</sup> *Id.*

<sup>22</sup> P-49-12.

15. DCPS proposed a July 22, 2015 IEP (“proposed IEP”) for Student that included 24.5 hours per week of specialized instruction outside the general education setting, 240 minutes per month of speech-language pathology outside the general education setting, 240 minutes per month of behavioral support services outside the general education setting, and 240 minutes per month of occupational therapy services outside the general education setting.<sup>23</sup>

16. The July 22, 2015 proposed IEP did not indicate that Student would receive support for lunch and recess, as DCPS generally takes the position that lunch and recess will not be included on a student’s IEP unless the student has goals specific to those time periods. The proposed IEP for Student does not include any goals specific to lunch and/or recess; however, some of Student’s social emotional goals could appropriately be worked on during lunch and/or recess.<sup>24</sup> The proposed IEP includes specials in the 24.5 hours, though Student does not have goals specific to the specials.<sup>25</sup>

17. Educational Consultant and staff from Nonpublic School participated in the July 22, 2015 IEP meeting, along with Parent, and contributed their opinions on Student’s goals. As a result, Student’s IEP team modified his goals during the meeting.<sup>26</sup>

18. Student’s IEP team reached general consensus on the goals and objectives in his the proposed IEP. They also reached general consensus on the fact that Student needed support during lunch and recess. However, they disagreed as to whether the time Student would spend in lunch and recess needed to be reflected as service hours on his IEP, with staff from Nonpublic School, Educational Consultant, and Parents believing that lunch and recess hours did need to be reflected on Student’s IEP.<sup>27</sup>

### ***DCPS Proposed School Settings***

19. Approximately a week after the July 22, 2015 IEP meeting, DCPS proposed to Parents City School and District School as potential school settings for Student.<sup>28</sup>

20. In August 2015, Educational Consultant had detailed conversations with the principal of City School and the special education chair of District School.<sup>29</sup>

21. On September 21, 2015, Educational Consultant visited District School with Parent to learn about the proposed CES classroom.<sup>30</sup> Based on this visit, Educational Consultant had several concerns regarding District School, including that: (a) there are a large number of students entering the building each day through the same door, which would be difficulty for Student due to his poor social interaction with peers and difficulty interacting properly with

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<sup>23</sup> P-53-18; R-65-19.

<sup>24</sup> Testimony of Program Specialist; P-53-13 through P-53-15; R-65-14 through R-65-16.

<sup>25</sup> Testimony of Program Specialist.

<sup>26</sup> Testimony of Educational Consultant.

<sup>27</sup> Testimony of Educational Consultant; testimony of Special Education Teacher (Nonpublic School).

<sup>28</sup> Testimony of Educational Consultant; P-55.

<sup>29</sup> Testimony of Parent; P-59.

<sup>30</sup> P-63.

students he perceives to invade his personal space; (b) Student would have difficulty eating lunch in the lunch room without adult support, due to his poor social skills; due to the large student-teacher ratio for general education specials; (c) Student would need self-contained specials and, while District School could offer them, Student would be the only one in the self-contained specials classes; (d) some of the CES students were reading above Student's grade level.<sup>31</sup>

22. On October 5, 2015, Educational Consultant requested to visit City School on behalf of Parents and Student. On October 6, 2015, DCPS denied the request, stating "Unfortunately, we cannot allow anyone who is not the parent/guardian and has been named as a potential witness to a due process hearing to observe our students. We would be happy to set up an observation for the parent or for you after the hearing has concluded."<sup>32</sup>

23. There are 76 Communication and Education Support ("CES classrooms") self-contained classroom throughout DCPS. All CES students are students with disabilities with full time IEPs. District School's CES classrooms have been in existence for at least six years. District School has 3 CES classrooms. One of these classrooms was presented to Student's parents to consider.<sup>33</sup>

24. The CES classroom can implement a 27.5 hour IEP, such as Student's.<sup>34</sup>

25. In the CES classroom, students are supported during lunch and recess. They have a paraprofessional with them during these times.<sup>35</sup>

26. There are three CES classrooms at District School, segmented by age groupings. Most of the students in the CES classrooms mostly fall on the autism spectrum. Some are classified with ("Other Health Impairment").<sup>36</sup>

27. The maximum number of students in the CES classroom for Student's age group is eight students. During the 2015-2016 school year, the CES classroom for Student's age group at one point had a total of five students, but currently has a total of four students. However, only two of the students are in the CES classroom for the full day. The two part-time CES students only join the classroom in the morning for reading and mathematics instruction.<sup>37</sup>

28. Throughout the full day (even when only the two full-time students are in the classroom), a special education teacher and two paraprofessionals are assigned to the CES classroom. The paraprofessionals support the students at the teacher's direction.<sup>38</sup>

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<sup>31</sup> Testimony of Educational Consultant; testimony of Parent; P-63-2.

<sup>32</sup> P-65-3.

<sup>33</sup> Testimony of Program Specialist.

<sup>34</sup> Testimony of Special Education Coordinator (District School).

<sup>35</sup> Testimony of Program Specialist.

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

<sup>37</sup> *Id.*

<sup>38</sup> *Id.*

29. The students in the CES classroom participate in specials and recess with their non-disabled peers. District School has the flexibility to allow a CES student to participate in specials and recess in a self-contained setting; however, at present Student would be the only student utilizing that option, which would mean he would be participating in specials and recess alone.<sup>39</sup>

30. Both paraprofessionals accompany the CES students to their specials in the general education setting. During recess the teacher as well as the two paraprofessionals accompany the two CES students. Depending on the needs and level of functioning of each student, the adults supporting them will give them space to explore their relationships with their nondisabled peers, or they will prompt them toward some of their social emotional IEP goals, such as connecting with peers during specials and recess. Specials and recess occur during the period during the school day when there are currently two students in the class and three adults. The regular class ratio for specials is one teacher for nine students; however, the two paraprofessionals remain with the two CES students, which means they have direct support during specials. Students would also go into the general education setting for periodic assembly presentations, with support from their teacher and paraprofessionals.<sup>40</sup>

31. Students in the CES students each lunch in their classroom, away from the general education setting. If a parent preferred, their CES student could eat lunch in the general education setting.<sup>41</sup>

32. The CES special education teacher is in the classroom each morning prior to the school day starting. If a student would have trouble entering the building alongside a large number of other students, the student could be brought to the CES classroom as early as 8:05 a.m. Staff from the three CES classrooms is available to meet arriving students in the hallway beginning at 8:30 a.m. The CES classroom has worked with students with poor communication skills and who feel a strong need for personal space, and has been able to successfully help them enter and exit the building.<sup>42</sup>

33. The CES classroom has prompting available, starting with the least intrusive prompt (such as pointing) and then moving as needed to the most restrictive prompt (such as moving the student's hand).<sup>43</sup>

34. Students in the CES classroom receive their related services outside the general education setting, either in their classroom or in the related service provider's office.<sup>44</sup>

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<sup>39</sup> Testimony of Special Education Coordinator (District School); testimony of Special Education Teacher (District School).

<sup>40</sup> Testimony of Special Education Teacher (District School).

<sup>41</sup> Testimony of Special Education Coordinator (District School); testimony of Special Education Teacher (District School).

<sup>42</sup> Testimony of Special Education Teacher (District School).

<sup>43</sup> Testimony of Program Specialist.

<sup>44</sup> *Id.*

35. At least one student in the CES classroom is regularly taught reading using the whole-word reading method; however, decoding is also taught in the classroom, and each student is taught in the manner best suited to their learning needs.<sup>45</sup>

36. Student has never attended or enrolled District School.<sup>46</sup>

### CONCLUSIONS OF LAW

“Based solely upon evidence presented at the hearing, an impartial hearing officer shall determine whether the party seeking relief presented sufficient evidence to meet the burden of proof that the action and/or inaction or proposed placement is inadequate or adequate to provide the student with a FAPE.” 5 D.C.M.R. E-3030.3. The burden of proof in an administrative hearing is properly placed upon the party seeking relief. *Schaffer v. Weast*, 546 U.S. 49 (2005). Through documentary evidence and witness testimony, the party seeking relief must persuade the impartial hearing officer by a preponderance of the evidence. DCMR 5-E3022.16; *see also*, *N.G. v. District of Columbia*, 556 F.Supp.2d 11, 17 n.3 (D.D.C. 2008).

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 student’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).

**(a) Whether DCPS denied Student a FAPE by failing to propose an appropriate educational program for him on July 22, 2015, including by proposing an IEP that fails to include a sufficient amount of specialized instruction.**

At a minimum, an IEP must “provide personalized instruction with sufficient support services to permit the child to benefit educationally from that instruction.” *Reid ex rel. Reid v. District of Columbia*, 401 F.3d 516, 519 (D.C.Cir.2005), quoting *Bd. of Educ. of the Hendrick Hudson Cent. Sch. Dist., Westchester County v. Rowley*, 458 U.S. 176, 203, 102 S.Ct. 3034, 73 L.Ed.2d 690 (1982). While an LEA is not required to maximize a student’s educational potential, it also cannot “discharge its duty under the by providing a program that produces some minimal academic advancement, no matter how trivial.” *Hall ex rel. Hall v. Vance County Bd. of Educ.*, 774 F.2d 629, 636 (4th Cir.1985). The July 22, 2015 IEP challenged in this action was ordered to be developed by way of a previous HOD (“the May 2015 HOD”). The May 2015 HOD, which ordered DCPS to provide a full-time IEP for Student HOD, contemplated the possibility that DCPS might define “full-time” as 27.5 hours per week, rather than 32.5 hours per week as Nonpublic School defines it. The July 22, 2015 IEP provides all of Student’s instruction, including specials, outside the general education setting.

It does not provide lunch and recess outside the general education setting. Student does require support during lunch and recess periods, not necessarily because he would suffer harm

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<sup>45</sup> Testimony of Special Education Teacher (District School).

<sup>46</sup> Stipulation of the parties.

through exposure to nondisabled peers, but because without support, his social skills are not strong enough at this point for him to engage with peers. Student's IEP would have been more complete if it indicated Student's need for social skills support during lunch and recess. However, the IEP does not fail to meet the *Rowley* standard, in that it would permit Student to benefit educationally from his instruction. Student would receive all his academic instruction in a small, structured, highly specialized learning environment with students of compatible learning needs. He would have a great deal of adult support, and the instruction would be differentiated to meet his individual needs. Even if the Hearing Officer had found the IEP to be so deficient as to violate the IDEA, it would not have risen to a substantive violation, because at District School it would have been implemented in an environment that provided tremendous support at every phase of the school day.

Students eat lunch in their classroom with only their special education peers. Though the other CES students have their specials in a general education setting, the specials classes are still small (with approximately nine students), and the students have the support of their two paraprofessionals throughout the specials classes. At Parents discretion, Student could have his specials in a self-contained setting. The CES students have recess with the support of their special education teacher and two paraprofessionals. For these reasons, the Hearing Officer would not have found that Student's right to a FAPE would have been impeded, that Parents' opportunity to participate in the decision-making process regarding the provision of a FAPE to their child would have been impeded, or that Student would have had a deprivation of educational benefit, even if the IEP had violated the IDEA. Petitioners did not meet the burden of proving that DCPS denied Student a FAPE by failing to propose an appropriate educational program for him on July 22, 2015, including by proposing an IEP that fails to include a sufficient amount of specialized instruction.

**(b) Whether DCPS denied Student a FAPE on July 22, 2015, by failing to propose an appropriate placement for him.**

To the extent that a student's IEP is appropriate, his educational placement (location of services) is also appropriate, if it is able to implement the terms and conditions of the IEP. *O.O. ex rel. Pabo v. District of Columbia*, 573 F.Supp.2d 41, 55 (D.D.C.2008) (Where a student's IEP was adequate, a school capable of implementing the IEP was an appropriate placement.) Though Student's IEP would have been strengthened by specifying that Student requires adult support during lunch and recess, the Hearing Officer has not found Student's IEP to violate the IDEA. Even if it had, as indicated above, the CES classroom at District School was a highly appropriate location for Student, including because it provides tremendous support for its students throughout the entire school day, including during academic instruction, lunch, recess and specials. District School's CES classroom can even support students like Student with entering the building smoothly, as CES staff are available to meet student in the hallway on arrival, and the CES special education teacher is available to receive Student in her classroom before the school day begins. Petitioners did not meet the burden of proving that DCPS denied Student a FAPE on July 22, 2015, by failing to propose an appropriate placement for him.

**(c) Whether DCPS denied Student a FAPE by failing to propose a location of services that could implement his IEP as of the start of the 2015-2016 school year.**

The CES classroom at District School can fully implement Student's July 22, 2015 IEP, providing all of his academic instruction and specials outside the general education setting. The fact that Student would have to take his specials with no other students present in order to have them outside the general education setting was a source of concern for the Hearing Officer. However, Parents would also have the opportunity to choose to allow Student to participate in specials as the CES students do, in small classes with their general education peers, with a great deal of direct support from their paraprofessionals the entire time. The first option (self-contained specials alone) complies with the letter of Student's IEP. The second option (general education specials with significant support) is more in line with the spirit of Student's IEP and would not represent a "substantial or significant" deviation from Student's IEP." See *Catalan ex rel. E.C. v. District of Columbia*, 478 F. Supp. 2d 73, 75 (D.D.C. 2007), *aff'd sub nom. E.C. v. District of Columbia*, No. 07-7070 (D.C.Cir. Sept. 11, 2007). To the extent that an IEP deviation is not a material deviation (is *de minimus*), there must be a finding that Student would have suffered educational harm from the deviation. *Wilson v. District of Columbia*, 770 F. Supp. 2d 270 (D.D.C. 2011). In this instance, the Hearing Officer would not have found educational harm, because Parents have the option to choose the singular self-contained specials or well-supported, small, structured general education specials. The second option would actually be more likely to help Student strengthen his social skills. Petitioners did not meet the burden of proving that DCPS denied Student a FAPE by failing to propose a location of services that could implement his IEP as of the start of the 2015-2016 school year.

**(d) Whether DCPS denied the student a FAPE by failing to allow the student's educational advocate to observe the student's proposed placement at District School, at Parents' requests in October 2015.**

D.C. Code § 38-2571.03(5), which went into effect in March 2015, indicates that "[u]pon request, an LEA shall provide timely access" to observe "a current or proposed special education program" to certain individuals including parents of a child with a disability, or a designee appointed by the parent of a child with a disability who has professional expertise in the area of special education being observed. While Parents' expert did observe District School, DCPS did not allow Parents' expert to observe City School in October 2015, which violates the statute. However, a finding of a denial of FAPE must be based on substantive grounds. Nothing in the record leads the Hearing Officer to the conclusion that Educational Consultant would have counseled Parents to conclude that City School was appropriate for Student, especially since the school year was already in full swing at the time the observation request was denied in October 2015, and the instant DPC was already pending. Parents themselves were not precluded from observing City School, and Educational Consultant had obtained some detailed information about City School in a phone conversation with its principal in August 2015. Therefore, in this instance, the Hearing Officer does not conclude that the lack of opportunity for Educational Consultant to observe City School at Parents' request impeded Student's right to a FAPE; significantly impeded Parents' opportunity to participate in the decision-making process

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regarding the provision of a FAPE to Student; or caused a deprivation of educational benefit. Petitioners did not meet the burden of proof on this issue.

**ORDER**

As no denial of FAPE is found, all relief Petitioners requested in the complaint is **DENIED**, and the DPC is dismissed with prejudice.

**IT IS SO ORDERED.**

Date: March 16, 2016

**/s/ NaKeisha Sylvester Blount**  
Impartial Hearing Officer

Copies to:

Petitioners (by U.S. mail)

Petitioners' Attorneys (electronically)

DCPS' Attorney (electronically)

Chief Hearing Officer Virginia Dietrich, Esq. (electronically)

OSSE-SPED (electronically)

ODR (electronically)

**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).