

**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
March 21, 2019

<i>Student</i> , ¹)	Case No.: 2018-0338
through <i>Parents</i> ,)	
<i>Petitioners</i> ,)	Date Issued: 3/21/19
)	
v.)	Hearing Officer: Keith L. Seat, Esq.
)	
District of Columbia Public Schools)	Hearing Date: 3/11/19
("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 appropriate placement/location of services and the process lacked meaningful parental participation. DCPS responded that it had twice provided appropriate locations of services and welcomed 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 12/20/18, the case was assigned to the undersigned on 12/21/18. Respondent filed a response on 1/2/19 which did not challenge jurisdiction. The resolution meeting took place on 1/18/19, but the parties neither settled the case nor terminated the 30-day resolution period, which ended on 1/19/19. A

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

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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 3/25/19.

The due process hearing took place on 3/11/19 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 3/4/19, contained documents P1 through P29, of which Petitioners’ counsel offered only P1 through P8 and P14 through P29, all of which were admitted into evidence over specified objections. Respondent’s Disclosures, submitted on 3/4/19, contained documents R1 through R16, which were admitted into evidence over specified objections.

This case is very similar to a previous case between the parties heard on 1/2/19 by the undersigned, with an HOD issued on 1/11/19. The current case is about the appropriateness of *Second Proposed School* for Student, while the prior case was about the appropriateness of *First Proposed School*. At the March hearing for the present case, the parties stipulated to four paragraphs of background facts in their entirety from the 1/11/19 HOD, which are the first four paragraphs in the Findings of Fact, below.

Petitioners’ counsel presented 2 witnesses in Petitioners’ case-in-chief (*see* Appendix A):

1. Parent
2. *Monitoring Specialist* at DCPS

Respondent’s counsel presented 2 witnesses in Respondent’s case (*see* Appendix A):

1. Monitoring Specialist at DCPS (qualified over objection as an expert in Special Education Programming and Placement)
2. *Director of Education* at Second Proposed School

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.”*

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

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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. 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 provide Parents all of Student's education records.
4. DCPS shall (a) provide appropriate compensatory education for any denial of FAPE 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).³
5. Any other just and appropriate relief.

Findings of Fact

After considering all the evidence, as well as the arguments of both counsel, the Findings of Fact⁴ 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. Student is *Age*, *Gender* and in *Grade*, but has not attended school in 2018/19. Student has a disability classification of Autism Spectrum Disorder. Student previously attended *Previous School* for multiple years; Previous School did not have an intensive autism program available to continue serving Student.⁵

³ 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). DCPS disagrees with subpart (b) pursuant to IDEA.

⁴ Footnotes in these Findings of Fact refer to stipulated facts, 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.

⁵ The parties stipulated to all facts in this paragraph, which were from the 1/11/19 HOD.

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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. 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. The IEP also provides for a dedicated aid six hours/day and for special education transportation on a DOT vehicle. 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.⁶

3. 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.⁷

4. 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. On 8/1/18, Monitoring Specialist circulated the final IEP and indicated she was sending referrals to three nonpublic schools, including First Proposed School.⁸ Monitoring Specialist asked Parents and Petitioners' counsel if there were other schools that they were interested in. Petitioners' counsel responded on 8/8/18, promising to respond quickly to any schools that contact Petitioners, but not suggesting any preferred schools.⁹

5. At the IEP meeting, there was some discussion of four nonpublic schools that DCPS was focusing on as the best options for Student, including First Proposed School but not Second Proposed School.¹⁰ During the IEP meeting, there was lively discussion about the location of schools and how Baltimore would be too far; there was no objection to a school in Rockville, Maryland as being too far.¹¹ The Rockville location was found on Google

⁶ The parties stipulated to all facts in this paragraph, which were from the 1/11/19 HOD; P5.

⁷ The parties stipulated to all facts in this paragraph, which were from the 1/11/19 HOD. Audio recordings made by Petitioners' counsel of the IEP meeting on 7/10/18 and 7/13/18 were offered and admitted in the current due process hearing, but were not offered in the prior due process hearing; in reviewing key portions of the IEP meeting, the undersigned found the notes to be accurate. P27; P28.

⁸ In the 1/11/19 HOD, First Proposed School was the focus of the case and referred to in that decision as simply "Proposed School."

⁹ The parties stipulated to all facts in this paragraph, which were from the 1/11/19 HOD.

¹⁰ P24-108; P27 (audio recording at about 2:35).

¹¹ P24-108,109,110; P27 (audio recording at about 2:36).

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maps at the meeting and determined to be 26 minutes from Previous School, which brought no objection or further discussion about transportation by Parent or Petitioners' counsel.¹² Parent testified that Previous School was about 10-15 minutes away from home.¹³ In the IEP meeting, school personnel stated that the IEP would need to be amended after 30 days at a new school for any needed changes as a routine matter.¹⁴

6. Second Proposed School. Second Proposed School emailed Parents on 9/6/18 seeking to set up a phone behavior intake interview, which Parent arranged promptly.¹⁵ Parent visited Second Proposed School one time and took Student.¹⁶

7. Director of Education viewed Student as a good candidate for the program at Second Proposed School and considered Second Proposed School a good fit for Student's IEP.¹⁷ Second Proposed School students are all on the autism spectrum and some have other disability classifications as well; they function at different levels.¹⁸ Student comes within the type of children that Second Proposed School deals with; Second Proposed School could meet Student's needs both behaviorally and academically; Second Proposed School is not able to accept all children due to behaviors they present.¹⁹

8. Director of Education believed that Parent had a positive reaction to her visit at Second Proposed School, with the only concern being whether Second Proposed School offered diplomas or only certificates, which would not be an issue for Student for many years given Student's early grade.²⁰ Director of Education explained that Second Proposed School is set up to offer only certificates and not diplomas to its students.²¹

9. Student's IEP was reviewed by Director of Education and the Board Certified Behavior Analyst ("BCBA") and they had no concerns about servicing the IEP; Student's

¹² P24-110,112; P27.

¹³ Parent.

¹⁴ P24-111; P27.

¹⁵ P15-1.

¹⁶ Parent.

¹⁷ Director of Education.

¹⁸ *Id.*

¹⁹ *Id.*

²⁰ Director of Education; Monitoring Specialist (understood that Parent's visit to Second Proposed School went well).

²¹ Director of Education. Parent testified that she asked about the academic and intellectual levels of the other children in Student's proposed class at Second Proposed School and was told by Director of Education that they had "no grade level and no intellectual ability," and that Director of Education further stated that since Student did have intellectual ability, Second Proposed School was not the right school for Student. Based on logic and his testimony generally, the undersigned does not find it credible that Director of Education would both accept Student and make a statement about Second Proposed School not being the right school for Student, nor that he would denigrate other children at the school as having no intellectual ability.

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IEP could be fully implemented at Second Proposed School.²² Monitoring Specialist believed that Second Proposed School could offer FAPE to Student.²³ On 10/18/18, Monitoring Specialist emailed Second Proposed School's 10/17/18 acceptance letter of Student along with the 10/18/18 DCPS location of services ("LOS") letter to Parents.²⁴ The LOS letter stated that Second Proposed School had been selected for Student based on evaluations, IEP, IEP progress reports and education records, as well as the programming offered by Second Proposed School.²⁵

10. At the 10/30/18 resolution meeting in the prior case, Parent was notified that the anticipated start date at Second Proposed School was 11/12/18 and that the spot would be held for Student for 30 days.²⁶ For Student to have transportation set up by OSSE for 11/12/18, Parent or Petitioners' counsel needed to provide notice by 11/7/18 that Student would attend Second Proposed School.²⁷ Director of Education received nothing from Parent or Petitioners' counsel.²⁸ DCPS received no response from Parent, so transportation was not set up; the only notice that Parent was rejecting Second Proposed School was the filing of the due process complaint in this case.²⁹

11. Class Size. Student's IEP team extensively discussed the maximum number of children acceptable in Student's classroom and the IEP (to which Parent agreed) provides a maximum classroom size of six students.³⁰ Parent testified that she "agreed generally" to six children in Student's class and was willing to try a class of six, but "in reality" doesn't think Student can participate in a class that large.³¹ Parent testified that Student barely tolerates four children, so she does not think it will make a difference whether there are five, six, or seven children in Student's class.³² Parent met with DCPS to pursue more academic testing/data and is in the process of trying to get new evaluations from private providers.³³

12. Director of Education credibly testified that at the time Student visited there were four children in the class that would be the best fit for Student with other children of similar ability levels; by the time of the hearing there were five children in the class, so Student would be the sixth.³⁴ Parent testified that when she visited there were seven children in the

²² Director of Education.

²³ Monitoring Specialist.

²⁴ P17-1; P7-1; R10-1.

²⁵ P7-1.

²⁶ R10-3.

²⁷ *Id.*

²⁸ Director of Education.

²⁹ Monitoring Specialist.

³⁰ P5-21; Monitoring Specialist.

³¹ Parent.

³² *Id.*

³³ *Id.*

³⁴ Monitoring Specialist.

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class Student would attend, so with Student there would be eight, plus each child had a dedicated aide.³⁵

13. Class Noise. Parent testified that most of the kids in the Second Proposed School classroom for Student were nonverbal and could not communicate except by making noises.³⁶ Student is very sensitive to noise, so was disturbed by the other children and didn't want to be in the class.³⁷ Director of Education credibly testified that most of the children in the class for Student were very verbal; only one was nonverbal and vocalized as well as used voice output hardware that can speak words.³⁸

14. Student's IEP provides specific guidelines on noise that must be implemented.³⁹ In seeking an appropriate school for Student, detailed information is sent out so each school team is aware of Student's needs and the recommendations for Student, including noise; Monitoring Specialist reviewed Student's IEP closely with the Monitor for Second Proposed School and confirmed that Second Proposed School could meet Student's IEP; specifically, Second Proposed School can provide noise-cancelling headphones, as required.⁴⁰ Schools are able to implement IEPs if they accept students; if they can't implement the IEPs they send out denial letters.⁴¹

15. Transportation. It took a little over an hour for Parent to drive Student from home to visit Second Proposed School, as she had to stop several times for Student due to motion sickness and resulting stomach pain.⁴² Parent has asked Student's pediatrician for medication and was told that nothing would help, so Parent should find a nearby school for Student.⁴³ Parent testified that she didn't recall whether she mentioned motion sickness in the January hearing, but acknowledged that she had never told DCPS about Student's motion sickness outside a hearing.⁴⁴

16. Parent also testified that the longer Student is in the car the more Student has tantrums, shakes and cries and is hard to calm.⁴⁵ A minimum of two stops would be required to drive Student 30-45 minutes to school, with each stop lasting an average of 10 minutes.⁴⁶ Google maps on 3/4/19 indicated that leaving around 8:15 AM it would typically take 40 to 65 minutes to drive from Student's home to Second Proposed School; returning

³⁵ Parent.

³⁶ *Id.*

³⁷ *Id.*

³⁸ Director of Education.

³⁹ Monitoring Specialist.

⁴⁰ *Id.*

⁴¹ *Id.*

⁴² Parent.

⁴³ *Id.*

⁴⁴ *Id.*

⁴⁵ *Id.*

⁴⁶ *Id.*

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would typically take 45 to 75 minutes if arriving around 4:55 PM.⁴⁷ Second Proposed School's school hours are 9:30 AM to 3:30 PM.⁴⁸ In previous attempts to take Student to visit schools, Student couldn't participate after a long car trip.⁴⁹ Student had a very bad experience trying to visit a nonpublic school and couldn't be calmed after arriving, so the school had to terminate the visit and call Parent to pick up Student; Parent reported that Student's communication skills declined for a month after that episode.⁵⁰

17. Another time when Parent's car was in the shop, they tried to take public transportation, but Student threw self on the ground and refused to get on a bus, so Parent had to rent a car.⁵¹ Parent testified that she could not recall whether Student had ever taken the bus to Previous School.⁵²

18. At the July 2018 IEP meeting, Petitioners' counsel, speaking for Parent (who was present), requested that transportation for ESY be added, but gave no indication of limitations or concerns about Student being able to use transportation.⁵³ Monitoring Specialist didn't ever hear any concerns about transportation to Second Proposed School, only to First Proposed School.⁵⁴ Second Proposed School was no closer for Student than First Proposed School, but Student needed to be in school and Monitoring Specialist viewed the benefits of being in school as outweighing any transportation challenges.⁵⁵

19. A parent can provide transportation and be reimbursed in situations like this.⁵⁶ Parent testified that she would be willing to drive her child to school if Student was not disabled, but as it was she could not "neglect" Student's medical condition and drive Student to school.⁵⁷ Special transportation concerns could be included on Student's IEP, which would be followed by OSSE, such as adding an aide for transportation.⁵⁸

20. Parental Participation. Monitoring Specialist did not know why Parent didn't accept Second Proposed School; if she knew why, Monitoring Specialist would try to work out any issues or needs.⁵⁹ Monitoring Specialist wanted to talk to Parent about her concerns with schools to try to get to the heart of the issues and find out what Student needed, as Parent has a good handle on Student's needs, unlike Petitioners' counsel.⁶⁰ The 10/18/18 LOS

⁴⁷ P20-1; P21-1; Parent.

⁴⁸ P19-1; Parent.

⁴⁹ Parent.

⁵⁰ *Id.*

⁵¹ *Id.*

⁵² *Id.*

⁵³ R6-10; P28 (audio recording at about 1:40).

⁵⁴ Monitoring Specialist.

⁵⁵ *Id.*

⁵⁶ *Id.*

⁵⁷ Parent.

⁵⁸ Monitoring Specialist.

⁵⁹ *Id.*

⁶⁰ *Id.*

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letter invited specific questions about the program at Second Proposed School to be directed to the LEA representative, and for any further questions to go to the Division of Specialized Instruction (which sent the letter).⁶¹ The only problems with Second Proposed School that Monitoring Specialist had heard about prior to the March hearing were transportation and the lack of a diploma track.⁶² No schools had been requested by Parent or Petitioners' counsel since the prior hearing.⁶³

21. Monitoring Specialist was very concerned about the barriers that she perceived prevented her from communicating with Parent; Monitoring Specialist was concerned about having schools able to service Student's IEP, but not finding out about parental concerns until litigation had commenced, rather than earlier when the issues might be worked out together.⁶⁴ Monitoring Specialist felt that the process was not collaborative and that it was very difficult not to have a shared goal of getting Student into school.⁶⁵ Monitoring Specialist acknowledged that she had not tried to initiate a meeting with Parent about Second Proposed School because she had been unsuccessful in reaching out about First Proposed School.⁶⁶ Monitoring Specialist didn't think Parent would respond differently in dealing with Second Proposed School than First Proposed School, when Parent wouldn't talk with Monitoring Specialist and told her to meet with Petitioners' counsel instead.⁶⁷ If Parent had shared any concerns about Second Proposed School, Monitoring Specialist would have met with her.⁶⁸

22. Second Proposed School can implement Student's IEP, although First Proposed School was DCPS's first choice for Student.⁶⁹ Monitoring Specialist continues to send out referrals for Student; it has been such a long time that Monitoring Specialist is re-referring Student to schools that rejected Student initially.⁷⁰ If there were no appropriate schools on OSSE's list of approved schools, that would open the option of schools not on OSSE's approved list.⁷¹ Monitoring Specialist continues to seek Parent's collaboration in the process.⁷²

23. Education at Home. Student is not enrolled in school; Parent, who was a teacher for 10 years, has been providing educational services to Student at home using the

⁶¹ P7-1.

⁶² Monitoring Specialist.

⁶³ *Id.*

⁶⁴ *Id.*

⁶⁵ *Id.*

⁶⁶ *Id.*

⁶⁷ *Id.*

⁶⁸ *Id.*

⁶⁹ *Id.*

⁷⁰ *Id.*

⁷¹ *Id.*

⁷² *Id.*

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curriculum of Student's sibling.⁷³ Parent has not filed a request with OSSE to formally home school Student.⁷⁴

24. Credibility. Given the conflict in testimony between Parent and other witnesses about the number of children in the classroom, the proportion of nonverbal children and other facts, the undersigned considers it relevant that during her testimony, Parent (a) could not remember in what year she visited Second Proposed School, (b) could not recall or recognize Director of Education's name, even after it was suggested to her, (c) could not recall whether Student had ever taken a school bus to Previous School, (d) could not recall whether she had met with DCPS to provide her concerns about Second Proposed School, and (e) mistakenly asserted that there was no discussion of nonpublic schools for Student during the July 2018 IEP meeting, even though Parent participated in such a discussion, including the distance of certain schools from her home.⁷⁵

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:

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.'" *Andrew 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." *Andrew 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); *Andrew 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

⁷³ Parent.

⁷⁴ *Id.*

⁷⁵ Parent; R6-7; P24-108,109,110; P27 (audio recording at about 2:35-36).

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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).

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.”)*

This issue of placement or location of services remains the same here as in the 1/11/19 HOD. 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*

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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 in Second Proposed School is analyzed by considering the specific concerns raised by Petitioners.

Transportation. First Proposed School and Second Proposed School are approximately the same distance from Student’s home and take about an hour with stops to assist Student, so transportation is a key issue in the current case, just as it was in the January hearing. But the primary objection in the current hearing was that Student suffers from motion sickness for which Parent has found no remedy, while in the previous hearing it was an issue of Student’s need for hugs and reassurance along the way. Further, in the January hearing Parent clearly stated her willingness to drive Student to school as long as the start time for Student could be adjusted, which appeared to eliminate transportation as a concern for Parent (as long as she otherwise found the school acceptable). However, by the March hearing, Parent testified that she would only be willing to drive Student if not disabled, but she could not “neglect” Student’s medical condition by driving Student to school due to Student’s disability.

Monitoring Specialist testified during the March hearing that special transportation concerns could be included on Student’s IEP, which would be followed by OSSE in providing transportation, such as adding an aide for Student on the bus, which could open a range of possible solutions that Parent had not discussed with OSSE or DCPS. Moreover, transportation was a focus of the lengthy July IEP meeting, both when the location and distance of specific nonpublic schools being considered for Student were discussed, and when Petitioners’ counsel – who spoke throughout the meeting for Parent – asked for transportation for ESY to be included on the IEP. Yet, there was no mention by Parent or Petitioners’ counsel at the IEP meeting about Student’s difficulty with motion sickness, or need for reassurance, or problems with buses generally, and no effort to discuss possible solutions or include special transportation needs on Student’s IEP.

Class Size. Much attention has been given to the maximum size of Student’s proposed class and requiring a classroom to have no more than six children was an important element of Student’s IEP. Director of Education credibly testified that there were only four other children in the class selected for Student at Second Proposed School at the time of Parent’s visit and five children in the class at the time of the current hearing, so Student would have been the fifth or sixth child in the class. Inexplicably, Parent testified that there were seven children (other than Student) in the classroom intended for Student at Second Proposed School, but apparently did not raise any concerns about that at the time. Given Parent’s uncertainty or inaccuracy on other facts, the undersigned finds Director of Education more credible on this basic fact. Moreover, Parent’s testimony at the recent

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hearing made clear her serious concerns about whether Student can tolerate a classroom with more than four children, but this Hearing Officer is tasked with determining whether Second Proposed School can carry out Student's current IEP as finalized by the IEP team – including Parent – and there was no failure due to the size of the class.⁷⁶

Classroom Noise. Noise was a big concern at the July IEP meeting and possibly the most difficult area to address, as Student is sensitive to noise, yet children are not always quiet and cannot be muzzled. As a general matter, Second Proposed School was aware of the requirements in Student's IEP relating to noise and concluded that it could implement them. In particular, Second Proposed School could provide noise-cancelling headphones as required. Monitoring Specialist also reviewed Student's IEP closely with the Monitor for Second Proposed School and independently confirmed that Second Proposed School could meet Student's IEP.

Based on her visit, Parent testified that the Second Proposed School classroom for Student was noisy because most of the other students were nonverbal and could not communicate except by making noises. Parent added that Student is very sensitive to noises and was disturbed by the other children, so didn't want to be in the class. However, the more knowledgeable and credible testimony by Director of Education was that most of the children in the class for Student were very verbal and only one student was nonverbal and used voice output hardware. Parent did not raise concerns about noise or other specifics on the IEP during her visit. If Parent had concerns, she should have raised them to see what could be adjusted or addressed.

Diploma Track. Finally, Parent did raise her concern about the fact that Second Proposed School does not offer a diploma track for students but only certificates of completion. Parent viewed the lack of a diploma track as an indication of the low intellectual and academic levels of the other students at Second Proposed School. However, Director of Education explained that was simply the way the school was set up and that the classroom intended for Student had children with ability levels similar to Student. Given Student's early grade, with no need to elect between a diploma or certificate track for many years, the undersigned does not find that the absence of a diploma track at Second Proposed School could prevent Student from making appropriate progress. On the other hand, ensuring sufficient adequate academic rigor in Student's program is important and certainly could and should be achieved through adequate IEP goals and engagement with Second Proposed School.

Adjusting to a new school can be challenging for a child in any circumstances, much less a child with the challenges facing Student. So a visit to a new classroom in which Student was not immediately comfortable does not mean the school was necessarily inappropriate, but does suggest that the parties needed to work through issues together and see what could be done to make the situation viable so Student could get back to school.

⁷⁶ As noted in the Findings of Fact, Parent is in the process of obtaining new assessments of Student's needs.

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The undersigned favorably noted the expertise and exercise of judgment of Monitoring Specialist, the school authority involved in determining that Second Proposed 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”). Further, the fact that DCPS would routinely adjust Student’s IEP and make any needed changes after 30 days in a new school helps ensure that Student would obtain the services and support needed to make appropriate progress. Student’s IEP was reviewed by Director of Education and the BCBA at Second Proposed School and they were confident Student’s IEP could be fully implemented at Second Proposed School. Monitoring Specialist also believed that Second Proposed School could offer FAPE to Student, which bolsters this Hearing Officer’s conclusions.

The system is set up so that if nonpublic schools which receive referrals are able to implement the IEPs they accept students, but if they can’t implement the IEPs they send denial letters. To the extent that Petitioners seek to challenge the process of DCPS sending out referrals and assigning Student to schools that credibly assert they can fulfill Student’s IEP, then Petitioners are seeking to raise a systemic challenge to the way the process is established by the State Educational Agency (“SEA”). But systemic challenges are outside the jurisdiction of Hearing Officers. *See R. A-G ex rel. R.B. v. Buffalo City Sch. Dist. Bd. of Educ.*, 2013 WL 3354424, at *7 (W.D.N.Y. 2013) *aff’d sub nom. R.A.G. ex rel. R.B. v. Buffalo City Sch. Dist. Bd. of Educ.*, 569 Fed. Appx. 41 (2d Cir. 2014); *S.W. by J.W. v. Warren*, 528 F. Supp. 2d 282, 294 (S.D.N.Y. 2007). A Hearing Officer’s jurisdiction is limited to matters relating to the identification, evaluation, or educational placement of the child, or the provision of a free appropriate public education to such child. 20 U.S.C. § 1415(b)(6). .

Accordingly, bearing in mind that Second Proposed School was DCPS’s second choice after Parent rejected the first, preferred option, this Hearing Officer concludes that on balance DCPS has met its burden of persuasion on educational placement, for with adjustments the proposed placement at Second Proposed School would afford Student the opportunity to attend school and make appropriate progress in light of 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.)*

While this issue is somewhat closer than in the prior HOD, on balance Petitioners failed to meet their burden of persuasion on this issue, for DCPS did not prevent meaningful parental participation, but was open to input and participation by Parent.

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

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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 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, Monitoring Specialist did not know what concerns Parent had about Second Proposed School and wanted to talk to Parent to try to get to the heart of what Student needed. Further, Parent’s visit to Second Proposed School was a substantial opportunity for her to raise any concerns about the school or program proposed for Student, but at the end of the visit Parent left Director of Education with the impression that Parent had a positive reaction to Second Proposed School with only the one concern that there was no diploma track, which was not an issue that Student would face for years. In addition, the 10/18/18 LOS letter invited specific questions about the program at Second Proposed School, but Parent again made no attempt to participate in any way outside the legal system.

While Parent may assert that she did not participate in the “choice” of Second Proposed School, at the time Second Proposed School was an option there was no other school that felt it was able to implement the IEP and was willing to accept Student. Nor did Parent make any suggestion at any time about any other school that could serve Student. While DCPS was limited at this stage to considering the nonpublic schools approved by OSSE, Parent faced no such constraints. This would be a very different case had Parent found a suitable school for Student that she felt was satisfactory, even though – as counsel emphasizes – legally it is not her burden to find an appropriate school for Student.

Monitoring Specialist clearly expressed her concerns about the barriers that prevented her from communicating with Parent. Monitoring Specialist acknowledged that she had not tried to initiate a meeting with Parent about Second Proposed School, but the situation differed from the first time around in that Monitoring Specialist had experience with Petitioners’ counsel and Parent, so did not expect a willingness to engage or work with her on any concerns about Second Proposed School. Monitoring Specialist felt there was no collaborative effort from Parent’s side and no shared goal of getting Student into school. If Parent had suggested any concerns about Second Proposed School, Monitoring Specialist would have worked with her, but Parent sought no such parental participation.

Importantly, Parent had extensive opportunities for parental participation during the lengthy IEP meeting conducted 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 discussion of four possible nonpublic schools that were being considered as potential spots for Student, including First Proposed School. That was a time when Parent and Petitioners’ counsel could have raised questions and concerns or provided other input about educational placement/locations of services, and apparently did so to the extent they desired.

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.

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See Middleton, 312 F. Supp. 3d at 136 (IDEA guarantees “opportunity to participate” in 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 nonpublic schools being discussed at the July IEP meeting. Because only one school accepted Student and could implement Student’s IEP initially in 2018/19 and Petitioners rejected that school, it was reasonable for DCPS to move forward promptly with Second Proposed School with all the input they could get from Parent.

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**. As DCPS continues to try to find a suitable placement/location for Student, Parents are strongly encouraged to cooperate in working through any concerns about any proposed classroom(s) with DCPS and nonpublic school(s).

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).

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