

**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 09, 2019

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<i>Student,</i> <sup>1</sup>	)	Case No.: 2019-0031
through <i>Parents,</i>	)	
<i>Petitioners,</i>	)	Date Issued: 3/9/19
	)	
v.	)	Hearing Officer: Keith L. Seat, Esq.
	)	
Office of the State Superintendent of	)	Hearing Dates: 2/28/19 & 3/4/19
Education (“OSSE”),	)	ODR Hearing Room: 423
Respondent.	)	
	)	

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**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 with meaningful parental participation. OSSE defended its placement process and determination.

**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 1/31/19, the case was assigned to the undersigned on 2/1/19. Respondent filed a response on 2/4/19, which did not challenge jurisdiction. A resolution meeting is not required in cases against OSSE and there is no resolution period, so a final decision in this matter must be reached no later than 45

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

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days following the filing of the due process complaint, which requires a Hearing Officer Determination (“HOD”) by 3/17/19.

The due process hearing took place on 2/28/19 and 3/4/19 and was closed to the public. Petitioners were represented by *Petitioners’ counsel* and *Petitioners’ co-counsel*. OSSE was represented by *Respondent’s counsel*. Both Parents were present for the entire hearing.

Petitioners’ Disclosures, submitted on 2/21/19, contained documents P1 through P60, all of which were admitted into evidence over objection to specified documents. Respondent’s Disclosures, submitted on 2/21/19, contained documents R1 through R27, which were admitted into evidence without objection.

Petitioners’ counsel presented 4 witnesses in Petitioners’ case-in-chief (*see* Appendix A):

1. *Educational Consultant* (qualified without objection as an expert in Special Education Eligibility, Programming and Instruction)
2. *Special Education Director at Nonpublic School* (qualified without objection as an expert in Special Education)
3. *Therapist* (qualified without objection as an expert in Mental Health Therapy for Children and Families)
4. Parent

Respondent’s counsel presented 4 witnesses in Respondent’s case (*see* Appendix A):

1. *LEA Representative at Prior School* (qualified without objection as an expert in Special Education Programming and Curriculum)
2. *Special Educator at Prior School* (qualified without objection as an expert in Special Education Programming)
3. *Special Programs Manager* (OSSE)
4. *Senior Change in Placement Coordinator* (OSSE)

Petitioners’ counsel presented Parent as the sole rebuttal witness.

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The issues<sup>2</sup> to be determined in this Hearing Officer Determination are:

**Issue 1:** Whether OSSE denied Student a FAPE by failing to propose an appropriate placement with a sufficient type and amount of special education hours for 2018/19.<sup>3</sup>

*Respondent has the burden of persuasion on this issue, if Petitioners establish a prima facie case.*

**Issue 2:** Whether OSSE denied Student a FAPE by preventing meaningful parental participation in the IEP and placement process by failing to provide to Parents the reasoning behind school referral decisions. *Petitioners have the burden of persuasion on this issue.*

**Issue 3:** Whether Nonpublic School is a proper placement for Student. *Petitioners have the burden of persuasion.*

The relief requested by Petitioners is:

- OSSE shall reimburse Parents for tuition and related services for Student at Nonpublic School for the 2018/19 school year, and place and fund Student there for the remainder of the school year.

At the beginning of the due process hearing, the undersigned denied on the record Respondent's 2/4/19 Motion to Dismiss, as counsel had been alerted would occur about 10 days prior to the due process hearing.

At the end of Petitioners' case-in-chief, Respondent's counsel orally moved for a directed verdict on Issue 1, which the undersigned took under advisement and hereby denies for the reasons set forth below.

### **Findings of Fact**

After considering all the evidence, as well as the arguments of both counsel, the Findings of Fact<sup>4</sup> are as follows:

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<sup>2</sup> At the end of the due process hearing, Petitioners withdrew with prejudice the third issue set forth in the Prehearing Order, which was "Whether OSSE denied Student a FAPE by failing to permit educational consultant to observe the proposed location of services."

<sup>3</sup> All dates in the format "2018/19" refer to school years.

<sup>4</sup> 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.

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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.<sup>5</sup> Student is *Age*, *Gender* and in *Grade*.<sup>6</sup> Student is charming, sincere, thoughtful, sensitive, loving, and easy to know and like.<sup>7</sup> Student began attending Nonpublic School on 10/1/18, after previously attending Prior School.<sup>8</sup>

2. Background. Student was found to have a Specific Learning Disability ("SLD") early on by DCPS's Early Stages.<sup>9</sup> In a January 2017 psycho-educational evaluation, Student met the criteria for diagnoses of Specific Learning Disorders, with impairment in reading and written expression; a Learning Disorder, not otherwise specified; and Attention Deficit Hyperactivity Disorder ("ADHD"), combined presentation.<sup>10</sup> A 12/1/17 clinical evaluation found that Student presented with symptoms of Post-Traumatic Stress Disorder ("PTSD") due to a traumatic car accident.<sup>11</sup>

3. Cognitively, Student's full scale IQ was Average with a standard score of 99, while the components ranged from High Average verbal comprehension of 113 to Very Low processing speed of 72, based on the Wechsler Intelligence Scale for Children – Fifth Edition ("WISC-V") in Student's January 2017 psycho-educational evaluation.<sup>12</sup> Academically, based on a Woodcock-Johnson IV ("WJ-IV") assessment on 4/4/18, Student ranged from a low of a 0.5 percentile rank compared to peers in passage comprehension to a 22 percentile high in writing samples, with most results in single digits.<sup>13</sup>

4. In the 4/4/18 Diagnostic Educational Evaluation, Educational Consultant concluded that Student was "basically illiterate" and that Student's SLD, including dyslexia, were "profound"; Student required intervention that was specialized, individualized, intensive, and provided one-to-one.<sup>14</sup> Educational Consultant was clear that Student could not stay at Prior School, but required a full-time, nonpublic, special education school.<sup>15</sup>

5. Car Accident and Aftermath. Student was able to cope emotionally with the internal and external events of life and had no underlying emotional problems prior to a serious car accident in July 2017.<sup>16</sup> The car crash occurred while Student was far from home without Parents, visiting grandparents.<sup>17</sup> The accident was not fatal for anyone, but Student was on the side of impact and next to a passenger whose neck was severed by glass and who fell on

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<sup>5</sup> Parent.

<sup>6</sup> *Id.*

<sup>7</sup> Therapist.

<sup>8</sup> Parent; P46-1.

<sup>9</sup> Educational Consultant.

<sup>10</sup> P3-8,9.

<sup>11</sup> P13-10.

<sup>12</sup> P3-13.

<sup>13</sup> P21-28.

<sup>14</sup> P21-8; Educational Consultant.

<sup>15</sup> P21-27.

<sup>16</sup> Educational Consultant; P13-8.

<sup>17</sup> Parent; P13-1.

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Student, so Student was covered by both Student's and passenger's blood; Student was in the hospital several days and underwent reconstructive facial surgery.<sup>18</sup> The accident was sufficiently serious that the injured were taken to different hospitals.<sup>19</sup>

6. Student was a worrier and suffered from separation anxiety prior to the accident, but never displayed behavioral problems or school refusal; after the accident, Student experienced great difficulty going to school and demonstrated severe separation anxiety.<sup>20</sup> Student engaged in self-injurious behaviors and demonstrated harm to others.<sup>21</sup>

7. Student was admitted to psychiatric hospitals early in 2017/18 as Student struggled to cope with the trauma of the car accident and was sometimes put in isolation rooms.<sup>22</sup> Student missed a lot of school due to hospitalization, including 9/15/17 to 10/6/17.<sup>23</sup> Student occasionally had to be physically restrained at Prior School to ensure Student's safety, including a serious incident on 10/17/17.<sup>24</sup> The effect of the accident on Student called for trauma therapy and supports, not a change in Student's disability classification.<sup>25</sup>

8. Gradual Improvement. Student's IEP Progress Report at Prior School at the end of term on 2/9/18 noted that Student had regressed in coping with anger and frustration before winter break, but had since responded well to new intervention strategies and improved in impulse control.<sup>26</sup> Student's IEP Progress Report at the end of term on 6/12/18 noted that Student had progressed on emotional, social and behavioral development goals.<sup>27</sup>

9. Based on calculations by Therapist from parental inputs, Student made significant progress on DSM Oriented Scales, where all results were in the clinical or borderline range in October 2017, but by November 2018 had improved so all results were in the normal or borderline range.<sup>28</sup> Similarly, with the Syndrome Scale Scores all results but one were in the borderline or clinical range in October 2017, but the results had improved by November 2018 so all results but one were in the normal range.<sup>29</sup>

10. Disability Classifications. On 3/9/18, Prior School completed disability worksheets, concluding that Student met the criteria for Other Health Impairment ("OHI"), for Emotional Disturbance ("ED"), for SLD, and for Multiple Disabilities ("MD") (selecting both ED and SLD, despite instructions to choose no more than 1 option from that group, as

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<sup>18</sup> P13-2; Parent.

<sup>19</sup> *Id.*

<sup>20</sup> P13-2; Therapist; Parent.

<sup>21</sup> P13-9,10.

<sup>22</sup> Parent; P13-10; P29-15.

<sup>23</sup> P5-1; P7-2; P8-1.

<sup>24</sup> Special Educator; P10-1.

<sup>25</sup> Educational Consultant.

<sup>26</sup> P17-7,8.

<sup>27</sup> P28-1,7.

<sup>28</sup> P49-1,2; Therapist.

<sup>29</sup> P49-3,4; Therapist.

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well as OHI).<sup>30</sup> On 3/9/18, the IEP team found Student eligible for special education with an MD classification, based on ED and OHI.<sup>31</sup> At Parents' request, Prior School reconsidered Student's disability classification on 5/11/18 and determined that Student did not meet the criteria for ED.<sup>32</sup> On 5/14/18, Student was unanimously found eligible for special education with an MD classification based on SLD and OHI.<sup>33</sup>

11. Educational Consultant emphatically testified that Student was not ED prior to the car accident and has never been ED; Educational Consultant was crucial to getting the IEP team to shift from ED to SLD for Student's 7/9/18 IEP.<sup>34</sup> Educational Consultant explained that an ED label could impact where Student would go to school; an accurate label would help ensure that Student ended up in a suitable school.<sup>35</sup>

12. IEPs. Student's 10/30/17 Functional Behavioral Assessment ("FBA") noted Student's disability as SLD on Student's IEP at that time.<sup>36</sup> Student's 4/23/18 IEP at Prior School classified Student as MD based on ED and OHI, and provided 4 hours/week of special education services for reading outside general education and 8 hours/week of specialized instruction inside general education, 45 minutes/week of Occupational Therapy ("OT") outside general education, 30 minutes/week of Behavioral Support Services ("BSS") inside general education and 30 minutes/week of BSS outside general education, along with 30 minutes/week of BSS consultation and 30 minutes/week of OT consultation, and a dedicated aide.<sup>37</sup>

13. Student's 7/9/18 IEP was developed at Prior School in a very collaborative manner and was agreed to by all involved at the end of the IEP meeting; it stated that Student was MD based on SLD and OHI, and provided for 30 hours/week of specialized instruction outside general education, 90 minutes/week of BSS outside general education, 60 minutes/week of OT outside general education, along with 15 minutes/week of BSS consultation and 15 minutes/week of OT consultation, and no dedicated aide.<sup>38</sup> The 7/9/18 IEP detailed Student's serious attendance and behavior issues.<sup>39</sup>

14. Change in Placement Process. Prior School initiated the change in placement process by submitting a justification letter to OSSE on 7/9/18 seeking a more restrictive placement for Student.<sup>40</sup> The Prior School letter stated that Student was MD based on SLD and OHI, noting a recent evaluation when ED was suspected based on Student's PTSD and

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<sup>30</sup> P15-5,6,7,8,9,10,11,12,15.

<sup>31</sup> P18-1,2.

<sup>32</sup> P26-1.

<sup>33</sup> P27-1,3.

<sup>34</sup> Educational Consultant.

<sup>35</sup> *Id.*

<sup>36</sup> R8-43.

<sup>37</sup> R8-3,14.

<sup>38</sup> P29-1,21,22; Educational Consultant; LEA Representative.

<sup>39</sup> P29-2.

<sup>40</sup> R3-1.

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other indicia, but that Student did not meet the criteria for ED.<sup>41</sup> The Prior School letter noted that Parents had unilaterally made application to a number of nonpublic special education facilities.<sup>42</sup> Prior School sought an expedited process by OSSE to find a new school prior to the start of 2018/19.<sup>43</sup>

15. A change in placement meeting was held on 8/3/18; Senior Change in Placement Coordinator and LEA Representative met in person and 9 others – including Parents, who were out of town – participated by telephone.<sup>44</sup> OSSE recommended a change in Student’s Least Restrictive Environment (“LRE”) to a “non-public, special education separate private day school,” with which Student’s entire IEP team agreed.<sup>45</sup> Senior Change in Placement Coordinator worked diligently to find a suitable school within the 10 business days that began on 8/9/18 when Parents provided consent to send Student’s information to selected schools that had OSSE Certificates of Approval (“COAs”) and were suitable for Student’s disability classification (as well as age, grade, and other IEP requirements).<sup>46</sup>

16. In numerous communications beginning at the change in placement meeting, OSSE asked for parental input on possible schools to pursue from OSSE’s list of approved schools (those with COAs) and sought feedback from Parents about schools they visited.<sup>47</sup> Special Programs Manager credibly testified that parental participation was sought and welcomed by OSSE; parents have a “significant role” in the process and what parents think matters to OSSE.<sup>48</sup> Nonpublic School does not have an OSSE COA and was not mentioned at the beginning of the search process.<sup>49</sup>

17. School Search. Parents suggested 3 schools initially, Proposed School A, Proposed School B and Proposed School C, but OSSE could not refer Student to Proposed School B because its certificate to operate was on “probation,” and could not refer Student to Proposed School C because it did not accept MD students (although it served both SLD and OHI students separately, when not MD).<sup>50</sup> Senior Change in Placement Coordinator initially referred Student to Proposed School A and 2 other schools (Proposed School D and Proposed School E-1) that appeared to best be able to meet Student’s unique educational

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<sup>41</sup> *Id.*

<sup>42</sup> R3-2.

<sup>43</sup> R3-1,2.

<sup>44</sup> P31-2; Parent.

<sup>45</sup> P31-3; Educational Consultant.

<sup>46</sup> P32-1,2; R7-2; Special Programs Manager; Senior Change in Placement Coordinator.

<sup>47</sup> P33-3 (contact Senior Change in Placement Coordinator if “you feel strongly” about a school); P36-1 (provide feedback after school visits); P37-1 (asking for other schools on OSSE’s list that Parents would like considered); P42-1,2,3 (same).

<sup>48</sup> Special Programs Manager.

<sup>49</sup> *Id.*

<sup>50</sup> P31-3; R12-4.

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needs; according to the formal change in placement meeting notes, Parents would “have the option” to visit the 3 schools selected for referral.<sup>51</sup>

18. Senior Change in Placement Coordinator summarized the process of trying to find a school for Student by email on 8/22/18, as OSSE’s 10-day period for finding a school was about to end on 8/23/18; Parents responded on 8/22/18 asking Senior Change in Placement Coordinator if he had a contact at Proposed School E or Proposed School F they could talk to.<sup>52</sup>

19. On 8/23/18 at 5:28 p.m., OSSE provided a notice of conditional location assignment for Proposed School E-2; that evening, Parents responded that after reviewing the website they were sure Proposed School E was not appropriate for Student and were “increasingly concerned” about OSSE’s understanding of Student’s needs based on the schools selected.<sup>53</sup> In response to Parents’ concerns on 8/23/18, Senior Change in Placement Coordinator summarized the situation, noting rejections of Student by Proposed School A and Proposed School D, and that Proposed School E-1 indicated that it could only consider Student for its waitlist.<sup>54</sup> Additional referrals had been sent to Proposed School E-2, Proposed School G and Proposed School F, but as of the 8/23/18 deadline, OSSE had only received the conditional acceptance from Proposed School E-2.<sup>55</sup> Parents visited Proposed School F and were told it did not have space for Student.<sup>56</sup>

20. By 10/10/18, Parents had visited Proposed School E-2 and Proposed School G and were of the view that neither was appropriate for Student, so did not want to take Student to visit.<sup>57</sup> Parents turned to the mental health therapist who had been working with Student, who explained in a 10/5/18 letter the emotional harm to Student from school visits due to Student’s PTSD; Therapist recommended that Student not be required to visit any programs Parents had visited and determined were not appropriate.<sup>58</sup> In particular, visiting schools that had isolation rooms and where classrooms were locked could be very triggering for Student.<sup>59</sup>

21. On 10/11/18, OSSE noted that Student had not visited any of the schools that OSSE was considering and that OSSE stood by its 8/23/18 location assignment decision of Proposed School E-2; OSSE encouraged Parents to complete the admissions requirements for the schools under consideration, which were only Proposed School E and Proposed

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<sup>51</sup> P31-3; P33-2,3.

<sup>52</sup> R23-4.

<sup>53</sup> P36-1,2; P37-1; R16-1; R13-1 (Proposed School E-2 conditional acceptance of Student dated 8/20/18).

<sup>54</sup> P37-1.

<sup>55</sup> *Id.*

<sup>56</sup> P39-1; Parent.

<sup>57</sup> P42-2; Parent.

<sup>58</sup> P41-1; Therapist; Parent.

<sup>59</sup> Therapist.



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School G.<sup>60</sup> On 11/16/18, Parent explained to Proposed School E that she did not want to take Student to visit Proposed School E until after Educational Consultant could see the program and advise on its viability, but Educational Consultant had reached out twice to observe to no avail.<sup>61</sup> Educational Consultant attempted to observe at Proposed School E-2 in September 2018, but was told the referral had been closed out, so she visited Proposed School E-1, which issued a “contingent accept” letter for Student on 12/4/18 if Student had a successful intake interview and there was also space.<sup>62</sup> Proposed School E-1 removed Student from consideration on 1/28/19 due to lacking space and not foreseeing any openings this year.<sup>63</sup> Student was not accepted anywhere OSSE referred Student.<sup>64</sup>

22. Consideration of Proposed School E-2 and Proposed School G. Educational Consultant testified that Proposed School E is a great school for the right kid; for Student, Educational Consultant knew it was wrong from the beginning because of the focus on children with serious behavioral issues.<sup>65</sup> Educational Consultant credibly testified that Proposed School E was “wholly inappropriate” for Student as Student had never demonstrated the issues that Proposed School E addresses; Proposed School E is also a very large school and Student needs a much smaller setting.<sup>66</sup> Proposed School E can use restraint and isolation with students, which is bad for Student to be exposed to, as it would re-traumatize Student by reminding Student of experiences in hospitals; Therapist was also concerned about re-triggering Student’s trauma by forcing Student to visit schools Parents found inappropriate.<sup>67</sup>

23. Student can be impressionable, so being with children with challenging behaviors could cause Student to imitate them or make Student feel unsafe and insecure.<sup>68</sup> Parent visited Proposed School E-2 and was troubled by every classroom being locked, having multiple locked isolation rooms, looking like a hospital, having nothing on the walls, not seeing any movement by the children in the class for Student, and not having a playground; the emphasis was on behavior over academics.<sup>69</sup> After the Proposed School E-2 visit, Parent sat in her car and cried, as she knew it was not the right school for Student, who would view it as the consequence for something bad Student had done.<sup>70</sup>

24. Parents visited Proposed School G, where the focus was also on behavior issues, so the lights were kept low and there were isolation rooms.<sup>71</sup> Student would have issues as a

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<sup>60</sup> P42-1; Parent.

<sup>61</sup> P47-1.

<sup>62</sup> Educational Consultant; P52-1.

<sup>63</sup> P54-1.

<sup>64</sup> Educational Consultant.

<sup>65</sup> *Id.*

<sup>66</sup> *Id.*

<sup>67</sup> Educational Consultant; P41-1.

<sup>68</sup> Special Education Director; Parent.

<sup>69</sup> Parent.

<sup>70</sup> *Id.*

<sup>71</sup> *Id.*

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result of being with other kids with behavior needs, including imitation; Student is sensitive and worries about other children, such as a child on the autism spectrum who Student saw on a visit to another school.<sup>72</sup> Student feels much safer in a smaller school.<sup>73</sup>

25. Parents didn't hear from OSSE what would happen if there wasn't an appropriate school for Student on the OSSE COA list.<sup>74</sup> Special Programs Manager testified that there is a process for going beyond the list of OSSE approved schools, if a student is not accepted by a school on the OSSE list, but that process has only been used a handful of times in the last dozen years.<sup>75</sup> Parents were proactive in visiting additional schools, trying to find a suitable place for Student, including a visit to a school suggested by a teacher at Prior School and a visit to Nonpublic School, which was suggested by Educational Consultant and resulted in Student being unilaterally placed there as Petitioners' counsel notified OSSE in a 9/17/18 letter.<sup>76</sup> OSSE had not exhausted the list of possible approved schools for Student in this case, so would not consider Nonpublic School.<sup>77</sup>

26. Nonpublic School. Nonpublic School is a special education school for children in grades K-12 which is approved by the state of Maryland; it has fewer than 2 dozen students, including 2 non-disabled students.<sup>78</sup> Nonpublic School costs about \$40,000/year for Student's tuition, plus the costs of related services.<sup>79</sup> Student's Nonpublic School class has 5 children, including children in the grade above and the grade below Student, who are taught by two adults.<sup>80</sup>

27. Student's teacher at Nonpublic School in the fall of 2018 noted Student's sensitivity; the sight of blood triggered a panic attack by Student in the classroom.<sup>81</sup> Student progressed from not being able to sit with other students at lunch to becoming comfortable within a couple of months; Student initially would find ways to avoid work, but not later.<sup>82</sup> Student initially took breaks to see Special Education Director (and her dog) 3-4 times a week, but has tapered down to not needing to take breaks to see Special Education Director at all.<sup>83</sup> By the end of 2018, Student was happy to arrive at Nonpublic School each morning and reluctant to leave at the end of the day; Student made academic growth.<sup>84</sup>

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<sup>72</sup> *Id.*

<sup>73</sup> *Id.*

<sup>74</sup> *Id.*

<sup>75</sup> Special Programs Manager.

<sup>76</sup> Parent.

<sup>77</sup> Special Programs Manager; Senior Change in Placement Coordinator.

<sup>78</sup> Special Education Director.

<sup>79</sup> Parent.

<sup>80</sup> Special Education Director.

<sup>81</sup> P56-1.

<sup>82</sup> P56-1; Special Education Director.

<sup>83</sup> Special Education Director.

<sup>84</sup> P56-2; Special Education Director.

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28. Student responded very well at Nonpublic School and is attending there without the challenges and school avoidance at Prior School.<sup>85</sup> Student's Progress Reports at Nonpublic School show progress.<sup>86</sup> LEA Representative visited Student at Nonpublic School on 10/22/18 and observed Student in a couple of settings; Student was "happy and engaged in learning" and proud to tell about the new school and show the good work Student is doing.<sup>87</sup> Student's reading has improved, writing has "dramatically" improved, and Student is happy at Nonpublic School.<sup>88</sup> Student has exhibited no school refusal or significant behaviors this year at Nonpublic School.<sup>89</sup> Nonpublic School is not providing the BSS on Student's IEP from Prior School because Student doesn't need the support; Nonpublic School has a counselor and would provide the BSS if needed.<sup>90</sup> Student's needs are being met and Nonpublic School is appropriate for Student.<sup>91</sup>

### 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

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<sup>85</sup> Educational Consultant.

<sup>86</sup> P46 (first quarter); P53 (second quarter).

<sup>87</sup> P44-1.

<sup>88</sup> Educational Consultant.

<sup>89</sup> Special Education Director.

<sup>90</sup> *Id.*

<sup>91</sup> Educational Consultant; Special Education Director.

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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.

In addition, the LEA must ensure that to the maximum extent appropriate, children with disabilities are educated with children who are nondisabled, and special classes, separate schooling, or other removal of children with disabilities from the regular educational environment occurs only if the nature or severity of the disability is such that education in regular classes with the use of supplementary aids and services cannot be achieved satisfactorily. 34 C.F.R. § 300.114; *Endrew F.*, 137 S. Ct. at 1000 (children with disabilities should receive education in the regular classroom to the extent possible); *Montuori ex rel. A.M. v. Dist. of Columbia*, 2018 WL 4623572, at \*3 (D.D.C. 9/26/18).

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 OSSE denied Student a FAPE by failing to propose an appropriate placement with a sufficient type and amount of special education hours for*

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2018/19. (*Respondent has the burden of persuasion on this issue, if Petitioners establish a prima facie case.*)

Petitioners established a prima facie case on this central issue through the testimony of Educational Consultant and Parent, shifting the burden of persuasion to OSSE, which did not meet its burden, as discussed below.

The applicable legal standard for educational placement is that it must be “reasonabl[y] calculated to enable [a student] to progress appropriate[ly] in light of his circumstances,” but “need not satisfy a parent's every desire and need not represent the best possible programming for the student.” *Middleton v. Dist. of Columbia*, 312 F. Supp. 3d 113, 143, 144 (D.D.C. 2018). At a more pragmatic level, the IDEA also 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*, 312 F. Supp. 3d at 143, 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 placements are analyzed by reviewing the specific concerns of Petitioners.<sup>92</sup>

Here, after the change in placement meeting in which all agreed that Student needed a non-public, special education separate private day school, OSSE worked diligently to find a suitable school for Student within 10 business days, trying to get a school lined up for the beginning of 2018/19. OSSE sent out referrals on a rolling basis. OSSE tried to get Student into Proposed School A and Proposed School D, which quickly rejected Student. OSSE tried Proposed School E-1 and Proposed School F, neither of which had space, although Proposed School E-1 was willing to put Student on its waitlist. OSSE refused to send referrals to Proposed School B and Proposed School C, which Parents sought, as Proposed School B was on probation and Proposed School C was not approved for MD students, although it could handle both SLD and OHI students.

OSSE got the furthest with Proposed School E-2, which issued a conditional acceptance for Student on 8/20/18, which was conditioned on Parents completing the admission process by making Student available for an interview. OSSE in turn issued to Parents a conditional notice of location assignment for Proposed School E-2. However, by the time Educational Consultant sought to visit Proposed School E-2 in September the referral had been closed out and she had to view Proposed School E-1, which issued a “contingent accept” letter in December before acknowledging in January that it was not likely to have space in 2018/19.

When OSSE provided its notice of conditional location assignment for Proposed School E-2 on 8/23/18, Parents promptly responded that after reviewing the website they

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<sup>92</sup> A Hearing Officer must also determine whether “the State complied with the procedures” set forth in the IDEA. *A.M. v. Dist. of Columbia*, 933 F. Supp. 2d 193, 204 (D.D.C. 2013), quoting *Rowley*, 458 U.S. at 206-07. Here, a procedural violations is discussed in Issue 2, below.

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were sure Proposed School E was not appropriate for Student and were increasingly concerned about whether OSSE understood Student's needs, given the schools selected. Parents sought to engage with OSSE on this crucial point, but when Senior Change in Placement Coordinator responded to Parents on 8/27/18, he simply recounted the history of the referral process and did not discuss the type of school needed for Student, which was the heart of the matter. Ultimately, it seems that OSSE was simply seeking an acceptance from any school with a COA that served Student's disability classification (along with age, grade and other IEP elements).

By contrast, Parents credibly believed that schools focused on ED children would harm Student and would not permit appropriate progress to be made in Student's circumstances. Student could be impressionable, so being with children with challenging behaviors could cause Student to imitate them or could make Student feel unsafe and insecure. Parent visited Proposed School E-2 and was troubled by every classroom being locked, having multiple locked isolation rooms, the facility looking like a hospital, having nothing on the walls, not seeing any movement by the children in the class for Student, and not having a playground. The emphasis at Proposed School E-2 was on behavior over academics. After completing the Proposed School E-2 visit, Parent sat in her car and cried, as she knew it was not the right school for Student, who Parent felt would view the school as punishment for something Student had done.

Parent's concerns about Proposed School E-2 were bolstered by Educational Consultant's clear assertions that Proposed School E was wholly inappropriate for Student as Student had never demonstrated the behavioral issues that Proposed School E addresses. Further, Proposed School E is a very large school and Student needs a much smaller setting. Proposed School E can use restraint and isolation with its students, which was bad for Student to be exposed to, as that could re-traumatize Student by bringing up memories of hospitals that confined Student. Therapist was similarly concerned about re-triggering Student's trauma by forcing Student even to visit Proposed School E-2 and other schools Parents found inappropriate, much less to be enrolled and attend such a school.

Parents also visited Proposed School G, where the focus was again on behavior issues, so the lights were kept low and there were isolation rooms for children. Student could have issues as a result of being with other kids with behavior needs, including imitation. Moreover, Student is sensitive and worries about other children, such as a child on the autism spectrum who Student saw on another school visit. Student feels much safer in a smaller school.

OSSE carries the burden of persuasion on this issue, but did not put on any evidence that Proposed School E-2 (or Proposed School G) were appropriate for Student. OSSE appeared to rely on the mere fact that the schools were on OSSE's COA list, and had indicated that they could work with the disability classification of Student. In the view of the undersigned, this is much too crude an approach given Student's sensitivities and the solid testimony that Student could suffer harm from being exposed to such schools even for a visit, much less by attending.

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The law is clear that parents are not obliged to put their children into situations that do not appear viable in order to prove a denial of FAPE. As the Court explained in *N.S. ex rel. Stein v. Dist. of Columbia*, 709 F. Supp. 2d 57, 72 (D.D.C. 2010), “parents are not required to wait and see a proposed IEP [or placement] in action before concluding that it is inadequate and choosing to enroll their child in an appropriate private school.”

Even bearing in mind the *Middleton* language above that OSSE’s proposed school “need not represent the best possible programming” for Student, this Hearing Officer concludes that on balance neither Proposed School E-2 nor Proposed School G were schools reasonably calculated to enable Student to progress appropriately in Student’s unique circumstances, given the schools’ focus on ED and children with serious behavior issues. OSSE’s failure to provide an appropriate school for Student was a denial of FAPE and results in the remedy set forth below.

**Issue 2:** *Whether OSSE denied Student a FAPE by preventing meaningful parental participation in the IEP and placement process by failing to provide to Parents the reasoning behind school referral decisions. (Petitioners have the burden of persuasion on this issue.)*

Petitioners failed to meet their burden of persuasion on this issue, for OSSE did not prevent meaningful parental participation, but affirmatively and repeatedly sought such 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 S. Ct. at 999. *See also Pavelko v. Dist. of Columbia*, 288 F. Supp. 3d 301, 306 (D.D.C. 2018) (parental participation in placement just requires input, with no guarantee of output); *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, the credible testimony from Special Programs Manager was that parental participation was both sought and welcomed by OSSE, and that parents have a significant role to play in the process. In particular, OSSE repeatedly asked Parents for input on possible schools to pursue from OSSE’s list of approved schools. OSSE did take seriously those schools proposed by Parents, sending referrals when possible (such as Proposed School A) and explaining in each case when OSSE could not send referrals under the regulations (Proposed School C, Proposed School B, Nonpublic School). Further, OSSE sought feedback from Parents about any OSSE-referred schools they visited. Although Parents did not achieve the outcome they desired, this Hearing Officer concludes that these efforts were meaningful parental participation and that Petitioners did not meet their burden of persuasion on this issue.

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**Issue 3:** *Whether Nonpublic School is a proper placement for Student. (Petitioners have the burden of persuasion.)*

Petitioners met their burden on this final issue. Student has made significant progress since arriving at Nonpublic School in October 2018. While at Prior School Student would frequently avoid school, but by the end of 2018 Student was happy to arrive at Nonpublic School each morning and reluctant to leave at the end of the day. Student is no longer trying to avoid work and is making academic progress. Observers from Prior School reported that Student was happy and engaged in learning. Student no longer needs the BSS that was required at Prior School, as Student's needs are being met and Nonpublic School is appropriate for Student. The undersigned concludes that Nonpublic School is a proper and appropriate placement for Student.

### Remedy

As the remedy for the denial of FAPE found above, Petitioners seek reimbursement of their payments to Nonpublic School for 2018/19, and for OSSE to place and fund Student there for the remainder of the school year. Under the IDEA, however, parents who unilaterally place their disabled child in a private school, without obtaining the consent of local school officials, "do so at their own financial risk." *Florence County Sch. Dist. Four v. Carter*, 510 U.S. 7, 15, 114 S. Ct. 361, 126 L. Ed. 2d 284 (1993), quoting *Burlington*, 471 U.S. at 374. The Court of Appeals in *Leggett v. Dist. of Columbia*, 793 F.3d 59, 66-67 (D.C. Cir. 2015), explained that

As interpreted by the Supreme Court, IDEA requires school districts to reimburse parents for their private-school expenses if (1) school officials failed to offer the child a free appropriate public education in a public or private school; (2) the private-school placement chosen by the parents was otherwise "proper under the Act"; and (3) the equities weigh in favor of reimbursement – that is, the parents did not otherwise act "unreasonabl[y]."

Here, the first prong of *Leggett* is met due to the denial of FAPE by OSSE failing to provide Student an appropriate placement, as discussed in Issue 1, above.

The second prong of *Leggett* focuses on whether Nonpublic School is proper for Student. Petitioners readily demonstrated that Nonpublic School is proper and appropriate for Student in Issue 3, above, and OSSE did not seriously dispute the issue. The legal standard for proper placement is the same for school districts and parents. *Leggett*, 793 F.3d at 70. Under *Andrew F.*, 137 S. Ct. at 1001, the question is now whether Parents' unilateral private placement was reasonably calculated to enable Student to make appropriate progress given Student's circumstances. Cf. *Leggett*, 793 F.3d at 71, quoting *Rowley*, 458 U.S. at 207, 102 S. Ct. 3034. See also *Wirta v. Dist. of Columbia*, 859 F. Supp. 1, 5 (D.D.C. 1994); *N.G. v. Dist. of Columbia*, 556 F. Supp. 2d 11, 37 (D.D.C. 2008). Petitioners' witnesses convincingly testified that Student was being appropriately educated at Nonpublic School, where Student has overcome school avoidance and is making progress appropriate for Student's circumstances. The second prong of *Leggett* is satisfied.



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The final prong of *Leggett* is to consider whether the equities weigh in favor of reimbursement or whether Petitioners acted unreasonably. Here, in the view of the undersigned, Parents acted reasonably and sought to work with OSSE concerning the school needed by Student, but OSSE failed to engage. During the due process hearing, OSSE sought to cast aspersions on Parents for not subjecting Student to school visits at facilities that Parents had already determined were not appropriate for Student. Such visits would have caused emotional harm to Student in the expert opinion of Therapist, but would not have changed the posture of this case in any way, since Parents were clear that the schools were not viable for Student for good reason, regardless of whether the schools completed their intake process with Student. In declining to subject Student to inappropriate schools, Parents simply did what any loving parents would do to shield a sensitive child from unnecessary harm. The equities weigh in favor of Parents and the third prong is satisfied.

Accordingly, this Hearing Officer concludes that Parents should be reimbursed for Student's tuition and related services at Nonpublic School for 2018/19 and funded there for the remainder of the school year. This meets the Court's guidance that the essence of equity jurisdiction is "to do equity and to mould each decree to the necessities of the particular case." *Lopez-Young v. Dist. of Columbia*, 211 F. Supp. 3d 42, 55 (D.D.C. 2016), quoting *Reid ex rel. Reid v. Dist. of Columbia*, 401 F.3d 516, 523-24 (D.C. Cir. 2005).

### **ORDER**

Petitioners have prevailed on the central issue in this case, as set forth above. Accordingly, **it is hereby ordered that:**

Upon receipt of documentation of payment by Petitioners, OSSE shall within 30 days (a) reimburse Petitioners for tuition and related services paid to date for Student at Nonpublic School for the 2018/19 school year, and (b) fund tuition and related services for Student at Nonpublic School for the remainder of the 2018/19 school year.

Any and all other claims and requests for relief are **dismissed with prejudice.**

**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

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controversy within ninety (90) days from the date of the Hearing Officer Determination in accordance with 20 U.S.C. § 1415(i).

Copies to:

Counsel of Record (Appendix A, by email)

OSSE-SPED ([due.process@dc.gov](mailto:due.process@dc.gov))

ODR ([hearing.office@dc.gov](mailto:hearing.office@dc.gov))

[Contact.resolution@dc.gov](mailto>Contact.resolution@dc.gov)