

District of Columbia
Office of the State Superintendent of Education
Office of Review and Compliance
Office of Dispute Resolution
1050 First Street, NE
Washington, DC 20002
Tel: 202-698-3819
Fax: 202-478-2956

OSSE
Office of Dispute Resolution
November 13, 2023

Confidential

Parent on Behalf of Student, ¹	HEARING OFFICER'S DETERMINATION
Petitioner,	Hearing Date: October 27, 2023
v.	Counsel for Each Party listed in Appendix A
District of Columbia Public Schools (Local Education Agency "LEA")	<u>Hearing Officer:</u> <u>Coles B. Ruff, Esq.</u>
Respondent.	
Case # 2023-0170	
Date Issued: November 13, 2023	

¹ Personally identifiable information is in the attached Appendices A & B.

JURISDICTION:

The hearing was conducted, and this decision was written, pursuant to the Individuals with Disabilities Act ("IDEA"), P.L. 101-476, as amended by P.L. 105-17 and the Individuals with Disabilities Education Improvement Act of 2004, the District of Columbia Code, Title 38 Subtitle VII, and the District of Columbia Municipal Regulations, Title 5 Chapter 5-A30.

BACKGROUND AND PROCEDURAL HISTORY:

The student who is the subject of this due process hearing ("Student") resides with Student's parent ("Petitioner") in the District of Columbia. The District of Columbia Public Schools ("DCPS" or "Respondent") is Student's local education agency ("LEA"). Student is a child with a disability pursuant to IDEA with a classification of Autism.

During school year ("SY") 2022-2023 Student attended a Communications Educational Support ("CES") classroom in a DCPS school ("School A"). In April 2023, DCPS informed Petitioner that because Student would be progressing to another age level for the CES program, Student would be assigned to a CES classroom at a different DCPS school ("School B") for SY 2023-2024. Petitioner disagreed with the change of schools and sought to have DCPS change its decision and for Student to remain at School A. Petitioner's attempts were unsuccessful. Petitioner reluctantly enrolled Student in the CES program at School B soon after the start of SY 2023-2024.

On September 7, 2023, filed the due process complaint ("DPC") to challenge the change in Student's school. Petitioner maintains that the change in schools was a change in placement that was made without Petitioner's input as required by IDEA and is a denial of a free appropriate public education ("FAPE").

Relief Sought: Petitioner seeks as relief a finding that Student has been denied FAPE and that DCPS be ordered to place Student with transportation at School A for the remainder of SY 2023-2024 school, immediately convene a multidisciplinary team ("MDT") meeting to discuss Student's transition to School A, and fund compensatory education based on the denial of FAPE.

DCPS's Response to the Complaint:

DCPS filed a response to the complaint on September 8, 2023. In its response, DCPS stated, inter alia, the following:

Student has always received an IEP and placement of self-contained program outside of general education. Recently, Student attended School A CES classroom. On January 11, 2023, a team met to propose Student's annual individualized education program ("IEP"). The IEP team considered Student's overall programming, and proposed a program and placement appropriate for Student based on present levels of performance, recent triennial assessment results, and identified needs, services, accommodations, and other supports, required for Student to receive FAPE. The team determined that Student's IEP continued to require 25 hours of specialized instruction, and the parent continued to agree. The parent was fully involved in the IEP programming and placement process as a collaborative partner.

On or about April 7, 2023, DCPS informed the parent in an in-person communication that Student's location of service ("LOS") would change to School B for the next grade in SY 2023-2024. DCPS followed that meeting with a prior written notice ("PWN") which provided the notice of the new LOS in writing on or about April 11, 2023. The School A team explained to the parent that Student would need to enroll and attend at School B for SY2023-2024.

Additionally, DCPS notified the parent that the LEA would be happy to connect him with the IEP team at School B. The School A team indicated that it would support the transition, in any way possible. The parent enrolled Student at School B where Student had been in attendance since on or about August 28, 2023, for approximately (9) nine days at the time Petitioner's DPC was filed. According to the team at School B, Student is doing well and making progress, experiencing a smooth transition.

Resolution Meeting and Pre-Hearing Conference:

Petitioner and DCPS participated in a resolution meeting on September 13, 2023. The parties did not mutually agree to shorten the 30-day resolution period. The due process complaint ("DPC") was filed on September 7, 2023. The 45-day period begins on October 7, 2023, and ends [and the Hearing Officer's Determination ("HOD")] is due on November 13, 2023.

The undersigned impartial hearing officer ("IHO") conducted a pre-hearing conference ("PHC") on September 28, 2023, during which Petitioner's DPC and DCPS's response were considered, along with oral arguments on Petitioner's Motion for stay put protections. The IHO issued a pre-hearing order ("PHO") on October 4, 2023.

Stay Put Motion/Order

On September 6, 2023, Petitioner counsel filed a motion for stay-put protections to maintain Student at School A. On September 11, 2023, DCPS filed an opposition to Petitioner's motion. On September 12, 2023, Petitioner's counsel filed rebuttal to DCPS's opposition to the motion. On September 27, 2023, the parties made oral arguments on the record during the PHC regarding Petitioner's Motion and rendered a decision on Petitioner's motion in the PHO issued on October 4, 2023.

The IHO concluded after considering the case law cited and the facts, as represented by each party, that the change from School A to School B, pending Petitioner's appeal, was not a change in the type of school or Student's special education programming, but a change in location. The IHO noted the factual dispute between that parties as to whether the change of school had had a detrimental effect on Student or whether Student was thriving at School B. Nonetheless, based upon the facts as represented by each party, the IHO concluded that, at least at the pre-hearing juncture, because Student was in a CES program in School B, the change of schools was one of location and not placement. Thus, the IHO concluded that School A was not Student's "then current placement" for pre-hearing stay-put purposes. Accordingly, Petitioner's motion for

Student to remain at School A was denied as pre-hearing matter pending a full presentation of evidence at hearing.²

DCPS's Motion to Dismiss:

On October 20, 2023, DCPS counsel filed a motion to dismiss Petitioner's DPC based on the ruling by the IHO on Petitioner's Motion for stay-put protections. DCPS asserted that since the only issue to be adjudicated is whether DCPS changed Student's placement, the IHO decided that matter in his PHO, rendering the case moot. Further, DCPS asserted that the IHO determined that DCPS has maintained Student in a CES program, and that Petitioner has not challenged that program, but only challenges a change in schools.

Respondent's Argument

In analyzing a motion to dismiss under Rule 12(b)(6), the Court similarly accepts the factual allegations in the complaint as true and draws all reasonable inferences in plaintiffs' favor. *Nat'l Postal Profl Nurses v. U.S. Postal Serv.*, 461 F. Supp. 2d 24, 27 (D.D.C. 2006). To survive a motion to dismiss under Rule 12(b)(6), a complaint must "state a claim upon which relief can be granted." *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 552 (2007). That is, the complaint must contain sufficient factual allegations that, if accepted as true, state a claim to relief that "is plausible on its face." *Id.* at 570. Plaintiffs' entitlement to relief must rise above mere speculation. *Id.* at 555. *Sadra Pourshakouri, Hossein Pourshakouri, v. Mike Pompeo, et al.*, No. 20-00402 (RJL), 2021 WL 3552199, at 3-4 (D.D.C. Aug. 11, 2021)."

A case is subject to dismissal on grounds of mootness if there is no "case or controversy." No case or controversy exists "when the issues presented are no longer "live" or the parties lack a legal cognizable interest in the outcome." *Theodore v. Gov't of the Dist. of Columbia*, 655 F. Supp. 2d 136, 143 (D.D.C. 2010). Stated otherwise, if the court or administrative tribunal cannot grant meaningful relief, then the case may be moot. *Id.* However, there is a well-established exception to mootness. That exception to the doctrine's application arises when despite the supposed absence of a live case or controversy, the facts of the particular case suggest that the matter is "capable of repetition yet evading review." This exception is invoked "where a party can demonstrate that (1) the challenged action (is) in its duration too short to be fully litigated prior to its cessation or expiration, and (2) there (is) a reasonable expectation that the same complaining party (will) be subjected to the same action again." *Zearley v. Ackerman*, 116 F. Supp. 2d 109, 112 (D.D.C. 2000), quoting *U.S. v. Weston*, 194 F.3d 145 (D.C. Cir. 1999).

Respondent argues that the only possible issue the Petitioner has remaining is the complaint concerning the move between schools, but that does not present a cognizable claim pursuant to the IDEA and DC precedent. Respondent urges that in light of the IHO's prehearing order, and finding that the move from School A to School B was not a change in placement, the matter is

² DCPS argued at the outset of the hearing and in its motion to dismiss, that because the IHO had denied Petitioner's motion and concluded that this was a change in location in the PHO, that decision was final and conclusive on the issue that was to be adjudicated at hearing.

moot, and/or the Petitioner has failed to present a claim upon which relief can be granted. DCPS requested that the DPC be dismissed.

Petitioner's Response to DCPS's Motion to Dismiss:

On October 24, 2023, Petitioner's counsel filed a Response to DCPS's Motion. Petitioner asserted for the first time in response to the motion, that Student's move from School A to School B was an "Involuntary Transfer" and when the parent was notified in April 2023. Petitioner asserted that even though he reached out to DCPS for assistance, he was not advised of the reasons for the transfer or afforded an opportunity for a hearing prior to the transfer as contemplated by DCMR 5E § 2107.³

Petitioner's arguments in opposition to the motion are noted as follows: Petitioner never received a response from DCPS to his inquiry until August 2023. Considering Student's disability of autism, the fact that Student is nonverbal, relies on an AAC device for communication, and Student's individualized needs and circumstances, Student is particularly vulnerable to transitions. Petitioner asserts that not only did the transition to School B go against DCPS' own policy of sending students to the closest to their home, but School A was also the only school that Student had attended since being identified as eligible under IDEA. Given Student's individualized circumstances and disability, Petitioner views the transfer as a "fundamental change" in Student's programming which goes beyond an LOS and constitutes a change in placement, and that issue calls for a fact specific inquiry.

The standard to be applied in reviewing a motion to dismiss requires the court to take the factual allegations of the complaint as true and that any ambiguities or doubts must be resolved in favor of the pleader. Only if this cannot be done, the court must dismiss a complaint. *See Caudle v. Thompson*, 942 F. Supp. 635, 638 (D.D.C. 1996), citing *Gregg v. Barnett*, 771 F. 2d 539, 547 (D.C. Cir. 1987). The court must limit its review to the pleadings and the defendants must show beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief. *Caudle*, 942 F. Supp. At 638, citing *In re: Swine Flu Immunization Prods. Liability Litigation*, 880 F.2d 1439, 1442 (D.C. Cir. 1989) (quoting *Conley v. Gibson*, 355 U.S. 41, 45-46 (1955)).

Petitioner asserts that there continues to be a "case or controversy" since Student remains in a school setting that the parent believes to be contrary to Student's best interests educationally and there is meaningful relief that could be awarded via an HOD, such ordering a transition meeting and that Student be returned to the prior educational establishment. In addition, given Student's disability and individual circumstances, it would be detrimental to this vulnerable child to be subject to further transitions should DCPS arbitrarily and unilaterally decide to move the child yet again, making this a situation that is certainly "capable of repetition and avoiding review" *Zearley v. Ackerman*, 116 F. Supp. 2d 109, 112 (D.D.C. 2000), quoting *U.S. v. Weston*, 194 F.3d 145 (D.C. Cir. 1999).

³ DCMR 5E § 2107.3 provides that a student who is transferred due to special education placement shall be provided an opportunity to request a hearing on the proposed placement, as provided in Chapter 30; however, since the issue of involuntary transfer may be included in the placement hearing, no separate hearing on the transfer is required.

Petitioner asserts that Respondent's narrow interpretation of placement is unsupported by the cases that were cited in its motion and that have been addressed in other motions filed in this matter. Those cases make it clear that "placement" extends beyond just the student's goals and service hours contained in the IEP. Again, this is a fact-specific inquiry. Should the Hearing Officer determine that the change is a change in "Placement" as opposed to just location, then clearly a denial of FAPE has occurred.

Where a particular educational institution, location, or student-teacher relationship is intrinsically related to an IEP, a change in location can constitute a change in placement particularly for students with disabilities such as autism. *See also P.V. v. School Dist. of Philadelphia*, 60 IDELR 185 (E.D. Pa. 2013) (A district's practice of unilaterally transferring students with autism between centralized grade-level programs located in different schools violated the IDEA, noting that children with autism typically have difficulty with transitions and changes in routine, the court observed that a change in the physical location of services would likely be far more traumatic for students with autism than it would for students with other disabilities.

In *Eley v. District of Columbia*, 63 IDELR 165 (D.D.C. 2014) it was noted that the Court in *Lunceford* "emphasized the fact-specific nature of the inquiry" *See Lunceford*, 745 F.2d at 1582. *Eley* ultimately concluded that the holding in *Lunceford* does not foreclose consideration of the physical location where a student receives educational services as part of determining whether a "fundamental change" in educational placement has occurred. Ultimately, the court in *Eley* concluded that "the location where educational services are to be implemented is a vital portion of a student's educational placement" and that the term placement "can include both the physical location of educational services and the services required by the student's IEP." (citing *Bd of Educ. Of Cmty. High Sch. Distr. No 218*). A fact specific inquiry cannot be made if the parent is denied an opportunity to be heard at a Due Process Hearing.

Decision on DCPS's Motion:

As Petitioner aptly points out in his opposition to DCPS's motion, genuine issues of material fact still exist in this case. The parties have not stipulated to any facts. Neither party has offered or introduced testimonial or documentary evidence into the record. Petitioner has the right to present and object to any evidence and confront and cross-examine witnesses with respect to whether Student was substantively denied a FAPE. The evidence and testimony from DCPS witnesses regarding the development of and underlying public policy rationale for Student's move from School A to School B may affect the outcome of the case. Absent testimony from Petitioner's and DCPS's witnesses and consideration of documentary evidence, the IHO could not make a final determination of whether the change in Student's school was a change in placement such that Petitioner should have been a part of that decision making. Following consideration of Respondent's Motion and Petitioner's Response in Opposition to the Motion, the IHO denied DCPS's Motion to Dismiss and proceeded with the hearing and the resulting findings of fact and conclusions of law.

ISSUE ADJUDICATED AT HEARING:⁴

As stated, the IHO conducted a PHC on September 28, 2023, and issued PHO on October 4, 2023, inter alia, outlining, the issue to be adjudicated:

Did DCPS deny Student a FAPE by failing to provide Student with an appropriate location of service and/or placement for SY 2023-2024 when DCPS changed Student location/placement from School A to School B for SY 2023-2024 without Petitioner's participation.⁵

DUE PROCESS HEARING:

The Due Process Hearing was convened on October 27, 2023. The hearing was conducted via video teleconference on the Microsoft Teams platform.

RELEVANT EVIDENCE CONSIDERED:

The IHO considered the testimony of the witnesses and the documents submitted in each party's disclosures (Petitioner's Exhibits 1 through 27 and Respondent's Exhibits 1 through 9) that were admitted into the record and are listed in Appendix 2.⁶ The witnesses testifying on behalf of each party are listed in Appendix B.⁷

SUMMARY OF DECISION:

Petitioner held the burden of production and the burden of persuasion on the issue adjudicated. The IHO concluded that Petitioner sustained the burden of persuasion by a preponderance of the evidence that the change in Student's school from School A to School B, that DCPS characterizes as a change in location, amounted to a change in placement that required the parent's participation, and that DCPS's failure to include Petitioner in that determination significantly impeded the Petitioner's opportunity to participate in the decision-making process regarding the provision of

⁴ At the outset of the due process hearing, the IHO reviewed issues to be adjudicated from PHO. Petitioner withdrew the third issue from the PHO regarding educational records. The parties agreed that the two issues as stated here are the issues to be adjudicated.

⁵ The IHO noted at the outset of the hearing in reviewing the issue to be adjudicated, that the crux of the issue is whether the change in Student's school from School A to School B, that DCPS characterizes as a change in location, amounts to a change in placement that required the parent's participation.

⁶ Any item disclosed and not admitted or admitted for limited purposes was noted on the record and in Appendix A.

⁷ Petitioners presented four witnesses: (1) Petitioner, (2) Student's out of school independent Board-Certified Behavior Analyst ("BSBA"), and two DCPS employees who Petitioner sought and obtained notices to appear for their testimony: (3) DCPS Director of Academic Programs, and (4) Student's special education teacher at School A. Respondent presented five witnesses: (1) DCPS also presented Student's School A special education teacher, and five other witnesses who testified as experts: (2) Student's School B special education teacher, (3) the BCBA at School B, (4) the BCBA at School A, (5) School A LEA representative. Any material inconsistencies in the testimony of witnesses that the IHO found are addressed in the conclusions of law.

FAPE. The IHO ordered DCPS to place Student with transportation at School A for the remainder of SY 2023-2024, and to immediately convene a MDT meeting to discuss Student's transition to School A.

FINDINGS OF FACT:⁸

1. Student is a child with a disability pursuant to IDEA with a disability classification of autism. Student resides with Petitioner, Student's parent, in the District of Columbia. DCPS is Student's LEA. For SY 2022-2023 Student attended CES program at School A. Student attended the CES program at School A for the past five (5) years because Student's neighborhood school did not have a CES program. Prior to SY 2023-2024, Student had not attended any other school programs except for School A since being initially identified and provided with an IEP. (Petitioner's testimony, Petitioner's Exhibit 4)
2. Student was placed by DCPS at School A, the closest school to Student's home with a CES program. Once Student was assigned to Student's most recent special education teacher at School A, Student's displayed tremendous progress. Petitioner has observed Student's growth in every aspect of academics and social interactions. Student has great relationships with teachers and service providers at School A. For Student, the structure of knowing who he/she would see every day on the way to his/her classroom was important. When Student's mother passed away School A was a second family for Student. (Petitioner's testimony)
3. Student is nonverbal and uses an augmentative and alternative communication ("AAC") device to communicate, which Student began using about a year and half ago. Student has a few words for some of the things that Student enjoys and uses some sign language. Student is beginning to realize and use the AAC device as Student's principal means of communication. (Petitioner's testimony)
4. Student's most IEP was developed on January 11, 2023, and provides for Student twenty-five (25) hours of instruction outside of the general education setting, two hundred forty (240) minutes a month of speech and language services, two hundred forty (240) minutes a month of occupational therapy, and the use of assistive technology such as an AAC device as a result of Student's severe delays in receptive, expressive and pragmatic language skills. (Respondent's Exhibit 2)
5. Student made academic and social progress while at School A and consistently made achieved Student's IEP goals through the years. As with most Student's in Student's classroom at School A, Student was familiar with the classroom routines that allowed him/her to progress. By Student's third year in the CES classroom to which Student was assigned at School A, Student had mastered the classroom routines. Student is friendly

⁸ The evidence (documentary and/or testimony) that is the source of the Findings of Fact ("FOF") is noted within parentheses following the finding. A document is noted by the exhibit number. If there is a second number following the exhibit number, that number denotes the page of the exhibit from which the fact was obtained. When citing an exhibit submitted by more than one party separately, the IHO may only cite one exhibit.

with familiar adults and people Student sees on a regular basis and likes to get acquainted to new faces as well. (Witness 2's testimony)

6. For SY 2023-2024, Student was scheduled to move from Student's CES classroom and teacher Student had for the previous three years to a new CES classroom for the next grade grouping. At School A, when a student transitions to the next level of CES classroom, the student would continue to have some contact with the student's previous teacher to assist with transition to the new classroom and the students who were with him/her would typically move with the student to the new classroom. (Witness 2's testimony)
7. Petitioner was aware that Student would be transitioning to a new CES classroom for SY 2023-2024, but anticipated that Student would remain at School A. Petitioner felt comfortable that Student would be transitioning to the next level CES classroom at School A because of the communication he had with and about the teacher in that classroom and because Student would still have some contact with the current special education teacher. (Petitioner's testimony)
8. In late March 2023, Petitioner received a text message from the School A office and was then informed that DCPS has decided to change Student's school location. At the time of the notification, Petitioner was not provided an opportunity for input regarding the change. Petitioner was startled by the news of Student's anticipated change of schools for SY 2023-2024, and inquired of the School A staff who and how the decision was made and to whom Petitioner should address his concerns. Petitioner opposed the change because School B is farther from his home than School A and he believed Student would be negatively impacted given the relationship Student had built with providers and peers at School A. (Petitioner's testimony)
9. Student's School A special education teacher provided Petitioner a PWN, dated April 11, 2023, by putting it in Student's backpack and sending it home with Student, as the teacher typically did for notices and correspondence directed to parents. Student's special education teacher did not provide a PWN to his other students who were transitioning to the next level CES classroom in the School A. (Witness 2's testimony)
10. School A provided Petitioner the contact information for DCPS central office staff members involved in Student's change in school location. On or about May 19, 2023, Petitioner reached out to DCPS's central office to raise his objections and address his concerns about the proposed transfer. The school year ended with Petitioner never receiving a response from the DCPS central office until August 3, 2023. Petitioner later had a conversation with the DCPS central staff member about the change in Student's school location. That staff member had not seen Petitioner's May 19, 2023, email, and explained to Petitioner why and how School B was selected as Student's school for SY 2023-2024. (Petitioner's testimony, Witness 1's testimony)
11. The DCPS central office staff provides DCPS schools, including School A, support, instruction, and guidance that they must draft a PWN when a change in school location is made for the upcoming school year. The LOS team from central office sends the protocol

to the school LEA on how to generate the PWN and that action is taken by the school-based team. The School A LEA representative met with Student's special education teacher, and they sat together to generate the PWN issued to Petitioner. (Witness 6's testimony, Respondent's Exhibit 2A)

12. DCPS provided Petitioner the PWN dated April 11, 2023, that stated the following: "Dear [Parent]: The Individual with Disabilities Education Act (IDEA), 34 C.F.R. §300.503(a), requires the LEA to provide you with prior written notice before the LEA (1) proposes to initiate or change the identification, evaluation, or educational placement of the student or the provision of a free and appropriate public education (FAPE) to the student referenced above; or (2) refuses to initiate or change the identification, evaluation, or educational placement of the student or the provision of FAPE to the student" (Petitioner's Exhibit 21)
13. Under the section "Description of the proposed or refused action(s)," the PWN stated: In accordance with DC Municipal Regulations (DCMR) Section 3022 and IDEA, DCPS is proposing [School B] as the service location for [Student's] educational placement in school year 2023-2024. This service location is, as close as possible, to the child's home address, and has the appropriate program to implement [his/her] IEP." (Petitioner's Exhibit 21)
14. Under the section "Explanation of reasons for proposal or refusal of action," the PWN stated: "[School B] is the proposed location of services for school year 2023-2024 where [Student] will have [Student's] IEP implemented in the CES Program. On Friday, 4/7/2023, the child's parent was notified via in-person conversation of the change in services location and was provided with an LOS letter via U.S. mail." (Petitioner's Exhibit 21)
15. Under the section "Description of each evaluation procedure, assessment, record, or report used as a basis for the proposed or refused action," the PWN stated: "Based on [Student's] most recent IEP, [Student's] current educational placement is a self-contained special education classroom, outside of the general education setting. [Student] will continue to receive specialized instruction and related services in this setting when [Student] transitions to [School B] for ____ grade." (Petitioner's Exhibit 21)
16. Under the section "Description of other options considered by the IEP Team, if any, and reason for rejecting them, if warranted, the PWN stated: "no additional options were considered." The PWN also stated the regarding the description of other factors related to the proposal or refusal: "no additional factors apply." (Petitioner's Exhibit 21)
17. Finally, the PWN concluded as follows: "Parents of a student with a disability have specific rights under IDEA, Part B that are outlined in the procedural safeguards notice. Please feel free to contact the person listed below to receive a copy of the procedural safeguards notice, receive assistance understanding the procedural safeguards notice, or receive additional information about the Part B process. The person identified below may also assist you in identifying resources to help understand Part B of the IDEA or with any additional

questions regarding the student's educational needs. Sincerely, [DCPS Staff member]" (Petitioner's Exhibit 21)

18. On April 12, 2023, DCPS sent a letter to Petitioner that stated the following:

Dear Parent/Guardian of [Student]:

[School B] has been identified as the school year 2023-2024 location of special education services for [Student]. [School B] has the programming in place to implement the educational and IEP needs of [Student]. Your student's location is changing for the 2023-2024 school year because [School B] is the feeder school for the Communication & Education Support program in the [Neighborhood high school] boundary.

You can enroll at [School B] with a copy of this letter and a completed copy of the DCPS 2023-2024 school enrollment packet. The school enrollment packet can be found on the DCPS website at <https://enrolldcps.dc.gov/node/76> and is also available for pick up at your student's current school. If you would like to learn more about [School b], or would like assistance with completing the enrollment process, please contact the LEA Representative, [Name] at [School B] via phone at (202[number]). Please note, this letter confirms your child's Location of Special Education Services at [School B] through September 30, 2023. If you are attempting to enroll [Student] after September 30th please contact the Division of Specialized Instruction at dcps.specialed@k12.dc.gov for guidance on the Location of Services. As a parent of a student with a disability, you have specific rights under the Individuals with Disabilities Education Act (IDEA). To obtain a copy of the IDEA procedural safeguards for families, you may access it here:

<http://osse.dc.gov/publication/rights-parents-students-disabilities-idea-part-b-notice-procedural-safeguards>. If you have any questions about your rights, you may contact the Division of Specialized Instruction at dcps.specialed@k12.dc.gov. You may also contact the Ombudsman for Public Education at 202-741-0886 or ombudsman@dc.gov or the Office of the Student Advocate at 202-741-4692 or student.advocate@dc.gov for assistance. If you have additional questions or concerns about Dewey's location of special education services for the 2023-2024 school year or believe the information above is incorrect, please contact [Name] [Position] via email at [email]. [Name & Signature of Sender].

(Respondent's Exhibit 3)

19. The decision to change Student's school location to School B for SY 2023-2024 was made by the DCPS central office. In doing so, DCPS central office staff did not consider the impact of the change of school location on Student. Because the central office staff makes location assignment decisions for hundreds of students throughout DCPS per year, the staff does not consider the impact of any individual student, the staff simply determines the

geographical (feeder) boundary that a student lives in and provides the Student a school location based on that boundary. The staff strives in that regard to have a student going to school with other students/peers in his or her community by using the DCPS “geographical feeder pattern.” (Witness 1’s testimony, Petitioner’s Exhibit 19)

20. Petitioner enrolled Student at School B and Student began attending School B shortly after the start of SY 2023-2024. Petitioner arranged for outside related services after school in the community that Student easily attended after school when Student attended School A. The recent change in school location to School B, makes it more difficult for Student to access these services and has resulted in Student missing school to attend these outside sessions. (Petitioner’s testimony)
21. On September 11, 2023, School B sent Petitioner a letter of invitation to attend a transition virtual meeting that occurred on September 21, 2023. Members of the School A staff who were familiar with Student participated in the meeting along with Petitioner and Student’s School B classroom special education teacher and other School B staff members. It was principally an opportunity to introduce the School B to Petitioner. Student was not a part of the meeting. (Petitioner’s testimony, Respondent’s Exhibit 4A)
22. When Student first arrived at School B Student was sad and shy. Student has now begun to open up, and show what Student can do. Student has begun to interact with staff and is learning to engage with peers. School B is implementing Student’s IEP and Student is making progress. Student’s current special education teacher at school B talked with Student’s previous teacher during the September 21, 2023, transition meeting. Otherwise, has not had any communication with anyone at School A regarding Student. Student’s School B teacher has not yet shared any of Student’s academic data with Petitioner, but has had brief conversations with Petitioner regarding Student. (Witness 4’s testimony)
23. Student has displayed some self-stemming behavior since attending School B, but School B is not tracking this behavior and recording data on those behaviors. Student has on occasion pretended to not know things that Student previously mastered while attending School A and has pretended not to know how to use Student’s AAC device. (Witness 5’s testimony, Petitioner’s testimony)
24. Petitioner has requested that Student return to School A for the remainder of SY 2023-2024. Currently, all the seats in the School A CES classroom for Student’s grade have been assigned; however, there is one assigned seat in the classroom is available because the assigned student has not yet attended School A for SY 2023-2024. (Witness 6’s testimony)

CONCLUSIONS OF LAW:

Pursuant to IDEA §1415 (f)(3)(E)(i), a decision made by a hearing officer shall be made on substantive grounds based on a determination of whether the child received a free appropriate public education (“FAPE”).

Pursuant to IDEA §1415 (f)(3)(E)(ii), in matters alleging a procedural violation, a hearing officer may find that a child did not receive FAPE only if the procedural inadequacies impeded the child's right to FAPE, significantly impeded the parent's opportunity to participate in the decision-making process regarding the provision of FAPE, or caused the child a deprivation of educational benefits. An IDEA claim is viable only if [DCPS'] procedural violations affected the student's substantive rights." *Lesesne v. District of Columbia*, 447 F.3d 828, 834 (D.C. Cir. 2006)

34 C.F.R. § 300.17 provides:

A free appropriate public education or FAPE means special education and related services that--
(a) Are provided at public expense, under public supervision and direction, and without charge;
(b) Meet the standards of the SEA, including the requirements of this part; (c), Include an appropriate preschool, elementary school, or secondary school education in the State involved;
and (d) Are provided in conformity with an individualized education program (IEP) that meets the requirements of Sec. 300.320 through 300.324.

Pursuant to 5A DCMR 3053.6, the burden of proof is the responsibility of the party seeking relief. *Schaffer v. Weast*, 546 U.S. 49, 126 S.Ct. 528 (2005). Petitioner held the burden of production on both issues adjudicated. Petitioner held that the burden of persuasion on the issue adjudicated. The burden of persuasion shall be met by a preponderance of the evidence. The normal standard is a preponderance of the evidence. See, e.g., *N.G. V. District of Columbia* 556 f. Sup. 2d (D.D.C. 2008) see also 20 U.S.C. §1451 (i)(2)(C)(iii).

ISSUE: Did DCPS deny Student a FAPE by failing to provide Student with an appropriate location of service and/or placement for SY 2023-2024 when DCPS changed Student location/placement from School A to School B SY 2023-2024 without Petitioner's participation?

Conclusion: Petitioner sustained the burden of persuasion by a preponderance of the evidence.

In *Board of Education v. Rowley*, the United States Supreme Court set forth a two-part inquiry for determining whether a school district has satisfied the FAPE requirement. First, the state must have "complied with the procedures set forth in the Act." *Rowley*, 458 U.S. at 206. Second, the IEP that is developed must be "reasonably calculated to enable the child to receive educational benefits." *Rowley*, 458 U.S. at 206-07. To be appropriate under 34 C.F.R. § 300.324, the IEP must consider the (i) strengths of the child; (ii) concerns of the parents; (iii) results of the initial or most recent evaluation; and (iv) academic, developmental, and functional needs of the child.

"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); *Endrew F.*, 137 S. Ct. at 994; *Sch. Comm. of Town of Burlington, Mass. v. Dep't of Educ. of Mass.*, 471 U.S. 359, 369, 105 S. Ct. 1996, 2002, 85 L. Ed. 2d 385 (1985); *Jenkins v. Squillacote*, 935 F.2d 303, 304 (D.C. Cir. 1991); *Dist. of Columbia v. Doe*, 611 F.3d 888, 892 n.5 (D.C. Cir. 2010).

This evidence reveals that for SY 2023-2024, Student was scheduled to move from Student's CES classroom and teacher at School A that Student had for the previous three years, to a new CES classroom for the next grade grouping. Petitioner was aware that Student would be transitioning to a new CES classroom for SY 2023-2024, but anticipated that Student would remain at School A.

Petitioner was first informed in person by School A that DCPS had decided to change the Student's school location. At the time of the notification, Petitioner was not provided an opportunity for input regarding the change. Student's School A special education teacher provided Petitioner a PWN, dated April 11, 2023. Although Petitioner did not recall receiving the PWN, DCPS strongly maintained that the Petitioner received the PWN. Student's special education teacher did not provide a PWN to his other students who were transitioning to the next-level CES classroom at the School A.

The evidence demonstrates that DCPS central office staff provides DCPS schools, including School A, guidance, and direction that they must draft a PWN when a change in school location is made for the upcoming school year. The LOS team from central office sends the protocol to the school LEA on how to generate the PWN and that action is taken by the school-based team. The School A LEA representative met with Student's special education teacher, and they sat together to generate the PWN issued to Petitioner.

DCPS provided Petitioner the PWN dated April 11, 2023, that cited the provisions of 34 C.F.R. §300.503(a), that require the LEA to provide prior written notice before the LEA (1) proposes to initiate or change the identification, evaluation, or educational placement of the student or the provision of a free and appropriate public education (FAPE) to the student referenced above; or (2) refuses to initiate or change the identification, evaluation, or educational placement of the student or the provision of FAPE to the student” The PWN also cited DC Municipal Regulations (DCMR) Section 3022.

Finally, the PWN concluded as follows: "Parents of a student with a disability have specific rights under IDEA, Part B that are outlined in the procedural safeguards notice. Please feel free to contact the person listed below to receive a copy of the procedural safeguards notice, receive assistance understanding the procedural safeguards notice, or receive additional information about the Part B process. The person identified below may also assist you in identifying resources to help understand Part B of the IDEA or with any additional questions regarding the student's educational needs.

On April 12, 2023, DCPS sent a letter identifying School B as the location of Student's special education services for SY 2023-2024 because School B was the feeder school for the CES program in the high school boundary in which Student lives.

The evidence reveals that decision to change Student's school location to School B for SY 2023-2024 was made by the DCPS central office and that the DCPS central office directed School A to issue Petitioner the PWN. In making the decision to change Student's school location, DCPS central office staff did not consider the impact of the change of school location on Student.

DCPS's witness testified that because the central office staff makes location assignment decisions for hundreds of students throughout DCPS per year, the staff does not consider the impact of any individual student; the staff simply determines the geographical (feeder) boundary that a student lives in and provides the Student a school location based on that boundary.

In addition to citing IDEA, the PWN that DCPS issued Petitioner at DCPS central office's direction, also cited DC Municipal Regulations (DCMR) 5 A Section 3022, which states:

3022 PLACEMENT DETERMINATION

3022.1 The LEA shall ensure that the appropriate educational placement for a child with a disability is: (a) Based on the child's current level of need as documented in the child's IEP; (b) Reviewed and determined annually by a group of persons, including the parents and other persons knowledgeable about the child, the meaning of the evaluation data, and the continuum of alternative placement options; (c) As close as possible to the child's home; and (d) Determined in conformity with the least restrictive environment provisions of Section 3021.

3022.2 The LEA shall determine the child's placement based upon the child's needs, regardless of existing placement options, services, staff, or space that exists at the time.

3022.3 The LEA shall not determine a child's placement based solely on additional costs or administrative inconvenience that would result from educating the child within the general education classroom.

3022.4 A child with a disability shall be educated in the school that the child would attend if the child did not have a disability unless the child's unique needs or the nature or severity of the child disability warrant a more restrictive placement.

IDEA allows states to create additional procedural and substantive protections if they are consistent with IDEA. *Middleton*, 312 F.Supp.3d at 122. If a state creates a higher standard, "an individual may bring an action under the federal statute seeking to enforce the state standard." *Id.* (quoting *Gill v. Columbia* 93 Sch. Dist., 217 F.3d 1027, 1035).

In 2014, the District of Columbia passed the Student Rights Act. The Act "provides district parents with additional procedural safeguards to help make sure parents have the tools they need to stay informed, engaged, and empowered throughout the special education process." See D.C. Council Comm. Rep. on B 20-723 (D.C. 2014) at 1.

The Act (D.C. Code § 38-2571.03) states in pertinent part the following:

In addition to any procedural safeguards and due process requirements required by IDEA:

(1) Before any change in service location for a child with a disability is made, the LEA shall provide the parent with written notice of the proposed change, which shall at minimum include:

- (A) A description of the action proposed by the LEA;
- (B) An explanation of why the LEA proposes to take the action;
- (C) A description of each evaluation procedure, assessment, record, and report the agency used as a basis for the proposed action;
- (D) A statement that the parents of a child with a disability have protection under the procedural safeguards of IDEA and that describes the means by which a copy of the procedural safeguards can be obtained;
- (E) Sources for parents to contact to obtain assistance in understanding the provisions of IDEA;
- (F) A description of other options that the LEA considered and the reasons why those options were rejected; and
- (G) A description of any other factors relevant to the LEA's proposal.

The case law generally supports the proposition that the actual school location where a student's IEP will be implemented is the purview of the school district. In *Sanchez v. District of Columbia*, 382 F. Supp. 3d 32, (April 25, 2019) the Court stated:

"First, the Court concludes that Z.B. was not denied a FAPE on this ground because the decision to refer Z.B. to Kennedy Krieger was a change in location of services not a change in educational placement, which would have necessitated parental involvement. The IDEA requires that a student's parents be part of the team that creates the student's IEP and determines the student's educational placement. See 20 U.S.C. § 1414(d)(1)(A)-(B). However, [**33] the IDEA does not "explicitly require parental participation in site selection." *James*, 949 F. Supp. 2d at 138 (quoting *White ex rel. White v. Ascension Parish School Bd.*, 343 F.3d 373, 379 (5th Cir. 2003)). Plaintiff has failed to cite any case, from this Circuit or another, requiring parental involvement in site selection. Instead, all of the cases cited by Plaintiff in support of her argument refer to parental participation in the development of the student's IEP and educational placement. See e.g., *Doug C. v. Hawaii Dep't of Educ.*, 720 F.3d 1038, 1044-45 (9th Cir. 2013) (requiring parental participation in the student's IEP development and educational placement); *Anchorage Sch. Dist. v. M.P.*, 689 F.3d 1047, 1055 (9th Cir. 2012) (same); *Deal v. Hamilton Cty. Bd. of Educ.*, 392 F.3d 840, 857-59 (6th Cir. 2004) (explaining that a predetermination of services can violate the parents' right to participate in the IEP process)."

In *Lunceford v. District of Columbia Board of Education*, 745 F.2d 1577, 1579 (D.C. Cir. 1984), the court considered the definition of "educational placement" for "a multi-handicapped young man with profound mental [disability] and crippling conditions." The student lived in a private hospital where he was also provided educational services. *Id.* The dispute arose when the private hospital informed the school district that the plaintiff "was ready to be discharged" and recommended that he continue the identical "education program on an outpatient basis." *Id.* The only change at issue in *Lunceford* was the student's residential setting, not his IEP or any other aspect of his educational setting. See *id.*

In the current case, Petitioner contends that DCPS denied Student a FAPE when it changed Student's school location from School A to School B for SY 2023-2024 school year as the change constitutes a change in placement not just a location considering Student's individualized circumstances. Petitioner contends that given that Student attended School A for five years, has built relationships with staff and peers and has acclimated to this specific environment in such a way as to allow Student to access Student's education, the change is traumatic to Student and negatively impacts Student's progress and well-being.

On the other hand, DCPS counsel argued during the hearing that Student's placement is the "20 hours and the services in the IEP," and that the case law is clear that an LEA may unilaterally decide of a student's school location.

During the hearing there was particular focus on the PWN that DCPS issued to Petitioner regarding the change in Student's location for SY 2023-2024. In response to the inquiry why the PWN, in addition to citing provisions of IDEA, also cited the DCMR provisions regarding placement, and noted that the change was made pursuant to provisions that require parent participation, DCPS counsel explained that DCPS is required to include this provision by DC law, but the inclusion of that provision has no real meaning regarding a parent's participation in the determination of a location of services. DCPS counsel explained that OSSE created the PWN document in the special education database and the contents of the document are beyond DCPS's control.

DCPS counsel acknowledged that the citations of IDEA and DCMR regulations create a contradiction because this is a document for a change in placement when what is being done here is a change in location. DCPS counsel also stated that he was unsure of how the DCMR reference was placed in the PWN provided to Petitioner.

There was no testimonial or documentary evidence presented to support any of the explanations given for why the PWN DCPS provided Petitioner noted that Petitioner had the right to participate in the change of Student school assignment for SY 2023-2024. The facts of this case demonstrate that Petitioner was given no opportunity to weigh in on the change of school or to have Student's teachers, service providers, or anyone who had worked with Student for five years at School A provide any input, feedback on the proposed change, or much less for that information to be conveyed to and considered by the school staff at School B before Student arrived at School B.

The evidence demonstrates that as a result, Student masked many of the academic and communication abilities that Student had demonstrated and, in some instances, mastered at School A, resulting in Student losing out on valuable time in Student's education progress. Ultimately, had DCPS provided Petitioner the opportunity to participate in the decision to change Student's school location, DCPS may have still directed that Student attend School B for SY 2023-2024; however, Petitioner would have been provided the right he should have been afforded and cited in the PWN that DCPS issued. Accordingly, the IHO concludes that DCPS' failure to include Petitioner in the decision to change Student's school location for SY 2023-2024 significantly impeded the Petitioner's opportunity to participate in the decision-making process regarding the provision of FAPE.

Although in Petitioner's DPC there was a request for compensatory education, there was no evidence presented during the hearing for such relief, and the IHO found no basis to grant such relief.

ORDER:

1. DCPS shall, within ten (10) school days of the issuance of this order, place Student in the age appropriate CES classroom at School A, for the remainder of SY 2023-2024, and offer Student transportation services.
2. DCPS shall, within five (5) school days of the issuance of this order, convene a multidisciplinary team meeting with Petitioner's participation to discuss Student's transition to School A pursuant to this order.
3. All other relief requested by Petitioner is denied.

APPEAL PROCESS:

The decision issued by the Hearing Officer is final, except that any party aggrieved by the findings and decision of the Hearing Officer shall have ninety (90) days from the date of the decision of the Hearing Officer to file a civil action with respect to the issues presented at the due process hearing in a District Court of the United States or a District of Columbia court of competent jurisdiction, as provided in 20 U.S.C. §1415(i)(2).

/S/ Coles B. Ruff

Coles B. Ruff, Esq.
Impartial Hearing Officer
Date: November 13, 2023

Copies to: Counsel for Petitioners
 Counsel for LEA
 ODR hearing.office@dc.gov