

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

OSSE
Office of Dispute Resolution
October 25, 2017

STUDENT, ¹)	
through the PARENT A,)	Hearing Officer: NaKeisha Sylver Blount
<i>Petitioner,</i>)	
)	Case No: 2017-0216
v.)	
)	Date Issued: October 25, 2017
District of Columbia Public Schools)	
<i>Respondent.</i>)	

Hearing Officer Determination

SUBJECT MATTER JURISDICTION

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

PROCEDURAL BACKGROUND

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

The DPC was filed on August 11, 2017 by Petitioner (Student’s parent), a resident of the District of Columbia, against Respondent, District of Columbia Public Schools (“DCPS”). On August 21, 2017, Respondent filed its timely Response, denying that Respondent denied Student a free appropriate public education (“FAPE”).

The parties convened a Resolution Session Meeting (“RSM”) in this matter on August 21, 2017. The parties did not reach an agreement during the RSM; however, they agreed to keep the resolution process open for the entire 30-day resolution period. Accordingly, the parties agree that the 45-day timeline for the Hearing Officer’s Determination (“HOD”) in this matter began to run on September 12, 2017 and concludes on October 25, 2017.

The undersigned Impartial Hearing Officer (“IHO” or “Hearing Officer”) convened a Pre-hearing Conference (“PHC”) on September 7, 2017, during which the parties discussed and clarified the issues and the requested relief. The PHC was summarized in the Pre-Hearing

¹ Personal identification information is provided in Appendix A.

Conference Summary and Order (the “PHO”) issued on September 8, 2017, which ordered that five-day disclosures would be filed by September 14, 2017 and that the DPH would be held on September 21, 2017.

The DPH was held on September 21, 2017 and October 11, 2017 at the Office of Dispute Resolution, 810 First Street, NE, Rooms 2003 and 2006. Petitioner elected for the hearing to be closed. Petitioner was represented by [PETITIONER’S COUNSEL], Esq. DPCS was represented by [RESPONDENT’S COUNSEL], Esq.

Petitioner’s and Respondent’s disclosures were timely filed. At the DPH, Petitioner’s exhibits P-1, P-2; P-4; P-6 through P-20; P-21; P24; P-25 were admitted into evidence without objection. Petitioner’s exhibits P-3 and P-5 were admitted over Respondent’s objection. Petitioner did not offer into evidence a P-22. Respondent’s exhibits R-1 through R-3 were admitted into evidence without objection.

Petitioner called the following witnesses at the DPH:

- (a) Parent A
- (b) Clinical Psychologist, Nonpublic School 1
- (c) Classroom Teacher, Nonpublic School 1
- (d) IEP Coordinator, Nonpublic School 1

Respondent called the following witnesses at the DPH:

- (a) Parent B
- (b) Former Nonpublic Monitor (“Nonpublic Monitor A”)
- (c) Current Nonpublic Monitor (“Nonpublic Monitor B”)
- (d) Admission Director, Nonpublic School 2

Petitioner and Respondent gave oral closing arguments.

ISSUES

As discussed at the PHC and reflected in the PHO, the following issues were presented for determination at the DPH:

- (a) Whether DCPS denied Student a FAPE by failing to involve Parent A in the placement determination in summer 2017. DCPS circumvented Parent A’s full involvement in the placement determination, though it was aware of Parents’ court ordered custody agreement.
- (b) Whether DCPS denied Student a FAPE by failing to convene an IEP meeting at a date and time convenient to Parent A in spring 2017.
- (c) Whether DCPS denied Student a FAPE by failing to provide the Parent A with a copy of Parent A’s procedural due process rights when it changed Student’s placement in summer 2017.
- (d) Whether DCPS denied Student a FAPE by failing to identify an appropriate location of services for Student in summer 2017.

RELIEF REQUESTED

Petitioner requested the following relief:

- (a) an Order that DCPS continue the student's placement at Nonpublic School 1;
- (b) a finding that DCPS denied Student a FAPE when it changed Student's placement;
- (c) an Order that DCPS comply with the court's order on the parents' custody agreement and an Order that DCPS comply with the court's order on the parents' custody agreement.

FINDINGS OF FACT

1. Student is [AGE] years old and is in the [GRADE] grade. Student resides in Washington, D.C. with Parents, who are divorced but share custody.²
2. Student is eligible for special education and related services under the disability classification Autism Spectrum Disorder ("Autism").
3. Student attends Nonpublic School 1. The 2017-2018 school year is Student's ninth year at Nonpublic School 1.³
4. Student is curious, interested in social justice, and when Student has a passion for something, Student has the capacity to produce good quality academic work.⁴
5. Student's October 8, 2015 IEP classified Student with Autism Spectrum Disorder, and provided Student 25.5 hours per week of specialized instruction outside the general education setting, 480 minutes per month of occupational therapy services outside the general education setting, 360 minutes per month of physical therapy services outside the general education setting, 240 minutes per month of speech-language pathology services outside the general education setting and 360 minutes per month of behavior support services outside the general education setting.⁵
6. Student is often internally distracted, which presents difficulties for Student's academic performance.⁶ By approximately spring 2016, Student began exhibiting some behavioral challenges at school. Student experienced a much greater level of disruptive and oppositional conduct during the 2015-2016 school year than in previous years.⁷ By approximately April 2016, Student's IEP team at Nonpublic School 1 decided to put a system in place to use behavioral tracking sheets at school with Student

² Testimony of Parent A; testimony of Parent B. The Petitioner in this action will be referred to as "Parent A." The joint custodial parent will be referred to as "Parent B." Jointly, the parents will be referred to as "Parents" or "the parents."

³ Testimony of Parent A.

⁴ Testimony of Classroom Teacher, Nonpublic School 1.

⁵ P-1-2.

⁶ Testimony of Classroom Teacher, Nonpublic School 1.

⁷ P-1-2.

and send them home to Parents.⁸ The tracking sheets are designed such that a check mark is to be placed on Student's tracking sheet every 15 minutes reflecting Student's behavioral status at the time.⁹

7. In spring 2016 without the knowledge of Parent 2, Parent 1 entered Student into the DCPS school lottery, and Student got into a public, general education school with some smaller self-contained classrooms ("Lottery School") that Parent 1 desired Student to attend, as a less restrictive environment ("LRE"), in part to mainstream Student in preparation for adult life, and to help Student's social skills to improve. With a short window of time available to claim the lottery school slot for Student, Parent 1 wrote an email to Parent 2 laying out the reasons Parent 1 thought the two of them should consider claiming the lottery slot and moving Student to the general education school.

8. Parent B forwarded Parent A's email to Nonpublic Monitor A and Student's IEP team members at Nonpublic School. The Lottery School contacted Nonpublic Monitor A to express that it did not believe it could meet Student's needs. Though Parent B was interested in moving Student to a school other than Nonpublic School 1, Parent B requested an IEP team meeting before moving Student to an LRE.¹⁰

9. Parent B wanted the assistance of an educational consultant in determining Student's LRE and an appropriate school for Student.¹¹ Nonpublic School 1 provided to Parents names of two potential educational consultants. Parent B hired and paid the fee for the educational consultant Parent A preferred, between the two referred options.¹² The hired educational specialist is a psychologist who works, in part, on placement issues.¹³

10. Student's team agreed that Student required more support than the Lottery School could provide.¹⁴ Nonpublic Monitor A informed Parents of several recommended locations of service for Student and referred Student to DCPS' centralized location of services team ("LOS").

11. On June 6, 2016 and July 11, 2016, DCPS sent referral packets to two different nonpublic schools ("Summer-2016 Identified Schools").¹⁵ At least one of the Summer-2016 Identified Schools is located outside the District of Columbia in TOWN. Parent A visited these schools in summer 2016, but Student had not yet visited them. Student was not accepted into either of these schools.

⁸ Testimony of Nonpublic Monitor A.

⁹ Testimony of Classroom Teacher, Nonpublic School 1.

¹⁰ Testimony of Parent A; testimony of Parent B; testimony of Nonpublic Monitor A.

¹¹ Testimony of Parent A; testimony of Parent B.

¹² Testimony of Parent B.

¹³ P-1-3.

¹⁴ Though not necessarily agreeing, Parent A deferred to the team's perspective that Student should not attend the Lottery School. P-20-4.

¹⁵ DCPS had referred Student to other potential schools as well within the same general time period.

12. In approximately June 2016, Student's IEP team agreed that Student would receive an independent comprehensive psychological evaluation ("IEE") at DCPS' expense. Parent A desired an IEE to confirm that Autism remained the correct disability classification for Student. Parent A believed the Autism classification limited Student's school location options. The IEE was also to assess Student's readiness to move to an LRE as Parent A desired.

13. Student's IEE comprehensive psychological evaluation report was August 3, 2016 ("August 2016 IEE") by an independent clinical psychologists Parents. The report indicates that while Student did quite well at Nonpublic School 1 for a number years, recently, "the school has not been as good of a fit for [Student's] needs and parents are trying to find a more appropriate placement for the upcoming school year."¹⁶

14. The August 2016 IEE demonstrated that Student's cognitive abilities are a relative strength, with domains testing from the low average to the high average range. Student's full scale IQ falls in the average range, at the 34th percentile.¹⁷ Academically, Student's testing scores reflect a great deal of variability with some areas of significant disparities as compared to the cognitive scores. For instance, while Student's broad reading and written language scores are average, Student scored in the 6th percentile (low) for broad math and the 0.4th percentile (very low) in math facts fluency.¹⁸ Such low academic scores, given Student's cognitive ability, are concerning.¹⁹

15. Because Student's disability classification is Autism, not all special education nonpublic schools will consider Student for admission. Student requires a school that can challenge Student academically and support Student's behavioral and emotional needs.²⁰ As of the start of the 2016-2017 school year, Student needed all of the services on the IEP, and perhaps even more. For example, Student sought out behavioral and emotional support services more frequently than they were scheduled.²¹

16. On September 20, 2016, Student's IEP team met to review the IEE. It determined the Student's disability classification continued to be Autism, and that Student's LRE continued to be a separate, outside the general education setting.²²

17. At the September 20, 2016 meeting, the educational consultant recommended that Student be moved to a more restrictive setting with specific programming to address Student's academic and behavioral needs. Parent A and Nonpublic School 1, including Clinical Psychologist, Nonpublic School 1, believed that Nonpublic School 1 could continue to meet Student's needs and expressed that Student

¹⁶ P-1-2.

¹⁷ P-1-5 through P-1-8.

¹⁸ P-1-13 through P-1-14.

¹⁹ Testimony of Classroom Teacher, Nonpublic School 1; testimony of Nonpublic Monitor B.

²⁰ Testimony of Parent A; P-1-2.

²¹ Testimony of Clinical Psychologist, Nonpublic School 1; P-1-3.

²² R-2-4.

should remain there. Parent B desired to look into other school settings, but deferred to Parent A's decision for the time. The team agreed to reconvene in October to consider an additional teacher rating scale, and Parent A requested that the educational consultant not be permitted to attend the next meeting.²³

18. Both parents agreed to meet with Nonpublic Monitor A regarding "next steps" following the September 20, 2016 meeting.²⁴ Referrals were sent to nonpublic schools following the September 2016 meeting and prior to April 2017; however, Parent A declined to allow Student to visit the referred nonpublic schools.²⁵

19. Student used to be "the poster child for regression" during breaks, but the amount of regression has diminished to some extent over the years.²⁶ As of the start of the 2016-2017 school year Student would have benefitted from extended school year ("ESY") services, because Student still "experiences a great deal of academic and behavioral regression and . . . struggles greatly to transition back to the routine of the school environment after breaks."²⁷

20. The Nonpublic School 1 members of Student's IEP team had repeatedly recommended ESY for Student during the previous couple of years;²⁸ however, they respected Parent A's strong desire that Student not attend ESY, and wanted to be responsive to Parent A's perspective on ESY for Student.²⁹ When meeting on October 12, 2016, Student's IEP team acknowledged that Student shows regression over summer breaks. The team nonetheless indicated on Student's October 2016 IEP that Student does not require ESY, because it indicated that Student was able to recover from the summer regression within a few weeks. The team indicated that it would monitor what regression the Student experienced over the winter break.³⁰

21. Student's October 12, 2016 IEP classified Student with Autism Spectrum Disorder. It indicated that Student's behavior impedes Student's learning or that of other students. It indicates that Student experiences behavior regression at the start of the school year. It indicates that Student is provided behavior support through the schoolwide incentive program, and is also provided a behavior checklist to keep Student on task and provide Student an overview of the school day and that a behavior intervention plan ("BIP") "is not being recommended at this time."³¹

22. Student's October 12, 2016 IEP includes goals in math, reading, written expression; communication/speech and language; emotional, social and behavioral development; and motor skills/physical development. It provides 26 hours per week of specialized instruction

²³ R-2-7.

²⁴ P-2-7.

²⁵ Testimony of Nonpublic Monitor B; testimony of Parent A.

²⁶ Testimony of Clinical Psychologist, Nonpublic School 1.

²⁷ P-1-3.

²⁸ P-1-3.

²⁹ Testimony of Nonpublic Monitor A.

³⁰ P-5-2.

³¹ P-4-3.

outside the general education setting, 480 minutes per month of occupational therapy services outside the general education setting, 360 minutes per month of physical therapy services outside the general education setting, 240 minutes per month of speech-language pathology services outside the general education setting, and 360 minutes per month of behavioral support services outside the general education setting.³²

23. Student's October 12, 2016 IEP describes Student's LRE as follows: **Instruction** – “[Student] requires a small class size with low student to teacher ratio, instruction and integration of services in an out of general education, nonpublic setting to [Student's] deficits;” **Occupational Therapy** – “Due to deficits in sensory processing, control, developmental hand, bilateral coordination, and visual motor skills, [Student] individualized instruction and support of related services to effectively access the school/class environment;” **Physical Therapy** – “Due to deficits in postural strength, balance, motor planning, and endurance, [Student] requires support and related services in a small structured setting to safely negotiate and access [Student's] school environment;” **Speech-Language Pathology** – “Due to deficits in expressive and receptive language as well as articulation impact [Student's] access to the curriculum. Pragmatic language deficits impede social communication in the classroom;” and **Behavioral Support Services** – “Student needs counseling due to problems with: behavioral control, frustration tolerance, cognitive rigidity, coping skills & social skills.”³³

24. In January 2017, Nonpublic Monitor A transitioned to a new job with DCPS, and Nonpublic Monitor B took over Student's case.³⁴

25. Nonpublic Monitor B conducted formal classroom observations of Student at Nonpublic School 1 on April 7, 2017, April 13, 2017 and May 23, 2017. During these observations, Student exhibited a great deal of off-task behavior and low engagement, except when the teacher was working with Student one-on-one. Student's adverse behaviors, such as arguing with the teacher and throwing blocks, were addressed through verbal prompting and allowing Student to leave the classroom for several breaks when Student became overwhelmed.³⁵ No tracking sheet was observed in use during either of the three observations.³⁶

26. For Student, unregulated behavior for the majority of class time, an inability to cope with frustration in the classroom, and extended time spent outside the classroom is not beneficial to the learning process. It would be ideal to reduce the amount of time Student spends out of the classroom due to behavior, and to be able to limit the amount of verbal prompting Student receives.³⁷

³² P-4-17.

³³ P-4-18.

³⁴ Testimony of IEP Coordinator, Nonpublic School 1.

³⁵ Testimony of Nonpublic Monitor B; P-7; P-8; P-9.

³⁶ Testimony of Nonpublic Monitor B.

³⁷ Testimony of IEP Coordinator, Nonpublic School 1; testimony of Nonpublic Monitor B.

27. Even when Student earned enough points to be eligible for a tangible award, award, Student often did not request the award.³⁸

28. At least by the start of the 2016-2017 school year, a behavior intervention plan plan (“BIP”) would have been beneficial for Student.³⁹ Nonpublic School 1 has not created a created a BIP for Student, and was aware during the 2016-2017 school year that DCPS had had concerns about the lack of a BIP for Student.⁴⁰

29. On April 14, 2017, Nonpublic Monitor B issued to Parent A a letter titled “Prior Written Notice – Intent to Discuss Change in Placement,” which provided the following description of the proposed or refused action(s): “DCPS is proposing to meet to discuss a change in location of SY 2017-2018 to a school that can meet [Student’s] needs and service [Student’s] IEP. The proposed options for referrals at this time are [the Summer-2016 Identified Schools] and [Public Communication Education Support (“CES”) Classroom].” The letter indicates the nonpublic Summer-2016 Identified Schools require that Student visit before they will consider admission; however, the DCPS Public CES Classroom does not. The letter indicates that Parent A had not as of that time allowed Student to visit the Summer-2016 Identified Schools.⁴¹ The email Nonpublic Monitor B sent to Parent A attaching the letter stated “This is to notify you that DCPS is proposing to discuss a change in location for [Student] for next school year.”⁴² Parent A responded to the email and letter the same day, asking Nonpublic Monitor B to “[p]lease explain why DCPS is proposing a change in location for [Student] in the upcoming school year.”⁴³ Nonpublic Monitor B and Parent A exchanged several emails during which Nonpublic Monitor B consistently referred to a desire to meet with Parents to a discuss a change in Student’s location of services. On May 3, 2017, in response to an email from Parent A sent on the same date that used the word “placement,” Nonpublic Monitor B stated that “[a]t this meeting we would be discussing [Student’s] location of service, not placement.”⁴⁴

30. Beginning April 14, 2017, Nonpublic Monitor B made several requests to both parents to discuss Student’s current location of services at Nonpublic School 1 and other potential location of services options. Nonpublic Monitor B preferred to meet with only with the Parents initially, to share DCPS’ concerns with them about Nonpublic School 1. Parent B was comfortable having a meeting with only the two parents and Nonpublic Monitor B present. Parent A was only comfortable having the meeting if it included Student’s MDT members from Nonpublic School 1. By May 3, 2017, Nonpublic Monitor B and Parent B had consented to having the meeting Nonpublic Monitor B was requesting with Student’s MDT.⁴⁵

³⁸ Testimony of Clinical Psychologist, Nonpublic School 1.

³⁹ P-1-11.

⁴⁰ Testimony of Parent A; testimony of Nonpublic Monitor A; testimony of Clinical Psychologist, Nonpublic School 1.

⁴¹ P-16.

⁴² P-20-6.

⁴³ P-20-6.

⁴⁴ P-20-5.

⁴⁵ Testimony of Parent A; testimony of Parent B; testimony of Nonpublic Monitor B; P-20.

31. In May 2017, Nonpublic Monitor B made several attempts to schedule a meeting prior to the end of the 2017-2018 school year with both parents and the Nonpublic School members of the MDT team. Due to work and family obligations, Parent A indicated only during the afternoons beginning at approximately 1:30 through approximately 3:15 p.m. Nonpublic School 1 offered availability for 9:00 a.m. on June 1, 2017 and no availability during the afternoons, except for May 25, 2017 at 1:30 p.m. Nonpublic Monitor B and Nonpublic School 1 had a meeting regarding a different student scheduled for 2:00 p.m. on May 25, therefore, Nonpublic Monitor B was not available for a 1:30 meeting regarding Student A. Nonpublic Monitor B expressed willingness to meet at the 9:00 a.m. slot on June 1, 2017 offered by Nonpublic Public School 1, and proposed at least three 1:30 p.m. slots in June 2017, and requested additional proposed afternoon time slots from Nonpublic School 1.⁴⁶

32. Between approximately April 2017 and June 2017, DCPS attempted to persuade Parent A to allow Student to visit other nonpublic schools, including the Summer 2016-Identified Schools, so that Student could be considered for admission; however, Parent A declined to allow Student to visit any other schools. Parent A also informed the Summer 2016-Identified Schools that Parent A was not in agreement with their programs or Student attending there. Parent A is aware that most nonpublic schools will not admit a student if the parent is not in agreement.⁴⁷

33. On June 5, 2017, DCPS issued to Parent A a letter identifying Public CES Classroom as Student's location of services for the 2017-2018 school year.⁴⁸ Parent A contacted the District of Columbia Office of the Ombudsman for Public Education regarding the letter, and the Office of the Ombudsman stated the letter was sent in error.⁴⁹

34. Nonpublic School 2 is a self-contained nonpublic special education school that serves students with varying disability classifications, including Autism. There are six students, including Student, assigned to Student's designated classroom at Nonpublic School 2, and each of the students in Student's classroom are diagnosed with Autism or disabilities in common with Autism. It focuses on social skills instruction as well as academic instruction. It can provide the services listed on Student's IEP, including the related services. It has a Certificate of Approval from OSSE. It can develop and implement BIPs. All of the students except one in Student's designated classroom at Nonpublic School 2 are on the diploma track.⁵⁰

35. Nonpublic School 2 is an 11-month program because Students who attend the school need a great deal of support and maintaining their structure is helpful for them. During the traditional school year, their program is 30 hours per week of specialized

⁴⁶ P-19.

⁴⁷ Testimony of Parent A;

⁴⁸ P-15.

⁴⁹ Testimony of Parent A.

⁵⁰ Testimony of Admission Director, Nonpublic School 2.

instruction. During the month of July, students attend for 22 hours per week of specialized instruction. Nonpublic School 2's summer instruction is different from ESY because the school is structured as an 11-month program for all its students. The summer instruction is not solely for students identified to struggle with regression as is the case with ESY.⁵¹

36. When a student attends a new school, it is not uncommon for the LEA to have to have to tweak the student's schedule to meet the programmatic structure/bell schedule of the school.⁵² Nonpublic School 1's bell schedule is 32 hours per week of specialized instruction, minus related services.⁵³

37. On or around July 11, 2017, DCPS submitted a referral for Student to Nonpublic School 2. On this referral, Nonpublic Monitor B intentionally worked on with Parent B due to concern that Parent A would again preempt Student's admission.⁵⁴

38. On August 7, 2017, Student was accepted into Nonpublic School 2 with an 11-month program, 30 hours per week classroom instruction during the school year, 22 hours per week classroom instruction during the summer, 240 minutes per month direct speech and language therapy, 480 minutes per month direct occupational therapy, 360 minutes per month direct behavioral support services, 360 minutes per month direct physical therapy services, and daily transportation.⁵⁵

39. On August 9, 2017, DCPS issued to Parent A a letter identifying Nonpublic School 2 as Student's location of services for the 2017-2018 school year.⁵⁶

40. On December 4, 2015, a judge of the District of Columbia Superior Court issued a "Final Divorce and Custody Order" finding that "[a]though [Parents] seem to mostly be able to agree . . . in limited circumstances, [the court] must award tie-breaking authority to one party in order to enable [Parents] to share joint legal custody without Court intervention." The court ordered that "[i]n the event that the parties cannot reach a shared decision regarding their children after a good-faith effort to do so, [Parent A] shall have tie-breaking authority." In awarding tie-breaking authority to Parent A, the court noted that its anticipation that Parent A would "need to exercise . . . tie-breaking authority rarely, and stresses that the parties must negotiate in good faith before [Parent A] exercises . . . tie-breaking authority in any situation."⁵⁷

41. Summer breaks are important to Parent A, Student and Student's siblings. The family spends significant amounts of time outside the District of Columbia in a beach town, and Student has a great deal of fun on these trips. It is important to Parent A that Student not participate in ESY because doing so would result in Student missing out on family time at the

⁵¹ Testimony of Admission Director, Nonpublic School 2.

⁵² Testimony of Admission Director, Nonpublic School 2.

⁵³ Testimony of Nonpublic Monitor B.

⁵⁴ Testimony of Nonpublic Monitor B; P-13.

⁵⁵ P-18.

⁵⁶ P-17.

⁵⁷ P-21.

beach which would disappoint and “demoralize” Student. From Parent A’s perspective, Student does not need ESY. Parent A (an educator) believes that, while Student showed regression in earlier years, Student no longer shows significant regression, and that the summer time away at the beach is important for Student’s socialization, morale and family bond.⁵⁸

CONCLUSIONS OF LAW

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

A hearing officer’s determination of whether a child received a FAPE must be based on substantive grounds. In matters alleging a procedural violation, a hearing officer may find that a child did not receive a FAPE only if the procedural inadequacies (i) impeded the student’s right to a FAPE; (ii) significantly impeded the parent’s opportunity to participate in the decision-making process regarding the provision of a FAPE to the parent’s child; or (iii) caused a deprivation of educational benefit. 34 C.F.R. 300.513(a).

- (a) Whether DCPS denied Student a FAPE by failing to involve Parent A in the placement determination in summer 2017. DCPS circumvented Parent A’s full involvement in the placement determination, though it was aware of Parents’ court ordered custody agreement.**

District of Columbia law defines a special education “service location” as the “the physical address at which instruction occurs or at which a student with disabilities receives special education and related services.” D.C. Code 38–2571.02(10). To the extent that a student’s IEP is appropriate, the student’s service location is also appropriate, if it is able to implement the terms and conditions of the IEP. *O.O. ex rel. Pabo v. District of Columbia*, 573 F.Supp.2d 41, 55 (D.D.C.2008) (Where a student’s IEP was adequate, a school capable of implementing the IEP was an appropriate placement.) The service location’s services do not need to perfectly match the services listed in the IEP. However, there cannot be “more than a minor discrepancy between the services a school provides to a disabled child and the services required by that child’s IEP.” *James v. District of Columbia*, No. 14-02147, 2016 WL 3461185 (D.D.C. 2016) (*citing Holman v. District of Columbia*, 153 F. Supp. 3d 386, 389-90 (D.D.C. 2016)).

⁵⁸ Testimony at Parent.

In this instance, DCPS proposes to move Student from one nonpublic, standalone, special education school to another. The schools structure their weeks differently, resulting in a different bell schedule. Nonpublic School 1 has slightly longer weeks during the traditional school 10-month school year. Nonpublic School 2 has slightly shorter weeks during the 10 months of the traditional school year, with an additional month of instruction over the summer. Having considered the testimony and documentary evidence, including the August 2016 IEE, LRE description in the October 2016 IEP, expert, parental and other witness testimony, the undersigned does not find the difference in the bell schedules between the two schools to more than a minor discrepancy in services. Therefore, the change from Nonpublic School 1 to Nonpublic School 2 was a change in service locations rather than a change in placement.

Additionally, for more than a year prior to the change in service location, DCPS had encouraged Parent A's involvement in visiting, allowing Student to visit, and providing input in other proposed service locations, including but not limited to the Summer 2016-Identified Schools. Not all nonpublic special education schools would be willing to consider Student for admission, given Student's autism diagnosis. Parent A had foreclosed several available options by expressing to the schools that a lack of willingness to have Student attend. As discussed with respect to issue (d) below, DCPS had reasonable concerns that allowing Student to remain at Nonpublic School 1 would not provide Student FAPE, and Parent B, who maintains shared custody and educational decision-making rights, desired Student to receive a FAPE. Though Parents custody order indicates that Parent A maintains tie-breaking authority, the order includes an obligation for good-faith negotiations between Parents. From DCPS' perspective, Parent A, did not negotiate fully in good faith. Ultimately, however, the obligations of the custody order flow to Parents, and it would be incumbent upon them to seek clarity from the issuing court as to how to interpret it if they are unclear. DCPS is held accountable for providing FAPE to Student, and the court order clearly indicates that Parent B is also a capable parent who maintains shared legal and physical custody and educational decision making rights.

The instant situation is not one in which DCPS avoided Parent A entirely or consistently in favor of Parent B. Rather, under the particular facts of this case, Petitioner does not meet the burden of proving that DCPS denied Student a FAPE by changing Student's school from Nonpublic School 1 to Nonpublic School 2, or in working with Parent B rather than both parents, when after repeated attempts to engage both parents, Parent A declined in several key regards to participate in selecting a different service location for Student. Petitioner does not meet the burden of proof on this issue.

(b) Whether DCPS denied Student a FAPE by failing to convene an IEP meeting at a date and time convenient to Parent A in spring 2017.

The record reflects a number of attempts by DCPS to schedule a meeting in spring 2017 with Parents, with a focus on a date and time convenient to Parent A. At Parent A's request, DCPS also tried to schedule a date and time convenient to members of Student's IEP team from Nonpublic School 1. As stated above with respect to issue (a), the move proposed at the time was a change in service location, not a change in placement; therefore, a meeting with Parents and/or the IEP team was not required. Nonetheless, DCPS did make significant attempts. The undersigned particularly deems the spring 2017 attempts at scheduling a meeting to have been

reasonable in light of the at least year-long effort to engage Parents in the process of selecting a different school for Student. By spring April 2017, Student had remained at Nonpublic School 1 for nearly an entire additional school year, notwithstanding the reasonable concerns DCPS continued to have about the school's appropriateness to meet Student's needs. By spring 2017, time was of the essence if DCPS were to be able to change Student's school in time for the upcoming school year, particularly if Student were to be maintained in a nonpublic school to which Student would have to be referred and accepted. Parent A and Nonpublic School 1 team members were unfortunately only able to offer limited and conflicting availability at the end of the school year. Nonpublic Monitor B was unavailable on some of the dates Parent A and Nonpublic School 1 proposed; however, the unavailability was due to other meetings Nonpublic Monitor B already had scheduled at Nonpublic School 1 regarding other students. Petitioner does not meet the burden of proof on this issue.

(c) Whether DCPS denied Student a FAPE by failing to provide the Parent A with a copy of Parent A's procedural due process rights when it changed Student's placement in summer 2017.

As discussed with respect to issue (a) above, DCPS changed Student's service location in summer 2017, not Student's placement. Once DCPS selected Nonpublic School 2 as Student's location of services for the 2017-2018 school year, it sent to Parent A (and Parent B) a letter on August 9, 2017 that substantially complied with the requirements applicable in D.C. Code 38-2571.03(1) for when an LEA changes a service location. Petitioner does not meet the burden of proof on this issue.

(d) Whether DCPS denied Student a FAPE by failing to identify an appropriate location of services for Student in summer 2017.

While Student did quite well at Nonpublic School 1 for a number of years, recently, the school has not been as good of a fit for Student's academic or behavioral needs. Initially, Both parents were interested in considering other possibilities for Student's education, though once Student's LRE was determined to remain a nonpublic school, Parent A had a strong preference to keep Student at Nonpublic School 1. Yet, the IEE demonstrated a significant and troubling disparity in the Student's academic performance compared to Student's cognitive abilities. Student had behavioral challenges during the 2015-2016 school year, and continued to demonstrate behavioral difficulties during three DCPS observations in spring 2017, near the end of the school year. Student's behavioral challenges were not being managed in a manner that was effective for Student. Though the IEE recommended a BIP in August 2016, and though Student's behavior challenges persisted during the 2016-2017 school year even after the behavioral tracking sheet was put into place, Nonpublic School 1 had not elected to conduct a functional behavioral assessment and develop a BIP by the spring of 2017. Student was spending significant periods of time outside the classroom on breaks as behavioral management strategy. The independent educational consultant Parent B hired, at the recommendation of Nonpublic School 1 and in consultation with Parent A, recommended that Nonpublic School 1 was not appropriate for Student. Nonpublic School 2 could implement the services on Student's IEP, with an adjustment to accommodate the varying bell schedules of the two schools, and the change would not rise to the level of more than a minor discrepancy.

Though the team did not elect to include ESY on Student's IEP, Student continued to experience some degree of regression during breaks from which Student had to recover, which likely compounded the discrepancy between Student's cognitive abilities and academic performance. Therefore, an 11-month school model is not inconsistent with Student's educational needs. In so finding, the undersigned recognizes the particular value and importance of summer break time at the beach for Student, Parent A and their family. However, the question relevant to this decision turns not on the worthiness and significance of the family's vacation time, but rather whether moving Student from Nonpublic School 1 to Nonpublic School 2 violated DCPS' legal obligation to provide FAPE to Student. The undersigned concludes that DCPS made an appropriate choice in changing Student's location of services, and that Nonpublic School 2 was an appropriate location of services for Student. Respondent meets its burden of persuasion on this issue.

All relief requested in the complaint is **DENIED**.

IT IS SO ORDERED.

Date: October 25, 2017

/s/ NaKeisha Sylver Blount
Impartial Hearing Officer

Copies to:
Petitioner (by U.S. mail)
Petitioner's Attorney (electronically)
Respondent's Attorney (electronically)
OSSE-SPED (electronically)
ODR (electronically)

NOTICE OF RIGHT TO APPEAL

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