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Confidential

Parent on Behalf of Student, Petitioner, v. District of Columbia Public Schools ("LEA") Respondent. Case # 2017-0261 Date Issued: March 22, 2018	CORRECTED HEARING OFFICER'S DETERMINATION ¹ Hearing Dates: January 8, 2018 February 15, 2018 Counsel for Each Party listed in Appendix A <u>Hearing Officer:</u> <u>Coles B. Ruff, Esq.</u>
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¹ This "Corrected" HOD is issued to only make typographical and/or grammatical changes and/or to remove personally identifiable information; no substantive changes have been made. The HOD issuance date, March 22, 2018, remains unchanged, as does the applicable appeal date. 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 E30. The Due Process Hearing was convened on January 8, 2018, at the District of Columbia Office of the State Superintendent of Education (“OSSE”) Office of Dispute Resolution (“ODR”) 810 First Street, N.E. Washington, D.C. 20003, in Hearing Room 2008 and on February 15, 2018, at OSSE ODR at 1050 First Street, N.E., Washington, D.C. 20003.

BACKGROUND AND PROCEDURAL HISTORY:

The student or (“Student”) is age _____ and in grade _____.² Student’s parent (“Petitioner”) resides in the District of Columbia. Student has been determined eligible for special education and related services pursuant to IDEA with a disability classification of emotional disability (“ED”). Student is assigned to a DCPS school (“School A”) where Student began attending in January 2017. District of Columbia Public Schools (“DCPS”) is Student’s local educational agency (“LEA”). On September 28, 2017, Petitioner filed the current due process complaint asserting DCPS denied Student, inter alia, an appropriate individualized educational program (“IEP”) and placement at School A.

Relief Sought:

Petitioner seeks as relief that the Hearing Officer order DCPS to place and fund Student at non-public special education separate day school, develop an appropriate IEP, fund independent evaluation(s), develop a behavior intervention plan (“BIP”) and fund compensatory education.

LEA Response to the Complaint:

The LEA filed a response to the complaint on October 6, 2017. In its response DCPS asserted, inter alia, that on April 3, 2017, DCPS held an annual review of Student’s IEP and the IEP was updated to reflect goals in the academic areas of math, reading, and written expression, and the related service of emotional, social and behavior support. The IEP team determined that the IEP and placement represented the least restrictive environment for the student. Student has neither reported to School A for the 2017-2018 school year, nor does Petitioner or her attorney know Student’s whereabouts. DCPS asserts that it cannot serve a student who is not available for instruction. Nonetheless, DCPS has made a free appropriate public education available to Student.

Resolution Meeting and Pre-Hearing Conference:

The parties held a resolution meeting on October 30, 2017. The parties did not mutually agree to proceed directly to hearing. The 45-day period began on October 29, 2017, and originally ended

[and the Hearing Officer's Determination ("HOD") was originally due] on December 12, 2017.

The undersigned Hearing Officer ("Hearing Officer") convened a pre-hearing conference ("PHC") on October 24, 2017, prior to the parties convening a resolution meeting. The Hearing Officer scheduled the second PHC on November 2, 2017, and issued a pre-hearing order ("PHO") on November 7, 2017, outlining, inter alia, the issues to be adjudicated.

DCPS filed an unopposed motion for a continuance of the hearing and extension of the HOD due date by 30-calendar days to allow the parties' mutually requested hearing dates of January 5, 2018, and January 8, 2018. The HOD due date was extended to January 11, 2018.

Petitioner's counsel was thereafter unavailable to proceed to hearing on January 5, 2018, and Petitioner's counsel filed a consent motion to extend the HOD due date by seventy (70) calendar days, extending the HOD due date to March 22, 2018, to enable the hearing to be held on January 8, 2018, and February 15, 2018.

ISSUES:³

The issues adjudicated are:

1. Whether the DCPS denied Student a free appropriate public education ("FAPE") by failing to provide an appropriate IEP and placement/location of services from March 2017 to the date the complaint was filed.⁴
2. Whether DCPS denied Student a FAPE by failing to provide an appropriate and timely BIP from April 2017 until the date the complaint was filed.
3. Whether DCPS denied Student a FAPE by failing to evaluate Student in all areas of suspected disability and meet with the parent to develop an appropriate IEP.⁵
4. Whether DCPS denied Student a FAPE by failing to convene a meeting to conduct an annual review of Student's IEP.⁶

³ The Hearing Officer restated the issues at the hearing and the parties agreed that these were the issues to be adjudicated. At the outset of the hearing, Petitioner's counsel withdrew issue #3 of the PHO regarding educational records.

⁴ Petitioner asserts the Student's LRE is a non-public special education separate day school. Petitioner also alleges the behavior support services prescribed by the Student's April 3, 2017, IEP were insufficient and should have been 240 minutes per month.

⁵ Petitioner's counsel stated at the outset of the hearing that Petitioner is seeking a comprehensive psychological evaluation and a BIP.

⁶ Petitioner asserts that although an IEP meeting occurred on April 3, 2017, Petitioner did not receive a copy of the IEP until after the complaint was filed.

5. Whether DCPS denied Student a FAPE by failing to implement Student's IEP.

RELEVANT EVIDENCE CONSIDERED:

This Hearing Officer considered the testimony of the witnesses and the documents submitted in each party's disclosures (Petitioner's Exhibits 1 through 55 and Respondent's Exhibits 1 through 6 and Hearing Officer Exhibit 1) that were admitted into the record and are listed in Appendix A.⁷ The witnesses testifying on behalf of each party are listed in Appendix B.⁸

SUMMARY OF DECISION:

Petitioner had the burden of production on all issues adjudicated and the burden of persuasion on all issues adjudicated except issue #1. The burden of persuasion fell to Respondent on issue #1 after Petitioner met a prima facie case. The Hearing Officer concluded Respondent sustained the burden of persuasion by a preponderance of the evidence on issue #1 and Petitioner did not sustain the burden of persuasion by a preponderance of the evidence on issues #2 through #5. As a result, the Hearing Officer dismissed Petitioner's due process complaint with prejudice.

FINDINGS OF FACT:⁹

1. Petitioner, Student's parent, resides in the District of Columbia. (Petitioner's testimony)
2. Student has been determined eligible for special education and related services pursuant to IDEA with an ED disability classification. (Petitioner's Exhibit 5-1)
3. Student is assigned to School A, Student's neighborhood school, where Student began attending in late January 2017. DCPS is Student's LEA. (Petitioner's Exhibits 3-1, 5-1)
4. Prior to attending School A, Student attended School B, a public charter school. DCPS was the LEA for School B when Student attended. Student had attendance problems at School B. (Petitioner's Exhibit 4-8)
5. School B performed a functional behavior assessment ("FBA") for Student in October 2016 and developed a BIP on November 4, 2016. The BIP addressed Student's

⁷ Any item disclosed and not admitted or admitted for limited purposes was noted on the record and is noted in Appendix A.

⁸ Petitioner presented five witnesses: (1) Student's mother (Petitioner), (2), an educational advocate employed by the law firm representing Petitioner, designated an expert witness, and (3) a representative of School C. Respondent presented one witness: the School A special education coordinator, designated an expert witness.

⁹ The evidence (documentary and/or testimony) that is the source of the Findings of Fact ("FOF") is noted within a parenthesis following the finding. A document is noted by the exhibit number. The second number following the exhibit number denotes the page of the exhibit from which the fact was extracted. When citing an exhibit that has been submitted by more than one party separately, the Hearing Officer may only cite one party's exhibit.

behavioral difficulties as well as school attendance problems. (Petitioner's Exhibit 8-1, 8-4)

6. School B suspended Student in November 2016 for a behavioral infraction and then later expelled Student in December 2016. (Petitioner's Exhibit 4-8)
7. Petitioner filed a due process complaint on December 23, 2016, prior to Student enrolling at School A. The complaint alleged DCPS had denied Student a FAPE by failing (a) to provide Student with an appropriate IEP on April 22, 2016, and/or by failing to review and revise Student's April 22, 2016, IEP in light of Student's lack of expected progress. Petitioner alleged Student's IEP lacked: appropriate hours outside general education; an appropriately restrictive LRE and placement/location of services; present levels of performance in written language; a comprehensive disability classification; appropriate behavioral supports, and failed to appropriately address Student's school and work avoidance issues. (Petitioner's Exhibit 4-1, 4-2, 4-3, 4-8)
8. Petitioner also alleged DCPS failed: (b) to provide Student with an appropriate, timely and accurate functional behavior assessment ("FBA") and BIP from April 2016; (c) to provide Student with an appropriate interim placement after Student was suspended and then later expelled from School B; (d) to comprehensively reevaluate the Student during Student's triennial evaluation in school year ("SY") 2016-2017. (Petitioner's Exhibit 4-3)
9. On February 7, 2017, prior to the hearing on Petitioner's due process complaint and after Student began attending School A, Petitioner's attorney wrote to DCPS expressing concern that Student had a behavioral incident where Student cursed at teachers in School A's evening program. The attorney expressed Petitioner's belief that School A was not an appropriate placement for Student and that Student required a non-public special education separate day school ("School C") that Petitioner had identified as the only appropriate and available placement for Student. (Petitioner's Exhibit 49-2)
10. On February 14, 2017, DCPS responded to the Petitioner's attorney that Petitioner had opted for School A's evening program when she enrolled Student and that Student could change to School A's day program at anytime. The DCPS representative expressed DCPS' concern that Petitioner believed that Student would only be attending School A until March as she expected Student to attend School C following her upcoming due process hearing. (Petitioner's Exhibit 49-1)
11. The hearing on Petitioner's due process complaint was convened on February 23, 2018, and February 24, 2018. An HOD issued on the due process complaint on March 9, 2017. The Impartial Hearing Officer ("IHO") found that in August 2016 Student received a court-initiated referral for, inter alia, truancy, failure to complete academic work, chronic substance abuse and severe aggression. (Petitioner's Exhibit 4-1, 4-6)
12. The IHO noted in the HOD that an independent psychological evaluation was conducted for Student on January 30, 2014, and DCPS conducted a triennial reevaluation for

Student on February 12, 2014, in which a team reviewed Student's report card grades, BIP, the independent psychological evaluation and comments from Student's parent and teachers. (Petitioner's Exhibit 4-4)

13. The IHO found that Student's attendance at School B was poor, and Student was often not attending school, arriving late, or leaving early. Student had earned a significant number of "Fs" and was scheduled for behavioral support in the form of individual counseling as well as behavioral management sessions; however, Student's attendance and suspension played a role in Student's ability to receive the services. (Petitioner's Exhibit 4-6)
14. The IHO found that a FBA was conducted of Student on October 2016 and November 2016. The IHO found that the October 2016 FBA stated that "[Student's] inconsistent mood, history of truancy, and poor interpersonal skills can be best attributed to a history of symptoms related to internalizing or externalizing psychiatric disorders, substance use disorders, and/or maladaptive/negative community behaviors". The IHO found that the FBA mentioned Student's substance use disorder but did not name the substance Student had been using. (Petitioner's Exhibit 4-7)
15. The IHO found that on November 4, 2016, a BIP was prepared for Student. The stated purpose of the BIP was to increase Student's timely school attendance, increase Student's ability to identify and appropriately express feelings, and to increase Student's ability to develop and/or enhance Student's interpersonal relationships. The BIP presented five (5) layers of support for Student, including a number of forms of positive reinforcement from teachers; having Student's behavioral support provider offer Student specific skills in self-control, communication and conflict resolution; routine (at least quarterly) communication with the parent and outside agencies such as those appointed by the Superior Court of the District of Columbia to work on Student's attendance, and daily check-ins and check-outs. The BIP also included several ways for Student to earn incentives, such as homework passes and Chipotle gift cards. (Petitioner's Exhibit 4-7)
16. The IHO found that in November 2016, Student was suspended from School B after an illicit substance was found in Student's locker. A manifestation determination review ("MDR") was held and Student's behavior in bringing the substance to school was not found to be a manifestation of Student's disability. The IHO found that the Parent did not enroll Student in a DCPS school for more than a month after Student was expelled from School B. The IHO found that Petitioner had the option of enrolling Student in a regular day program or an evening program. Petitioner chose an evening program and provided DCPS a written waiver of enforcement of Student's special education rights. Notwithstanding the waiver, the IHO found that the School B evening program had the capacity to implement Student's IEP and had made services available to Student. (Petitioner's Exhibit 4-8)
17. On review of the issues presented in the December 23, 2016, due process complaint, the IHO concluded DCPS did not meet the burden of proving that Student's IEP was appropriate solely because the amount of behavioral supports the April 22, 2016, IEP was

insufficient and should have been increased in light of Student's ongoing attendance and behavioral issues. However, the IHO concluded Student's least restrictive environment ("LRE") prescribed by the IEP (specialized instruction both inside and outside general education) was appropriate. Although, the IHO determined that Student's October 2016 FBA and BIP were strong, the IHO found Student's prior FBA and BIP were out of date, and the failure to have a current BIP and FBA for Student from April 2016 to October 2016 impeded Student's right to a FAPE and caused a deprivation of educational benefit. The IHO determined that a one-month delay in providing Student with an interim placement impeded Student's right to a FAPE and caused a deprivation of educational benefit. (Petitioner's Exhibit 4-5, 4-10, 4-11)

18. As to the final issue of failing to comprehensively evaluate Student, the IHO determined that Student received an independent psychological evaluation on January 30, 2014, in which Student was diagnosed with Disruptive Mood Dysregulation Disorder. The IHO determined that the independent psychological evaluation was current and that Student did not have a substance use issue at the time of the independent evaluation. The IHO determined that the FBA and BIP conducted and developed in 2016 were thorough, and that the FBA mentioned the substance use issue. The IHO also determined that the BIP focused on Student's disability and the challenges Student was experiencing. The IHO determined that Petitioner failed to meet the burden of proof that DCPS had failed to comprehensively evaluate Student. (Petitioner's Exhibit 4-11, 4-12)
19. As a result of the IHO's findings and determinations, the IHO ordered that DCPS fund thirty (30) hours that the Parent could elect to use for independent counseling, or independent tutoring for Student. The IHO did not grant Petitioner's requested relief that Student be placed at School C and did not grant the other requested relief including triennial assessments. Although the IHO determined Student's IEP had insufficient behavioral support services, the HOD did not direct DCPS to increase the level of behavior supports in Student's IEP. (Petitioner's Exhibit 4-3, 4-12, 4-13)
20. Student was initially enrolled in School A's evening program. In March 2017 Petitioner asked that Student be changed to School A's day program rather than the evening program and Student was switched. Petitioner dropped Student at school and watched Student enter the building on a few occasions while Student was in School A's evening program and on two occasions when Student was in School A's day program. However, Petitioner could not attest that Student stayed in the school or attended classes on the days she dropped Student off at School A. Student did not like attending School A. In March 2017 Student stopped attending School A because of the neighborhood rivalries. Petitioner received report cards for Student from School A but Student earned F's because of non-attendance. Petitioner eventually asked School A to initiate a truancy referral for Student during SY 2016-2017. (Petitioner's testimony)
21. School A special education coordinator is aware of Student only attending School A for one-day in the evening program and did not attend any days in the day program. Student attended class for approximately 20 minutes and got into a verbal confrontation with the teacher, stormed out the class and announced loudly that it would be Student's last day

attending School A. Thereafter, Student did not return to School A. (Witness 3's testimony)

22. On April 3, 2017, School A convened an IEP team to perform an annual review of Student's IEP. The team included Petitioner and her attorney who both participated by telephone, as well as the LEA Representative, Social Worker, Evaluator and Special Education Teacher, who all appeared in-person. (Respondent's Exhibit 2-1)
23. The April 3, 2017, IEP team developed an IEP that increased Student's services outside general education. The IEP provided Student with 10 hours of specialized instruction outside of the general education setting and 120 minutes per month of behavior support services outside of the general education setting. The IEP indicates that Student's last eligibility meeting date was May 20, 2015. (Respondent's Exhibit 2-1, 2-9, 2-10, 2-11,)
24. During the April 3, 2017, meeting Petitioner did not ask that DCPS provide Student a therapeutic day school placement meeting. (Petitioner's testimony)
25. During the April 3, 2017, meeting the team noted that Student had missed 24 days of school as of March 28, 2017, and had only attended one-day out of the 25 days of Student was enrolled at School A.¹⁰ The School A social worker who provided Student behavior support services ("BSS") noted in Student's April 3, 2017, that Student had attended only one BSS session since Student was added to the caseload on February 3, 2017, and had refused to complete an assessment. There was also no request made during the April 3, 2017, meeting that Student's behavior support services be increased. (Witness 3's testimony, Respondent's Exhibit 2-8, 2-21)
26. The IEP team recognized Student's "tremendous amount of difficulties" in all areas of learning during SY 2016-2017. The IEP team carried over Student's Present Levels of Academic Achievement and Functional Performance from Student's previous IEP and maintained the same academic and behavioral support goals. (Petitioner's Exhibit 6-3 through 6-11, Respondent's Exhibit 2-3 through 2-9)
27. The April 3, 2017, IEP team established three (3) annual math goals for Student which included solving 4 out of 5 problems in (2 consecutive) problem sets, when given 5 problems on evaluating a function for a given input and interpreting value of a function, and solving 4 out of 5 problems, when given 5 problems involving the use of trigonometric ratios and the use of the Pythagorean Theorem to solve right triangles in applied problems and a labeled right triangle for each problem, using reference materials, with a description of the trigonometric ratios. Student's stated Annual goals were

¹⁰ The Hearing Officer points out that if Student enrolled at School A in late January 2017, and was put on the BSS caseload on February 3, 2017, there would have been approximately 40 days of school between the day of enrollment at School A the April 3, 2017, IEP meeting, yet Student was reported as having missed only 24 days of school, which is a discrepancy of 16 days. Nonetheless, the Hearing Officer credited Witness 3's testimony that Student only attended School A one day because that testimony was consistent with, and bolstered by, the notes from the April 3, 2017, meeting.

matched with corresponding Common Core Standards and baseline information. (Petitioner's Exhibit 6, Respondent's Exhibit 2-3, 2-4)

28. The team developed goals for Student in Reading and included information on Student's Scholastic Reading Inventory Test from SY 2015-2016. Student received a Lexile Score of 454, which was stated to be a 252-point increase from Student's score at the beginning of the year score of 202. The team stated that Student's most recent Lexile Score was 554, which demonstrated a 352-point increase in Reading. The team developed three (3) annual goals for Student which included, writing an essay of 250 words to explain and interpret a character's development including an introductory paragraph containing the book title, after reading instructional level literature and receiving a rubric that explains the suggested content for each paragraph of the essay, and completing a sentence frame by circling the correct answer when provided two (2) written prompts above each space in a sentence frame for 2 out of 3 words or phrases, after given a paragraph of instructional level text (written and read out loud) with a specific word or phrase with the implied meaning underlined. Student's goals were linked to Common Core Standards and baselines were established for all three goals. (Respondent's Exhibit 2-4, 2-5, 2-6)
29. Student received two (2) annual goals in Written Expression which included, using sensory specific language to develop the setting of a 300-word narrative, using a detailed description that addresses the setting through each of the five (5) senses and five (5) metaphors or similes for 3 out of 4 topics, when given a sample narrative with sensory details highlighted in different colors for different senses. Student's goals were linked to Common Core Standards and baselines were established for the two goals. (Respondent's Exhibit 2-6, 2-7, 2-8)
30. The IEP team developed two (2) annual goals for Student which were targeted toward Emotional, Social and Behavioral Development which included, refraining from engaging in disagreements with other students or school staff by listening and using resolution prompts to express Student's opinion using I-messages and rephrasing 3-4 things the other student said in Student's own words while refraining from negative behaviors such as yelling, fighting, inappropriate comments, noises or leaving the room, with 80% accuracy. Each goal was accompanied by baseline information. (Respondent's Exhibit 2-8, 2-9)
31. Within the IEP, and with each area of concern, the team noted how Student's disability affected Student's access to the general education curriculum. The IEP noted that Student "does not focus on academic tasks while at school", "has difficulty paying attention to class instruction", and "has difficulty getting to school on time and on a regular basis." The IEP referenced Student's "sporadic" attendance as a lack of availability to receive behavior support services, since Student transitioned to day school. (Respondent's Exhibit 2-3 through 2-9)
32. Student's IEP included accommodations such as preferential seating, location with minimal distractions, small group testing, extended time, frequent breaks, and use of a calculation device on no-calculator sections. According to the IEP team meeting notes,

Student did not receive extended school year (“ESY”) services because Student only attended one (1) day out of twenty-five (25) school days while enrolled at School A. As of March 28, 2017, Student had been absent for 24 days. The team stated that it was unable to analyze any data that would warrant ESY services. The team, which included Petitioner and her attorney, agreed that until Student attends school, “it will be almost impossible to collect data to warrant any discussion regarding location of services.” (Respondent’s Exhibit 2-12, 2-13, 2-21, 2-22, 2-23)

33. School A’s special education coordinator emailed a copy of Student’s April 3, 2017, IEP to Petitioner’s attorney. (Witness 3’s testimony)
34. Student never returned to School A after the April 3, 2017, IEP was developed and has not attended School A at all during SY 2017-2018. (Petitioner’s testimony, Witness 3’s testimony)
35. On August 29, 2017, Petitioner’s attorney emailed a request to School A for an emergency IEP meeting to address Petitioner’s concerns about Student’s truancy and to address Student’s school attendance for SY 2017-2018. The email also requested Student’s “cumulative and special education files from March 2017 on forward...”. (Respondent’s Exhibit 4-4)
36. The School A special education coordinator proposed a meeting date and asked if Petitioner had enrolled Student at School A for SY 2017-2018. The parties agreed to meeting on September 19, 2017, and School A indicated the requested records would be available at the meeting. (Respondent’s Exhibit 4-1, 4-2, 4-3)
37. On September 19, 2017, a multidisciplinary team (“MDT”) meeting was convened. Petitioner and her educational advocate participated in the meeting. The team discussed that Student had not attended School A at all during the current school year and had been absent from School A since March 2016. Petitioner stated that she dropped Student off at her grandmother’s home in Manassas, Virginia on June 6, 2017, that Student had been seen in D.C. since then, but Petitioner believed Student was missing. Petitioner stated that police had informed her to file a missing person report in Virginia. During the September 19, 2017, meeting, Petitioner’s educational advocate requested that DCPS initiate a truancy referral. (Witness 1’s testimony, Petitioner’s Exhibits 17-1, 17-2, 18-2)
38. During the September 19, 2017, meeting Petitioner did not ask that DCPS provide Student a therapeutic day school placement. (Petitioner’s testimony)
39. On September 22, 2017, DCPS forwarded an email to Petitioner’s attorney to which a note was attached related to Petitioner’s report that Student’s last known residence was in Manassas, Virginia. The email indicates that Petitioner advised DCPS that she dropped Student off in Manassas, Virginia on June 6, 2017. The email advised Petitioner’s attorney that Student had missed 75 consecutive school days since enrolling at School A. (Respondent’s 4-13)

40. On September 22, 2017, Petitioner forwarded an email to DCPS in which she stated that Student was in the District of Columbia and that Student “hangs over in” neighborhoods in N.E. and S.E. D.C. (Respondent’s Exhibit 4-23)
41. On September 22, 2017, Petitioner’s attorney emailed a request to DCPS for a current and appropriately modified FBA/BIP; attendance contract and/or plan; a truancy referral and truancy interventions; sufficient wrap-around services, a psychiatric evaluation and a social history. (Respondent’s 4-34)
42. School A’s special education coordinator responded to Petitioner’s attorney’s September 22, 2017, email noting that he had been informed by Petitioner that Student’s last known residence was in Virginia, student had missed 75 consecutive days of school and had not attended School A since March 2017, and that he had informed Petitioner to follow up with DCPS when Student returned to Petitioner’s residence in Washington, D.C. (Witness 3’s testimony, Respondent’s Exhibit 4-34)
43. Student resided with Petitioner briefly starting in November 2017 until mid December 2017. Student is currently not living with Petitioner and Petitioner is not sure of Student’s whereabouts. Petitioner initiated a Person in Need of Supervision (“PINS”) case in District of Columbia Superior Court Petitioner regarding student. Petitioner has been in touch with Student occasionally by text messaging. Student has expressed to Petitioner a desire to attend school, once there is a school available that Student feels comfortable attending. (Petitioner’s testimony)
44. On November 17, 2017, DCPS forwarded an email to Petitioner’s attorney indicating that DCPS was willing to perform evaluations but Student had not been to school during SY 2017-2018. The email also requested that Petitioner complete residency verification. School A made special education services available for Student both in SY 2016-2017 and SY 2017-2018, but Student has not attended school, been available for services, or been available for evaluation. School A has made a truancy referral for Student. Student and Petitioner came to School A together in January 2018 to inquire about Student’s enrolling in a different DCPS school. (Witness 3’s testimony, Respondent’s Exhibit 4-40)
45. Petitioner attempted to get Student enrolled in a DCPS school other than School A. Petitioner and Student were referred to two other DCPS schools Student may want to attend. Petitioner and Student went to one of those two (“School D”) and met with the school staff twice. School D has not sent a final answer about Student’s acceptance and has not returned Petitioner’s telephone call. Student recently texted Petitioner and indicated Student is willing to attend School D. (Petitioner’s testimony)
46. On November 12, 2017, Student was again accepted to School C. School C is therapeutic special education separate day school. School C has a certificate of approval (“C of A”) from OSSE. School C provides specialized instruction and related services to students with various disabilities including ED. Special education teachers and related service providers are certified. There are approximately 53 students in School C’s high school

program with a student to staff ratio of 3 to 1 and its tuition is approximately \$63,000 per year. School C has vocational programs. School C closely monitors school and class attendance. If a student is chronically truant/absent from school, School C personnel will attempt to make a home visit to the student, provide private transportation if necessary, and will make a truancy court referral if warranted. School C has had no contact with Student in more than a year but based its acceptance of Student on data available. (Witness testimony, Petitioner's Exhibit 16-1)

47. Petitioner's educational advocate developed a proposed compensatory education plan. The plan sought to compensate Student for the alleged denials of FAPE in the due process complaint. The advocate requested an updated FBA and BIP, 350 hours of tutoring, 100 hours counseling, 50 hours of vocational training, that Student be placed in a full-time special education therapeutic day school, and that reevaluations be conducted and wrap around services be provided to address academic, behavior, and substance abuse issues. (Witness 1's testimony, Petitioner's Exhibit 55)

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 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 5E DCMR 3030.14 the burden of proof is the responsibility of the party seeking relief. *Schaffer v. Weast*, 546 U.S. 49, 126 S.Ct. 528 (2005). In this case, as noted in the PHO, Petitioner had the burden of production on all issues adjudicated and the burden of persuasion on all issues adjudicated except issue #1. The burden of persuasion fell to Respondent on issue #1 after Petitioner met a prima facie case.¹¹ The normal standard is preponderance of the evidence.

¹¹ DC Code § 38-2571.03 (6) provides:

(A) In special education due process hearings occurring pursuant to IDEA (20 U.S.C. § 1415(f) and 20 U.S.C. § 1439(a)(1)), the party who filed for the due process hearing shall bear the burden of production and the burden of

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 1: Whether the DCPS denied Student a FAPE by failing to provide an appropriate IEP and placement/location of services from March 2017 to the date the complaint was filed.

Conclusion: Respondent sustained the burden of persuasion by a preponderance of the evidence on this issue.

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 IDEA's system for delivering education to disabled children," *D.S. v. Bayonne Bd. of Educ.*, 54 IDELR 141 (2010) (quoting *Polk v. Cent. Susquehanna Intermediate Unit 16*, 853 F.2d 171, 173 (3d Cir. 1988), and the centerpiece for the implementation of FAPE is the IEP. *S.H. v. State-Operated Sch. Dist. of the City of Newark*, 336 F.3d 260, 264 (3d Cir. 2003).

Pursuant to *Schaefer v. Weast*, 554 F.3d 470 (U.S. App. 2009), the Hearing Officer must "focus on the adequacy of the IEP at the time it was created, and ask if it was reasonably calculated at that time to enable the student to receive educational benefits."

In determining the educational placement of a child with a disability, each public agency must ensure that the placement decision is made by a group of persons, including the parents, and other persons knowledgeable about the child, the meaning of the evaluation data, and the placement options; and is made in conformity with the Least Restrictive Environment provisions of the IDEA; and the public agency must ensure that the child's placement is determined at least

persuasion; except, that:

(i) Where there is a dispute about the appropriateness of the child's individual educational program or placement, or of the program or placement proposed by the public agency, the public agency shall hold the burden of persuasion on the appropriateness of the existing or proposed program or placement; provided, that the party requesting the due process hearing shall retain the burden of production and shall establish a prima facie case before the burden of persuasion falls on the public agency. The burden of persuasion shall be met by a preponderance of the evidence.

(ii) Where a party seeks tuition reimbursement for unilateral placement, the party seeking reimbursement shall bear the burden of production and the burden of persuasion on the appropriateness of the unilateral placement; provided, that the hearing officer shall have the authority to bifurcate a hearing regarding a unilateral placement; provided further, that if the hearing officer determines that the program offered by the public agency is appropriate, it is not necessary to inquire into the appropriateness of the unilateral placement.

(B) This paragraph shall apply to special education due process hearings resulting from complaints filed after July 1, 2016.

annually, is based on the child's IEP, and is as close as possible to the child's home. See 34 C.F.R. § 300.116.¹²

Removing a child with disabilities "from the regular education environment occurs only when the nature or severity of the disability is such that education in regular classes cannot be achieved satisfactorily." 34C.F.R. § 300.550; see also 20 U.S.C. § (a)(5)(A) (a disabled child is to participate in the same activities as non-disabled children to the "maximum extent appropriate"); *Roark ex rel. Roark v. District of Columbia*, 460 F.Supp.2d 32, 43 (D.D.C. 2006) ("The IDEA requires school districts to place disabled children in the least restrictive environment possible.")

Pursuant to D.C. Code § 38-2561.02(c) (c) Special education placements shall be made in the following order or priority; provided, that the placement is appropriate for the student and made in accordance with the IDEA and this chapter: (1) DCPS schools, or District of Columbia public charter schools pursuant to an agreement between DCPS and the public charter school; (2) Private or residential District of Columbia facilities; and (3) Facilities outside of the District of Columbia.

Petitioner asserts the Student's LRE is a non-public special education separate school. Petitioner also alleges the behavior support services prescribed by the Student's April 3, 2017, IEP were insufficient and should have been 240 minutes per month.

DCPS convened annual IEP meeting with Petitioner and with input from Petitioner's attorney and educational advocate developed an IEP for Student on April 3, 2017. The evidence demonstrates that DCPS in its development of Student's April 3, 2017, IEP "complied with the procedures set forth in the Act."

The second, substantive, prong of the *Rowley* inquiry is whether the IEPs DCPS developed were reasonably calculated to enable Student to make progress appropriate in light of Student's individual circumstances.

In *Andrew F. ex rel. Joseph F. v. Douglas Cty. Sch. Dist.* RE-1, 137 S. Ct. 988 (2017), the U.S. Supreme Court elaborated on the "educational benefits" requirement pronounced in *Rowley*. To meet its substantive obligation under the IDEA, a school must offer an IEP reasonably calculated to enable a child to make progress appropriate in light of the child's circumstances. . . . Any review of an IEP must appreciate that the question is whether the IEP is reasonable, not whether

¹² Pursuant to 34 C.F.R. § 300.115 - Continuum of alternative placements (a) Each public agency must ensure that a continuum of alternative placements is available to meet the needs of children with disabilities for special education and related services. (b) The continuum required in paragraph (a) of this section must-- (1) Include the alternative placements listed in the definition of special education under Sec. 300.38 (instruction in regular classes, special classes, special schools, home instruction, and instruction in hospitals and institutions); and (2) Make provision for supplementary services (such as resource room or itinerant instruction) to be provided in conjunction with regular class placement. Pursuant to DC Code § 38-2561.02. (c) Special education placements shall be made in the following order or priority; provided, that the placement is appropriate for the student and made in accordance with the IDEA and this chapter: (1) DCPS schools, or District of Columbia public charter schools pursuant to an agreement between DCPS and the public charter school; (2) Private or residential District of Columbia facilities; and (3) Facilities outside of the District of Columbia.

the court regards it as ideal. . . . When a child is fully integrated in the regular classroom, as the Act prefers, what that typically means is providing a level of instruction reasonably calculated to permit advancement through the general curriculum. . . . If that is not a reasonable prospect for a child, his IEP need not aim for grade-level advancement. But his educational program must be appropriately ambitious in light of his circumstances, just as advancement from grade to grade is appropriately ambitious for most children in the regular classroom. The goals may differ, but every child should have the chance to meet challenging objectives. *Andrew F.*, supra, 137 S. Ct. at 999–1000 (citations omitted).

In this case, Petitioner filed a request for a due process hearing on December 23, 2016. One of the issues raised by Petitioner was that Student’s IEP was inappropriate. The IHO determined DCPS did not meet the burden of proving that the amount of behavioral supports contained in Student’s April 22, 2016, IEP were sufficient, and that the lack of sufficient behavioral support impeded Student’s right to a FAPE and caused deprivation of educational benefit. The IHO, determined, however, DCPS conducted a FBA and developed a BIP which the IHO determined was “strong” and responsive to Student’s behavioral needs and the IHO found Student’s IEP including the LRE was otherwise appropriate.

Despite the IHO finding the IEP lacked sufficient behavioral support, the IHO did not direct DCPS to increase Student’s behavioral support services beyond 120 minutes per month. The evidence demonstrates that Student came to School A with the April 22, 2016, IEP, and Student attended school a single day, participated in BSS services once and refused to take an assessment that the School A social worker attempted to provide.

Student’s IEP was reviewed on April 3, 2017. By that time Student had stopped attending School A, albeit it may not have been apparent to School A at the time that Student would not return. Nonetheless, there was no indication that Student was even taking advantage of the 120 minutes per month of BSS services that were available. Consequently, based on the evidence I do not conclude there was a sufficient basis for School A to have increased Student’s BSS services to 240 minutes per month as Petitioner asserts. It was reasonable for School A to have kept the BSS services unchanged as well as to have kept Student’s LRE unchanged given the March 9, 2018, HOD conclusion that Student’s LRE was appropriate.

The evidence indicates that there was expectation on Petitioner part, and perhaps that of Student, that Student would not have to attend School A at all, because they believed Student’s placement at School C was imminent. However, Student was not placed at School C by the March 9, 2017, HOD. All evidence indicates that School A was ready and willing to provide Student a FAPE consistent with Student’s April 6, 2016, IEP, as well as the April 3, 2017, IEP had Student attended school.

Consequently, I conclude that Respondent sustained the burden of persuasion by a preponderance of the evidence that Student’s April 3, 2017, IEP was reasonably calculated to provide Student with educational benefit in light of Student’s circumstances and that DCPS offered Student an appropriate placement and location of services at School A that could implement Student’s IEP.

ISSUE 2: Whether DCPS denied Student a FAPE by failing to provide an appropriate and timely BIP from April 2017 until the date the complaint was filed.

Conclusion: Petitioner did not sustain the burden of persuasion by a preponderance of the evidence on this issue.

Petitioner does not assert that DCPS failed to modify Student's BIP pursuant to 34 C.F.R. § 300.530 (f). However, assuming arguendo Petitioner had, the evidence demonstrates that when Student was disciplined at School B there was a MDR held that concluded that Student's behavior was not a manifestation of Student's disability. Therefore, DCPS had no obligation at that time to review Student's BIP.

Petitioner asserts that School A should have reviewed Student's BIP when Student's IEP was reviewed and updated in April 2017 and/or subsequent thereto.

34 C.F.R. § 300.324 requires that in the case of a child whose behavior impedes the child's learning or that of others, an IEP team must consider the use of positive behavioral interventions and supports, and other strategies, to address that behavior. However, IDEA does not mandate that a BIP be developed. In the comments to the regulations it is noted that a BIP is not a part of a student's IEP unless mandated by a state requirement.¹³ The Hearing Officer is aware of no such requirement in the District of Columbia.

Nonetheless, the evidence demonstrates that Student was provided an updated BIP in November 2016, just prior to Student attending School A. The IHO in the March 9, 2017, HOD clearly determined Student's November 2016 BIP was "strong" and responsive to Student's behavioral issues. The BIP not only addressed Student's behavioral difficulties but also school attendance problems. Student was also to be monitored by agencies as required by D.C. Superior Court for chronic substance abuse, truancy and other issues that are contained in Student's IEP.

The evidence demonstrates that Student only attended School A one-day and then stopped attending, perhaps because Student expected not to remain at School A and expected to attend School C. There was no practical reason for School A to review or update Student's BIP given that there was a recent HOD upholding Student's BIP. Student's refusal to attend school meant that School A could not implement the BIP. Consequently, I conclude that Petitioner did not sustain the burden of persuasion by a preponderance of the evidence on this issue.

ISSUE 3: Whether DCPS denied Student a FAPE by failing to evaluate Student in all areas of suspected disability and meet with the parent to develop an appropriate IEP.

Conclusion: Petitioner did not sustain the burden of persuasion by a preponderance of the evidence on this issue.

34 C.F.R. § 300.303(a) makes clear that, "A local education agency ("LEA") shall ensure that a

¹³ Functional behavioral assessments and behavior intervention plans are not required components of the IEP under § 300.320. Federal Register /Vol. 71, No. 156, August 14, 2006

re-evaluation of each child with a disability is conducted if a public agency determines that the educational or related services needs, including improved academic achievement and functional performance, of the child warrant a reevaluation; or...if the child's parents or teacher requests a re-evaluation." and that the reevaluation must be conducted at least once every three years. Requests for evaluations/reevaluations are to be conducted in a timely manner. *Herbin v. Dist. of Columbia*, 362 F. Supp. 2d. 254, 259, 261 (D.C.C. 2005).

34 C.F.R. §300.304 provides evaluation procedures that require that the agency use a variety of assessment tools, and it specifically states that the agency must not use any single measure or assessment as the sole criterion for determining if the child is a child with a disability and determining an appropriate program.¹⁴

Petitioner counsel stated at the outset of the hearing that Petitioner is seeking a comprehensive psychological evaluation and a BIP.

The evidence demonstrates that Student was provided an independent psychological on January 30, 2014, and DCPS conducted a triennial reevaluation for Student on February 12, 2014. As a result, Student was due for triennial reevaluation in February 2017. Student began attending School A just before the triennial reevaluation was due. The evidence demonstrates that Student attended school a single day and refused to participate in the assessment School A attempted. Although School A should have apparently initiated a triennial reevaluation of Student, there is no requirement in IDEA that the LEA use any particular evaluation tool in conducting the triennial evaluation. Thus, there was no specific requirement that School A conduct another psychological evaluation.

As addressed in Issue #2 above regarding Student's BIP, the evidence does not support a conclusion that School A should have conducted another BIP for Student as Petitioner asserts. The evidence demonstrates that DCPS was and is able and willing to conduct evaluations of Student when Student is available.

Based upon the evidence that Student was unavailable for evaluation because of non attendance, I conclude that Petitioner did not sustain the burden of persuasion by a preponderance of the evidence that DCPS denied Student a FAPE because of failure to conduct evaluations. As was discussed in Issue #1 above School A clearly held an annual IEP review meeting on April 3, 2017, in which Petitioner and her representatives participated. Therefore, there is no basis for

¹⁴ 34 C.F.R. § 300.304 Evaluation procedures. (a) Notice. The public agency must provide notice to the parents of a child with a disability, in accordance with § 300.503, that describes any evaluation procedures the agency proposes to conduct. (b) Conduct of evaluation. In conducting the evaluation, the public agency must— (1) Use a variety of assessment tools and strategies to gather relevant functional, developmental, and academic information about the child, including information provided by the parent, that may assist in determining— (i) Whether the child is a child with a disability under § 300.8; and (ii) The content of the child's IEP, including information related to enabling the child to be involved in and progress in the general education curriculum (or for a preschool child, to participate in appropriate activities); (2) Not use any single measure or assessment as the sole criterion for determining whether a child is a child with a disability and for determining an appropriate educational program for the child; and (3) Use technically sound instruments that may assess the relative contribution of cognitive and behavioral factors, in addition to physical or developmental factors. (c) Other evaluation procedures. Each public agency must ensure that— (4) The child is assessed in all areas related to the suspected disability, including, if appropriate, health, vision, hearing, social and emotional status, general intelligence, academic performance, communicative status, and motor abilities;

Petitioner's assertion that DCPS failed to meet with her to develop an appropriate IEP.

ISSUE 4: Whether DCPS denied Student a FAPE by failing to convene a meeting to conduct an annual review of Student's IEP.

Conclusion: Petitioner did not sustain the burden of persuasion by a preponderance of the evidence on this issue.

34 C.F.R. §300.324(b)¹⁵ requires that a student's IEP be updated at least annually to determine whether the annual goals for the child are being achieved and revise the IEP to address any lack of expected progress toward the annual goals and in the general education curriculum.

As already stated, the evidence clearly demonstrates that Student's last IEP annual review occurred on April 3, 2017. DCPS conducted a timely review of Student's IEP as the previous IEP did not expire until April 16, 2017. Although Petitioner's counsel asserted that Petitioner was not provided a copy of Student's April 3, 2017, IEP following the IEP meeting, the evidence demonstrated that Petitioner, Petitioner's attorney and Petitioner's educational advocate all participated in the April 3, 2017, IEP meeting and that School A's special education coordinator forwarded Petitioner's counsel a copy of the IEP following the meeting.

Student's next IEP review would not have become due until on, or about, April 3, 2018. Since student has not been attending school, there is no school data available which would justify any changes to student's IEP. The IEP developed on April 3, 2017, has not been implemented because Student has not been available. Consequently, I conclude that Petitioner did not sustain the burden of persuasion by a preponderance of the evidence on this issue.

ISSUE 5: Whether DCPS denied Student a FAPE by failing to implement Student's IEP.

Conclusion: Petitioner did not sustain the burden of persuasion by a preponderance of the evidence on this issue.

5E DCMR 3002.3 provides that:

- (c) The LEA shall ensure that an IEP is developed and implemented for each eligible with a disability served by the LEA.
- (d) The LEA shall ensure that special education and related services are provided to an eligible child with a disability in accordance with the child's IEP...

¹⁵ 34 C.F.R. §300.324(b): Each public agency must ensure that, subject to paragraphs (b)(2) and (b)(3) of this section, the IEP Team-- (i) Reviews the child's IEP periodically, but not less than annually, to determine whether the annual goals for the child are being achieved; and (ii) Revises the IEP, as appropriate, to address-- (A) Any lack of expected progress toward the annual goals described in Sec. 300.320(a)(2), and in the general education curriculum, if appropriate; (B) The results of any reevaluation conducted under Sec. 300.303; (C) Information about the child provided to, or by, the parents, as described under Sec. 300.305(a)(2); (D) The child's anticipated needs; or (E) Other matters.

(f) The LEA shall make a good faith effort to assist the child to achieve the goals and objectives or benchmarks listed in the IEP.

“To prevail on a claim under IDEA, a party challenging the implementation of an IEP must show more than a *de minimus* failure to implement all elements of that IEP, and instead, must demonstrate that the ...authorities failed to implement substantial or significant portions of the IEP” *Savoy v. District of Columbia* (DC Dist. Court) February 2012 adopted *Houston Indep. School District v. Bobby R.* 200 F3d 341 (5th Circ. 2000)

Since Student has not been available for instruction, a claim related to a failure to implement Student’s April 3, 2017, IEP cannot be found against DCPS. From a review of the record, DCPS made a FAPE available to Student and appeared willing to work with Petitioner, even offering information regarding the necessity of filing a missing person’s report in Virginia. DCPS also established its readiness to work with Petitioner and Student, once Student returned to school. In this case, nothing prevented the implementation of Student’s IEP except Student going missing and failing to return to school. Consequently, I find that Petitioner did not sustain the burden of persuasion by a preponderance of the evidence on this issue.

Remedy:

A hearing officer may award appropriate equitable relief when there has been an actionable violation of IDEA. *See* 20 U.S.C. § 1415(f)(3)(E)(ii)(II); *Eley v. District of Columbia*, 2012 WL 3656471, 11 (D.D.C. Aug. 24, 2012) (citing *Branham v. District of Columbia*, 427 F.3d at 11–12.) I concluded that DCPS offered Student an appropriate IEP, placement and location of services and that Petitioner did not sustain the burden of persuasion by a preponderance of the evidence on the other violations alleged. Consequently, because I did not find any denial of FAPE, I will not grant Petitioner’s request that DCPS be ordered to place and fund Student at School C for SY 2017-2018, or grant any of the other relief Petitioner has requested. I encourage Petitioner and DCPS to continue to work to ensure that Student is located and made available for instruction and to work cooperatively to identify and provide Student a school location that meets Student’s needs and that Student is willing to attend.

ORDER:

Petitioner’s due process complaint filed on September 28, 2017, is hereby dismissed with prejudice and all 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.
Hearing Officer
Date: March 22, 2018

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