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Office of Review and Compliance
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Confidential

Parent on Behalf of Student, Petitioner, v. District of Columbia Public Schools Local Educational Agency (“LEA”) Respondent. Case # 2018-0019 Date Issued: April 14, 2018	CORRECTED HEARING OFFICER’S DETERMINATION ¹ Hearing Dates: April 9, 2018 April 10, 2018 Counsel for Each Party is 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, April 14, 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 April 9, 2018, and April 10, 2018, at the District of Columbia Office of the State Superintendent of Education (“OSSE”) Office of Dispute Resolution (“ODR”) 1050 First Street, N.E., Washington, D.C. 20003 in Hearing Room 112.

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 the IDEA with a disability classification of multiple disabilities (“MD”) including emotional disability (“ED”) and other health impairment (“OHI”) for Attention Deficit Hyperactivity Disorder (“ADHD”). District of Columbia Public Schools (“DCPS”) is Student’s current local educational agency (“LEA”).

Student attends to a DCPS school (“School A”) where Student began attending on November 15, 2017. On January 29, 2018, Petitioner filed his current due process complaint asserting DCPS denied Student a free appropriate public education (“FAPE”) by, inter alia, failing to provide Student an appropriate individualized educational program (“IEP”) and placement.

Relief Sought:³

Petitioner seeks as relief that the Hearing Officer find that DCPS denied the student a FAPE, and order DCPS to amend Student’s IEP to reflect a residential program as Student’s least restrictive environment (“LRE”) and to prescribe a dedicated aide, increase behavioral supports and add baseline data and accommodations for testing. Petitioner requests that the student be placed in a residential program and be awarded compensatory education.

LEA Response to the Complaint:

DCPS filed a response to the complaint on February 20, 2018. DCPS denies that there has been any failure to provide the student with a FAPE. In its response DCPS asserted, inter alia, in a December 4, 2017, meeting Petitioner initially disagreed with the IEP team’s decision of a non-public placement but later communicated he agreed. The parties reconvened on December 11, 2017, and initiated the nonpublic referral process and the IEP team, including Petitioner, agreed that the student’s placement was a nonpublic special education day school. OSSE has been working since December 11, 2017, to identify a school.

³ At the outset of the hearing Petitioner’s counsel withdrew the request that DCPS be ordered to conduct a functional behavior assessment (“FBA”) and develop a behavior intervention plan (“BIP”).

At the outset of the hearing DCPS counsel acknowledged that School A is an inappropriate placement and location of services. Student has been accepted to a non-public separate special education school (“School B”) with the requirement of a dedicated aide and DCPS has agreed to amend Student’s IEP to include a dedicated aide and place and fund Student at School B. DCPS maintains that Student’s LRE is not a residential placement.

Resolution Meeting and Pre-Hearing Conference:

The parties held a resolution meeting on February 12, 2018. The parties did not mutually agree to proceed directly to hearing. The 45-day period began on March 1, 2018, and ends [and the Hearing Officer’s Determination (“HOD”) is due] on April 14, 2018.

The undersigned Hearing Officer (“Hearing Officer”) convened a pre-hearing conference on March 1, 2018, and issued a pre-hearing order (“PHO”) on March 7, 2018, outlining, inter alia, the issue to be adjudicated.

ISSUE: ⁴

The issue adjudicated is:

Whether the DCPS denied Student a FAPE by failing to provide and/or implement an appropriate IEP, placement/location of services since Student enrolled in DCPS in November 2017. ⁵

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 66 and Respondent’s Exhibits 22 through 24) that were admitted into the record and are listed in Appendix A.⁶ The witnesses testifying on behalf of each party are listed in Appendix B.⁷

⁴ The Hearing Officer restated the issue at the hearing and the parties agreed that this was the issue to be adjudicated.

⁵ Petitioner alleges the IEP is inappropriate because the IEP: (a) does not have baseline data or accommodations for statewide assessments, (b) does not prescribe a dedicated aide, (c) has insufficient behavioral support services which Petitioner alleges should be 1 hour per week, and (d) has an inappropriate LRE that Petitioner alleges should be a residential placement.

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

⁷ Petitioner presented five witnesses: (1) Student’s father (Petitioner), (2), an educational advocate employed by the law firm representing Petitioner, designated an expert witness, (3) a second educational advocate employed by the law firm representing Petitioner, designated an expert witness, (4) Student’s psychiatrist, designated an expert witness and (5) Student’s psychologist, designated an expert witness. Respondent presented five witnesses: (1) a DCPS special education teacher, (2) DCPS LRE Support Manager, designated an expert witness (3) OSSE Non-Public Placement Manager, (4) DCPS psychologist designated an expert witness, and (5) Admissions Director of School B.

SUMMARY OF DECISION:

Petitioner had the burden of production on the issue adjudicated. The burden of persuasion fell to Respondent as to the appropriateness of Student's IEP after Petitioner met a prima facie case. However, Petitioner retained the burden of persuasion as to the implementation of Student's IEP. Respondent did not sustain the burden of persuasion by a preponderance of the evidence on the appropriateness of Student's IEP. Petitioner did not sustain the burden of persuasion by a preponderance of the evidence as to the alleged failure to implement Student's December 11, 2017, IEP. The Hearing Officer directs DCPS in the order below to place and fund Student at School B, conduct an evaluation of Student and convene an IEP meeting within thirty days of Student's attendance at School B to review evaluation(s), Student's progress at School B and review and revise Student's IEP as appropriate. The Hearing Officer also granted Petitioner compensatory education.

FINDINGS OF FACT:⁸

1. Student has been determined eligible for special education and related services pursuant to the IDEA with a MD disability classification including ED and OHI for ADHD. DCPS is Student's current LEA. (Petitioner's Exhibit 3-1)
2. During school year ("SY") 2015-2016, Petitioner and Student resided in another state and Student had another LEA ("LEA-4"). Student had an LEA-4 IEP to be implemented from January 4, 2016, to July 26, 2016, that prescribed an LRE in a separate therapeutic day school. Student's LEA-4 IEP prescribed related services of counseling (30 minutes per week to be provided outside the classroom), occupational therapy and speech-language therapy. The IEP did not include any testing accommodations. Student was attending a non-public separate special education school while in LEA-4. (Petitioner's testimony, Petitioner's Exhibit 9-1, 9-13, 9-14, 9-15, 9-17)
3. While Student was in LEA-4 Petitioner had an independent neuropsychological evaluation conducted in January and February 2015 because of behavior issues Student was exhibiting. The evaluation report is dated March 1, 2015. The psychologist assessed Student's cognitive, academic and social/emotional functioning. Student's overall cognitive functioning fell in the Average range with a full scale IQ of 94. The evaluator administered the Woodcock-Johnson III ("WJ-III") educational assessment. Student's academic functioning was Low to Average, with reading and writing abilities in the Average range, and math skills in the Low range. Student's social/emotional functioning scores resulted in Student being diagnosed with ADHD, Childhood Mood Disorder and Conduct Disorder. (Petitioner's Exhibit 19-1, 19-3, 19-4, 19-5, 19-7, 19-8) had averaged

⁸ 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.

4. Student and Petitioner relocated from LEA-4 to another state and on June 13, 2016, Student enrolled in an LEA within that state ("LEA-3"). LEA-3 conducted a psychological and an educational evaluation in July 2016. The evaluation reflected a decline in Student's cognitive scores with a full scale IQ of 71. Student's social emotional functioning was derived from Student's parent report and that of Student's extended school year ("ESY") teacher in LEA-3. The behavior rating scales sent to LEA-4 were not returned to LEA-3 to be included in the evaluation. There was a high discrepancy between the behaviors reported by Student's parent(s) and the ESY teacher. The ESY teacher reported Student was polite and cooperative, but inattentive. Student's parent(s) reported elevated scores in externalizing behaviors of anger, aggression and bullying. (Petitioner's testimony, Petitioner's Exhibits 20-1, 20-4, 20-6, 20-15, 20-16)
5. LEA-3 conducted a Woodcock-Johnson IV ("WJ-IV") educational assessment in July 2016. Student's academic scores declined slightly from the previous assessment in LEA-4. Student's reading subtest scores ranged from Very Low to Average, with Passage Comprehension and Word Attack being Average and Reading Fluency rated as Low and Reading Recall rated as Very Low. Student's math scores were generally Low and the writing subtests scores were Low Average to Average. (Petitioner's Exhibit 21)
6. While attending school in LEA-3 Student had an IEP dated August 24, 2016, that prescribed Student's placement as either Students' local school or an ED Cluster Program and an LRE with 100% special education services delivered inside the general education setting. (Petitioner's Exhibits 7, 8-1, 8-2)
7. The August 24, 2016, IEP included academic achievement data from the WJ-IV administered on July 20, 2016, and specifically gave Student's performance scores and skill levels in the areas of reading, math, language and social/emotional. Student's LEA-3 IEP did not prescribe counseling or behavior support services as a related service outside general education. The IEP provided for Student's use of mathematics tools and calculation devises and extended time and frequent breaks for instruction and assessment. (Petitioner's Exhibit 8-31, 8-32, 8-33, 8-34, 8-35, 8-39, 8-40, 8-41)
8. Although Student originally had an LRE with services provided inside general education, while attending school in LEA-3, Student was eventually transferred to a self-contained special education program before Student left LEA-3 in February 2017, when Petitioner began to home school Student. Petitioner home schooled Student from February 2017 to May 2017 when Petitioner and Student relocated to another jurisdiction where they resided from approximately May 2017 to October 2017. In this new jurisdiction Petitioner enrolled Student in an LEA ("LEA-2"). (Petitioner's testimony, Petitioner's Exhibit 18-1)
9. Although Student was enrolled in LEA-2, because Student arrived in LEA-2 near the end of SY 2016-2017, Student did not attend school in LEA-2 during SY 2016-2017. (Petitioner's testimony, Petitioner's Exhibits 5, 6, 7, 8)

10. Although LEA-2 identified a separate special education school for Student to attend for SY 2017-2018, Student was psychiatrically hospitalized near the start of SY 2017-2018 and Petitioner and Student relocated to the District of Columbia within weeks of Student being released from hospitalization. Consequently, Student never attended school in LEA-2 and did not have an IEP developed by LEA-2. (Petitioner's testimony, Petitioner's Exhibit 29)
11. When Student was discharged from hospital, the discharge document indicated that Student would benefit greatly from a step down therapy program such as a partial hospitalization and that Student's outpatient psychiatrist recommended a residential treatment program be considered to address longstanding behavioral problems. (Petitioner's Exhibit 29-2)
12. After arriving in the District of Columbia, Petitioner inquired of DCPS where Student should be enrolled in school. DCPS instructed Petitioner to enroll Student in School A, the neighborhood school. Petitioner provided DCPS Student's LEA-4 IEP from SY 2015-2016 and Student's 2015 psychological evaluation. (Petitioner's testimony, Petitioner's Exhibit 31)
13. On November 14, 2017, School A convened a meeting with Petitioner to discuss Student's attendance at School A. DCPS developed a safety crisis response plan in case Student exhibited any problematic behaviors related to Student's psychiatric symptoms. Student began attending School A on November 15, 2017. Petitioner requested that DCPS provide Student a residential placement. (Petitioner's testimony, Petitioner's Exhibit 58)
14. Based on the LEA-4 IEP that indicated Student was in a separate special education school, School A created a separate special education classroom⁹ for Student in an effort to as closely as possible provide Student services comparable to what the LEA-4 IEP prescribed until DCPS could obtain more recent data on Student and initiate a change of placement to a non-public separate special education school. Petitioner did not initially inform DCPS that Student had attended school in LEA-3 and had a more recent IEP from LEA-3. Since Student has attended School A Student has made some academic progress. Although Student has had some incidents of frustration and refusing to do work, Student's in-school behaviors have generally been manageable and Student is easily redirected when Student engages in non-desired behaviors. (Witness 5's testimony, Respondent's Exhibits 8-10, 12-3)
15. DCPS immediately contacted OSSE and on November 20, 2017, initiated a formal change of placement request for Student. The request noted that Petitioner had provided DCPS a letter from Student's treating psychiatrist recommending a residential treatment facility with a non-public school with an intensive therapeutic setting. The change of placement request noted that no more current data was available on Student than the 2015

⁹ Student's classroom at School A included a dedicated aide, a special education teacher and rotating staff that included the school psychologist, assistant principal and principal. (Respondent's Exhibit 12-3)

neuropsychological and that Petitioner had not provided access to more recent school records from LEA-3. (Witness 6's testimony, Respondent's Exhibit 12)

16. On December 4, 2017, DCPS and OSSE convened a change of placement meeting at School A with Petitioner and School A team members. An OSSE representative and DCPS central office representative informed Petitioner and the School A IEP team of the change of placement process. Petitioner reiterated his request for a residential placement. Based upon a review of Student's previous IEP and data, OSSE recommended Student be placed in a non-public separate special education school, but left the decision regarding Student's placement to the IEP team. Petitioner requested that the meeting be continued to another day so that he could process the information provided. (Witness 6's testimony, Witness 7's testimony)
17. On December 11, 2017, DCPS reconvened the meeting with Petitioner and the School A team. Petitioner again requested a residential placement for Student and provided a letter dated December 8, 2017, from Student's psychiatrist that recommended residential placement. (Petitioner's testimony, Petitioner's Exhibit 16)
18. School A developed an IEP for Student dated December 11, 2017, that prescribes 30 hours per week of specialized instruction outside general education and the following related services: behavioral support, speech-language pathology, occupational therapy and physical therapy. The behavioral support services are 30 minutes per week in the general education setting. The IEP notes on the LRE page that the LRE placement category is a "Separate school". The page states the LEA-3 IEP was adopted and "[Student] was placed in a Non-Public school". Initially Petitioner did not agree with Student's placement in non-public separate special education school but eventually agreed. (Witness 5's testimony, Petitioner's Exhibit 3-8, 3-10,)
19. On December 11, 2017, DCPS issued a prior written notice ("PWN") that stated that comparable services would be offered and services would be provided in a full time separate day school. Thereafter, OSSE sent placement packets to several non-public separate special education schools. (Witness 7's testimony, Petitioner's Exhibit 21)
20. In October and November 2017 Petitioner had Student evaluated through Petitioner's health insurance by an independent psychologist whose office also conducted Student's 2015 psychological evaluation. The psychological evaluation report was completed on January 8, 2018. Student's assessed cognitive and academic functioning declined between the two evaluations conducted in 2015 and 2017. Student's cognitive abilities had declined from Average to Borderline with a full scale IQ of 76. The evaluation report recounted Student's history of self-injurious behaviors and auditory hallucinations and noted Student's father's desire that Student be placed in a residential therapy facility based on doctors' recommendations. However, the psychologist did not recommend a residential placement based upon her inability to confer with Student's treating psychiatrist and Student's teacher(s) and confirm Student's symptoms and behaviors. The psychologist wrote Student would "benefit from a small behavioral therapeutic placement with paraprofessional assistance (for safety) as needed with an academic focus

as well.” Petitioner provided DCPS the psychological evaluation report once it was available. (Petitioner’s Exhibit 18, 19)

21. DCPS convened a multi-disciplinary team (“MDT”) meeting on January 18, 2018, attended by Petitioner, his attorney and educational advocate at which the team reviewed Student’s January 8, 2018, psychological evaluation. Petitioner’s advocate requested that Student be provided a residential placement based on Student’s documented mental health and history of self-harm and aggressive behavior. (Petitioner’s testimony, Witness 1’s testimony, Petitioner’s Exhibit 2)
22. At the January 18, 2018, meeting the team also had available the LEA-3 IEP that included July 2016 academic assessment data. Although there was more recent academic assessment data available to the IEP team from both the LEA-3 IEP and the January 8, 2018, psychological evaluation, DCPS did not amend Student’s IEP to include baseline data for the IEP goals or to include a dedicated aide. The December 11, 2017, IEP DCPS developed remained unchanged and prescribed an LRE in non-public School. Petitioner and his representatives disagreed with the proposed placement. (Witness 1’s testimony, Petitioner’s Exhibit 3)
23. Petitioner and Student visited approximately five of the schools to which OSSE sent referrals, including a visit to School B. None of the schools Petitioner visited, except for School B, offered Student acceptance, either because the schools could not meet Student’s needs or did not have an opening. At School B Petitioner spoke with School B’s clinical director who informed Petitioner that if he were seeking residential placement he should engage an attorney. (Petitioner’s testimony, Witness 7’s testimony)
24. On February 2, 2018, School A prepared an IEP progress report for Student that indicates that academic goals were just introduced, Student made progress in some speech-language goals and others were not introduced. The behavioral support goals were not introduced. (Petitioner’s Exhibit 12).
25. On February 10, 2018, a DCPS psychologist conducted a review of Student’s January 8, 2018, psychological evaluation and as part of the review she spoke with Student’s School A teacher. The DCPS psychologist noted that the January 8, 2018, evaluator stated she could not clearly recommend residential placement “from a professional and ethical standpoint.” The DCPS psychologist recommended based on her review of the evaluation, other documentation regarding Student and her conversation with Student’s School A teacher, that Student be placed in a non-public special education separate school and not a residential placement. (Witness 8’s testimony, Respondent’s Exhibit 8)
26. Since attending School A, Student has been psychiatrically hospitalized for self-injurious behaviors and auditory hallucinations telling Student to harm others. Student has been hospitalized on four occasions:

and was hospitalized during the

hearing. When student was released from

, there was a recommendation that Petitioner explore Student attending the Child Day Hospital and that Student follow up with Student's treating psychiatrist and an outpatient psychologist. However, the hospital discharge documents indicated Student should be able to return to school. Upon Student's various discharges has not recommended that Student be placed in residential treatment. (Petitioner's testimony, Petitioner's Exhibits 25-1, 25-23, 25-28, 26-1, 26-5, 26-5, 27-17, 47)

27. Student saw a psychologist upon discharge from and has seen the psychologist on one additional occasion. However, the psychologist has not generated any written evaluation report. Nonetheless, the psychologist recommended that Student be placed in the residential school. (Witness 5's testimony)
28. DCPS convened another meeting in February 12, 2018, to review a plan of care after Student's discharge from hospital. Petitioner acknowledged that recommended a partial hospitalization day program, but Petitioner did not have funding or transportation for Student to attend such a program. By the time of this meeting Petitioner had filed his due process complaint and DCPS also convened a resolution meeting on February 12, 2018. At the time Student had not yet been admitted to any of non-public school. DCPS offered to provide transportation to Petitioner to visit additional non-public schools and offered home or hospital instruction if Student remained hospitalized. (Petitioner's Exhibit Exhibits 32, 33, 34, 56, 57).
29. Student has visited and been admitted to School B. School B has a total of 102 students in grades 1 through 12 with various disability classifications including ED and OHI. School B holds an OSSE certification of approval ("C of A") and the annual cost is approximately \$60,000. School A can provide Student specialized instruction and related services in a therapeutic 100% special education setting. Certified special education teachers provide instruction and the related service providers are licensed and/or certified. School B has a licensed psychologist on staff and access to a licensed psychiatrist. There are other students at School B who from time to time are hospitalized for social/emotional issues and hospitalization is not an automatic basis for excluding any student from acceptance and attendance at School B. School B has a defined protocol when a student is in need of de-escalation and has trained mental health clinical staff to assist students as needed. School B can implement Student's current DCPS IEP in LRE the IEP prescribes. School B has requested that Student be provided a dedicated aide at least initially. School B will conduct a thirty-day review once Student has begun attending to determine if the dedicated aide continues to be required. (Witness 9's testimony, Respondent's Exhibit 18)
30. Since 2013 Student has received continual psychiatric treatment (approximately once per month) from a psychiatrist in the jurisdiction of LEA-4. Student has been diagnosed by the psychiatrist with the following: ADHD, Conduct Disorder, Mood Disorder Schizophrenia, Learning Disorder and Eating Disorder. Student's psychiatrist recommended Student be placed in a residential treatment because of student's auditory hallucinations and frequent hospitalizations and because in his opinion Student's

condition has not improved despite Student's placement in a non-public special education school in the past. Student's psychiatrist provided two letters, one dated December 8, 2017, and one dated March 27, 2018, recommending Student be in a residential treatment facility with a non-public school with an intensive therapeutic setting so that Student has constant supervision for behavioral support. (Witness 2's testimony, Petitioner's Exhibits 16, 17)

31. On February 14, 2018, Petitioner's attorney sent an email to OSSE stating Petitioner was willing for Student to attend a non-public special education separate school on an interim basis during the pendency of the due process complaint. (Petitioner's testimony, Petitioner's Exhibit 36-1)
32. On February 22, 2018, an incident occurred at School A, near the end of the school day, in which Student was hearing voices instructing Student to harm others. Student was escorted to the principal's office. The School A principal telephoned Petitioner and telephoned the mobile mental health response team (██████████) regarding the incident. ██████████ was unable to send a team to School A and Petitioner agreed student would be picked up from school by Student's other parent and the issue would be addressed at home. (Petitioner's Exhibit 11)
33. On March 19, 2018, an incident occurred when student had auditory hallucinations at school telling Student to self-harm and to harm others. School A's principal informed Petitioner of the incident and offered to call ██████████. Petitioner declined the offer and Student was able to remain at school until the end of the day when Student was picked up by Student's parent(s). (Petitioner's Exhibit 50)
34. Petitioner educational advocate developed a compensatory education plan to compensate Student for being in an inappropriate placement from December 11, 2017, to present. The advocate requested 150 hours of tutoring (3 to 4 hours per week for 1 year) and 25 hours of counseling. The proposed plan anticipated Student would be placed in a residential placement and would not be able to use the recommended hours of compensatory education unless and until Student was not in such a placement. (Witness 3's testimony, Petitioner's Exhibit 66)

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). Petitioner had the burden of production the issue adjudicated and the burden of persuasion fell to Respondent as to the appropriateness of Student's December 11, 2017, IEP.¹⁰ Petitioner met a prima facie case on that portion of the issue. Petitioner held the burden of persuasion as to the implementation of the IEP. The normal standard is preponderance of the evidence. See, e.g. *N.G. V. District of Columbia* 556 f. Sup. 2d (D.D.C. 2008). See also 20 U.S.C. §1451 (i)(2)(C)(iii).

ISSUE: Whether the DCPS denied Student a FAPE by failing to provide and/or implement an appropriate IEP, placement/location of services since Student enrolled in DCPS in November 2017.

Conclusion: Respondent did not sustain the burden of persuasion by a preponderance of the evidence on the appropriateness of Student's IEP. Petitioner did not sustain the burden of persuasion by a preponderance of the evidence as to the alleged failure to implement Student's December 11, 2017, IEP.

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

¹⁰ 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 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.

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 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.

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.")

The second, substantive, prong of the *Rowley* inquiry is whether Student's IEP was 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 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 the District of Columbia, to determine whether a residential placement is necessary, “a court must analyze ‘whether full-time placement may be considered necessary for educational purposes, or whether the residential placement is a response to medical, social or emotional problems that are segregable from the learning process.’” *McKenzie v. Smith*, 771 F. 2d 1527, 1534 (D.C. Cir. 1985) (quoting *Kruelle v. New Castle County School District*, 642 F.2d 687, 693 (3d Cir. 1981).

Petitioner alleges the IEP is inappropriate because the IEP (a) does not have baseline data or accommodations for statewide assessments, (b) does not prescribe a dedicated aide, (c) has insufficient behavioral support services which Petitioner alleges should be 1 hour per week, and (d) has an inappropriate LRE that Petitioner alleges should be a residential placement.

The evidence demonstrates that on December 11, 2017, DCPS developed an IEP that attempted to provide Student services comparable to the LEA-4 IEP that DCPS was first provided by Petitioner. DCPS through OSSE sought thereafter to identify another and more appropriate school placement for Student. The evidence, however, also demonstrates that DCPS was later provided the January 8, 2018, psychological evaluation and Student’s more recent LEA-3 IEP. These two documents contained updated cognitive and academic achievement information for Student. However, despite being provided this additional data, DCPS did not take action to update Student’s IEP either at the January 18, 2018, meeting or thereafter to include baselines from which student’s IEP goals could be measured. In addition, DCPS took no action to amend Student’s IEP to include a dedicated aide although DCPS was providing Student a dedicated aide at School A. Based upon this evidence Petitioner met a prima facie case that Student’s IEP is inappropriate. Although Petitioner also asserted the IEP is inappropriate because it lacks testing accommodations, there was no evidence that while at School A Student has engaged in any testing.

DCPS asserted that it did not amend Student’s IEP because it was awaiting a new placement for Student before any update to the IEP was made, this assertion was insufficient to persuade the Hearing Officer that DCPS’s actions were reasonable. The IEP could have been amended to include baselines and the dedicated aide. Had the IEP been amended, the IEP would have presumably been provided to some of the schools that were considering Student for admission and may have resulted in less delay in identifying an appropriate placement for Student. Consequently, based upon this evidence, the Hearing Officer concludes Respondent did not sustain the burden of persuasion by a preponderance of the evidence that Student’s DCPS IEP was reasonably calculated to provide Student educational benefit in light of Student’s circumstances.

Although Petitioner alleges that the level of behavior supports in the IEP was insufficient, the evidence demonstrates that the IEP prescribed the same level of behavior support services as the Student’s LEA-4 IEP and more services than the LEA-3 IEP. Although Petitioner’s witness testified that Student needed more behavior support services, the Hearing Officer did not find this testimony more persuasive than Student’s School A teacher who credibly testified that Student’s in-school behavior was easily redirected. Consequently, the Hearing Officer did not conclude Student’s IEP is inappropriate because of insufficient behavior support services.

Finally, Petitioner asserts that the December 11, 2017, IEP was inappropriate because it did not prescribe a residential placement as Student's LRE. As to this component of the issue adjudicated, Respondent's sustained the burden of persuasion by a preponderance of the evidence. The Hearing Officer is persuaded by the evidence that Student's appropriate LRE is a non-public special education separate school.

Although Petitioner's expert witnesses opined that Student should be in a residential setting because of self-injurious behaviors and suicidal and/or homicidal ideations, these behaviors have been minimal at School A. The Hearing Officer was not convinced by their testimony and found the testimony of the Student's teacher, who has seen, been with and interacted with Student at School A, more credible as to Student's in-school behaviors. The evidence demonstrates that although Student has had behavioral incidents at School A, Student is easily redirected by School staff. Although Student has had auditory hallucinations on occasions at School A, Student has not acted on those behaviors and there have been no incidents of Student engaging in self-harm while at school or physically endangering others despite Student being in a setting the DCPS has acknowledged since Student arrived is an inappropriate placement for Student.

Between Student's assessments in 2015 and 2017, Student's cognitive and academic scores have declined. Petitioner asserts that this decline is the result of Student not being in a residential placement. However, the evidence tends to demonstrate otherwise. Student, after having been in a non-public special education therapeutic school during SY 2015-2016 in LEA-4, was removed from that setting placed in a less restrictive setting for nearly a year and thereafter home schooled. After being home schooled, Student did not attend any school at all for nearly six months prior to coming to DCPS. This seems a more plausible explanation for Student's decline in assessment scores as anything else. Since November 15, 2017, DCPS has cobbled a temporary solution for Student's placement until an appropriate non-public placement was identified.

Although Student has been hospitalized on several occasions since DCPS developed the IEP and began to identify placements for Student, the discharge documents from the hospitalizations have not indicated that Student needs a residential placement. Rather, the documents have indicated that Student could return to school. In addition, the formal evaluations that have been provided DCPS have not supported a residential placement. Although Student's treating psychiatrist and the psychologist who saw Student twice after the hospitalization(s) both recommended a residential placement, the behaviors that these witnesses described as the basis for their recommendation have almost exclusively occurred while Student was at home.

The Hearing Officer acknowledges that Petitioner genuinely believes Student should to be in a residential placement and desires the same. However, the evidence does not convincingly demonstrate that Student is in need of such a restrictive placement. The Hearing Officer is not convinced that Student's emotional concerns are so inseparable from Student's educational concerns that a residential placement is required. The Hearing Officer concludes that the medical, social or emotional issues Student has displayed appear to be problems that are segregable from Student's learning process. Once Student has been placed in a therapeutic day school setting then Student's educational and social emotional progress can be adequately gauged.

The Hearing Officer is persuaded that Student would be best served if Student is immediately placed in a non-public special education therapeutic day school that can provide Student the school-based therapeutic services as well as educational and related services Student requires. The evidence demonstrates that School B can provide Student an appropriate placement and meets the requirements the Hearing Officer should consider.¹¹

As a further assurance that Student's needs are being met and that the current placement in a therapeutic day school is appropriate long term, the Hearing Officer has in the order below, in addition to directing DCPS to place and fund Student at School B, directed that DCPS conduct a psychiatric evaluation of Student to be reviewed and considered by an MDT ideally by the time DCPS convenes the 30-day review of Student's placement at School B.

Petitioner asserted in the alternative that DCPS had denied Student a FAPE by failing to implement Student's December 11, 2017, IEP.

34 C.F.R. § 300.323(c)(2) requires that, as soon as possible following the development of an IEP, special education and related services are made available to the child in accordance with the child's IEP.

5E DCMR 3002.3 provides that:

(c) The LEA shall ensure that an IEP is developed and implemented for each eligible child 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...

(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 Cir. 2000)

The evidence demonstrates that since Student has attended School A Student has been provided instruction and related services and since Student's IEP was developed on December 11, 2017,

¹¹ In determining a placement a Hearing Officer should consider the nature and severity of a student's disability; the student's specialized individual educational needs; the link between those needs and the services offered by the private school; the private school placement's costs; and the extent to which the placement represents the least restrictive environment. *Branham ex rel. Branham v. District of Columbia*, 427 F. 3d 7; 44 IDELR 149 (D.C. Cir. 10/25/05).

DCPS has provided instruction and services pursuant to that IEP even though the services have not been provided in the LRE that the IEP prescribes. There was no evidence presented by Petitioner that supported a finding that Student's IEP has not otherwise been implemented. Consequently, the Hearing Officer concludes that Petitioner did not sustain the burden of persuasion by a preponderance of the evidence on this component of the issue adjudicated.

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.)

Under the theory of compensatory education, "courts and hearing officers may award educational services to be provided prospectively to compensate for a past deficient program. The inquiry must be fact-specific and, to accomplish IDEA's purposes, the ultimate award must be reasonably calculated to provide the educational benefits that likely would have accrued from special education services the school district should have supplied in the first place." *Reid*, 401 F.3d 522 & 524. To aid the court or hearing officer's fact-specific inquiry, "the parties must have some opportunity to present evidence regarding [the student's] specific educational deficits resulting from his loss of FAPE and the specific compensatory measures needed to best correct those deficits." *Id.* at 526.

The Hearing Officer concluded that DCPS denied Student a FAPE by failing to develop an appropriate IEP with baseline data and a dedicated aide. Petitioner requested that Student be provided compensatory education in the form of tutoring and counseling. However, the proposed compensatory education plan presumed that Student would be in a residential placement and in need of no tutoring or counseling services while there. Petitioner's witness did not offer any evidence as to what services would be appropriate to compensate Student if Student were in any other educational placement. Based upon the testimony offered, however, the Hearing Officer determined that Student would benefit from tutoring and counseling. The Hearing Officer, therefore, in the order below has directed that Student be provided tutoring and counseling in amount that seems reasonable given that DCPS has provided Student instruction and related services and attempted to address Student's needs to the best of its ability until Student was moved to a more suitable school setting.

ORDER: ¹²

1. DCPS shall, within ten (10) school days of the issuance of this order, place and fund Student at School B and provide transportation services and a dedicated aide.

¹² Any delay in Respondent meeting the timelines of this Order that is the result of action or inaction by Petitioner shall extend the timelines on a day for day basis.

2. DCPS shall, within ten (10) school days of the issuance of this order, amend Student's IEP to: (a) include baseline data from Student's most recent evaluation(s) and/or classroom performance/assessments, and (b) include a dedicated aide.
3. DCPS shall, with written authorization from Petitioner, conduct a psychiatric evaluation of Student within thirty school days of the issuance of this Order. DCPS may at its option authorize Petitioner to obtain the evaluation independently at the OSSE prescribed rate.
4. DCPS shall, within thirty calendar days of the first day that Student begins attending School B, convene an IEP meeting to review Student's academic and social/emotional/behavioral progress, review any recent evaluation(s)/assessment(s) and review and revise Student's IEP as the team deems appropriate.
5. Within ten (10) school days of the issuance of this order DCPS shall provide Petitioner authorization for 25 hours of independent tutoring and 10 hours of independent counseling at the OSSE prescribed rates.
6. All other relief requested by Petitioner is denied.

APPEAL PROCESS:

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

/S/ Coles B. Ruff

Coles B. Ruff, Esq.
Hearing Officer
Date: April 14, 2018

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