

District of Columbia
 Office of the State Superintendent of Education
 Office of Review and Compliance
 Office of Dispute Resolution
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OSSE
 Office of Dispute Resolution
 April 2, 2020

Confidential

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| <p>Parent on Behalf of Adult Student,</p> <p>Petitioner,</p> <p>v.</p> <p>District of Columbia Public Schools (“LEA”)</p> <p>Respondent.</p> <p>Case # 2019-0308</p> <p>Date Issued: March 24, 2020</p> | <p>CORRECTED HEARING OFFICER’S DETERMINATION ¹</p> <p>Hearing Dates: February 28, 2020 March 12, 2020</p> <p>Counsel for Each Party listed in Appendix A</p> <p><u>Hearing Officer:</u> <u>Coles B. Ruff, Esq.</u></p> |
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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 24, 2020, 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 February 28, 2020, and March 12, 2020, at the District of Columbia Office of the State Superintendent of Education (“OSSE”) Office of Dispute Resolution 1050 First Street, N.E., Washington, D.C. 20003, in Hearing Room 423.

BACKGROUND AND PROCEDURAL HISTORY:

The student or (“Student”) is an adult, age __ and in grade __.² Student resides with Student's parent (“Petitioner”) in the District of Columbia (“D.C”). Student has been determined eligible for special education and related services pursuant to IDEA with a disability classification of specific learning disability (“SLD”). District of Columbia Public Schools (“DCPS”) is Student's local educational agency (“LEA”).

During school year (“SY”) 2016-2017 and during summer 2017, Student resided in the District of Columbia and attended a District of Columbia Public Charter School (“School A”). At the start of SY 2017-2018 Student began living with Student’s other parent in Prince George’s County, Maryland (“PGC”), and attended a public school in that county (“School B”). While at School B, Student had an individualized educational program (“IEP”).

Student began residing with Petitioner again later in 2018. Petitioner then initiated Student’s enrollment in DCPS at Student’s neighborhood school (“School C”) on or about November 14, 2018. Petitioner engaged legal counsel, and on or about December 19, 2018. Petitioner’s counsel requested that DCPS reevaluate Student and provide Student’s educational records. Petitioner’s counsel also provided School B with Petitioner’s notice of intent to unilaterally place Student at a non-public special education day school (“School D”). Student began attending School D in December 2019.

Petitioner filed a due process complaint on January 31, 2019, that alleged, inter alia, that DCPS failed to evaluate Student, failed to have a current IEP in place, and failed to provide Student an appropriate placement at School C. DCPS conducted evaluations of Student after Petitioner granted consent. Petitioner later withdrew her due process complaint without prejudice.

On June 7, 2019, DPCS convened an IEP meeting at which the evaluations DCPS conducted were reviewed, and DCPS developed an IEP. The IEP was amended on June 18, 2019. DCPS proposed to implement Student’s IEP at School C. Petitioner filed the current due process complaint on

² The student's current age and grade are indicated in Appendix B. Although Student is an adult and education rights are deemed transferred from Parent to Student, Petitioner (Parent) submitted sufficient documentation that Student has designated Petitioner to proceed in this hearing on Student's behalf and to otherwise pursue and defend Student's educational rights.

December 27, 2019, alleging, in addition to claims in her initial due process complaint, that the IEP that DCPS developed and the placement DCPS proposed at School C are inappropriate.

Relief Sought:

Petitioner seeks as relief a finding DCPS denied Student a free appropriate public education (“FAPE”) and that DCPS be ordered to fund Student's placement at School D retroactive to January 1, 2019, and continuing until Student graduates from the school, funding to include all special education instruction, related services, and transportation services; that DCPS amend Student's IEP to prescribe a separate special education school with vocational training and develop a behavior intervention plan (“BIP”). Petitioner also seeks compensatory education.

LEA Response to the Complaint:

DCPS filed a response to the complaint on January 7, 2020, asserting, inter alia, that Petitioner had not sufficiently established residency in the District of Columbia until the February 27, 2019, resolution meeting on her initial due process complaint. Respondent in its response stated the following, inter alia:

After Petitioner established residency on February 27, 2019, DCPS, rather than electing to adopt Student's IEP from Maryland, decided to conduct its own evaluations and, thereafter, develop Student's IEP. Petitioner provided signed consent to have Student evaluated on March 13, 2019. DCPS had 60 days to complete the evaluations and 30 days to develop the IEP. The IEP was developed on June 7, 2019. DCPS met its statutory requirements to evaluate and develop Student's IEP.

At the June 7, 2017, meeting Petitioner requested that the DCPS complete a functional behavior assessment (“FBA”). DCPS agreed to complete the requested evaluation. Student was provided with an IEP/placement that calls for 22 hours of specialized instruction outside the general education setting as well as 120 minutes per month of behavior support. The IEP/ placement was developed based on Student’s academic and social-emotional needs. The location of service is a decision left up to the LEA and School C is appropriate because it can implement Student's IEP.

Resolution Meeting/Pre-Hearing Conference/Pre-Hearing Motion(s):

The parties participated in a resolution meeting. The parties did not mutually agree to proceed directly to hearing in this matter. The 45-day period began on January 27, 2020, and ends [and the Hearing Officer’s Determination (“HOD”) was originally due] on March 11, 2020. Respondent’s counsel filed a motion to continue that the Hearing Officer granted, extending the HOD due date to March 24, 2020.

The undersigned Hearing Officer (“Hearing Officer”) issued a pre-hearing order (“PHO”) on February 9, 2020, outlining, inter alia, the issues to be adjudicated.

Respondent styled its response to the due process complaint as a Motion to Dismiss. The Hearing Officer discussed and denied Respondent’s Motion in the PHO. On February 21, 2020,

Petitioner's counsel filed a Motion for Summary Judgment. On February 27, 2020, Respondent filed an Opposition to Petitioner's Motion for Summary Judgment. At the outset of the hearing on February 28, 2020, the Hearing Officer allowed each party to make representations on the record regarding Petitioner's motion. After considering each parties' arguments, the Hearing Officer denied Petitioner's Motion on the record with an oral ruling and directed that the hearing proceed.

ISSUES:³

The issues adjudicated are:

1. Whether DCPS denied Student a FAPE by failing to have a current IEP in effect from November 1, 2018, through June 18, 2019.
2. Whether DCPS denied Student a FAPE by failing to timely convene an IEP meeting on or before November 1, 2018, to determine if Student's annual IEP goals were being achieved.
3. Whether DCPS denied Student a FAPE by failing to timely comply with Petitioner's December 19, 2018, request for evaluations: a comprehensive psychological evaluation, a speech-language evaluation, an occupational therapy evaluation, and a vocational evaluation.
4. Whether DCPS denied Student a FAPE by failing to comprehensively evaluate Student because DCPS did not assess Student's social-emotional functioning in order to determine if Student as has an emotional disturbance ("ED") and/or other health impairment ("OHI").
5. Whether DCPS denied Student a FAPE by failing to develop an appropriate IEP because Student's June 7, 2019, IEP does not include fulltime special education support outside the general education setting, along with a BIP.
6. Whether DCPS denied Student a FAPE by failing to provide Student with an appropriate placement/location of service because School C was/is unable to provide Student with the special education services and supports Student requires.

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 36 and Respondent's Exhibits 1 through 22) that were admitted into the record and are listed in Appendix 2.⁴ The witnesses testifying on behalf of each party are listed in Appendix B.⁵

³ The Hearing Officer restated the issues at the hearing, and the parties agreed that these were the issues to be adjudicated.

⁴ Any item disclosed and not admitted or admitted for limited purposes was noted on the record and is noted in Appendix A.

⁵ Petitioner presented four witnesses: (1) Student's parent ("Petitioner") and the following individuals who were

SUMMARY OF DECISION:

Petitioner held both the burden of production and persuasion on issues #1, #2, #3, and #4. Respondent held the burden of persuasion on issues #5 and #6. Based on the evidence adduced, the Hearing Officer concluded that Petitioner did not sustain the burden of persuasion by a preponderance of the evidence on issues #1, #2, #3, and #4. Respondent did not sustain the burden of persuasion on issues #5 and #6. Consequently, the Hearing Officer granted Petitioner's requested relief of Student's prospective placement at School D.

FINDINGS OF FACT:⁶

1. Student resides with Petitioner in the D.C. Student has been determined eligible for special education and related services pursuant to IDEA with a disability classification of SLD. DCPS is Student's LEA. (Petitioner's testimony, Petitioner's Exhibit 23, Respondent's Exhibit 13)
2. During SY 2016-2017 and summer 2017, Student resided in the District of Columbia and attended School A, a D.C. Public Charter School. (Petitioner's Exhibit 5-1)
3. At the start of SY 2017-2018 Student began living with Student's other parent in PGC, Maryland, and attended School B, a public school in that county. While at School B, Student had an IEP. Student's PGC IEP prescribed that Student be provided 15 hours per week of specialized instruction in general education. Student's least restrictive environment ("LRE") while attending School B was in the general education setting. The IEP expired on November 1, 2018. Student attended School B until January 18, 2018, when Student withdrew and enrolled in a general education development test ("GED") program. (Petitioner's Exhibits 3, 5, 6, 7)
4. Student stayed in the GED program briefly and then moved on to Job Corps. Student then left Job Corps after a few months and then began residing with Petitioner again later in 2018. Petitioner initiated Student's enrollment in DCPS at School C, Student's DCPS neighborhood school on or about November 14, 2018. (Petitioner's testimony, Respondent's Exhibit 1)
5. When Petitioner went to School C on November 14, 2018, she filled out and signed a

designated as expert witnesses: (2), an independent clinical psychologist, (2) a School C administrator, and (3) a School C therapist. Respondent presented four witnesses, two of whom were designated as expert witnesses: (1) a School C enrollment analyst (2) School C special education coordinator, (3) a DCPS social worker, and (4) a DCPS psychologist.

⁶ The evidence (documentary and/or testimony) that is the source of the Findings of Fact ("FOF") is noted within parenthesis following the finding. A document is noted by the exhibit number. If there is a second number following the exhibit number, that number denotes the page of the exhibit from which the fact was obtained. When citing an exhibit that has been submitted by more than one party separately, the Hearing Officer may only cite one party's exhibit.

residency verification form. The form states the specific types of documentation that are required to prove residency in order for any student to attend a DCPS school. A School C staff member signed the form. Above the staff member's signature was a statement on the form that certified that Petitioner had filed the form with the staff member and that the staff member had personally reviewed any documents presented. However, no item in the list of required documents to prove residency was checked as having been provided. Petitioner later provided School C a document by email. Although Petitioner was later told that form was sufficient, the form did not actually meet the requirement to satisfy the proof of residency. (Petitioner's testimony, Witness 4's testimony, Respondent's Exhibits 1-3, 2-1, 4-1)

6. Student never actually attended School C. On the day that Student was to attend, Student never entered the school building. Student saw and was chased from the school grounds by some young people Student knew from Student's previous school, School A. Consequently, because Student never actually entered School C, Student was never on the School C's attendance roles, was never provided a class schedule and School C did not develop an IEP for Student. (Petitioner's testimony, Witness 4's testimony, Witness 5's testimony)
7. Petitioner engaged legal counsel, and on or about December 19, 2018, Petitioner's counsel requested that DCPS reevaluate Student and provide Student's educational records. Petitioner's counsel also provided School B with Petitioner's notice of intent to unilaterally place Student at School D, non-public special education day school, and seek DCPS reimbursement if needed. Student began attending School C on December 10, 2019. (Petitioner's testimony, Witness 2's testimony, Petitioner's Exhibits 10, 11)
8. School D is a non-public special education day school that provides academics and vocational training to approximately 30 students with various disability classifications, including SLD and OHI for ADHD. School C has an OSSE Certificate of Approval ("C of A"). School C is a year-round program. Teachers are certified, and the school provides related services of social/emotional counseling, OT, and speech-language services. The annual tuition is between \$70,000.00 and \$85,000.00. Related services are billed at \$80.00 to \$100.00 per hour. School C can award its students a DCPS high school diploma. (Witness 2's testimony)
9. Petitioner filed a due process complaint on January 31, 2019. The complaint alleged, inter alia, that DCPS failed to timely evaluate Student or failed to timely review evaluation(s), and failed to have a current IEP in place and an appropriate placement for Student. Petitioner sought, inter alia, Student's placement at School D. (Case # 2019-0033) On February 27, 2019, DCPS convened a resolution meeting on Petitioner's due process complaint. (Respondent's Exhibit 6)
10. During the resolution meeting, DCPS counsel asserted that Petitioner had not yet established residency pursuant to DCPS policy and practice and that the documentation Petitioner had submitted when she initiated Student's enrollment at School C in November 2018 was not sufficient nor compliant in order to establish D.C. residency. Petitioner

maintained that she had sufficiently established residency in November 2018. At this meeting, Petitioner presented DCPS documentation, which DCPS acknowledged satisfied the residency documentation requirements, and DCPS considered Student registered with DCPS as of that date of the resolution meeting. (Witness 4’s testimony, Respondent’s Exhibits 5, 6)

11. On March 11, 2019, Petitioner provided DCPS a signed consent form for DCPS to conduct the requested evaluations. Petitioner later withdrew her due process complaint without prejudice to allow DCPS to review evaluations it had conducted and to convene an IEP meeting. (Respondent’s Exhibit 7)
12. DCPS conducted a comprehensive psychological evaluation, an occupational therapy (“OT”) evaluation, a vocational assessment, and a speech-language evaluation. (Petitioner’s Exhibits 14, 15, 16, 17)
13. The DCPS psychological evaluation report was completed on May 6, 2019. The evaluation report noted that the reason for the referral of the reevaluation was to determine Student’s current level of academic and behavioral functioning and Student’s special education and related services needs. The referral statement did not indicate that the team suspected Student of an ED or OHI disability. Also, there was no request from Petitioner or her representative or from anyone else involved in Student’s case that Student be evaluated for ED or OHI. (Petitioner’s Exhibit 17-1)
14. The DCPS psychologist conducted the following assessments: Behavior Assessment System for Children, Third Edition (“BASC-3”), the Reynolds Intellectual Assessment Scales, Second Edition (“RIAS-2”), Woodcock-Johnson Test of Achievement, Fourth Edition (WJ-IV ACH”). The psychologist conducted a records review, classroom and testing observations of Student, and teacher and Student interviews. The evaluation report revealed Student’s intellectual functioning was in the Moderately Above Average range at the 8% percentile, and Student’s overall academic functioning was significantly below Student’s age at the time of the evaluation. (Petitioner’s Exhibit 17-1)

Student received the following academic/achievement scores:

| <u>CLUSTER/Test</u> | <u>Standard Score</u> | <u>Confidence Interval</u> | <u>Age Equivalency</u> | <u>Descriptive Category</u> |
|---------------------------------------|-----------------------|----------------------------|----------------------------|---------------------------------|
| BROAD READING | 60 | 57-63 | 8-7 | Very Low |
| READING | 65 | 62-68 | 8-7 | Very Low |
| Letter-Word Identification | 56 | 53-60 | 8-1 | Very Low |
| Passage Comprehension | 77 | 72-81 | 9-9 | Low |
| Sentence Reading Fluency | 62 | 56-68 | 8-7 | Very Low |
| BROAD MATHEMATICS | 77 | 74-80 | 10-9 | Low |
| MATHEMATICS | 82 | 78-85 | 11-1 | Low Average |

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|--|----|-------|------|-------------|
| MATH CALCULATION SKILLS | 79 | 76-83 | 11-0 | Low |
| Applied Problems Calculation | 79 | 75-84 | 10-1 | Low |
| Math Facts Fluency | 86 | 83-90 | 12-0 | Low Average |
| BROAD WRITTEN LANGUAGE WRITTEN EXPRESSION | 75 | 70-80 | 10-3 | Low |
| WRITTEN LANGUAGE | 66 | 63-70 | 9-4 | Very Low |
| WRITTEN EXPRESSION | 79 | 75-83 | 10-4 | Low |
| WRITTEN LANGUAGE | 69 | 66-72 | 9-5 | Very Low |
| Spelling | 60 | 56-64 | 8-5 | Very Low |
| Writing Samples | 89 | 85-94 | 12-4 | Low Average |
| Sentence Writing Fluency | 70 | 63-77 | 9-2 | Low |
| ACADEMIC SKILLS | 65 | 63-67 | 9-3 | Very Low |
| ACADEMIC FLUENCY | 64 | 61-68 | 9-2 | Very Low |
| ACADEMIC APPLICATION | 79 | 76-82 | 10-6 | Low |
| BRIEF ACHIEVEMENT BROAD ACHIEVEMENT | 62 | 59-64 | 8-9 | Very Low |
| | 66 | 64-68 | 9-6 | Very Low |

15. The DCPS psychologist also noted that on the BASC-3 rating scales, Student was rated as having At-Risk to Clinically Significant behaviors at home and school in the areas of Hyperactivity, Aggression, and Conduct Problems. The DCPS psychologist recommended, among other things, that Student continue to receive special education and related services with the LSD classification; that the team discuss the need for interventions to address behavior concerns (i.e., FBA/behavior intervention plan ("BIP")); that Student be provided interventions to address Student's behavioral and social-emotional deficits; that given Student's high levels of distractibility, Student be provided a highly structured classroom setting with predictable routines and schedules. (Petitioner's Exhibit 17)
16. On June 7, 2019, DCPS convened an IEP meeting at which the evaluations DCPS conducted were reviewed. Petitioner and her attorney participated in the meeting, along with representatives from School D. DCPS developed an IEP that prescribed 22 hours per week of specialized instruction and 120 minutes per month of behavioral support services ("BSS"), both outside general education. The IEP was later amended on June 18, 2019, to change data and goals. Petitioner and her counsel did not agree with the amount of specialized instruction in IEP and maintained Student required all hours outside general education and placement at School D. (Respondent's Exhibits 13, 14, Petitioner's Exhibits 26, 27)
17. On July 16, 2019, Petitioner filed a second due process complaint (2019-0178), asserting, inter alia, that the IEP that DCPS developed and the placement DCPS proposed for Student were inappropriate. DCPS convened a resolution meeting on the complaint on August 23,

2019. At that meeting, DCPS agreed to issue an authorization for Petitioner to obtain an independent comprehensive psychological evaluation ("IEE") to determine if Student met the criteria for emotional disability ("ED") or other health impairment ("OHI"). (Respondent's Exhibit 16)

18. At School D, Student's weaknesses are below grade level academic deficits, distractibility, and an inability to remain focused in class. Student has demonstrated defiance toward teachers and staff and lacks coping skills with peers. Student also has a challenge with drug use and occasionally sleeping in class. Student is allowed to walk out of class to take breaks as needed. Nonetheless, Student has been able to make passing grades since attending School D. School D staff believe Student would benefit from a BIP to address Student's behaviors. Student has missed school on occasion due to Petitioner's inability to pay for Student's transportation to and from school. Petitioner is aware of Student's drug use and has sought help for it, to little avail. Student has difficulty sleeping at night, which may contribute to Student sleeping in class. (Petitioner's testimony, Witness 2's testimony, Witness 3's testimony)
19. A DCPS social worker conducted a functional behavior assessment ("FBA") of Student on September 9, 2019. On September 19, 2019, DCPS convened an evaluation review meeting to review the speech-language evaluation and the FBA. The team determined that Student did not qualify for direct speech-language services. Petitioner requested an independent FBA. DCPS denied the request and filed a due process complaint to defend its assessment. DCPS determined it would conduct additional observations to supplement the FBA. The DCPS social worker in conducting the evaluations for the FBA did not observe any physically or verbally aggressive behaviors by Student, only sleeping in class and the appearance of drug use. The social worker did not believe a BIP was needed to address those concerns. (Witness 6's testimony, Petitioner's Exhibits 24, 28)
20. Petitioner's independent comprehensive psychological evaluation was conducted on September 20, 2019, and an evaluation report was prepared on October 1, 2019. The independent psychologist conducted the following assessments: WJ-IV Tests of Cognitive Abilities, WJ-IV Tests of Achievement, BASC-3, Attention-Deficit/Hyperactivity Disorder Test, reviewed records, interviewed Student, Petitioner, and Student's teachers and conducted a classroom observation. The psychologist was unable to measure Student's cognitive functioning and concluded that there was no indication it was higher or lower than previously assessed. Student's achievement in reading, math, and written language was measured as being significantly below grade level at early elementary school. The psychologist, among other things, recommended Student have a placement totally removed from general education due to Student's academic deficits, aggression, and Student's expressed history of trauma from allegedly being assaulted at a previous D.C. school. Petitioner provided DCPS a copy of the evaluation on October 2, 2019. (Witness 1's testimony, Petitioner's Exhibit 18)
21. On October 4, 2019, DCPS filed a due process complaint to defend its FBA. On November 5, 2019, Petitioner's counsel withdrew Petitioner's due process complaint without prejudice. DCPS withdrew its due process complaint without prejudice on November 19,

2019. (ODR case #s 2019-0178 & 2019-0247)
22. On November 21, 2019, DCPS issued an addendum to the FBA that did not recommend behavior interventions despite Student's off-task behavior and being truant from class. (Petitioner's Exhibit 25)
 23. On November 29, 2019, a DCPS psychologist completed and issued a review on December 3, 2019, of the IEE. The DCPS psychologist also conducted an observation of Student at School D as a part of the evaluation review. The DCPS psychologist observed that Student was able to sustain personal relationships at School D, and Student's behavior was improving. However, during the observation Student did not seem engaged and left the classroom on occasion. The DCPS psychologist agreed with most of the recommendations of the IEE, but did not agree with the recommendation for ED classification, and Student's placement in a non-public special education day school. The DCPS psychologist acknowledged that Student needs more direct engagement and more structure to the breaks that Student is allowed to take from the classroom with the use of a timer. He also recommended the use of headphones or other calming tools to assist Student to focus and remain in class. These items are the type of interventions that could be included in a BIP. (Witness 5's testimony, Petitioner's Exhibit 21)
 24. DCPS reconvened the multidisciplinary team ("MDT") on December 3, 2019, and reviewed the IEE. Petitioner and her attorney participated, along with DCPS and School D staff members. The DCPS team members concluded Student did not qualify for the ED disability classification. Over Petitioner's disagreement and that of School D staff, DCPS concluded that Student's June 7, 2019, IEP was appropriate and could be implemented at School C. (Petitioner's Exhibit 29)
 25. Petitioner, her representative, and the School D staff rejected this contention and requested again that Student be provided 27.5 hours of specialized instruction outside of the general education setting. DCPS rejected this request. As such, the parties were unable to come to a resolution regarding the contents of the IEP. DCPS proposed that Student's placement and location of services be School C. Petitioner and her representatives disagreed requesting that Student be funded at School D. DCPS did not agree. As a result, a due process complaint was filed. (Petitioner's Exhibit 30)
 26. Petitioner filed the current due process complaint on December 27, 2019. (Petitioner's Exhibits 1, 2)
 27. If Student were to attend School C, Student would be grouped with a cohort of approximately 12 students who all receive special education services. That cohort would move together from class to class and be taught by special education teachers. Each cohort has a social worker and behavioral technician assigned. The behavioral technician travels with the cohort from class to class. Students are allowed to engage in credit recovery classes after school in self-paced courses where individualized instruction is provided. School C does not have a self-contained special education classroom that Student could remain in the full day. However, if Student's IEP were to prescribe 27.5 hours of services

per week outside general education, that IEP could be implemented at School C. (Witness 5's testimony)

CONCLUSIONS OF LAW:

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

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

34 C.F.R. § 300.17 provides:

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

Pursuant to 5E DCMR 3030.14, the burden of proof is the responsibility of the party seeking relief. *Schaffer v. West*, 546 U.S. 49, 126 S.Ct. 528 (2005). Petitioner held both the burden of production and persuasion on issues #1, #2, #3, and #4. Respondent held the burden of persuasion on issues #5 and #6 after Petitioner established a prima facie case.⁷ The burden of persuasion shall be met by a preponderance of the evidence. The normal standard is a preponderance of the evidence. See, e.g., *N.G. V. District of Columbia* 556 f. Sup. 2d (D.D.C. 2008) see also 20 U.S.C. §1451

⁷ 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.

(i)(2)(C)(iii).

ISSUE 1: Whether DCPS denied Student a FAPE by failing to have a current IEP in effect from November 1, 2018, through June 18, 2019.

Conclusion: Petitioner did not sustain the burden of persuasion by a preponderance of the evidence that DCPS did not have an IEP in effect from November 1, 2018, through June 18, 2019.

Pursuant to 34 C.F.R. § 300.324 (b) (f) *IEPs for children who transfer from another State*. If a child with a disability (who had an IEP that was in effect in a previous public agency in another State) transfers to a public agency in a new State, and enrolls in a new school within the same school year, the new public agency (in consultation with the parents) must provide the child with FAPE (including services comparable to those described in the child's IEP from the previous public agency), until the new public agency— (1) Conducts an evaluation pursuant to §§ 300.304 through 300.306 (if determined to be necessary by the new public agency); and (2) Develops, adopts, and implements a new IEP, if appropriate, that meets the applicable requirements in §§ 300.320 through 300.324.

Pursuant to 34 C.F.R. § 300.324 (b) Review and revision of IEPs—(1) 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 § 300.320(a)(2), and in the general education curriculum, if appropriate; (B) The results of any reevaluation conducted under § 300.303; (C) Information about the child provided to, or by, the parents, as described under § 300.305(a)(2); (D) The child's anticipated needs; or (E) Other matters.

The evidence in the case demonstrates that Petitioner attempted to enroll Student in School C on November 14, 2018, and filled out and signed a residency verification form. The form states the specific types of documentation that are required to prove residency in order for any student to freely attend a DCPS school. Although Petitioner was later told that the form she submitted was sufficient, the form did not actually satisfy proof of residency. Although generally, a student need not be enrolled in a DCPS school in order to trigger the requirement that DCPS provide a student a FAPE and develop an IEP⁸, a student must be a resident of the District of Columbia. In this instance, the evidence demonstrates that Petitioner did not fulfill the requirements of proving D.C. residency until she submitted the required document(s) at the resolution meeting on February 27, 2019.

In this instance had Student ever actually attended School C, the Hearing Officer would be far more inclined to conclude that DCPS had an obligation to develop an IEP or implement the PGC IEP as of November 2018. However, Student never actually attended School C. On the day that Student was to attend, Student never entered the school building and thus was never officially on

⁸ See *Dist. of Columbia v. Oliver*, 2014 WL 686860, at 6 (D.D.C. 2014).

School C's enrollment. Because Student never actually entered School C, Student was never on the School A's attendance rolls, was never provided a class schedule, and School C did not develop an IEP for Student. When Petitioner's counsel contacted School C, on December 19, 2018, Student had already begun attending School D, and Petitioner had no apparent intention of enrolling Student in a DCPS school.

Once the due process complaint was filed and Petitioner proved residency and provided DCPS consent to evaluate, DCPS acted promptly to evaluate Student and develop an IEP and offer Student a placement. DCPS fulfilled its obligation to evaluate Student and promptly provide Student an IEP and propose a location for the IEP to be implemented. Consequently, under the circumstances of this case, the Hearing Officer does not conclude that Petitioner sustained the burden of persuasion by a preponderance of the evidence that DCPS denied Student a FAPE by having not developed an IEP for Student prior to June 7, 2019, or June 18, 2019.

ISSUE 2: Whether DCPS denied Student a FAPE by failing to timely convene an IEP meeting on or before November 1, 2018, to determine if Student's annual IEP goals were being achieved.

Conclusion: Petitioner did not sustain the burden of persuasion by a preponderance of the evidence that DCPS failed to timely convene an IEP meeting on or before November 1, 2018, to determine if Student's annual IEP goals were being achieved.

As noted in the discussions of the issue above, although generally, a student need not be enrolled in a DCPS school in order to trigger the requirement that DCPS provide a student an IEP, a student must be a resident of the District of Columbia. The evidence demonstrates that Petitioner did not fulfill the requirements of proving D.C. residence until she submitted the required document(s) at the February 27, 2019, resolution meeting.

As previously stated, because Student never actually entered School C, Student was never on the School A's attendance rolls, was never provided a class schedule, and School C did not develop an IEP for Student. Once the due process complaint was filed and Petitioner proved residency and provided DCPS consent to evaluate, DCPS acted promptly to evaluate Student and develop an IEP and offer Student a placement. DCPS fulfilled its obligation to evaluate Student and promptly provide Student an IEP and propose a location for the IEP to be implemented. Consequently, under the circumstances of this case, the Hearing Officer does not conclude that Petitioner sustained the burden of persuasion by a preponderance of the evidence that DCPS denied Student a FAPE by not convening an IEP meeting on or before November 1, 2018, to determine if Student's annual IEP goals were being achieved.

ISSUE 3: Whether DCPS denied Student a FAPE by failing to timely comply with Petitioner's December 19, 2018, request for evaluations: a comprehensive psychological evaluation, a speech-language evaluation, an occupational therapy evaluation, and a vocational evaluation.

Conclusion: Petitioner did not sustain the burden of persuasion by a preponderance of the evidence that DCPS failed to timely comply with Petitioner's December 19, 2018, request for evaluations.

34 C.F.R. § 300.303(a) makes it clear that, “A local education agency (“LEA”) *shall ensure* that a reevaluation of each child with a disability is conducted...if the child's parents or teacher requests a re-evaluation.” and that the reevaluation must be conducted at least once every three years. *(Emphasis added)*

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).

Petitioner alleges DCPS should have conducted a comprehensive psychological evaluation after the December 19, 2018, request. As already discussed, the evidence demonstrates that Petitioner provided DCPS proof of residency at the February 27, 2019, resolution meeting. Petitioner did not provide DCPS signed consent to evaluate Student until March 13, 2019. Thereafter, DCPS promptly evaluated Student with all the requested evaluations. The evaluations were completed and reviewed by June 7, 2019. The Hearing Officer concludes that based upon the circumstances of this case, DCPS was not obligated to initiate evaluations of Student until Petitioner had granted signed consent. Thus, DCPS acted promptly to evaluate Student. The Hearing Officer concludes that Student was not denied a FAPE by DCPS conducting evaluations of Student any sooner than it did.

ISSUE 4: Whether DCPS denied Student a FAPE by failing to comprehensively evaluate Student because DCPS did not assess Student's social-emotional functioning in order to determine if Student as has an emotional disturbance and/or other health impairment.

Conclusion: Petitioner did not sustain the burden of persuasion by a preponderance of the evidence that DCPS failed to assess Student’s social-emotional function to determine if Student had an ED or OHI.

34 C.F.R. § 300.303(a) makes it clear that, “A local education agency (“LEA”) *shall ensure* that a reevaluation of each child with a disability is conducted...if the child's parents or teacher requests a re-evaluation.” and that the reevaluation must be conducted at least once every three years. *(Emphasis added)*

Pursuant to 34 C.F.R. § 300.304 (c), a school district must ensure that a student has been appropriately evaluated in all areas of suspected disability. D.C. law requires that "a full and individual evaluation is conducted for each child being considered for special education and related services." D.C. Mun. Regs. Title. 5E, § 3005.1 (2006). "Qualified evaluators [are to] administer tests and other assessment procedures as may be needed to produce the data required" for the MDT to make its determinations. D.C. Mun. Regs. Title. 5E § 3005.5 (2006).

The evaluators shall utilize "a variety of assessment tools and strategies [to] gather relevant functional and developmental information about the child, including information provided by the parent, and information related to enabling the child to be involved in and progress in the general curriculum ... that may assist in determining whether the child is a child with a disability." D.C. Mun. Regs. Title 5E § 3005.9(b).

The evidence demonstrates that DCPS conducted its evaluation of Student, and the psychological evaluation report was completed on May 6, 2019. The evaluation report noted that the reason for the referral of the reevaluation was to determine Student's current level of academic and behavioral functioning and Student's special education and related services needs. The referral statement did not indicate that the team suspected Student of an ED or OHI disability. Also, there was no request from Petitioner or her representative or from anyone else involved in Student's case that Student be evaluated for ED or OHI.

Nonetheless, the DCPS psychologist conducted assessments that included BASC-3 and conducted an observation of Student. There is no evidence that based upon the DCPS' psychologist's assessment and observation that there was any basis to conduct additional assessments to determine if Student qualified for ED or OHI.

After the evaluation was reviewed, Petitioner requested, and DCPS agreed to provide Petitioner, an IEE, to assess for additional concerns. Based upon the IEE and a team's review of the evaluation, the team did not determine that Student qualified for the ED or OHI classification. Rather, the team concluded that Student SLD classification remained appropriate.

Based upon the evidence adduced, the Hearing Officer does not conclude that DCPS denied Student a FAPE by failing to evaluate Student for ED and/or OHI when it conducted its initial evaluation in spring 2019.

ISSUE 5: Whether DCPS denied Student a FAPE by failing to develop an appropriate IEP because Student's June 7, 2019, IEP does not include fulltime special education support outside of the general education setting, along with a BIP.

Conclusion: Respondent did not sustain the burden of persuasion by a preponderance of the evidence that Student's June 18, 2019, IEP was reasonably calculated to enable Student to make progress appropriate in light of Student's circumstances.

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.”

The second, substantive, prong of the *Rowley* inquiry is whether the IEP DCPS developed 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).

The key inquiry regarding an IEP’s substantive adequacy is whether, taking account of what the school knew or reasonably should have known of a student’s needs at the time, the IEP offered was reasonably calculated to enable the specific student’s progress. . . . “Any review of an IEP must appreciate that the question is whether the IEP is reasonable, not whether the court regards it as ideal.” *Z.B. v. District of Columbia*, 888 F.3d 515 (D.C. Cir. 2018) citing *Andrew F.*, supra, 137 S. Ct. 988.

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." 34 C.F.R. § 300.550; 34 C.F.R. §300.114 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 IDEA requires that children with disabilities receive education in the regular classroom whenever possible” *Z.B. v. District of Columbia*, 888 F.3d 515 (D.C. Cir. 2018) citing *Andrew F.*, supra, 137 S. Ct. at 999 (quoting *Rowley*, 458 U.S. at 202)

Petitioners assert that the IEP DCPS developed for Student dated June 18, 2019, is inappropriate, because the IEP does not include fulltime special education support outside of the general education setting, along with a BIP.

The evidence presented by Petitioner indicates that prior to Student enrolling in DCPS in February 2019, that Student had been enrolled in several schools and had failed to be successful. Although the evidence demonstrates that Student's prior IEPs before enrolling in DCPS did not prescribe

services that were totally removed from general education, Student has significant social-emotional difficulties since attending School D, including difficulty sleeping at night, drug use, sleeping in class. Despite these difficulties, Student has been able to demonstrate passing grades since attending School D.

The testimony offered by Petitioners expert witness who conducted the independent psychological evaluation was compelling, and the Hearing Officer found her description of Student's social-emotional difficulties convincing that Student, at least currently, is in need of a school setting that is not only consistent with her evaluation, but that of the original evaluation that DCPS conducted in May 2019, in a highly structured classroom setting with predictable routines and schedules. That initial evaluator also concluded that Student would benefit from BIP to provide interventions to address Student's behavioral and social-emotional deficits and given Student's high levels of distractibility.

Although Respondent presented witnesses who averred that Student did not need such a restrictive program, the description of Student's behaviors even in the highly restrictive program in which Student is currently enrolled at School D, causes the Hearing Officer concern that Student would at all be successful in even a special education program housed in a general education school. Consequently, the Hearing Officer concludes that Respondent did not sustain the burden of persuasion by a preponderance of the evidence that the June 18, 2019, IEP DCPS developed is reasonably calculated to enable Student to make progress appropriate in light of Student's circumstances because it did not prescribe all services outside general education.

Although there is evidence that a BIP would assist in addressing Student's behaviors at School D, including sleeping in class and apparent drug use, there was insufficient evidence presented that the absence of a BIP rises to the level of a denial of a FAPE.

ISSUE 6: Whether DCPS denied the student a FAPE by failing to provide Student with an appropriate placement/location of service because School C was/is unable to provide Student with the special education services and supports Student requires.

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

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.

"Educational placement" means an educational program, not the particular institution where that program is implemented." *White v. Ascension Parish School Board*, 343 F.3d 373 (5th Cir. 2003), 39 IDELR 182. A placement is not a physical location, but a program of educational services offered to the student. *Sherri A.D. v. Kirby*, 19 IDELR 339 (5th Cir. 1992).

A student's IEP determines whether an educational placement is appropriate; the placement does not dictate the IEP. *See Roark v. District of Columbia*, 460 F.Supp.2d 32, 44 (D.D.C. 2006); *Spielberg v. Henrico Cty. Public Sch.*, 853 F.2d 256, 258 (4th Cir. 1988) ("Educational placement is based on the IEP, which is revised annually."); 34 C.F.R. § 300.116(b)(2).

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." 34 C.F.R. § 300.550; 34 C.F.R. §300.114 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 IDEA requires that children with disabilities receive education in the regular classroom whenever possible" *Z.B. v. District of Columbia*, 888 F.3d 515 (D.C. Cir. 2018) citing *Andrew F.*, supra, 137 S. Ct. at 999 (quoting *Rowley*, 458 U.S. at 202)

As discussed in the issue above, the evidence in this case supports the finding that the IEP that DCPS developed dated June 18, 2019, was not reasonably calculated to enable Student to make progress appropriate in light of Student's circumstances. The evidence also demonstrates that School C, where DCPS proposed to implement the IEP, could provide Student a placement totally removed from general education, of which the Hearing Officer has concluded Student is currently in need.

Consequently, the Hearing Officer concludes that Respondent did not sustain the burden of persuasion by a preponderance of the evidence that the educational placement that DCPS offered both in the IEP and in the school proposed to implement the IEP were appropriate.

A student's IEP determines whether an educational placement is appropriate; the placement does not dictate the IEP. *See Roark v. District of Columbia*, 460 F.Supp.2d 32, 44 (D.D.C. 2006); *Spielberg v. Henrico Cty. Public Sch.*, 853 F.2d 256, 258 (4th Cir. 1988) ("Educational placement is based on the IEP, which is revised annually."); 34 C.F.R. § 300.116(b)(2).

Under the IDEA, parents who unilaterally decide to place their disabled child in a private school, without obtaining the consent of local school officials, "do so at their own financial risk." *Florence County Sch. Dist. Four v. Carter*, 510 U.S. 7, 15, 114 S.Ct. 361, 126 L.Ed.2d 284 (1993) (quoting *Sch. Comm. of the Town of Burlington v. Dep't of Educ.*, 471 U.S. 359, 374, 105 S.Ct. 1996, 85 L.Ed.2d 385 (1985)). "As interpreted by the Supreme Court, IDEA requires school districts to reimburse parents for their private-school expenses if (1) school officials failed to offer the child a free appropriate public education in a public or private school; (2) the private-school placement chosen by the parents was otherwise "proper under the Act"; and (3) the equities weigh in favor of reimbursement—that is, the parents did not otherwise act "unreasonabl[y]." *Leggett v. District of Columbia*, 793 F.3d 59, 66–67 (D.C. Cir. 2015) (citing *Carter*, supra, 510 U.S. at 15–16, 114 S.Ct. 361; 20 U.S.C. § 1412(10)(C)(iii)(III)).

Based upon the evidence adduced, the Hearing Officer concludes that at School D Student has and

is making academic progress, that School D can and is providing Student educational benefit, that School D has an OSSE C of A, thus, School D is a “proper” placement for Student prospectively.

Albeit the evidence demonstrates that Student has attended School D since December 2018, there was no evidence presented that Petitioner has sustained any financial obligation for Student’s attendance at School D, thus far. Neither was there any evidence presented that Petitioner has paid any tuition costs for Student to attend School D, or is otherwise obligated to pay for Student’s attendance there to date. Therefore, the Hearing Officer cannot grant Petitioner reimbursement for Student’s attendance at School D thus far. Therefore, the remedy below is limited to Student’s prospective placement at School D through the end of SY 2019-2020.

Likewise, although Petitioner made a request for compensatory education, there was no evidence presented from which the Hearing Officer could conclude that compensatory education was due to Student.

ORDER:⁹

1. DCPS shall, within ten (10) school days, of the date of this order, place and fund Student at School D and provide transportation services throughout the remainder of SY 2019-2020.
2. DCPS shall, within ten (10) school days of the date of this order, amend Student’s IEP to prescribe services and an LRE in a sperate special education day school.
3. DCPS shall, within fifteen (15) business days prior to the start of SY 2020-2021, convene an MDT/IEP meeting for Student to review Student’s academic and social-emotional progress and review and revise Student’s IEP as appropriate and determine an appropriate placement and school location for SY 2020-2021.
4. All other relief requested by Petitioner is denied.

⁹ 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.

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 24, 2020

Copies to: Counsel for Petitioner
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