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Confidential

Public Charter School Local Educational Agency (“LEA”) Petitioner, v. Parent on Behalf of Student, ¹ Respondent. Case # 2020-0069 Date Issued: April 20, 2020	HEARING OFFICER’S DETERMINATION Hearing Date: April 9, 2020 Counsel for Each Party listed in Appendix A <u>Hearing Officer:</u> <u>Coles B. Ruff, Esq.</u>
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¹ Personally identifiable information is in the attached Appendices A & B.

JURISDICTION:

The hearing was conducted, and this decision was written, pursuant to the Individuals with Disabilities Act (“IDEA”), P.L. 101-476, as amended by P.L. 105-17 and the Individuals with Disabilities Education Improvement Act of 2004, the District of Columbia Code, Title 38 Subtitle VII, and the District of Columbia Municipal Regulations, Title 5 Chapter E30.

BACKGROUND AND PROCEDURAL HISTORY:

Student is age ____ and in grade ____.² Student is enrolled in a public charter school located in the District of Columbia (School A). School A is Student’s local education agency (“LEA”). Student began attending School A in school year (“SY”) 2019-2020. Student was not a special education student when enrolled at School A. However, Student’s parent (“Respondent”) informed School A at the time she enrolled Student that Student had a history of aggressive in-school behaviors.

School A conducted evaluations of Student and on October 30, 2019, found Student eligible for special education services with a disability classification of emotional disability (“ED”). School A developed an individualized education program (“IEP”) for Student on November 6, 2019. Student’s IEP was later amended to include a dedicated aide. School A completed a functional behavior assessment (“FBA”) and developed and behavior intervention (“BIP”) plan for Student in January 2020.

School A suspended Student for two separate behavioral incidents in January 2020. School A conducted a manifestation determination review (“MDR”) after the second incident. The MDR team determined that Student’s behavior was a manifestation of Student’s disability. School A and Respondent agreed to move forward with a change in placement to a more restrictive setting and to place Student in an interim alternative setting pending the change in placement.

On February 14, 2020, the School A IEP team determined that Student was in need of a therapeutic special education day school and amended Student’s IEP. At that meeting, Respondent did not agree to the change in placement to a therapeutic special education day school.

On March 10, 2020, School A (“Petitioner”) filed this due process complaint seeking to affirm the change in placement so that School A can proceed to request that OSSE identify a therapeutic special education day school for Student and to obtain an order that Student remain in the interim alternative placement until a new school placement is identified.

RELIEF SOUGHT:

Petitioner seeks as relief that the Hearing Officer conclude that Student's continued placement at School A is likely to result in injury to Student or others and authorizing Student’s continued placement in an interim alternative educational setting until Student is placed in a therapeutic special education day school. Petitioner also requests that the Hearing Officer issue an order

² Student's age and grade in Appendix B.

requiring Respondent to consent to the change in placement, or an order overriding Respondent's refusal to grant consent, so that OSSE may issue location assignment for Student to a therapeutic special education day school.

Response to the Complaint:

Respondent is not represented by counsel. Respondent did not file a written response to the due process complaint. However, during the pre-hearing conference ("PHC") Respondent stated that she is opposed to Student attending a non-public special education school and noted that the OSSE representative who attended the IEP team meeting also did not agree with Student's change in placement. Respondent stated her ability and intention to participate in the hearing.

Pre-Hearing Conference:

A telephone PHC was held on March 6, 2020, with Petitioner's Counsel and Respondent. The Hearing Officer advised Respondent to seek legal counsel, and where to obtain a list of free and/or low-cost counsel. The Hearing Officer issued a pre-hearing order ("PHO") on March 17, 2019, directing, inter alia, the parties to participate in the hearing on March 30, 2020, and stating the issues to be adjudicated at the hearing.

However, due to the COVID-19 emergency, and the resulting school closure, the hearing date was changed to Thursday, April 9, 2020, from 10:00 a.m. to 2:00 p.m. The Hearing Officer communicated the change in hearing date to Respondent and Petitioner's counsel and both Respondent and Petitioner's counsel agreed to participate in the hearing by teleconference on April 9, 2020. Respondent again expressed to the Hearing Officer her intention to participate in the hearing and her intention to do so without legal representation.³ The Hearing Officer issued a revised PHO on April 1, 2020, noting the new hearing date, outlining the dates for disclosures to be filed, and the issues to be adjudicated.

Due Process Hearing:

There was no resolution period and no resolution meeting because the due process complaint was filed by the LEA. Because of Student was in an interim alternative placement due to disciplinary proceedings, the hearing was conducted, pursuant to the expedited hearing provisions of 34 CFR § 300.532, within twenty (20) school days of the date the due process complaint was filed. The final Hearing Officer's decision ("HOD") is due within ten (10) school days from the date the due process hearing was convened.

Due to the COVID-19 emergency and the inability to conduct an in-person hearing, the due process hearing was convened on April 9, 2020, via teleconference. The day before the hearing, the Hearing Officer communicated with Respondent by telephone and ensured that she had received the email instructions to log into the teleconference hearing. Respondent stated her intention to participate in the hearing the next day. On April 9, 2020, to no avail, the Hearing Officer attempted to reach Respondent by telephone to secure her participation in the hearing. After several

³ The Hearing Officer notes that Respondent was again sent a list of free and/or low-cost counsel and an ODR staff member communicated with Respondent by telephone to ensure she received the list.

unsuccessful attempts to reach Respondent, the Hearing Officer proceeded with the hearing with Respondent in absentia and Petitioner presented its case.

The issues adjudicated are:

1. Whether Student requires placement in a more restrictive environment, specifically a therapeutic non-public special education day school.
2. Whether Student's continued placement at School A is likely to result in injury to Student or others such that Student's continued placement in an interim alternative educational setting is required until Student is placed in a therapeutic special education day school.

RELEVANT EVIDENCE CONSIDERED:

This Hearing Officer considered the testimony of the witnesses and the documents submitted by Petitioner (LEA Exhibits 1 through 34) that were admitted into the record and are listed in Appendix 2.⁴ The witnesses who testified are listed in Appendix B.⁵ Respondent did not submit any documents or any list of anticipated witnesses.

SUMMARY OF DECISION:

Petitioner held the burden of persuasion on the issues adjudicated and met that burden as to both issues. The Hearing Officer concludes that Student requires more a restrictive educational placement than School A can provide, and is in need of a therapeutic special education day school consistent with the determination made by Student's IEP team on February 14, 2020, and as reflected in the Prior Written Notice ("PWN") School A issued on February 17, 2020.

School A sought an order requiring Respondent to consent to the change in placement so that OSSE could issue a location assignment to a therapeutic special education day school. Alternatively, School A sought an order overriding Respondent's refusal to grant consent to a change in placement so that OSSE may issue location assignment for Student. The Hearing Officer determined that he cannot do the former. However, the Hearing Officer concluded that he can direct School A to initiate the location assignment process with OSSE, despite Respondent refusal to grant consent, so that an appropriate educational placement and a school location can be provided to Student. The Hearing Officer also ordered that Student shall remain in the interim alternative placement for an additional 45 school days or until a new placement is identified by OSSE, whichever is sooner.

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, three of whom were designated as expert witnesses: (1) School A's Director of Student Support, (2) School A's School Psychologist, (3) Student's PCS Special Education Teacher, and (4) School A's Assistant Principal.

FINDINGS OF FACT:⁶

1. Student resides in the District of Columbia with Respondent (Student's parent). Student attends School A, a public charter school in the District of Columbia. School A is Student's LEA. Respondent first enrolled Student in School A in August 2019 for school SY 2019-2020. Student was not a special education student when enrolled at School A. However, Respondent informed School A at the time of enrollment that Student had a history of aggressive in-school behaviors. (Witness 1's testimony, LEA Exhibit 1, 5-2)
2. Soon after the start of the school year, Student began having behavioral incidents and discipline referrals. Student displayed behaviors including hitting other students, threatening students and teachers, and cursing. School A staff had to mediate disputes between Student and other students. (Witness 3's testimony, Witness 4's testimony, LEA Exhibit 30)
3. On September 6, 2019, Respondent granted School A consent to evaluate Student. School A conducted a comprehensive psychological evaluation. The School A psychologist conducted her testing of Student on September 23, 2019, and September 26, 2019, and issued her evaluation report on October 21, 2019. The evaluation revealed that Student tested in the Low Average range of cognitive functioning with a Full-Scale IQ Score of 84. Student's academic scores were Low Average in Broad Reading and Broad Math and Average for Written Language. (Witness 2's testimony, LEA Exhibits 3, 4, 5)
4. In assessing Student's social/emotional and behavioral functioning, the psychologist obtained behavior rating scales from two of Student's teachers: English and Literary Arts and Math. Student's parent did not return the rating scales. The psychologist also administered assessments for depression, anxiety, and emotional disturbance. The behavioral and emotional assessments indicated the presence of conduct problems, impulsivity, and aggression. The psychologist also noted evidence that Student experiences anxiety, depression, and negative emotionality. (Witness 2's testimony, Witness 2's testimony, Respondent's Exhibit Page 25)
5. School A's psychologist also conducted a clinical interview with Student and Student's parent and conducted a classroom observation of Student. During the classroom observation, Student appeared energetic and outgoing but exhibited difficulty managing behaviors. Student was non-compliant, argumentative, combative and would shut down. Student's behaviors were unpredictable and at times explosive. Student would become aggressive without any specific trigger. Student displayed a disregard for authority and rules, which was also consistent with Student's behaviors as reported to the psychologist by Student's parent. The School A psychologist concluded Student's primary diagnoses were Disruptive Mood Dysregulation Disorder, Oppositional Defiant Disorder, and

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. 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.

Specific Learning Disorder with impairment in mathematics. (Witness 2's testimony, LEA Exhibit 5)

6. Student's disruptive behaviors were having an adverse effect on other students in Student's grade. Other students were emulating Student's negative behaviors. Student's disruptive behaviors increased in intensity and frequency and soon were occurring daily. The typical consequence of in-school detention did not work to curb Student's disruptive behaviors. (Testimony of Witness 1, Witness 3's & Witness 4, LEA Exhibit 30)
7. On October 28, 2019, a team, including Respondent, found Student eligible for special education services with an ED disability classification. School A issued a PWN dated October 30, 2019, documenting Student's eligibility for special education services. (Witness 1's testimony, LEA Exhibits 6, 7, 8)
8. School A developed an IEP for Student on November 6, 2019. The IEP prescribed the following services and a least restrictive environment ("LRE") to include: 16 hours per week of specialized instruction: 10 hours per week inside the general education, 6 hours per week outside general education. The IEP also prescribed 120 minutes per month of behavior support services ("BSS") outside general education. (Witness 1's testimony, LEA Exhibits 9, 10, 11)
9. On November 6, 2019, Respondent granted written consent for School A to conduct an FBA. The School A psychologist conducted data collection and observations of Student on November 21, 2019, December 5, 2019, December 13, 2019, and December 20, 2019. The psychologist conducted observations in three different classes. Student was not always engaged and when prompted Student sometimes engaged in disruptive behaviors. On a few occasions, Student responded to redirection. The targeted behaviors in the FBA were physical aggression, verbal aggression, non-compliant, task completion, and being out of location or assigned areas. The School A psychologist concluded that a BIP should be developed. (Witness 2's testimony, LEA Exhibits 12, 18)
10. In November 2019, School A conducted a speech-language evaluation of Student. The evaluation determined that Student's language skills were average and Student did not require language intervention services. On January 6, 2020, School A convened an IEP meeting with Respondent participating by telephone to review the speech-language evaluation. The team determined there was no need to add speech-language services to Student's IEP. (LEA Exhibits 14, 17)
11. Due to Student's in-school and in-class difficulties with emotion management and behaviors that included disrespectful, threatening and aggressive interactions with peers and staff, School A provided Student with a dedicated aide. (LEA Exhibits 13, 15, 16)
12. On December 4, 2019, Respondent agreed to an amendment of Student's IEP to include a dedicated aide without the need to convene an IEP meeting. Student's IEP was amended to include the dedicated aide, who began working with Student the full school day as of December 9, 2019. (LEA Exhibits 13, 15, 16)

13. The IEP was amended on December 11, 2019, to include the dedicated aide. Student's behavior disruptions abated for a while, but then Student's daily behavioral incidents resumed. Student liked the dedicated aide, but Student did not do a lot of classwork even with one to one attention from the dedicated aide. (Witness 1's testimony, Witness 4's testimony, LEA Exhibit 15)
14. Student was making no academic progress primarily because Student was missing significant instructional time due to Student's behaviors. Even with the dedicated aide Student was still missing instructional time due to behavior incidents. (Witness 3's testimony)
15. School A's psychologist completed the FBA in January 2020. The psychologist recommended behavior management and psychiatric consultation and community counseling. On January 13, 2020, a School A team reviewed the FBA. School A was unable to reach Respondent to participate in the meeting. The team discussed Student's identified behaviors and the interventions that would be implemented to address the behaviors. School A developed a BIP for Student dated January 20, 2020. At the time Student had 60 reportable behavioral incidents, several of which involved physical aggression. (Witness 2's testimony, LEA Exhibits 19, 21)
16. On January 15, 2020, Student had a behavioral incident in the hallway while students were transitioning between classes, in which Student shouted a threat to and cursed at another student. School A staff members were present and observed the incident. Staff directed Student to a break-out space to address Student's behavior. Student stated that the other student had done something to Student and then began to curse at the staff member. Student later began to get physically combative with staff and then ran away from staff. This caused school administrators to put the school on "lockdown" for approximately 45 minutes during which students were not allowed to transition in the hallway to classes. Student eventually calmed down and began to cooperate with staff. School A staff telephoned Student's parent about the incident and Student was allowed to leave school early. (Witness 1's testimony, Witness 4's testimony, LEA Exhibit 30)
17. On January 15, 2020, School A informed Respondent by letter that School A was suspending Student for five school days beginning January 16, 2020, until January 27, 2020, for a violation of school code of conduct, engaging in unsafe behaviors including making verbal threats to another student, being physically aggressive with staff and repeatedly cursing. (LEA Exhibit 20)
18. During the week that Student was suspended Student made threats toward other students on social media about which parents of other students called School A with their concerns. On January 27, 2019, when Student returned, two students who were threatened on social media came to a School A staff member with their concerns about the threats. The students were allowed to remain with the staff member during the class they shared with Student. Student later made threats overheard by staff members that Student was going to "shank" the two students. Student intimated that Student might have a weapon. When the threats

were reported by staff to the administrators, two administrators searched Student's belongings and found a pocket knife. School A telephoned Student's parent requesting that she come to the school to get Student immediately. (Witness 4's testimony, LEA Exhibit 30)

19. On January 28, 2020, School A informed Respondent by letter that School A had issued a notice to expel Student for violating the school's discipline policy, and informing Respondent of a scheduled MDR meeting to determine if Student's behavior in violating the school policy was a manifestation of Student's disability. (LEA Exhibit 22).
20. Although School A provided Student special education supports and a dedicated aide, Student's negative in-school behaviors nonetheless escalated. School A issued an IEP progress report for Student dated January 28, 2019. The report noted that relative to the IEP goals, Student either made no progress on the goal or the goal had not yet been introduced. (Witness 1's testimony, LEA Exhibit 29)
21. On January 29, 2020, School A issued Respondent a PWN that stated that based on a telephone conversation with Respondent, School A and Respondent had agreed to begin a change in placement process to determine whether Student required a therapeutic non-public placement. The PWN stated that School A would provide Student tutoring and behavior support during Student's 10-day suspension. The PWN also stated that if it was determined that Student's behavior was a manifestation of Student's disability that Respondent agreed that Student would remain in an alternative placement with tutoring and behavior support provided by School A for up to 45 school days pending placement in a non-public school. (LEA Exhibit 23)
22. On February 10, 2020, School A convened the MDR meeting regarding the incident that occurred on January 27, 2020. Respondent participated by telephone. The team, including Respondent, determined that Student's behavior that resulted in the suspension was a manifestation of Student's disability. Respondent expressed her dissatisfaction with the tutoring situation and threatened to withdraw Student from School A. (LEA Exhibits 24, 28)
23. On February 14, 2020, School A convened a change in placement meeting. The School A team and an OSSE representative participated in the meeting. Respondent participated by telephone. Respondent acknowledged that School A was providing Student daily tutoring, a full day with the dedicated aide, and behavior support once per week. However, she expressed that Student fluctuated with accepting work and wanted to return to school. (LEA Exhibit 25)
24. The School A team members expressed their opinions that Student requires intensive therapeutic supports that School A cannot provide. Respondent expressed her disagreement with Student being in a non-public therapeutic school. Based on her experience with Student's sibling attending a non-public therapeutic school, she stated that such a setting was too confining. Respondent stated that she was considering enrolling Student in Student's neighborhood school. The School A team members implored

Respondent that Student should be provided the therapeutic supports Student needs and would likely later be able to return to a general education setting. (LEA Exhibit 25)

25. On February 14, 2020, the School A IEP team amended Student's IEP and determined that Student was in need of therapeutic special education day school with 31 hours per week of specialized instruction and 240 minutes per month of BSS, both outside general education, and a dedicated aide for 8 hours per day. At that meeting, Respondent did not agree to the change in placement to a more restrictive setting. Despite Respondent's resistance to the change in placement, the School A team members determined that the change in placement was appropriate and needed. School A issued a PWN dated February 17, 2020, regarding the increase in services and the change in Student's LRE. (LEA Exhibit 25, 26, 27)
26. Based on Student's behaviors escalating behaviors culminating in the January 15, 2020, and January 27, 2020, incidents, School A staff and administrators concluded that both Student and other students at School A are not be safe if Student returns to School A. Student has demonstrated a need to be physically restrained on occasion and the School A staff does not have the training to restrain students who display the type of verbal and physical aggression that that Student has displayed. Student's behavior has impacted the student culture and some students not feel safe. (Witness 1's testimony, Witness 4's testimony)
27. Based on her observations of Student and her participation in meetings regarding Student, School A's psychologist concluded that Student is suffering from an untreated psychological disorder. Student needs a smaller more structured, therapeutic school setting, which cannot be met at School A. The School A psychologist clinically recommends that Student not return to School A as Student's escalation in behavior is aggressive and volatile. Student does not appear to be able to regulate behaviors that put Student and others at risk of harm. (Witness 2's testimony)
28. Student has been in the interim alternative placement since January 27, 2019, for a total of 33 school days prior to the school closure due to the COVID-19 emergency.⁷

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)

⁷ The Hearing Officer takes administrative notice of School A's school calendar as reflected on its website and included a copy of that calendar as a part of the administrative record.

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 held the burden of persuasion on the issues adjudicated. The burden of persuasion shall be met by a preponderance of the evidence. The normal standard is a preponderance of the evidence. See, e.g., *N.G. V. District of Columbia* 556 f. Sup. 2d (D.D.C. 2008) see also 20 U.S.C. §1451 (i)(2)(C)(iii).

ISSUE 1: Whether Student requires placement in a more restrictive environment, specifically a therapeutic non-public special education day school.

CONCLUSION: Petitioner sustained the burden of persuasion by a preponderance of the evidence that Student requires placement in a non-public special education day school pursuant to the IEP team's decision on February 14, 2020.

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 *Endrew F. ex rel. Joseph F. v. Douglas City. 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. *Endrew 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, what 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 *Endrew F.*, supra, 137 S. Ct. 988.

The starting point in this analysis is that “the IEP is the vehicle through which school districts typically fulfill their statutory obligation to provide a free appropriate public education and that officials must have an IEP in place for each student with a disability ‘[a]t the beginning of each U.S.C. § 1414(d)(2)(A)); 34 C.F.R. 300.322(a), 300.323(a). *See also Dist. of Columbia v. Wolfire*, 10 F. Supp. 3d 89, 95 (D.D.C. 2014) (“there is no requirement that the child be currently enrolled in a public school in order to trigger the LEA’s obligation to develop an IEP for that child”); *Dist. of Columbia v. Oliver*, 2014 WL 686860, at 6 (D.D.C. 2014).

Pursuant to 34 C.F.R. § 300.116, 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. An LEA must ensure that a continuum of placements is available to meet the needs of children with disabilities.⁸

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

⁸ Pursuant to 34 C.F.R. § 300.115 - Continuum of alternative placements (a) Each public agency must ensure that a continuum of alternative placements is available to meet the needs of children with disabilities for special education and related services. (b) The continuum required in paragraph (a) of this section must-- (1) Include the alternative placements listed in the definition of special education under Sec. 300.38 (instruction in regular classes, special classes, special schools, home instruction, and instruction in hospitals and institutions); and (2) Make provision for supplementary services (such as resource room or itinerant instruction) to be provided in conjunction with regular class placement.

child is to participate in the same activities as non-disabled children to the "maximum extent appropriate"); *Roark ex rel. Roark v. District of Columbia*, 460 F.Supp.2d 32, 43 (D.D.C. 2006) ("The IDEA requires school districts to place disabled children in the least restrictive environment possible.")

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

The legal standard under the IDEA is that DCPS “must place the student in a setting that is capable of fulfilling the student’s IEP.” *Johnson v. Dist. of Columbia*, 962 F. Supp. 2d 263, 267 (D.D.C. 2013). *See also O.O. ex rel. Pabo v. Dist. of Columbia*, 573 F. Supp. 2d 41, 53 (D.D.C. 2008) (placement must be in a school that can fulfill the student’s IEP requirements).

5-E DCMR §3002.1(a)(b)(c) state:

3002.1 Provision of FAPE

(a) The LEA shall make a free appropriate public education (FAPE) available to each child with a disability, ages three to twenty-two, who resides in, or is a ward of, the District including children who are suspended or expelled and highly mobile children, such as migrant or homeless children, even if they are advancing from grade to grade.

(b) For DCPS, the responsibility to make FAPE available extends to all children with disabilities between the ages of three (3) and twenty-two (22) years old, who are residents of the District of Columbia but are not enrolled in a public charter school LEA, and children with disabilities attending private and religious schools in the District of Columbia, pursuant to the requirements of IDEA.

(c) Unless otherwise provided in § 3002.9, a public charter school LEA’s obligation to determine eligibility for special education services or to provide special education services on an existing IEP is triggered upon completion of the registration of the student in the Student Information System (SIS) by the school upon receipt of required enrollment forms and letter of enrollment agreement, in accordance with subparagraph (4) in the definition of enrollment in 5-A DCMR § 2199.

5E DCMR § 3026 states:

3026.1 The LEA shall obtain informed written parental consent before: (a) conducting an initial evaluation or reevaluation; and (b) initial provision of special education and related services to a child with a disability and any change in the child's placement.

3026.2 If a parent refuses consent for initial evaluation or a reevaluation, the LEA may pursue those evaluations through mediation or due process consistent with this Chapter.

On March 10, 2020, School A filed this due process complaint seeking to affirm the change in Student's educational placement so that School A can proceed to request that OSSE identify a therapeutic special education day school for Student to attend. School A asserts that it is not an appropriate placement that meets Student's needs and Student is, therefore, being denied a FAPE by Respondent's continued refusal to consent to the change in placement. Petitioner asserts that unless Respondent consents to the change in placement, OSSE cannot proceed with the location assignment process to identify and place Student in an appropriate school placement because under the law in the District of Columbia a parent's consent is required for a change in placement.

The evidence in this case demonstrates that Student has attended School A since the start of SY 2019-2020. When enrolled at School A, Student had not been determined eligible for special education services. However, immediately upon enrollment, Student's parent (Respondent) alerted School A of Student's behavioral difficulties and soon thereafter consented to have Student evaluated for special education eligibility. Soon after school started, Student began to display behavioral difficulties that resulted in discipline referrals. Student was aggressive both verbally and physically with peers and school staff.

School A conducted a psychological evaluation and a team determined Student met the eligibility criteria for an ED disability classification. School A developed an IEP for Student on November 6, 2019, and thereafter provided Student specialized instruction both inside and outside general education and behavior support outside general education.

Student's aggressive and non-compliant behavior continued such that School A amended Student's IEP to include a full-time dedicated aide to assist Student through the school day with behavior management. Despite the assistance of a dedicated aide, Student continued to display non-complaint and aggressive behavior and even threatened other students and school staff.

The evidence demonstrates that Student has made no academic progress because Student has missed significant amounts of instructional time because of Student's behaviors. Student's IEP progress reports reflect that that Student has made no progress.

On January 15, 2020, Student engaged in aggressive behaviors toward another student and aggressive and non-compliant behavior toward school staff that caused a school-wide disruption. Student's behavior resulted in a five day out of school suspension. Upon Student's return to school on January 27, 2020, following the suspension, Student threatened and cursed at other students in the presence of school staff. Student was found to have brought a pocket knife to school. Student was again suspended pending School A's consideration of Student's expulsion from School A.

School A convened an MDR in which Respondent participated. The team determined that Student's behavior was a manifestation of Student's disability and the team, including Respondent, agreed to move forward with a change in placement for Student to a more restrictive LRE and for Student to have an interim alternative placement until the change in placement was effectuated.

The evidence demonstrates that School A incrementally placed Student in increasingly more restrictive settings, pursuant to the Student's IEP, in an effort to address Student's needs. The

evidence demonstrates that School A has exhausted the level of restriction in special education services that it can provide Student and has sought OSSE's assistance to provide Student an appropriate LRE and educational placement. School A made the OSSE referral, convened a change of placement meeting, and filed a due process complaint in attempts to provide Student an appropriate placement.

Courts have held that "the placement decision must be based on the IEP produced by the IEP team and cannot be made before the IEP is produced." *Board of Educ. of Tp. High School Dist. No. 211 v. Michael R.*, 2005 WL 2008919, at 14 (N.D.Ill. Aug. 15, 2005) (citing *Spielberg v. Henrico County Public Schools*, 853 F.2d 256, 258–59 (4th Cir.1988)). *See, also, e.g., Roark ex rel. Roark v. District of Columbia*, 460 F. Supp. 2d 32, 43 (D.D.C. 2006) (Federal and D.C. regulations require placements to be "based on the child's IEP.")

Pursuant to 34 CFR § 300.324(b), School A reviewed and revised, Student's IEP on February 14, 2020. The IEP team members, save Respondent, agreed that Student required a change in placement to a therapeutic day school and revised Student's IEP to reflect that placement.

Respondent in her communications to the Hearing Officer during the PHC disputed that Student needs a therapeutic non-public placement and wanted Student to either remain at School A or be withdrawn to attend another school. Although given ample opportunity to obtain counsel and to participate in the hearing, Respondent did not participate and consequently did not present any evidence that refuted the overwhelming evidence presented by School A that Student requires a more restrictive setting than School A can provide, and is in need of placement in a therapeutic day school.

Despite School A's efforts to provide Student with specialized instruction, behavioral supports and even the support of a full-time dedicated aide, Student, nonetheless, continued aggressive, non-compliant behaviors that put Student, other students and school staff at risk of harm. Despite having only recently been determined eligible for special education services, the preponderance of the evidence, including the credible testimony of Petitioner's witnesses and its documents, support a finding that Student requires a therapeutic non-public school placement.

Although Petitioner is not in agreement with the change in placement and did not provide consent to the change in placement, School A as Student's LEA is obligated to provide Student a FAPE and ensure that Student's IEP is implemented with fidelity in an appropriate school placement. School A in filing this due process complaint has taken appropriate action to ensure Student is provided a FAPE. When a parent refuses to consent to a student's placement, a district may request a due process hearing to ensure that the student is provided FAPE. *See Broward County School Board, Florida State Education Agency* 118 LRP 14813 (December 19, 2017).

Based upon the evidence adduced, the Hearing Officer concludes that Student is in need of more restrictive educational placement than School A can provide and requires placement in a therapeutic special education day school consistent with the determination made by Student's IEP team on February 14, 2020, and as reflected in the PWN that PCS issued on February 17, 2020.

School A sought an order requiring Respondent to consent to the change in placement so that OSSE could issue a location assignment. Alternatively, School A sought an order overriding Respondent's refusal to grant consent to a change in placement so that OSSE may issue location assignment for Student to a non-public therapeutic special education day school. The Hearing Officer has determined that I cannot require that Respondent grant consent to the change in placement. However, the Hearing Officer concludes that I can direct School A to initiate the location assignment process with OSSE so that an appropriate educational placement and location of service can be provided to Student.

The Hearing Officer, in the order below, directs School A to promptly notify OSSE of the decision made in this HOD that Student requires a change in placement to a non-public therapeutic special education day school so that OSSE can proceed to determine and provide an appropriate school location for Student.

ISSUE 2: Whether Student's continued placement at School A is likely to result in injury to Student or others such that Student's continued placement in an interim alternative educational setting is required until Student is placed in a therapeutic special education day school.

CONCLUSION: Petitioner sustained the burden of persuasion by a preponderance of the evidence that Student's continued placement at School A is likely to result in injury to Student or others such that Student's continued placement in an interim alternative educational setting is required for an additional 45 school days or until Student is placed in a therapeutic special education day school, whichever is sooner.

Pursuant to 34 CFR § 300.530 through 300.536, School A made a change in placement for Student to an interim alternative placement, based upon Student's violation of a School A code of conduct. School A conducted an MDR and determined that Student's January 27, 2019, conduct for which the change in placement was initiated, was a manifestation of Student's disability.

Pursuant to 34 CFR § 300.530 (e) (ii), having determined that Student's conduct was a manifestation of Student's disability, School A was required to review Student's behavioral intervention plan and modify it as necessary to address Student's behavior; and return Student to School A, unless Respondent and School A agreed to a change of placement as part of the modification of the behavioral intervention plan.

The evidence demonstrates that the School A team, including Respondent, at least initially following the MDR, agreed that Student would not return to School A. They agreed to a change in placement to an interim alternative placement, including tutoring, behavior support and the full-time assistance of a dedicated aide, until a more restrictive long-term placement in a therapeutic day school for Student could be secured.⁹

⁹ Pursuant to 34 CFR § 300.531, the child's IEP team determines the interim alternative educational setting for services under § 300.530(c), (d)(5), and (g).

Pursuant to 34 CFR § 300.532 a parent who disagrees with any decision regarding placement under §§ 300.530 and 300.531, or the manifestation determination under § 300.530(e), or an LEA that believes that maintaining the current placement of the child is substantially likely to result in injury to the child or others, may request a hearing.

School A also seeks to affirm Student remaining in the interim alternative placement until a new school placement is identified. School A filed its request for a hearing seeking, inter alia, to extend Student's interim alternative placement beyond 45 school days until a long-term placement was found, and to prevent Student from returning to School A because its staff believes that maintaining the Student's placement at School A and having Student's return is substantially likely to result in injury to Student and/or others.¹⁰

In this case, the burden rests with School A to demonstrate that Student's removal from School A and Student's continued placement in the interim alternative placement is reasonably justified. See *Velma Olu-Cole v. E.L. Haynes PCS*, 930 F.3d 519 citing *Doe v. Mattis*, 889 F.3d 745, 782 (D.C. Cir. 2018)

Respondent in her communications to the Hearing Officer during the PHC disputed that Student requires therapeutic non-public placement and wanted Student to either remain at School A or be withdrawn to attend another school. Although given ample opportunity to obtain counsel and to participate in the hearing, Respondent did not participate and consequently, did not present any evidence that refuted the overwhelming evidence presented by School A.

Student displayed behaviors, including hitting other students, threatening students and teachers, and cursing. Student's disruptive behaviors were having an adverse effect on other students with other students emulating Student's negative behaviors. Student's disruptive behaviors increased in intensity and frequency and soon were occurring daily. The typical consequence of in-school detention has not worked to curb Student's disruptive behaviors.

Based on Student's behaviors in the two incidents in January 2020, School A staff and administrators have concluded that both Student and other students at School A will not be safe if Student returns to School A. Student has demonstrated a need to be physically restrained on occasion, has repeatedly cursed, threatened and become physically aggressive with staff and administrators. Despite School A's efforts to provide Student with specialized instruction, behavioral supports and even the support of a full-time dedicated aide, Student, nonetheless, continued aggressive, non-compliant behaviors that put Student, other students and school staff at risk of harm.

The credible testimony of Petitioner's witnesses and the documents support a finding that Student requires a therapeutic non-public school placement and Student's return to School A would create a certain, great and actual harm to others such that an additional 45 school days in the interim

¹⁰ Pursuant to 34 CFR § 300.533 Placement during appeals. When an appeal under § 300.532 has been made by either the parent or the LEA, the child must remain in the interim alternative educational setting pending the decision of the hearing officer or until the expiration of the time period specified in § 300.530(c) or (g), whichever occurs first, unless the parent and the SEA or LEA agree otherwise.

alternative placement beyond the time that Student has already been in the interim alternative placement is appropriate. (See *Doe v. Mattis*, 889 F.3d 745, 782 (D.C. Cir. 2018))

The preponderance of the evidence supports a conclusion that Student, despite having only recently been determined eligible for special education services, requires a therapeutic non-public placement and that Student's return to School A, prior to such a placement being secured would put Student, Student's peers and School A staff at significant risk of harm.

Consequently, the Hearing Officer directs in the order below that School A maintain Student in the interim alternative placement for 45 additional school days or until a long-term placement in a therapeutic day school is effectuated, whichever is sooner.

ORDER:

1. Student is in need of more restrictive educational placement than School A can provide and requires a therapeutic special education day school placement consistent with the determination made by Student's IEP team on February 14, 2020, and as reflected in the PWN that PCS issued on February 17, 2020.
2. School A is hereby directed to, within two (2) business days of the issuance of this order, notify OSSE of the decision made in this HOD, that Student requires a change in placement to a therapeutic special education non-public day school, so that OSSE can proceed to identify and provide Student with an appropriate school location.
3. School A is hereby authorized and directed to maintain Student in the interim alternative placement including daily independent tutoring, and the assistance of full-time dedicated aide, and weekly behavioral support, for up to 45 school days from the date of this order, or until Student's long-term placement in a therapeutic day school is effectuated, whichever is sooner.
4. 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 20, 2020

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