

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 August 5, 2019, 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 112.

BACKGROUND AND PROCEDURAL HISTORY:

This due process complaint was filed by a Public Charter School located in the District of Columbia, hereafter referred to as “PCS” and/or “Petitioner.” PCS is its own location education agency (“LEA”) for purposes of special education. On July 8, 2019, PCS filed this due process complaint against the parent of one its students, hereafter referred to as “Parent” and/or “Respondent”. Respondent’s child, hereafter referred to as “Student” is currently age ___ and recently completed ___ grade at PCS.² Student is eligible for special education with a classification of Multiple Disabilities (“MD”) including Other Health Impairment (“OHI”) due to Attention Deficit Hyperactivity Disorder (“ADHD”) and Emotional Disability (“ED”).

Petitioner sought through its due process complaint to obtain a Hearing Officer’s Determination (“HOD”) requiring Respondent to consent to the change in Student’s placement from PCS, so that OSSE could issue a location assignment for Student to attend a non-public therapeutic special education day school. Alternatively, Petitioner sought an order authorizing OSSE to issue a location assignment.

Response to the Complaint:

Respondent did not file a written response to the due process complaint. However, in email correspondence and a telephone conversation with the undersigned hearing officer (“Hearing Officer”), Respondent expressed her disagreement with the change in placement for Student and her belief that the issue regarding the proposed change in placement was conclusively decided by a previous hearing officer.

Resolution Meeting and Pre-Hearing Conference:

There was no resolution period and no resolution meeting because the due process complaint was filed by the LEA. The final Hearing Officer’s decision (“HOD”) is due date 45 calendar days from the date the due process complaint was filed: August 22, 2019.

A telephone pre-hearing conference (“PHC”) in this matter was attempted on July 22, 2019, with Petitioner’s Counsel and Respondent. Respondent was not in agreement with participating in the PHC when the Hearing Officer spoke with her by telephone. As a result, the PHC was not held.

² Student’s age and grade are identified in Appendix B

The Hearing Officer apprised Respondent of the consequences of not participating in the hearing process and that the hearing would proceed and could result in a default judgment and order if she did not participate. 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 made Petitioner's counsel aware of his conversation with Respondent. The Hearing Officer issued a pre-hearing order on July 29, 2019, directing, inter alia, the parties to participate in the hearing on August 5, 2019, and stating the issue to be adjudicated at the hearing.

ISSUE:

The issue adjudicated is:

Whether Student requires placement in a nonpublic special education day school pursuant to the Individualized Educational Program ("IEP") team's decision on April 22, 2019.

RELEVANT EVIDENCE CONSIDERED:

This Hearing Officer considered the testimony of the witnesses and the documents submitted by Petitioner (Petitioner's Exhibits 1 through 42) that were admitted into the record and are listed in Appendix 2.³ The witnesses who testified are listed in Appendix B.⁴

Hearing and Interim HOD:

At the hearing on August 5, 2019, Petitioner was represented by counsel and Respondent was unrepresented. At the outset of the hearing the Hearing Officer offered to delay the hearing for Respondent to obtain legal counsel and/or to explore mediation as an alternative to proceeding with the hearing. Respondent chose to proceed with the hearing and to represent herself.

At the conclusion of the hearing, the Hearing Officer informed the parties, on the record, that based upon review of the documents that had been submitted by Petitioner and introduced into the record and the testimony of Petitioner's witnesses and that of Respondent, unless there was something in the documents submitted that the Hearing Officer had overlooked, the Hearing Officer was convinced that that Petitioner had met its burden of persuasion by a preponderance of the evidence that Student was in need of a change of placement.

The Hearing Officer noted that with the impending start of SY 2019-2020, he would issue an interim HOD authorizing and directing Petitioner to take action to ensure that Student was provided an appropriate change in placement in time for the start of school year ("SY") 2019-2020 and that a final HOD would be issued by the final due date of August 22, 2019.

³ Any item disclosed and not admitted, or admitted for limited purposes, was noted on the record and is noted in Appendix A.

⁴ Petitioner presented three witnesses: (1) Student's PCS Counselor, (2) Student's PCS Special Education Teacher, and (3) PCS' Special Education Coordinator. Respondent testified, but presented no other witnesses.

The Hearing Officer issued an Interim HOD on August 7, 2019, in order to expedite the LEA initiating a change of placement with OSSE. This Final HOD includes additional findings of fact and conclusions of law consistent with the findings of fact, conclusions of law and order in the Interim HOD.

SUMMARY OF DECISION:

Petitioner held the burden of persuasion on the issue to be adjudicated and met that burden. The Hearing Officer concludes that Student is in need of more restrictive educational placement than PCS can provide, and is in need of a therapeutic special education day school consistent with the determination made by Student's IEP team on April 22, 2019, and as reflected in the Prior Written Notices ("PWN") PCS issued on April 25, 2019, and June 3, 2019.

PCS sought an order requiring Respondent to consent to the change in placement and change in location process so that OSSE could issue a location assignment. Alternatively, PCS sought an order authorizing OSSE to issue a location assignment. The Hearing Officer determined that he could not grant either. However, the Hearing Officer concluded he could direct PCS to initiate the location assignment process with OSSE so that an appropriate educational placement and location of service could be provided to Student by the start of SY 2019-2020.

Thus, in the order below the Hearing Officer directs PCS to promptly notify OSSE of the decision made in this HOD, that Student is in need of a change of placement to a therapeutic special education day school, so that OSSE can proceed to make an appropriate school location assignment for Student for SY 2019-2020.

FINDINGS OF FACT:⁵

1. Student resides with Petitioner in the District of Columbia, is currently age ___ and recently completed ___ grade at PCS during SY 2018-2019. Student has attended PCS for the past three school years. (Respondent's testimony, Petitioner's Exhibit 37)
2. Student is eligible for special education with a classification of MD including OHI due to ADHD and ED. (Petitioner's Exhibit 37)
3. On May 2, 2016, PCS developed an IEP for Student that noted Student's disability causes Student to be highly hyperactive/impulsive, inattentive, defiant and aggressive. Student's May 2, 2016, IEP prescribed 4 hours per week of specialized instruction, including 2 hours outside the general education setting, and 120 minutes per month of Behavioral Support Services ("BSS"). The IEP was amended on June 3, 2016, to increase specialized instruction to 10 hours per week, including 5 hours outside general education and to provide for a full-time dedicated aide. (Petitioner's Exhibits, 1, 2, 36)

⁵ The evidence (documentary and/or testimony) that is the source of the Findings of Fact ("FOF") is noted within a parenthesis following the finding. A document is noted by the exhibit number. The second number following the exhibit number denotes the page of the exhibit from which the fact was extracted. When citing an exhibit that has been submitted by more than one party separately, the Hearing Officer may only cite one party's exhibit.

4. PCS' June 2016 Justification and Plan for Dedicated Aide stated that Student had a history of absconding from class without teacher permission several times throughout the school day; that Student ran throughout the school building with staff/security chasing; that Student would hide in sections of the school building to avoid classroom work resulting in a safety concern; that Student's absconding resulted in temper tantrums with staff/peers, physical aggression towards staff/peers, and defiance of staff directives and that in addition, Student had missed a significant amount of classroom time during SY 2015-2016, resulting in poor academic performance. (Petitioner's Exhibits 16, 36)
5. On April 25, 2017, PCS conducted an annual review of Student's IEP and increased specialized instruction to 15 hours per week, all in general education. The IEP provided for Student to have a full- time dedicated aide. For SY 2017-2018, Student was placed in a classroom co-taught by a general education teacher and a special education teacher. This model did not work for Student. (Petitioner's Exhibits 4, 36)
6. On September 29, 2017, Student's IEP was revised to place Student full-time in a self-contained classroom with 3 to 5 students. Student had become very confrontational with the dedicated aides "attached" to Student and was not able to connect with them. The provision for a dedicated aide was removed from Student's IEP. An aide was still assigned to Student's new classroom, but was introduced as a teaching assistant for the self-contained classroom. (Petitioner's Exhibit 36)
7. In May 2018, as a part of Student's triennial evaluation PCS had a psycho-educational and psychological evaluation conducted. Student's cognitive functioning was measured as Average in previous evaluations, but was measured as in the Very Low range (FSIQ=68) in the May 2018 testing. Student' academic functioning was measured in the Low to Low Average range. The evaluator noted that Student had significant difficulties demonstrating necessary basic skills in all academic areas. The evaluator opined that Student's noncompliant behaviors may have interfered with Student's ability to perform and demonstrate Student's full potential. (Petitioner's Exhibit 13)
8. As a part of the May 2018 evaluation, Student's special education teacher reported to the evaluator that behaviorally, Student was not cooperative during group assignments and Student's behaviors were consistent across settings. She reported that Student was often disruptive and noncompliant and Student never attended specials classes. The special education teacher reported that Student would only interact with peers during recess when they were playing sports. She described Student's interactions with teachers and other adults as noncompliant, disrespectful, and verbally aggressive. Student would curse and run out of class and would demonstrate noncompliance when being redirected by others. The instructional assistant in Student's classroom, reported that it was difficult for Student to fit in with peers because of Student's maturity level. The assistant reported that Student had difficulty establishing and maintaining friendships and that Student did not eat lunch in the cafeteria with peers, but preferred to eat with adults or alone. The assistant reported Student's behaviors commonly observed in the classroom included defiance, noncompliance, verbal and physical aggression, and elopement. The assistant reported

that Student had a low frustration level with class work and would completely “shut down” if Student did not understand how to solve one problem. When Student would shut down, Student would curse, go underneath the table, throw chair cushions, or leave the classroom. (Petitioner’s Exhibits 13, 36)

9. On June 1, 2018, the PCS eligibility team confirmed Student’s special education eligibility and updated Student’s IEP. The June 1, 2018, IEP provided for Student to continue to receive full-time specialized instruction outside general education and 30 minutes per week of BSS. The IEP team resumed the dedicated aide in Student’s IEP. PCS instructed the assigned aide to keep some distance from Student because of Student’s resistance to having an “attached” dedicated aide. (Petitioner’s Exhibits 15, 36)
10. During SY 2018-2019 Student was placed in a self-contained classroom at PCS. Despite receiving significant support at PCS, Student made little to no progress. Student had behavior incidents on a daily basis that interfered with Student’s learning and posed a risk to Student’s safety and the safety of others. Student needs constant redirection and support from an adult to stay on task and complete work. (Witness 1 testimony, Witness 2’s testimony)
11. During SY 2018-2019, Student’s behaviors in the classroom became more difficult to manage. Student had intense mood swings and Student’s behavior would become intense so quickly that Student became a danger in the classroom. Student would be noncompliant with every person with whom Student engaged. Student could have 3-5 aggressive behaviors every day. Other students began separating from Student because of the way Student treated them. (Petitioner’s Exhibit 36)
12. Based on Student’s Behavior Intervention Plan (“BIP”), in SY 2018-2019, Student spent 3.5 hours per week sitting with the PCS counselor in the counselor’s office or in the gym. Student stayed with the counselor during most scheduled specials classes because Student struggled in low-structured environments. Student could usually handle gym class, but not music or art class. The counselor is supposed to check in with Student on arrival in the mornings, but most of the time that did not happen because Student typically arrived to school tardy, between 10:00 and 11:00 a.m. (Petitioner’s Exhibits 32, 36)
13. Student is impulsive and struggles to regulate Student’s mood. Student has negative interactions with adults and peers on a daily basis. In light of these behaviors, on January 4, 2019, PCS submitted a change of placement request for Student to OSSE. In its justification statement, PCS stated, inter alia, the following: Student’s academic performance and behaviors are significantly impacting Student. Student had made little to no progress for the past two years in spite of supports and services and changes to the least restrictive environment “LRE”. Student needs constant redirection and support from an adult to stay on task and complete work. Student needs a class with few students that allows Student to take breaks. Student needs few transitions and frequent breaks. When Student is attentive and engaged, Student is able to quickly grasp concepts. Student is in need of a therapeutic setting to support and teach social and emotional, problem-solving

skills, on task behaviors, self-regulation and making safe choices. (Witness 1 testimony, Witness 2's testimony, Petitioner's Exhibits 18, 19, 20, 36)

14. In fall 2018, Respondent had Student seen by a psychiatrist who prescribed medication to treat ADHD. Student started taking the medication shortly before PCS made its change of placement request. The PCS staff observed some decrease in Student's impulsivity and aggressive behaviors and an increase in Student's ability to complete work. Student's ability to stay on task has increased from 5 to 10 minutes to 15 to 20 minutes at a stretch. After starting medications, Student's explosivity was not at the same level and there was a decrease in Student's use of profanity. However, Student still absconded from the classroom, and it was no easier for PCS staff to redirect Student despite Student being on the medication. Student still displayed aggressive behaviors, but with medication, Student engaged in verbal abuse rather than touching other students. (Witness 1's testimony, Petitioner's Exhibit 36)
15. During a brief period after Student was put on medication, Student began to make some progress academically. Student was able to engage in testing test with only the teacher in the room and Student's parent was not called to assist with Student as was the case in previous school years. Student began to communicate and was more receptive, but would still engage in verbal push-back and walk out of the classroom. (Witness 2's testimony)
16. On January 28, 2019, PCS convened a change of placement meeting for Student. Student's parent (Respondent) attended, as did OSSE's Change in Placement Coordinator. The PCS representatives all agreed that Student required a more restrictive environment than PCS could provide. This was based on safety concerns and Student's lack of progress. Respondent objected and stated that Student was in the trial stage of medications and that more time was needed to get results. The OSSE Coordinator closed the change in placement case because, with Respondent's opposition, Student's IEP team was not in consensus that Student needed a more restrictive environment. (Petitioner's Exhibits 20, 36)
17. On January 29, 2019, the OSSE Coordinator issued OSSE's State Recommendation on PCS' change in placement request. OSSE's recommendation was that a change in placement into a more restrictive environment was warranted for Student. OSSE also recommended that PCS be provided technical assistance in effective documentation demonstrating implementation of modifications/accommodations needed for students with specialized instructional needs. The OSSE coordinator provided Respondent a list of OSSE approved nonpublic schools. (Petitioner's Exhibits 21, 22, 36)
18. Because Respondent would not consent to the recommended change in placement, PCS filed for due process on February 11, 2019, seeking a hearing officer's approval of the change in placement. A hearing was held on March 27, 2019, and a hearing officer's determination was issued on April 1, 2019. As part of his determination, the hearing officer concluded that the IEP team first had to meet to determine that Student requires

placement at a separate school before appealing to the hearing officer. (Petitioner's Exhibit 36)

19. The hearing officer stated the following in the April 1, 2019, HOD: "[i]f Student's IEP team revises Student's IEP to provide for a more restrictive educational setting and Mother were to refuse to consent to a change in Student's placement, then PCS could potentially seek due process relief under 34 CFR § 300.507(a)3 as well as look to the safeguards of 34 CFR § 300.300(b)(3). Because Student's IEP team has not yet revised the June 1, 2018, IEP, PCS' complaint in this case is premature." (Petitioner's Exhibit 36)
20. Following the hearing officer's determination, the IEP team met again on April 22, 2019, to discuss Student's need for a change in placement. The PCS counselor participated in the meeting and expressed and still believes Student is in need of a more restrictive placement. The counselor believes that if Student returns of PCS in SY 2019-2020 Student would not make academic and behavioral progress and relationships with other students would be difficult. (Witness 1's testimony)
21. Student's April 22, 2019, IEP team determined that based on Student's behavior and lack of progress Student requires a therapeutic setting to address significant academic and behavioral needs. The entire team except Student's parent agreed with that determination. The team determined that Student requires a separate school placement and revised Student's IEP accordingly. On April 25, 2019, PCS issue a PWN to that effect. (Petitioner's Exhibits 38, 39, Witness 1 testimony, Witness 2's testimony, Petitioner's Exhibit 37)
22. Student's current IEP prescribes 24.5 hours per week of specialized instruction outside the general education setting, 120 minutes per week of BSS outside the general education setting, and the support of a dedicated aide for 6 hours per day. The IEP states that Student's LRE is a separate school. (Petitioner's Exhibit 37)
23. On June 3, 2019, PCS issued an amended IEP and a PWN to correct errors in Student's IEP and to clarify that the Student's IEP prescribes all services outside general education and a placement in a separate special education school. (Witness 3's testimony, Petitioner's Exhibits 40, 41)
24. On July 8, 2019, PCS filed the current due process complaint seeking to have Student's placement changed to a therapeutic special education day school. (Petitioner's Exhibit 42)
25. Respondent wants Student to remain at PCS for SY 2019-2020. Respondent believes that Student's behaviors and academic progress at PCS improved during SY 2018-2019 compared to prior years. Unlike in previous school years, during SY 2018-2109, Student would come home and report to Respondent about assignments, progress in school and homework. Student has been on ■ most recent medication since February 2019. However, because of side effects, Student has to occasionally not take the medication until

the side effects subside. The medication is still being monitored to determine the appropriate dosage. (Respondent's testimony)

26. Respondent believes that with medication and the improvements in Student's relationships at school, Student has begun to make some progress at PCS. Respondent does not want Student to have to start all over again in another school for fear Student might regress. Student does well when Student is not in confined environment and has done well in camp during summer 2019. Student gets along with Student's sibling and is compliant with Respondent's directives. Respondent is leery of Student attending any school outside the District of Columbia. All the schools on OSSE's list were outside the District of Columbia and would have required Student to use bus transportation. Student's IEP currently prescribes transportation services. However, Student has had difficulty with OSSE bus transportation in the past and prefers to travel to and from school on Metro. (Respondent'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").

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 both the burden of production and persuasion on the issue adjudicated. The normal standard is for the burden of persuasion 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: Whether Student requires placement in a nonpublic special education day school pursuant to the IEP team's decision on April 22, 2019.

CONCLUSION: Petitioner sustained the burden or persuasion by a preponderance of the evidence that Student requires placement in a nonpublic special education day school pursuant to the IEP team's decision on April 22, 2019.

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 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. *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, 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 *Andrew 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).

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. § 300.116.⁶

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.")

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

The 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 LEA RESPONSIBILITY

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

⁶ Pursuant to 34 C.F.R. § 300.115 - Continuum of alternative placements (a) Each public agency must ensure that a continuum of alternative placements is available to meet the needs of children with disabilities for special education and related services. (b) The continuum required in paragraph (a) of this section must-- (1) Include the alternative placements listed in the definition of special education under Sec. 300.38 (instruction in regular classes, special classes, special schools, home instruction, and instruction in hospitals and institutions); and (2) Make provision for supplementary services (such as resource room or itinerant instruction) to be provided in conjunction with regular class placement. Pursuant to DC Code § 38-2561.02. (c) Special education placements shall be made in the following order or priority; provided, that the placement is appropriate for the student and made in accordance with the IDEA and this chapter: (1) DCPS schools, or District of Columbia public charter schools pursuant to an agreement between DCPS and the public charter school; (2) Private or residential District of Columbia facilities; and (3) Facilities outside of the District of Columbia.

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.

The evidence in this case demonstrates that Student has attended PCS for the past three school years and that PCS has provided Student special education services pursuant to an IEP. Over the years to address Student's academic and behavioral needs, PCS has gradually increased Student's special education services and has 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 PCS 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. PCS made the OSSE referral, convened a change of placement meeting and filed a due process complaint in attempts to provide Student a more restrictive placement.

However, PCS was unsuccessful with its prior due process complaint. The hearing officer in the April 1, 2019, HOD pointed out that IDEA regulations provide that, in determining the educational placement of a disabled child, the public agency must ensure that the placement "[i]s based on the child's IEP." 34 C.F.R. § 300.116(b)(2). 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.")

At the time of the prior hearing, Student's IEP, was last revised on June 1, 2018, and prescribed that Student to receive full-time specialized instruction and BSS outside general education. The IEP did not prescribe Student's LRE as a separate special education school. On January 28, 2019, PCS convened the change in placement meeting for Student. At that time, Student's IEP team had yet to revise Student's June 1, 2018, IEP to change Student's educational placement.

The previous hearing officer noted that in that proceeding, PCS was asking the hearing officer to determine that Student requires a more restrictive placement in a separate, special education day school before Student's IEP team had met to review and revise Student's IEP. The hearing officer reasoned that procedurally, that was "putting the cart before the horse," and the preliminary step

of an IEP team convening, pursuant to 34 CFR § 300.324(b), to review and revise, Student's June 1, 2018, IEP, and not occurred. Accordingly, the hearing officer concluded PCS' due process complaint was premature and denied Petitioner's requested relief.

The evidence in the current hearing demonstrates that after the April 1, 2019, HOD was issued, PCS convened an IEP team meeting on April 22, 2019. The IEP team members, save Student's parent (Respondent), agreed that Student required a change in placement to a therapeutic day school and revised Student's IEP to reflect that placement.

Respondent disputes that Student is in need of therapeutic nonpublic placement and wants Student to remain at PCS. However, the evidence presented in the current hearing, including the credible testimony of Petitioner's witnesses and the documents support the finding that Student is in need of a therapeutic nonpublic school placement. It appears that once Student was provided medication there was some improvement in Student's behaviors and academic focus during SY 2018-2019. Student, nonetheless, continued aggressive, non-compliant behaviors and Student continued to abscond from the classroom. The preponderance of the evidence supports a finding and conclusion that Student, despite limited progress during SY 2018-2019, is in need of a therapeutic nonpublic placement.

The Hearing Officer concludes that Student is in need of more restrictive educational placement than PCS can provide and is in need of a therapeutic special education day school consistent with the determination made by Student's IEP team on April 22, 2019, and as reflected in the PWN that PCS issued on June 3, 2019.

Although Petitioner is not in agreement with the change of placement, PCS 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. PCS 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 findings of fact adduced and conclusions of law made in this decision, the Hearing Officer, in the order below directs PCS to promptly notify OSSE of the decision made in this Final HOD, that Student is need of a change of placement to a therapeutic special education day school, so that OSSE can proceed to make a determination as to an appropriate school location for Student for SY 2019-2020.

ORDER:

1. Student is in need of more restrictive educational placement than PCS can provide and is in need of a therapeutic special education day school consistent with the determination made by Student's IEP team on April 22, 2019, and as reflected in the PWN that PCS issued on June 3, 2019.

2. PCS is hereby directed to, within two (2) business days of the issuance of this order, notify OSSE of the decision made in this Final HOD, that Student is need of a change of placement to a therapeutic special education day school, so that OSSE can proceed to identify and provide Student with an appropriate school location for SY 2019-2020.

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: August 22, 2019

Copies to: Counsel for Petitioner
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