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 Office of the State Superintendent of Education
 Office of Review and Compliance
 Office of Dispute Resolution
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Confidential

<p>Parents on Behalf of Student,</p> <p>Petitioners,</p> <p>v.</p> <p>District of Columbia Public Schools ("LEA")</p> <p>Respondent.</p> <p>Case # 2017-0187</p> <p>Date Issued: December 12, 2017</p>	<p>2nd CORRECTED HEARING OFFICER'S DETERMINATION ¹</p> <p>Hearing Dates: November 15, 2017 November 16, 2017</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, December 12, 2017, 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 November 15, 2017, and November 16, at the District of Columbia Office of the State Superintendent of Education (“OSSE”) Office of Dispute Resolution 810 First Street, N.E., Washington, D.C. 20003, in Hearing Room 2003. The parties submitted written closing arguments on December 5, 2017.

BACKGROUND AND PROCEDURAL HISTORY:

The student or (“Student”) is age _____ and in grade _____.² The student resides with Student’s parents (“Petitioners”) in the District of Columbia. 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”).

Student attends a non-public special education separate day school (“School A”) where Student has attended since February 2012 when Petitioners withdrew Student from a DCPS elementary school and unilaterally placed Student at School A.

DCPS developed an individualized education program (“IEP”) for Student on July 6, 2015, for school year (“SY”) 2015-2016 and proposed that Student attend a DCPS middle school. Petitioner’s maintained Student at School A for SY 2015-2016. DCPS conducted an annual review of its IEP for Student on September 20, 2016, for SY 2016-2017 and proposed Student attend a DCPS high school. Petitioner maintained Student at School A for SY 2016-2017.

On July 5, 2017, Petitioners filed this due process complaint asserting DCPS had denied Student a free appropriate public education (“FAPE”) because, inter alia, the IEPs and placements DCPS proposed for Student for SY 2015-2016 and SY 2016-2017 were inappropriate.

Relief Sought:

Petitioners request the following relief: (a) an Order directing DCPS to reimburse Petitioners the cost of tuition and related services for Student attending School A for SY 2015-2016 and SY 2016-2017; (b) an Order that DCPS prospectively place Student at School A for SY 2017-2018.

LEA Response to the Complaint:

DCPS filed a response to the due process complaint on July 20, 2017. DCPS maintained that DCPS did not deny Student a FAPE by failing to propose an appropriate educational program and placement for SY 2015-2016 and SY 2016-2017. DCPS asserts that both the July 6, 2015,

² The student’s current age and grade are in indicated in Appendix B.

IEP and the September 20, 2016, IEP DCPS developed were appropriate and DCPS proposed appropriate school locations where the IEPs could be implemented. DCPS asserted Petitioners failed to enroll Student in the proposed locations of service, and refused to provide consent for evaluation, thus rejecting DCPS' offer of FAPE. DCPS asserted that in a previous HOD, a Hearing Officer concluded that a separate special education school was not Student's least restrictive environment ("LRE") and that decision was upheld on appeal, and there is nothing that supports a change in student's LRE since that decision.

Resolution Meeting and Pre-Hearing Conference:

The parties participated in a resolution meeting on July 27, 2017, and did not resolve the complaint. The parties did not mutually agree to proceed directly to hearing. The 45-day period began August 5, 2017, and ended [and the Hearing Officer's Determination ("HOD") was originally due] on September 18, 2017.

This matter was originally assigned to Independent Hearing Officer NaKeisha Sylver Blount, Esq., who on August 16, 2017, convened a pre-hearing conference ("PHC") and issued a pre-hearing order ("PHO") on August 18, 2017, outlining, inter alia, the issues to be adjudicated.

Petitioner filed a consent motion to extend the HOD due date, due to unavailability of witnesses. Hearing Officer Blount granted the motion and the HOD due date was extended 15 calendar days to October 3, 2017. Thereafter, Petitioners' counsel had an emergency and because of scheduling conflicts regarding hearing dates, Hearing Officer Blount on September 25, 2017, granted a second motion to extend the HOD due date by 58 calendar days to November 30, 2017.

On October 17, 2017, the OSSE Office of Dispute Resolution reassigned this case to the current Hearing Officer, Coles B. Ruff, Jr. Esq. ("Hearing Officer") to conduct the hearing and to adjudicate the issues outlined in the August 18, 2017, PHO.

The hearing was held on November 15, 2017, and November 16, 2017. At the conclusion of the hearing on November 16, 2017, DCPS counsel filed an unopposed motion to extend the HOD due date by 12 calendar days to allow additional time for closing arguments. The undersigned Hearing Officer granted that motion extending the HOD due date from November 30, 2017, to December 12, 2017. The parties submitted written closing arguments on December 5, 2017.

ISSUES:³

The issues adjudicated are:

1. Whether DCPS denied Student a FAPE by failing to propose an appropriate educational program and placement for SY 2015-2016 by providing an insufficient amount and type of specialized instruction and an insufficient amount of speech and language therapy.⁴

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

⁴ Petitioners allege Student required specialized instruction in a self-contained setting throughout the school day and

2. Whether DCPS denied Student a FAPE by failing to propose an appropriate educational program and placement for SY 2016-2017 by providing an insufficient amount and type of specialized instruction and an insufficient amount of speech and language therapy.⁵

RELEVANT EVIDENCE CONSIDERED:

This Hearing Officer considered the testimony of the witnesses and the documents submitted in each party's disclosures (Petitioner's Exhibits 1 through 42⁶ and Respondent's Exhibits 1 through 8A, and Hearing Officer Exhibit 1) that were admitted into the record and are listed in Appendix 2.⁷ The witnesses testifying on behalf of each party are listed in Appendix B.⁸

SUMMARY OF DECISION:

Petitioners had the burden of production on both issues adjudicated. The burden of persuasion fell to Respondent after Petitioners met a prima facie case. The Hearing Officer concluded based on the evidence adduced that Respondent did not sustain the burden of persuasion by a preponderance of the evidence on issues #1 and #2 that the July 2015 and September 2016 IEPs were reasonably calculated to provide Student educational benefit with regard to the amount of specialized instruction prescribed. However, with regard to speech language services in those IEPs, the Hearing Officer concluded that Respondent sustained the burden of persuasion. As a result of the denial of FAPE determined, the Hearing Officer granted Petitioners reimbursement for the student's tuition and costs at School A for SY 2015-2016 and SY 2016-2017 and directed that DCPS conduct evaluations of the student and develop an IEP for the student for SY 2017-2018 and determine an appropriate educational placement for the student for SY 2017-2018.

6 hours per month of speech/language services.

⁵ Petitioners allege that again for SY 2016-2017 Student required specialized instruction in a self-contained setting throughout the school day and 6 hours per month of speech/language services.

⁶ Respondent asserts that Petitioner's Exhibit 24 (a draft IEP dated May 22, 2017) and any disclosed documents that were not in existence at the time that the IEPs being challenged were developed, should be given no weight. The Hearing Officer admitted all Petitioners' disclosed documents, but did not consider any documents that did not exist at the time the IEPs were developed to be probative as to the appropriateness of the IEPs when they were developed.

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

⁸ Petitioner presented five witnesses: (1) One of Student's parents ("Petitioner") and the following individuals who were designated as expert witnesses: (2), an educational consultant, (3) a School A psychologist, (4) a School A speech language pathologist, and (5) a School A administrator. Respondent presented six witnesses: (1) a DCPS general educator, (2) DCPS LEA representative from the middle school DCPS proposed to implement Student's IEP for SY 2015-2016, (3) DCPS monitor for School A, (4) a DCPS speech language pathologist, (5) DCPS LEA representative from the high school DCPS proposed to implement Student's IEP for SY 2016-2017, and (6) a DCPS special educator.

FINDINGS OF FACT:⁹

1. Student resides with Petitioners in the District of Columbia and 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, Respondent's Exhibit 5-4)
2. Student was first determined eligible for special education during SY 2010-2011, while attending a DCPS elementary school. Student had been diagnosed with Attention Deficit Hyperactivity Disorder ("ADHD"). (Petitioners' Exhibit 2-4)
3. Petitioners engaged an educational consultant to assist them in identifying Student's educational needs. The consultant conducted assessments and prepared an educational diagnostic report in July 2011 that indicated Student had average cognitive abilities and academic achievement scores that were approximately one year below Student's chronological age at the time of the assessments. The report noted a learning disability in reading, math and written language, as well as expressive and receptive language weakness that were identified in a February 2011 speech language evaluation. (Hearing Officer's Exhibit 1)
4. On October 13, 2011, DCPS changed Student's disability classification to SLD and revised Student's IEP. In a due process complaint filed in February 2012 Petitioners challenged, among other things, the appropriateness of the IEP DCPS had developed on October 13, 2011, and the resulting placement. The IEP prescribed a placement with specialized instruction and related services to be provided both inside and outside general education.¹⁰ (Petitioner's Exhibit 2-1, 2-2, 2-3, 2-4)
5. In February 2012, Petitioners withdrew Student from the DCPS elementary school and unilaterally placed Student at School A, a non-public special education separate day school where Student has attended ever since. (Petitioner's Exhibit 2-6)
6. A Hearing Officer adjudicated the February 2012 due process complaint and in a May 14, 2012, HOD concluded that the October 13, 2011, IEP and the resulting placement were appropriate. The Hearing Officer found that "the nature and severity of Student's disability did not warrant additional removal from the general education environment." However, the Hearing Officer found a denial of FAPE due to DCPS' failure to convene an IEP meeting and ordered DCPS to convene an IEP meeting and to partially reimburse Petitioners for Student attending School A. Petitioners appealed the May 14, 2012, HOD

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

¹⁰ The IEP prescribed specialized instruction in reading, written expression and math for 7.5 hours per week (1.5 hours in each area inside general education, and 1 hour in each area outside general education) and 30 minutes per week of speech language services outside general education and 30 minutes per week inside general education.

to U.S. District Court. The Court upheld the HOD's ruling that the October 13, 2011, IEP and placement were appropriate. (Petitioners' Exhibits 2-11, 2-15, 2-16, 3-5, 3-6)

7. DCPS convened an IEP meeting on May 31, 2012, but did not develop a new IEP because Student was not attending a DCPS school. Petitioners continued to maintain Student at School A for the remainder of SY 2012-2013 and for SY 2013-2014. On March 5, 2013, Petitioners filed a due process complaint alleging denial of a FAPE for, inter alia, DCPS' failure to review and revise Student's IEP since October 13, 2011. This resulted in a HOD issued May 8, 2013, that found procedural violations but no denial of a FAPE and denied Petitioners requested relief of reimbursement. (Petitioners' Exhibit 3-6)
8. On Petitioners' appeal of the May 8, 2013, HOD, the U.S. District Court reversed the HOD's conclusion regarding the denial of a FAPE, and granted Petitioners reimbursement for Student attending School A up until April 11, 2013, the date on which DCPS had convened an IEP meeting with Petitioners and developed an IEP for Student. However, the Court did not grant Petitioners' requested relief of Student's prospective placement at School A, because the Court had previously upheld the May 14, 2012, HOD's conclusion that Student's October 13, 2011, IEP and the resulting placement were appropriate. At that juncture, there had been no challenge to the IEP developed on April 11, 2013. (Petitioners' Exhibit 3-18)
9. On August 14, 2014, DCPS convened an eligibility meeting for Student and found Student continued to meet the SLD disability classification and reviewed and updated Student's DCPS IEP. (Respondent's Exhibit 3-1)
10. In February 2015, Petitioners filed a due process complaint that resulted in a settlement agreement dated March 5, 2015, that reimbursed Petitioners for Student's attendance at School A for part of SY 2013-2014 and all of SY 2014-2015. The parties agreed to convene an IEP meeting by May 8, 2015, at which School A personnel could attend. Petitioners allowed DCPS to obtain Student's educational records from School A and to observe Student at School A. (Petitioners' Exhibit 4)
11. While Student has attended School A, School A has developed its own internal annual IEP for Student, prescribing Student's educational goals and services. School A developed its IEP on March 17, 2015, that prescribed 33.5 hours per week of specialized instruction in a special education setting. The IEP also prescribed integrated speech language and occupational therapy services as a part of the 33.5 hours of instruction. In addition, the IEP prescribed 45 minutes of individual speech language therapy per week and 45 minutes of individual psychological services per week, both in a special education setting. The School A IEP noted student was on an instructional level in reading, written language and math that was 2 years below grade level. (Petitioners' Exhibit 5)
12. In May 2015, the School A psychologist began providing Student with weekly therapy to address Student's anxiety due to increased academic demands at School A. Student's learning disability, ADHD, and executive functioning concerns were contributing to

academic difficulties. Student found Language Arts and History to be the most challenging classes. (Witness 2's testimony)

13. DCPS convened an annual review of Student's DCPS IEP on May 19, 2015, and reconvened on July 6, 2015. Petitioners participated along with their attorney and educational consultant. The resulting IEP prescribed 15 hours per week of specialized instruction with 5 hours per week outside general education for reading and the remaining split between written expression and math, both inside general education. The IEP also prescribed 240 minutes per month of speech language services outside general education, and 180 minutes per month of behavioral support services outside general education. (Respondent's Exhibit 3-1, 3-15, Petitioner's Exhibit 8-18)
14. On July 6, 2015, DCPS issued a prior written notice ("PWN") that noted that the team agreed on goals in the areas of reading, writing, math, adaptive daily living (to address executive functioning concerns) speech and social-emotional concerns. The PWN noted that DCPS increased specialized instruction to 15 hours per week from the 2014 DCPS IEP of 7.5 hours per week. The team agreed to add behavior support services, because Student struggled with the transition to middle school, noting the increased academic demands had led to a decrease in Student's self-esteem, which was impacting academic performance. The PWN noted that Petitioners requested Student's placement at School A; however, the DCPS team believed Student would benefit from exposure to non-disabled peers and School A was too restrictive a placement for Student. (Petitioner's Exhibit 8-18)
15. On July 13, 2015, DCPS issued Petitioners a letter informing them that a DCPS middle school ("School B") had been identified as the location of service to implement Student's DCPS IEP. (Respondent's Exhibit 4-1)
16. School B was able to implement the IEP DCPS offered for SY 2015-2016, and could provide the specialized instruction and related services prescribed by the IEP. School B had an inclusion special education teacher to assist Student when in the general education setting to stay on track in the classroom. The school also offered a specialized reading program, Read 180, and offered behavioral support services for any students with social emotional concerns. (Witness 6's testimony)
17. On August 5, 2015, Petitioners' attorney sent a letter to DCPS informing that Student would be attending School A for SY 2015-2016, and requesting that DCPS fund Student's placement at School A, because Petitioners did not believe DCPS had proposed an appropriate and current IEP for Student for SY 2015-2016. (Petitioner's Exhibit 10-1, 10-2)
18. DCPS responded in a letter dated August 12, 2015, expressing that it had made a FAPE available to Student with an appropriate IEP and placement in the LRE and did not agree to fund Student's placement at School A. In the letter, DCPS requested that Petitioners enroll Student at the identified DCPS middle school, and if Petitioners did not, DCPS

would consider Student as a student parentally placed as a private school student. (Petitioner's Exhibit 10-3)

19. In February 2016, School A prepared an annual speech-language summary report for Student and on April 26, 2016, updated its own internal annual IEP for Student. The IEP prescribed 33.5 hours per week of specialized instruction in a special education setting. The IEP also prescribed integrated speech language and occupational therapy services as a part of the 33.75 hours of instruction. In addition, the IEP prescribed 45 minutes per week of individual speech language therapy, and 45 minutes per week of individual psychological services, both in a special education setting. Again, the School A IEP noted Student was on an instructional level in reading, written language and math that was 2 years below Student's current grade level at the time. (Petitioner's Exhibits 11, 12)
20. During most of SY 2015-2016, Student received one 45-minute session per week of speech language services. School A had always recommended Student be provided two individual therapy sessions per week to address the complexity of Student's language needs, and to maximize Student's progress. So, in March 2016, Student began receiving two sessions per week. (Witness 3's testimony, Petitioner's Exhibits 11, 21)
21. On June 27, 2016, Petitioners' attorney sent DCPS Student's most recent School A IEP and speech-language progress report and requested that DCPS convene a meeting to review the reports and update Student's DCPS IEP. (Petitioner's Exhibit 14)
22. On August 4, 2016, Petitioners' attorney sent a letter to DCPS informing that Student would be attending School A for SY 2016-2017, and requesting that DCPS fund student's placement at School A, because Petitioners did not believe DCPS had proposed an appropriate and current IEP for Student for SY 2016-2017. (Petitioner's Exhibit 15)
23. DCPS convened an annual IEP review meeting on September 20, 2016. Petitioners participated in person, along with their attorney and educational consultant. During the September 20, 2016, meeting which included staff from School A, the team discussed and agreed to most aspects of Student's IEP except the least restrictive environment ("LRE") and the amount of speech language services. DCPS maintained that based on the Student's overall performance, a full time special education school was not appropriate for Student. Petitioners, their educational advocate, and the School A personnel disagreed, and maintained that Student required a full-time placement totally removed from general education. DCPS agreed to 4 hours per month of speech language services and School A and Petitioners' representatives maintained that the Student required 6 hours per month of speech language services. (Petitioner's Exhibit 5-31, 5-32, 5-33, 5-34)
24. The DCPS members of the team determined that despite Student's academic deficits, Student was performing no more than two grade levels behind. Therefore, Student could access the general education curriculum, and Student's needs could be sufficiently met with some instruction being provided inside general education. Based upon observation of Student, DCPS determined Student could demonstrate grade level performance with

the use of assistive technology such as speech to text software, to minimize the labor of writing, without the worry of spelling or grammar errors. DCPS concluded there was insufficient data to support the conclusion that Student could not be with non-disabled peers for some instruction and for non-academic activities. (Witness 10's testimony)

25. The resulting IEP from the September 20, 2016, meeting prescribed 15 hours per week of specialized instruction, with 5 hours per week outside general education for reading, and the remaining split between written expression and math, both inside general education. The IEP also prescribed 4 hours per month of speech language services outside general education, and 180 minutes per month of behavioral support services outside general education, and 1 hour per month of speech language consultative services. (Respondent's Exhibit 5-3, 5-21, 5-29)
26. In October 2016, Petitioner's educational consultant assessed Student and administered nonverbal intelligence and academic achievement assessments. Student scored at the 45th percentile, with an IQ score of 98. The consultant concluded Student continued to display below age and grade levels achievement in math, reading and written expression and difficulty with executive functioning. The consultant opined that Student required specialized instruction in all classes that require reading, math and written language skills. (Witness 1's testimony, Petitioner's Exhibit 19-4, 19-12)
27. Student's School A IEP includes speech and language goals that include decoding and reading comprehension goals that can be addressed through specialized instruction. Although School A includes reading goals in speech language services, the School A speech language pathologist acknowledged that in a public school the appropriate approach is to address reading and written language objectives through specialized instruction. (Witness 3's testimony)
28. Student's School A IEP had 9 objectives/goals under speech language and 6 of those goals were carried over to Student's September 20, 2016, DCPS IEP. The other three goals were reading and written expression goals that were not included under speech language, because they were covered by specialized instruction. DCPS added consultative services of 1 hour per month for a speech language pathologist to work with Student's teachers to make certain the goals are monitored in the classroom. An hour per month is usually sufficient for that task. (Witness 8's testimony, Respondent's Exhibit 5-17)
29. Petitioners and DCPS had no dispute about the behavior support services, classroom aides, and services in either July 6, 2015, or the September 20, 2016, IEP. (Stipulation)
30. On September 28, 2016, DCPS issued Petitioners a prior written notice ("PWN") informing Petitioners that the IEP DCPS developed for Student could be implemented at Student's neighborhood high school ("School C"). (Respondent's Exhibit 5-35)
31. As the academic demands increased for Student at School A since middle school, Student began to struggle with academics and experience increased frustration and anxiety, and

has needed additional supports. Petitioners believe that Student needs special education support in every class that involves reading and language, and do not consider the amount and setting of the specialized instruction that DCPS has offered in the IEPs to be appropriate. Petitioners visited both the middle school and the high school that DCPS proposed to observe and consider whether Student's needs could be met there, and in both instances, did not believe Student would be successful in those school environments. (Petitioner's testimony)

32. On October 26, 2016, Petitioners went to School C and met with the School C special education coordinator ("SEC"), and one of the special education teachers, and observed a self-contained special education class for about 20 minutes. Petitioners were disappointed in what they observed as the students did not appear engaged and the instruction appeared to be ineffective. (Petitioner's Exhibit 18)
33. In spring 2017 Student experienced increased anxiety and as a result was psychiatrically hospitalized for a short period. Upon Student's return to school after hospitalization, School A adjusted and reduced Student's course load and increased support with a tutor and continued psychological services. Student was able to complete SY 2016-2017 successfully. (Petitioner's testimony, Witness 4's testimony)
34. As the pace of school has increased, the impact to Student's social, emotional and behavioral functioning has created greater concern for Petitioners as to Student's ability to make it through school without the supports Student receives at School A. Petitioners believe Student has made progress at School A, and the intensity and level of services that Student is provided at School A has allowed Student to make progress. Petitioners believe Student receives the level of services Student requires at School A. (Petitioner's testimony)
35. On April 18, 2017, Petitioners' attorney wrote a letter to DCPS inquiring as to the reason DCPS had contacted School A asking to schedule an IEP meeting for Student. (Petitioners' Exhibit 22)
36. In May 2017, School A prepared a psychotherapy progress report for Student and noted Student's diagnosis of Generalized Anxiety Disorder, Major Depressive Disorder and ADHD. The report noted that Student makes excellent use of therapy sessions at School A and has made slow but gradual improvement but continued to display symptoms of anxiety, depression and executive functioning challenges. (Petitioner's Exhibit 23)
37. On May 15, 2017, a DCPS social worker conducted a classroom observation of Student at School A in a reading class and a science class. Student was occasionally off task and minimally defiant to teacher requests but generally redirectable. (Respondent's Exhibit 6-1)
38. In May 2017, DCPS convened an IEP meeting for Student. DCPS provided Petitioners with a draft IEP, dated May 22, 2017. The DCPS representative expressed concern that given the intense services Student has allegedly been provided at School A, Student had

not progressed more academically between the 2011 and the 2016, assessments conducted by Petitioners' educational consultant. The DCPS representative asked for additional data to support a finding that Student needed to be totally removed from general education. The DCPS team requested an assessment against grade level expectations to determine how far away from grade level Student was, and to determine strengths and the level of service required. DCPS generally does not remove a student totally from general education when the student is only one or two grade levels behind. (Witness 5's testimony, Petitioners' Exhibit 24)

39. Student's May 2017 DCPS IEP has not been finalized, and a final IEP meeting has not been convened, because the parties agreed that additional evaluations would be conducted. DCPS requested to evaluate Student at School A. Petitioners did not agree, but chose to have an independent evaluation conducted at their expense. Petitioners allowed DCPS to conduct a functional behavior assessment ("FBA") but did not allow DCPS to interview Student directly. DCPS, therefore, provided a questionnaire that was given to the Student. An IEP team has not reviewed the results of the FBA. (Petitioner's testimony, Witness 7's testimony)
40. On September 6, 2017, Petitioners counsel provided DCPS with a recent independent neuropsychological evaluation that has been conducted. Petitioners asked DCPS to review the information before conducting any further testing, and are willing to consent to further testing after that evaluation is reviewed. (Petitioner's testimony, Petitioners' Exhibits 29, 32)
41. Petitioner signed a contract with School A for Student to attend School A for SY 2015-2016 and SY 2016-2017 and paid tuition. Petitioners signed contracts and provided deposits for both school years by June prior to the start of the next school year and before Petitioners had the DCPS IEPs in 2015 and 2016. Petitioners paid School A between \$40,000 to \$50,000 each year for all services during SY 2015-2016 and SY 2016-2017. (Petitioner's testimony)
42. At School A student has made progress and passing grades during SY 2015-2016 and 2016-2017. At School A the class size is generally 5 to 10 students. School A provides integrated related services in the classroom as well as individualized related services. Not all teachers at School A are certified in special education, some are certified in their content areas only. School A maintains that despite teachers not all being special education teachers, because instruction is provided in small groups, and the pace and structure of instruction is altered to meet students' needs, Student is being provided special education in all subjects. School A has an OSSE certificate of approval ("C of A"). It is a separate special education day school and provides services exclusively to students with disabilities. Because Student displays academic deficits in reading, writing and math, executive functioning difficulties and speech language deficits, School A personnel who participated in Student's DCPS IEP meetings have observed that student requires prompting, re-teaching, individualized monitoring and redirection, and thus recommends specialized instruction for Student throughout the school day. (Witness 4's testimony)

43. The DCPS monitor who oversees students placed by DCPS at School A has noted that in the years she has monitored at School A she has rarely, if ever, experienced School A taking any action to develop reintegration programs for students placed at School A to return to general education. The monitor to date has not been able to monitor Student at School A, as she does with DCPS funded students, because Student is considered privately placed.

CONCLUSIONS OF LAW:

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

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

34 C.F.R. § 300.17 provides:

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

Pursuant to 5E DCMR 3030.14 the burden of proof is the responsibility of the party seeking relief. *Schaffer v. West*, 546 U.S. 49, 126 S.Ct. 528 (2005). In this case, as noted in the PHO and during the hearing, Petitioner had the burden of production on both issues. Petitioner had both the burden persuasion on both issues after Petitioners established a prima facie case.¹¹ The

¹¹ DC Code § 38-2571.03 (6) provides:

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

normal standard is preponderance of the evidence. See, e.g. *N.G. V. District of Columbia* 556 f. Sup. 2d (D.D.C. 2008) se also 20 U.S.C. §1451 (i)(2)(C)(iii).

ISSUE 1: Whether DCPS denied Student a FAPE by failing to propose an appropriate educational program and placement for SY 2015-2016 by providing an insufficient amount and type of specialized instruction and an insufficient amount of speech and language therapy.

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

ISSUE 2: Whether DCPS denied Student a FAPE by failing to propose an appropriate educational program and placement for SY 2016-2017, by providing an insufficient amount and type of specialized instruction and an insufficient amount of speech and language therapy.

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

In *Board of Education v. Rowley* the United States Supreme Court set forth a two-part inquiry for determining whether a school district has satisfied the FAPE requirement. First, the state must have "complied with the procedures set forth in the Act." *Rowley*, 458 U.S. at 206. Second, the IEP that is developed must be "reasonably calculated to enable the child to receive educational benefits." *Rowley*, 458 U.S. at 206-07. To be appropriate under 34 C.F.R. § 300.324, the IEP must consider the (i) strengths of the child; (ii) concerns of the parents; (iii) results of the initial or most recent evaluation; and (iv) academic, developmental, and functional needs of the child.

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

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

Pursuant to 34 C.F.R. §300.324(b)(1), DCPS must ensure that...the IEP Team reviews the child's IEP periodically, but not less than annually, to determine whether the annual goals for the child are being achieved; and revises the IEP, as appropriate, to address any lack of expected progress toward the annual goals...and in the general education curriculum, if appropriate; the results of any reevaluation conducted ...; information about the child provided to, or by, the parents...; the child's anticipated needs; or other matters.

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.

DCPS convened annual IEP meetings with Petitioners and with input from Petitioners' educational consultant and the educators and service providers from School A developed IEPs for Student for SY 2015-2016 and SY 2016-2017. The evidence demonstrates that DCPS in its development of Student's July 6, 2015, and September 20, 2016, IEP "complied with the procedures set forth in the Act."

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

In *Endrew 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 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).

Petitioners allege that for both SY 2015-2016 and SY 2016-2017 Student required specialized instruction in a self-contained setting throughout the school day, and 6 hours per month speech/language services.

The evidence in this case demonstrates a long history of litigation surrounding this student's IEPs dating back to 2011. In a May 14, 2012, HOD a Hearing Officer concluded that "the nature and severity of Student's disability did not warrant additional removal from the general education environment." That HOD was upheld on appeal. Since then, however, Student has remained in a placement that is totally removed from the general education environment. In the past DCPS has reimbursed Petitioners for Student's attendance at School A to settle due process complaints. Nonetheless, DCPS maintains that Student's placement at School A is too restrictive.

As IDEA demands, removing a child with disabilities "from the regular education environment occurs only when the nature or severity of the disability is such that education in regular classes cannot be achieved satisfactorily." 34C.F.R. § 300.550; 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.")

First as to Petitioner's assertion that the July 6, 2016, IEP and the September 20, 2016, IEPs are inappropriate because they do not prescribe 6 hours per month of speech language services, the Hearing Officer concludes that DCPS sustained the burden of persuasion by a preponderance of the evidence on this part of the issue. The DCPS speech pathologist credibly testified that School A is addressing reading and literacy goals through speech and language services that is accounting for the additional hours of speech language services Petitioners are maintaining Student needs. In the DCPS IEPs these goals are to be addressed within the academic goals. The School A speech pathologist acknowledged that in a public school setting, unlike the methodology School A uses, the reading goals are addressed with specialized instruction. Based upon this evidence, the Hearing Officer concludes that despite the fact that School A recommends Student receive 6 hours of speech language services per month, the DCPS IEPs provided sufficient hours of speech language services to address the core speech and language needs of this student.

However, with regard to Petitioners claim that the DCPS IEPs did not prescribe sufficient hours of specialized instruction and sufficient instruction outside the general education setting, the Hearing Officer concludes that the preponderance of the evidence supports Petitioners' assertion that both DCPS IEPs prescribed too few hours of specialized instruction. Petitioners' educational consultant, the School A personnel who work with the student, as well as Petitioner, clearly and credibly pointed out that as the level of academic intensity has increased for Student moving to middle school and then high school, the level of supports Student requires to make academic progress have increased.

The evidence demonstrates that Student displays academic deficits in reading, writing and math, executive functioning difficulties and speech language deficits such that Student requires prompting, reteaching, individualized monitoring and redirection in all classes. The School A staff credibly testified that student required specialized instruction throughout the school day and Petitioners' educational advocate credibly testified that Student required specialized instruction in all classes that require reading, math and written language skills. Consequently, the Hearing Officer concludes that the preponderance of the evidence supports a finding that when DCPS developed the July 6, 2015, IEP and the September 20, 2016, IEP, the amount of specialized instruction and the setting of the specialized instruction prescribed in the IEPs were not reasonably calculated to enable Student to make progress appropriate in light of the circumstances. At the time the IEPs were developed Student needed specialized instruction in all classes that required reading, math and written language skills. Thus, Student was denied a FAPE.

Petitioners have asked as relief that the Hearing Officer reimburse for Student attending School A for SY 2015-2016 and SY 2016-2017 and that Student be placed prospectively at School A for SY 2017-2018. Although the preponderance of evidence presented in this case demonstrates that the IEPs DCPS developed prescribed insufficient specialized instruction outside general education, the evidence does not support a finding that Student's LRE is a setting that is totally removed from non-disabled peers for activities other than academic subjects. The Hearing Officer points out that although Student has needed more support as the academic demands of middle and high school have increased, there is was insufficient evidence that student should be

totally removed from non-disabled peers. Consequently, the Hearing Officer will not grant Petitioners' requested relief of prospective placement at School A.

The DCPS expert witnesses testified that in their opinion there was insufficient data to conclude that Student could not receive some instruction in general education with appropriate supports. One of the witnesses had observed Student at School A. However, the other witnesses had little contact with Student. Consequently, the Hearing Officer did not give as much weight to these witnesses' testimony.

DCPS has begun the process of updating Student's IEP for SY 2017-2018. DCPS requested authorization to evaluate Student to better discern Student's needs, but its ability to evaluate has been limited by Petitioners. The Hearing Officer notes that although there was testimony that Student has made progress while at School A, based upon the data that has been provided to DCPS, Student has remained years behind grade level despite attending School A. Although it appears Petitioners elected to obtain their own independent evaluation, the Hearing Officer concludes that equity demands DCPS be allowed to fully evaluate Student to effectively develop an IEP for Student for the current school. Consequently, the Hearing Officer directs in the order below that DCPS conduct its own evaluation(s) of Student and promptly convene an IEP meeting and develop an appropriate IEP for Student.

Remedy:

A hearing officer may award appropriate equitable relief when there has been an actionable violation of IDEA. *See* 20 U.S.C. § 1415(f)(3)(E)(ii)(II); *Eley v. District of Columbia*, 2012 WL 3656471, 11 (D.D.C. Aug. 24, 2012) (citing *Branham v. District of Columbia*, 427 F.3d at 11–12.) The Hearing Officer has concluded that the student was denied a FAPE by DCPS and has directed that DCPS in the order below remedy that denial.

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)).

In the Hearing Officer's opinion, it was reasonable for Petitioners to have rejected the IEPs and offers of FAPE that DCPS made and to unilaterally place Student in School A. The Hearing Officer has concluded that the evidence supports a finding that School A is a private placement that is “proper under the Act” and that Petitioners are entitled to reimbursement for Student's attendance at School A for SY 2015-2016 and SY 2016-2017.

ORDER: ¹²

1. DCPS shall, within ten (10) school days of the issuance of this Order, reimburse Petitioners the costs of the student's attendance at School A consistent with OSSE rates, upon satisfactory proof of payment to DCPS from Petitioners of their payment to School A of the student's tuition and costs for the student attending School A for SY 2015-2016 and SY 2016-2017.¹³
2. Petitioners and School A shall make Student available for formal observation and evaluation(s) to determine Student's current academic functioning by DCPS to update Student's IEP in accordance with the requirements of 34 C.F.R. §300.324(b)(1).
3. DCPS shall, within twenty (20) school days of the issuance of this order, observe, and evaluate student consistent with paragraph #2 above, and convene a multi-disciplinary team ("MDT") meeting with DCPS personnel and Petitioner(s) and School A personnel all together, in person, and in the same room at School A, to review evaluations and current data and conduct an annual review of Student's IEP, and update Student's IEP as appropriate.
4. At the MDT meeting directed to be convened pursuant to the provision above, following an update of the student's IEP, the MDT shall determine an educational placement for Student, and DCPS shall within five (5) school days of the MDT meeting determine a location of service for Student where Student's IEP will be implemented.
5. DCPS shall issue a PWN and/or a location of service letter within five (5) school days of the MDT meeting described in paragraph # 4 above indicating Student's educational placement and location of service where Student's IEP will be implemented.
6. All other relief requested by Petitioners is denied.

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

¹³ The Hearing Officer notes that as to related services, reimbursement is limited to the amount of services DCPS prescribed in the IEPs that were adjudicated in this HOD.

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: December 12, 2017

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