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Confidential

<p>Parent on Behalf Student,</p> <p>Petitioner,</p> <p>v.</p> <p>District of Columbia Public Schools (“DCPS”) Local Education Agency (“LEA”)</p> <p>Respondent.</p> <p>Case # 2020-0161</p> <p>Date Issued: December 9, 2020</p>	<p>CORRECTED HEARING OFFICER’S DETERMINATION ¹</p> <p>Hearing Dates: November 13, 2020 & November 14, 2020</p> <p>Counsel for Each Party listed in Appendix A</p> <p><u>Hearing Officer:</u> <u>Coles B. Ruff, Esq.</u></p>
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¹ This “Corrected” HOD is issued to make typographical and/or grammatical changes and/or to remove personally identifiable information; no substantive changes have been made. The HOD issuance date, December 9, 2020, remains unchanged, as does the applicable appeal date. Personally identifiable information is in the attached Appendices A & B.

JURISDICTION:

The due process 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:

The student who is the subject of this due process hearing (“Student”) resides with Student’s parent (“Petitioner”) in the District of Columbia and the District of Columbia Public Schools (“DCPS”) is Student’s local educational agency (“LEA”). Student is a currently age ___² and has been found eligible for special education and related services pursuant to IDEA with a disability classification of Other Health Impairment (“OHI”) due to Attention Deficit Hyperactivity Disorder (“ADHD”). During school year (“SY”) 2016-2017, Student attended a DCPS school (“School A”) until February 2017, when Petitioner began to home school Student. Student was officially withdrawn from DCPS on February 2, 2017.

In January 2017 DCPS convened an eligibility meeting at which the team reviewed an independent educational evaluation provided by Petitioner. The team determined Student’s continued eligibility with the OHI classification. Because Student was withdrawn from DCPS, School A did not develop an IEP subsequent to the eligibility determination. Since then, Student has been home schooled by Petitioner with verification from the Office of the State Superintendent of Education (“OSSE”) for SY 2017-2018, SY 2018-2019, and SY 2019-2020.

Petitioner asserts that in September 2018 she contacted DCPS asking for educational placement options for Student. Petitioner asserts that after her contact, DCPS made no formal offer of a free appropriate public education (“FAPE”). Therefore, she continued to home school Student for the remainder of SY 2018-2019. Petitioner asserts that prior to the start of SY 2019-2020 she contacted Student’s neighborhood DCPS school (“School B”) and inquired about enrolling Student in that school. She was told that she could enroll Student at any time. Petitioner also left a message for School B’s special education coordinator (“SEC”) asking questions about what supports and services could be made available to Student for the upcoming school year.

Student was hospitalized shortly thereafter and then admitted to an out of state residential treatment center (“RTC”) where Student remained until discharged in October 2019. School B’s SEC returned Petitioner’s call in August 2019 when Student was at the RTC. Petitioner alleges that the SEC stated that she would review Student’s paper work and neither the SEC, nor anyone else from DCPS, contacted Petitioner regarding an offer of FAPE to Student for SY 2019-2020. Petitioner home schooled Student for the remainder of SY 2019-2020.

Petitioner filed her due process complaint against DCPS on September 4, 2020, alleging DCPS denied Student a FAPE by failing to offer Student a FAPE after Petitioner contacted DCPS in

² Student’s age and grade are listed in Appendix B.

September 2018 and failed to do so for SY 2019-2020 after she contacted School B in August 2019. Petitioner also alleges DCPS denied Student a FAPE by failing to comprehensively reevaluate Student as of August 2019.

Relief Sought:

Petitioner seeks as relief that DCPS be ordered to comprehensively re-evaluate Student by funding the following evaluations: comprehensive psychological, occupational therapy (to include a sensory profile) and speech language; that DCPS provide compensatory education for the alleged denials of FAPE, or in the alternative, that compensatory education be reserved until such time as the requested evaluations, including a compensatory education evaluation, are completed.

LEA Response to the Complaint:

The LEA filed a response to the complaint on September 14, 2020. The LEA denies that there has been any failure to provide Student with a FAPE. In its response DCPS asserts, inter alia, the following:

Student was home schooled from the latter half of SY 2016-2017. Petitioner has been provided her procedural safeguards since September 2018. Student has remained home schooled to date. Student has a neuropsychological assessment from October 2016. DCPS denies that there has been any failure to make a legally required offer a FAPE or any failure to evaluate.

Resolution Meeting and Pre-Hearing Conference and Order:

The parties participated in a resolution meeting on September 30, 2020, and did not resolve the complaint. The parties did not mutually agree to shorten the 30-day resolution period. The 45-day period began on October 4, 2020, and ended [and the Hearing Officer’s Determination (“HOD”) was originally due] on November 18, 2020. Petitioner’s counsel filed a motion to continue and to extend the HOD due date to accommodate the selected hearing dates. The motion was granted and the HOD is now due December 9, 2020.

The undersigned hearing officer (“Hearing Officer”) conducted a pre-hearing conference on October 6, 2020, and issued a pre-hearing order (“PHO”) on October 13, 2020, outlining, inter alia, the issues to be adjudicated.

ISSUES ADJUDICATED:

1. Whether DCPS denied Student a FAPE by failing to offer Student a FAPE as of September 6, 2018.³

³ Petitioner asserts that based on a referral from the Office of the Ombudsman, on September 6, 2018, Petitioner reached out via email to the Re-Engagement Coordinator for DCPS’ Office of Equity. In the email, Petitioner asked to discuss placement options for Student to see if any “might work...”. In response, she scheduled a meeting with Petitioner and a Placement Specialist. Petitioner was asked to send documentation for review and provided, among other data, an October 15, 2016, neuropsychological evaluation that recommended a full-time special education

2. Whether DCPS denied Student a FAPE by failing to comprehensively reevaluate Student and offer Student a FAPE as of August 2019. ⁴

DUE PROCESS HEARING:

Due to the COVID-19 emergency, the hearing was conducted via video-teleconference on November 13, 2020, and November 16, 2020. The parties presented oral closing arguments on November 16, 2020.

RELEVANT EVIDENCE CONSIDERED:

This Hearing Officer considered the following as evidence and the source of findings of fact: (1) the testimony of the witnesses, and (2) the documents submitted in the parties' disclosures (Petitioner's Exhibits 1 through 36 and Respondent's Exhibits 1 through 16) that were admitted into the record and are listed in Appendix A.⁵ Witnesses' identifying information is in Appendix B.⁶

SUMMARY OF DECISION:

Petitioner held the burden of production and the burden of persuasion on the two issues adjudicated. The Hearing Officer concludes, based on the evidence adduced, that Petitioner did not sustain the burden of persuasion by a preponderance of the evidence on either issue. Having found no denial of FAPE to Student, the Hearing Officer dismissed Petitioner's due process complaint with prejudice and denied the requested relief.

placement in a small school setting. Petitioner alleges that she explained that Student's IEP was never updated from School A even after DCPS reviewed this evaluation and asked whether DCPS had a school that could support the findings of the evaluation. Petitioner alleges that DCPS never updated Student's IEP and made no formal offer of FAPE.

⁴ Petitioner asserts that DCPS knew Student had not been comprehensively evaluated since October 2016, and knew or should have known, Student's triennial evaluation was due in 2019 at the time she was attempting to enroll Student in School B.

⁵ Any item disclosed and not admitted, or admitted for limited purposes, was noted on the record and is noted in Appendix A.

⁶ Petitioner presented three witnesses: (1) An independent Psychologist who testified as an expert witness, (2) Petitioner's Educational Advocate who testified as an expert witness and who is an employed by the law firm representing Petitioner, and (3) Petitioner. DCPS presented three witnesses all of whom testified as expert witnesses: (1) DCPS Special Educator from School A, (2) DCPS Director of Student Supports in the Office of Equity, and (3) DCPS LEA Representative from School A. The Hearing Officer found the witnesses credible unless otherwise noted in the Conclusions of Law. Any material inconsistencies in the testimony of witnesses that the Hearing Officer found are addressed in the Conclusions of Law.

FINDINGS OF FACT:⁷

1. Student resides with Student's parent in the District of Columbia and DCPS is Student's LEA. Student has been found eligible for special education and related services pursuant to IDEA with a disability classification of OHI due to ADHD. During SY 2016-2017, Student attended School A, a DCPS school until February 2017, when Petitioner began to home school Student. Student was officially withdrawn from DCPS on February 2, 2017. (Respondent's Exhibits 2-16, 3-31, 4-32, 6-36, Petitioner's Exhibit 23)
2. Prior to attending School A, Student attended another DCPS school ("School C") during SY 2015-2016. While at School C, Student was administered an academic achievement assessment in May 2016. Student's Word Reading, Pseudoword Decoding and Oral Reading Fluency were all above grade level. However, Student's Reading Comprehension was nearly three years below grade level. Student's Math scores were one to two years below grade level and Student's Spelling was at grade level and Student's Sentence Composition was approximately one year below grade level. Student's Composite Scores were Average for Reading, Below Average for Math and Average for Math Fluency. (Petitioner's Exhibit 5-55, 5-57, 5-59)
3. In the final reporting period of SY 2015-2016, Student either mastered or was progressing on the goals in Student's individualized educational program ("IEP"). (Petitioner's Exhibit 5-61, 5-62, 5-63, 5-64, 5-65)
4. Student's last DCPS IEP was developed on June 9, 2016, while Student was attending School C. Student's IEP prescribed the following services: 60 minutes per week of specialized instruction in written expression in the general education setting, 80 minutes per week of specialized instruction in math in the general education setting, 60 minutes per month of behavioral support services in the general education setting and 30 minutes per month of behavioral support consultative services. The least restrictive environment ("LRE") section of the IEP stated that Student had no services in a setting outside general education. (Respondent's Exhibit 2-19, 2-27, 2-28)
5. When Student entered School A, Student was nervous, but also excited. After the first two weeks of school, Student was telling Petitioner that the school's environment was "crazy." Student began falling behind academically and feeling overwhelmed. Student's behavior at home changed. Student was less cooperative, and less concerned with self-care, eating and homework. By late September 2016, Petitioner had two meetings with School A staff. Student was starting to get sick and by November 2016, Student was getting sad. Teachers were beginning to tell Student that it was time for Student to "step up and do a better job." (Petitioner's testimony)

⁷ The evidence (documentary and/or testimony) that is the source of the Findings of Fact ("FOF") is noted within parenthesis following the finding. Documents cited are noted by the exhibit number. The second number following the exhibit number denotes the page of the exhibit (or the page number of the entire disclosure document) 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.

6. Petitioner obtained an independent neuropsychological evaluation completed October 15, 2016, that DCPS funded. The independent evaluator made recommendations for Student including, but not limited to: a full-time special education placement in a small school setting with certified and trained providers for Dyslexia and multiple disabilities with a class size no larger than 12 that includes 2 certified teachers; implementation of the Wilson Reading Method, and in-school and out-of-school counseling. Petitioner provided the finalized report to School A's IEP team. (Respondent's Exhibit 1)
7. On November 18, 2016, School A convened an IEP team meeting, which Student and Petitioner attended. The team, including Petitioner, decided they did not have enough data to make a final eligibility determination, that Petitioner was going to bring an independent educational evaluation and the team, along with a DCPS psychologist, would reconvene on January 26, 2017, to review the evaluation. The team determined that it would await the independent educational evaluation from Petitioner in order to make a final determination of Student's continued eligibility for special education services. (Respondent's Exhibits 1, 14)
8. At the November 18, 2016, meeting, Petitioner shared that Student continued to struggle with organization skills in the classroom, struggled with timed tests, needed strategies and support with transitions from class to class and support with re-entering the classroom after absences. (Respondent's Exhibit 5-34, 5-35)
9. By winter break Student was telling Petitioner that Student did not want to return to school. In January 2017, Student refused to enter the School A building and even refused to leave the house. Petitioner received a truancy letter and the School A attendance director informed Petitioner that she had two choices, either bring Student to school or face truancy proceedings. To avoid truancy proceeding, Petitioner withdrew Student from School A and began home schooling Student. (Petitioner's testimony).
10. During SY 2016-2017 Student had seventeen (17) excused absences and twelve (12) unexcused absences from November 23, 2016, through February 2, 2017. (Respondent's Exhibit 14)
11. On January 13, 2017, OSSE sent Petitioner a letter acknowledging Petitioner's expressed intent to home school Student for the remainder of SY 2016-2017. Petitioner withdrew Student from DCPS on February 2, 2017. Since then, Student has been home schooled by Petitioner with receipt of verification from OSSE for SY 2017-2018, SY 2018-2019 and SY 2019-2020. Petitioner attempted to find alternative schools for Student by participating in the DCPS lottery and periodically made calls regarding Student's IEP and any supports that could be offered to Student. However, Petitioner was unsuccessful in finding an alternative public school for Student and continued homeschooling Student. (Petitioner's testimony, Petitioner's Exhibits 20, 21, 22, Respondent's Exhibits 3, 6, 14)
12. On January 26, 2017, DCPS convened the eligibility meeting at which the team reviewed the independent educational evaluation provided by Petitioner. The team determined

Student's continued eligibility with the OHI classification. During that same meeting, the School A IEP team completed Student's triennial reevaluation with a final eligibility report and determined Student continued to meet the eligibility criteria for OHI classification due to Student's ADHD. The team decided to reconvene at a later date to review and revise Student's IEP. (Petitioner's Exhibit 11, Respondent's Exhibit 14)

13. Because Student was withdrawn from DCPS by this time, School A did not develop an IEP subsequent to the eligibility determination. On February 23, 2017, DCPS issued a prior written notice ("PWN") stating that "[special education services are available until [student] turns 22 years old. You may re-enroll to receive FAPE that was offered in the IEP." (Respondent's Exhibits, 4, 14)
14. On November 8, 2017, Petitioner filed a state complaint with OSSE against DCPS alleging violations in the special education program of Student, including, inter alia, failure to revise Student's IEP and provide Student IEP services. After an investigation, OSSE issued a Letter of Decision ("LOD") on January 30, 2018. The LOD determined, inter alia, that DCPS had complied with IDEA because it reviewed and was prepared to utilize information provided by Petitioner to revise Student's IEP prior to Petitioner withdrawing Student from DCPS. (Respondent's Exhibit 14)
15. OSSE concluded that DCPS had provided or attempted to provide Student specialized instruction and behavior support services, but had not implemented all the classroom aides and services listed on Student's IEP related to an organization system to help Student manage classroom and homework assignments. OSSE directed DCPS to provide Student compensatory education for its failure to provide those classroom aides and services from November 15, 2016 to December 15, 2016. (Petitioner's Exhibit 11-178, Respondent's Exhibit 14)
16. On September 4, 2018, Petitioner contacted the DCPS Re-Engagement Coordinator in the DCPS Office of Equity and provided her a portion of Student's last IEP. The coordinator, after looking at what was sent, pointed out to Petitioner that the IEP did not suggest a smaller setting and asked if Petitioner had any evidence why Student's neighborhood school could not accommodate Student. The coordinator asked for Petitioner's address so she could determine Student's neighborhood school. (Petitioner's Exhibit 29-271)
17. Petitioner later shared Student's 2016 evaluation. In an email sent to DCPS Office of Equity on September 14, 2018, Petitioner stated that she wanted to know if DCPS had a school that could support the findings for smaller class sizes supports for learning differences noted in Student's last evaluation that she provided. (Petitioner's Exhibit 29-271).
18. Petitioner had further communication thereafter with the DCPS Office of Equity by telephone. Typically the Office of Equity personnel meet in person with parents and students and there was an attempt to do so, but it did not happen with Petitioner. After reviewing the educational records and history of enrollment and speaking to Petitioner,

the Director of Student Support in the DCPS Office of Equity determined that because Student was not enrolled as a DCPS student, Petitioner should reach out to her local DCPS school. He suggested Petitioner do so for the local school to make a determination of the level of restriction in educational setting that Student would require. There was no email response sent by DCPS in response to Petitioner's September 14, 2018, email. (Witness 4's testimony)

19. In August 2019, prior to the start of SY 2019-2020, Petitioner reached out to Student's neighborhood DCPS school, School B, about re-enrolling Student in DCPS. She was told by the front desk staff that Student could be enrolled at any time and she could even come in person to enroll [REDACTED]. Petitioner was also given the name and contact information of the new Special Education Coordinator ("SEC") for the school at that time. She called the SEC and left a message outlining her questions about what supports and/or services could be made available to Student for the upcoming school year. Petitioner did not ever go to School B to enroll Student in DCPS. (Petitioner's testimony)
20. Upon hearing about Petitioner's intent to re-enroll Student in a public school, Student became scared, anxious and overwhelmed. Prior to the first day of school for DCPS Student called a suicide hotline and threatened to harm [h_]self as a result of the upcoming change in schooling. Student was admitted to Children's National Medical Center in Washington, D.C. for one week and thereafter was admitted to an out of state RTC. (Petitioner's testimony)
21. The School B SEC contacted Petitioner on August 28, 2019, during her trip to admit Student to the RTC. She explained the situation to the SEC and asked again what DCPS could offer based on Student's needs. The SEC stated she would look into Student's paperwork and follow up regarding potential options. Petitioner never received a response or follow up from the SEC. Student was discharged from the RTC on October 7, 2019. Student was to attend a special post RTC program, but was not able to do so. For Petitioner, Student attending School B was not an option. Petitioner continued to home school Student after Student's discharge from the RTC and she had no other contact with School B or DCPS. (Petitioner's testimony)
22. Student has engaged in regular and consistent therapy. Student's most significant area of need is defiance – Student does not want to do a lot of the things when asked. This interferes with school work and creates trouble with relationships and interpersonal interactions. Student's therapist believes Student needs a school setting where the academic work is matched to accommodate Student's learning disabilities and where Student can feel safe with peer interactions. (Witness 1's testimony)
23. Petitioner believes that Student has great potential in math and science, is great in art and music and has a good imagination. According to Petitioner, Student's biggest deficit is reading and Student avoids reading anything complex. Student also struggles with organization and stamina, works in short intervals, and has to be prepared to get to learning. Student has sensory issues which were diagnosed at an early age. Subtle noises can cause Student to become distracted. Since being homeschooled, Student has done

better and has begun to feel more secure about academics and has detoxified from the negative experiences Student had when last attending a traditional school. Student has chosen to self-isolate, but has created a limited social network online. Petitioner believes Student needs a specialized school setting to regain confidence and self-perception as a good learner. (Petitioner's testimony)

CONCLUSIONS OF LAW:

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

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

34 C.F.R. § 300.17 provides:

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

Pursuant to 5E DCMR 3030.14, the burden of proof is the responsibility of the party seeking relief. *Schaffer v. Weast*, 546 U.S. 49, 126 S.Ct. 528, (2005). In this case, Petitioner held the burden of persuasion on the two issues adjudicated. ⁸ The normal standard is the preponderance of the evidence. See, e.g., *N.G. V. District of Columbia* 556 f. Sup. 2d (D.D.C. 2008) see also 20

⁸ Pursuant to DC Code § 38-2571.03 (6):

(A) In special education due process hearings occurring pursuant to IDEA (20 U.S.C. § 1415(f) and 20 U.S.C. § 1439(a)(1)), the party who filed for the due process hearing shall bear the burden of production and the burden of persuasion; except, that: (i) Where there is a dispute about the appropriateness of the child's individual educational program or placement, or of the program or placement proposed by the public agency, the public agency shall hold the burden of persuasion on the appropriateness of the existing or proposed program or placement; provided, that the party requesting the due process hearing shall retain the burden of production and shall establish a prima facie case before the burden of persuasion falls on the public agency. The burden of persuasion shall be met by a preponderance of the evidence. (ii) Where a party seeks tuition reimbursement for unilateral placement, the party seeking reimbursement shall bear the burden of production and the burden of persuasion on the appropriateness of the unilateral placement; provided, that the hearing officer shall have the authority to bifurcate a hearing regarding a unilateral placement; provided further, that if the hearing officer determines that the program offered by the public agency is appropriate, it is not necessary to inquire into the appropriateness of the unilateral placement.

(B) This paragraph shall apply to special education due process hearings resulting from complaints filed after July 1, 2016.

U.S.C. §1451 (i)(2)(C)(iii).

Issue 1: Whether DCPS denied Student a FAPE by failing to offer Student a FAPE as of September 6, 2018.

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

A free appropriate public education is available to all children with disabilities residing in the State between the ages of 3 and 21." 20 U.S.C. § 1412(a)(1)(A). A "child with a disability" is defined by statute as a child with intellectual disabilities, physical impairments, or serious emotional disturbance "who, by reason thereof, needs special education and related services." *Id.* § 1401(3)(A). The District is required to enact policies and procedures to ensure that "[a]ll children with disabilities residing in the State, including ... children with disabilities attending private schools, regardless of the severity of their disabilities, and who are in need of special education and related services, are identified, located, and evaluated." *Id.* § 1412(a)(3)(A).

The overall purpose of the IDEA is to ensure that "all children with disabilities have available to them a free appropriate public education that emphasizes special education and related services designed to meet their unique needs and prepare them for further education, employment, and independent living." 20 U.S.C. § 1400(d)(1)(A). *See Boose v. Dist. of Columbia*, 786 F.3d 1054, 1056 (D.C. Cir. 2015) (the IDEA "aims to ensure that every child has a meaningful opportunity to benefit from public education").

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 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.

Pursuant to 34 C.F.R. § 300.324 (b) (1) Each public agency must ensure that, subject to paragraphs (b)(2) and (b)(3) of this section, the IEP Team— (i) Reviews the child’s IEP periodically, but not less than annually, to determine whether the annual goals for the child are being achieved; and (ii) Revises the IEP, as appropriate, to address— (A) Any lack of expected progress toward the annual goals described in § 300.320(a)(2), and in the general education curriculum, if appropriate; (B) The results of any reevaluation conducted under § 300.303; (C) Information about the child provided to, or by, the parents, as described under § 300.305(a)(2); (D) The child’s anticipated needs; or (E) Other matters.

Pursuant to 34 C.F.R. § 300.323 at the beginning of each school year, each public agency must have an IEP effect for each child with a disability within its jurisdiction. 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).

Although DCPS has a duty under child find to identify, locate, and evaluate students with a disability, Student in this case had already been located, identified and evaluated by DCPS. The evidence demonstrates that Student’s last IEP was developed in June 2016 and Student last attended a DCPS school in January 2017. Since then, Student has been home schooled with formal acknowledgment from OSSE for SY 2016-2017, 2017-2018 and 2019-2020.

Petitioner does not assert in this complaint any violation of IDEA by DCPS prior to September 2018. Petitioner filed a State Complaint with OSSE in 2017 and received an LOD resolving her complaint related to the provision of FAPE by DCPS during SY 2016-2017.

In the current complaint, Petitioner asserts that based on her contact with DCPS in September 2018 with the DCPS Office of Equity requesting an educational placement for Student, DCPS was obligated, but failed, to offer Student a FAPE for SY 2018-2019. In addition, Petitioner asserts that in August 2019 she contacted Student’s neighborhood DCPS school, School B, requesting a FAPE, and DCPS did not make an offer of FAPE to Student for SY 2019-2020 following her contact with School B.

Petitioner asserts that based *Dist. of Columbia v. Vinyard*, 971 F.Supp.2d 103 (D.D.C., 2013) an LEA has a duty to update a student's IEP at the parent's request even if the student is not enrolled in a public school in that locality at the time of request.⁹

On the other hand, Respondent asserts that the home-schooled child is not entitled to an offer of FAPE under the holding in *Vinyard*, because state law determines if a home school program is considered a private school.¹⁰ Although Respondent has asserted that students who are home schooled are not to be considered privately placed students, such that the holding in *Vinyard* would be applicable, Respondent has cited no specific authority that in the District of Columbia such a determination has been made. Thus, the Hearing Officer concludes that as with a Student who is parentally placed in private school, a student who is parentally placed in a "home school" is entitled to the same protections outlined in *Vinyard* of an offer of FAPE unless the parent makes clear his or her intent to keep the child enrolled in the private elementary or secondary school located in the LEA.¹¹

⁹ "The agency guidance contemplates that once a parentally placed private school child is identified as a student with disabilities under the IDEA, the local educational agency will offer the child a FAPE, i.e., an IEP, at which point the parents either (1) "accept the offer of FAPE and enroll the child in a public school," at which point the local educational agency "is obligated to make FAPE available to the child"; or (2) the parents "make clear [their] intent to keep the child enrolled in the private ... school," and the local educational agency "is not required to make FAPE available to the child." *Id.* By the Department of Education's own interpretation of the governing regulations, the receipt of services pursuant to an IEP is predicated on a child enrolling in a public school, but an offer of an IEP is not." Petitioner also cites *Woods v. Northport Public School*, 487 Fed.Appx. 968 (6th Cir.2012) (An LEA cannot require a student to re-enroll in the public school in order to receive an updated IEP); Department of Education, *Questions and Answers on Serving children with Disabilities Placed by Their Parents in Private Schools*, April 2011, and *Dist. of Columbia v. Wolfire*, 62 IDELR 198 (D.D.C., 2014) ("Absent a statutory exception, the IDEA mandates that a LEA offer a FAPE to all students residing in its district."); and Petitioner cited the following DOE publication: https://sites.ed.gov/idea/files/Private_School_QA_April_2011.pdf>

¹⁰ Respondent asserts that DCPS does not consider home schooling to be a private school and thus not entitled to the LEA offer or responsibility for FAPE. (71 Fed. Reg. 46, 594 (2006) ("Whether home-schooled children with disabilities are considered parentally placed private school children with disabilities is a matter left to state law. Children with disabilities in home-schools or home day cares must be treated in the same way as other parentally placed private school children with disabilities for purposes of Part B of the Act *only if the State recognizes home schools or home day cares as private elementary or secondary schools.*"(emphasis added)) See also *Letter to Sarzynski*, 29 IDELR 904 (OSEP 1997); *Hooks v. Clark County Sch. Dist.*, 33 IDELR 120 (9th Cir. 2000) cert. denied, 113 LRP 9215, 532 U.S. 971 (2001); *Letter to Williams*, 18 IDELR 742 (OSEP 1992); and *Letter to Anonymous*, 20 IDELR 177 (OSEP 1993). When the state declines or fails to include home-schooling as a private school or private placement, then home-schooled students may be "cut off" from receiving district special education. *Hillsborough County Sch. Bd.*, 42 IDELR 163 (SEA FL 2004)

¹¹ "The Office explains that the LEA where a child attends private school is responsible for ensuring equitable participation. If a parentally placed private school child also resides in that LEA, then the LEA would be responsible for making FAPE available to the child, *unless the parent makes clear his or her intent to keep the child enrolled in the private elementary or secondary school located in the LEA.* If a parentally placed private school child resides in a different LEA, the district in which the private elementary or secondary school is located is not responsible for making FAPE available to that child, but the LEA of the child's residence would be responsible for making FAPE available to that child." *Dist. of Columbia v. Vinyard*, 971 F.Supp.2d 103 (D.D.C., 2013)

The facts in this case demonstrate that in September 2018, Petitioner contacted the DCPS Office of Equity and requested a placement for Student and provided that office some of Student's educational records, including portions of Student's last IEP and Student's last psychological evaluation. Petitioner requested an educational placement consistent with the recommendations in the evaluation which appeared to the personnel of that DCPS office to be a placement more restrictive than Student's neighborhood school.

Petitioner asserts that her contact with the DCPS Office of Equity should suffice as her notification to DCPS of her desire for an offer of a FAPE for Student for SY 2018-2019. However, the Hearing Officer does not find Petitioner's assertion in this regard convincing.

The DCPS Office of Equity directed Petitioner to contact Student's neighborhood school where a determination of the appropriate placement for Student could be made. The evidence does not demonstrate that Petitioner followed that direction. She did not contact the neighborhood school to request a FAPE and chose instead to continue to home school Student and sought and obtained acknowledgement of same from OSSE. In addition, Petitioner made no further contact with DCPS that school year. The Hearing Officer concludes that Petitioner's failure to follow through with the direction offered her by the DCPS Office on Equity and instead her choice to continue to home school Student made clear her intent to keep Student "privately placed." Had Petitioner truly sought an offer of FAPE for Student, she would have followed the direction provided to her by DCPS in September 2018 and contacted her DCPS neighborhood school.

The evidence demonstrates that unlike in SY 2018-2020, when Petitioner did not contact Student's neighborhood school for an offer of a FAPE, before the start of SY 2019-2020, Petitioner, presumably based on the information she had previously been provided by the DCPS Office of Equity, contacted Student's neighborhood DCPS school to inquire about an offer of FAPE. The School B SEC contacted Petitioner when Petitioner was having Student admitted to an RTC due to Student's acute emotional needs. Petitioner did not contact DCPS following Student's discharge for the RTC to seek an offer of a FAPE for the remainder of SY 2019-2020. Instead, Petitioner made a determination on her own that a DCPS school would not be appropriate for Student and again registered with OSSE to home school Student for the remainder of that school year. Since then, it was not until Petitioner filed this due process complaint in September 2020, that she put DCPS on notice that rather than continue to home school Student, she wants an offer of FAPE.

Based on the facts of this case, and Petitioner's repeated action to home school Student and seek acknowledgement of same from OSSE for each school year, and her repeated inaction to make clear to DCPS that she wanted an offer of a FAPE for Student, the Hearing Officer concludes that Petitioner did not sustain the burden of persuasion by a preponderance of the evidence that DCPS failed to make a legally required offer of a FAPE to Student for SY 2018-2019 or SY 2019-2020, and concludes that DCPS did not deny Student a FAPE.

Issue 2: Whether DCPS denied Student a FAPE by failing to comprehensively reevaluate Student and offer Student a FAPE as of August 2019.

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

34 C.F.R. § 300.303 provides:

- (a) General. A public agency must ensure that a reevaluation of each child with a disability is conducted in accordance with Sec. Sec. 300.304 through 300.311--
 - (1) If the public agency determines that the educational or related services needs, including improved academic achievement and functional performance, of the child warrant a reevaluation; or
 - (2) If the child's parent or teacher requests a reevaluation.
- (b) Limitation. A reevaluation conducted under paragraph (a) of this section--
 - (1) May occur not more than once a year, unless the parent and the public agency agree otherwise; and
 - (2) Must occur at least once every 3 years, unless the parent and the public agency agree that a reevaluation is unnecessary.

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

Students are also entitled to a reevaluation of their disability upon a parental request, provided that no reevaluation occurs "more frequently than once a year," though a requested reevaluation must occur "at least once every 3 years." 34 C.F.R. § 300.303(a)(2); see *Cartwright v. Dist. of Columbia*, 267 F. Supp. 2d 83, 87 (D.D.C. 2003) ("DCPS' failure to comply with [the parent's] request clearly violates the language of [34 C.F.R. § 300.303].").

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

Generally, when a child has been evaluated for special education eligibility, and the appropriateness of the agency's evaluation is at issue, the hearing officer must consider whether the agency adequately gathered functional, developmental and academic information about the child's needs to determine the content of the IEP in all areas of suspected disability and that the evaluation was sufficiently comprehensive to identify all of the child's needs. 20 U.S.C. §§ 1412(a)(6)(B), 1414(b)(1-3); 34 C.F.R. §300.304(b)(1-3), (c)(4, 6).

Pursuant to § 300.305 (a) As part of an initial evaluation (if appropriate) and as part of any reevaluation, the IEP Team and other qualified professionals, as appropriate, must— (1) Review existing evaluation data on the child, including— (i) Evaluations and information provided by the parents of the child; (ii) Current classroom-based, local, or State assessments, and classroom-based observations; and (iii) Observations by teachers and related services providers; and (2) On the basis of that review, and input from the child's parents, identify what additional data, if any, are needed to determine— (i)(A) Whether the child is a child with a disability, as defined in § 300.8, and the educational needs of the child; or (B) In case of a reevaluation of a child, whether the child continues to have such a disability, and the educational needs of the child; (ii) The present levels of academic achievement and related developmental needs of the child; (iii)(A)

Whether the child needs special education and related services; or (B) In the case of a reevaluation of a child, whether the child continues to need special education and related services; and (iv) Whether any additions or modifications to the special education and related services are needed to enable the child to meet the measurable annual goals set out in the IEP of the child and to participate, as appropriate, in the general education curriculum.

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

All areas "related to the suspected disability" should be assessed, including academic performance, health, vision, hearing, social and emotional status, general intelligence (including cognitive ability and adaptive behavior), communicative status, and motor abilities. D.C. Mun. Regs. Title. 5E § 3005.9(g). The evaluations must be "sufficiently comprehensive to identify all of the child's special education and services needs." D.C. Mun. Regs. Title 5E § 3005.9(h) (2007).

Requests for evaluations/reevaluations are to be conducted in a timely manner. *Herbin v. Dist. of Columbia*, 362 F. Supp 2d. 254, 259, 261 (D.C.C. 2005).

In addition to asserting that DCPS was obligated to offer Student a FAPE for SY 2019-2020, in the case at bar, Petitioner asserts that DCPS knew Student had not been comprehensively evaluated since October 2016, and knew or should have known Student's triennial evaluation was due in 2019 at the time she was attempting to enroll Student in School B.

The Court in *Vinyard* also stated:

"The multi-disciplinary team must review the data from any reevaluation and determine, among other things "whether the child continues to need special education and related services" and "whether any additions or modifications to the special education and related services are needed to enable the child to meet the measurable annual goals set out in the individualized education program." *Id.* § 1414(c)(1)(B). Nothing in this section limits the District's responsibilities to reevaluating only disabled students enrolled in public schools. If, after reevaluation G.V.'s parents once again decline services under the IEP and maintain his enrollment in a private school, the District is correct that pursuant to section 1412(a)(10) the District is not required to provide services to G.V. under the IEP... However, once the Defendants sought reevaluation of G.V. and a new IEP for the following school year the District was required to create an IEP."

In the case at bar, unlike the facts in *Vinyard*, which Petitioner cites as authority for her claim against DCPS, there is no evidence that Petitioner sought reevaluation of Student in SY 2019-2020. Although DCPS has an obligation to reevaluate students at least triennially, there is no obligation to do so when a parent is not seeking an offer of FAPE from the LEA. Based upon

the facts and rationale discussed in issue #1 above, the Hearing Officer concludes that Petitioner did not sustain the burden of persuasion by a preponderance of the evidence that DCPS failed to reevaluate Student during SY 2019-2020, and concludes that DCPS did not deny Student a FAPE.

It is apparent based upon Petitioner's filing of this due process complaint that Petitioner is now seeking an offer of FAPE from DCPS that will address Student's unique needs, including comprehensive and up to date evaluation(s). As a result, the Hearing Officer strongly suggests that the parties, if they have not already done so, act promptly to grant DCPS authorization to conduct evaluations and that DCPS promptly evaluate Student, determine Student's continued eligibility for special education and related services and make an appropriate offer of a FAPE for SY 2020-2021.

ORDER:

Petitioner's due process complaint is hereby dismissed with prejudice and all 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 concerning 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 9, 2020

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