District of Columbia
Office of the State Superintendent of Education
Office of Dispute Resolution
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Parents, on behalf of Student,[1]	**)**	
Petitioners,	**)**	
	)	**Hearing Dates: 10/19/21; 10/20/21;**
	)	**10/27/21; 11/4/21; 11/29/21; 12/3/21**
v.	**)**	**Hearing Officer: Michael Lazan**
	)	**Case No. 2021-0136**
District of Columbia Public Schools,	**)**	
Respondent.	**)**	

HEARING OFFICER DETERMINATION

I. Introduction

This is a case involving an X-year-old student (the "Student") who is currently eligible for services as a student with Multiple Disabilities (Emotional Disturbance, Other Health Impairment). A due process complaint ("Complaint") was received by District of Columbia Public Schools ("DCPS" or "Respondent") pursuant to the Individuals with Disabilities Education Act ("IDEA") on September 8, 2021. The Complaint was filed by the Student's parents ("Petitioners"). On September 15, 2021, Respondent filed a response. A supplemental response was filed on October 4, 2021. The resolution period expired on October 8, 2021.

II. Subject Matter Jurisdiction

This due process hearing was held, and a decision in this matter is being rendered, pursuant to the IDEA, 20 U.S.C. 1400 et seq., its implementing regulations, 34 C.F.R.

[1] Personally identifiable information is attached as Appendix A and must be removed prior to public distribution.

Sect. 300 et seq., Title 38 of the D.C. Code, Subtitle VII, Chapter 25, and the District of Columbia Municipal Regulations, Title 5-E, Chapter 30.

III. Procedural History

Petitioners moved for an expedited hearing on September 8, 2021. This motion was denied by order dated September 16, 2021. A prehearing conference was held on October 4, 2021. Attorney A, Esq., counsel for Petitioners, appeared. Attorney B, Esq., counsel for Respondent, appeared. A prehearing conference order was issued on October 9, 2021, summarizing the rules to be applied in the hearing and identifying the issues in the case. The order was revised on October 9, 2021.

The hearings were conducted through the Microsoft Teams videoconferencing platform, without objection. Petitioners were represented by Attorney A, Esq. Respondent was again represented by Attorney B, Esq. This was a closed proceeding.

The matter proceeded to trial on October 19, 2021, and continued on October 20, 2021, and October 27, 2021. Respondent orally moved to dismiss on October 19, 2021, and again on October 27, 2021. These motions were denied on the record by this Hearing Officer. On November 5, 2021, Petitioners moved to extend the timelines on consent in order to add additional hearing dates. This motion was granted on November 19, 2021, and the deadline for the Hearing Officer Determination ("HOD") was changed to December 20, 2021. There were two additional days of testimony: November 4, 2021, and November 29, 2021. After testimony concluded, the parties presented closing arguments on December 3, 2021. Both parties then submitted a list of closing authorities on December 6, 2021.

During the proceeding, Petitioners moved into evidence exhibits P-1, P-2, P-5 through P-7, P-8, P-10 through P-12, P-14 through P-19, and P-21 through P-25. Objections were filed with respect to exhibits P-6, P-7, P-17 through P-19, and P-21. These objections were overruled. Exhibits P-1, P-2, P-5 through P-7, P-8, P-10 through P-12, P-14 through P-19, and P-21 through P-25 were admitted. Respondent moved into evidence exhibits R-1 through R-15 without objection. Petitioners presented as witnesses, in the following order: Witness A, a psychologist (expert in psychology); Witness B, an educational consultant (expert in special education programming and placement); the Student's mother ("Mother"); Witness C, a clinical therapist (expert in social work with an emphasis on the treatment of children with trauma); and Witness D, director of admissions at School D. Respondent presented as witnesses: Witness E, special programs manager at OSSE; Witness F, special education coordinator at School C (over objection); Witness G, manager of the DCPS CIEP team (expert in special education programming and placement); and Witness H, a clinical director at School C. On November 3, 2021, DCPS learned that Witness H was available and sought permission to add this witness on another hearing date. Witness H had not been previously disclosed on DCPS's witness list. Over the objection of Petitioners, this Hearing Officer granted the motion on the condition that Witness A be allowed to observe the testimony of Witness H. Witness A then testified in response to the testimony of Witness H. Witness I, a monitoring specialist at DCPS (expert in special education programming and placement), was then also presented, and Respondent rested. After the conclusion of Respondent's case, the Mother presented rebuttal on November

29, 2021. The parties presented closing oral arguments on December 3, 2021, and submitted lists of citations to this Hearing Officer on December 6, 2021.

IV. Issues

As identified in the revised Prehearing Order and in the Complaint, the issue to be determined in this case is as follows:

Did Respondent violate an HOD by failing to place the Student at a school that provides him/her with a residential facility that can appropriately address his/her needs related to the trauma of adoption and abandonment? If so, did Respondent act in contravention of 34 C.F.R. 300.320, Endrew F. v. Douglas County School District, 137 U.S. 988 (2017), and Hendrick Hudson Bd. of Educ. v. Rowley, 458 U.S. 176 (1982)? If so, did Respondent deny the Student a Free Appropriate Public Education ("FAPE")?

Petitioners contended that the OSSE-approved schools recommended for the Student do not provide programming to address his/her issues relating to adoption and abandonment, as required in an HOD issued by Hearing Officer Terry Banks in case number 2020-0147. For these issues, the burden of persuasion is on Respondent, provided that Petitioners present a *prima facie* case.

V. Findings of Fact

1. The Student is an X-year-old who is eligible for services as a student with Multiple Disabilities (Emotional Disturbance, Other Health Impairment). The Student has severe behavioral issues linked to his/her difficulties accepting the circumstances surrounding his/her adoption as a young child. The Student has always been a "fairly challenging child," but with psychotherapy and medication, the Student's behavioral issues were manageable, for the most part, until the fall of 2018, when the Student became progressively agitated, angry, and aggressive. Testimony of Witness A; Testimony of Mother; Testimony of Witness C; P-3-1.

2. In February, 2019, the Student started at School A, a "full-time" special education school with small class sizes. Testimony of Mother. However, the Student was not able to manage the environment at School A. The Student engaged in multiple outbursts and had difficulty regulating inside the classroom. One of the issues at School A was the use of a Positive Behavior Intervention System ("PBIS") to regulate student behavior. This system, which gave students "points" for good behavior, was not a good fit for the Student, who would get upset and angry when s/he was unable to gain points. Testimony of Witness C.

3. Also in 2019, the Student began therapy with Witness C, a clinical social worker who is an expert in social work with an emphasis on the treatment of children with trauma. Witness C employed Trauma-focused Cognitive Behavioral Therapy ("TF-CBT") to address the Student's behavioral problems. TF-CBT focuses on understanding how thoughts can create physical reactions and sensations. Witness C also employed Dialectical Behavior Therapy ("DBT"), which is similar to TF-CBT but usually used for individuals with personality disorders and "very dysregulated" behavior. The Student had difficulty with the "cognitive coping"/"cognitive restructuring" aspect of TF-CBT, which is an important part of the treatment. Witness C ultimately concluded that TF-CBT did not and could not work for the Student. Testimony of Witness C; Testimony of Witness A.

4. In or about summer, 2019, the Student's behavior worsened. Testimony of Mother. The Student was evaluated by Witness A, and the ensuing report, issued on October 14, 2019, found the Student to be an emotionally fragile person with "highly disordered attachment." The report indicated that the Student was traumatized by his/her

perceived abandonment by his/her birth mother, who did not give up some of the Student's siblings, and by the fact that the Student looks very different from his/her adoptive parents and other family members. The evaluation found that this adoption-related trauma was consistent with Post-Traumatic Stress Disorder ("PTSD") and that the Student also had symptoms of Reactive Attachment Disorder and Disinhibited Social Engagement Disorder, though s/he did not meet the full criteria for either diagnosis. Witness A felt that the Student needed praise, could be withdrawn or ill at ease with people, misperceived others' intentions, and would lash out at others to test how far s/he could push them without being abandoned. Witness A indicated that the Student escaped to fantasy, imagining, and creating a life with his/her birth family, while sometimes rejecting and lashing out at his/her adoptive family, whom s/he loved and needed. The Student was seen as especially sensitive to anything that might be perceived as negative judgment or rejection. Witness A noted that the Student was previously diagnosed with Pediatric Bipolar Disorder and medicated for it, and that the Student considered self-harm as a means of seeking attention. The Student was also found to meet the criteria for a secondary diagnosis of Anxiety Disorder, Unspecified, and Attention Deficit Hyperactivity Disorder, Combined Type, with related executive functioning weaknesses. Witness A recommended a "considerate," highly structured, nurturing, low-stress environment with safety and support measures and a positive behavior modification system. P-2.

5. The Student continued at School A for the 2020-2021 school year. However, the Student was increasingly dysregulated at school and needed a 1-to-1 aide to function. The Student engaged in verbal and physical aggression, elopement, and other

behaviors, and struggled with virtual instruction. The Student had particular issues with the points system used by the school to regulate behavior. The Student would get upset if s/he did not gain enough points, then destroy objects and places, including his/her bedroom. The Student was hospitalized due to his/her behavior on August 6, 2021, at Hospital A, where s/he stayed for approximately one month. Testimony of Mother.

6. On August 23, 2021, an HOD was issued by Hearing Officer Terry Michael Banks. This HOD ordered DCPS to convene an Individualized Education Program ("IEP") meeting for the Student within fifteen days of the issuance of the HOD and write an IEP to provide the Student with placement in a residential facility, preferably one with experience handling children who suffer trauma due to adoption or abandonment. P-7-26. On August 25, 2021, Petitioners and DCPS agreed by email to amend the Student's IEP without a meeting "to speed up the process." R-3-2. Petitioners signed a corresponding waiver agreeing to amend the IEP without a meeting. Petitioners also signed the IEP amendment form, agreeing to the amendment. P-8-1.

7. The IEP was amended on August 26, 2021, to change the Student's placement to a residential facility. P-8-3. Specifically, the IEP was changed with the following language: "The IEP is being amended to change the placement to a residential facility, pursuant to a 8/23/21 hearing officer determination." P-8-3. The IEP contained "Area of Concern" sections in mathematics, reading, writing, motor skills/physical development, and emotional, social and behavioral development. The IEP also reported that the Student had difficulty in math calculation and fluency, struggled to retain information, and had issues with reading comprehension strategies. P-8.

8. The IEP stated that the Student's verbally aggressive behaviors toward staff and other students had increased in the past month, and indicated that the Student presented with "highly disordered attachment," which affected his/her interpersonal relationships. The IEP reported that the Student was traumatized by his/her abandonment by his/her birth mother, and that the Student required continuous reassurance, praise, and positive interaction to feel stable. The IEP noted that "(a)s soon as [s/he] does not have such interaction, or as soon as someone else receives attention s/he wants, the Student feels de-stabilized (sic)." The IEP also stated that the Student could be highly negatively reactive, withdrawn, and ill at ease with people. The IEP reported that the Student was terrified of being abandoned and would lash out at others to test how far s/he could push them without being abandoned. The IEP also reported that the Student was fragile, vulnerable, and easily destabilized. P-8-17. The IEP further indicated that the Student's behavior prevented other children from learning, and that the Student was sometimes off-task during virtual instruction, engaging in threats and insults, even with a 1-to-1 aide. The IEP reported that school staff used a variety of techniques to address the Student's behavior in virtual class, including using a breakout room, prompts to use sensory tools, and a PBIS system that gave the Student an opportunity to earn one point per class, along with other point awards and deductions. P-8-5.

9. The IEP provided the Student with 30.5 hours of specialized instruction outside general education, with sixty minutes of occupational therapy and sixty minutes of behavior support services per week. The IEP also recommended a range of "Other Classroom Aids and Services," including repetition of directions, a small group setting, a

"safe space," preferential seating, direct social skills instruction, manipulatives, and breakout rooms for video instruction. P-8-24.

10. The selection of a school setting for the Student was deemed to be the responsibility of OSSE, per a local law. On or about September 2, 2021, OSSE convened a meeting with Petitioners and Respondent to review the setting selection process. At the meeting, Witness E from OSSE said that OSSE was considering four approved residential schools for the Student. Petitioners shared that the Student had been accepted at School D, which was not approved by OSSE. Testimony of Witness E.

11. The Student remained hospitalized during August and at least part of September, 2021. At one point, the Student transitioned to part-time hospitalization, receiving instruction through the learning lab in Hospital A's partial hospitalization plan. Testimony of Mother. Two of the schools that OSSE considered for the Student ultimately did not accept him/her. P-14-1; Testimony of Witness E. On September 13, 2021, the Student was accepted at School D. P-10. On September 22, 2021, School C sent an acceptance letter for the Student, with acceptance contingent on Petitioners' signature acknowledging the services offered by the school. On September 23, 2021, OSSE issued a conditional assignment letter for the Student to attend School B, indicating that an official letter placing the Student at School B would be issued by OSSE once the steps included in the September 23, 2021, acceptance letter were completed.

12. Shortly thereafter, Petitioners sent OSSE an email which stated: "This email is to officially serve notice that the parents have made arrangements for [the Student] to start at School D on October 1, 2021." P-16-2-3.

13. On or about September 21, 2021, Witness A, Petitioners, and two representatives from School B discussed whether the School B program specializes in working with students who have issues with attachment and adoption trauma. School B Representative #1 and School B Representative #2 shared that the school is a "trauma informed" center that does not offer attachment-specific therapy, and that School B should not be the Student's school if the Student needs attachment-specific therapy. School B Representative #1 then explained that the school would approach the Student's trauma using TF-CBT, modified to support adopted children with associated trauma and relationship feelings. School B Representative #1 also indicated that the school's program is based on Applied Behavioral Analysis ("ABA") and that they use a PBIS system that allows students to earn points in fifteen-minute increments. If students get frustrated by not earning points, they are given time to process what they could have done differently. The School B representatives also indicated that the school uses elements of the "ARC" model, which can address attachment issues, and "Trauma Informed Care" based on a "Risking Consequences" protocol. Petitioners and Witness A indicated to the School B representatives that the Student had not been successful with PBIS or TF-CBT. School B Representative #1 said that the school's program could not be changed and that if the school's interventions, including its points system, were not "good" for the Student, then School B was not the right program for him/her. P-21; Testimony of Witness A.

14. Petitioners were then asked to sign a document acknowledging the services that School B offers, since the treatment modalities School B was being asked to implement were not in the Student's IEP or evaluations. P-11; P-14; Testimony of Witness E. Petitioners would not sign the document. P-11; Testimony of Mother.

15. As a result, on September 29, 2021, OSSE provided Petitioners with an offer of placement at School C, a school run by the same organization as School B. P-16-2; P-15-1. On or about October 1, 2021, the Student started school at School D. Testimony of Witness D.

16. On or about October 7, 2021, a meeting was set up between School C and Petitioners. Testimony of Witness E. The meeting was not held because School C wanted its clinical director to be on the call and she was unavailable. School C said that they would reschedule the meeting. R-11-1. Witness E then spoke on the phone with a representative from School C, who asked Witness E if it was necessary to meet because the Student was already attending another program. Testimony of Witness E.

17. School C is a residential school that works with special education students. It is part of a national organization that operates several schools, all of which provide services with a PBIS-based approach. School B is another such school. Testimony of Witness F. School C's PBIS- based program uses a framework that encourages safe behaviors to promote the reduction of challenging behaviors. The PBIS program teaches being respectful, responsible, and safe. R-8-5. Abandonment issues would be addressed through TF-CBT. The school does not have a specific model to deal with attachment issues. School C also provides 330 minutes of daily special education, speech and language therapy, twenty-four hour staff support, and a multi-disciplinary treatment approach. The school contains certified special education teachers as well as "general education" staff, with social workers from State X, where the school is located. These social workers are for State X students only. For behavioral concerns, a student may be assigned a 1-to-1 aide as needed. Students at School C receive sixty minutes of

individual therapy, 120 minutes of group therapy, and 180 minutes of activity therapy per week from certified therapists. The school also provides family therapy and music therapy, and occupational therapy is available off campus. The school's treatment team includes a person who meets with staff monthly for a comprehensive review of students' treatments, including reviewing any interventions that have been put in place. Parents are included in this meeting. The school uses the TF-CBT approach to address trauma and has students who were adopted and feel abandoned, but general abandonment issues are more common, and the school specializes in helping children who suffer from sex-trafficking and related trauma. There is a certified recreational therapist on staff. Students are assigned an individual therapist, licensed in counseling and social work, for 1-to-1 weekly therapy sessions and family therapy sessions. There is also a DBT skills group focused on mindfulness, emotional regulation, distress tolerance, and interpersonal effectiveness, and group therapy focusing on issues such as social skills and anger management. The school also contains a Board Certified Behavior Analyst ("BCBA") who can create Functional Behavior Assessments ("FBAs") and individualized support plans for students. Testimony of Witness F; Testimony of Witness H.

18. School D is specifically geared to students with developmental trauma and adoption-related needs. The school does not use TF-CBT, PBIS, or ABA as treatment modalities. Instead, the program's approach is called Dyadic Developmental Psychotherapy ("DDP"), which is designed to teach empathy, among other things. Testimony of Witness A. Instead of trying to change students' behavior, School D's mission is to help children process trauma, feel accepted by their families, and develop feelings of safety and security, based on the theory that behavior will change when the

trauma is successfully addressed. Testimony of Witness B. The goal of School D's program is to enable healthy relationships, including through actions of trust and accountability, calm students' nervous systems, and get students to be more regulated and able to use logic and reasoning. Testimony of Witness D. The school's brochure states:

> [DDP] involves creating a safe setting in which the child can begin to explore, resolve, and integrate a wide range of memories, emotions, and current experiences, that are frightening, shameful, avoided or denied. Safety is created by insuring that this exploration occurs within an intersubjective context characterized by nonverbal attunement, reflective dialogue, acceptance, curiosity, and empathy. As the process unfolds, the client is creating a coherent life-story which is crucial for attachment security and is a strong protective factor against psychopathology.

P-18. No other school has the same treatment model. Testimony of Witness D.

19. School D was founded specifically to work with adopted children. Eight-five to ninety-five percent of the approximately 100 students at the school were adopted. School D's services also include weekly group occupational therapy, sensory integration, and brain mapping, including two "neurofeedback" sessions per week. The school is licensed by State Y, where it is located. Some students at the school are funded by school districts. X Gender students receive instruction in the morning, from 8:30 A.M. to 12:30 P.M. or 1:00 P.M., with a different schedule on Friday that includes more extracurricular activities. In the afternoon, the school has physical education, animal-assisted therapy, and organized recreational activities that are considered classes. The day ends after dinner. Parents are involved in weekly family therapy and there is a "family bridge" portal for parents to review, including academic information, a treatment team summary, and photographs. Some of the teachers at the school are certified in special education. Additional support is provided in the classroom, including 1-to-1

assistance. There are also two IEP coordinators and a special education director who push into the classrooms as needed. In the dorm, there are overnight residential staff and cameras. Testimony of Witness D; P-18. Petitioners pay the school a self-pay rate, which is about one-third of the rate charged to institutions. Petitioners have filed an insurance claim on the Student's behalf. Testimony of Mother.

20. At the start of the Student's time at School D, there was an incident between the Student and another child. As a result, the Student was assigned to a "safety team" home, where s/he stayed for a few days. The safety team has therapeutically-trained staff who accompany students showing aggression, for their own protection. Although the Student has been verbally and physically aggressive at the school, s/he has left the safety team home and is back in the school's general population, regularly attending classes. Testimony of Witness B; Testimony of Mother.

VI. Conclusions of Law

The burden of proof in District of Columbia special education cases was changed by the local legislature through the District of Columbia Special Education Student Rights Act of 2014. That burden is expressed in statute as the following: "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." D.C. Code Sect. 38-2571.03(6)(A)(i). Accordingly, for the sole issue in this case, which relates to the

appropriateness of the Student's IEP and placement, the burden of persuasion is on Respondent if Petitioners present a *prima facie* case.

Did Respondent violate an HOD by failing to place the Student at a school that provides him/her with a residential facility that can appropriately address his/her needs related to the trauma of adoption and abandonment? If so, did Respondent act in contravention of 34 C.F.R. 300.320, Endrew F. v. Douglas County School District, 137 U.S. 988 (2017), and Hendrick Hudson Bd. of Educ. v. Rowley, 458 U.S. 176 (1982)? If so, did Respondent deny the Student a FAPE?

Petitioners contended that the OSSE-approved schools recommended for the Student do not provide programming that would address the Student's issues relating to adoption and abandonment. Petitioners argued that Respondent did not even try to find a placement that would appropriately address the Student's adoption and abandonment issues and simply looked for a school setting that was residential. Petitioners also argued that Respondent restricted them from investigating whether School C was an appropriate placement, pointing out that they did not know much about the school when they were forced to decide on the Student's program, and that they were accordingly denied meaningful participation in the determination of the provision of FAPE. Petitioners argued that the Student's response to previous therapeutic interventions demonstrated the inappropriateness of the methodologies used at School C. Petitioners also contended that no deference should be paid to witnesses who do not know the Student, that the offer for the Student to attend School C was untimely, that "educational placement" decisions must be made in consideration of the Student's unique needs, and that Petitioners have acted in good faith throughout the IEP and placement process.

Respondent conceded that Petitioners made a "strong case" but noted that they agreed to the IEP and that OSSE then implemented the IEP per its terms and conditions. Respondent contended that it is the IEP that drives the placement, and that Petitioners

could and should have provided DCPS with information from Witness A or Witness C to the effect that the Student should not be placed at a school that uses PBIS or TF-CBT. Respondent also objected to claims that were beyond the scope of the Complaint and the Prehearing Order, and underscored that OSSE is the entity that selects a school in this situation, not DCPS. Respondent also suggested that Petitioners' claim that they could not talk to the staff at School C was disingenuous because Petitioners had decided on School D well before School C was introduced. Respondent added that it did try to engage Respondents in the process through the September 2, 2021, meeting, which included representatives of the Student's former school, School A. Respondent also pointed out that School D could not be considered for the Student because state law prevents students from being placed in unapproved schools. Finally, DCPS argued that it has discretion to select schools for students and that such discretion should not be subject to review by an impartial hearing officer.

In Hendrick Hudson Bd. of Educ. v. Rowley, 458 U.S. 176 (1982), the Court explained that an IEP must be reasonably calculated to enable the child to receive benefit. Id. at 204. The Court's decision in Endrew F. ex rel. Joseph F. v. Douglas County School District RE-1, 137 S. Ct. 988 (2017), elaborated on the doctrine established in Rowley. The Court reasoned that "a student offered an educational program providing merely more than *de minimis* progress from year to year can hardly be said to have been offered an education at all." Id. at 1001. The Court held that IDEA "demands" a higher standard—"an educational program reasonably calculated to enable a child to make progress appropriate in light of the child's circumstances." Id. The Court stated that its ruling "should not be mistaken for an invitation to the courts to substitute their own

notions of sound educational policy for those of the school authorities." Id. Still, the Court stated that courts should fairly expect those authorities to offer a "cogent and responsive explanation" for their decisions. Id. at 1002. The District of Columbia Circuit Court of Appeals has accordingly found that Endrew F. raised the bar on what counts as an adequate education under the IDEA. Z. B. v. District of Columbia., 888 F.3d 515, 517 (D.C. Cir. 2018).

As a preliminary matter, DCPS is correct that the scope of Petitioners' current claims go beyond the language in the Complaint. There is nothing in the Complaint or the Prehearing Order that raises issues relating to parental involvement or the lateness of the school placement. A party requesting a due process hearing may not raise issues at the hearing that were not raised in the due process complaint, unless the other party agrees otherwise. 34 C.F.R. Sect. 300.511(d); Adams v. District of Columbia, 285 F. Supp. 3d 381, 394 (D.D.C. 2018); Damarcus S. v. District of .Columbia, 190 F. Supp. 3d 35, 55 (D.D.C. 2016). This Hearing Officer therefore must not, and shall not, consider Petitioners' claim to the effect that they were not provided with sufficient information about School C prior to the Student's assignment to that school by OSSE. Nor will this Hearing Officer consider Petitioners' contention that DCPS was late when it assigned the Student a school in late September, 2021.

The main issue here is whether of School C, which was recommended for the Student by DCPS and OSSE, is appropriate for this Student. School C's program was discussed extensively through the testimony of Witness H, the clinical director of the school, who was called as a witness by Respondent in the middle of the litigation, over Petitioners' objection. However, the direct examination of Witness H contained virtually

no reference to adoption or abandonment issues until Respondent's counsel asked whether, since 1983, it has been common for her to work with students suffering from trauma from issues relating to adoptions and/or abandonment. Witness H initially responded "between those two, very common" but then downplayed the school's experience with adopted children, saying "probably more general abandonment." Then, instead of explaining how the school addresses issues relating to adoption, Witness H began discussing how the school specialized in working with children who have experienced trauma from commercial exploitation and sex-trafficking. Similarly, Witness F, a special education coordinator at School C, did not even mention adoption once in her direct examination.

Additionally, both Witness H and Witness F testified that School C uses PBIS to regulate student behavior; Witness H discussed how the school uses a points system to encourage positive behavior. But the record establishes that, after the Student's experience at School A, it was not advisable to use a PBIS system for the Student. The credible testimony of Witness A and Witness B established that PBIS was a main reason for the Student's extreme behavioral issues at School A, which included two threats to kill other students. As Witness A explained, the Student reacted to PBIS at School A by feeling a significant level of shame when s/he was unable to earn points. Outbursts then resulted, as detailed in the seven-page list of aggressive acts included in the Appendix to Hearing Officer Banks's HOD.

The testimony of Witness A and Witness B was corroborated by a conversation that Petitioners and Witness A had with School B. On September 21, 2021,[2] Petitioners and Witness A spoke to School B Representative #1 and School B Representative #2 to find out more about the program at School B. According to Witness A, both School B representatives concluded that the school's PBIS-based program would be inappropriate for the Student if the Student had not responded to a PBIS-based program at School A. There is no dispute in the record that the program at School B is similar to the program at School C. DCPS did not call these two School B representatives as witnesses in this proceeding to rebut these contentions, or otherwise explain what they meant when they were talking to Petitioners and Witness A.

Witness H also discussed School C's use of the TF-CBT approach to behavior, which focuses on understanding how thoughts can create physical reactions and sensations. However, Witness C testified that she has employed this technique with the Student for more than a year and that the technique was not successful because the Student could not get through the "cognitive coping" portion of the program. Respondent did not rebut this with any evidence or testimony to establish that the TF-CBT approach would work for the Student during the 2021-2022 school year.

Moreover, the Student has attachment issues because his/her birth parents put [redacted] up for adoption but did not put [redacted] siblings up for adoption. The Student's IEP states that the Student "presents with highly disordered attachment." The IEP goes on to explain that the Student feels abandoned by his/her birth mother, who did not put her other

[2] Respondent was notified of this conversation through an email sent on September 27, 2020. P-14-1.

children up for adoption. However, School C did not indicate that it has a program for attachment-related issues. In fact, Witness H said that School C does not have a specific program for attachment issues.

In its post-hearing submission, DCPS argued that deference should be paid to OSSE's determination that School C was appropriate for the Student. However, deference is only applicable where the deciding agency "reasonably calculated" the Student's program with "cogent and responsive" reasoning. Any reasonable interpretation of Hearing Officer Banks's HOD requires DCPS and OSSE to at least try to find the Student a program that addresses the Student's adoption and abandonment issues. There is nothing in the record to suggest that DCPS nor OSSE genuinely tried to find the Student a program that addresses his/her adoption and abandonment issues. In particular, there is nothing in the record to establish that DCPS or OSSE carefully and thoughtfully went through the features of all of the approved residential schools and then made a calculated decision on which schools could best service the Student's adoption and abandonment issues. Instead, OSSE appears to have been driven by the IEP, which did not include language relating to a school that has experience in adoption and abandonment issues. Accordingly, OSSE selected four potential residential schools for the Student, with a range of modalities, and offered the Student placement at the school that accepted [redacted], which ended up being School C.

DCPS argued that the IEP governs, and that Petitioners agreed with the amended IEP, which did not include any reference to adoption or abandonment issues. DCPS therefore suggested that DCPS or OSSE had no obligation to find a placement that had experience with children with adoption and abandonment issues. It is true that the

amended IEP did not completely reference the language in Hearing Officer Banks's HOD relating to the need to "preferably" find a school with experience in adoption and abandonment issues. However, there is nothing in the record to suggest that Petitioners' agreement to amend the IEP was meant to vitiate the language in Hearing Officer Banks's HOD relating to adoption and abandonment. The testimony and evidence in this case make clear that Petitioners signed the amended IEP to move the process along, since the school year was about to start, and the Student needed a school. Under the circumstances, this Hearing Officer does not agree that DCPS or OSSE were relieved of their obligation to *at least try* to provide the Student with a placement with meaningful experience in addressing adoption and abandonment issues because of the amended IEP.[3]

Respondent also objected to Petitioners' insistence on a particular methodology for the Student. Though the United States Department of Education has stated that "there is nothing in the [IDEA] that requires an IEP to include specific instructional methodologies," 71 Fed. Reg. 46,665 (2006), the commentary to the 1999 IDEA regulations does give hearing officers some leeway to require a methodology in an IEP where "there are circumstances in which the particular teaching methodology that will be used is an integral part of what is 'individualized' about a student's education" and "will need to be discussed at the IEP meeting and incorporated into the student's IEP." Fed. Reg. Vol. 64, No. 48 (March 12, 1999) at 12552. The commentary explained that, "(f)or a child with a learning disability who has not learned to read using traditional

[3] A parent's unwitting assent to an inappropriate IEP does not inoculate a local educational agency from liability if that IEP does not provide the student with a FAPE. Letter to Lipsitt, 52 IDELR 47 (OSEP Letter December 11, 2008).

instructional methods, an appropriate education may require some other instructional strategy." Id.

Petitioners allege that the Student needs a methodology other than PBIS or TF-CBT in order to refrain from extreme behavior and make meaningful progress during instruction. In support, Petitioners presented three credible witnesses who know the Student and testified consistently with each other. In contrast, DCPS did not present any persuasive testimony from witnesses who know the Student well. In fact, witnesses from DCPS continued to state that the Student should remain at School A, notwithstanding the HOD of Hearing Officer Banks. The record makes clear that the Student should not be in a school that uses an approach based on PBIS or TF-CBT to manage student behavior.

Respondent also argued that OSSE should have been the target of the Complaint, since OSSE made the decision on the Student's placement for the 2021-2022 school year. However, the local educational agency ("LEA"), not the state educational agency ("SEA"), is charged with making a FAPE available to each child with a disability in the District of Columbia, from ages 3 to 22. 5-E DCMR Sect. 3002.1. Moreover, a federal IDEA statute, 20 U.S.C. Sect. 1413(g)(1), squarely addresses the issue of whether an SEA can use payments otherwise designed for an LEA and be deemed to be providing direct services to students:

> (g) DIRECT SERVICES BY THE STATE EDUCATIONAL AGENCY
>
> (1) IN GENERAL A State educational agency shall use the payments that would otherwise have been available to a local educational agency or to a State agency to provide special education and related services directly to children with disabilities residing in the area served by that local educational agency, or for whom that State agency is responsible, if the State educational agency determines that

> the local educational agency or State agency, as the case may be:
> **(**A) has not provided the information needed to establish the eligibility of such local educational agency or State agency under this section;
> (B) is unable to establish and maintain programs of free appropriate public education that meet the requirements of subsection (a);
> (C) is unable or unwilling to be consolidated with 1 or more local educational agencies in order to establish and maintain such programs; or
> (D) has 1 or more children with disabilities who can best be served by a regional or State program or service delivery system designed to meet the needs of such children.

Subsections (A), (B), and (D) are not at issue in this case. Moreover, subsection (B) does not apply because there is no contention here that DCPS cannot provide the Student with a FAPE. Research on this issue reveals that 20 U.S.C. 1413(g)(1) typically relates to a situation where the LEA is no longer operative and cannot deliver *any* services to a student, who would receive no education at all absent SEA intervention. H.E. v. Palmer, 220 F. Supp. 3d 574, 586 (E.D. Pa. 2016), rev'd on other grounds H.E. v. Walter D. Palmer Leadership Learning Partners Charter Sch., 873 F.3d 406 (3d Cir. 2017) (where the LEA has ceased to exist and cannot provide students with a FAPE, a parent may look to the SEA to vindicate their child's rights to a FAPE). That is not the case here. Nor is there any suggestion in the record that only OSSE can provide the relief sought in this case. R.J. v. Rivera, 2016 WL 4366987, at *3 (E.D. Pa. 2016) (state must assume responsibility for attorneys' fees obligation of a failed charter school); compare Lejeune v. Khepera Charter Sch., 327 F. Supp. 3d 785, 800 (E.D. Pa. 2018), aff'd sub nom. LeJeune G. v. Khepera Charter Sch., No. 18-3157, 2019 WL 3335138 (3d Cir. July 25, 2019) ("the Court concludes that the IDEA does not require an SEA to step in and fulfill IDEA resolution agreements when the LEA is merely "unwilling" to comply"). As

discussed in Chavez ex rel. MC v. N.M. Public Educ. Dep't., 621 F.3d 1275, 1283 (10th Cir. 2010): "given the policy implications of requiring the SEA to intervene in all disputes when the parents claim the LEA is not providing their child a FAPE, we hold that the SEA need not have been part of the administrative process here and reverse the district court on this issue." Caselaw in the District of Columbia is consistent with the holding in Chavez. W.S. v. District of Columbia, 2020 WL 6611048 (OSSE made school selection decision, but HOD and federal court appeal brought against DCPS only); Hill v. District of Columbia, No. 14-CV-1893 (GMH), 2016 WL 4506972, at *24 (D.D.C. Aug. 26, 2016) (though OSSE provided transportation services to the student, court made substantive determinations on claims that student was denied transportation services by DCPS); Wilson v. District of Columbia, 770 F. Supp. 2d 270 (D.D.C. 2011) (same).

Respondent also argued that a due process complaint cannot be brought to enforce an HOD. However, courts have found otherwise in this circuit, where, as here, parents alleged that the LEA failed to enforce an HOD *and* contended that the failure to enforce the HOD denied the Student a FAPE. Shelton v. Maya Angelou Public Charter School, 578 F. Supp. 2d 83 (D.D.C. 2008). Respondent also argued that this claim is effectively a claim about the Student's location of services, and that such claims should not be addressed by an impartial hearing officer. It is true that most due process claims therefore relate to the IEP, the "centerpiece" of the Act. Honig v. Doe, 484 U.S. 305, 311 (1988). It is also true that, where the IEP is not at issue, school-based claims are generally a function of whether the school can implement the IEP. Johnson v. District of Columbia, 962 F. Supp. 2d 263, 268 (D.D.C. 2013). However, parents may bring claims based solely upon an inappropriate educational placement where appropriate. W.S. v.

District of Columbia, No. 19-CV-1390 (KBJ), 2020 WL 6611048, at *4 (D.D.C. Nov. 12, 2020) (aggressive behaviors may not have been addressed in proposed school setting); Gellert v. District of Columbia, 435 F. Supp. 2d 18 (D.D.C. 2006) (hectic, unstructured environment); Shore Regional High School Board of Education v. P.S., 381 F.3d 194 (3d Cir. 2004) (proposed placement would subject a student to bullying); M.L. v. Federal Way School District, 394 F.3d 634 (9th Cir. 2005) (teacher was deliberately indifferent to the teasing of child with a disability). Here, Respondent may not have failed to implement an IEP, but it did fail to implement an HOD by failing to genuinely look for a school that could address the Student's adoption and abandonment issues. Therefore, this Hearing Officer finds that the Student was denied a FAPE for the 2021-2022 school year.

RELIEF

A school district may be required to pay for educational services obtained for a student by the student's parent, if the services offered by the school district are inadequate or inappropriate, the services selected by the parent are appropriate, and equitable considerations support the parents' claim, even if the private school in which the parents have placed the child is unapproved. Florence County School District Four et al. v. Carter by Carter, 510 U.S. 7 (1993). Courts must consider "all relevant factors" including the nature and severity of the student's disability, the student's specialized educational needs, the link between those needs and the services offered by the private school, the placement's cost, and the extent to which the placement represents the least restrictive educational environment. Branham v. District of Columbia, 427 F.3d 7, 12 (D.C. Cir. 2005).

School D provides a program specifically designed for children like the Student. In fact, eighty-five to ninety percent of students at School D were adopted. The school does not use the PBIS system or the TF-CBT approach to try to manage student behaviors. Instead, School D's approach is to develop a student's empathy and gently teach the Student how to connect with others. The school's mission is not to change behavior but to help the children process trauma, feel accepted by their families, and develop feelings of safety and security, based on the theory that behavior will change when the trauma is successfully addressed.

There is also a significant amount of academic instruction at School D. X Gender students receive academic instruction in the morning, from 8:30 A.M. to 12:30 P.M. or 1:00 P.M. There is a different schedule on Friday that includes more extracurricular activities. In the afternoon, School D has physical education, animal-assisted therapy, and organized recreational activities considered to be classes. Some teachers at the school are certified in special education, and there are two IEP coordinators and a special education director who push into the classrooms as needed. In the dorm, there are overnight residential staff and cameras. Services also include weekly group occupational therapy, sensory integration, and brain mapping, including two "neurofeedback" sessions per week. The school is licensed by State Y and there is nothing in the record to suggest that there were other options for Petitioners. Leggett v. District of Columbia, 793 F.3d 59, 73 (D.D.C. 2015). There is also nothing in the record to suggest that the practices employed by School D are unusual or experimental, and Respondent did not so argue. Respondent's main argument against School D was that it could not implement the terms of the Student's IEP. However, in Carter, the Supreme Court found that a non-public

school does not have to comply with state requirements in order for parents to be reimbursed. 510 U.S. at 13. Respondent also argued that Petitioners did not present any witnesses from School D who taught the Student. However, Respondent did not support this argument with on-point caselaw, and this Hearing Officer is not aware of any caselaw that supports this proposition. This Hearing Officer therefore finds that Petitioners have met their burden to show that School D is appropriate for the Student.

Tuition reimbursement may be reduced or denied when parents fail to raise the appropriateness of an IEP in a timely manner, fail to make their child available for evaluation by the district, or upon a finding of unreasonableness with respect to the actions taken by the parents. 20 U.S.C. Sect. 1412(a)(10)(C)(iii). Under 20 U.S.C. Sect. 1412(a)(10)(C)(iii), a denial or reduction in reimbursement is discretionary.

Respondent argued that Petitioners did not provide them with any notice that the PBIS and TF-CBT approaches were unsuccessful for the Student. In particular, DCPS argued that Petitioners should have told informed them of Witness A's conclusion that the PBIS system did not work for the Student at School A. It might have been a good idea for Petitioners to ask the school district for a formal IEP meeting to discuss Witness A's conclusions about PBIS, as well as Witness C's conclusions with respect to TF-DBT. However, Petitioners' actions were understandable. In August, 2021, these parents were managing an emergency with their child, who was hospitalized for a month. There was nothing insidious about their failure to provide DCPS with notice that a PBIS system would not work for the Student. Moreover, DCPS could have held a meeting to discuss the Student's educational issues in light of the HOD of Hearing Officer Banks and the Student's hospitalization. It is the LEA's responsibility to review each child's IEP

periodically and, if appropriate, revise its provisions to address significant new information about the child. 34 C.F.R. Sect.300.324 (b)(ii)(C); see, e.g., Letter to Borucki, 16 IDELR 884 (OSEP 1990) (student's failure to cooperate with school staff may indicate the need for, among other things, revision of the IEP, making it necessary to convene IEP meetings).

Respondent also suggested that Petitioners never considered the placement at School C and requested tuition reimbursement for School D the day after the IEP was signed. However, while Petitioners obviously preferred School D, they were willing and indeed eager to learn more about School C to see if it could provide the Student with an appropriate education. Courts generally employ a practical approach in considering whether a parent has behaved unreasonably by not being open to the school district's proposed placement and program for a child. A rigid refusal to cooperate and consider the district's proposal counts as a negative for full reimbursement. Rockwall Indep. Sch. Dist. v. M.C., 816 F.3d 329 (5th Cir. 2016) (parent refused to attend meetings after first meeting at which parent demanded private placement, and parent adopted all-or-nothing approach which caused breakdown of process). On the other hand, simply maintaining a firm view of what the child needs does not bar recovery. N.R. v. Department of Educ. of the City Sch. Dist. of the City of New York Dep't of Educ., No. 07 Cv. 9648, 2009 WL 874061 (S.D.N.Y. 2009) (holding that failure to notify school system of parent's arrangements for enrollment of child in private placement did not bar reimbursement when school system did not offer appropriate education and parent's actions did not impede IEP process); Board of Educ. v. Bauer, No. CIV. JFM–99–3219, 2000 WL 1481464, at *4 n.7 (D. Md. 2000) (rejecting "unreasonableness" as a matter of law

because of a factual issue as to whether parents were gaming the system to extract free tuition for private school, or simply hedging their bets when faced with a demonstrably under-resourced public school system); cf. Leggett, 793 F.3d at 65 (boarding school, even if not strictly necessary, was reasonably calculated to provide educational benefits and was needed in that it was the only placement on record and school district failed to offer a timely IEP).

Finally, DCPS argued that Petitioners should be denied reimbursement because they did not sign a release for DCPS to obtain records and data from School D. Witness I testified that he asked Petitioners to sign a release but they would not sign it until they were able to talk with School C. While Petitioners could have been more cooperative in this instance, Respondent and OSSE could also have done more to ensure that Petitioners had an opportunity to speak with School C before the Student was assigned there. Petitioners only found out about the program at School C during the fourth and fifth day of the hearing. Under the circumstances, this Hearing Officer finds that it would be inappropriate to reduce the tuition award on equities.

In sum, this Hearing Officer finds that Petitioners have shown that the program recommended by OSSE was inappropriate for the Student, that their unilateral placement at School D was appropriate, and that equities favor Petitioners. Contrary to Respondent's suggestion, Petitioners did not seek a "Cadillac" placement for their child. Rather, Petitioners sought a setting where their child could be regulated enough to learn, given his/her issues with adoption and abandonment. Petitioners are therefore awarded full tuition reimbursement for School D for the 2021-2022 school year, less any insurance money they have received or may receive for services rendered by School D.

VII. Order

As a result of the foregoing:

1. Respondent shall reimburse or pay Petitioners for all of the Student's tuition expenses at School D for the 2021-2022 school year, less any monies received by Petitioners as a result of insurance claims for services rendered by School D during the 2021-2022 school year.

Dated: December 20, 2021

Michael Lazan
Impartial Hearing Officer

cc: Office of Dispute Resolution
Attorney A, Esq.
Attorney B, Esq.
OSSE
[redacted]/DCPS
[redacted]/DCPS

VIII. Notice of Appeal Rights

This is the final administrative decision in this matter. Any party aggrieved by this Hearing Officer Determination may bring a civil action in any state court of competent jurisdiction or in a District Court of the United States without regard to the amount in controversy within ninety days from the date of the Hearing Officer Determination in accordance with 20 USC §1415(i).

Dated: December 20, 2021

Michael Lazan
Impartial Hearing Officer