

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

Parent on Behalf of Student, ¹	HEARING OFFICER'S DETERMINATION
Petitioner,	Hearing Dates: January 9, 2019 January 10, 2019 January 30, 2019
v.	
District of Columbia Public Schools ("DCPS") Local Educational Agency ("LEA"),	Counsel for Each Party listed in Appendix A
Respondent.	<u>Hearing Officer:</u> <u>Coles B. Ruff, Esq.</u>
Case # 2018-0276	
Date Issued: February 7, 2019	

¹ Personally identifiable information is in the attached Appendices A & B.

JURISDICTION:

The hearing was conducted, and this decision was written, pursuant to the Individuals with Disabilities Act ("IDEA"), P.L. 101-476, as amended by P.L. 105-17 and the Individuals with Disabilities Education Improvement Act of 2004, the District of Columbia Code, Title 38 Subtitle VII, and the District of Columbia Municipal Regulations, Title 5 Chapter E30. The Due Process Hearing was convened on January 9, 2019, January 10, 2019, and January 30, 2019, at the District of Columbia Office of the State Superintendent of Education ("OSSE") Office of Dispute Resolution 1050 First Street, N.E., Washington, D.C. 20003, in Hearing Room 112.

BACKGROUND AND PROCEDURAL HISTORY:

The student or ("Student") is age _____ and in grade _____.² Student resides with Student's parent ("Petitioner") in the District of Columbia. Student has been determined eligible for special education and related services pursuant to the IDEA with a disability classification of other health impairment ("OHI") due to Attention Deficit Hyperactivity Disorder ("ADHD"). District of Columbia Public Schools ("DCPS") is Student's local educational agency ("LEA"). Student attends a DCPS school ("School A")

During school year ("SY") 2015-2016, Student attended school in an LEA outside the District of Columbia and had an individualized educational program ("IEP") that prescribed a placement totally removed from the general education setting. During SY 2015-2016, Student attended a non-public therapeutic day school funded by Student's LEA at the time. At the start of SY 2016-2017, Petitioner enrolled Student in a DCPS public school ("School A"). School A conducted a thirty (30) day review and developed a DCPS IEP for Student that prescribed a placement, and a least restrictive environment ("LRE"), that was less restrictive than Student's previous IEP and placement in Student's previous LEA.

Student attended School A for the remainder of SY 2016-2017, and in SY 2017-2018. In December 2017, School A determined Student was in need of a more restrictive program and amended Student's IEP, identified a self-contained special education program in another DCPS school ("School B"), and proposed that program to Petitioner. Petitioner rejected that placement, and DCPS proposed a similar program at another DCPS school ("School C"). Student attended School C for a short time in the latter part of SY 2017-2018. Thereafter, Petitioner did not allow Student to return to School C, and Student did not attend school at all for the remainder of SY 2017-2018. At the start of SY 2018-2019, DCPS again proposed that Student attend the self-contained special education program at School B. Student began attending School B shortly after the start of SY 2018-2019, and currently remains at School B.

On October 24, 2018, Petitioner filed the current due process complaint, asserting DCPS denied Student a free appropriate public education ("FAPE") by, inter alia, failing to provide Student an appropriate individualized educational program ("IEP"), including an appropriate least restrictive environment ("LRE"), and failing to timely and comprehensively evaluate Student.

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

Relief Sought:

Petitioner seeks as relief, that DCPS be ordered to a finding that Student has been denied a FAPE, that Student requires a more restrictive placement at a full-time, self-contained, therapeutic, day school, ("School E") and that the Hearing Officer order DCPS to place Student in the placement proposed by Petitioner; and a finding that Student is entitled to compensatory in the form of tutoring, mentoring and counseling, or fund an assessment to determine compensatory education.

LEA Response to the Complaint:

The LEA filed a response to the complaint on November 20, 2018. The LEA denies that there has been any failure to provide the student with a FAPE. In its response, DCPS asserted, inter alia, the following:

The IEP and placement at School A were proper based on the information available at the time. The sole fact that Student at one time may have had a full time IEP, in another jurisdiction, does not indicate that a full time IEP was required when student started at School A. The IEP team at School A determined that student needed a more restrictive setting in December 2017, and identified School B, but Petitioner refused to allow student to attend. DCPS then identified School C. Student attended School C shortly and now attends School B, and is making progress.

Since Student has attended School Student's behaviors have gradually improved and that Student is currently making behavioral and academic progress. Student was appropriately evaluated and an appropriate FBA was in place as of October 4, 2017, and an appropriate BIP was in place as of October 30, 2017. DCPS has addressed student's behaviors appropriately and these behaviors have reduced, although they have not been eliminated. Student can obtain a FAPE at DCPS and there are no grounds to demand private placement.

Resolution Meeting and Pre-Hearing Conference:

The parties participated in a resolution meeting and the complaint was not resolved. The parties did not mutually agree to shorten the 30-day resolution period. The 45-day period began on November 24, 2018, and ended [and the Hearing Officer's Determination ("HOD") was originally due] on January 7, 2018,

The parties were not available for the hearing dates the Hearing Officer offered. The parties thereafter requested the hearing dates noted above. Thus, the hearing was continued to January 10, 2018. The parties filed a motion to extend the HOD due date correspondingly from January 7, 2019, to January 18, 2019.

Petitioner's Counsel requested that the second-day of hearing start late, necessitating a third day of hearing to complete Respondent's case. Petitioner's counsel submitted a motion to continue the hearing to January 30, 2019, and extend the HOD due date to February 7, 2019. The motion was granted and HOD is now due February 7, 2019.

The undersigned Hearing Officer (“Hearing Officer”) convened a pre-hearing conference (“PHC”) on December 10, 2018, and issued a preliminary pre-hearing order (“PHO”) on December 19, 2018, and a final revised PHO on January 1, 2019, outlining, inter alia, the issues to be adjudicated.

ISSUES:³

The issues adjudicated are:

1. Whether DCPS denied Student a FAPE by failing to provide Student with an IEP reasonably calculated to enable Student to make progress appropriate, in light of Student’s circumstances, because from November 2016 Student’s IEPs⁴ (a) were not based on current evaluations, and/or (b) did not prescribe at least 25 hours of specialized instruction per week outside general education, in a therapeutic day school, and/or (c) did not prescribe ESY services, and/or (d) did not prescribe a dedicated aide, and/or (e) did not state that Student’s behaviors impede Student’s learning, (f) and/or did not include appropriate IEP goals.
2. Whether DCPS denied the student a FAPE by failing to timely and comprehensively evaluate Student from November 2016 to September 2017.
3. Whether DCPS denied the student a FAPE by failing to implement or timely develop an appropriate functional behavioral assessment (“FBA”) and behavior intervention plan (“BIP”) by November 2016.

RELEVANT EVIDENCE CONSIDERED:

This Hearing Officer considered the testimony of the witnesses, and the documents submitted in each party’s disclosures (Petitioner’s Exhibits 1 through 68 and Respondent’s Exhibits 1 through 26) that were admitted into the record and are listed in Appendix 2.⁵ The witnesses testifying on behalf of each party are listed in Appendix B.⁶

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

⁴ This includes the IEPs developed on the following dates: November 14, 2016, October 30, 2017, January 26, 2018, and April 26, 2018.

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 six witnesses: (1) Student's parent ("Petitioner"), (2) an independent psychologist who was at one time Petitioner's educational advocate, (3) Petitioner's educational advocate, employed by the law firm representing Petitioner, qualified as an expert in IEP programming, (4) a second educational advocate, employed by the law firm representing Petitioner, qualified as an expert in neuropsychology, (5) a representative of the non-public school at which Petitioner is seeking to have student placed, (6) representative of the non-public school where Student formerly attended. Respondent presented four witnesses: (1) a DCPS psychologist, who evaluated Student, qualified as an expert in psychology (2) a DCPS social worker qualified an expert, (3) DCPS LEA representative

SUMMARY OF DECISION:

Respondent held the burden of persuasion on issue #1 after Petitioner met a prima facie case. Petitioner had both the burden of production and persuasion on issues # 2 and #3. Respondent did not sustain the burden of persuasion by a preponderance of the evidence on issue #1. Petitioner did not sustain the burden of persuasion by a preponderance of the evidence on issues #2 and #3.

Although Student has begun to make limited progress at School B since Student's IEP was amended, services increased, and LRE made more restrictive, the Hearing Officer concluded that based on the evidence of an inappropriate placement that Student was in for virtually two years, and because of Student's apparent regression academically, Student's placement at least for the remainder of SY 2018-2019 in the non-public therapeutic day school Petitioner seeks is an appropriate remedy. The Hearing Officer also awarded Petitioner compensatory education for the denial of FAPE determined in the HOD at the amounts that the parties agreed was appropriate.

FINDINGS OF FACT:⁷

1. Student resides with Petitioner in the District of Columbia and has been determined eligible for special education and related services pursuant to the IDEA, with a disability classification OHI, due to ADHD. DCPS is Student's LEA. Student attends School B, a DCPS school, where Student enrolled at the start of SY 2018-2019. (Petitioner's testimony, Respondent's Exhibit 36-1)
2. DCPS Early Stages initially evaluated Student in October 2012. Student's overall cognitive functioning was assessed as Low Average with FSIQ of 88. Student's academic achievement was also Low Average. In June 2014, Student's neuropsychological evaluation, which was conducted by Student's previous LEA, was completed. In that evaluation, Student's overall intellectual ability was in the Low Average, with a FSIQ score of 89. Student's academic achievement was Low Average to Average. Student's behavior rating scales and adaptive functioning assessments were consistent with a diagnosis of ADHD, and the evaluator noted that Student continued to require a self-contained classroom setting with a small class size and low student to teacher ratio. (Respondent's Exhibits 9-1, 9-7, 17-2, 17-3, 17-4)
3. During SY 2015-2016, Student attended school in an LEA outside the District of Columbia and had an IEP that prescribed a placement totally removed from the general education setting. The IEP prescribed 30 hours per week of classroom instruction and 1

from School B qualified as an expert witness, and (4) an LEA representative from School A qualified as an expert witness.

⁷ The evidence (documentary and/or testimony) that is the source of the Findings of Fact ("FOF") is noted within parenthesis following the finding. A document is noted by the exhibit number. The second number following the exhibit number denotes the page of the exhibit from which the fact was extracted. When citing an exhibit that has been submitted by more than one party separately, the Hearing Officer may only cite one party's exhibit.

hour per week of counseling. During SY 2015-2016 Student attended a non-public therapeutic day school ("School D") funded by Student's LEA at the time. (Petitioner's testimony, Petitioner's Exhibit 1-1, 1-40)

4. Student attended School D from April 2015 through October 2016. School D developed an IEP for Student on April 12, 2016. The IEP prescribed Student receive 30 hours per week of specialized instruction outside of general education and 1 hour per week of counseling outside of general education. Student was performing one (1) grade level behind in reading and written language, with accommodations. Student was performing on grade level in math. (Witness 2's testimony, Petitioner's Exhibits 3, 21-1)
5. In response to Student's behaviors, on April 12, 2016, the School D social worker participated in developing a BIP. Student's BIP was targeted toward Student's verbal and physical aggression, and disruptive behaviors toward staff and students. Although Student's related service log at School D reflect an "S" for Satisfactory, Student's progress was not sufficient to achieve stated goals by the end of Student's IEP period. (Witness 2's testimony, Petitioner's Exhibits 4, 5, 21)
6. On July 12, 2016, and September 20, 2016, School D sent letters to Petitioner to inform that Student was engaging in behaviors that resulted in Student being physically restrained and placed in seclusion. Student had created emergency situations and posed an imminent danger to self and others. Student demonstrated aggression toward staff and/or peers. Although School D was aware that Student was homeless for a period, there was no clear indication that Student's behavior difficulties at School D had a direct relationship to homelessness. (Witness 2's testimony, Petitioner's Exhibits 22, 23)
7. Petitioner was not pleased with Student's placement at School D because she did not see any changes in Student's behavioral issues, Student was not getting along with siblings, and Student's behavior, while at home, was uncontrollable. Petitioner also did not like the fact that School D was physically restraining Student and she had discussed her concerns with staff at School D in July 2016 and October 2016. However, while Student was enrolled in School D, Petitioner viewed Student's IEPs as being appropriate for Student's needs. (Petitioner's testimony)
8. On October 6, 2016, School D convened a meeting to discuss Student's placement. The IEP team decided that Student would be referred to another non-public school at Petitioner's request. (Witness 2's testimony, Petitioner's Exhibit 1)
9. On October 7, 2016, the School D social worker documented a conversation she had with Petitioner in which she advised Petitioner that when she began living in the District of Columbia ("D.C."), she would have to register Student in a local D.C. school. (Witness 2's testimony, Petitioner's Exhibits 20-1)
10. In October 2016, Petitioner became homeless and was living in a van in D.C. until March 2018, when she obtained an apartment in D.C. Petitioner enrolled Student in School A in October 2016 she provided School A with Student's then current IEP, FBA and BIP.

Petitioner conversed with School A staff about Student's history of elopement as well as Student's disruptive and disrespectful behaviors. Petitioner advised School A that Student had been receiving specialized instruction and related services since Student was in kindergarten, without any appreciable improvement. Despite the information, School A attempted to maintain Student, resulting in numerous calls to Petitioner to pick-up Student, due to Student's behaviors. (Petitioner's testimony)

11. School A conducted a thirty (30) day review and on November 14, 2016, developed a DCPS IEP for Student that prescribed a placement and LRE that was less restrictive than Student's previous IEP and placement in Student's previous LEA. The IEP prescribed 15 hours per week of specialized instruction outside general education and 240 minutes per month of behavioral support services outside general education. DCPS did not conduct an evaluation of Student prior to amending Student's IEP to change Student's LRE to a less restrictive setting. (Petitioner's testimony, Petitioner's Exhibit 26-1, 26-8, 26-9)
12. Student attended School A for the remainder of SY 2016-2017 and SY 2017-2018. During SY 2016-2017, according to Student's report card, Student was functioning far Below Basic in virtually every academic area in the first three advisories, and rarely displayed appropriate work habits and social skills. Student's report card for the fourth advisory of SY 2016-2017 reflects that Student's performance was not measured. In the third IEP reporting period Student made progress in IEP math goals, no progress in IEP reading and written expression goals and regressed in emotional, social, and behavioral development goals. School A's social worker provided Student with group and individual therapy to address Student's behaviors of verbal aggression, class disruption and defiance. (Petitioner's Exhibits 44, 49)
13. At the start of SY 2017-2018, School A compiled an Analysis of Existing Data ("AED") for Student that identified student as operating three grades below grade level in math, and significantly below grade level in reading and written expression. The AED noted that Student had difficulty sustaining attention, exhibiting self-regulation, was distracted by peers and nonacademic matters, and often refused to attend to assigned tasks. (Respondent's Exhibit 21-1, 21-2, 21-3, 21-4)
14. In September 2017, School A conducted a triennial psychological reevaluation of Student. The evaluation report was completed in October 2017. The evaluator reviewed Student's previous evaluations, previous achievement testing and other records, conducted a classroom observation, and conducted interviews of Student, Petitioner, Student's teachers, and service provider. (Witness 6's testimony, Respondent's Exhibit 17-1)
15. Student's overall academic achievement, as reported in the October 2017 evaluation report, was Very Low with age equivalent scores approximately two to three years below Student's grade at the time. Student had 19 discipline referrals for behaviors including fighting, being out of location, physical assault and physical aggression. (Respondent's Exhibit 17-8, 17-9, 17-10, 17-12)

16. On October 4, 2017, a DCPS social worker conducted a FBA to address Student's behaviors of refusing to attend class, leaving class without permission, work avoidance, class disruption, defiance, and verbal threats and physical aggression towards adults and peers. The FBA noted Student's behaviors had resulted in in-school and out-of-school suspensions, and an inability to access the educational curriculum. The social worker recommended that a BIP be developed. (Respondent's Exhibit 18-1, 18-10)
17. On October 30, 2017, School A conducted an annual review of Student's IEP and maintained the same level of services. DCPS also developed a BIP to address Student's verbal and physical aggression and academic disengagement, and amended Student's IEP to add 120 minutes of behavior support services inside general education, to Student's existing services outside general education. (Respondent's Exhibits 19, 20-1, 20-8, 40)
18. Because Student's negative behaviors became more consistent, at a November 2017 meeting, Student's IEP team discussed the fact that Student was no longer taking medication and the School A social worker recommended to Petitioner the use of community services to assist. The team also discussed whether Student required a more restrictive placement. Upon review of Student's progress reports, Student was not completing writing assignments, and was only making nominal progress regarding behavioral issues. (Witness 9's testimony, Petitioner's Exhibits 29, 31)
19. On December 11, 2017, DCPS issued a PWN stating that Student's IEP team concluded Student needed more time outside general education to be successful and Student would benefit from a full-time IEP. (Respondent's 23)
20. School A convened an IEP meeting on January 26, 2018. Petitioner's educational advocate attended and requested that Student's IEP prescribe full-time specialized instruction, a dedicated aide, and a therapeutic day school. The rationale for the request was Student's continued lack of academic progress and behavioral issues. At that time, DCPS claimed it would take action to place Student in a Behavior Education Support ("BES") program. (Witness 4's testimony, Petitioner's Exhibits 38)
21. School A determined Student was in need of a more restrictive program, and amended Student's IEP, identified a self-contained BES special education program in another DCPS school, School B, and proposed that program to Petitioner. Petitioner rejected that placement, and DCPS proposed a similar program at School C.
22. Student's April 2018 IEP prescribed 25.5 hours of specialized instruction outside general education, and 240 minutes per month of behavioral support services outside general education. (Petitioner's testimony, Petitioner's Exhibit 36-1, 36-9, 36-10)
23. On March 28, 2018, DCPS issued a location of services ("LOS") letter indicating Student should attend School C. (Respondent's Exhibit 16)
24. On April 26, 2018, School A convened a transition meeting with Petitioner and staff members from both School A and School C to discuss the supports that would be in place

for Student at School C, to bring the School C staff up to speed on Student's current academic and behavioral functioning and the supports that would need to be in place when Student arrived at School C. On April 26, 2018, DCPS issued a PWN that stated that Student would attend School C. (Respondent's Exhibits 13, 14)

25. Student attended School C for a few weeks in the latter part of SY 2017-2018 before being involved in an altercation with another student at School C. Thereafter, Petitioner did not allow Student to return to School C and Student did not attend school at all for the remainder of SY 2017-2018. (Petitioner's testimony)
26. At the start of SY 2018-2019, DCPS again proposed that Student the self-contained special education program at School B. Student began attending School B shortly after the start of SY 2018-2019 and remains at School B at present. (Petitioner's testimony)
27. On October 2, 2018, and October 12, 2018, School B developed a student crisis plan and student safety plan, respectively, to address Student's severe behavioral challenges of eloping and verbal and physical aggression towards peers and staff since attending School B. (Respondent's Exhibits 10, 11)
28. On October 12, 2018, School B convened a 30-day review meeting. Petitioner and her attorney participated in the meeting. The School B staff stated that Student was having some attendance and tardiness issues, but when Student attended school Student was engaged academically and making progress. (Respondent's Exhibit 8)
29. The DCPS social worker has noted that Student has made significant changes in Student's behavior, and has developed relationships and friendships at School B. When Student first arrived at School B, Student used profanity, refused to perform class assignments, eloped from class and school, and engaged in peer conflicts that resulted in physical aggression. Now, Student is better able to self-regulate and can be redirected. Student is in therapy with the social worker for one (1) hour per week, and participates in group therapy. Student was awarded Student of the Month because of the improvements in Student's behavior. (Witness 8's testimony,)
30. Although Student's behavior has improved some since attending School B, Student often attempts to manipulate teachers to get out of doing work. Student's first advisory report card for SY 2018-2019 reflects that Student is below basic in all academics and requires frequent prompting in work habits and social skills. Student has 15 days absent in the first advisory. Student has had at least one incident of elopement since attending School B in which a crisis team was alerted. (Witness 7's testimony Petitioner's Exhibit 55)
31. Petitioner claims Student was absent from school for 15-days in November 2018 due to Student being bullied. Petitioner believes that Student requires appropriate behavioral and academic supports, a full-time therapeutic day school, counseling outside of school to assist Student with coping skills, a dedicated classroom aide and a mentor. (Petitioner's testimony)

32. Petitioner's expert witness opined that there was sparse data available for the School A IEP team to base its decision to reduce Student's academic services in November 2016, and little data regarding Student's behaviors. Based upon the available data, Petitioner's expert in neuropsychology opined that Student should have been placed in a self-contained classroom with the implementation of the behavior modifications detailed in Student's November 2016 IEP. The neuropsychologist based this view on the fact that Student has had a full-time IEP since kindergarten and Student's aggressive and disruptive behaviors have continued. Student should have been provided the same level of IEP services and placement Student had prior to coming to DCPS. In addition, DCPS did not indicate that it reviewed Student's 2014 neuropsychological evaluation when the decision was made to reduce Student's specialized instructional hours in half and change Student's setting. (Witness 3's testimony)
33. Student's IEP from School D reflected that Student's academic performance was on a higher level, while Student's academic data from 2018 is indicative of academic regression. Student should be performing three (3) to four (4) grade levels ahead of Student's current academic level (Witness 3's testimony, Petitioner's Exhibit 42, 43, 54)
34. Student has interviewed at and been accepted to School E, a non-public therapeutic day school. The Program Director at School E, participated in the interview of Student along with other School E staff members. School E determined it could appropriately service Student's needs and accepted Student into School E. The school has an OSSE Certificate of Approval ("C. of A."), certified teachers, and has an assigned DCPS placement monitor, who is an IEP team member, and to whom School E provides quarterly student progress reports. The Program Director at School E is familiar with Student and Student's behaviors of verbal aggression, impulsivity, defiance and refusal to perform classroom assignments. (Witness 1's testimony, Petitioner's Exhibit 62)
35. School E has a lower school classroom for Student with five (5) students, one (1) teacher and one (1) assistant teacher. School E implements a school-wide behavioral system that includes behavioral management staff placed outside the classroom for crisis intervention. There are also five (5) in-house clinicians to provide counseling and address behaviors. School E provides small class sizes and reading intervention programs and reading teachers for students performing below grade level. The teachers provide both individual and small group instruction. (Witness 1's testimony)
36. Petitioner's educational advocate proposed a compensatory education plan to redress the denials of FAPE alleged in Petitioner complaint. The advocate recommended Student be provided 100 hours of independent tutoring, 40 hours of counseling and 60 hours of mentoring. DCPS has provided written authorization to Petitioner, dated January 2, 2019, for the compensatory education in the advocate's proposed plan. (Respondent's Exhibit 15, Petitioner's Exhibit 68)

CONCLUSIONS OF LAW:

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

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

34 C.F.R. § 300.17 provides:

A free appropriate public education or FAPE means special education and related services that--

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

Pursuant to 5E DCMR 3030.14 the burden of proof is the responsibility of the party seeking relief. *Schaffer v. Weast*, 546 U.S. 49, 126 S.Ct. 528 (2005). Petitioner has both the burden of production and persuasion on issues: # 2 and #3. Respondent held the burden of persuasion on issue #1 after Petitioner established a prima facie case on issue #1. ⁸ The normal standard is preponderance of the evidence. See, e.g. *N.G. V. District of Columbia* 556 F. Sup. 2d (D.D.C. 2008) see also 20 U.S.C. §1451 (i)(2)(C)(iii).

ISSUE 1: Whether DCPS denied Student a FAPE by failing to provide Student with an IEP reasonably calculated to enable Student to make progress appropriate in light of Student’s

⁸ DC Code § 38-2571.03 (6) provides:

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

(i) Where there is a dispute about the appropriateness of the child’s individual educational program or placement, or of the program or placement proposed by the public agency, the public agency shall hold the burden of persuasion on the appropriateness of the existing or proposed program or placement; provided, that the party requesting the due process hearing shall retain the burden of production and shall establish a prima facie case before the burden of persuasion falls on the public agency. The burden of persuasion shall be met by a preponderance of the evidence.

(ii) Where a party seeks tuition reimbursement for unilateral placement, the party seeking reimbursement shall bear the burden of production and the burden of persuasion on the appropriateness of the unilateral placement; provided, that the hearing officer shall have the authority to bifurcate a hearing regarding a unilateral placement; provided further, that if the hearing officer determines that the program offered by the public 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.

circumstances because from November 2016 Student's IEPs (a) were not based on current evaluations, and/or (b) did not prescribe at least 25 hours of specialized instruction per week outside general education in a therapeutic day school, and/or (c) did not prescribed ESY services, and/or (d) did not prescribed a dedicated aide, and/or (e) did not state that Student's behaviors impede Student's learning, (f) and/or did not include appropriate IEP goals.

Conclusion: Respondent did not sustain the burden of persuasion by a preponderance of the evidence that Student's IEPs that DCPS developed since Student arrived at DCPS in October 2016 were reasonably calculated to enable Student to make progress appropriate in light of Student's circumstances principally because they did not prescribe a sufficiently restrictive LRE and placement.

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

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

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

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

In *Andrew F. ex rel. Joseph F. v. Douglas City. Sch. Dist.* RE-1, 137 S. Ct. 988 (2017), the U.S. Supreme Court elaborated on the "educational benefits" requirement pronounced in *Rowley*. To meet its substantive obligation under the IDEA, a school must offer an IEP reasonably calculated to enable a child to make progress appropriate in light of the child's circumstances. . . . Any review of an IEP must appreciate that the question is whether the IEP is reasonable, not whether the court regards it as ideal. . . . When a child is fully integrated in the regular classroom, as the Act prefers, what that typically means is providing a level of instruction reasonably calculated to permit advancement through the general curriculum. . . . If that is not a reasonable prospect for a child, his IEP need not aim for grade-level advancement. But his educational program must be appropriately ambitious in light of his circumstances, just as advancement from grade to grade is appropriately ambitious for most children in the regular classroom. The goals may differ, but

every child should have the chance to meet challenging objectives. *Andrew F.*, supra, 137 S. Ct. at 999–1000 (citations omitted).

The key inquiry regarding an IEP's substantive adequacy is whether, taking account of what the school knew or reasonably should have known of a student's needs at the time, what the IEP offered was reasonably calculated to enable the specific student's progress....“Any review of an IEP must appreciate that the question is whether the IEP is reasonable, not whether the court regards it as ideal.” *Z.B. v. District of Columbia*, 888 F.3d 515 (D.C. Cir. 2018) citing *Andrew F.*, supra, 137 S. Ct. 988.

Removing a child with disabilities "from the regular education environment occurs only when the nature or severity of the disability is such that education in regular classes cannot be achieved satisfactorily." 34 C.F.R. § 300.550; 34 C.F.R. §300.114 see also 20 U.S.C. § (a)(5)(A) (a disabled child is to participate in the same activities as non-disabled children to the "maximum extent appropriate"); *Roark ex rel. Roark v. District of Columbia*, 460 F.Supp.2d 32, 43 (D.D.C. 2006) ("The IDEA requires school districts to place disabled children in the least restrictive environment possible.")

34 C.F.R. § 300.324 (b) Review and revision of IEPs—(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.

In determining the educational placement of a child with a disability, each public agency must ensure that the placement decision is made by a group of persons, including the parents, and other persons knowledgeable about the child, the meaning of the evaluation data, and the placement options; and is made in conformity with the Least Restrictive Environment provisions of the IDEA; and the public agency must ensure that the child's placement is determined at least annually, is based on the child's IEP, and is as close as possible to the child's home. See 34 C.F.R. § 300.116.

“Educational placement” means educational program, not the particular institution where that program is implemented.” *White v. Ascension Parish School Board*, 343 F.3d 373 (5th Cir. 2003), 39 IDELR 182. A placement is not a physical location, but a program of educational services offered to the student. *Sherri A.D. v. Kirby*, 19 IDELR 339 (5th Cir. 1992).

A student's IEP determines whether an educational placement is appropriate; the placement does not dictate the IEP. See *Roark v. District of Columbia*, 460 F.Supp.2d 32, 44 (D.D.C. 2006); *Spielberg v. Henrico Cty. Public Sch.*, 853 F.2d 256, 258 (4th Cir. 1988) ("Educational placement is based on the IEP, which is revised annually."); 34 C.F.R. § 300.116(b)(2).

Petitioner alleges Student's DCPS IEPs were inappropriate because they were not based on current evaluations, did not prescribe at least 25 hours of specialized instruction per week outside

general education in a therapeutic day school, did not prescribed ESY services, did not prescribed a dedicated aide, did not state that Student's behaviors impede Student's learning, and did not include appropriate IEP goals.

The evidence in this case demonstrates that Student's LRE prior to entering DCPS was a non-public therapeutic day school and DCPS inappropriately and abruptly changed Student's LRE and drastically reduced Student's special education services. Student floundered both academically and behaviorally for two years thereafter. Student's report card and IEP progress reports from SY 2016-2017 at School A clearly demonstrate Student was not making any progress academically or behaviorally.

At the start of SY 2017-2018 School A initiated an AED of Student, then developed a FBA and BIP for Student and then conducted a triennial psychological evaluation. It was clear to School A by November 2017 that Student was in an inappropriate placement. However, the evidence of Student's placement at School A was clear long before then.

The evidence demonstrates that rather than provide Student the level of services in the IEP Student brought from [REDACTED] previous IEP, DCPS developed an IEP, based upon a brief honeymoon period regarding Student's behavior, that fit the program that was available for Student at School A rather than provide Student the level of services and the restrictiveness of placement Student needed. Had DCPS immediately placed Student in a self-contained special education program, perhaps there would have been a greater chance of Student's success. Instead, Student was given a totally inappropriate program with reduced services. This drastic change was insufficiently supported by evidence of Student's longer-term disruptive behaviors and poor academic performance. It was evidence as early as the first and second advisory of SY 2016-2017, reflected in Student's report cards and IEP progress reports, that the IEP DCPS developed and the resulting LRE were inappropriate.

Although DCPS finally increased Student's services and changed Student's LRE by April 2018, that change appears to have been too little too late. The evidence demonstrates that academically Student has regressed significantly from the level Student was performing at prior to enrolling in DCPS. Based on this evidence the Hearing Office concludes that the IEP DCPS developed for Student in November 2017 as well as the IEP developed thereafter were and are inappropriate because they prescribe an insufficiently restrictive LRE.

Although it appears that Student current placement in a self-contained BES program in a DCPS school has shown some promise of improving Student's behavior and academics, Student's first advisory in that program during the current school year have not been drastic enough for the Hearing Officer to be convinced that Student's LRE, at least at present, is something other than the level of restriction Student had prior to entering DCPS. Consequently, the Hearing Officer concludes Student was denied a FAPE based upon DCPS developing IEPs that were not reasonably calculated to enable Student to make progress appropriate in light of Student's circumstances.

Although Petitioner presented an educational advocate who testified as an expert witness that Student's IEPs were inappropriate because of inappropriate goals and because the IEPs did not

indicate that Student's behavior impeded Student's learning, this witness only met Student on one or two occasions and only reviewed Student's IEP and educational records. The witness had never participated in any of Student's IEP meeting, spoken with any of Student's teachers or observed Student in the classroom. The Hearing Officer did not find this witness' testimony regarding Student's IEP convincing as a result.

Petitioner also asserted that Student's IEPs were inappropriate because it lacked a dedicated aide and ESY services. However, there was insufficient evidence presented regarding Student's need for ESY services or a dedicated aide. Student's continued behavioral difficulties as well as academic deficiencies at School A and that have continued under Student's IEP at School B are, the Hearing Officer's opinion, more appropriately attributable to Student being in an inappropriate program and placement rather than the details of Student's academic goals, or the lack of ESY services, or a dedicated aide. In addition, there was insufficient evidence that because Student's DCPS IEPs did not indicate that Student's behavior impeded learning was a contributing factor to conclude Student's IEPs were inappropriate. As to whether the IEPs were based on current evaluations, the evidence demonstrates that DCPS evaluated Student within the time frame required by IDEA.

ISSUE 2: Whether DPCS denied the student a FAPE by failing to timely and comprehensively evaluation Student from November 2016 to September 2017.

Conclusion: Petitioner did not sustain the burden of persuasion by a preponderance of the evidence

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

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).

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).

Petitioner alleges DCPS should have conducted a comprehensive psychological evaluation in November 2016; that the data currently available at the time of the November 2016 IEP justified placement in a full time therapeutic day school, and if DCPS was going to reduce Student's services, an evaluation was necessary. Otherwise, a comparable IEP was warranted.

The evidence demonstrates that Student was provided a neuropsychological evaluation in 2014 when Student was attending another LEA. Although Petitioner asserts that Student's IEP should not have been amended without a formal evaluation, there was no legal requirement to conduct a triennial evaluation of Student until DCPS did so in 2017.

However, as Petitioner aptly points out, given that DCPS so drastically reduced Student's services and changed Student's LRE shortly after Student arrived at School A, a full evaluation would have perhaps provided a more justifiable basis for reducing Student's services. Nonetheless, there was no legal requirement that DCPS conduct an evaluation before it did so. The Hearing Officer, having already determined that DCPS inappropriately reduced Student's services and changed Student's LRE in the issue above, concludes that the evidence does not support a finding that Student was denied a FAPE based upon an untimely evaluation. Petitioner did not sustain the burden of persuasion by a preponderance of the evidence on this issue.

ISSUE 3: Whether DCPS denied the student a FAPE by failing to implement or timely develop an appropriate FBA and BIP by November 2016.

Conclusion: Petitioner did not sustain the burden of persuasion by a preponderance of the evidence that DCPS failed to implement or timely develop and appropriate FBA and BIP for Student by November 2016.

34 C.F.R. §300. 324 (a) (2) provides: The IEP Team must— (i) In the case of a child whose behavior impedes the child's learning or that of others, consider the use of positive behavioral interventions and supports, and other strategies, to address that behavior.

However, IDEA does not specifically mandate that an FBA be conducted and/or a BIP be developed except in the provisions related to disciplinary actions pursuant to 34 C.F.R. 300.530 et. seq. Those provisions are not applicable to this case. Nonetheless, in the instant case, DCPS conducted an FBA and developed a BIP to address Student's behaviors.

Petitioner alleges that from November 2016 forward, DCPS failed to implement and/or timely develop an appropriate FBA and BIP.

DCPS' expert witness testified that she reviewed Student's current FBA, and noted the FBA includes a statement of triggers for Student's behaviors. Based upon her review of Student's

records and her knowledge of Student, in her expert opinion, Student's FBA and BIP were and are appropriate.

Although Petitioner's expert witness testified that by November 2016 Student's behaviors had changed and a new FBA and BIP were warranted, the majority and most consequential behaviors Student displayed were the behaviors that were addressed in the BIP Student brought to School A and the behaviors that were identified in the FBA and BIP that School A developed in October 2017. The FBA appeared to have a detailed discussion of Student's behavior and the BIP included actions that school staff members were to use to address the behaviors. The Hearing Officer did not find Petitioner's expert witness' testimony more convincing than that of the DCPS witness.

The Hearing Officer concludes that Student's continued behavioral difficulties as well as academic deficiencies at School A and School B are more likely attributable to Student being in an inappropriate program and placement rather than the details of what could have perhaps been improved in Student's FBA and BIP. Consequently, the Hearing Officer concludes that Petitioner did not sustain the burden of persuasion by a preponderance of the evidence on this issue.

Remedy:

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

Under the theory of compensatory education, "courts and hearing officers may award educational services to be provided prospectively to compensate for a past deficient program. The inquiry must be fact-specific and, to accomplish IDEA's purposes, the ultimate award must be reasonably calculated to provide the educational benefits that likely would have accrued from special education services the school district should have supplied in the first place." *Reid*, 401 F.3d 522 & 524. To aid the court or hearing officer's fact-specific inquiry, "the parties must have some opportunity to present evidence regarding [the student's] specific educational deficits resulting from his loss of FAPE and the specific compensatory measures needed to best correct those deficits." *Id.* at 526.

The evidence demonstrates that the compensatory education plan that Petitioner proposed and that DCPS has authorized Petitioner to obtain is appropriate to remedy the denial of FAPE that has been determined herein coupled with Student's prospective placement for the remainder of SY 2018-2019 at School E.

In *Branham v. District of Columbia*, 427 F.3d 7 (D.C. Cir. 2005), the circuit court laid forth rules for determining when it is appropriate for hearing officers to order funding of non-public placements. First, the court indicated that "(i)f no suitable public school is available, the [school system] must pay the costs of sending the child to an appropriate private school." *Id.* At 9 (citing

to *Jenkins v. Squillacote*, 935 F.2d 303, 305 (D.C.Cir.1991)). The court then explained that such relief "must be tailored" to meet a student's "unique needs." Id. At 11-12 (citing to *Florence County School Dist. v. Carter*, 510 U.S. 7, 16 (1993)). To inform this individualized assessment, 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. Id. at 12.

As previously stated, although it appears that Student current placement in a self-contained program in a DCPS school has shown some promise of improving Student's improvements in behavior and academics, Student's first advisory in that program during the current school year have not been drastic enough for the Hearing Officer to be convinced that Student's LRE, at least at present is something other than the level of restrict Student had prior to entering DCPS.

The evidence demonstrates that School E has an OSSE C of A, and is equipped to provide Student the services requires to meet the severity of Student's needs and does, for now, represent Student's LRE. Consequently, the Hearing Officer directs in the order below that DCPS place and fund Student at School E for the remainder of SY 2018-2019.

ORDER: ⁹

1. DCPS shall, consistent with its January 2, 2019, written authorization provided to Petitioner, provide Student the following as compensatory education for the denial of FAPE determined herein: 100 hours of independent tutoring, 40 hours of counseling and 60 hours of mentoring, all at the OSSE approved rates.
2. DCPS shall, within ten (10) school days of the issuance of this order, place and fund Student at School E [REDACTED] for the remainder of SY 2018-2019 and provide transportation services.
3. DCPS shall, within thirty (30) calendar days of Student's start of attendance at School E, convene an IEP team meeting to review Student's progress in that program and determine and make any appropriate changes to Student's IEP.
4. All other relief requested by Petitioner is denied.

APPEAL PROCESS:

The decision issued by the Hearing Officer is final, except that any party aggrieved by the findings and decision of the Hearing Officer shall have ninety (90) days from the date of the decision of the Hearing Officer to file a civil action with respect to the issues presented at the due

⁹ Any delay in Respondent meeting the timelines of this Order that is the result of action or inaction by Petitioners shall extend the timelines on a day for day basis.

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: February 7, 2019

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