

OSSE
Office of Dispute Resolution
January 23, 2023

Parents on Behalf of Student,	CORRECTED FINAL HEARING OFFICER’S DETERMINATION ¹
Petitioners,	Hearing Dates: December 13, 2022 December 14, 2022 December 15, 2022 December 23, 2022 December 29, 2022
v.	
District of Columbia Public Schools (Local Education Agency “LEA”)	Counsel for Each Party listed in Appendix A
Respondent.	
Case # 2022-0162	<u>Hearing Officer:</u> <u>Coles B. Ruff, Esq.</u>
Date Issued: January 1, 2023	

¹ This Corrected HOD is issued to make typographical and/or grammatical changes and/or to remove personally identifiable information. No substantive changes have been made. The HOD issuance date, January 1, 2023, remains unchanged, as does the applicable appeal date. Personally identifiable information is in the attached Appendices A & B.

JURISDICTION:

The hearing was conducted, and this decision was written, pursuant to the Individuals with Disabilities Act ("IDEA"), P.L. 101-476, as amended by P.L. 105-17 and the Individuals with Disabilities Education Improvement Act of 2004, the District of Columbia Code, Title 38 Subtitle VII, and the District of Columbia Municipal Regulations, Title 5A Chapter E30.

BACKGROUND AND PROCEDURAL HISTORY:

The student who is the subject of this due process hearing ("Student") resides with Student's parent in the District of Columbia. The District of Columbia Public Schools ("DCPS" or "Respondent") is Student's local education agency ("LEA"). Student has been determined eligible for special education and related services pursuant to IDEA with a disability classification of emotion disability ("ED"). Student has been diagnosed with, among other things, a depressive disorder and attention deficit hyperactivity disorder ("ADHD").

Student last attended a DCPS school during school year ("SY") 2021-2022, at "School A" which was also Student's school for SY 2019-2020 and SY 2020-2021. Student had significant difficulty engaging in virtual instruction during the Covid-19 pandemic when DCPS and most school districts were providing virtual instruction exclusively. Student also had difficulty engaging in the hybrid combination of virtual and in-person instruction that DCPS initiated in the second half of SY 2020-2021.

Because of Student's increasing emotional difficulties, Petitioners placed Student in a residential wilderness program ("RWP") outside the District of Columbia, from January 2021 to April 2021. After Student's return to School A, Student had a difficult time engaging in school and had significant absences. Student had significant school attendance issues during both SY 2020-2021 and during SY 2021-2022. During SY 2021-2022, DCPS provided Student with some home-bound instruction services. Petitioners filed due process complaints which resulted in two settlement agreements. The first of these related to Student's attendance at the RWP in the second semester of 2021, and the other related SY 2021-2022.

In January 2022, Student's parents ("Petitioners") unilaterally placed Student in a residential therapeutic school ("School B") located outside the District of Columbia. They provided DCPS a notice of that unilateral placement for SY 2022-2023 on June 16, 2022. In their current due process complaint ("DPC"), Petitioners assert that DCPS has denied Student a free appropriate public education ("FAPE") by not placing Student in a residential program and not timely providing Student an appropriate educational placement for SY 2022-2023. Petitioners are seeking reimbursement from DCPS for the tuition and costs associated with Student's attendance at School B. Petitioners also seek a finding by the undersigned independent hearing officer ("IHO") that Student's least restrictive environment ("LRE") is a residential placement and that the IHO order DCPS to fund Student's continue attendance at School B for at least the remainder of SY 2022-2023.

LEA Response to the DPC:

Respondent filed a response to Petitioners' DPC on September 16, 2022. In its response, DCPS

stated, inter alia, the following:

DCPS did not fail to provide Student an appropriate IEP and placement for SY 2022-2023, and Petitioners are not entitled to reimbursement for the cost incurred from their unilateral placement of Student at School B.

Student's current individualized education plan ("IEP") is dated May 16, 2022. Petitioners were present for this IEP meeting. The IEP prescribes 30 hours per week of specialized instruction outside general education, 420 minutes per month of behavioral support services outside general education, 120 minutes of parent counseling and training outside general education, 60 minutes per month of parent counseling and training, other classroom aids and services including a behavioral intervention plan ("BIP"), classroom and statewide assessment accommodations, extended school year, and a post-secondary transition plan. The IEP and placement are reasonably calculated to enable the child to make progress appropriate considering the child's circumstances.

During SY 2021-2022, Petitioners requested, and Student was approved for the Home and Hospital Instruction Program ("HHIP"), based on concerns about Student's mental health. On August 5, 2021, Petitioners filed a DPC alleging the May 27, 2021, IEP was inappropriate.

On October 29, 2021, the parties executed a settlement agreement in resolution of the complaint. On November 17, 2021, DCPS issued a Prior Written Notice ("PWN") proposing continued implementation of Student's services as outlined in Student's IEP.

Between October 5, 2021, and Student's unilateral placement at School B, DCPS continued its efforts to implement Student's IEP, in coordination with a private tutor funded by DCPS.

On March 9, 2022, Petitioners filed a DPC alleging that DCPS failed to revise Student's IEP and consider residential placement, specifically after November 1, 2021. On May 24, 2022, the parties executed a settlement agreement in resolution of the complaint.

On June 6, 2022, DCPS issued a PWN notifying Petitioners that DCPS was placing Student in a non-public day school, rather than the residential placement that Petitioners requested. The school team recommended a non-public school placement that could meet Student's needs, including small class sizes and therapeutic support throughout the day. The team also suggested that the placement include or offer intensive community-based family support and included parent training and coaching service hours and consultation to be provided to ensure consistency and progress towards family-related goals.

On June 16, 2022, DCPS received a unilateral placement notice from Petitioners notifying DCPS that they were unilaterally placing Student at School B, a therapeutic residential boarding school, for SY 2022-2023, which began for School B on July 6, 2022.

On July 14, 2022, a change in placement ("CIP") meeting was held with the D.C. state educational agency ("SEA" or "OSSE"), Petitioners, and their counsel. At this meeting, OSSE shared that their LRE recommendation is a non-public day school. OSSE shared multiple schools that could support Student's need for small class sizes, intensive mental health needs, and safety backstops.

Petitioners immediately disagreed with OSSE and expressed that they felt Student was “not ready” and required the continued level of support given at School B. Petitioners did agree to move forward with the process “to ensure there is a next step”.

On July 20, 2022, OSSE’s special programs manager, e-mailed Petitioners, along with their counsel, schools that were under consideration as possible locations for Student’s placement. From July 20, 2022, until the present day, OSSE has continued to make attempts to refer Student to appropriate non-public day schools.

While Petitioners have been active in the referral process, during conversations and interviews with the non-public schools, Petitioners continue to express to the schools that they feel that Student’s therapeutic needs cannot be met, and the interview then concludes. Some of the referrals made by OSSE share that they are more than willing to continue to consider Student for admission if Petitioners are willing to move forward with the process.

School B does not hold an OSSE Certificate of Approval (“COA”) to serve students enrolled in LEAs in the District of Columbia. Also, School B does not provide special education and related services and cannot implement Student’s IEP. A residential treatment facility is not Student’s LRE.

Resolution Meeting and Pre-Hearing Conference:

The parties participated in a resolution meeting on September 23, 2022. The parties did not mutually agree to shorten the 30-day resolution period. The 45-day period began on October 6, 2022, and ended [and the Hearing Officer’s Determination (“HOD”) was originally due] on November 20, 2022. The parties were not available for the hearing dates offered by the IHO and, as a result, agreed to a continuance and extension of the HOD due date from November 20, 2022, to December 25, 2022.

The IHO conducted a pre-hearing conference and, on November 10, 2022, issued a pre-hearing order (“PHO”) outlining, inter alia, the issues to be adjudicated.

ISSUES:²

The issues adjudicated are:

1. Did DCPS deny Student a FAPE by failing to provide an appropriate IEP on May 16, 2022, by limiting Student’s LRE and placement to a non-public day school rather than a residential setting?
2. Did DCPS deny Student a FAPE by failing to identify any appropriate school placement in a timely manner for the beginning of SY 2022-2023?

² The IHO restated the issues at the outset of the due process hearing, and the parties agreed that these were the issues to be adjudicated.

3. Are Petitioners entitled to reimbursement of all tuition, expenses, costs of related services, fees, and other costs, including any transportation expenses related to the parental placement for SY 2022-2023 effective July 6, 2022?

DUE PROCESS HEARING:

The Due Process Hearing was convened on December 13, 2022, December 14, 2022, and December 15, 2022. The parties submitted written closing arguments on December 22, 2022, with final oral arguments made on December 23, 2022. The hearing was conducted via video teleconference on the Microsoft Teams platform. On December 23, 2023, the parties agreed to a continuance of the HOD due date to January 1, 2023, to allow for bifurcation of the decision regarding the alleged denials of FAPE and any remedy that might be awarded if the IHO found there was a denial of a FAPE. The IHO issued an interim HOD on December 25, 2022, and convened a hearing on December 29, 2022, to hear arguments from the parties regarding relief to be granted to Petitioners. Both parties submitted written arguments regarding relief.

RELEVANT EVIDENCE CONSIDERED:

The IHO considered the testimony of the witnesses and the documents submitted in each party's disclosures (Petitioner's Exhibits 1 through 39 and Respondent's Exhibits 1 through 131) that were admitted into the record and are listed in Appendix 2.³ The witnesses testifying on behalf of each party are listed in Appendix B.⁴

SUMMARY OF DECISION:

DCPS held the burden of persuasion on issue #1, after Petitioners presented a prima facie case on that issue.⁵ Petitioners held the burden of persuasion on issues #2 and #3. Based on the evidence

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

⁴ Petitioners presented four witnesses: (1) Student's treating psychiatrist, designated as an expert witness (2) a social worker from School B, (3) the academic director of School B, designated as an expert witness, and (4) Student's mother. Respondent presented two witnesses, both designated as expert witnesses: (1) a DCPS School A social worker who provided Student behavior support services at School A, and (2) the OSSE change of placement coordinator. The IHO found the witnesses credible unless otherwise noted in the conclusions of law. Any material inconsistencies in the testimony of witnesses that the IHO found are addressed in the conclusions of law.

⁵ 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.

adduced, the IHO concluded that Respondent did not sustain the burden of persuasion by a preponderance of the evidence on issue #1. Petitioners sustained the burden of persuasion on issue #2. The IHO concluded that Petitioners are entitled to reimbursement for Student attendance at School B. The IHO directs in the order below that DCPS reimburse Petitioners for the tuition and costs of Student attending School B from the start of SY 2022-2023 until the date of this HOD. The IHO also directs, inter alia, that DCPS amend Student's IEP to reflect a residential placement LRE.

FINDINGS OF FACT:⁶

1. Student resides with Student's mother in the District of Columbia. DCPS is Student's LEA. Student has been determined eligible for special education and related services pursuant to IDEA with an ED disability classification. Student has been diagnosed with, among other things, a depressive disorder and ADHD. (Mother's testimony, Petitioners' Exhibit 3)
2. Student last attended a DCPS school during SY 2021-2022, at School A. Student has experienced social-emotional-behavioral issues since entering School A in SY 2017-2018. School A conducted a functional behavior assessment ("FBA") of Student and developed a behavior intervention plan ("BIP") which was updated in SY 2018-2019. Student made significant gains evidencing internalized coping skills and the ability to problem-solve and regulate behavioral impulses. In December 2019, during SY 2019-2020, Student began to experience difficulties. These issues were the result of classes being missed due to medical appointments and tests. The School A team revised Student's BIP to increase Student's work completion and decrease anxiety. (Petitioner's Exhibit 25)
3. In the latter half of SY 2019-2020, Student had significant difficulty engaging in virtual instruction during the height of the Covid-19 pandemic when DCPS and most school districts were providing virtual instruction exclusively. (Mother's testimony)
4. From the beginning of the Covid-19 school shutdown, Student was unable to use the social-emotional interventions in a consistent and effective manner. In the school setting, the School A social worker was able to provide significant levels of support to facilitate Student's engagement and practice with the tools and strategies. "During quarantine, it appeared that Student experienced significant levels of emotional flooding and being

(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.

⁶ The evidence (documentary and/or testimony) that is the source of the Findings of Fact ("FOF") is noted within parentheses following the finding. A document is noted by the exhibit number. If there is a second number following the exhibit number, that number denotes the page of the exhibit from which the fact was obtained. When citing an exhibit that has been submitted by more than one party separately, the IHO may only cite one party's exhibit.

overwhelmed. In the virtual setting, Student was unable to access the coping tools Student relied upon for the previous few years. (Petitioner's Exhibit 25)

5. Student also had difficulty engaging in the hybrid combination of virtual and in-person instruction that DCPS initiated in the second half of SY 2020-2021. Because of increasing emotional difficulties, Petitioners placed Student at an RWP outside the District of Columbia from January 2021 to April 2021. (Mother's testimony)
6. Student was at RWP primarily due to depression and stated, "I didn't leave the house for months at a time. I am also here to work on not shutting down when situations get difficult." "[Student's] mother reported [Student] is at [residential wilderness program] primarily due to difficulty regulating [Student's] emotions and behavior." She stated, "[Student] gets stuck and shuts down and is unable to cope with situations [Student] can't control. [Student's] general emotion when that happens is anger and aggression. The pandemic exacerbated [Student's] struggles, and [Student] completely shut down, stopped going to virtual school, stopped leaving the house, reversed [Student's] daily schedule, and stopped [Student's] personal hygiene routines." (Petitioners' Exhibit 23 pdf pg. 85)
7. While Student was at the RWP, a psychologist associated with the RWP conducted an independent psychological evaluation ("IEE") of Student dated March 10, 2021. Petitioners provided DCPS with the IEE report. A DCPS psychologist reviewed the IEE and issued a written report dated April 30, 2021. The evaluator administered the Wechsler Intelligence Scale for Children – Fifth Edition (WISC-V), from which Student's composite scores were derived. Student's full-scale IQ (FSIQ) score was derived from a combination of subtest scores. The FSIQ is considered the most representative estimate of Student's global intellectual functioning. Student's general cognitive ability is within the Average range of intellectual functioning, as measured by the FSIQ. Student's overall thinking and reasoning abilities exceed the abilities of approximately 66% of adolescents Student's age (FSIQ = 106). (Petitioners' Exhibit 23, pdf pg. 89, Respondent's Exhibit 13)
8. To evaluate Student's academic achievement, the evaluator administered the Wechsler Individual Achievement Test-III (WIAT-III). Student received a total composite score of 109, which corresponds to the 73rd percentile for all students of Student's age. (Petitioners' Exhibit 23 pdf pg. 91)
9. The IEE also noted the following regarding Student's home and family dynamics: "Student also describes having close but problematic relationships with each of [Student's] parents. [Student] stated that [Student] and [Student's] father have had more "struggles" and noted that [Student's] father has not been living in the home, making it difficult for [Student] to feel that [Student's] father understands [Student]. Both [Student] and [Student's] mother describe a somewhat enmeshed, "codependent" relationship in which [Student] had become overly dependent on [Student's] mother to meet [Student's] own emotional needs. These family dynamics will need to be addressed as part of [Student's] overall treatment plan in order to both improve the relationships as well as help [Student] become more independent and autonomous, consistent with what would be expected for a young [person] of [Student's] age." (Petitioners' Exhibit 23 pdf pg. 98)

10. On May 27, 2021, DCPS developed an IEP for Student that prescribed an LRE with all instruction and services except behavioral support services being provided inside general education. The IEP prescribed the following services:

SPECIAL EDUCATION AND RELATED SERVICES

Special Education Services

Service	Setting	Begin Date	End Date	Time/Frequency
Written Expression	General Education	01/08/2021	01/07/2022	1 hr per wk

Related Services

Service	Setting	Begin Date	End Date	Time/Frequency
Behavioral Support Services	Outside General Education	01/08/2021	01/07/2022	240 min per mon

11. The IEP also prescribed the following Classroom Aids and Services: [Student] has a BIP in place to provide support services in the classroom and school setting, as well as protocols in place to ensure that [Student] is accessing the curriculum appropriately in the classroom. Please review the BIP. [Student] benefits from graphic organizers as requested, frequent check-ins during the writing process, distribution of all tasks up front followed by distribution of singular tasks as [Student] progresses through to the end goal for the writing task only, seating closest to the teacher, and extended time on all writing assignments. (Respondent's Exhibit 15)
12. Upon Student's return from the RWP, no effective plan was in place to transition Student from the environs and structure of the RWP back to Student's family, home, and school environments. As a result, Student had difficulty re-engaging in school and reverted to previous disruptive behaviors at home and significant absences from school. (Mother's testimony)
13. Student had significant school attendance issues during both SY 2020-2021 and SY 2021-2022. DCPS put HHIP in place during the SY 2021-2022, which provided Student with limited instructional and social-emotional support. Because DCPS was only offering virtual home instruction during the pandemic, DCPS authorized 175 hours of independent tutoring for Student to access instruction. (Petitioners' Exhibit 31)
14. Petitioners filed due process complaints which resulted in two settlement agreements. The first of these related to Student's attendance at the RWP in the second semester of SY 2019-2021. On January 18, 2022, Petitioners, through counsel, sent DCPS a notice of intent to place Student at School B and seek reimbursement for all tuition, fees, costs, and related expenses for the remainder of SY 2021-2022. Petitioners requested reimbursement, and the matter was resolved with another settlement agreement regarding SY 2021-2022. (Stipulation)
15. On May 16, 2022, DCPS developed an IEP for Student. Petitioners participated in the IEP meeting along with their attorney. The IEP cites the results of the March 10, 2021, IEE and notes the following regarding Positive Behavior Interventions and Supports:

"Over the last IEP year [Student] has not been able to attend in-person learning and enrolled in the DCPS HHIP program, and throughout this school year, [Student] has been working with an in-home tutor. Through [Student's] tutor [the School A social worker] was able to increase sessions with [Student]; however, this remained sporadic, and use of [Student's] BIP and tools was not observed. Since the end of January 2022, [Student] has been attending school at [School B], where [Student] also resides full-time and follows their behavior support plans. The team at [School B] has reported that [Student] has been able to engage in their school structures and had a minor incident in which [Student] got stuck. The structure and behavior systems at [School B] support [Student] at this time - some of these interventions look like small group class settings with 1 teacher and 1 support staff as well as ongoing access to the clinical and behavior team as needed." (Respondent's Exhibit 16)

16. The May 16, 2022, IEP prescribes the following services and prescribes extended school year ("ESY"):

Special Education Services

Service	Setting	Begin Date	End Date	Time/Frequency
Specialized Instruction	Outside General Education	05/16/2022	05/15/2023	30 hr per wk

Related Services

Service	Setting	Begin Date	End Date	Time/Frequency
Behavioral Support Services	Outside General Education	05/16/2022	05/15/2023	420 min per mon
Parent Counseling and Training	Outside General Education	05/16/2022	05/15/2023	120 min per mon

Consultation Services

Service	Begin Date	End Date	Time/Frequency
Parent Counseling and Training	05/16/2022	05/15/2023	60 min per mon

17. The May 16, 2022, IEP prescribes the following regarding Student's LRE:

Least Restrictive Environment (LRE)

This section describes student needs that require removal from general education to receive the following special education and related services. Note: The nature and/or severity of the disability must be such that the student can only make progress on IEP goals and objectives by being removed from the general education classroom to receive these services.

Service	Time/Frequency	Reason services cannot be provided in a general education setting
Specialized Instruction	30 hr per wk	[Student] will benefit from small-group or one-to-one specialized instruction outside of the general education setting. Due to Student exhibiting anxiety when completing assignments, small class size and 1:1 assistance as needed to allow for answers

Behavioral Support Services	420 min per mon	[Student]requires intensive supports outside the classroom to identify and manage ■ stressors and emotions. At School B Student receives 1 hr/wk of direct 1:1 clinical support, 45 min of small group social skills, and 1 hr/wk of family work per week.
Parent Counseling and Training	120 min per mon	[Student]will benefit from parental counseling and consultation to focus on goals such as 'communication, parenting styles, and family dynamics in the home, especially after struggles upon returning home for an academic school break

18. At the May 16, 2022, IEP meeting, Petitioners requested ongoing placement in a residential therapeutic setting. DCPS declined the request, instead proposing a non-public day school setting. On June 9, 2022, DCPS issued a PWN for the May 16, 2022, IEP. The PWN states that the school team recommends a non-public placement that can provide small class sizes and therapeutic support throughout the school day, as well as intensive community-based family support services. (Mother's testimony, Respondent's Exhibit 6)
19. On June 16, 2022, Petitioners provided DCPS a notice of their unilateral placement of Student at School B for SY 2022-2023 and their intention to seek reimbursement for Student's placement at School B. (Petitioners' Exhibit 1)
20. Following the May 16, 2022, IEP meeting, DCPS submitted a referral to OSSE for placement in a non-public special education day school. OSSE convened a change in placement meeting on July 14, 2022, at which time OSSE supported the DCPS determination for placement in a non-public day school rather than the residential setting requested by Petitioners. To begin OSSE's referral process, parental consent is required to release Student's records to the schools. On July 20, 2022, Petitioners granted consent for OSSE to continue with the placement and referral process, although they continued to object to the LRE determination made. During the referral process, schools usually interview the student. (Witness 6's testimony)
21. On August 26, 2022, DCPS responded to Petitioners' June 16, 2022, a notice of unilateral placement. In its response, DCPS stated that OSSE was in the process of identifying an appropriate non-public school and did not agree to bear the cost of the placement identified by Petitioners. DCPS requested that Petitioners continue to work with DCPS and OSSE in the process of identifying an appropriate non-public school location with an OSSE COA. (Petitioners' Exhibit 2)
22. DCPS school year began on August 29, 2022. OSSE did not find a non-public special education day school to accept Student immediately. A seat for Student became available in September 2022, after the start of SY 2022-2023, but that seat is no longer available, and Student is now on the wait list for that school. When seats become available at non-public day schools, they usually don't remain available long. Currently, there is no educational placement available for Student. However, there is another school referral for which Student's acceptance is pending. (Witness 6's testimony)

23. Neither DCPS nor OSSE believes Student needs a residential placement. When OSSE is making a placement determination with the IEP team, the team is making an educational determination. Decisions about a residential placement are not an evidence-based practice. It is usually a medical decision. OSSE has made the recommendation for residential placements in the past, but it is rare and usually based on medical professionals' opinions. (Witness 5's testimony, Witness 6's testimony)
24. Typically, when a student is in a residential program, there is an exit and transition plan formulated soon after a student arrives that is updated periodically. The fact that there is no discharge plan for Student, although Student has been attending School B for almost a year, raises concerns that Student's needs are not being adequately addressed by School B toward Student's readjustment and reintegration to Student's home setting and a return to school near Student's home. (Witness 5's testimony, Witness 6's testimony)
25. School B is a therapeutic boarding school that provides academics and a therapeutic environment for its students, where they can receive academic instruction aligned with their ability and grade level, along with therapeutic support. Since being placed at School B, Student has been able to successfully attend class, participate in instruction, complete assignments, engage in therapy, and participate in off-campus activities. Student has made academic and social-emotional progress at School B. Student is currently receiving one hour per week of direct counseling, 45 minutes a week of small group social skills counseling, and an additional 30 minutes twice per week for family support and counseling. (Mother's testimony, Witness 2's testimony, Witness 3's testimony)
26. School B has developed a treatment plan for Student. Student had input into the treatment plan, and it was sent to Student's parents for them to have input. Student tends to isolate and has low self-esteem, depression, and family issues. However, Student's communication abilities are amazing. Student has seemed to need constant support to ensure that Student does not get stuck and can get through the day. Student seems to have no problem attending class at School B, but has missed some classes and gets stuck in the morning, needing support to start the day. There are four breaks throughout the school year and an optional break for Thanksgiving. Student has had home visits since attending School B. During and after visits, Student gets anxious and focuses on sliding back into old behaviors. (Witness 2's testimony)
27. School B has three separate dormitory buildings. Student lives with ten other students and has Student's own room. There is a television in the dorm, but Student does not have unsupervised access to electronics. School B staff does not believe Student is yet ready to return home, and School B does not have a discharge plan in place for Student. Student does not have issues getting out of bed daily – they are occasional. School B typically does a case review for a student after Christmas break, but typically automatically keeps any student for a full year. (Witness 2's testimony, Witness 3's testimony)
28. Student has an independent psychiatrist who has treated Student for the past five years. The psychiatrist acknowledges, however, Student's taking of prescribed medication has

been intermittent, and the psychiatrist's intervention with Student has not been successful in addressing Student's anxiety. The psychiatrist has not seen Student in over a year and has had one conversation regarding Student with the staff at School B. The psychiatrist supported Student's placement in a residential program due to Student's difficulties at home and with school attendance. However, the psychiatrist has never visited Student's home and does not recall recommending that the family engage in family therapy as a support for Student's difficulties in the home setting. The psychiatrist does not support Student's long-term placement in a residential setting. He considers a long-term placement to be a year. (Witness 1's testimony)

CONCLUSIONS OF LAW:

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

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

34 C.F.R. § 300.17 provides:

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

Pursuant to 5E DCMR 3030.14, the burden of proof is the responsibility of the party seeking relief. *Schaffer v. Weast*, 546 U.S. 49, 126 S.Ct. 528 (2005). Petitioners held the burden of persuasion on issues #2 and #3. The burden of persuasion fell to Respondent on issue #1 once Petitioners established a prima facie case on that issue.⁷ The burden of persuasion shall be met by a

⁷ 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

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

ISSUE 1: Did DCPS deny Student a FAPE by failing to provide an appropriate IEP on May 16, 2022, by limiting Student's LRE and placement to a non-public day school rather than a residential setting?

Conclusion: Respondent did not sustain the burden of proof by a preponderance of the evidence that the IEP that DCPS developed for Student on May 16, 2022, was reasonably calculated to enable Student to make progress appropriate in light of Student's circumstances.

The Individuals with Disabilities Education Act ("IDEA") was enacted to "ensure that all children with disabilities have available to them a free appropriate public education ["FAPE"] that emphasizes special education and related services designed to meet their unique needs and prepare them for further education, employment, and independent living." *M.G. v. Dist. of Columbia*, 246 F. Supp. 3d 1, 7 (D.D.C. 2017) (citing 20 U.S.C. § 1400(d)(1)(A)); see also *Boose v. Dist. of Columbia*, 786 F.3d 1054, 1056 (D.C. Cir. 2015)). Once a child is identified as disabled, the school district must develop an individualized education program ("IEP") for the student. See 20 U.S.C. § 1414 (d)(1)(A) & (d)(2)(A).

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).

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 *Endrew F. ex rel. Joseph F. v. Douglas Cty. Sch. Dist.* RE-1, 137 S. Ct. 988 (2017), the U.S. Supreme Court elaborated on the "educational benefits" requirement pronounced in *Rowley*: To meet its substantive obligation under the IDEA, a school must offer an IEP reasonably calculated

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.

to enable a child to make progress appropriate in light of the child's circumstances. . . . Any review of an IEP must appreciate that the question is whether the IEP is reasonable, not whether the court regards it as ideal. . . . When a child is fully integrated in the regular classroom, as the Act prefers, what that typically means is providing a level of instruction reasonably calculated to permit advancement through the general curriculum. . . . If that is not a reasonable prospect for a child, his IEP need not aim for grade-level advancement. But his educational program must be appropriately ambitious in light of his circumstances, just as advancement from grade to grade is appropriately ambitious for most children in the regular classroom. The goals may differ, but every child should have the chance to meet challenging objectives. *Endrew F.*, supra, 137 S. Ct. at 999–1000 (citations omitted).

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 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, 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 *Endrew 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.")

“The IDEA requires that children with disabilities receive education in the regular classroom whenever possible” *Z.B. v. District of Columbia*, 888 F.3d 515 (D.C. Cir. 2018) citing *Endrew F.*, supra, 137 S. Ct. at 999 (quoting *Rowley*, 458 U.S. at 202)

Student's mother credibly testified regarding Student's inability to engage in virtual and hybrid virtual instruction during SY 2019-2020 and SY 2020-2021. She credibly testified about Student's decline in mental and behavioral health, resulting in Student not wanting to leave the house at all and the decline in Student's personal hygiene. Petitioners took action to send Student to the RWP, where Student made significant progress in a three-month program and then returned home. However, that return was not met with an adequate transition regarding both Student's home life and Student's return to school. Consequently, the progress Student made at the RWP was short-lived, and Student did not successfully re-engage and attend School A.

The evidence demonstrates that at the time that DCPS developed Student's May 16, 2022, IEP, Student had been in a residential school, School B, since January 2022. Before Petitioners unilaterally placed Student at School B, Student had not attended school at all in over a year.

DCPS had provided Student with both HHIP services and then additionally agreed to provide Student with independent tutoring services. It may have seemed reasonable to the DCPS team members at the May 16, 2022, IEP meeting to have developed an IEP and placement for Student for SY 2022-2023 that prescribed significantly increased services and was a significant change in Student's LRE to 100% outside general education placement at a special education day school, however, the evidence demonstrates that at the time, Student was either refusing to or could not attend any school at all. At that meeting, Petitioners requested that Student's LRE be a residential placement.

In the District of Columbia, to determine whether a residential placement is necessary, "a court must analyze 'whether full-time placement may be considered necessary for educational purposes, or whether the residential placement is a response to medical, social or emotional problems that are segregable from the learning process.'" *McKenzie v. Smith*, 771 F.2d 1527, 1534 (D.C. Cir. 1985) (quoting *Kruelle v. New Castle County School District*, 642 F.2d 687, 693(3d Cir. 1981).

Petitioners allege that at the time this IEP was developed, Student was in need of a residential placement and that any placement less restrictive would have resulted in the same problem that had occurred prior to Student's unilateral placement at School B: Student's nonattendance and continued social-emotional decline.

DCPS's witness, who had provided Student social-emotional services in the past, credibly testified that Student had engaged in services successfully when Student attended School A, but once Student stopped attending, Student's participation in related services was sporadic. Although both of DCPS's witnesses testified that, in their professional and expert opinions, Student was not in need of a residential placement, one DCPS witness acknowledged that a decision about a residential placement is not an evidence-based practice. Rather, it is usually a medical decision. OSSE has made the recommendation for residential placements in the past, but it is rare and usually based on medical professionals' opinions. Nonetheless, the witnesses both credibly testified that when any student is in a residential placement, there is an exit transition plan developed and updated soon after the student begins in the placement.

DCPS asserts that it put numerous interventions in place to assist Student including one-on-one instructional support, home visits, referrals to community resources, and other services. DCPS also asserts that Petitioners did not regularly make Student available to access the supports DCPS put in place. In addition, DCPS asserts that Petitioners could have sought hospitalization or some other intervention short of residential placement to address their concerns about Student social-emotional well-being. However, there was evidence that Student's parent made efforts to engage services, and there is no legal requirement for a parent to seek hospitalization prior to taking action to secure an appropriate educational placement for his or her child.

The DCPS witness acknowledged that a decision regarding residential placement is usually based upon a medical professional's opinion. There was a single medical professional who testified: Student's psychiatrist. He expressed an opinion that Student needed residential placement. However, he had not seen Student in over a year. He also stated that he did not suggest that Student needed a long-term residential placement which he defined as a year or more. Nonetheless, based upon Student's psychiatrist's testimony, as well as the evidence indicating that

at the time DCPS developed Student's May 16, 2022, IEP, Student had not attended school in more than a year, the preponderance of the evidence supports the conclusion that Student's social or emotional problems were not segregable from the learning process and that Student needed a residential placement. Consequently, the IHO concludes the May 16, 2022, IEP was not reasonably calculated to enable Student to make progress appropriate in light of Student's circumstances and resulted in a denial of a FAPE to Student.

Petitioners' expert witness testified that he would not recommend Student remain in a long-term residential placement. Student has been at School B for nearly a year. Yet, School B has failed to develop or apparently even discuss an exit and transition plan for Student to return home and to a non-residential school. This factor causes the IHO concern as to whether School B is an appropriate prospective placement for Student. In addition, there is no evidence that School B provides specialized instruction or has an OSSE COA to provide services to students who are residents of the District of Columbia. Consequently, the IHO is not convinced that Student should remain at School B or that Student needs a residential placement for the remainder of SY 2022-2023. As a result, the IHO directs in the order below that DCPS convene an IEP meeting to determine, inter alia, Student's continued need for a residential placement.

ISSUE 2: Did DCPS deny Student a FAPE by failing to identify any appropriate school placement in a timely manner for the beginning of SY 2022-2023?

Conclusion: Petitioners sustained the burden of persuasion by a preponderance of the evidence on this issue.

The starting point in this analysis is that "the IEP is the vehicle through which school districts typically fulfill their statutory obligation to provide a free appropriate public education and that officials must have an IEP in place for each student with a disability '[a]t the beginning of each school year. U.S.C. § 1414(d)(2)(A)); 34 C.F.R. 300.322(a), 300.323(a). *See also Dist. of Columbia v. Wolfire*, 10 F. Supp. 3d 89, 95 (D.D.C. 2014) ("there is no requirement that the child be currently enrolled in a public school in order to trigger the LEA's obligation to develop an IEP for that child"); *Dist. of Columbia v. Oliver*, 2014 WL 686860, at 6 (D.D.C. 2014).

The D.C. Circuit Court explained in *Leggett* that, "[a]s interpreted by the Supreme Court, IDEA requires school districts to reimburse parents for their private-school expenses if (1) school officials failed to offer the child a free appropriate public education in a public or private school; (2) the private-school placement chosen by the parents was otherwise 'proper under the Act; and (3) the equities weigh in favor of reimbursement – that is, the parents did not otherwise act 'unreasonabl[y].'" *Leggett*, 793 F.3d at 66-67 (citing *Carter*, 510 U.S. at 15- 16, 114 S. Ct. 361; 20 U.S.C. § 1412(10)(C)(iii)(III)).

There is no dispute that DCPS did not have an educational placement for Student at the beginning of SY 2022-2023. The evidence demonstrates that DCPS finalized Student's IEP on May 16, 2022, and informed Petitioners that the process of determining a school location assignment would be coordinated with OSSE. Petitioners granted the required consent to OSSE in July 2022 for OSSE to make school referrals. There was no school placement for Student at the start of DCPS' school year in August 2022. Although a seat at a non-public school became available in September 2022,

that seat quickly became unavailable. DCPS asserts that Petitioners have slow-walked the interview process and taken actions that have frustrated efforts to secure a school placement for Student. However, there was insufficient evidence presented to support this claim. In addition, with the IHO having determined in the issue discussed above that Student's LRE, as of May 16, 2022, was a residential placement, this argument is moot. Consequently, the IHO concludes that Petitioners sustained the burden of proof by a preponderance of the evidence that DCPS denied Student a FAPE by not providing Student an appropriate educational placement at the start of SY 2022-2023.

ISSUE 3: Are Petitioners entitled to reimbursement of all tuition, expenses, costs of related services, fees, and other costs, including any transportation expenses related to the parental placement for SY 2022-2023 effective July 6, 2022?

Conclusion: Petitioners sustained the burden of persuasion by a preponderance of the evidence on this issue.

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).

Under the IDEA, parents who unilaterally decide to place their disabled child in a private school without obtaining the consent of local school officials "do so at their own financial risk." *Florence County Sch. Dist. Four v. Carter*, 510 U.S. 7, 15, 114 S.Ct. 361, 126 L.Ed.2d 284 (1993) (quoting *Sch. Comm. of the Town of Burlington v. Dep't of Educ.*, 471 U.S. 359, 374, 105 S.Ct. 1996, 85 L.Ed.2d 385 (1985)). "As interpreted by the Supreme Court, IDEA requires school districts to reimburse parents for their private-school expenses if (1) school officials failed to offer the child a free appropriate public education in a public or private school; (2) the private-school placement chosen by the parents was otherwise "proper under the Act"; and (3) the equities weigh in favor of reimbursement—that is, the parents did not otherwise act "unreasonabl[y]." *Leggett v. District of Columbia*, 793 F.3d 59, 66–67 (D.C. Cir. 2015) (citing *Carter*, supra, 510 U.S. at 15–16, 114 S.Ct. 361; 20 U.S.C. § 1412(10)(C)(iii)(III)).

The IHO has concluded in the issues above, that DCPS denied Student a FAPE. The evidence demonstrates that the private school placement chosen by Petitioners, School B, can and has provided Student academic instruction and behavioral health services from which Student has made both academic and social-emotional progress. Although School B does not provide specialized instruction and does not have an OSSE COA, the school has provided Student educational benefit. Although the evidence does reflect that Petitioners expressed to some of the schools proposed by OSSE that they believed Student needed a residential placement, there was insufficient evidence that Petitioners acted unreasonably. Consequently, the IHO concludes that Petitioners are entitled to reimbursement for Student's attendance at School B from the start of SY 2022-2023 until the date of this HOD.

As stated earlier, Student has been at School B for nearly a year. Yet, School B has failed to develop or even discuss an exit and transition plan for Student to return home and to a non-residential school. In addition, there is no evidence that School B provides specialized instruction

or has an OSSE COA to provide services to students who are residents of the District of Columbia. Consequently, the IHO directs in the order below that DCPS identify and place Student in an appropriate residential placement.

ORDER:

1. DCPS shall, within ten (10) school days of the issuance of this order, amend Student's IEP to prescribe a residential placement as Student's LRE.
2. DCPS shall, within forty-five (45) calendar days of the issuance of this order, in coordination with OSSE and any other relevant agency or health provider(s), identify an appropriate residential placement for Student, and coordinate Student's transition to that residential placement.
3. Petitioners shall promptly provide the requisite consent(s) and/or release(s) for DCPS, OSSE, and any other agency or health provider(s) to facilitate DCPS's compliance with the provisions above.
4. DCPS shall, within ninety (90) calendar days of the issuance of this order, convene an IEP meeting to review and update Student's IEP as appropriate, review Student's LRE and determine whether Student continues to need residential placement.
5. Within thirty (30) calendar days of Petitioners providing DCPS appropriate documentation of payment, DCPS shall, consistent with DCPS and/or OSSE published procedures, reimburse Petitioners for their costs for Student attending School B from the start of SY 2022-2023 (July 6, 2022), until the date of issuance of this order.
6. All other relief requested by Petitioners 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 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: January 1, 2023

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