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Confidential

<p>Parents on Behalf of Student, ¹</p> <p>Petitioners,</p> <p>v.</p> <p>District of Columbia Public Schools (Local Education Agency “LEA”) &</p> <p>Office of the State Superintendent of Education (“OSSE”) (State Education Agency “SEA”)</p> <p>Respondents.</p> <p>Case # 2024-0204</p> <p>Date Issued: January 20, 2025</p>	<p>HEARING OFFICER’S DETERMINATION</p> <p>Hearing Dates:</p> <p>January 8, 2025 January 9, 2025 January 10, 2025</p> <p>Counsel for Each Party listed in Appendix A</p> <p><u>Hearing Officer:</u> <u>Coles B. Ruff, Esq.</u></p>
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¹ Personally identifiable information is in the attached Appendices A & B.

JURISDICTION:

The hearing was conducted, and this decision was written in accordance with the Individuals with Disabilities Act (“IDEA”), P.L. 101-476, as amended by P.L. 105-17, as well as 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 5-A30.

BACKGROUND AND PROCEDURAL HISTORY:

The student who is the subject of this due process hearing (“the Student”) lives with the Student’s parents (“Petitioners”) in the District of Columbia. The District of Columbia Public Schools (“DCPS”) serves as the Student’s local education agency (“LEA”), and the Office of the State Superintendent of Education (“OSSE”) functions as the state education agency (“SEA”). The Student has been found eligible for special education and related services under IDEA, classified with a disability of autism.

On October 17, 2024, the Petitioners filed the current due process complaint (“DPC”) against DCPS and OSSE, alleging that the Student was denied a free appropriate public education (“FAPE”) because DCPS and OSSE failed to provide the Student with an appropriate individualized educational program (“IEP”) and educational placement for the 2023-2024 and 2024-2025 school years.

Petitioners request that DCPS and OSSE be ordered to place and fund the Student for the remainder of the 2024-2025 school year at the residential facility (“School A”) where Petitioners unilaterally placed the Student and to reimburse them for the tuition and related services already paid to School A for the 2023-2024 and 2024-2025 school years.

LEA Response to the Complaint:

DCPS submitted a response to the DPC on October 29, 2024. In its response, DCPS noted, among other things, the following:

DCPS proposed an appropriate IEP placement and location for the school year (“SY”) 2023-2024. DCPS informed the parents in writing, at least by, if not before, August 11, 2023, in its response to the parent’s unilateral notice letter. At the June 2023 meeting, it was discussed and determined by DCPS that the Student’s IEP would be implemented at the Student’s DCPS school (“School B”). The parents and their attorneys met with School B at the February 2023 meeting as well as the June 2023 meeting. DCPS further amended the Student’s IEP at the June 2023 meeting and maintained the February 2024 dates of achievement for the goals. The amendment involved the Student’s services. It was also in June 2023 that DCPS proposed and obtained parental written consent to evaluate the Student.

For SY 2024-2025, DCPS proposed a more supportive setting based on information and data received during SY 2023-2024 through evaluation procedures and from School A, the residential facility where the parents had unilaterally placed the Student. In May 2024, the

parties convened a meeting to determine the Student's needs. The team met again before SY 2024-2025 to determine the Student's IEP placement.

In June 2024, Petitioners provided DCPS with an independent occupational therapy evaluation and an independent psychological evaluation, which DCPS reviewed. On July 2, 2024, DCPS sent the Petitioners its review reports of the evaluations in preparation for a meeting held on July 12, 2024.

Documents from School A, including a behavior intervention plan ("BIP") from February 2024, were sent to DCPS nearly a week after the July meeting. Because this was new and relevant information, DCPS agreed to reconvene an IEP meeting to consider this data.

On September 20, 2024, DCPS received what staff from School A identified as diagnostic assessments conducted or collected around September 18, 2024. In March 2024, DCPS proposed a non-public separate day school for the Student's IEP placement and continued to propose that placement following the September 2024 meeting.

A change in placement meeting required by OSSE took place on March 12, 2024, and again in September 2024. A nonpublic separate day school had been sought since at least mid-March 2024. By mid-May 2024, OSSE received a denial letter from one nonpublic day school and a conditional acceptance letter from another nonpublic day school ("School C"). Petitioners notified OSSE and DCPS that they would not make the Student available for necessary interviews and other admission processes for the nonpublic school(s). This was the primary reason why the acceptance was conditional.

DCPS has limited information regarding School A, which is not an OSSE-certified location. The Student has been in this placement since at least March 2024. As a non-approved program, DCPS does not consider this location suitable for the Student. DCPS asserts that nonpublic separate-day schools can be offered to the Student as soon as she/he is ready for the necessary admission procedures and appropriate transportation support to ensure her/his access to a FAPE.

SEA Response to the Complaint:

OSSE submitted a response to the DPC on October 28, 2024. In its response, DCPS mentioned, among other things, the following:

On February 21, 2024, OSSE received a change in placement ("CIP") request from DCPS for the Student. The CIP meeting occurred on March 12, 2024. OSSE offered a state recommendation that the Student be placed in a nonpublic day school. However, this was merely a recommendation, as OSSE did not have a decisive role in the Student's placement. The team, which included DCPS and the Student's parents, concluded that the Student requires placement in a nonpublic day school.

Because the team agreed that the Student should be placed in a nonpublic day school, OSSE identified a service location. On March 12, 2024, OSSE obtained parental consent to proceed with sending out admission packets. Before OSSE's involvement, Petitioners unilaterally placed the

Student at School A, a therapeutic boarding school outside the District of Columbia, and expressed their preference for the Student to continue at School A.

At the March 12, 2024, CIP meeting, OSSE explained the process for determining service locations according to local laws and regulations. This process requires OSSE to designate locations for schools or programs that possess a full Certificate of Approval (COA) from OSSE, ensuring that the programs meet specific criteria: the student's age, grade, disability classification, and distance from the student's home. OSSE noted that programs with a COA must adhere to strict requirements, which include, but are not limited to, employing certified staff to teach students with disabilities, staff who have cleared background checks, and facilities that comply with safety codes. OSSE also pointed out that School A does not possess a COA and is not classified as a nonpublic day school.

On March 14, 2024, OSSE emailed admission packets to several schools. On April 24, 2024, OSSE received a denial notification from one non-public day school ("School D"). On May 3, 2024, OSSE received a conditional acceptance from School C. This conditional acceptance indicated that School C would consider offering full acceptance upon completing additional steps in its admissions process, which the parents have not completed.

On May 10, 2024, OSSE issued a Notice of Conditional Service Location to ensure that the Student's seat was secured in a nonpublic day school and to inform Petitioners that the issuance of a Notice of Conditional Service Location did not prevent the family from exploring other nonpublic day schools.

On June 10, 2024, OSSE, Petitioners, and their attorney were notified of a conditional acceptance from another non-public day school ("School E"). Since June 2024, OSSE has not been notified of any updates to the Student's disability classification, IEP, or any other of the IEP team's decisions. OSSE stands ready to support the team in completing the service location process but is limited until the Student returns to the District of Columbia, completes the admissions processes with the nonpublic day schools, and obtains a full acceptance.

Resolution Meeting and Pre-Hearing Conference:

Petitioners and DCPS participated in a resolution meeting on October 30, 2024. The parties did not mutually agree to shorten the 30-day resolution period. The DPC was filed on October 17, 2024. The 45-day period began on October 17, 2024, for the SEA and November 17, 2024, for the LEA and ended [and the Hearing Officer's Determination ("HOD") was originally due on December 1, 2024, for the SEA and December 31, 2024, for the LEA. The parties were unavailable for the proposed hearing dates of November 15, 2024, for the SEA and December 2, 2024, for the LEA. The parties requested and agreed to align the timelines for the SEA and LEA cases and proceed on their requested hearing dates. Petitioner's counsel filed a motion to continue the case and extend the HOD due dates for the SEA case by 50 calendar days and for the LEA case by 20 calendar days. With the granting of that motion, the HOD is now due on January 20, 2025.

The IHO conducted a pre-hearing conference ("PHC") on October 31, 2024, and issued a pre-hearing order ("PHO") on November 8, 2024, outlining, inter alia, the issues to be adjudicated.

ISSUES:²

The issues adjudicated are:

1. Did DCPS deny the Student a FAPE by failing to propose an appropriate IEP and placement for the 2023-2024 and 2024-2025 school years?
2. Did OSSE deny the Student a FAPE by failing to propose an appropriate program/location of service for the 2023-2024 and 2024-2025 school years?
3. Is School A an appropriate placement?

DUE PROCESS HEARING:

The Due Process Hearing was held on January 8, 9, and 10, 2025, using a video teleconference on the Microsoft Teams platform. On January 15, 2025, the parties submitted legal citations.

RELEVANT EVIDENCE CONSIDERED:

The IHO considered the testimony of witnesses³ and the documents submitted in each party's disclosures (Petitioners' Exhibits 1 through 45, DCPS's Exhibits 1 through 52, and OSSE's Exhibits 1 through 15) that were admitted into the record and are listed in Appendix 2.

SUMMARY OF DECISION:

DCPS held the burden of persuasion on issue #1 after the Petitioners presented a prima facie case on that issue. OSSE held the burden of persuasion on issue #2 after the Petitioners presented a prima facie case on that issue. Petitioners held the burden of persuasion on issue #3. The IHO concluded that DCPS did not sustain the burden of persuasion by a preponderance of the evidence on issue #1 regarding the IEP developed in February 2023. However, DCPS sustained the burden of persuasion by a preponderance of the evidence regarding the IEP developed in February 2024. OSSE sustained the burden of persuasion by a preponderance of the evidence on issue #2. The Petitioners did not sustain the burden of persuasion by a preponderance of the evidence on issue #3. The IHO dismissed the Petitioners' claims against OSSE and ordered DCPS to reimburse Petitioners for the Student's placement at School A from February 2024 through February 2025

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

³ Petitioner presented four witnesses: (1) Petitioner's educational consultant, who testified as an expert; (2) an independent psychologist who evaluated the Student and testified as an expert; (3) the academic director of School A, who testified as an expert; and (4) the Student's mother. OSSE presented one witness: the special programs manager for the change in placement process. DCPS presented three witnesses, all of whom testified as experts: (1) a DCPS LEA representative who is both a special and a general educator, (2) a DCPS occupational therapist, and (3) the DCPS placement monitor for two of the special education day schools that provided the Student conditional acceptances. The IHO found the witnesses credible unless noted otherwise in the conclusions of law. Any material inconsistencies in the testimony of witnesses identified by the IHO are discussed in the conclusions of law.

and to convene a meeting to review the Student's IEP and determine an appropriate placement and location of service for the remainder of SY 2024-2025.

FINDINGS OF FACT: ⁴

1. The Student resides with the Student's parents, the Petitioners, in the District of Columbia. DCPS serves as the Student's LEA, and OSSE is the Student's SEA. The Student has been determined to be eligible for special education and related services under IDEA, with an autism disability classification. (Mother's testimony, Petitioners' Exhibit 41)
2. The Student was born outside the United States. Petitioners adopted the Student when the Student was two years and two months of age. The Student was allegedly abandoned by his/her biological mother and lived in an orphanage until adoption. (Petitioners' Exhibit 2)
3. The Student attended his/her local DCPS school ("School B") from prekindergarten through second grade, where she/he received special education services, behavior support services, and OT through an IEP. (Petitioners' Exhibit 2)
4. DCPS conducted a psychological evaluation in April 2020. At that time, the Student's reading and written language skills were below grade level. The Student's math skills were reportedly stronger. Student's inattention, impulsivity, and executive dysfunction negatively affected her/his academic performance. (Petitioners' Exhibit 2)
5. Petitioners engaged an independent psychologist who performed a neuropsychological evaluation of the Student in March 2021. The psychologist diagnosed the Student with the following conditions: Attention Deficit Hyperactivity Disorder, Combined Presentation, characterized by distractibility, impulsivity, hyperactivity, and executive dysfunction; Disinhibited Social Engagement Disorder; Disruptive Mood Dysregulation Disorder; Specific Learning Disorder with Impairment in Reading and Written Expression; and Developmental Coordination Disorder. (Witness 2's testimony, Petitioner's Exhibit 2)
6. The psychologist advised that the Petitioners prioritize the Student's mental health and reduce his or her dysregulated outbursts with effective medication prescribed by a psychiatrist. Given the severity of the Student's outbursts, she pointed out that the Student would likely require periodic inpatient hospitalization and/or placement in a therapeutic residential setting, and she recommended that the Student be placed in such a setting. (Witness 2's testimony, Petitioner's Exhibit 2)

⁴ 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 or the PDF page number of the entire disclosure document. When citing an exhibit that has been submitted by more than one party separately, the Hearing Officer may only cite one party's exhibit.

7. Petitioners placed the Student in a residential facility in May 2021, where the Student remained until April 2023. The Student thrived at the residential facility, enjoyed attending school, built self-confidence, and formed strong bonds with the Staff. (Mother's testimony, Petitioner's Exhibit 4)
8. On February 7, 2023, DCPS convened an IEP team to update the Student's IEP using data, including information from the Student's residential program regarding the Student's progress and a recommendation that the Student was ready for a less restrictive program. The Student's teacher at the residential program reported that the Student was performing at grade level in reading and math. Petitioners requested that DCPS place the Student in a non-public special education school, which DCPS considered. However, the DCPS team ultimately rejected the non-public placement, determining that the Student's ability to access and progress in the general education curriculum could be effectively supported at School B, his/her local DCPS school. The Student's IEP prescribed the following services outside of general education: 2.5 hours (150 minutes) per week of specialized instruction, 3 hours (180 minutes) per month of behavioral support services, and 1.5 hours (90 minutes) per week of OT. DCPS proposed evaluating the Student upon his/her return to DCPS and conducting a 30-day review with the IEP team to determine whether further IEP revisions were necessary. (Petitioner's Exhibits 3, 4-14)
9. On June 15, 2023, DCPS amended the Student's IEP, increasing specialized instruction and related services to 5.6 hours (340 minutes) per week of specialized instruction outside general education and 2 hours (120 minutes) per week of specialized instruction inside general education, 4 hours (240 minutes) per month of behavioral support services and 1.5 hours (90 minutes) per month of OT outside general education, and 30 minutes per month of OT consultation. (Petitioner's Exhibit 6)
10. The Student did not perform well upon returning to School B. Petitioners eventually sent the Student to another residential program in June 2023. In August 2023, Petitioners notified DCPS of their unilateral placement of the Student in the residential program and requested DCPS funding. DCPS acknowledged Petitioner's notice of unilateral placement, declined Petitioner's request for DCPS funding, and maintained that it had proposed an appropriate IEP, LRE, and placement for the Student. (DCPS Exhibit 9)
11. The student remained in the residential program for under six months until December 2023. By November 2023, the student exhibited signs of emotional and behavioral dysregulation, struggled to maintain relationships with peers, and became involved in physical altercations with other students in the program. Due to insufficient qualified staff at the residential program, the Student's deteriorating behavior, and safety concerns for the Student, Petitioners chose to remove the Student from that program and, on December 26, 2023, enrolled the Student in a short-term inpatient psychiatric residential stabilization program. (Mother's testimony, Witness 1's testimony, Petitioners' Exhibits 12, 14)
12. During his/her time in the inpatient residential program, the Student stabilized and complied with the program protocols. The program described the Student as an engaged, willing learner who required daily prompting. The autism diagnosis was added to the

Student's profile at this program. The Student remained in this program from December 26, 2023, until mid to late February 2024. The team at the short-term residential program recommended an out-of-home placement with 24-hour care and support from a team to address the Student's academic deficits. (Witness 1's testimony, Petitioner's Exhibits 14, 16, 19)

13. DCPS convened an IEP meeting on February 6, 2024, and updated the Student's IEP to prescribe a least restrictive environment ("LRE") removed from general education, including 28.37 hours per week of specialized instruction, 5 hours per month of behavior support services and 1.5 hours per month of occupational therapy. (DCPS Exhibit 14)
14. On February 7, 2024, Petitioners notified DCPS of their intent to unilaterally enroll the Student in School A. DCPS acknowledged the Petitioners' letter and responded in a letter dated February 20, 2024. In that letter, DCPS stated, inter alia, the following: "It is DCPS's position that the LEA has been working to make a FAPE available to your child with an appropriate IEP and placement in the least restrictive environment. As indicated in the PWN issued on 2/14/24, DCPS is initiating the change in placement process with OSSE. OSSE will begin identifying an appropriate location of services at a Non-Public Day School that holds a Certificate of Approval (COA) with the OSSE. Once OSSE identifies a location of service, DCPS will issue a location of services letter accordingly." (DCPS Exhibit 29, Petitioner's Exhibit 13)
15. On February 21, 2024, OSSE received a change in placement ("CIP") request from DCPS for the Student. On February 22, 2024, OSSE emailed DCPS requesting documents and proposing meeting dates. (OSSE's Exhibit 2, 3, 4)
16. The CIP meeting took place on March 12, 2024. During this meeting, the Student's IEP team, which included DCPS and the Student's parents, determined that the Student required placement in a nonpublic day school. At the CIP meeting, OSSE informed the parents that it must apply to schools with a full COA before applying to those that do not possess such certification. The COA helps ensure that a student is placed where FAPE can be provided in the least restrictive environment and that the health and safety of the student is protected. (Witness 4's testimony, OSSE Exhibit 5)
17. On March 12, 2024, OSSE obtained parental consent to send admission packets. In this consent, OSSE informed Petitioners that it would apply to nonpublic schools listed on OSSE's COA list. (OSSE Exhibit 6)
18. On March 14, 2024, OSSE sent admissions packets to four non-public special education day schools. (OSSE Exhibits 7, 8, 9, 10, 11).
19. On April 10, 2024, School C emailed DCPS that the Student's parents had visited School C for admission information and a school tour. During this visit, they communicated to School C staff that they were awaiting a court hearing with DCPS and did not expect the Student to return home for at least another six months. School C staff informed Petitioners that they have open enrollment throughout the year based on availability, and whenever

the Student was ready for a nonpublic placement, School C would proceed with our admissions process for the Student. (OSSE Exhibit 13 pg. 74)

20. On April 24, 2024, OSSE received a denial notification from one of the non-public schools (“School D”) to which it had sent the Student’s application packet. (OSSE Exhibit 12).
21. On May 3, 2024, OSSE received a conditional acceptance from School C, pending a full acceptance once Petitioners completed all the admission requirements. (OSSE Exhibit 13 pg. 72)
22. On May 10, 2024, OSSE issued a Notice of Conditional Service Location to School C (OSSE Exhibit 14)
23. On June 10, 2024, OSSE received a conditional acceptance from another non-public day school (“School E”), pending a full acceptance once the parents complete all the admission requirements. On this same day, OSSE notified the parents of this conditional acceptance. (OSSE Exhibit 15).
24. As of the due process hearing date, the Student has not completed the admission process with the two nonpublic day schools that have extended conditional acceptances. (Mother’s testimony)
25. School C can implement the Student’s current IEP and could have done so when the IEP was developed. School C serves students with a variety of disabilities, including autism. It has behavior interventions embedded in its educational programming and offers vocational training. To address the Student’s behavior/emotional concerns while being transported by bus to School C, DCPS and OSSE can, among other things, limit the Student’s commute time to School C and assign the Student a dedicated aide to ride with him/her on the bus. (Witness 7’s testimony, Page 347)
26. School A is a therapeutic boarding school located in a southern U.S. state. It does not possess an OSSE COA. Some students at School A are funded by their public school districts. School A creates individualized learning and behavior intervention plans for all its students. All classes at School A average four to five students, except physical education, which accommodates ten students. At School A, students need support as they transition between classes and move from class to residential living, so staff members accompany them during these transitions. (Witness 4’s testimony, Petitioners’ Exhibit 17)
27. At School A, the Student experiences more difficulty staying regulated in larger groups and requires redirection. He/She needs assistance waking up to help him manage her/his morning routine. If she/he is dysregulated upon waking, it can sometimes impact his/her day. At School A, the Student participates in group therapy sessions twice weekly and has an hour of individual therapy each week. Family calls take place once a week, along with supervised social calls weekly. OT is outsourced. School A collaborates with its local school system to provide a special education teacher and necessary related services to students. (Witness 4’s testimony, Petitioners’ Exhibit 17)

28. None of the teachers at School A are certified. However, a certified special education teacher from the local school district is on campus for a few hours each week to work with some, but not all, students on reading and math. The Student receives limited specialized instruction from a special education teacher. (Witness 3's testimony, Witness 4's testimony, Petitioners' Exhibit 20)
29. At School A, the Student is progressing in self-regulation, managing impulsivity, self-reflection, and accepting feedback. The Student struggles with transitioning from the residence at School A to a school setting in the mornings and after weekends. The Student is scheduled to move to a smaller private home on School A's campus. However, the Student has exhibited aggression toward a teacher and encountered other challenges that have delayed this transition. (Mother's testimony)
30. Since arriving at School A, the Student has returned home to the District of Columbia at least four times, including during the summer of 2024 and for Labor Day weekend. The Student had home visits during the November and December 2024 holidays, engaging in family-oriented activities and spending time with friends in the neighborhood. During these home visits, the Petitioners collaborated with School A to establish home visit goals, which were reviewed with School A during and after the visits. The next time the Student is scheduled to return home is for spring break in 2025. (Mother'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 5A DCMR 3053.6, the burden of proof is the responsibility of the party seeking relief. *Schaffer v. West*, 546 U.S. 49, 126 S.Ct. 528 (2005). The burden of persuasion shall be met by 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). DCPS held the burden of persuasion on issue #1 after Petitioners presented a prima facie case on that issue. OSSE held the burden of persuasion on issue #2 after Petitioners presented a prima facie case on that issue.⁵ Petitioners held the burden of persuasion on issue #3.

ISSUE 1: Did DCPS deny the Student a FAPE by failing to propose an appropriate IEP and placement for the 2023-24 and 2024-25 school years?

Conclusion: DCPS did not sustain the burden of persuasion by a preponderance of the evidence that it provided the Student with an appropriate IEP and educational placement from February 2023 to February 2024. However, DCPS sustained the burden of persuasion by a preponderance of the evidence that it provided the Student with an appropriate IEP and educational placement as of February 2024.

The Individuals with Disabilities Education Act ("IDEA") was enacted to ensure that all disabled students receive a "free appropriate public education." 20 U.S.C. § 1400(d)(1)(A). "Commonly referred to by its acronym 'FAPE,' a free appropriate public education is defined as 'special education and related services that' are 'provided at public expense, under public supervision ...;' and that 'meet the standards of the State educational agency;' as well as 'conform[] with [each disabled student's] individualized education program.'" *Charles H. v. District of Columbia*, 2021 WL 2946127 (D.D.C. June 16, 2021) (quoting 20 U.S.C. § 1401(9)) (alterations in original). "Special education" is defined as "specially designed instruction, at no cost to parents, [that] meet[s] the unique needs of a child with a disability." 20 U.S.C. § 1401(29). "Related services," on the other hand, are defined as "such developmental, corrective, and other supportive services ... as may be required to assist a child with a disability to benefit from special education." *Id.* § 1401(26)(A).

"Under [the] IDEA and its implementing regulations, students with disabilities ... are entitled to receive [a] FAPE through an Individualized Education Program (or IEP)." *Charles H.*, 2021 WL

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.

(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.

2946127 (quoting 20 U.S.C. § 1401(9)(D)). An IEP is a written document that lays out how the student will obtain measurable annual goals and that mandates specific special education and related services that the student must receive. 20 U.S.C. § 1414(d)(1)(A)(i). It is created for each student by a special "IEP Team," consisting of the child's parents, at least one regular-education teacher, at least one special-education teacher, and other specified educational experts. *Id.* § 1414(d)(1)(B). An IEP is the main tool for ensuring that a student is provided a FAPE. See *Charles H.*, 2021 WL 2946127 (quoting *Lofton v. District of Columbia*, 7 F. Supp. 3d 117, 123 (D.D.C. 2013)). " (*Robles v. District of Columbia* 81 IDELR 183 D.D.C. August 26, 2022)

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

The second substantive prong of the *Rowley* inquiry is whether the IEP 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 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 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 into 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).

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 *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 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)

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).

In *Kruelle*, the Court stated: “Of course, before ordering residential placement, a court should weigh the mainstreaming policy embodied in the Education Act, which encourages placement of the child in the least restrictive environment. The district judge here, however, carefully undertook such a calculation. He noted that past attempts to provide in-home care and after-school instruction had been singularly unsuccessful; all had occasioned regression for Paul. And as the trial judge remarked in *DeWalt v. Burkholder*, No. 80-0014-A, 3 EHLR 551:500 (E.D. VA March 13, 1980), once a court concludes that residential placement is the only realistic option for learning improvement, the question of "least restrictive" environment is also resolved. "Only when alternatives exist must the court reach the issue of which is the least restrictive," 3 EHLR 551 at 553.

In *Leggett v. District of Columbia*, 793 F.3d 59, 71 (D.C. Cir 2015), the Court, while referencing *McKenzie (supra)*, also cited *Ashland School District v. Parents of Student R.J.*, 588 F.3d 1004, 1010 (9th Cir.2009) (although teachers reported that student had difficulty turning in assignments on time, she earned good grades when she completed her work, was well regarded by teachers, and was not disruptive, and it was student's "risky behaviors" outside of school that prompted her parents to enroll her in the facility). In other words, if a placement reasonably calculated to educate the child could be provided in a non-residential school, or if a parent sends her child to a residential program primarily to treat the child's emotional, social, or psychological issues, then the placement is not "necessary to provide a free appropriate public education."

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)).

Petitioners challenged the appropriateness of the Student's IEPs that were in effect during SY 2023-2024 and SY 2024-2025 only as the level of services prescribed and the LRE. They did not challenge the goals, related services, or other aspects of the Student's IEPs.

The evidence demonstrates that Petitioners unilaterally placed the Student in a residential placement in May 2021, where the Student remained until April 2023. In February 2023, DCPS convened an IEP meeting, during which the IEP team considered data from that residential facility to determine the Student's services and LRE. Petitioners requested that the Student provide an LRE outside general education in a non-public special education day school consistent with the recommendation made by the residential placement where the Student had been for nearly two years. Instead, DCPS determined that the Student would receive specialized instruction in general education and related services outside general education at the Student's neighborhood DCPS school.

The evidence demonstrates that the Student returned to his/her local DCPS school in the spring of 2023 and did poorly. In June 2023, Petitioners again unilaterally placed the Student in a residential setting. Although Petitioners presented testimony from a psychologist who evaluated the Student in May 2023 and recommended that the Student be placed in a residential setting, DCPS did not have this evaluation and recommendation when it developed the Student's February 2023 IEP and determined the Student's LRE.

Based upon the data available to DCPS from the residential placement where the Student was at the time of this meeting, DCPS should have followed the recommendation that the Student be stepped down to a less restrictive placement in a special education non-public day school. DCPS presented witnesses who supported the LRE that DCPS determined for the Student in February 2023 at his/her local DCPS school. However, none of these witnesses were the Student's IEP team members. The IHO did not find their testimony sufficient to counter the evidence that the Student had been in a highly restrictive setting for nearly two years and the recommendation by that program that the Student be stepped down to a non-public special education day school.

Based on this evidence, the IHO concludes that DCPS did not sustain the burden of persuasion by a preponderance of the evidence that it provided the Student with an appropriate IEP, LRE, and placement in February 2023.

However, regarding the IEP developed in February 2024, DCPS presented sufficient evidence that the Student required an LRE and placement outside of general education in a non-public special education day school. There was insufficient evidence that the Student needed a residential placement.

The evidence demonstrated that on February 6, 2024, DCPS updated the Student's IEP and changed the Student's LRE to a placement outside the general education setting. DCPS submitted a CIP request to OSSE. The CIP meeting occurred on March 12, 2024, during which the IEP team determined that the Student required placement in a nonpublic day school. At the CIP meeting, OSSE informed the parents that it must apply to schools with a COA.

On March 12, 2024, OSSE received parental consent to send admission packets. In this consent, OSSE informed the Petitioners that it would apply to the nonpublic schools listed on OSSE's COA list. By the time of the CIP meeting, the Petitioners had already notified DCPS of their intention to enroll the Student unilaterally in School A.

Although Petitioners visited some of the schools OSSE proposed, including School C, they informed School C that they were awaiting a court hearing with DCPS and did not expect the Student to return to the District of Columbia to complete School C admission requirements for at least another six months.

The Student's mother also testified that she understood that completing the admission process for School C required an in-person interview and a day spent on the School A campus. She acknowledged that, in her view, School C could be a suitable option for the Student after he/she finished at School A.

On May 3, 2024, OSSE received a conditional acceptance from School C, pending a full acceptance once Petitioners completed all the admission requirements. On June 10, 2024, OSSE received a conditional acceptance from another non-public day school, pending a full acceptance once the parents completed all the admission requirements. As of the due process hearing date, the Student had not completed the admission process with the two nonpublic day schools that extended conditional acceptances despite evidence that the Student has, on multiple occasions, returned home from School A.

Petitioners assert that the Student required a residential program in February 2024 and still does. The IHO was unconvinced by this assertion based on the evidence presented. Petitioners presented two expert witnesses who testified that the Student needs a high level of structure and support inside and outside the classroom, expressing doubts about the Student's potential success in a special education day program. However, one witness who evaluated the Student had not interacted with him/her since the evaluation in May 2023. The other witnesses had not interacted with or had personal knowledge of the Student since the initial months following the Student's unilateral placement at School A.

Although Petitioners presented a witness from School A who testified that the Student needs assistance waking up and help manage his/her morning routine, this witness' testimony did not support a finding that the Student's out-of-school behaviors are impacting the Student educationally or that the Student's social-emotional concerns are not segregable from the Student's learning process.

Although the Student's mother testified the Student displayed aggression toward a teacher and faced other challenges that have hindered the Student's transition to another living space at School A, she also testified that the Student is managing impulsivity and transitioning from the residence at School A to a school setting mornings and after weekend breaks.

A DCPS witness who conducted a virtual observation of the Student at School A credibly testified, based on that observation, that the Student was fully engaged in the classroom and did not demonstrate off-task behaviors.

In addition, there was insufficient evidence that the Student could not function appropriately at his/her home. The Student's mother testified that since arriving at School A, the Student returned home for about five days during the summer of 2024, the Labor Day weekend, Thanksgiving, and Christmas holidays, and resided with Petitioners with little incident. She also testified that while at School A, the Student is progressing in self-regulation, accepting feedback, and engaging in self-reflection.

Based on the evidence presented, the IHO concludes that DCPS sustained the burden of persuasion by a preponderance of the evidence that it provided the Student with an appropriate IEP and LRE as of February 2024 that was reasonably calculated to enable the Student to make progress appropriate in light of the Student's circumstances. DCPS then promptly took appropriate action to identify a location of service where the Student's IEP could be implemented.

ISSUE 2: Did OSSE deny the Student a FAPE by failing to propose an appropriate program/location of service for the 2023-2024 and 2024-2025 school years?

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

OSSE filed a Motion for Summary Judgment to dismiss Petitioner's claims against OSSE. On December 19, 2024, the IHO issued an order denying OSSE's motion and narrowing the scope of inquiry regarding whether OSSE denied the Student a FAPE.

Based on facts undisputed by both OSSE and Petitioners, the IHO concludes there was no evidence that OSSE was liable for an alleged failure to provide the Student with an appropriate IEP and placement in February 2023. OSSE's only potential direct involvement in an alleged failure to provide the Student with a FAPE was in February 2024, when DCPS initiated a change in placement for the Student.

Although IDEA (20 U.S.C. 1413(g)(1)) allows for an SEA to use payments otherwise designed for an LEA and be deemed to be providing direct services to a student, the local educational agency ("LEA"), not the state educational agency ("SEA"), is charged with making a FAPE available to each child with a disability in the District of Columbia, from ages 3 to 22. (5-A DCMR § 3002.1.)

Once an LEA determines, as DCPS has in this case, that a student requires a placement outside the LEA, OSSE's responsibilities pursuant are defined by D.C. Municipal Regulations, Title 5-A, §3025. These regulations provide in pertinent part:

"After review of all supporting documentation from the LEA and a change in placement meeting to discuss a possible placement outside of the LEA, the SEA representative shall make a recommendation indicating whether a placement outside of the LEA is warranted. The SEA representative shall make a verbal recommendation after the meeting to discuss the proposed change in placement. However, the LEA team, as defined in 5-A DCMR § 3022.1 (b) is responsible for selecting the appropriate educational placement."

On February 21, 2024, OSSE received a CIP request from DCPS for the Student. On March 12, 2024, a CIP meeting occurred in which the Student's IEP team, including DCPS personnel and the Student's parents and representatives, participated. Although an OSSE representative made a recommendation regarding the Student's placement, no evidence was presented that the OSSE representative participated in the placement decision or that the OSSE recommendation had any influence on the team's ultimate placement decision for a non-public day school placement rather than the residential placement requested by Petitioners. The evidence demonstrates that the decision was made solely by the IEP team that did not include an OSSE representative.

Following the CIP meeting on March 12, 2024, OSSE informed the parents that it must apply to schools with a full COA before applying to those without such certification. OSSE obtained parental consent to proceed with sending admission packets to schools. The evidence demonstrates that following the team's placement decision, OSSE complied with its obligations in securing a placement location consistent with the placement decision made by the Student's IEP team.

Consequently, the IHO concludes that OSSE met the burden of persuasion by a preponderance of the evidence, demonstrating that it did not deny the Student a FAPE. Therefore, Petitioner's claims against OSSE are dismissed with prejudice in the order below.

ISSUE 3: Is School A an appropriate placement?

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

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.

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 *Andrew F.*, supra, 137 S. Ct. at 999 (quoting *Rowley*, 458 U.S. at 202)

Pursuant to D.C. Code § 38-2561.02(c) Special education placements shall be made in the following order of priority; provided, that the placement is appropriate for the student and made in accordance with the IDEA and this chapter: (1) DCPS schools, or District of Columbia public

charter schools pursuant to an agreement between DCPS and the public charter school; (2) Private or residential District of Columbia facilities; and (3) Facilities outside of the District of Columbia.

The legal standard under the IDEA is that DCPS “must place the student in a setting that is capable of fulfilling the student’s IEP.” *Johnson v. Dist. of Columbia*, 962 F. Supp. 2d 263, 267 (D.D.C. 2013). *See also O.O. ex rel. Pabo v. Dist. of Columbia*, 573 F. Supp. 2d 41, 53 (D.D.C. 2008) (placement must be in a school that can fulfill the student’s IEP requirements).

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." A school district may be required to pay for educational services obtained for a student by the student’s parent, if the services offered by the school district are inadequate or inappropriate, the services selected by the parent are appropriate, and equitable considerations support the parents’ claim, even if the private school in which the parents have placed the child is unapproved. *Florence County 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)).

Courts must consider “all relevant factors” including the nature and severity of the student’s disability, the student’s specialized educational needs, the link between those needs and the services offered by the private school, the placement’s cost, and the extent to which the placement represents the least restrictive educational environment. *Branham v. District of Columbia*, 427 F.3d 7, 12 (D.C. Cir. 2005).

“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)).

Petitioners have not only requested reimbursement for their costs of placing the Student at School A but have also requested the Student’s prospective placement at School A for the remainder of SY 2024-2025.

Although there was testimony that the Student has made progress at School A, as noted in the discussion of the evidence and conclusions made by the IHO on issue #1 above, the Student does not require a residential placement.

The evidence demonstrates that School A is not implementing the Student's IEP nor providing the Student with consistent specialized instruction. In addition, the evidence demonstrates that School A’s staffing does not include certified teachers, and it does not hold an OSSE COA, which helps ensure that FAPE is provided in the least restrictive environment and that the Student’s health and safety are protected. Consequently, the IHO concludes that School A is not an appropriate prospective placement for the Student. However, based on the Student’s progress since attending

School A, there is sufficient evidence that School A meets the legal standard for parental reimbursement.

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.)

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/her loss of FAPE and the specific compensatory measures needed to best correct those deficits." *Id.* at 526.

When a hearing officer finds denial of FAPE, he has "broad discretion to fashion an appropriate remedy, which can go beyond prospectively providing a FAPE, and can include compensatory education.... [A]n award of compensatory education 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." *B.D. v. District of Columbia*, 817 F.3d 792, 797-98 (D.C. Cir. 2016) (internal quotations and citations omitted.)

The IHO has concluded that DCPS denied the Student a FAPE when it did not provide the Student with an appropriate IEP and placement in February 2023. DCPS should have provided the Student with placement and an LRE outside of general education in a non-public special education day school. The IHO concludes that the Petitioners' reimbursement for the Student's attendance at School A from February 2024 to February 2025 is appropriate compensation for this denial of FAPE to the Student.

ORDER:

1. Petitioners' claims of violations of IDEA alleged against OSSE in Petitioners' due process complaint are hereby dismissed with prejudice.
2. Within thirty calendar days of Petitioners providing DCPS proof of payment, DCPS shall reimburse the Petitioners in accordance with OSSE prescribed rates, Petitioners' costs associated with the Student's attendance at School A from February 2024 to February 28, 2025.
3. DCPS shall convene a multidisciplinary team meeting within thirty (30) calendar days of the issuance of this order to review the Student's progress at School A, review and revise

the Student's IEP as appropriate, and determine an appropriate placement and location of service for the Student for the remainder of SY 2024-2025.

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 20, 2025

Copies to: Counsel for Petitioners
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