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**Confidential**

Guardian on Behalf of Student,  Petitioner,  v.  District of Columbia Public Schools Local Educational Agency (“LEA”)  Respondent.  Case # 2020-0101  Date Issued: July 22, 2020	CORRECTED HEARING OFFICER’S DETERMINATION <sup>1</sup>  Hearing Dates: June 23, 2020 June 24, 2020  Counsel for Each Party is listed in Appendix A  <u>Hearing Officer:</u> <u>Coles B. Ruff, Esq.</u>
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<sup>1</sup> 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, July 22, 2020, 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 5 Chapter E30.

## **BACKGROUND AND PROCEDURAL HISTORY:**

The student who is the subject of this hearing (“Student”) is an adult resident of the District of Columbia (“D.C.”). Student has been determined eligible for special education and related services pursuant to the IDEA with a disability classification of Multiple Disabilities (“MD”) including Intellectual Disability (“ID”) and Other Health Impairment (“OHI”) due to various mental health diagnoses. District of Columbia Public Schools (“DCPS”) is Student’s local educational agency (“LEA”). Although Student has reached the age of majority, Student has been determined by a D.C. Superior Court Judge to be an incapacitated individual. As a result, Student has a Court-appointed guardian. Student's current guardian ("Petitioner") was appointed by the Court on February 19, 2020, and filed this due process complaint on May 8, 2020.

Student attends a non-public special education separate school ("School A") where Student began attending in January 2020. Prior to attending School A, Student was in a residential placement (“School B”) where Student attended from October 5, 2018, until December 2019. Student’s most recent individualized educational program (“IEP”) was developed at School A and is dated March 15, 2020, and prescribes a least restrictive environment (“LRE”) totally removed from non-disabled peers.

When Student began attending School A, Student was residing with Student’s mother in the District of Columbia. In addition to the assistance of Student's court-appointed guardian, and the educational and social-emotional supports Student is to receive at School A, Student is engaged in community-based social and mental services to assist in, among other things, medication management. Because of aggressive and threatening behaviors, Student has not been allowed to reside with Student's mother since April 2020 and has been barred from group home settings where Student has resided since then. At the time of this hearing, Student was residing temporarily with Student's father.

At a May 1, 2020, meeting, Petitioner and Petitioner’s attorney requested that Student’s LRE be changed to a residential placement and that DCPS secure an appropriate residential placement for Student. As the basis for his request for a change in placement, Petitioner cited Student’s psychiatric episodes and resulting hospitalizations since returning to the District of Columbia, along with Student’s difficulties in maintaining housing, spotty school attendance, and non-participation in distance learning since school closure due to the COVID-19 emergency. DCPS did not agree to the change in placement. Petitioner filed his due process complaint on May 8, 2020, asserting, inter alia, that DCPS has denied Student a free appropriate public education ("FAPE") by failing to change Student's LRE and provide Student a residential placement.

**Relief Sought:**

Petitioner seeks the following as relief:

- A finding that Student has been denied a FAPE and that DCPS immediately revise Student's IEP to reflect a change in LRE to a residential program and immediately place and fund the student in a residential facility;
- DCPS immediately send out packets to appropriate facilities and timely execute any documents required for Student to be placed and timely arrange for transportation to the facility;
- DCPS conduct a comprehensive vocational/transition assessment as soon as possible and reconvene Student's MDT to review the result and update Student's transition plan as appropriate.
- Student be granted compensatory education for the denials of FAPE that have occurred.

**LEA Response to the Complaint:**

The LEA filed a response to the complaint on May 18, 2020, and a revised response on May 23, 2020, after Petitioner's counsel clarified that the alleged lack of a residential LRE and placement started May 1, 2020. The LEA denies that there has been any failure to provide Student with a FAPE. In its responses, DCPS asserted, inter alia, the following:

DCPS convened a meeting on May 1, 2020, in response to a request from Petitioner's counsel on April 24, 2020. Student had been discharged from a residential educational placement in December 2019 and placed at a non-public separate day school by January 2020. Student was attending and had begun to develop a rapport and therapeutic service relationship with educators and providers. Many problems and difficulties occurred in Student's home environment in D.C. between Student and Student's parent. These continued after distance learning began in mid-March 2020.

Students' difficulties are not educational program deficiencies but home/community difficulties that pre-date the residential assignment and have unfortunately persisted. What's more, Student, an adult, has indicated Student will not remain enrolled at another residential placement and has threatened to check out of such a placement.

Student does not want a dedicated aide. There is no evidence in the record that a vocational/transition assessment was or has been inappropriate for Student. Further, with Student's most recent lesser restrictive school setting and progress made to get there, a vocational assessment would have been appropriate, but many factors prevented such an assessment from taking place during the early spring 2020. Lastly, the COVID-19 pandemic has prevented the full panoply of schooling as all schools have been closed. Student has been provided access to the

curriculum with the supports that have been available to Student at a distance and through technological means and devices.

### **Resolution Meeting and Pre-Hearing Conference:**

The parties participated in a resolution meeting on May 18, 2020, and did not resolve the complaint. The parties did not mutually agree to shorten the 30-day resolution period. The 45-day period began on June 18, 2020, and ends [and the Hearing Officer's Determination ("HOD") is due] on July 22, 2020.

The undersigned hearing officer ("Hearing Officer") convened a pre-hearing conference on May 19, 2020, and issued a pre-hearing order ("PHO") on May 26, 2020, outlining, inter alia, the issues to be adjudicated.

### **ISSUES:**<sup>2</sup>

The issues adjudicated are:

1. Whether DCPS denied Student a FAPE by failing to amend Student's IEP as of May 1, 2020, to reflect an LRE and placement in a residential facility and/or provide Student with an appropriate residential placement that can provide Student access to a FAPE.
2. Whether DCPS denied Student a FAPE by failing to conduct a comprehensive reevaluation during SY 2018-2019 because the reevaluation did not include a vocational and/or transition assessment.
3. Whether DCPS denied Student a FAPE by failing to provide Student with an appropriate IEP on March 25, 2019, because the IEP was not based upon an appropriate reevaluation that included a vocational and/or transition assessment.

### **RELEVANT EVIDENCE CONSIDERED:**

This Hearing Officer considered the testimony of the witnesses and the documents submitted in each party's disclosures (Petitioner's Exhibits 1 through 75 and Respondent's Exhibits 1 through 36 and 47 through 74) that were admitted into the record and are listed in Appendix A.<sup>3</sup> The witnesses testifying on behalf of each party are listed in Appendix B.<sup>4</sup>

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<sup>2</sup> The Hearing Officer restated the issues at the hearing, and the parties agreed that these were the issues to be adjudicated.

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

<sup>4</sup> Petitioner presented four witnesses: (1) Student's Community-based Case Manager, (2), Student's Guardian (Petitioner), (3) Student's Mother, and (4) Student's Educational Advocate who is employed by the law firm Representing Petitioner, designated as an expert witness. Respondent presented four witnesses: (1) School A's Educational Director, designated as an expert witness (2) Student's School A Therapist, designated as an expert witness, (3) DCPS Monitoring Specialist for School A, designated as an expert witness, and (4) Student.

## **RESPONDENT’S MOTION TO DISMISS:**

On June 16, 2020, DCPS filed a motion to dismiss asserting that Petitioner had no standing to file the current due process complaint because, although Petitioner has been appointed a guardian, Student has not been determined incompetent and Student still holds Student's educational rights and educational decision making. Respondent asserts that Student's educational rights are not expressly listed in the D.C. Superior Court Order that appointed Petitioner as Student's guardian.

Respondent asserts that IDEA and the District of Columbia Municipal Regulations (“DCMR”) expressly state that a transfer of rights under IDEA occurs automatically “when a child with a disability, except a child with a disability who has been determined to be incompetent under District law, reaches the age of eighteen.” Respondent cited in its motion 34 CFR §300.520(a)<sup>5</sup> and DCMR Title 5, §3023.1.

Respondent asserts that Student has not been deemed or determined incompetent to make or participate in Student’s educational decision-making. In fact, the law expressly prohibits generalizing an incapacitation/guardianship order as meaning this at all.

Respondent asserts that pursuant to D.C. Code § 21-2004 under which Student’s guardianship was effectuated, a finding that an individual is incapacitated shall not constitute a finding of legal incompetence. An individual found to be incapacitated shall retain all legal rights and abilities other than those expressly limited or curtailed in the order of appointment of a guardian or in a protective proceeding, or subsequent order of the court.

Respondent further asserts that the guardianship order appointing Petitioner as Student’s guardian indicates several things over which Student is determined incapacitated, none of which expressly limit or curtail Student’s educational decision-making.

Petitioner filed an opposition to Respondent's Motion on June 17, 2020. The Hearing Officer heard each party's arguments at the start of the due process hearing.

The Hearing Officer interprets 34 CFR §300.520(a) as allowing a state the discretion to mandate a transfer of educational rights from the parent to the student at the age of majority, except as to students who have been determined to be incompetent. The District of

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<sup>5</sup> A State may provide that, when a child with a disability reaches the age of majority under State law that applies to all children (except for a child with a disability who has been determined to be incompetent under State law)— (1)(i) The public agency must provide any notice required by this part to both the child and the parents; and (ii) All rights accorded to parents under Part B of the Act transfer to the child;

Columbia has so mandated that at the age of 18, a transfer of rights from the parent to the student occurs.

As Petitioner's counsel aptly points out, DCMR Title 5E, §3035.1<sup>6</sup> states that a court's declaration that a child with a disability is a legally incapacitated individual is an express exception to a transfer of educational rights.

Contrary to what Respondent counsel argues, the absence of finding that Student is incompetent does not result in Student retaining rights of educational decision making. The Hearing Officer interprets DCMR Title 5E, §3035.1 to indicate that in the instance of a finding that student is an incapacitated individual, the educational rights remain with the parent unless otherwise designated. The facts this case demonstrate that Student's parent petitioned the Court for a guardian to be appointed specifically to address Student's access to and maintenance in a residential placement.

Although the Court order under which Petitioner was appointed Student's guardian does not expressly grant Petitioner educational decision-making rights, the language of the order under which Petitioner is charged is broad and in the Hearing Officer's opinion includes educational decision-making rights. Consequently, the Hearing Officer denied Respondent Motion and determined that Petitioner has standing to bring the current due process complaint.

#### **SUMMARY OF DECISION:**

In this case, Petitioner held the burden of production and the burden of persuasion on issue #2. Petitioner established a prima facie case on issues #1 and #3 before the burden of persuasion fell to Respondent for issues #1 and #3. Respondent sustained the burden of persuasion by a preponderance of the evidence on the appropriateness of Student's LRE, issue #1. Petitioner did not sustain the burden of persuasion by a preponderance of the evidence on issue #2. Respondent sustained the burden of persuasion by a preponderance of the evidence on issue #3. The Hearing Officer directs DCPS to convene a meeting to review Student's current living arrangement and progress in accessing Student's services and education and directs DCPS to conduct a vocational assessment.

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<sup>6</sup> In accordance with D.C. Official Code § 46-101 and IDEA, all rights accorded to parents under IDEA and local law governing the delivery of special education and related services shall transfer to the child with a disability ("student") at the age of eighteen (18), unless one of the following exceptions is met: (a). The student is declared a legally incapacitated individual, as defined in this chapter, by a court of competent jurisdiction, and a legal guardian or representative has been appointed by the court to make decisions for the student, including educational decisions.

## **FINDINGS OF FACT:<sup>7</sup>**

1. Student is an adult resident of the District of Columbia. Student has been determined eligible for special education and related services pursuant to the IDEA with a disability classification of MD, including ID and OHI, due to various mental health diagnoses. DCPS is Student's LEA. (Respondent's Exhibits 14, 15)
2. Student attends School A, a non-public special education separate school where Student began attending in January 2020. Prior to attending School A, Student was in a residential placement, School B, where Student attended from October 5, 2018, until December 2019. Prior to School B, Student was in different residential placement ("School C"), from February 6, 2017, until April 10, 2018. (Petitioner's Exhibits 2-1, 2-2, Respondent's Exhibit 3: PDF page 17)
3. When Student was discharged from School C Student's discharge plan was for Student to live in a residential group home and attend a non-public special education day school. However, when Student returned to the District of Columbia in April 2018, no group home or school had been identified for Student and Student returned to Student's parent's home. (Respondent's Exhibit 3: PDF page 17)
4. On April 24, 2018, before a local residence and school were identified for Student, Student was hospitalized for homicidal ideations following an incident at Student's parent's home in which Student became agitated and destructive. Student's parent thereafter did not feel safe with Student returning home, and on May 2, 2018, DCPS and the District of Columbia Department of Behavioral Health ("DBH") held a meeting to discuss Student returning to a residential placement. (Respondent's Exhibit 3: PDF pages 17, 18)
5. On May 9, 2018, Student's parent filed a due process complaint requesting, inter alia, Student's placement in a residential facility. Student was discharged from the hospital on May 11, 2018, and returned to Student's parent's home. On May 17, 2018, the hearing officer in the matter issued a stay-put order requiring DCPS to provide a suitable residential facility as Student's stay-put educational placement. (Respondent's Exhibit 3: PDF page 18)
6. On August 23, 2018, School B notified DCPS that it had accepted Student for admission, but because Student was soon to reach the age of majority and would then be able to sign out of School B at will, School B required a parental guardianship be put in place. (Respondent's Exhibit 3: PDF page 20)

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

7. Based upon a petition filed by Student's parent, on September 27, 2018, a D.C. Superior Court Judge issued an order determining Student to be an "incapacitated individual" and appointing an attorney as Student's guardian to assist Student in maintaining, among other things, Student's shelter, health care, life skills, and therapeutic needs. Student arrived at School B on October 5, 2018. (Respondent's Exhibits 2, 3 PDF page 20 )
8. While Student was at School B, several evaluations were conducted as a part of Student's triennial reevaluation, including a psychological assessment conducted in December 2018 and January 2019. The evaluator assessed Student's cognitive, academic, social-emotional, and personality functioning. Student's cognitive functioning was classified as Extremely Low. Combined with Student's deficits in adaptive functioning, the evaluator concluded Student met the criteria for the ID classification. The evaluator noted Student's previous diagnoses of Schizophrenia and Psychotic Disorder Not Otherwise Specified ("NOI"). Student's academic achievement scores ranged from Very Low to Extremely Low, generally at the second percentile. Student's social-emotional and behavioral functioning indicated difficulties with guardedness and defensive avoidance that is heightened when Student's prescribed medications are decreased. The evaluator noted that Student presents with marked patterns of delusional thinking, particularly regarding paranoia surrounding interpersonal relationships and interactions with others. At times, Student misperceives interactions with and intentions of others and, as a result, may engage in maladaptive and aggressive behaviors. The assessment results were not consistent with a diagnosis of Attention Deficit Hyperactivity Disorder ("ADHD"). (Petitioner's Exhibit 2)
9. The evaluator recommended Student be in a program with a high level of structure and predictability and that Student increase independent living skills as a means of enrolling in a less restrictive supportive living environment as close to family as possible. As to an educational placement, the evaluator recommended a small structured classroom with clear schedules, rules, and expectations with Positive Behavior Support ("PBS") that integrate behavior strategies across treatment settings and group therapy for Student's social skill development. (Petitioner's Exhibit 2)
10. On February 28, 2019, School B and DCPS convened an IEP meeting and reviewed the results and recommendations from the psychological assessment and the other evaluations that had been conducted. Petitioner's attorney participated in that meeting. During that meeting, the attorney raised concerns about the need for vocational testing and the sufficiency of Student's transition plan. (Petitioner's Exhibit 19)
11. On October 17, 2019, School B and DCPS convened a Treatment Review Meeting to assess Student's progress at School B. Student's classroom teacher reported that Student continued to thrive in the program, but sometimes needed assistance in interactions with others but was able to be redirected. In the residential setting, Student demonstrated respectful conduct with staff and sometimes related well with others using appropriate coping skills. During Student's time at School B, Student participated in the Auto Vocational Program and was highly motivated. (Petitioner's Exhibit 14)

12. On December 10, 2019, DCPS and School B convened a discharge planning meeting, during which it was noted that Student had been accepted to School A. The team discussed that Student's possible discharge from School B would be on December 22, 2019, and a tentative date for Student to begin attending School A on January 2, 2020. (Petitioner's Exhibit 13)
13. When Student returned to D.C. after being discharged from School B, Student was initially residing with Student's mother and stepfather. Student began attending School A in early January 2020, initially with private transportation. On January 7, 2020, while being transported, Student threatened the private transportation driver and jumped out of the moving vehicle. After that incident, Student was provided bus transportation to and from School A. However, Student did not report to school on January 9, 2020, and did not get on the bus. Student was absent from school for 14 days as of February 11, 2020. (Mother's testimony, Petitioner's Exhibits 30, 31, 32, 34, Respondent's Exhibit 64)
14. In January 2020, Student incurred criminal charges as a result of an incident of making threats. On or about February 19, 2020, Student expressed a willingness to attend school and did attend thereafter. (Parent's testimony, Petitioner's Exhibit 45-1)
15. On February 19, 2020, a D.C. Superior Court Judge replaced Student's previous guardian and appointed Petitioner as Student's current guardian. The Court Order states that Petitioner is responsible for the care, custody, and control of Student and shall be governed by the general powers and duties listed in D.C. Code § 21-2047(a), (b), 21-2047.01 and 21-2047.02. The Order also states that the guardian is notified of filings to the Court, one of which states the following: Change of Address Requirements:

“Before moving [Student] to a location that is outside the District of Columbia but within the geographical boundaries of the neighboring jurisdictions listed above (Montgomery County, Prince Georges' County, Arlington County, City of Alexandria or Fairfax County), the guardian must file a Petitioner of Post Appointment for Permission to Move [Student] Outside the District of Columbia and Neighboring Jurisdictions and obtain prior court approval for the move.

(Respondent's Exhibits, 74, 21: PDF page 140)

16. In addition to the assistance of Student's court-appointed guardian, and the education and social-emotional support that Student is to receive at School A, Student is engaged in community-based social and mental health services to assist in, among other things, medication management. Student has a community-based case manager and an assigned psychiatric nurse practitioner. The case manager assists Student in accessing resources for housing, health and wellness, and independent living. The case manager has stayed abreast of Student's school and housing issues and Student's court involvement. (Witness 1's testimony)

17. On March 9, 2020, Student's current School A therapist drafted a summary of Student's progress at School A. Student's current therapist began working with Student at the end of February 2020, when the previous therapist left the school. The therapist noted that Student consistently and openly engaged in therapy but had had a difficult time adjusting to School A's program and was consistently out of class and in the hallways talking with the staff and requesting to see Student's therapist frequently throughout the school day. Student expressed to School A staff that Student did not believe Student could be successful at School A and wanted to attend a different school. According to the therapist, Student continued to struggle with distorted thoughts throughout the school day, including thought patterns resulting in feelings of paranoia, being unwanted, or being misunderstood. The therapist recommended that Student be assigned a one to one aide. (Witness 3's testimony, Witness 4's testimony, Respondent's Exhibit 66)
18. On March 9, 2020, School A convened a meeting to review Student's progress at School A. Student and Petitioner's attorney attended. The therapist's summary and recommendations were shared. Student failing grades had at the time due to non-attendance and time out of the classroom. Student expressed not wanting a dedicated aide and wanting to attend an alternate school. The team agreed to assign Student a dedicated aide and update Student's functional behavior assessment ("FBA") and behavior intervention plan ("BIP"). Student was making some progress relative to IEP goals, but many of the goals remained unintroduced. (Witness 3's testimony, Respondent's Exhibits 71, 73)
19. On March 11, 2020, Student made threatening statements to School A staff and made reference to bringing a weapon to school. On March 11, 2020, Student's parent and guardian were notified about Student's threats to bring a gun to school. School A responded by sending Student home immediately. Student was allowed to return the next day and continued to attend School A until schools were closed on March 13, 2020, due to the COVID-19 emergency. (Witness 3, testimony, Witness 4's testimony, Petitioner's Exhibit 50)
20. Student's most recent individualized educational program ("IEP") was developed at School A and is dated March 15, 2020. It prescribes a least restrictive environment ("LRE") totally removed from non-disabled peers. In addition to specialized instruction and related services outside general education, the IEP prescribes that Student have a dedicated aide for 27.5 hours per week. The IEP included a post-secondary transition plan. The transition assessment results cited in the plan were from a February 13, 2019, assessment (Brigance Transition Inventory) completed when student attended a DCPS school. (Respondent's Exhibits 69, 15: PDF pages 120, 121, 124, 125)
21. After getting into an altercation with Student's stepfather that resulted in a restraining order being issued against Student, Student was no longer able to reside with Student's mother and in April 2020 Student began residing in a group home. (Mother's testimony, Petitioner's Exhibit 29-4).

22. On April 24, 2020, Student was temporarily psychiatrically hospitalized at United Medical Center ("UMC") after being aggressive toward Student's mother. Student was admitted for safety and stabilization after demonstrating worsening psychosis and brandishing a weapon. Student was discharged from UMC on April 29, 2020. Student was stable upon discharge and denied any suicidal or homicidal ideation. (Petitioner's Exhibit 25)
23. Later in the evening, on April 29, 2020, after Student's discharge, Student was involved in an incident at the group home where Student was attending an interview to obtain housing. Police officers physically restrained Student because of Student's aggressive behaviors toward the group home staff. Student was psychiatrically hospitalized on an emergency basis at the Psychiatric Institute of Washington ("PIW"). (Petitioner's Exhibit 26)
24. On May 1, 2020, DCPS convened an IEP team meeting with Petitioner and his attorney to discuss their request for DCPS to place Student in a residential placement. Neither Student nor Student's parent participated in the meeting. The DCPS representative for School A, along with representatives from School A participated. DCPS and School A representatives did not agree that Student required a residential placement and did not agree to amend Student's IEP to reflect a residential placement LRE. School A staff could not say that a residential placement was appropriate because School A had not had a chance to fully implement Student's educational program because of Student's level of anxiety and difficulty transitioning to School A. DCPS did agree to work with the team to submit a referral for a change in placement to OSSE on Petitioner's behalf. During the meeting, the team discussed Student access to distance learning. (Witness 3's testimony, Respondent's Exhibit 10)
25. On May 22, 2020, DCPS issued a prior written notice ("PWN") stating that DCPS and School A did not agree that Student was in need of residential placement and refused Petitioner's and his attorney's request for a change Student's LRE to a residential placement. (Respondent's Exhibit 33)
26. On May 22, 2020, Student was admitted to the District of Columbia Department of Behavioral Health's Comprehensive Psychiatric Emergency Program ("CPEP") due to an incident that occurred at Student's mother's home. Student was released from CPEP the next day, May 23, 2020, and agreed not to return to Student's mother's home under any circumstances. Student returned to the men's shelter where Student was residing. (Petitioner's Exhibit 28)
27. On May 27, 2020, DCPS held a conference call with Student, Petitioner, [REDACTED] attorney, the DCPS representative for School A, Student's community-based case manager, a representative from School A, and a representative from the youth shelter where Student was residing. The purpose of the meeting was to connect Student's wrap-around services team with School A to best support Student, including Student's access to online distance learning. School A's was to end its school year on June 26, 2020, and start its summer session in July. School A agreed to forward distance learning materials to Student at the youth shelter. (Guardian's testimony, Respondent's Exhibit 18)

28. After residing in the men's shelter for three weeks, on June 6, 2020, a result of an incident of threatening another shelter resident, Student was again psychiatrically hospitalized at Washington Hospital Center from June 6, 2020, to June 11, 2020. (Petitioner's Exhibit 29)
29. Since Student was released from the group home Student has not had educational services. Student's current living situation with Student's father is temporary. Student's guardian talks with Student by telephone regularly and last visited Student before the hearing on June 12, 2020. Student has at least once violated the stay-away order and shown up at Student's mother's home. The guardian believes that Student's decision-making is poor and thinks Student cannot live in the community successfully, even with the support of a guardian and the community-based mental health and social services. Because of Student's difficulty maintaining stable and consistent housing due to Student's mental health and resulting aggressive actions, the guardian believes that Student is best served by returning to residential placement. (Guardian's testimony)
30. Student's community-based outpatient psychiatric nurse practitioner ("PNP") has expressed his opinion that it was unlikely, due to Student's aggressive behaviors resulting in recent involuntary hospitalizations, that Student would likely be able to secure any type of housing and might become homeless. As a result of what the PNP perceived as Student's difficulty in attending school when Student had housing, medication monitoring, and transportation to and from school, the PNP recommended Student return to a residential placement to provide significant structure to manage Student's behaviors. Student is due in court for the criminal charge in a few months. (Petitioner's Exhibit 27)
31. Before School A closed due to the COVID-19 emergency, Student had begun to display a small degree of progress in engaging in the School A program and engaged in approximately five weekly therapy sessions. Since the COVID-19 school closure, Student has not accessed the School A's distance learning programs. School A sent distance learning packets to Student, but because of Student's changing living arrangements, Student did not receive the packets timely. Student's School A therapist has talked to Student by telephone a few times since School A's closure, but Student, for the most part, has not been able to log onto the outline therapy and academic sessions. Student is still scheduled to have two 30 minutes of teletherapy sessions per week. School A is a 12-month program and will conduct a summer session from July 6, 2020, through August 24, 2020, and will have a week break before starting SY 2020-2021 at the beginning of September 2020. (Witness 3, testimony, Witness 4's testimony)
32. Student found it challenging to transition from School B to School A. However, Student appreciates that School A has teachers, service providers, and administrators who are helpful, pushed Student to attend school, participate in instruction, and wanted the best for Student. Student's relationship and rapport with the School A therapist has been positive, and Student has found the therapy sessions helpful, particularly when Student has gotten upset while at school. Student has had difficulty maintaining residence in the group homes in which Student was living because of getting into arguments with other residents. Student has recently been living with Student's father and believes, perhaps unrealistically, that Student can remain living there for an extended period because Student cannot live with

Student's mother. Student would prefer to continue living locally and attend a local day school, but Student would prefer to attend a school other than School A, one with a co-ed student body. (Student's testimony)

33. However, Student expressed a willingness to make greater efforts to succeed at School A. Student does not have access to a computer, but if Student did, Student believes Student can participate in school. The guardian informed Student that the due process hearing would consider Student's school placement, but Student did not indicate that Student knew that Petitioner was seeking to return Student to a residential placement. Student expressed that Student is in school for an education and can have interaction with co-eds outside of school. (Student's testimony)

34. DCPS was to send an authorization to School B to conduct a vocational assessment, but that assessment was never conducted. The transition data in Student's current IEP is from before Student went to a residential placement. Student talks of going on to college and of independent living. Student's educational advocate has asked DCPS to conduct an updated transition assessment to update Student's IEP transition plan. (Witness 2'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 provision of FAPE, or caused the child a deprivation of educational benefits. An IDEA claim is viable only if [DCPS'] procedural violations affected the student's substantive rights." *Lesesne v. District of Columbia*, 447 F.3d 828, 834 (D.C. Cir. 2006)

34 C.F.R. § 300.17 provides:

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

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

Pursuant to 5E DCMR 3030.14 the burden of proof is the responsibility of the party seeking relief. *Schaffer v. Weast*, 546 U.S. 49, 126 S.Ct. 528 (2005). In this case, Petitioner held the burden of production on all issues and the burden of persuasion issue #2. Petitioner established a prima facie case on issue #1, and #3 before the burden of persuasion fell to Respondent for those issues.<sup>8</sup> The

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<sup>8</sup> DC Code § 38-2571.03 (6) provides:

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

**ISSUE 1:** Whether DCPS denied Student a FAPE by failing to amend Student’s IEP as of May 1, 2020, to reflect an LRE and placement in a residential facility and/or provide Student with an appropriate residential placement that can provide Student access to a FAPE.

**Conclusion:** Respondent sustained the burden of persuasion by a preponderance of the evidence of the appropriateness of Student’s current LRE and placement, and there was no denial of a FAPE to Student as a result of DCPS not changing Student LRE at the May 1, 2020, meeting.

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

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

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

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

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(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.

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.

The second, substantive prong of the *Rowley* inquiry is whether Student's IEP was reasonably calculated to enable Student to make progress appropriate in light of Student's individual circumstances. In *Andrew F. ex rel. Joseph F. v. Douglas City. Sch. Dist.* RE-1, 137 S. Ct. 988 (2017), the U.S. Supreme Court elaborated on the "educational benefits" requirement pronounced in *Rowley*: To meet its substantive obligation under the IDEA, a school must offer an IEP reasonably calculated to enable a child to make progress appropriate in light of the child's circumstances. . . . Any review of an IEP must appreciate that the question is whether the IEP is reasonable, not whether the court regards it as ideal. . . . When a child is fully integrated in the regular classroom, as the Act prefers, what that typically means is providing a level of instruction reasonably calculated to permit advancement through the general curriculum. . . . If that is not a reasonable prospect for a child, his IEP need not aim for grade-level advancement. But his educational program must be appropriately ambitious in light of his circumstances, just as advancement from grade to grade is appropriately ambitious for most children in the regular classroom. The goals may differ, but every child should have the chance to meet challenging objectives. *Andrew F.*, supra, 137 S. Ct. at 999–1000 (citations omitted).

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." 34C.F.R. § 300.550; 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.")

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).

The evidence demonstrates that Student has spent the majority of the past few years in residential placements, first at School C. When Student returned to D.C. from School C, a hearing officer immediately determined that Student's residential placement should be maintained as Student's stay-put placement. Within months of Student's discharge from School C, Student was placed at School B in October 2018.

Student remained at School B for over one year, made progress, and was eager to return home to D.C. In December 2019, an IEP team determined Student was ready to step down to a less restrictive placement, and Student returned to D.C. and began attending School A in January 2020. Student's attendance at School A was spotty, and Student did not really begin attending School A regularly until mid-February 2020. In the interim Student was charged criminally for making threats and currently has a pending court date related to that incident.

Student has shown a pattern associated with Student's mental diagnoses and paranoia, of difficulties getting along with family and peers. Student has had the support of a community-based organization with a case manager and medication management. Despite this support, Student has had difficulty maintaining a long-term residence. Student's difficulties in maintaining a consistent residence have been Student's primary obstacle to accessing Student's education.

In the month that Student began attending School A regularly in mid-February 2020 until School A closed due to the COVID-19 emergency, Student had begun to make slow progress. Student was still having difficulty attending classes regularly and sought out therapy or engaged in conversations with staff most of the school day. Unfortunately, after the COVID-19 school closure, Student's life became drastically more unstable. Student was barred from residing with Student's mother because of threats, and because of Student's shifting residence, Student was unable to have access School A's distance learning consistently. Student was also hospitalized at least twice due to altercations with persons where Student resided or was attempting to reside.

Student's court-appointed guardian and Student's community-based service providers believe that Student should return to a residential placement to prevent further potential criminal court involvement due to Student's mental condition and pattern of aggression. However, it is unclear that Student's guardian told Student that the due process hearing being held was to determine if Student should return to a residential placement.

On the other hand, School A and DCPS are of the opinion that School A did not have the full opportunity to implement Student's educational program, and just as Student was making progress, the school was closed due to COVID-19. As a result, School A staff could not state that Student's LRE should be changed back to a residential placement.

Student also expressed a strong desire to remain at School A despite Student's difficulties in accessing distance learning since the COVID-19 school closure. Student recently began living with Student's father and believes Student can remain living there long-term. However, Student's guardian has been informed that the living arrangement is temporary. Student expressed a desire and willingness to attend School A regularly despite School A not being a co-ed school, and Student acknowledged that Student gained considerably from the support and helpfulness of the school staff, particularly School A's Educational Director and Student's Therapist.

It appears that Petitioner's counsel has inquired and received an indication that a residential placement outside the District of Columbia metropolitan area, but closer to D.C. than School B, has expressed a willingness to accept Student. However, unless and until an IEP team or a hearing officer changes Student's LRE to a residential placement, such a placement cannot be effectuated and would still need to proceed through the referral process administered by OSSE.

It is a difficult decision to make to place Student in a residential setting again away from family when Student has expressed a desire to remain at School A. At the time of the hearing, School A was about to start its summer session. School A is a 12-month program, and Student indicated a willingness to attend if School A opened or to participate in School A's distance learning if Student was provided a computer and online access.

As of the time of the due process hearing the Hearing Officer found that the evidence presented by Respondent, particularly the School A witnesses and most significantly Student's testimony, outweighed the evidence presented by Petitioner that Student's LRE should be changed at this juncture to a residential placement. It appears at least at the time of the due process hearing that the consideration of residential placement for Student is being sought by Petitioner more as a response to medical, social, or emotional problems that are segregable from Student's access to the learning process available to Student at School A.

In addition, even though Petitioner's counsel may have identified a possible residential placement for Student, the Hearing Officer notes that based upon the Hearing Officer's interpretation of the Court order of guardianship, before Student can be provided a residential placement outside the District of Columbia and surrounding jurisdictions, Petitioner must seek approval from D.C. Superior Court.

Given these circumstances, the Hearing Officer does not conclude that DCPS, in not changing Student's LRE to a residential placement at the May 1, 2020, meeting denied Student a FAPE. Student's March 25, 2020, IEP was reasonably calculated to enable Student to make progress appropriate in light of Student's circumstances.

It has been a month since the due process hearing was conducted and the Hearing Officer is unaware of whether Student's living arrangements have stabilized, whether Student has been able to regularly engage in Student's community-based services and maintain Student's medication, and most importantly, consistently access Student's education from School A.

Consequently, rather than at this juncture directing that DCPS change Student's LRE, the Hearing Officer directs DCPS to convene an IEP meeting within fifteen (15) business days to review Student's living arrangements and whether Student has been engaging in School A's distance learning and to review Student's academic and social-emotional progress. If at that meeting the team determines that Student does not have a stable living arrangement and has not consistently accessed the educational resources available to Student from School A, the Hearing Officer directs that DCPS immediately as of that meeting change Student's LRE in Student's IEP to a residential placement and take immediate action to secure a residential placement for Student.

**ISSUE 2:** Whether DCPS denied Student a FAPE by failing to conduct a comprehensive reevaluation during SY 2018-2019 because the reevaluation did not include a vocation and/or transition assessment.

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

34 C.F.R. § 300.303(a) makes clear that, "A local education agency ("LEA") *shall ensure* that reevaluation of each child with a disability is conducted...if the child's parents or teacher requests reevaluation and that the reevaluation must be conducted at least once every three years. Pursuant to 34 C.F.R. § 300.304 (c) a school district must ensure that a student has been appropriately evaluated in all areas of suspected disability.

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

Pursuant to 34 C.F.R. § 300.320 (b) *Transition services*. Beginning not later than the first IEP to be in effect when the child turns 16, or younger if determined appropriate by the IEP Team, and updated annually, thereafter, the IEP must include—

(1) Appropriate measurable postsecondary goals based upon age appropriate transition assessments related to training, education, employment, and, where appropriate, independent living skills; and

(2) The transition services (including courses of study) needed to assist the child in reaching those goals.

The evidence demonstrates that Student's current IEP includes a transition plan. Petitioner's educational advocate testified that DCPS was to send an authorization to School B to conduct a vocational assessment but it appears that that assessment was never conducted, and the transition data in Student's current IEP is from before Student went to a residential placement. The evidence indicates that Student was successfully engaged in an automotive vocational program while at School B and that Student has a desire to live independently.

Although there was evidence that DCPS agreed to conduct an updated vocational assessment, there was scant evidence presented that Student has been negatively impacted by the vocational assessment not having yet been conducted. Thus, the Hearing Officer concludes that DCPS's failure to conduct an updated vocational assessment of Student did not significantly impede Petitioner's opportunity to participate in the decision-making process regarding the provision of FAPE, or cause Student a deprivation of educational benefits. Nonetheless, in the order below, the Hearing Officer directs DCPS to conduct a vocational assessment of Student.

**ISSUE 3:** Whether DCPS denied Student a FAPE by failing to provide Student with an appropriate IEP on March 25, 2019, because the IEP was not based upon an appropriate evaluation that included a vocational and/or transition assessment.

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

Having concluded that DCPS's failure to conduct an updated vocational assessment of Student was not a denial of FAPE to Student, the Hearing Officer also concludes that Student's most recent IEP is not inappropriate as a result. The Hearing Officer concludes that Student's March 25, 2020, IEP Student's March 25, 2020, IEP was reasonably calculated to enable a Student to make progress appropriate in light of Student's circumstances.

**ORDER:**<sup>9</sup>

1. DCPS shall, within fifteen (15) business days of the date of this order, convene an IEP meeting to review Student's living arrangements and whether Student has been engaging in School B distance learning and to review Student's academic and social-emotional progress. If at that meeting the team determines that Student does not have a stable living arrangement and has not consistently accessed the educational resources available to Student from School A, the Hearing Officer directs that DCPS immediately as of that meeting change Student's LRE in Student's IEP to a residential placement and take immediate action to secure a residential placement for Student.
2. If at that meeting, the team determines that Student has a stable living arrangement and has consistently accessed the educational resources available to Student from School A, Student's LRE and placement at School A shall be continued.
3. DCPS shall, within 30 business days of the date of this order, conduct an updated vocational assessment of Student and convene an IEP meeting to review the assessment and review and revise Student's IEP appropriately to include data and any recommendations from that assessment.
4. All other relief requested by Petitioner is denied.

**APPEAL PROCESS:**

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

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Coles B. Ruff, Esq.  
Hearing Officer  
Date: July 22, 2020

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<sup>9</sup> Any delay in Respondent meeting the timelines of this Order that is the result of action or inaction by Petitioner shall extend the timelines on a day-to-day basis.