District of Columbia

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Confidential

Parent on Behalf of Student, Petitioner, v. School A Public Charter School Local Educational Agency ("LEA"), and District of Columbia Office of the State Superintendent of Education ("OSSE") State Education Agency ("SEA") Respondents. Case # 2021-0041 Date Issued: July 14, 2021	CORRECTED HEARING OFFICER'S DETERMINATION [1] Hearing Date: June 1, 2021 Counsel for Each Party listed in Appendix A Hearing Officer: Coles B. Ruff, Esq.

[1] This "Corrected" HOD is issued to make typographical and/or grammatical changes and/or remove personally identifiable information; no substantive changes have been made. July 14, 2021, the HOD issuance date 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 proceeding ("Student") resides in the District of Columbia with Student's mother ("Petitioner"). Student has been determined eligible for special education and related services pursuant to the IDEA with a disability classification of emotional disturbance ("ED").

On March 4, 2021, Petitioner filed a due process complaint against Student's former local education agency, a public charter school located in the District of Columbia ("School A"). Petitioner's complaint alleged that Student attended School A during school year ("SY") 2018-2019 and that School A has since closed. As a result, Petitioner's counsel served the due process complaint on School A's registered agent for the District of Columbia.

On April 8, 2021, Petitioner's counsel filed a motion to withdraw her due process complaint without prejudice. On April 9, 2021, the undersigned hearing officer ("Hearing Officer") granted Petitioner's Motion to Withdraw Without Prejudice.

On April 8, 2021, Petitioner filed the current due process complaint against both School A and the District of Columbia Office of the State Superintendent of Education ("OSSE"), the State Education Agency ("SEA"). Petitioner's due process complaint alleged, inter alia, claims and issues under the disciplinary provisions of IDEA, specifically, 34 CFR § 300.530 et seq.

Petitioner alleges that School A (1) failed to conduct a manifestation determination review ("MDR") before suspending Student in April 2019 for the remainder of SY 2018-2019; (2) unilaterally changed Student's educational placement for the three-month suspension in an inappropriate interim alternative educational setting; and 3) failed to conduct a functional behavior assessment ("FBA"), create a behavior intervention plan ("BIP"), and/or modify Student individualized education program ("IEP") after unilaterally changing Student 's educational placement.

Petitioner seeks as relief that the Hearing Officer find that School A denied Student a free appropriate public education ("FAPE") and that the Hearing Officer award Student compensatory education for the three violations and denials of FAPE alleged. Petitioner requests that OSSE as the SEA be held responsible for the relief owed to Petitioner for denials of FAPE, and that the Hearing Officer order OSSE to satisfy the award of relief for School A's FAPE violations. Petitioner requests compensatory education in the form of 300 hours of one-on-one tutoring and 10 hours of behavioral support services ("BSS"). If the amount of compensatory education to be awarded requires additional evidence, Petitioner requests that she be allowed to supplement the

record. In addition, Petitioner requests a finding that she is the prevailing party entitling her to an award of attorney fees.

LEA Response to the Complaint:

Petitioner's counsel served the due process complaint on an officer of the local education agency ("LEA"), School A, and School A's registered agent for the District of Columbia. The LEA filed no response to the due process complaint and was not represented by counsel in this proceeding despite being duly served with the due process complaint.

SEA Response to the Complaint:

On April 18, 2021, the SEA, OSSE, filed a response to the complaint. In its response, OSSE stated, inter alia, that OSSE did not deny Student a FAPE in violation of the IDEA. OSSE acknowledged that School A was responsible for providing Student a FAPE in SY 2018-2019. OSSE stated that it lacked sufficient information to admit or deny the remaining factual allegations in Petitioner's due process complaint. OSSE denied that School A denied Student a FAPE and denied that Petitioner is entitled to the relief requested. OSSE also alleged that Petitioner's due process complaint may be barred entirely or in part by the statute of limitations.

Resolution Meeting, Pre-Hearing Conference, and Continuances:

There was no resolution meeting held. A due process complaint filed against an SEA is subject to the 45-day timeline; thus, the Hearing Officer Determination ("HOD") in this matter would typically have been due by May 23, 2021.

On May 3, 2021, the Hearing Officer convened and pre-hearing conference with Petitioner's counsel and counsel for OSSE. OSSE's counsel asserted that the expedited hearing provision of IDEA did not apply and that to impose such on OSSE would prejudice OSSE. Petitioner's counsel did not object to that position and did not seek an expedited hearing. Based upon the parties' positions, the Hearing Officer did not mandate an expedited hearing but requested that OSSE's counsel file a motion as to the inapplicability of an expedited hearing.

OSSE filed a motion to document its position that an expedited hearing is not required in this case. On May 14, 2021, the Hearing Officer issued an order granting OSSE's motion. [2]

The parties agreed to a hearing date, and OSSE filed a consent motion of continuance. The motion was granted, extending the HOD due date to accommodate the agreed-upon hearing date. The

[2] Prior Office of Dispute Resolution ("ODR") practice is that all issues related to 34 CFR § 300.530 et. seq are expedited with a hearing convened within 20 school days of the date the due process complaint is filed. The decision (Hearing Officer Determination of "HOD") is issued within 10 school days of the due process hearing. Based upon the DCPS school calendar that Petitioner's counsel has agreed applies in this instance, the 20th school day would be May 13, 2021. However, based on OSSE representations that the expedited timeframe does not apply and Petitioner's counsel's representation that Petitioner does not seek an expedited hearing, the Hearing Officer set this case to be heard on the date agreed to by the parties.

Hearing Officer granted an additional motion to extend the HOD due date to allow the parties to file written closing arguments. The HOD is now due on July 14, 2021.

The Hearing Officer issued a pre-hearing order ("PHO") on May 10, 2021, setting the hearing dates and outlining, inter alia, the issues to be adjudicated.

ISSUES:

1. Whether the LEA and/or OSSE denied Student a FAPE by failing to conduct an MDR meeting before suspending Student on April 9, 2019, for the remainder of SY 2018-2019.

2. Whether the LEA and or OSSE denied Student a FAPE by failing to conduct a change in placement meeting with Petitioner to determine an appropriate interim alternative educational setting ("IAES") and on April 9, 2019, requiring Student to finish the school year at home.

3. Whether the LEA and or OSSE denied Student a FAPE by failing to conduct an FBA and develop a BIP or modify Student's IEP after deciding on April 9, 2019, that Student should receive Student's education at home and not in the school building.

Petitioner's Motion for Default Judgment against the LEA:

Petitioner's counsel has filed a motion for default judgment based on the LEA' failure to file a timely response to the due process complaint. In the alternative Petitioner requested that School A be barred from presenting any defenses.

Under the IDEA, within 10 days of receiving the due process complaint, the receiving party must send the other party a response that specifically addresses the issues raised in the due process complaint. 34 CFR §300.508; 20 USC §1415(c)(2)(B).

A represented entity may be served with any process, notice, or demand required or permitted by law by serving its registered agent. DC Code § 29–104.12-13.

Petitioner's due process complaint was filed on April 8, 2021, and on School A via its registered agent on April 8, 2021, via email and to his residence via process server. No response or other defense has been filed by School A.

Although Petitioner requests that the Hearing Officer make and enter a judgment against School A for its failure to file a response to the due process complaint, the Hearing Officer concludes default judgment to be an overly harsh remedy for such a failure. Courts in this jurisdiction have found that default judgment is an inappropriate and harsh remedy for the procedural failure to file a response to a due process complaint. (See *Nina Suggs, v. District of Columbia*, Defendant 679 F. Supp. 2d 43 U.S. District Court, District of Columbia 08-0938 (PLF) January 19, 2010) [3]

[3] "Ms. Suggs argued before the Hearing Officer, and insists before this Court, that a default judgment should have been entered against DCPS because the District failed to file an answer to her administrative due process complaint. See Pl.'s Mot. at 15-18. In his Report, Magistrate Judge Kay rejected this contention. The Court agrees with his

In addition, such a default might be unreasonably imputed to OSSE even though OSSE filed a timely response to the due process complaint. Consequently, the Hearing Officer denies Petitioner's Motion for Default Judgment and bases the decision in this HOD upon the evidence presented during the hearing.

DUE PROCESS HEARING:

The Due Process Hearing was convened on June 1, 2021. Due to the COVID-19 emergency, the hearing was conducted via video teleconference. The parties submitted the last of closing arguments on June 25, 2021.

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 29, DCPS Exhibits 1 through 38 identified as "Respondent's Exhibits" and OSSE Exhibits 1 through 9) that were admitted into the record and are listed in Appendix 2. The witnesses testifying on behalf of each party are listed in Appendix B. [4]

SUMMARY OF DECISION:

The Hearing Officer determined that Petitioner held the burden of production and persuasion on the first and third issues. The LEA held the burden of persuasion after Petitioner presented a prima facie case on that issue. Based on the evidence adduced, the Hearing Officer concluded that the LEA denied Student a FAPE on all three issues adjudicated and concluded that OSSE was responsible for providing the requested relief due to the LEA closing.

The Hearing Officer directed OSSE to provide Petitioner authorization to obtain an independent education evaluation ("IEE") for purposes of determining appropriate compensatory education for the denials of FAPE determined and that OSSE provide Petitioner authorization for reasonable compensatory education considering the results and recommendations of that IEE. The Hearing Officer also authorized Petitioner to pursue the award of compensatory education from OSSE

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conclusion and adopts his reasoning, with the exception of his finding that "the Hearing Officer's decision was supported by the record in this case and the facts presented to the Hearing Officer during the course of the hearing." Report at 16. The Court also notes that Ms. Suggs could have moved at the administrative level for the Hearing Officer to issue an order requiring the District to file an answer, but did not do so. The extraordinary remedy of a default judgment is certainly not warranted where a party has failed to pursue less drastic solutions." *Nina Suggs, v. District of Columbia*, Defendant 679 F. Supp. 2d 43 U.S. District Court, District of Columbia 08-0938 (PLF) January 19, 2010, 53 IDELR 321, 110 LRP 4915

[4] The Hearing Officer found the witnesses credible unless otherwise noted in the Conclusions of Law. Any material inconsistencies in the testimony of witnesses that the Hearing Officer found are addressed in the Conclusions of Law. Petitioner presented two witnesses, one of whom testified as expert witnesses: (1) Petitioner, (2) an Educational Advocate. The LEA presented no witnesses. The SEA presented no witnesses.

based on the results and recommendations of the IEE in a subsequent due process complaint if necessary.

FINDINGS OF FACT: [5]

1. Student resides in the District of Columbia with Petitioner and has been determined eligible for special education and related services pursuant to the IDEA with a disability classification of ED. (Petitioner's testimony, Petitioner's Exhibit 20)

2. During SY 2017-2018 and SY 2018-2019, Student attended School A, a public charter school located in the District of Columbia, and School A was Student's LEA during SY 2018-2019. (Petitioner's testimony, Petitioner's Exhibit 20)

3. On September 17, 2018, Petitioner requested School A evaluate Student for special education and related services due to Student's behavior and academics. School A documented Petitioner's special education referral request. On October 2, 2018, Petitioner executed the "consent for initial evaluation." (Portioner's Exhibits 1, 2, 3)

4. By October 17, 2018, School A had suspended Student for at least 12 school days. In an MDR meeting about an October 17, 2018, incident, the IEP team determined that the conduct was caused by or had a direct and substantial relationship to Student's disability and was, therefore, a manifestation. The manifestation determination did not include the date of the meeting, but the document states that it was created on April 3, 2019. (Petitioner's Exhibit 21)

5. On October 20, 2018, and November 8, 2018, a certified school psychologist conducted a comprehensive evaluation to assess Student's cognitive, academic, behavioral, and social-emotional functioning. On January 18, 2019, the psychologist completed the evaluation and provided the evaluation report to School A. Upon reviewing Student's discipline records, the psychologist noted that School A frequently suspended Student from school, and sent Student out of class for harassing other students, and teachers. (Petitioner's Exhibit 4)

6. The psychologist reported that Student's concerning school behaviors included: spitting on another student, loitering in the hallways, screaming profanity, eloping from the school building, threatening and using inappropriate language toward adults, play fighting, and disrupting the learning environment. (Petitioner's Exhibit 4)

7. For the evaluation, the psychologist attempted two in-class observations, but both were unsuccessful. For the first observation, the teacher informed the psychologist that Student eloped from the classroom and school building. The psychologist waited 15 minutes, but

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

Student did not return to class. For the second observation, Student refused to go to class. As a result, the psychologist could not complete the second classroom observation. Teachers noted that Student frequently refused to attend class and complete work. The psychologist recommended that Student be eligible for special education services as a student with an emotional disturbance. (Petitioner's Exhibit 4)

8. In February 2019, School A's IEP team determined Student eligible for special education and related services with an ED disability classification. (Petitioner's Exhibits 9, 11, 12, 13)

9. On March 5, 2019, School A held Student's initial IEP meeting and developed an IEP requiring 10 hours of specialized instruction outside general education and 120 minutes per month of behavioral support services ("BSS") outside general education. The March 5, 2019, IEP noted that Student's disability manifests in many ways, including conduct problems such as threatening staff, peers, destruction of property, and truancy issues. (Petitioner's Exhibits 18, 20)

10. According to Student's initial IEP, School A had suspended Student in excess of 25 school days by January 25, 2019. These suspensions were for a variety of behavior concerns; including unauthorized presence in the hallways and other school areas (outside of the designated classroom); leaving school without authorization; making sexually inappropriate comments; disrespect to an adult; unauthorized presence in the cafeteria and opening the cafeteria door to talk to people outside when someone threw firecrackers into the building; spitting, play fighting and screaming; and using an offensive spray product on a teacher which the school claimed may have impacted the health of numerous people in the school. (Petitioner's Exhibit 20)

11. By April 9, 2019, School A suspended Student for approximately 27 school days in total. Then School A decided to suspend Student for the rest of the school year. Student's records do not show that School A ever conducted an FBA or developed a BIP. (Witness 1's testimony)

12. According to BSS service trackers and IEP progress reports, School A suspended Student on March 19, 2019, for five (5) days and on April 2, 2019, for a "few" days. (Petitioner's Exhibit 23)

13. On April 9, 2019, School A told Petitioner that Student could no longer be educated within the school building and insisted that Student would have to receive education services at home. The IEP team did not convene a meeting to discuss a possible interim alternative educational setting ("IAES"). Instead, the LEA had Petitioner attend a meeting at the school where the school announced that Student would receive tutoring at home for three days a week, two hours per day, some services in the school library, and eat lunch with peers two days a week. Petitioner disagreed with School A's plan to send Student home and was never given a chance to express her disagreement. (Petitioner's testimony)

14. Student education records provided to Petitioner by DCPS do not document any other MDR meetings being held by School A when Student was not allowed to return to school for the remainder of SY 2018-2019. (Witness 1's testimony)

15. The LEA provided Student with limited tutoring at home. The school records do not show that Student received prescribed specialized instruction and related services in the home setting. Concerning the library and lunch services, on the first day that Student and Petitioner arrived at the school to go to the library, School A refused to allow Student to enter the school building and declined to provide services. (Petitioner's testimony)

16. As a result of not attending school, Student was angry and had more behavior problems at home. Petitioner believes the tutoring services Student was provided at home were horrible. The tutor seemed unorganized and unqualified. He instructed the Student for weeks at a time with a single sheet of paper which caused the Student not to want to participate. The tutor came from 10:00 a.m. until about 2:00 p.m. on those occasions when he did engage with Student. The tutoring ended about a week before school closed for SY 2018-2019. Petitioner does not think Student received any benefit from the tutoring. (Petitioner's testimony)

17. School A closed permanently at the end of SY 2018-2019. Petitioner did not find out School A was closing for good until a few weeks before the end of SY 2018-2019. The school year ended around June 13, 2019. Petitioner enrolled Student in DCPS for SY 2019-2020. Student is currently enrolled in DCPS attending School B. DCPS is Student's current LEA. Because School A had closed when Petitioner filed her due process complaint against School A, Petitioner's counsel served the due process complaint on School A's registered agent for the District of Columbia. (Petitioner's testimony)

18. Student attends School B and not doing well at all with distance learning. Student has a hard time connecting to classes and submitting work. It is not clear that Student understands what is being taught in the classes right now. (Petitioner's testimony, Witness 1's testimony)

19. Petitioner employed an educational consultant who was qualified and expert witness and proposed a compensatory education plan for Student. The consultant reviewed Student's educational records and spoke with Petitioner. The consultant did not evaluate or observe Student and did not confer with any of Student's former or current teachers or related service providers. The consultant recommended that Student be provided 300 hours of tutoring in reading, math, and writing and 10 hours of BSS. She arrived at this number by calculating that the average school day is 7 hours per day and Student missed 46 school days. She subtracted the hours provided by the tutor and landed at 300 hours. There was very little present-level education information on Student, and the consultant did her best with the information she had. She had to rely on the hour-for-hour method to calculate the proposed compensatory education. (Witness 1's testimony)

20. Pursuant to OSSE Charter School Closure Policy regarding students with disabilities under IDEA, OSSE is responsible for monitoring LEAs for compliance with the IDEA

and for ensuring that students with disabilities receive a free and appropriate public education when a public charter school is closed. (Petitioner's Exhibit 29)

CONCLUSIONS OF LAW:

The overall purpose of the IDEA is to ensure that "all children with disabilities have available to them a free appropriate public education that emphasizes special education and related services designed to meet their unique needs and prepare them for further education, employment, and independent living." 20 U.S.C. § 1400(d)(1)(A). *See Boose v. Dist. of Columbia*, 786 F.3d 1054, 1056 (D.C. Cir. 2015) (the IDEA "aims to ensure that every child has a meaningful opportunity to benefit from public education.

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 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)

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, the LEA held the burden of persuasion on issue # 2 after Petitioner established a prima facie case on that issue. [6] Petitioner

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[6] 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

held the burden of persuasion on the other issues, #1 and #3, as to the LEA and on the issue as to OSSE. 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).

ISSUE 1: Whether the LEA and/or OSSE denied Student FAPE by failing to conduct an MDR meeting before suspending Student on April 9, 2019, for the remainder of SY 2018-2019.

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

Students with IEPs have additional protections under IDEA from school discipline. 34CFR § 300.530 – 536. Congress created these protections to make sure that students with disabilities are not inappropriately punished on the basis of their disability. *Honig v. Doe*, 484 U.S. 305 (1988) ("Congress sought to prevent schools from permanently and unilaterally excluding disabled children by means of indefinite suspensions and expulsions."); See also, *Goss v. Lopez*, 419 U.S. 565, 574–576, 95 S. Ct. (1975) (A school suspension of 10 or more school days is a sufficient deprivation of property and liberty interests, which then triggers the protections of due process. It is important for students with disabilities to remain in their educational setting and be placed in their least restrictive environment. 34 CFR § 300.114.

These additional IDEA protections for children with disabilities include requiring the LEA to conduct a manifestation determination meeting, with the parent, within 10 school days of any decision to change the student's educational placement. 34CFR § 300.530(e).

A disciplinary removal is considered a change in placement when the school subjects the child to a series of removals, such as suspensions, and those removals constitute a pattern. 34 CFR § 300.536. A series of removals is considered a pattern when the removals were for more than 10 school days within the same school year and/or the child's behavior in question is substantially similar to prior incidents connected to earlier removals. Id. During the manifestation determination meeting, the IEP team examines the violation of student conduct in question. Id. As part of this examination, the IEP team determines whether the behavior is a manifestation of the student's disability.

Congress intended parents to be a part of the special education process. 34 CFR § 300.322, 324, 530-531. This includes disciplinary procedures from participating in manifestation determination meetings, addressing disciplinary changes of placement, and determining a child's interim alternative educational setting ("IAES") when an IAES is appropriate. 34 CFR § 300.530-31, 36; 20 U.S.C. § 1415(k)(2). All of these meetings are supposed to be made by a full IEP team, including the meaningful participation of the parent. Id. In addition, the school is required to continue to provide the child with educational services designed to meet their unique needs, including in an IAES. 34 CFR § 300.530(d).

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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.

The unrefuted evidence in this case demonstrates that during SY 2018-2019, School A was responsible for ensuring that Student was provided a FAPE, which included meeting the procedural requirements of IDEA that includes the convening an MDR whenever a student is removed from school for more than 10 school days in a school year.

The evidence demonstrates that after Student was determined eligible for special education services Student was removed from school for more than 10 school days without the benefit of an MDR as IDEA requires. The evidence demonstrates that Student's prior conduct of a similar nature had previously been determined to be a manifestation of Student's disability. The evidence supports a finding that Student's behavior for which Student was removed from School A for the remainder of SY 2018-2019 was also a manifestation of Student's disability for which Student should not have been removed from School A.

The unrefuted evidence also demonstrates that Student was harmed thereby. Although Student was provided some tutoring, Student's behavior further declined due to not attending school with peers in an appropriate educational setting. Student gained no appreciable educational benefit from the tutoring provided. As a result, the Hearing Officer concludes that Student was denied a FAPE by School A failing to conduct an MDR when it removed Student from School A for the remainder of SY 2018-2019.

ISSUE 2: Whether the LEA and or OSSE denied Student a FAPE by failing to conduct a change in placement meeting with Petitioner to determine an appropriate interim alternative educational setting (IAES) and April 9, 2019, requiring Student to finish the school year at home.

Conclusion: Petitioner presented a prima facie case that was met with no contrary evidence. Thus, the burden of persuasion was not met by a preponderance of the evidence by the LEA or on the LEA's behalf. The Hearing Officer thus concluded that Student was denied a FAPE in this regard.

As noted above, when an LEA moves a child to an IAES, the LEA is required to provide services to enable the child to participate in the general education curriculum and to make progress toward meeting his IEP goals, although in another setting. 34 CFR § 300.530(d).

On April 9, 2019, School A decided to change Student's placement by sending Student home for the rest of the school year. Student's IAES became minimal home tutoring. School A merely called Petitioner and insisted Student attend school from home for the rest of the school year with limited tutoring. This removal was for more than 45 school days and constituted a change in placement. As noted above, although Student was provided some tutoring, Student's behavior further declined as a result of not attending school with peers in an appropriate educational setting and Student gained no appreciable education benefit from the tutoring that was provided.

In addition, Student was not provided the related services that Student's IEP prescribed. The home tutoring that School A arranged for Student for the remainder of SY 2018-2019 was an inadequate and inappropriate interim alternative setting. There was no evidence to refute Petitioner's credible testimony of Student's harm due to Student being removed from School A for the remainder of SY 2018-2019. As a result, the Hearing Officer concludes that Student was denied a FAPE by School A removing Student from School A and failing to provide Student an appropriate IAES.

ISSUE 3: Whether the LEA and or OSSE denied Student a FAPE by failing to conduct an FBA and develop a BIP or modify Student's IEP after deciding on April 9, 2019, that Student should receive Student's education at home and not in the school building.

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

Whenever a school removes a child from their educational placement, the school is required to conduct an FBA and implement behavioral intervention services, including in an IAES.[16] 34 CFR § 300.530(d). The purpose of these interventions is to prevent the behavior from recurring. Id.

There was no FBA or BIP in Student's educational records, as demonstrated by the testimony presented. The evidence demonstrates that on April 3, 2019, School A conducted an MDR for an incident in October 2018. During this MDR, the IEP team determined that Student's October 2018 conduct was a manifestation of Student's disability. Despite this determination, School A failed to conduct an FBA and develop or implement a BIP.

Before deciding to suspend Student for the rest of the school year on April 9, 2019, School A failed to conduct an FBA and develop/implement a BIP. Student's April 3, 2019 manifestation determination, extensive suspensions, significant behavioral concerns, and Student's IEP all indicated that Student should have had an FBA and BIP. This failure resulted in a denial of a FAPE because Student's behavior impeded Student's ability to access and progress in the general education environment. By failing to conduct an FBA and implement a BIP or make changes to Student's IEP, School A denied Student a FAPE.

OSSE's Responsibility

Petitioner asserts that OSSE, the SEA, must assume responsibility for remedying denials of FAPE alleged against the dissolved public charter school, School A.

OSSE asserts that Petitioner cited in support of her argument a line of federal district court opinions from the Eastern District of Pennsylvania and a single case from Delaware that have held the SEA liable for denials of FAPE in particular circumstances where a charter school has closed. OSSE asserts that the Court in this line of cases relied upon the general supervisory responsibilities of 20 U.S.C.§1412(a)(11)(A) in finding that the SEA can be held liable. OSSE argues that the precedent set by this line of cases is not controlling in the District of Columbia and may only be considered as persuasive authority, if at all.

Further, OSSE asserts that when 20 U.S.C. §1412(a)(11)(A) is read in conjunction with20 U.S.C. §1412(a)(11)(B), there is a clear intent to limit the liability of the State Education Agency with respect to paying for the direct cost of providing FAPE to students with a disability in the State. Accordingly, OSSE asserts that Petitioner has failed to cite any provision of the IDEA or controlling authority to support her request to hold OSSE responsible for relief, if any, owed to Student for denials of FAPE by the LEA.

On the other hand, Petitioner provided legal authority from both the IDEA and persuasive case law from two different jurisdictions; *See*, *R.V. v. Rivera*, 220 F. Supp. 3d 588 (E.D. Pa. 2016); *Lujeune v. Khepra Charter School*, 327 F. Supp. 3d 785 (E.D. Pa. 2018); *Charlene R. v. Solomon*

Charter Sch., 63 F. Supp. 3d 510 (E.D. Pa. 2014) (The SEA is the backstop for vindicating denials of FAPE even when the LEA is defunct.); *M.K. v. Prestige Acad. Charter Sch.*, 470 F. Supp. 3d 417 (D. Del. 2020) (The SEA bears the ultimate responsibility under the IDEA, even when a defunct charter school can no longer meet its obligations.)

Petitioner asserts that because this issue is a case of the first impression, the Hearing Officer can apply the holdings of this persuasive case law to the District of Columbia. *Youngbey v. Mar.*, 676 F.3d 1114 (D.C. Cir. 2012). Petitioner argues that if there is no such controlling authority, then we must determine whether there is "a consensus of cases of persuasive authority." [*Wilson v. Layne*, 526 U.S. 603 (1999)].; see also Ashcroft v. al-Kidd, -U.S. -, 131 S. Ct. 2074, 2084, 179 L.Ed.2d 1149 (2011) (explaining that in the absence of "controlling authority," a "robust 'consensus of cases of persuasive authority" is necessary to demonstrate clearly established law (quoting *Wilson*, 526 U.S. at 617, 119 S. Ct. 1692)).

Although, as OSSE points out in its closing, there is no explicit legal authority in IDEA or controlling precedent in the District of Columbia that dictates the SEA's liability under the IDEA for failure to provide FAPE where a closed LEA is found liable, the Hearing Officer finds the case law in other jurisdictions holding the SEA responsible for providing FAPE to Student's in the case of closed public charter school convincing. In addition to the case law from other jurisdictions, OSSE's internal policy supports such a conclusion. Pursuant to OSSE Charter School Closure Policy regarding students with disabilities under IDEA, OSSE is responsible for monitoring LEAs for compliance with the IDEA and for ensuring that students with disabilities receive a free and appropriate public education when a public charter school is closed.

As Petitioner points out, an SEA who receives and administers the federal funding that is the basis of IDEA should not be permitted to deprive students of a remedy under IDEA when an LEA charter school dissolves. OSSE must ensure that the District, including LEA charter schools, are in compliance with the IDEA and meet the educational standards of the SEA. Consequently, the Hearing Officer concludes that when a denial of FAPE has been determined against the dissolved LEA, in the absence of LEA to offer redress because the LEA charter has dissolved, OSSE can be, and in this instance is, liable to provide the resulting remedy for the denial of a FAPE by the dissolved LEA.

OSSE's counsel also asserted that the statute of limitations bars Petitioner's due process complaint against OSSE.

Pursuant to IDEA, a due process complaint must "set forth an alleged violation that occurred not more than 2 years before the date the parent or public agency knew or should have known about the alleged action that forms the basis of the complaint." 20 U.S.C. 1415(b)(6)(B); 20 U.S.C 1415(f)(3)(C); 34 CFR 300.507(a)(2); 300.511(e).

The timeline is inapplicable if the parent was prevented from filing a due process complaint as a result of specific misrepresentations by the LEA that it had resolved the problem forming the basis of the due process complaint or the LEA's withholding of information from the parent that was required under this part to be provided to the parent. 20 U.S.C. 1415(f)(3)(D); 34 CFR 300.511.

OSSE asserts that because there is no basis for tolling of the statute of limitation pursuant to U.S.C. 1415(f)(3)(D); 34 CFR 300.511, all claims alleged in the due process complaint preceding April 8, 2019, are time-barred and should be dismissed.

OSSE asserts that Petitioner knew or should have known about the alleged action that forms the basis of the complaint on April 5, 2019. However, Petitioner filed her due process complaint on April 8, 2021, which is outside of the allowable two-year statutory period for filing a complaint.

On the other hand, Petitioner asserts that Petitioner's claims are within the statute of limitations. As Petitioner aptly points out in her closing, Petitioner testified that School A failed to give her any documentation when it sent Student home for the rest of the year – there was no prior written notice ("PWN"), or procedural safeguards notice. OSSE did not dispute her testimony. School A did not give Petitioner a PWN before the school changed Student's physical and programming placement to Student's home.

Under these circumstances, Petitioner's claims would not be barred by the statute of limitations. See, 34 CFR § 300.511(f)(1). Moreover, because the LEA did not provide the requisite information, pursuant to 34 CFR §§ 300.511(f)(2),300.530(h), 3300.504(a)(3), and 20 U.S.C. § 1415(f)(3)(D), the second exception to the statute of limitations applies. *See*, 34 CFR § 300.511(f)(2).

In addition, Petitioner aptly asserts that this is an instance of a continuing violation. Each day an LEA fails to provide an appropriate educational placement and/or appropriate educational services, the LEA is repeatedly violating the child's right to a FAPE. Even if the FAPE violation begins outside the statute of limitation, the student can recover for the continuing harm that occurred within the SOL. *See*, *Figueroa v. District of Columbia Metro.Police Dep't*, 633 F.3d 1129, 1135 (D.C. Cir. 2011) (When there is a series of repeated violations, a party can still challenge the harm caused by the repeated violations.); *Indep.Sch. Dist. No. 283 v. E.M.D.H.*, 960 F.3d 1073 (8th Cor. 2020), *petition for cert. filed*, (U.S. Dec.31, 2020) (No. 20-905) (A student can seek relief for a school district's ongoing FAPE violations, even when those violations began outside of the statute of limitations.)

Petitioner filed her due process complaint on April 8, 2021, which is within the statute of limitations. Student was receiving services from home on April 9, 2019, and those homebound services continued for the remainder of the school year. Thus, Petitioner's due process complaint was timely filed.

Remedy:

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

Under the theory of compensatory education, "courts and hearing officers may award educational services to be provided prospectively to compensate for a past deficient program. The inquiry

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

Petitioner has failed to establish that the requested 300 hours of one-on-one tutoring and10 hours of behavioral support services was reasonably calculated to remedy the alleged denial of FAPE. Pursuant to *Reid v. District of Columbia*, 401 F.3d 516, 519 (D.C. Cir. 2005), just as IEPs focus on disabled students' individual needs, so must awards compensating past violations rely on individualized assessments. *Id.* at 524. 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. *Id*.

Petitioner presented testimony from her educational consultant, identified as an expert in compensatory education who merely added the number of hours of specialized instruction and related services that Student would have received if Student had not been sent home to receive in-home educational services. The expert did not rely upon any current educational data as a basis for her testimony. The consultant acknowledged never having made a recommendation for compensatory education in this hour-to-hour fashion; however, she never articulated why such a calculation was appropriate under the current circumstances. She indicated that with this student, there was very little present-level data available.

For the Hearing Officer to grant no relief for the denials of FAPE would be contrary to case law in the District of Columbia. Thus, the Hearing Officer in the order below directs OSSE to fund an IEE and provide Student with appropriate compensatory education considering the results and recommendations of the IEE.

ORDER: [7]

1. OSSE shall, within ten (10) business days of the date of this order, provide Petitioner authorization to obtain an independent educational evaluation ("IEE") at the OSSE prescribed rate for the purpose of determining appropriate compensatory education for the denials of FAPE determined in this HOD, and shall provide Petitioner authorization for reasonable compensatory education considering the results and recommendations of that IEE within thirty (30) calendar days of OSSE being provided the IEE report.

[7] 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 for day basis.

2. Petitioner is authorized to pursue the award of compensatory education from OSSE based on the results and recommendations of that evaluation in a subsequent due process complaint if necessary.
3. 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*

_____

Coles B. Ruff, Esq.
Hearing Officer
Date: July 14, 2021

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Appendix A