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OSSE
Office of Dispute Resolution
July 8, 2024

Confidential

<p>Parents on Behalf of Student, ¹</p> <p>Petitioners,</p> <p>v.</p> <p>District of Columbia Public Schools (“DCPS”) (Local Education Agency “LEA”) & Office of State Superintended of Education (“OSSE”) (“SEA”)</p> <p>Respondents.</p> <p>Case # 2023-0196</p> <p>Date Issued: July 8, 2024</p>	<p>HEARING OFFICER’S DETERMINATION</p> <p>Hearing Dates: January 29, 2024 January 30, 2024 February 5, 2024 February 6, 2024 March 18, 2024 March 22, 2024 May 31, 2024 June 4, 2024</p> <p>Counsel for Each Party listed in Appendix A</p> <p><u>Hearing Officer:</u> <u>Coles B. Ruff, Esq.</u></p>
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¹ Personally identifiable information is in the attached Appendices A & B.

JURISDICTION:

The hearing was conducted, and this decision was written, 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 5-A30.

BACKGROUND AND PROCEDURAL HISTORY:

The student who is the subject of this due process hearing ("Student") is a resident of the District of Columbia. Student has been determined eligible for special education and related services pursuant to IDEA with multiple disabilities ("MD"). During the pendency of this proceeding, the District of Columbia Public Schools ("DCPS") was Student's local education agency ("LEA") the Office of State Superintendent of Education ("OSSE") was Student's state education agency ("SEA"). At the start of the due process hearing Student was living at an adult residential facility ("ARF") located in New Jersey where Petitioners had unilaterally placed Student.

On October 4, 2023, Student's parents ("Petitioners") filed a due process complaint ("DCP") against DCPS and OSSE alleging that DCPS denied Student a free appropriate public education ("FAPE") by, inter alia, allegedly failing to comply with a prior hearing officer's determination, and allegedly failing to implement Student's individualized educational program ("IEP").² Petitioners are seeking relief from both DCPS and OSSE, including inter alia, Petitioners reimbursement for placing Student at ARF.³

DCPS's Response to the Complaint:

DCPS filed a response to the complaint on October 16, 2023. In its response, DCPS stated, inter alia, the following:

DCPS complied with the HOD to the extent Student was made available. The independent evaluation ("IEE") assessor identified by Petitioners for the assessments indicated they were not

² Petitioners and DCPS have been engaged in years of litigation regarding Student, which has resulted in multiple HODs, District Court proceedings, and D.C. Circuit Court decisions. The current due process complaint focuses only on allegations of a denial of a FAPE to the Student since an HOD was issued on March 25, 2022.

³ Petitioners seeks the following as relief: compensatory education services for the time Student's IEP was implemented beginning November 1, 2021; order DCPS and/or OSSE to reimburse Petitioners for the additional aides they hired at their own expense; order DCPS to arrange for a physical therapy evaluation for Student; order DCPS to reimburse Petitioners for the cost of obtaining an independent evaluation; order DCPS and OSSE to provide all of Student's educational records, particularly those related to their contacts with potential schools or programs that have been contacted about or considered for Student since November 1, 2021; order DCPS to remove or correct, as appropriate, records it maintains that contain inaccurate information, including removing from Student's educational records the November 1, 2022, IEP that purportedly reflects a meeting that never happened, order DCPS and/or OSSE to reimburse Petitioner's cost to date of Student's participation at ARF; and declare ARF Student's "current educational placement" and/or order DCPS/OSSE to continue to fund Student's placement there unless and until a different residential program is found and Student is placed in accordance with IDEA procedural requirements.

aware of the extent of Student's disabilities. For example, they were not made aware Student was not a child but instead an adult. Another stated that it would not be ethical to accept pay for the IEE as they were certain they would not be able to identify or locate an educational placement for Student.

DCPS received a report from the _____ ("FC") in the summer of 2022. DCPS was not made aware any evaluation was taking place. DCPS sought to communicate with and seek out more information from FC about the evaluation procedure, among other things, but DCPS was denied availability and access to do that. DCPS sought a release and Petitioners refused to sign that release. No request for reimbursement was asked for or sought.

Petitioner's request to correct or remove information in Student's record is a misstatement. There is no error or correction; rather, Petitioners disagree with the statements made. Petitioners were invited by DCPS to provide a written statement and/or document for inclusion into Student's record as Petitioners requested. The document is a part of Student's record.

ARF, as identified by the Petitioners in the DPC, is not a program. It is a care facility and was not recommended by the FC as also stated in the DPC. According to a statement by administrators and personnel at ARF, made at a meeting in July 2023, they do not provide or offer availability to provide instruction, academics, related services, and/or other such support as might be found or required in an IEP placement. It is not a placement reimbursable under IDEA.

DCPS has sought out, engaged in, considered, and offered multiple options of support and service provision to Student. In short, Student has not been made available to DCPS and has been placed at a care facility that will not permit outside personnel or providers into its setting/facility for any services or instruction. DCPS has authorized more than \$100,000 of instruction and services for Student. Student has been offered FAPE, and there has been no violation of IDEA.

OSSE's Response to the Complaint:

OSSE filed a response to the complaint on October 16, 2023. In its response, DCPS stated, inter alia, the following:

OSSE understands that Student's placement is in a residential treatment center. This decision was made by Student's IEP team. OSSE has no indication that Student did not successfully participate in the programming at _____ ("RTC-2") during most of Student's time there. OSSE's understanding was that the program was in regular communication with Student's parents and DCPS, and was collaboratively working to ensure Student's success. OSSE denies that Student did not receive a FAPE during Student's placement at RTC-2.

Petitioners made several attempts to keep Student at RTC-2 after DCPS received notification of Student's termination from the school. OSSE and DCPS met with RTC-2 to see if we could work through any concerns and, if not, to see if they could extend the discharge date. RTC-2 declined. OSSE and DCPS attempted to extend the discharge date at other times, including by providing virtual services. RTC-2 declined all requests for an extension.

OSSE provided an option for safe, appropriate, and reliable transportation to the non-public special education day school that DCPS proposed as an interim placement (“School A”) that was consistent with Student’s identified needs, Student’s behavioral intervention plan (“BIP”), and the March 25, 2022, HOD.

OSSE additionally outlined specifically the supports provided by OSSE transportation staff and noted the collaboration that had already started between DCPS, OSSE, and School A. Lastly, OSSE shared with Student’s parent that she could also receive reimbursement for transporting the Student on her own. OSSE provided Petitioners with the direct resources to seek this option. Student’s parents did not seek this option and continued to not put Student on the bus each day it arrived. School A expressed to OSSE that Student’s seat remains open should Petitioners ever agree to send Student.

OSSE participated in several conversations with DCPS regarding the IEE ordered in the May 25, 2022, HOD.

OSSE has exhausted efforts and resources to identify a residential facility that can provide a FAPE to a student over the age of 22. OSSE was not able to speak with FC about its report, which did not provide any specific residential locations, and FC declined to keep Student in its residential programming.

OSSE has not refused record requests by Petitioners. OSSE continues to research and investigate programs for Student. To date, there is no program that is willing to receive an admission packet, and OSSE has found no program that is able to implement Student’s IEP. As shared with Petitioners, OSSE does not find it appropriate to send Student’s educational records to programs that are not willing to receive them or who cannot implement Student’s IEP. OSSE has responded to all requests from the Petitioners on identified locations. Most of these locations did not want to receive admissions packets from OSSE once OSSE contacted them.

For the two programs that OSSE did not pursue, including the ARF adult program, OSSE provided a detailed rationale for not moving forward. Both included the program’s inability or unwillingness to implement the IEP or work with the SEA and LEA on contracted services to implement the IEP. OSSE has not heard from ARF since November 2023. OSSE denies that its communications with facilities that it contacted but which it deemed inappropriate are educational records pursuant to the IDEA or the Family Educational Rights and Privacy Act (“FERPA”). OSSE respectfully requests that Petitioners’ request for relief be denied entirely.

Resolution Meeting and Pre-Hearing Conference:

Petitioners and DCPS participated in a resolution meeting. They did not reach a resolution and did not elect to waive the remainder of the resolution period. The DPC was filed on October 4, 2023. The 45-day period began on November 4, 2023, and ended [and the Hearing Officer’s Determination (“HOD”) was initially due as to the SEA on November 18, 2023, and as to the LEA on December 18, 2023. The SEA filed a motion to align the timelines for the SEA and LEA. With the granting of subsequent motions to continue, the HOD is now due on July 8, 2024.

The undersigned impartial hearing officer (“IHO”) conducted a pre-hearing conference on December 20, 2023, and issued a pre-hearing order (“PHO”) on December 31, 2023, stating, inter alia, the issue to be adjudicated.

ISSUES:⁴

The issues adjudicated are:

1. Did DCPS deny Student a FAPE by failing to comply with the March 25, 2022, HOD?
2. Did DCPS deny Student a FAPE by failing to update Student’s IEP since March 29, 2021?
3. Did DCPS deny Student a FAPE by failing to implement Student’s IEP since November 1, 2021?
4. Did DCPS deny Student a FAPE by failing to conduct the requested physical therapy (“PT”) evaluation?
5. Did DCPS deny Student a FAPE by failing to provide Petitioners the requested Student educational records?
6. Are Petitioners entitled to the following relief requested?⁵

DUE PROCESS HEARING:

The Due Process Hearing was convened on January 29, 2024; January 30, 2024; February 5, 2024; February 6, 2024; March 18, 2024; March 22, 2024, May 31, 2024; and June 4, 2024. It was conducted via video teleconference on the Microsoft Teams platform. The parties submitted written closing arguments, the last of which was filed on June 28, 2024.

RELEVANT EVIDENCE CONSIDERED:

The IHO considered the testimony of the witnesses and the documents submitted in each party’s disclosures (Petitioner’s Exhibits 1 through 138, Respondent DCPS’s Exhibits 1 through 138, and Respondent OSSE’s Exhibit 1 through 3) that were admitted into the record and are listed in Appendix 2.⁶ The witnesses testifying on behalf of each party are listed in Appendix B.⁷

⁴ At the outset of the due process hearing, the IHO reviewed the single issue to be adjudicated the parties agreed to the issue as stated herein.

⁵ Issue #6 is discussed and decided under the Relief section of this HOD.

⁶ Any item disclosed and not admitted or admitted for limited purposes was noted on the record and is noted in Appendix A.

⁷ Petitioners presented nine witnesses: (1) Student's mother, (2) Student’s father (3) an educational consultant who testified as an expert, (4) an independent behavior analyst from a residential facility Student visited, (5) the director of a tutoring services company that provided Student tutoring services, (6) the senior director of the residential facility

SUMMARY OF DECISION:

Petitioners held the burden of persuasion on all issues adjudicated. The IHO concluded that Petitioners sustained the burden of persuasion on issue # 3 regarding the implementation of the Student's IEP. Petitioners did not sustain the burden of persuasion on any of the remaining issues. The IHO granted Petitioners reimbursement for Student time at ARF from January 17, 2023, until April 2024, when Student returned to the District of Columbia, and granted Petitioners some, but not all, of the other requested relief.

FINDINGS OF FACT:⁸

1. Student is a resident of the District of Columbia and was determined eligible for special education and related services pursuant to IDEA with an MD disability classification. During the pendency of this proceeding, DCPS was Student's LEA and OSSE Student's SEA. (Respondent's Exhibits 55, 56, 57)
2. Student has reached the age of majority and granted Student's parents authority over Student's educational rights pursuant to a power of attorney dated February 11, 2023. Although Student is beyond IDEA's eligibility age, pursuant to an HOD issued on September 29, 2017, Student's special education eligibility was extended by two years and ended at the end of school year ("SY") 2023-2024. (Petitioner's Exhibit 2)
3. Student's eligibility was most recently reconfirmed at an eligibility meeting convened on July 25, 2023. The team determined that Student remained eligible for the following related services: speech services, behavior support services, and occupational therapy. (Respondent's Exhibits 57)
4. Student has been removed from education with typical peers, and DCPS, OSSE, and Student's parents have agreed that the Student's least restrictive environment ("LRE") is a residential treatment center. In August 2020 Student was placed at a residential treatment center located in Maryland ("RTC-2"). On February 12, 2021, while Student was at RTC-

(ARF) where Student was unilaterally placed by Petitioners, (7) an independent psychologist, (8) an employee of ARF, (9) another independent educational consultant who testified as an expert. DCPS presented nine witnesses, some of whom testified as expert witnesses: (1) a representative from School A, (2) a representative from DC Department of Disability Services, (3) a regional manager of School A, (4) a DCPS social worker, (5) a DCPS speech-language pathologist, (6) a DCPS LEA representative & special education teacher, (7) a DCPS occupational therapist, (8) a DCPS school psychologist, and (9) a DCPS resolution specialist/compliance case manager. OSSE presented one witness: the OSSE special programs manager. The IHO found the witnesses credible unless otherwise noted in the conclusions of law. Any material inconsistencies in the testimony of witnesses that the IHO found are addressed in the conclusions of law.

⁸ The evidence (documentary and/or testimony) that is the source of the Findings of Fact ("FOF") is noted within parentheses following the finding. A document is noted by the exhibit number. If there is a second number following the exhibit number, that number denotes the page of the exhibit from which the fact was obtained. When citing an exhibit submitted by more than one party separately, the IHO may only cite one exhibit.

2, DCPS convened an annual IEP meeting and updated Student's IEP.⁹ (Petitioner's Exhibit 12)

5. On October 1, 2021, RTC-2 notified DCPS that it could no longer meet Student's needs and that Student would be discharged from both its residential program and school, effective October 31, 2021. (Petitioner's Exhibit 14, Respondent's Exhibit 35).
6. Due to Student's extreme behaviors, Petitioners did not return Student to their home following Student's discharge from RTC-2. Instead, Petitioners had Student initially live in hotels. Student's father, along with the assistance of aides that Petitioners hired, stayed with Student in hotels for a couple of months until Student's increasingly problematic behaviors made it impossible to continue to stay in hotels. Student was hospitalized in January 2022. Upon Student's release from the hospital on January 24, 2022, Student returned to and resided in Petitioner's home until Petitioners unilaterally placed Student at an adult residential facility in New Jersey (ARF) in January 2023. Student has not resided in Petitioner's home since January 17, 2023, and remained at ARF until April 2024. (Father's testimony, Witness 17's testimony, Petitioner's Exhibit 23)
7. Upon Student's discharge from RTC-2 on November 1, 2021, Petitioners, DCPS, and OSSE, which is responsible for placing Students in the District of Columbia in non-public schools, agreed that Student's LRE continued to be a residential treatment center. In response to Student's discharge from RTC-2, OSSE communicated with Petitioners and obtained updated consent forms to send out admission packages to potential residential placements. OSSE sent the Student's admission packages to scores of residential treatment centers in the months surrounding the Student's discharge from RTC-2. None of them accepted Student. (OSSE Witness 17's testimony, Respondent's Exhibit 35)
8. In the absence of an RTC, DCPS proposed interim services provided either through funding authorizations that Petitioners were to use to arrange for and supervise some of Student's IEP services, using private providers, or virtual school through DCPS. Petitioners disagreed with both proposals and filed a due process complaint on October 28, 2021. (Respondent's Exhibit 35)
9. On February 1, 2022, DCPS convened an IEP meeting for Student in which Student's mother and her attorney participated. At the time, Student was hospitalized. DCPS noted that Student's IEP would soon be expiring and suggested that the IEP be extended pending the receipt of updated evaluation data for Student. Student mother and her attorney agreed to an extension of the HOD and agreed to provide independent evaluation data and updated information from RTC-2 about Student. During the meeting, DCPS reiterated that Student's LRE was a residential placement. Student's mother requested that in the interim Student be provided 2:1 aides and 24 hours per day care. DCPS also requested that Student's parents contact D.C. Department of Disability Services ("DDS") to inquire

⁹ The copy of the IEP that was developed at the February 12, 2021, IEP meeting carries a subscript date stamp of March 29, 2021, and is referred to herein as the March 29, 2021, IEP.

about what additional services might be available to Student to assist pending Student's placement in a residential treatment center. (Respondent's Exhibit 31)

10. In March 2022, the assigned hearing officer convened a due process hearing on Petitioners' October 28, 2021, DPC. On March 25, 2022, the hearing officer issued his HOD. In that decision, the hearing officer, inter alia, made the following findings of fact:

- On November 1, 2021, the Parents picked up Student from RTC-2. The Parents were highly concerned about bringing Student back to their home because of concerns for Student's safety and the impact on Student's sibling. As a short-term solution, the Parents housed Student, at their own expense, at a residential hotel (HOTEL 1) in Virginia beginning November 1, 2022, where Student remained for about 2 months. At Hotel 1, Student was at all times with a parent or a caregiver. Following several behavior incidents, including Student's pulling the hotel fire alarm 2 or 3 times, the Hotel 1 management required Student to leave. (Respondent's Exhibit 35)
- After being "evicted" from Hotel 1, the Parents housed Student at Hotel 2, another residential hotel in Virginia. After 2-3 weeks, on or about January 17, 2022, following another fire alarm incident which involved a police response, the Hotel 2 management required Student to leave. From Hotel 2, the Parents took Student directly to DISTRICT HOSPITAL's emergency psychiatric unit, where Student remained for a week. (Respondent's Exhibit 35)
- District Hospital staff attempted, without success, to find a healthcare facility that would admit Student for a short term stabilization period. On January 24, 2022, District Hospital discharged Student to the Parents' care. Since then, Student has lived at the Parents' home. (Respondent's Exhibit 35)
- At the Parents' home, the Parents have set up a bed and television for Student in their basement in order to provide some separation from Student's sibling and the parents. On a typical day, Father gets Student up in the morning and starts with the learning set-up. Student's aide arrives around 10:00 a.m. Mother helps with the learning program and lunch. Father relieves Mother around 4:00 p.m. The aide leaves around 6:00 p.m. Father then stays with Student until Student goes to sleep. (Respondent's Exhibit 35)
- By the third week of October 2021, when it became evident that OSSE would not be able to identify another residential treatment center for Student to move to, after he/she was discharged from RTC-2, DCPS developed an interim services authorization for Student. The October 21, 2021, authorization authorized the Parents to obtain interim independent services for Student, beginning November 1, 2021, to include:

- Tutoring – maximum of 22.5 hours per week, including weekends at \$65.00 per hour, behavior support services – maximum of 4 hours per week, including weekends at \$125 per hour, counseling – 4 hours per month at \$90.00 per hour speech-language pathology – 10 hours per month at \$109.43 per hour occupational therapy (OT) – 12 hours per month \$130.38 per hour.
- On November 9, 2021, DCPS revised the interim services authorization to add a provision for a dedicated aide – a maximum of 8 hours per day at \$40.00 per hour. Beginning December 1, 2022, the maximum allowed costs were increased for tutoring to \$71.90 per hour and for speech-language pathology to \$114.10 per hour. Since November 2021, DCPS has renewed the independent services authorizations for Student on a month-to-month basis. (Respondent’s Exhibit 35)
- As of the due processing hearing date (March 7, 2022), much of the DCPS-authorized interim independent services for Student by DCPS remain unused. The Parents have used the OT hours, dedicated aide hours, and a small part of the tutoring hours. According to Mother, without the support of a therapeutic residential environment, Student does not have the “bandwidth” to handle more services. Due to Student’s behavioral challenges, driving Student to locations for more services is not practicable for the Parents.

11. In his analysis of the issues, the hearing officer stated, inter alia, the following: “Altogether, beginning a few days after RTC-2 notified DCPS that it was discharging Student, OSSE reached out to over 30 residential schools, and sent follow-up application packets to at least 20 to 23 of those programs which responded. OSSE looked for residential programs outside of OSSE’s list of approved schools because most of the OSSE-approved programs had already denied admission to Student in the past. Unfortunately, for various reasons, including Student’s age and extended eligibility entitlement and his/her severe behavior challenges, none of the residential treatment centers which OSSE contacted has accepted Student for admission. OSSE’s efforts to find a residential placement for Student are ongoing.” (Respondent’s Exhibit 35)
12. In the March 25, 2022, HOD, the hearing officer credited DCPS for promptly offering Petitioners “interim independent services” when it recognized that OSSE would not be able to timely identify another RTC for Student. Nonetheless, the hearing officer concluded that DCPS denied Student a FAPE by putting the onus of obtaining the services on Petitioners and not providing Student services that would approximate Student’s March 29, 2021, “as closely as possible.” (Respondent’s Exhibit 35)
13. The hearing officer concluded that the appropriate remedy was to order DCPS to ensure that Student was provided some form of a special education day program, reasonably calculated to approximate the non-residential requirements of Student’s IEP as closely as possible, for as long as it remained impossible or impracticable for

OSSE to place Student in an appropriate residential treatment center. (Respondent's Exhibit 35)

14. The hearing officer agreed that Student was entitled to compensatory education services for the period that Student's IEP was not implemented; however, since the search for a new RTC remained open, the hearing officer deferred that award until Student was successfully placed at another residential facility, and therefore denied the request for compensatory education without prejudice. (Respondent's Exhibit 35)

15. The March 25, 2022, HOD ordered the following:

- “Within 21 school days of the date of this decision, until such time as DCPS/OSSE, secure a placement for Student at a residential treatment center, DCPS shall ensure that Student is provided a temporary year-round special education day program to approximate as closely as possible the other requirements of the March 2021 IEP, as may be amended from time to time, including without limitation a highly structured educational environment with 1:1 supervision, a highly structured behavioral intervention program; a 1:1 dedicated aide for 8 hours per school day; specialized instruction for 22.5 hours per week; speech/language therapy for 360 minutes per month; occupational therapy for 720 minutes per month; behavioral support services for 720 minutes per month and school transportation. DCPS shall consider the Parents' views in selecting an appropriate location for these services, which may be, without limitation, a DCPS or other public facility, a nonpublic day school, another private entity, or, with the Parents' consent, the Parents' home. If reasonably required to maintain Student's safety or the safety of others, DCPS must ensure that Student is provided a 1:2 student-to-staff ratio during all times in the day education program. To the extent that providing the temporary setting requires modification of Student's IEP, DCPS shall ensure that Student's IEP team is convened to review and revise the IEP as appropriate;”
- “To the extent DCPS has not already authorized funding for such services, upon receipt of documentation which DCPS may reasonably require, DCPS shall promptly reimburse the Parents their reasonable costs for special education and related services required by the March 2021 IEP, which they have obtained for Student after October 31, 2021, including without limitation tutoring services, OT services, dedicated aides and Student's transportation to and from such services;”
- “Within 21 school days of the date of this decision, subject to obtaining Petitioner's consent, DCPS, in consultation with OSSE shall procure an Independent Education Evaluation (IEE) by a qualified educational consultant, who is experienced in placing students with severe behavioral disabilities in residential treatment facilities, to assess Student's residential

facility needs, make residential treatment centers inquiries on Student's behalf and make recommendations to DCPS and OSSE on residential centers that would be able to provide the services required by Student's IEP and would be willing to consider Student for admission. In the event that OSSE identifies a suitable residential center location for Student in the meantime, DCPS may truncate performance of this IEE requirement;"

- "Petitioner's request for compensatory education for the denial of FAPE found in this decision is denied without prejudice to his/her right to renew the request for compensatory education from DCPS after Student is placed in a residential treatment facility;"
- "Petitioner's claims against OSSE herein are dismissed, and OSSE is dismissed as party respondent, without relieving OSSE of its ongoing responsibility for identifying and paying the costs for a residential treatment center for Student to attend and all other relief requested by the Petitioner herein is denied.

16. Upon Student's return from RTC-2 in November 2021, Student first received virtual tutoring in math and reading and occupational therapy services for 12 hours per month. Petitioners had difficulty finding providers who would bill DCPS directly for the independent services that DCPS had authorized. Petitioners were able to secure tutoring services and occupational therapy services with the DCPS authorizations. Because of the Student's difficult behaviors, the Student made little progress from the independent tutoring. Petitioners had difficulty securing services of one-to-one aides with the authorizations and hired aides independently. (Mother's testimony, Witness 4's testimony, Petitioner's Exhibit 130)
17. In January 2022, Petitioners engaged Student's occupational therapist to conduct an occupational therapy evaluation. On February 4, 2022, the occupational therapist provided Petitioners a letter recommending that Student receive a physical therapy evaluation. On February 14, 2022, Petitioner's attorney sent an email to DCPS requesting that Student be evaluated for physical therapy. On March 17, 2022, a DCPS occupational therapist completed an assessment review report of the independent occupational therapy evaluation that Petitioners provided to DCPS. The DCPS occupational therapist attempted to confer with the independent evaluator, but Petitioners never granted authorization. To date, a physical therapy evaluation has not been conducted. (Mother's testimony, Petitioner's Exhibits 23, 24 25, Respondent's Exhibit 32)
18. Petitioners engaged an independent psychologist to conduct an evaluation of Student, which was completed in April 2022. Based upon the evaluation, Student's academic functioning in all areas was in the Very Low range, and the psychologist noted in his report that while Student can read and follow common signs and answer simple questions about a story that has been read to him/her, and performs basic math calculations with support, she/he cannot independently read for understanding, cannot write his/her name and cannot

work independently for a reasonable amount of time. (Witness 5's testimony, Petitioner's Exhibit 29)

19. The independent psychologist noted the following in his evaluation report regarding Student's time at RTC-2 and Student's return to Petitioners' home:

- "Student's behavior and daily functioning skills deteriorated significantly during his/her time at [RTC-2] for example, he/she was brought to the emergency room at least seven times after swallowing potentially dangerous objects (e.g., pushpins). She/He also damaged property, refused to comply with directions, urinated in inappropriate places, became physically aggressive with staff or other residents, and eloped from the home. [RTC-2] attempted to manage and decrease Student's disruptive and dangerous behaviors by tiding her/him with 2:1 staffing and by moving her/him to another home where she/he was the only resident.
- Despite these interventions, Student made very little progress at [RTC-2] and was unsuccessfully discharged from the programs on November 1, 2021. Since that time, [Student's mother] stated that they have been in "*survival mode*" waiting for an appropriate residential placement to be found for her/him. She/He is currently living in the community and is provided with 24-hour supervision (either by his parents or behavior support paraprofessionals). Her/His private occupational therapy has been suspended since June 2022, when her/his tutor went on maternity leave, but she/he continues to participate in her/his individual tutoring. However, she/he also continues to have great difficulty regulating her/his emotions and behavior. These behaviors have resulted in police involvement, emergency psychiatric evaluations, and a week-long stay in an emergency room because an inpatient psychiatric bed could not be found." (Witness 5's testimony, Petitioner's Exhibit 29)

20. In March 2022, Petitioners contacted a residential facility in _____, (FC), about Student's admission. To assist Petitioners in hopefully securing a residential placement for Student, Petitioners engaged the FA to conduct an evaluation of Student's level of independence and ability to live in a setting outside of Petitioners family home. Student moved from Washington D.C. to _____, , and for two weeks, Student stayed in the FC's residential apartment complex along with Student's private aide, a live-in caregiver and friend of the family. During the two weeks, from July 18, 2022, through July 29, 2022, Student attended the FC adult day program, where FC staff observed and evaluated while Student participated in the activities with peers. FC ultimately rejected Student for admission because of Student's age and Student's behavior at FC. The FC evaluation cost Petitioners \$4500. (Mother's testimony, Witness 3's testimony, Petitioner's Exhibit 35)

21. Petitioners sought reimbursement from DCPS for the report prepared by FC. A DCPS representative responded to the request in a letter dated August 8, 2022. In that letter DCPS noted, among other things, a list of actions that DCPS had taken since Student was discharged from RTC-2 to provide Student IEP services, that DCPS had since March through July 2022 exhausted the list of non-public programs to accept Student pursuant to

the March 25, 2022, HOD, and that DCPS had identified two non-public day programs in May 2022, with potential to serve Student. DCPS noted its willingness to consider reimbursement for the FC report if the results were shared with DCPS along with access to the individuals who assessed Student. The letter noted that DCPS sought to connect Petitioners with government agencies to support their family while Student was living with Petitioner, including signing Student up for Medicaid services. (Respondent's Exhibit 108)

22. A DCPS psychologist conducted a review of Petitioner's independent psychological evaluation in October 2022. (Witness 14's testimony, Respondent's Exhibit 64)
23. On October 17, 2022, Petitioners received an acceptance letter for Student to attend a non-public school special education day school ("School A") located in the D.C. metropolitan area to which Student could have been transported by bus. Petitioners were interested in Student attending in the interim until a residential placement could be found for Student. DCPS updated Student's IEP include transportation services and issued a prior witness notice ("PWN") for Student to attend School A. Student's IEP was updated with a November 1, 2022, date. Because of Petitioner's concerns about the long travel time to and from Petitioner's home and School A, and concern for whether Student would be provided necessary aides on the bus, Petitioners did not agree to Student attending School A. Petitioners were not able to transport Student to School A themselves. (Mother's testimony, Petitioner's Exhibit 48, Respondent's Exhibits 46, 48)
24. School A has an OSSE certificate of approval ("COA"). OSSE initiated transportation services for Student to attend School A and communicated with Petitioners and School A regarding bus transportation for Student from Petitioner's home to School A and returning home. Because of Student's mother's concerns about Student's ability to ride the bus, OSSE made certain that Student's behavior intervention plan ("BIP") was reviewed to guide the need for any additional support for transportation. Parent concerns were mainly around restraint on the bus, but there was nothing in Student's BIP regarding restraints during transportation. Student also required a dedicated aide for the bus. OSSE offered Student's mother reimbursement if she wanted to transport Student. (Witness 17's testimony, OSSE Exhibit 1, Petitioners' Exhibit 68)
25. Petitioners unilaterally placed Student at ARF, an adult residential facility in New Jersey in January 2023. Student was in ARF's highest-level acute care program in a rural setting. Although Student entered ARF in January 2023, it took ARF until June 2022 to evaluate Student because Student exhibited new and problematic behaviors. However, by June 2003, ARF produced a comprehensive individualized treatment plan, that Petitioners provided to DCPS. Student's mother acknowledged that until the Student's behaviors are addressed, Student is not available for any other services. (Mother's testimony, Petitioners' Exhibits 89, 90)
26. ARF's program is designed to support individuals in a residential setting who have significant behavioral and medical needs with a diagnosis of autism, intellectual disability, or developmental disability. At ARF, Student lived in residence with three other similarly situated adults. ARF has a day program that provides day habitation and vocational

services and transitions from school to an adult program. The goal of ARF is skill acquisition, safety, and building communication capacity so that residents can self-advocate through the development of an individualized service plan. (Witness 4's testimony)

27. At ARF, A Student displayed self-injurious behavior, elopement, aggression toward peers, property destruction, non-compliance, anxiety, and impatience. ARF staff noted that Student's severe behavior challenges have to be addressed before Student can make any progress. Shortly after Student arrived at ARF, while attending ARF's day program, Student attempted to stab an employee in the eye and spread soap on the bathroom floor. Student would aggress toward people or her/himself. Student could not stay in the day program after those incidents, so ARF provided Student a one-to-one skill-building support at Student's ARF residence. There were three other individuals in Student's ARF home. Each resident had a staff member assigned along with a shift supervisor and a house manager. The staff member assigned must be 18 or older. Student is high-functioning and can complete most household activities without assistance. Student would sometimes interact with individuals in her/his ARF home, but not most of the time not. (Witness 4's testimony, Witness 6's testimony)
28. On July 25, 2023, DCPS convened an eligibility meeting for Student. Student's mother and her attorney participated in the meeting along with several members of the staff from ARF and FC and DCPS staff members and attorneys. It was shared during the meeting that since Student had been at ARF, Student had not been in a formal educational program and that ARF did not provide Student related services. It was noted that when Student first came to ARF, Student attended the day program, but Student's severe behavior prevented Student from continuing in the day program. DCPS indicated that it was awaiting a formal speech-language evaluation but that the Student remained eligible for speech-language services. Based on the independent occupational therapy evaluation, Student was deemed eligible for occupational therapy services. The DCPS psychologist reviewed the most recent psychological evaluation. The team determined that Student continued to be eligible under the MD disability classification. DCPS was still awaiting data from ARF to move forward with Student's IEP. The meeting notes indicated that DCPS would be in touch regarding an IEP meeting date. ARF staff noted that Student had a behavior plan and DCPS requested a copy and other behavioral data. DCPS received authorization for and completed a virtual observation of Student at ARF. (Testimony from Witnesses 10, 11, 12, Respondent's Exhibit 51, OSSE Exhibit 1 pg. 44)
29. After Petitioners unilaterally placed Student at ARF, OSSE coordinated with DCPS on creative ways to provide Students with alternative programming to implement Student's IEP at ARF. The OSSE representative inquired of ARF leadership about the Student being provided independent services from outside providers and a way to somehow marry ARF's adult program with the K through 12 educational program for Student. OSSE sent ARF a full admission packet for Student in November 2022, and the OSSE representative met with staff members from ARF and proposed that Student be provided instruction in the Student's residence or ARF's day program. OSSE also inquired with whether OSSE could rent space and hire staff to deliver IEP services to Student. ARF stated that none of these

options could be done. (Witness 17's testimony, Witness 16's testimony, OSSE Exhibit 1 pgs. 26-40)

30. In response to DCPS inquiry as to whether Student could be provided services from outside providers while Student was at ARF, ARF communicated that it would not allow outside providers in the following language: "We are not able to change our program descriptions for our Adult residential or Day program and the [ARF] does not have the capacity to contract for outside services at this time. There is no availability for outside vendors to provide services within the day program, as mentioned on our call, the guardian can have approved visitors within the residential program. I understand if our adult program does not meet the needs that you are looking for, please let me know how you would like to proceed." (Witness 17's testimony, OSSE Exhibit 1 pgs. 26-40)
31. ARF principally worked with Student on hygiene, socialization, and life skills. Student did not attend any school at ARF. ARF did not provide Student any instruction or related services in Student's IEP. Student made some progress in the severity of behaviors, his/her articulation, and Student's reading has improved. While Student was at ARF, the Student's father traveled to ARF every weekend to hang out with and support Student. At the time of the current due process hearing, Petitioners were paying for Student's stay at ARF. ARF charges approximately \$47,000 per month and bills by the day. Petitioners expended approximately \$522,000 for the time that Student spent at ARF. Student did not return to visit Petitioners' home after Student arrived at ARF and remained there until Student was recently discharged in April 2024. (Father's testimony, Petitioner's Exhibits 69)
32. DCPS updated Student's IEP on January 9, 2024. (Representation by Petitioners' counsel)
33. OSSE's program manager also communicated with the D.C. Department of Disability Services ("DDS") in a meeting in January 2023 with Petitioners and DCPS; however, OSSE never received approval from Petitioners to collaborate with DDS until the spring of 2024. (Witness 17's testimony)
34. Since November 2021, DCPS has authorized Petitioners to obtain independent services for counseling, speech-language pathology, occupational therapy, tutoring, and behavior support services totaling over \$368,000 from prior HODs. It is unclear how much of the independent services have been used by Petitioners. (Witness 16's testimony, Respondent's Exhibit 131)

CONCLUSIONS OF LAW:

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

Pursuant to IDEA §1415 (f)(3)(E)(ii), in matters alleging a procedural violation, a hearing officer may find that a child did not receive FAPE only if the procedural inadequacies impeded the child's right to FAPE, significantly impeded the parent's opportunity to participate in the decision-making

process regarding the provision of FAPE, or caused the child a deprivation of educational benefits. An IDEA claim is viable only if [DCPS'] procedural violations affected the student's substantive rights." *Lesesne v. District of Columbia*, 447 F.3d 828, 834 (D.C. Cir. 2006)

34 C.F.R. § 300.17 provides:

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

Pursuant to 5A DCMR 3053.6, the burden of proof is the responsibility of the party seeking relief. *Schaffer v. Weast*, 546 U.S. 49, 126 S. Ct. 528 (2005). Petitioners held the burden of persuasion on all issues adjudicated.¹⁰ The burden of persuasion shall be met by a preponderance of the evidence. The normal standard is a preponderance of the evidence. See, e.g., *N.G. V. District of Columbia* 556 F. Sup. 2d (D.D.C. 2008) see also 20 U.S.C. §1451 (i)(2)(C)(iii).

ISSUE 1: Did DCPS deny Student a FAPE by failing to comply with the March 25, 2022, HOD?

Petitioners seek to enforce the March 25, 2022, HOD. However, IDEA limits a hearing officer's jurisdiction to determining whether or not a FAPE has been provided. As stated above, 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").

IDEA mandates that parties who have prevailed in a due process hearing, as Petitioners did in the March 25, 2022, HOD, have the right to seek enforcement of an HOD through a State Education Agency complaint process (34 C.F.R. § 300.152(c)(3)) or seek legal recourse in a court of competent jurisdiction.

¹⁰ DC Code § 38-2571.03 (6) provides:

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

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

(ii) Where a party seeks tuition reimbursement for unilateral placement, the party seeking reimbursement shall bear the burden of production and the burden of persuasion on the appropriateness of the unilateral placement, provided that the hearing officer shall have the authority to bifurcate a hearing regarding a unilateral placement; provided further, that if the hearing officer determines that the program offered by the public agency is appropriate, it is not necessary to inquire into the appropriateness of the unilateral placement.

(B) This paragraph shall apply to special education due process hearings resulting from complaints filed after July 1, 2016.

Under the IDEA, "[a]ny party aggrieved by the findings and decisions made" in an administrative hearing has a right to bring a civil suit challenging those findings and decisions. 20 U.S.C. § 1415(i)(2)(A). In *B.D. v. District of Columbia*, 817 F.3d 792 (D.C. Cir. 2016), the D.C. Circuit explained that a party who prevails at an administrative hearing is not "aggrieved" by the HOD itself but rather only by the other party's failure to comply with the HOD. 817 F.3d at 801. As a result, the prevailing party does not have a right of action under § 1415(i)(2)(A), because the statute's "plain text refers not simply to an 'aggrieved' party, but to one aggrieved 'by the findings and decision' of a hearing officer." *Id.* (quoting 20 U.S.C. § 1415(i)(2)(A)).

However, the Circuit noted in *B.D.* that multiple courts have allowed parties seeking to enforce a HOD to bring suit under § 1983. *See id.* at 802 (citing *Mrs. W. v. Tirozzi*, 832 F.2d 748, 755 (2d Cir. 1987); *see also, e.g., Robinson v. Pinderhughes*, 810 F.2d 1270, 1273 (4th Cir. 1987); *Reid v. Bd. of Educ., Lincolnshire-Prairie View Sch. Dist. 103*, 765 F. Supp. 965, 969 (N.D. Ill. 1991); *K.W. v. District of Columbia*, No. 18-2578 (RMC), 2019 WL 2010360 (D.D.C. May 7, 2019). In *Blackman v. District of Columbia*, 456 F.3d 167 (D.C. Cir. 2006), the D.C. Circuit itself "assume[d], without deciding," that a § 1983 claim for enforcement of the IDEA was available to the plaintiffs, when none of the parties discussed the issue on appeal. *Id.* at 172 n.6. ¹¹

Although there was a concurring opinion in *B.D.* that alluded to the right of a party to enforce an HOD by filing a due process complaint, that was not the holding of opinion. Given that IDEA specifically mandates that an SEA complaint or a court action is the delineated means for enforcing an HOD, this IHO, concludes that enforcement of a prior HOD, particularly one not authored and issued by the IHO adjudicating the current matter, is inappropriate.

Based upon the foregoing authority, the IHO concludes that I am not authorized to enforce the specific provisions of the March 25, 2022, HOD, but I may and will consider them in determining whether DCPS has provided Student with a FAPE since that HOD was issued.

ISSUE 2: Did DCPS deny Student a FAPE by failing to update Student's IEP since March 29, 2021?

Conclusion: Petitioners did not sustain the burden of persuasion by a preponderance of the evidence that DCPS denied Student a FAPE by failing to update Student's IEP since March 29, 2021.

¹¹ In a concurring opinion Circuit Judge Millett noted the following: ... I write only to note that the United States Department of Education, which has responsibility for the federal administration and enforcement of the IDEA, see 20 U.S.C. § 1412(d), 1416(a), 1406(d)-(f), has identified a third possible avenue for enforcing a hearing officer's decision. See Brief for the United States as Amicus Curiae 13-14, *Porter v. Board of Trustees of Manhattan Beach Unified School District*, 307 F.3d 1064 (9th Cir. 2002) (No. 01-55032). Under the IDEA, any "matter relating to the identification, evaluation, or educational placement of the child, or the provision of a free appropriate public education to such child" can be the basis of a due process complaint and hearing. See 20 U.S.C. § 1415(b)(6) & (f)(1). In the federal government's view, a school district's failure to comply with a hearing officer's decision is such a matter. Thus, according to the Department of Education, parents facing a lack of compliance might be able to bring another due process complaint to enforce the prior decision and, if necessary, seek judicial review of any denial of needed relief in that proceeding.

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

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

IDEA requires that upon completion of an eligibility evaluation, the LEA eligibility team, including the parents, determines whether the child is a child with an IDEA disability who, by reason thereof, needs special education and related services. See 34 C.F.R. § 300.8. Regardless of the disability classification for special education eligibility relied upon by the LEA, the LEA must ensure that IEP special education and related services are tailored to the unique needs of each child. See *Andrew F. ex rel. Joseph F. v. Douglas Cty. Sch. Dist. RE-1*, 137 S. Ct. 988, 994, 197 L. Ed. 2d 335 (2017).

34 CFR § 300.323 (a) states: At the beginning of each school year, each public agency must have in effect, for each child with a disability within its jurisdiction, an IEP, as defined in § 300.320.

5A DCMR 3020.1 provides that an LEA shall ensure an IEP is in effect for each enrolled child who has been determined eligible for special education and related services throughout the calendar year, including the summer months.

As with all children with disabilities who reside in the District, DCPS must ensure that the child's IEP team reviews the child's IEP periodically, but not less than annually, to determine whether the annual goals for the child are being achieved and revises the IEP, as appropriate, to address lack of expected progress, results of any reevaluation and information by the parents. See 34 C.F.R. § 300.324(b).

34 C.F.R. §§ 300.324(b)(1)(i),(ii), 300.324(b)(2), mandates that DCPS must review Student's IEP not less than annually to address information about Student, anticipated needs, and other matters. *See Z. B. v. Dist. of Columbia*, 888 F.3d 515, 523-525 (D.C. Cir. 2018). Specifically, among other things, the IDEA requires statements of present levels of academic achievement and functional performance (PLOPs) in IEPs pursuant to 34 C.F.R. § 300.320(a)(1). Also, while the IDEA does not expressly require "baselines" in IEPs, it does require a description of how progress toward meeting a student's IEP goals will be measured in 34 C.F.R. § 300.320(a)(3).

The evidence in this case demonstrates that on February 1, 2022, DCPS convened an IEP meeting for Student in which Student's mother and her attorney participated. At the time, Student was hospitalized. DCPS noted that Student's IEP would soon be expiring and suggested that the IEP be extended pending the receipt of updated evaluation data for Student. Student's mother and her attorney agreed to an extension of the HOD and agreed to provide independent evaluation data and updated information from RTC-2 about Student. During the meeting, DCPS reiterated that Student's LRE was a residential placement. DCPS also requested that Student's parents contact DDS to inquire about what additional services might be available to Student to assist pending Student's placement in a residential treatment center.

Petitioners dispute that DCPS ever held an IEP meeting following the February 1, 2022, meeting to update Student's IEP. Nonetheless, the evidence demonstrates that DCPS updated Student's IEP on November 1, 2022, to reflect changes in transportation that were necessary to effectuate Student's placement in a non-public day school that had been identified and Student admitted to as an interim measure until a residential treatment center placement could be identified.

On July 25, 2023, DCPS convened an eligibility meeting for Student after Petitioners had unilaterally placed Student at ARF. Student's mother and her attorney participated in the meeting along with several members of the staff from ARF and FC and DCPS staff members and attorneys. The meeting notes indicated that at the conclusion of the meeting, DCPS would be in touch regarding an IEP meeting date. The evidence also indicates that DCPS was awaiting information from ARF to update Student's IEP. There was apparently no IEP meeting convened until January 9, 2024, when Student's IEP was updated.

The evidence demonstrates that at ARF, the Student was not provided instruction or related services, and thus, an update of any PLOPs or goals in the areas of concern in Student's IEP was not effectuated. Although there could have been updates to Student's behavior needs in the IEP because behavior was principally what ARF was working on with Student, however, DCPS witnesses credibly testified that there was little, if any, written data provided that would have effectuated a change in the PLOPs, and goals in Students IEP, as the IEP was not being implemented. ARF was operating from its own individualized service plan and its own behavioral goals that it had identified for Student.

An LEA's failure to ensure that an annual IEP includes updated PLOPs and appropriate annual goals is a procedural violation of the IDEA. *See, e.g., Alfono v. District of Columbia*, 422 F. Supp. 2d 1, 78 (D.D.C. 2006). Procedural violations of the IDEA may only be deemed a denial of FAPE if the procedural inadequacies (i) Impeded the student's right to a FAPE; (ii) Significantly impeded

the parent's (or adult student's) opportunity to participate in the decision-making process regarding the provision of a FAPE to the student; or (iii) Caused a deprivation of educational benefit.

See 34 C.F.R. § 300.513(a)(2). Petitioners bear the burden of establishing that such a procedural defect violated the student's substantive rights. *Herrion v. District of Columbia*, No. CV 20-3470 (RDM), 2023 WL 2643881 (D.D.C. Mar. 27, 2023).

DCPS made efforts to and eventually updated Student's IEP. Based on the evidence presented and the fact that Student had been unilaterally placed by Petitioners at ARF, where DCPS had limited, if any, access to Student and the data regarding the Student's performance, and the fact that ARF did not implement Student's IEP or allow DCPS/OSSE to do so, the IHO concludes that, and given the circumstances, DCPS's delay in updating Student's IEP doing so did not amount to a denial of a FAPE to the Student.

Petitioners presented insufficient evidence that DCPS's delay in updating Student's IEP between February 2022 and January 2024, particularly given the Petitioners' unilateral placement of Student at ARF where Student's IEP was not being implemented, impeded the student's right to a FAPE, significantly impeded Petitioners' opportunity to participate in the decision-making process regarding the provision of a FAPE to Student; or caused a deprivation of educational benefit.

ISSUE 3: Did DCPS deny Student a FAPE by failing to implement Student's IEP since November 1, 2021?

Conclusion: Petitioners sustained the burden of persuasion by a preponderance of the evidence that DCPS denied Student a FAPE by failing to fully implement Student's IEP.

For a failure to implement claim, the IDEA is violated only when a school district deviates materially from a student's IEP. See *James v. Dist. of Columbia*, 194 F. Supp. 3d 131, 139 (D.D.C. 2016); The IDEA is violated when a school district deviates materially from a student's IEP. *Wilson v. District of Columbia*, 770 F. Supp. 2d 270, 275 (D.D.C. 2011) (citation omitted). A material failure occurs when there is more than a minor discrepancy between the services a school provides to a disabled child and the services required by that child's IEP. *Holman v. District of Columbia*, No. 14-1836, 2016 WL 355066 (D.D.C. 2016) (citing *Van Duyn ex rel. Van Duyn v. Baker Sch. Dist.* 5J, 502 F.3d 811, 822 (9th Cir. 2007)). In other words, for the court to find a failure to implement an IEP, the school board or local authorities must have "failed to implement substantial or significant provisions of the IEP." *Wilson*, 770 F. Supp. 2d at 274 (citing *Houston Indep. Sch. Dist. v. Bobby R.*, 200 F.3d 341, 349 (5th Cir. 2000)). There is no requirement that the child suffer educational harm in order to find a violation; rather, the proportion of services mandated compared with those provided is "the crucial measure for purposes of determining whether there has been a material failure to implement" an IEP.

A school district "must ensure that ... special education and related services are made available to the child in accordance with the child's IEP." 34 C.F.R. § 300.323(c)(2). A material failure to implement a student's IEP constitutes a denial of a FAPE. *Johnson v. District of Columbia*, 962 F.Supp.2d 263, 268 69 (D.D.C. 2013). To meet its burden, the moving party "must demonstrate that the school board or other authorities failed to implement substantial or significant provisions

of the IEP." *Beckwith v. District of Columbia*, 208 F.Supp.3d 34, 49 (D.D.C. 2016) (quoting *Hous. Indep. Sch. Dist. v. Bobby R.*, 200 F.3d 341, 349 (5th Cir. 2000)). "Generally, in analyzing whether a student was deprived of an educational benefit, 'courts ... have focused on the proportion of services mandated to those actually provided, and the goal and import (as articulated in the IEP) of the specific service that was withheld.' " *Id.* (quoting *Wilson v. District of Columbia*, 770 F. Supp. 2d 270, 275 (D.D.C. 2011)). *Middleton v. District of Columbia*, 312 F. Supp. 3d 113 at 144 (D.D.C. 2018)

Courts in this jurisdiction and in other judicial circuits have recognized that there may be situations in which the implementation of a student's IEP, as written, has become impracticable or impossible. *See, e.g., Brown v. Dist. of Columbia*, Case No. 117CV00348RDMGMH, 2019 WL 3423208, at *16 (*D.D.C. July 8, 2019*); *John M. v. Bd. of Educ. of Evanston Twp. High Sch. Dist.* 202, 502 F.3d 708, 715 (7th Cir. 2007); *Tindell v. Evansville-Vanderburgh Sch. Corp.*, No. 309CV00159SEBWGH, 2010 WL 557058, at *4 (S.D. Ind. Feb. 10, 2010); *Worthington City Sch. Dist. Bd. of Educ. v. Moore*, No. 2:20-CV-3155, 2020 WL 4000979, at *5 (*S.D. Ohio July 15, 2020*).

In certain situations, the school district's delay in implementing an IEP is not, ipso facto, a denial of FAPE. As the Second Circuit Court of Appeals explained in *D.D. ex rel. V.D. v. New York City Bd. of Educ.*, 465 F.3d 503 (2d Cir. 2006), *opinion amended on denial of reh'g*, 480 F.3d 138 (2d Cir. 2007), the hearing officer must make a specific inquiry into the causes of the delay: Plaintiffs' right to a free appropriate public education requires that their IEPs be implemented as soon as possible. "As soon as possible" is, by design, a flexible requirement. It permits some delay between when the IEP is developed and when the IEP is implemented. It does not impose a rigid, outside time frame for implementation. Moreover, the requirement necessitates a specific inquiry into the causes of the delay. Factors to be considered include, but are not limited to: (1) the length of the delay, (2) the reasons for the delay, including the availability of the mandated educational services, and (3) the steps taken to overcome whatever obstacles have delayed prompt implementation of the IEP. *D.D., supra at 513-14*.

In *Brown v. Dist. of Columbia*, *supra*, U.S. Magistrate Judge G. Michael Harvey addressed the situation where according to DCPS, a student's incarceration in federal prison made implementation of the student's IEP impracticable. Magistrate Judge Harvey pronounced that where implementation of a student's IEP has become impracticable or impossible, "the school district has an obligation to 'provide educational services that approximate the student's . . . IEP as closely as possible.'" *Brown* at *16, n. 18 (citing *John M.*, *supra*, 502 F.3d at 714-15.).

There is no dispute that since the March 25, 2022, HOD was issued, Student's LRE has remained a RTC. Despite DCPS's and OSSE's efforts to identify and obtain a residential placement for Student that would accept Student and implement Student's IEP, those efforts did not produce an appropriate placement for Student.

Petitioners' expert witness acknowledged during the hearing that the extension of Student's eligibility through the last DCPS regular school day in June 2024, when Student is now ___ years old, presented significant challenges to finding and securing an appropriate residential program.

Acknowledging and presumably anticipating the continued difficulty in finding a suitable residential placement for Student, the hearing officer in the March 25, 2022, HOD ordered DCPS to ensure that Student was provided some form of a special education day program, reasonably calculated to approximate the non-residential requirements of Student's IEP as closely as possible, for as long as it remained impossible or impracticable for OSSE to place Student in an appropriate residential treatment center.

DCPS and OSSE identified one such special education day program that Petitioners declined and within two months of that day program being identified, Petitioners unilaterally placed Student at ARF. Following that unilateral placement OSSE and DCPS took action to implement Student's IEP while Student was at ARF to no avail. ARF does not implement IEPs and would not authorize OSSE to bring in outside providers to provide Student IEP services.

Given the fact that despite DCPS's and OSSE's efforts to identify and locate an appropriate residential placement for Student, a suitable residential placement was not available and that DCPS and OSSE were prevented from implementing Student's IEP because ARF would not allow or otherwise arrange for Student to be provided the IEP services while at ARF, the IHO concludes that it was practically impossible for DCPS to fully implement Student's IEP.

Nonetheless, DCPS was obligated to provide the Student a FAPE and is not relieved of its obligation to do so under the facts of this case. The IHO concludes that Student was entitled to a FAPE, and because no appropriate placement was found or created Student was denied a FAPE, and I must at least consider whether DCPS and OSSE are obligated to reimburse the Petitioners for the Student's time at ARF.

In *E.W.-G. v. District of Columbia*, No. CV 20-2806 (CKK), 2023 WL 2598680 (D.D.C. Mar. 22, 2023), U.S. District Judge Colleen Kollar-Kotelly explained the private school reimbursement remedy under the IDEA: [P]arents who "unilaterally" place a child with a disability in a private school, without consent of the school system, "do so at their own financial risk." *Florence Cty. Sch. Distr. Four v. Carter*, 510 U.S. 7, 15 (1993) (quoting *School Comm. of Town of Burlington, Mass. v. Dep't of Educ. of Mass.*, 471 U.S. 359, 373-74 (1996)). To qualify for tuition reimbursement under the IDEA, a plaintiff must demonstrate that: (1) the school district failed to provide a FAPE; (2) the plaintiff's private placement was suitable; and (3) the equities warrant reimbursement for some or all of the cost of the child's private education. *Forest Grove Sch. Dist. v. T.A.*, 557 U.S. 230, 247 (2009).

See, also, Leggett v. District of Columbia, 793 F.3d 59, 66-67 (D.C. Cir. 2015). (IDEA requires school districts to reimburse parents for their private-school expenses if (1) school officials failed to offer the child a free appropriate public education in a public or private school; (2) the private-school placement chosen by the parents was otherwise "proper under the Act"; and (3) the equities weigh in favor of reimbursement that is, the parents did not otherwise act unreasonably.)

Both DCPS and OSSE assert that ARF is not a residential treatment center, cannot and did not implement Student's IEP and meet Student's needs, and therefore does not qualify as a reimbursable placement for Student. In addition, Respondents assert that Petitioners acted unreasonably in not allowing Student to attend School A, which they claim was an appropriate

educational placement for Student to attend pending identification of an appropriate residential placement consistent with the directives of the March 25, 2022, HOD.

Although ARF is not a residential treatment center, and cannot and did not implement Student's IEP or allow DCPS/OSSE to do so, ARF, nonetheless targeted and apparently addressed some Student's server behavior difficulties. Student's father credibly testified that during Student's time at ARF, Student made some progress in the severity of behaviors, his/her articulation, and Student's reading has improved. The ARF personnel testified that although Student's problematic behaviors did not allow for Student to stay in its day program, ARF provided Student a one-to-one skill-building support at Student's ARF residence. Based on this evidence, the IHO concludes that ARF was at least suitable.

Although the hearing officer in the March 25, 2022, HOD directed DCPS/OSSE to provide Student an interim placement at a non-public special education day school, there is no dispute that given Student's severe behavioral issues that manifested not only during the day when Student would have otherwise been in a school setting, also manifested at any time during the day or night. Thus, the need for Student to have a residential placement in a RTC, which remained Student's LRE.

In the March 25, 2022, HOD, the hearing officer noted that the denial of a FAPE that he found was DCPS' placement of the onus of providing to Student appropriate services upon Petitioners following Student's discharge from RTC-2. The IHO does not find that Petitioners, in preferring and placing Student at a residential facility that did not meet all of Student's IEP needs instead of a day program that did not meet all of Student's needs, acted unreasonably.

The IHO concludes that although ARF was not an appropriate placement for Student that could implement Student's IEP, ARF still meets the requirements for Petitioners' reimbursement. Accordingly, the order below, the IHO grants Petitioners reimbursement for Student's stay at ARF.

Petitioners in their DPC sought Student's prospective placement at ARF. Student left ARF and returned to the District of Columbia on or about April 22, 2024. Student's special education eligibility ended at the conclusion of SY 2023-2024, June 17, 2024. Consequently, the Student's prospective placement at ARF is no longer viable relief to be granted.

ISSUE 4: Did DCPS deny Student a FAPE by failing to conduct the requested physical therapy ("PT") evaluation?

Conclusion: Petitioner did not sustain the burden of persuasion by a preponderance of the evidence of a denial of a FAPE by failing to conduct or authorize a physical therapy evaluating.

Pursuant to 34 C.F.R. § 300.304 (c) a school district must ensure that a student has been appropriately evaluated in all areas of suspected disability. D.C. law requires that "a full and individual evaluation is conducted for each child being considered for special education and related services." The evaluators shall utilize "a variety of assessment tools and strategies [to] gather relevant functional and developmental information about the child, including information provided by the parent, and information related to enabling the child to be involved in and progress in the general curriculum ... that may assist in determining whether the child is a child with a disability." D.C. Mun. Regs. Title 5A § 3006.7(a).

All areas "related to the suspected disability" should be assessed, including academic performance, health, vision, hearing, social and emotional status, general intelligence (including cognitive ability and adaptive behavior), communicative status, and motor abilities. The evaluations must be "sufficiently comprehensive to identify all of the child's special education and services needs." D.C. Mun. Regs. Title 5A § 3006.7(f).

34 C.F.R. § 300.303 provides:

(a) General. A public agency must ensure that a reevaluation of each child with a disability is conducted in accordance with Sec. Sec. 300.304 through 300.311--

(1) If the public agency determines that the educational or related services needs, including improved academic achievement and functional performance, of the child warrant a reevaluation; or (2) If the child's parent or teacher requests a reevaluation.

(b) Limitation. A reevaluation conducted under paragraph (a) of this section--

(1) May occur not more than once a year, unless the parent and the public agency agree otherwise; and

(2) Must occur at least once every 3 years, unless the parent and the public agency agree that a reevaluation is unnecessary.

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

Students are also entitled to a reevaluation of their disability upon a parental request, provided that no reevaluation occurs "more frequently than once a year," though a requested reevaluation must occur "at least once every 3 years." 34 C.F.R. § 300.303(a)(2); see *Cartwright v. Dist. of Columbia*, 267 F. Supp. 2d 83, 87 (D.D.C. 2003) ("DCPS' failure to comply with [the parent's] request clearly violates the language of [34 C.F.R. § 300.303].").

The evidence demonstrates that In January 2022, Petitioners engaged Student's occupational therapist to conduct an occupational therapy evaluation. On February 4, 2022, the occupational therapist provided Petitioners a letter recommending that Student receive a physical therapy evaluation. On February 14, 2022, Petitioner's attorney sent an email to DCPS requesting that Student be evaluated for physical therapy. On March 17, 2022, a DCPS occupational therapist completed an assessment review report of the independent occupational therapy evaluation that Petitioners provided DCPS. To date, a physical therapy evaluation has not been conducted.

The request for the physical therapy evaluation was not a recommendation made in the IEE itself; it was a recommendation that came later in another document. Petitioners did not grant authorization for the DCPS occupational therapist to confer with the IEE evaluator as to any of the recommendations. Based on that evidence, the IHO concludes that DCPS's action in not authorizing a physical therapy evaluation was not unreasonable given the circumstances, and there was no denial of a FAPE as a result. However, as part of the compensatory relief to Petitioners for the denial of FAPE found above regarding the failure to implement Student's IEP, the IHO grants the Petitioners the physical therapy evaluation.

ISSUE 5: Did DCPS deny Student a FAPE by failing to provide Petitioners the requested Student educational records?

Conclusion: Petitioner did not sustain the burden of persuasion by a preponderance of the evidence that DCPS denied Student a FAPE by failing to provide Petitioner full access to Student's educational records.

IDEA regulations provide that each agency "must permit parents to inspect and review any education records relating to their children that are collected, maintained, or used by the agency under [IDEA]." 34 CFR § 300.613 (a). "The agency must comply with a request without unnecessary delay and before any meeting regarding an IEP, or any hearing ... or resolution session ... , and in no case more than 45 days after the request has been made." *Id.* In addition, a parent's right to inspect and review includes: (1) the "right to a response from the participating agency to reasonable requests for explanations and interpretations of the records"; (2) the "right to request that the agency provide copies of the records containing the information if failure to provide those copies would effectively prevent the parent from exercising the right to inspect and review the records"; and (3) the "right to have a representative of the parent inspect and review the records." *Id.* § 300.613 (b).

IDEA regulations afford parents and their legal representatives an opportunity to inspect and review all education records with respect to the identification, evaluation, and educational placement of the student and the provision of a FAPE to the student. See 34 CFR § 300.501(a); *Friendship Edison Public Charter School Collegiate Campus v. Murphy* 2006 WL 2711524, 4 (D.D.C.2006). DCPS must permit parents to inspect and review any education records relating to their children that are collected, maintained, or used by the agency. See 34 CFR § 300.613(a).

The District of Columbia Municipal Regulations ("DCMR") provide that DCPS must honor the records request as soon as possible, but in no case in more than 45 calendar days. 5E DCMR § 2600.6. Failure to timely comply with a parent's request to inspect education records is a procedural violation of the IDEA. See, e.g., *N.P. v. E. Orange Bd. of Educ.*, No. CIV. 06-5130 DRD, 2011 WL 463037 at 7 (D.N.J. Feb. 3, 2011) (procedural violations of the IDEA by failing to timely respond to parent's requests for records.)

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)

Petitioner offered no testimony about any particular educational record that she was provided late that resulted in her being unaware of Student's academic or social-emotional progress, or in her being inadequately prepared to engage in any meeting. Absent testimony to that effect, the IHO concludes that there was insufficient evidence that DCPS's failure or delay in providing all Student's educational records impeded Student's right to FAPE, significantly impeded Petitioner's opportunity to participate in the decision-making process regarding the provision of FAPE, or caused Student a deprivation of educational benefits.

In addition, although Petitioners assert that DCPS maintained incorrect records, the IHO did not conclude that the Student's IEP, which was updated in November 2022, warranted correction given that the Student's IEP was updated to include transportation services for Student to attend School A. DCPS represented that Petitioners were allowed to include in Student's educational records clarification that no IEP meeting was held in November 2022.

Petitioners did not present sufficient evidence or convincing authority that any emails and correspondence maintained by OSSE relative to its attempts to locate a residential placement for Student constituted educational records to which Petitioners are entitled.

Consequently, the IHO concludes that Petitioner did not sustain the burden of persuasion by a preponderance of the evidence on this issue.

Remedy:

A hearing officer may award appropriate equitable relief when there has been an actionable violation of IDEA. *See* 20 U.S.C. § 1415(f)(3)(E)(ii)(II); *Eley v. District of Columbia*, 2012 WL 3656471, 11 (D.D.C. Aug. 24, 2012) (citing *Branham v. District of Columbia*, 427 F.3d at 11–12.) The IHO has concluded that School A denied Student a FAPE in failing to timely evaluate Student and determine eligibility.

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.

When a hearing officer finds denial of FAPE, he has "broad discretion to fashion an appropriate remedy, which can go beyond prospectively providing a FAPE, and can include compensatory education.... [A]n award of compensatory education must be reasonably calculated to provide the educational benefits that likely would have accrued from special education services the school district should have supplied in the first place." *B.D. v. District of Columbia*, 817 F.3d 792, 797-98 (D.C. Cir. 2016) (internal quotations and citations omitted.)

Petitioners requested the compensatory education included in their educational consultant's proposal in addition to reimbursement for Student's residing at ARF since January 17, 2023, and requested that the IHO create a monetary pool to be administered by a third party to relieve Petitioners of the onus of locating and implementing the compensatory services requested.

Petitioner's educational consultant inappropriately asserted that the Student should be compensated for unsubstantiated denials of FAPE. Consequently, the IHO found the proposal to

be grossly overstated. It doubtful from the evidence presented that the Student is even able to use and benefit from the level of compensatory services that the advocate requested.

The evidence demonstrates that DCPS has authorized Petitioners to obtain independent services for counseling, speech-language pathology, occupational therapy, tutoring, and behavior support services totaling over \$368,000 from prior HODs. The March 25, 2022, HOD noted that Petitioners had failed to use most of the services that DCSP authorized. And, it remains unclear how much of the independent services that have been authorized have been used by Petitioners, particularly since Student was not in the District of Columbia from January 2023 to April 2024.

The IHO finds that based on the evidence of Student's limited capacity to focus on much beyond behavior modifications that were addressed while Student was at ARF, and as noted by testimony from several witnesses, unless and until the Student's behaviors are addressed, Student is not available for any other services, the IHO concludes that compensatory services that are appropriate are limited to the IEP-related services that Student missed and a reasonable amount of tutoring services similar to that were previously authorized by DCPS prior to Petitioners' unilateral placement of Student at ARF.

ORDER:

1. Within forty-five (45) calendar days of the issuance of this Order, upon satisfactory proof of payment being provided to DCPS by Petitioners, DCPS shall reimburse Petitioners their costs of Student's attendance at ARF from January 17, 2023, until Student's discharge from ARF on or about April 22, 2024, consistent with OSSE prescribed rates, and any additional and customary expenses associated with Student's attendance at ARF during this period that DCPS and/or OSSE would have been responsible for paying while implementing Student's DCPS IEP(s) in a residential treatment center.
2. Within thirty (30) calendar days of the issuance of this Order, DCPS shall review, along with Petitioners, Petitioners use of any prior authorization for tutoring and IEP-related services that have been granted Petitioner in lieu of services that were in Student's IEP and provide Petitioners authorization for the following services for the period from March 25, 2022, to June 17, 2024, that have not already been provided to Petitioners for that period: tutoring for a maximum of 22.5 hours per week at \$71.90 per hour, counseling of 4 hours per month at \$114.10 per hour, speech-language pathology for 10 hours per month at \$109.43 per hour, occupational therapy for 12 hours per month at \$130.38 per hour
3. Within forty-five (45) calendar days of the issuance of this Order, upon satisfactory proof of payment being provided to DCPS by Petitioners, DCPS shall reimburse Petitioners at the OSSE prescribed rate for the unreimbursed cost of aides Petitioners hired to support Student between March 25, 2022, through January 17, 2023.
4. Within thirty (20) calendar days of the issuance of this Order, DCPS shall authorize Petitioners to obtain an independent physical therapy evaluation at the OSSE prescribed rate.

5. Within forty-five (45) calendar days of the issuance of this Order, upon satisfactory proof of payment being provided to DCPS by Petitioners, DCPS shall reimburse Petitioners at the OSSE Petitioners the cost of the FC evaluation, not to exceed \$4500.
6. All other relief requested by Petitioners is denied.

APPEAL PROCESS:

The decision issued by the Hearing Officer is final, except that any party aggrieved by the findings and decision of the Hearing Officer shall have ninety (90) days from the date of the decision of the Hearing Officer to file a civil action with respect to the issues presented at the due process hearing in a District Court of the United States or a District of Columbia court of competent jurisdiction, as provided in 20 U.S.C. §1415(i)(2).

/S/ Coles B. Ruff

Coles B. Ruff, Esq.
Impartial Hearing Officer
Date: July 8, 2024

Copies to: Counsel for Petitioner
 Counsel for LEA
 ODR hearing.office@dc.gov