

District of Columbia
Office of the State Superintendent of Education
 Office of Review and Compliance
 Office of Dispute Resolution
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Confidential

<p>Parent on Behalf of Student, ¹ Petitioner,</p> <p>v.</p> <p>District of Columbia Public Schools (“DCPS”) Local Educational Agency (“LEA”),</p> <p>&</p> <p>District of Columbia Office of the State Superintendent of Education (“OSSE”) State Educational Agency (“SEA”),</p> <p>Respondents.</p> <p>Case # 2018-0307</p> <p>Date Issued: May 30, 2019</p>	<p>HEARING OFFICER’S DETERMINATION</p> <p>Hearing Dates: March 6, 2019, March 18, 2019, March 21, 2019, May 2, 2019</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 E30. The Due Process Hearing was convened on the following days: March 6, 2019, March 18, 2019, March 21, 2019, and May 2, 2019, at the District of Columbia Office of the State Superintendent of Education (“OSSE”) Office of Dispute Resolution 1050 First Street, N.E., Washington, D.C. 20002, in Hearing Room 423. The parties filed written closing arguments on May 22, 2019.

BACKGROUND AND PROCEDURAL HISTORY:

The student (“Student”) is age _____ and in grade _____.² Student resides with Student's parent (“Petitioner”) in the District of Columbia. Student has been determined eligible for special education and related services pursuant to the IDEA with a disability classification of Autism Spectrum Disorder (“ASD”). District of Columbia Public Schools (“DCPS”) is Student's local educational agency (“LEA”) and the District of Columbia Office of the State Superintendent of Education (“OSSE”) is Student’s state educational agency (“SEA”). Student attends a non-public school located in the State of Maryland (“School A”) as a result of parental placement.

On November 28, 2018, Student’s parent (“Petitioner”) filed a due process complaint against DCPS. Petitioner filed a motion for stay-put protections for Student’s continued attendance at School A with DCPS funding and transportation for school year (“SY”) 2018-2019. DCPS opposed the motion. On December 20, 2018, the undersigned Hearing Officer issued an order granting Petitioner’s motion for stay-put protections.

On December 21, 2018, Petitioner filed an amended complaint against both DCPS and OSSE. In her amended complaint Petitioner alleged, inter alia, that DCPS denied Student a free appropriate public education (“FAPE”) by failing to provide Student with an individualized educational program (“IEP”) on July 13, 2018, that was reasonably calculated to enable Student to make progress appropriate in light of Student’s circumstances, and that DCPS and/or OSSE denied Student a FAPE by failing to provide an appropriate educational placement prior to the beginning of SY 2018-2019, and/or denied Student a FAPE by proposing an inappropriate placement and location of services at the non-public school (“School B”) that OSSE/DCPS proposed for SY 2018-2019.

Petitioners seeks as relief an Order directing DCPS and/or OSSE to reimburse Petitioner for all costs associated with her placing of Student at School A including, tuition, transportation, related services, and any other associated costs of educating Student at School A through the unilateral placement from the beginning of SY 2018-2019, including any deposits made. Petitioner also seeks to have Student placed and funded at School A prospectively for, at a minimum, the

² The student’s current age and grade are in indicated in Appendix B.

remainder of SY 2018-2019, or unless and until DCPS offers a FAPE to Student consistent with the Hearing Officer's decision.

LEA Response to the Complaint:

DCPS filed a timely response to the complaint on December 10, 2018, and filed a timely response to the amended complaint on January 2, 2019. The LEA denies that there has been any failure to provide Student with a FAPE and stated, inter alia, the following:

On July 13, 2018, DCPS and Petitioner acted as collaborative partners in the development of the Student's annual IEP, and the IEP is individualized to appropriately meet the needs of Student. The team determined that in placing Student in the least restrictive environment ("LRE"), Petitioner and her representatives were provided the opportunity to participate fully in the decision-making related to the placement determination.

On September 27, 2018, Petitioner was provided with a location of service ("LOS") letter by OSSE notifying that the IEP and placement would be implemented at School B. Petitioner did not bring Student to School B for SY 2018-2019. DCPS issued a prior written notice ("PWN") on October 29, 2018, to confirm the offer of FAPE and Petitioner's refusal of the placement.

DCPS is required to submit all requests for non-public location assignments to OSSE for LOS assignment. The LOS request is started by filing a justification for removal letter with OSSE. This was done by DCPS prior to the start of SY 2018-2019. The OSSE meeting was held on August 30, 2018, and the OSSE informed Petitioner that a location assignment letter would be sent out within ten (10) business days of the meeting. DCPS cannot be held liable for the timeline of a process which is mandated by the state.

Even if the Petitioner were to prevail on the issue of whether the IEP proposed is appropriate, the relief should be denied on equitable grounds as the parent removed Student from DCPS well in advance of the school year, and DCPS responds that it does not agree that Petitioner had any intention of Student attending a DCPS school. DCPS requests that all relief be denied or reduced.

SEA Response to the Complaint:

OSSE filed a timely response to the complaint on December 31, 2018. The SEA asserted that it did not deny Student a FAPE in violation of the IDEA. In its response OSSE stated, inter alia, that it has complied with local law and policy (as well as with the requests made by the LEA and Petitioner) by identifying and applying to nonpublic special education schools that hold a certificate of approval ("COA") issued by OSSE.

An initial placement request was submitted to OSSE on August 13, 2018. OSSE facilitated a change in placement meeting on August 30, 2018. Although Petitioner communicated that Student had already been unilaterally placed at School A, Petitioner agreed to move forward with OSSE's change in placement process, and signed parental consent for OSSE to identify a new nonpublic school for Student to attend. Petitioner was informed that this process would likely involve visits to the schools under consideration. Furthermore, OSSE communicated to Petitioner that School

A would not be considered as it did not hold an OSSE COA. Despite being made well aware that School A was not an option, Petitioner agreed to move forward with the process. There was a discussion of schools Petitioner had visited and planned to visit, and parent expressed concern with school choices based upon her own research. However, at that time, OSSE had yet to send out any referrals.

During a change in placement (“CIP”) meeting, it was communicated to Petitioner that OSSE would issue a notice of location assignment by the 10th business day if OSSE received a full-acceptance from a program. Given that OSSE had not yet received a full-acceptance from any program by the 10th business day, OSSE was unable to issue a full-notice of location assignment until one was received.

Student’s team was kept abreast of the most current information through the process of the multiple denials, which also included an identification of the schools that continued to remain under consideration. During this period, the team was aware that OSSE was waiting to receive a full-acceptance and that it would issue a full-notice of location assignment upon receipt of said acceptance.

School B is the only school program that provided a full-acceptance letter, so there were no other plausible options for Student at that time. OSSE sent the full-notice of location assignment to Petitioner on September 27, 2018, including what was required of the LEA regarding PWN and transportation. OSSE denies that School B is inappropriate for Student. OSSE clarifies by stating that the nonpublic school chosen is appropriate for Student, has a COA, and has completed a records review and determined that it can implement Student’s IEP.

Resolution Meeting and Pre-Hearing Conference:

Petitioner and the LEA participated in a resolution meeting on December 21, 2018. Petitioner and the LEA did not resolve the complaint and did not mutually agree to shorten the 30-day resolution period. The 45-day period as to the LEA began on January 20, 2019, and ended [and the Hearing Officer’s Determination (“HOD”) was originally due] on March 6, 2019.

On January 11, 2019, Counsel for Petitioner and Counsel for both Respondents, OSSE and DCPS, participated in a pre-hearing conference and agreed, inter alia, to hearing dates of March 6, 2019, March 18, 2019, and March 21, 2019. The hearing dates were beyond the 45-day timeline for decisions involving the SEA as a respondent and well as the 75-day timeline for decisions involving the LEA as a respondent. All parties agreed that cases for both Respondents would be heard together and tracked on the same timeline and that the timeline for the HOD would be extended accordingly. The undersigned Hearing Officer issued a pre-hearing order (“PHO”) on February 11, 2019, outlining, inter alia, the issues to be adjudicated.

The parties did not complete the hearing on March 21, 2019, and agreed to a continuance of the hearing to May 2, 2019. DCPS filed an unopposed motion for a 42-day continuance of the hearing, and the corresponding extension of the HOD due date. The hearing date was continued from March 21, 2019, to May 2, 2019, and the HOD due date was extended 42 calendar days from April 18, 2019, and is now due May 30, 2019.

ISSUES: ³

The issues adjudicated are:

1. Whether DCPS denied Student a FAPE by failing to provide Student with an IEP on July 13, 2018, that was reasonably calculated to enable Student to make progress appropriate in light of Student's circumstances. ⁴
2. Whether DCPS and/or OSSE denied Student a FAPE by failing to provide an appropriate IEP and educational placement prior to the beginning of SY 2018-2019, as required by *Leggett v. District of Columbia*.
3. Whether DCPS and/or OSSE denied Student a FAPE by proposing an inappropriate placement and location of services at the School B on September 27, 2018. ⁵

³ The Hearing Officer restated the issues at the hearing, and the parties agreed that these were the issues to be adjudicated.

⁴ Petitioner asserts the July 13, 2018, IEP failed to require a placement consistent with the Findings of Fact and Conclusions of Law made in the February 1, 2018, HOD that should have led to an IEP that included: (1) the following related services: (a) speech and language services only in the classroom setting and not in a pull-out setting; (b) 1 hour per week of OT for sensory integration and self-regulation; (c) no behavioral support services outside of the classroom; (d) a specific statement that related services should be provide in Student's classroom whenever possible due to issues with transitions, and (2) a requirement that Student be educated: (a) in a highly structured program/curriculum with a low student to teacher ratio; (b) with classmates who are able to communicate and are good language models for Student and provide Student with challenging program that is on or above grade level; (c) with support with pragmatic language in a natural setting; (d) with constant review of how Student is doing and working in a group and receiving help dealing with frustration; (e) in a classroom that does not include nonverbal children or put Student at risk of acquiring the skills of lower functioning peers.

Alternatively, Petitioner asserts the July 13, 2018, IEP was substantively inappropriate because the data available to the team at the time should have led to an IEP that: (1) limited transitions for the student and therefore provided any and all related services inside the classroom; (2) provided more than 120 minutes per month of OT Services and, (3) should have specified that the Student required placement in a program/classroom: (a) with classmates able to communicate and that were good language models for the student; (b) with pragmatic language support inside the classroom; (c) where Student would not be placed with lower functioning students that were below Student's level academically or socially; and (d) where Student would be exposed to a challenging curriculum and instruction at, or above, grade level.

⁵ Petitioner asserts School B does not meet the criteria set out by the Hearing Officer in the February 1, 2018, HOD. In the alternative, Petitioner asserts that School B is not designed to meet Student's unique needs based on Student's disabilities, as it does not provide: (1) classmates who are able to communicate and are good language models for Student, and a challenging program that is on, or above, grade level; (2) support with pragmatic language in a natural setting with constant review of how Student is doing and working in a group and support in dealing with frustration; (3) a classroom environment free of nonverbal children and lower functioning students/classmates that would put Student at risk of acquiring the skills of lower functioning peers; (4) a classroom environment that provides Student with appropriate/good social language models and students on, or above, grade level with a challenging curriculum appropriate for Student's skill level.

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 45, DCPS Exhibits 1 through 21 and OSSE Exhibits 1 through 17 and Hearing Officer Exhibit 1) 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

SUMMARY OF DECISION:

Respondent DCPS sustained the burden of persuasion by a preponderance of the evidence that Student's July 13, 2018, IEP was reasonably calculated to enable Student to make progress appropriate in light of Student's circumstances.

Respondent DCPS did not sustain the burden of persuasion by preponderance of the evidence that DCPS denied Student a FAPE by failing to provide an appropriate educational placement prior to the beginning of the 2018-2019 school year. The evidence did not support a finding that OSSE's action or inaction related to identifying a school placement for Student resulted in the denial of FAPE.

DCPS and OSSE sustained the burden of persuasion by a preponderance of the evidence that School B is an appropriate placement and location of services for Student for SY 2018-2019.

As a result the denial of FAPE found, the Hearing Officer ordered DCPS to reimburse Petitioner the costs of Student's attendance at School A and transportation to and from School A during SY 2018-2019 until funding and transportation was provided pursuant to the stay put order.

Because Student has remained at School A under stay put and SY 2018-2019 is soon coming to a close, the Hearing Officer orders that Student remain at School A with DCPS/OSSE funding until the end of SY 2018-2019. Because School A is not a separate special education school that can implement Student's DCPS IEP and it does not hold an OSSE COA, the Hearing Officer does not grant placement for Student at School A. The Hearing Officer directs the parties to promptly meet

⁶ Any item disclosed and not admitted, or admitted for limited purposes, was noted on the record and is noted in Appendix A. Although Petitioner's list of disclosed documents noted that P-2 was the November 2, 2016, Order Granting Motion for Summary Judgment, the document actually disclosed was the Order Granting Petitioner's Stay-Put Motion. The Hearing Officer consequently took administrative/judicial notice of the Order Granting Motion for Summary Judgment and has included it as Hearing Officer's Exhibit 1.

⁷ Petitioner presented five witnesses: (1) Student's parent ("Petitioner"), (2) Head of School for School A, testifying as an expert witness, (3) Student's School A classroom teacher, testifying as an expert witness, (4) A School A behavior specialist, testifying as an expert witness, (5) Student's educational advocate and grandmother, testifying as an expert witness. DCPS presented a total of seven witnesses with six of them testifying as expert witnesses: (1) a DCPS psychologist, (2) a DCPS speech language pathologist, (3) a DCPS occupational therapist, (4) the DCPS LEA monitor for School B, (5) a DCPS social worker, (6) and a DCPS special educator, and (7) a DCPS compliance specialist. OSSE presented one witness: the OSSE Special Programs Manager.

and update Student's IEP as appropriate and determine an appropriate placement and location of services for Student for SY 2019-2020.

FINDINGS OF FACT: ⁸

1. Student resides with Petitioner in the District of Columbia. Student has been determined eligible for special education and related services pursuant to the IDEA with a disability classification of ASD. DCPS is Student's LEA and OSSE is Student's SEA. (Petitioner's Exhibit 12-1)
2. Student was initially evaluated by DCPS in June 2014 and on June 24, 2014, DCPS determined Student eligible for special education services and related services. Petitioner did not consent to DCPS providing Student special education services. Rather than have DCPS provide Student with education and services, Petitioner elected to place Student in a private pre-school. (Petitioner's Exhibit 3-5, 3-7)
3. Petitioner later obtained an independent educational evaluation ("IEE") with DCPS funding. Petitioner provided to DCPS the IEE on January 12, 2015. The IEE concluded Student met the criteria for an ASD disability. In February 2015, Petitioner obtained an evaluation of Student that recommended Student repeat preschool for SY 2015-2016 in a preschool program designed for children with ASD diagnosis. As result, on April 20, 2015, Petitioner unilaterally placed Student at School A. (Petitioner's Exhibit 3-5, 3-6, 3-7)
4. On April 21, 2015, DCPS convened an initial IEP meeting for Student, developed an IEP and proposed a placement in a DCPS special education program. Petitioner rejected the DCPS proposed placement and Student remained at School A. (Petitioner's Exhibit 3-7, 3-8, 3-9)
5. Petitioner requested a FAPE for Student from DCPS for SY 2015-2016. DCPS offered a placement to Petitioner and offered to update Student's DCPS IEP with information from School A. Thereafter, DCPS personnel conducted observations of Student at School A. DCPS convened an IEP meeting on December 10, 2015, and a final IEP was completed on January 29, 2016. Petitioner did not agree to all components of the finalized IEP, and did not agree that the program DCPS proposed for Student at a DCPS school was appropriate. Petitioner maintained Student at School A. (Petitioner's Exhibit 3-9, 3-10, 3-11, 3-12)
6. On March 14, 2016, Petitioner filed her first due process complaint against DCPS challenging, inter alia, the IEP and placement DCPS proposed. The complaint resulted in an HOD issued June 24, 2016, that determined the January 29, 2016, IEP was inappropriate because it lacked a dedicated aide and Petitioner was not provided adequate input in the placement decision. Despite the fact that School A did not hold an OSSE COA, the Hearing

⁸ 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.

Officer found School A to be proper under IDEA for purposes of tuition reimbursement, and directed DCPS to reimburse Petitioner for Student's placement at School A from January 29, 2016, through the end of SY 2015-2016. (Petitioner's Exhibit 3-1, 3-3, 3-4, 3-12, 3-26, 3-27, 3-28, 3-29, 3-31, 3-32).

7. Because SY 2015-2016 had ended, the Hearing Officer did not order DCPS to convene a meeting to revise Student's IEP. Instead, the HOD stated that if Petitioner requested an IEP from DCPS for SY 2016-2017, then DCPS must provide one. (Petitioner's Exhibit 3-31)
8. After Student began SY 2016-2017 at School A, Petitioner filed another due process complaint against DCPS that resulted in an order issued by a Hearing Officer on November 2, 2016, granting Petitioner's Motion for Summary Judgment concluding DCPS denied Student a FAPE by failing to offer Student an appropriate IEP and educational placement prior to the start of SY 2016-2017. In the HOD, the Hearing Officer determined that DCPS simply sent Petitioner an LOS letter placing Student at a DCPS school for SY 2016-2017, but did not propose an appropriate IEP prior to the start of SY 2016-2017. (Hearing Officer Exhibit 1)
9. The Hearing Officer ordered DCPS to reimburse Petitioner for any costs Petitioner incurred for Student to attend School A during SY 2016-2017, and fund Student at School A for the remainder of SY 2016-2017. The Hearing Officer concluded Student would be harmed by a mid-year transfer of schools and that Student should not be moved during SY 2016-2017. The Hearing Officer stated in the Order that DCPS was not required to maintain Student's placement at School A beyond SY 2016-2017, if it offered another appropriate public or private school program. (Hearing Officer Exhibit 1)
10. On January 30, 2017, DCPS convened an IEP team meeting and finalized an IEP for Student on February 1, 2017, and on April 4, 2017, sent Petitioner an LOS letter placing Student in a Communications Education Support ("CES") special education program in a DCPS school for SY 2017-2018. (Petitioner's Exhibit 1-5, 1-12)
11. On October 6, 2017, Petitioner filed her third due process complaint against DCPS challenging the January 30, 2017, IEP and the school placement DCPS proposed. On October 21, 2017, a Hearing Officer issue an order granting Petitioner's motion for stay-put protections to maintain Student at School A during the pendency of that complaint. The complaint was withdrawn without prejudice on November 27, 2017. Petitioner refiled her complaint on November 27, 2018. The complaint resulted in an HOD issued on February 6, 2018. (Petitioner's Exhibits 1-1, 1-3, 2)
12. In the November 27, 2017, complaint Petitioner alleged, inter alia, that the January 30, 2017, IEP DCPS had developed was inappropriate because it did not reflect a prior Hearing Officer's decision and directly contradicted the prior HOD. In response to that allegation, the Hearing Officer in the February 6, 2018, HOD did not conclude that the prior HOD was to be enforced. Rather, the Hearing Officer ruled on the appropriateness of Student's

IEP based on the evidence presented to him at the hearing.⁹ (Petitioner’s Exhibit 1-17)

13. The February 6, 2018, HOD concluded DCPS denied Student a FAPE because the January 30, 2017, IEP was not reasonably calculated to enable Student to make appropriate progress under the circumstances due to “matters of related services”¹⁰, inadequate present levels of performance, and “erroneous guidelines”. The HOD concluded the IEP did not sufficiently describe Student’s LRE on the continuum of alternative placements and it did not prescribe a dedicated aide or one-to-one Applied Behavior Analysis (“ABA”) shadow. The HOD also concluded that the placement DCPS proposed in a CES program was inappropriate for Student,¹¹ and that Petitioner had no input in the decision to place Student in a CES program. (Petitioner’s Exhibit 1-17, 1-18, 1-19, 1-20, 1-21, 1-22)
14. Petitioner sought as relief, inter alia, that the Hearing Officer order DCPS to revise Student’s IEP to be aligned with the findings and conclusions of his HOD. The Hearing Officer declined to grant that relief, stating that he “[did] not consider it helpful to try to prescribe the specific IEP details that may be needed to provide FAPE for Student many months in the future in, very likely, changed circumstances.” (Petitioner’s Exhibit 1-24)
15. In the February 6, 2018, HOD the Hearing Officer granted Petitioner’s requested relief of reimbursement for payments to School A for SY 2017-2018 and that DCPS continue to fund Student at School A for the remainder of SY 2017-2018. (Petitioner’s Exhibit 1-24)
16. DCPS convened and IEP meeting for Student on February 1, 2018. Petitioner did not attend. However, Petitioner’s mother who served as her educational advocate participated in the meeting by telephone. Staff members from School A also participated by telephone. (Petitioner’s Exhibit 4-35, 4-36, 4-37)
17. On February 6, 2018, Petitioner granted DCPS written consent for DCPS to conduct the following evaluations of Student: comprehensive speech/language, comprehensive occupational therapy (“OT”) and comprehensive psychological including behavior rating

⁹ In the HOD the Hearing Officer, stated the following: “It is not within the jurisdiction of Hearing Officers as a regular matter to enforce prior decisions that have been rendered, although the substantive issue in the a prior decision may be ruled on as needed...in appropriate circumstance collateral estoppel may be applicable and narrow the issues to be resolved and testimony required in the case. In the posture here, with all the evidence already heard, the undersigned will simply rule on the merits of the issues as presented in this case...” (Petitioner’s Exhibit 1-17)

¹⁰ As one consideration, among others, regarding “matters of related services” in the January 30, 2017, IEP, the Hearing Officer concluded that DCPS did an inadequate job of obtaining updated information for the IEP from other sources including Student’s teachers and noted that DCPS had removed a requirement in a prior IEP that all ancillary services be provided in the classroom rather than pull out. (Petitioner’s Exhibit 1-18)

¹¹ In the context of determining the appropriateness of the school placement DCPS proposed, the Hearing Officer considered and discussed the need for a placement to provide Student “an appropriate peer group” and “good language models.” The Hearing Officer determined that DCPS failed to meet its burden of persuasion that the CES program was appropriate for Student. The Hearing Officer stated: “it is not at all clear that there was a ‘core group’ at a comparable intellectual level to Student, and the CES program was “designed for those with severe communication or behavior issues, which does not describe Student.” (Petitioner’s Exhibit 1-20, 1-21)

scales. (Petitioner's Exhibit 4-38)

18. a DCPS social worker conducted a classroom observation of Student at School A, and conducted two assessments of Student's behaviors: Motivation Assessment Scale ("MAS") and strengths and difficulties questionnaire ("SDQ") yielding rating from Student's teacher and parent. The MAS sought to identify the motivations of two of Student's behaviors: elopement and dropping to the floor. The SDQ assessed Student's emotional systems and behaviors over the prior six months identifying stress and emotional distress as very high. (Witness 10's testimony, DCPS Exhibit 5)
19. On March 14, 2018, a DCPS occupational therapist conducted an OT assessment, interviewed Student's School A teacher, parent, and the School A OT provider, and conducted an observation of Student. The therapist concluded Student qualified for OT services and in consultation with the School A OT provider confirmed there was no change needed in Student's treatment and goals. (Witness 9's testimony, DCPS Exhibit 4)
20. On April 19, 2018, a DCPS speech language pathologist conducted a speech language assessment with a report dated April 30, 2018. Student had profound weaknesses in pragmatic language. The DCPS speech language pathologist developed Student's IEP communication goals and considered them appropriate and the setting in which there were to be delivered to be appropriate. (Witness 8's testimony, DCPS Exhibit 6)
21. On April 5, 2018, and April 24, 2018, a DCPS psychologist conducted a comprehensive psychological reevaluation with an evaluation report dated April 30, 2018. She performed observation of Student while Student was within a classroom. She noted that Student was able to answer the questions but relied excessively upon feedback and attention from the teacher. Student did not have a lot of interaction with peers and was able to ignore disruptions. Student engaged in self-stimulating behaviors such as walking back and forth within the classroom. Student required a great deal of teacher support to complete the classroom assignments. (Witness 7's testimony, DCPS Exhibit 7)
22. On May 7, 2018, the IEP team reconvened to review Student's evaluations and determine eligibility. Petitioner and her educational advocate/mother and the DCPS representatives participated in person. The School A personnel, including participated by telephone. (Respondent's Exhibit 8-1)
23. During the May 7, 2018, meeting, the IEP team found that Student continued eligible for special education and related services. The team discussed Student's classroom observation, behavioral issues related to elopement, crying, dropping to the floor, and stomping out of the classroom. Student's OT services were discussed, and it was determined that Student continued to meet eligibility for OT services. Student's speech and language services were discussed as well as the results of Student's comprehensive psychological reevaluation. It was agreed that Student would receive academic goals in the areas of math, reading, and written expression despite Student's grade level performance in those areas. (Respondent's Exhibit 8-2, 8-3, 8-4)

24. Upon review of Student's psychological re-evaluation scores, the team was advised that Student's overall cognitive functioning fell within the Below Average range, as did Student's memory skills. Student's sentence reading fluency and writing fell within the Low Average range, while math fluency fell within the Low Average range. Petitioner's advocate believed that Student's IQ was much higher than reflected in the DCPS assessments, so she requested an IEE to assess Student's cognitive abilities, which DCPS granted. An IEP meeting was scheduled for June 6, 2018. Petitioner was also requested to submit proof of residency verification. (DCPS Exhibit 8-4)
25. On May 10, 2018, DCPS issued a PWN that Student continued to meet the eligibility criteria for ASD disability classification. (DCPS Exhibit 9-1)
26. Student's current School A teacher participated in the one of Student's IEP meetings and the CIP meeting. She did not recall sharing much at this meeting in which the IEP goals were reviewed. (Witness 2's testimony)
27. DCPS rescheduled Student's IEP meeting awaiting residency verification and eventually offered an alternative IEP meeting date of June 29, 2018. School A staff were not available on June 29, 2018, and the IEP meeting was rescheduled to July 13, 2018. DCPS sent Petitioner a draft IEP on July 3, 2018. (Petitioner's Exhibit 6-7, 6-9, 6-10, 6-12, 6-13, 6-20, 6-21, 6-22)
28. DCPS convened Student's IEP meeting on July 13, 2018. Petitioner participated by telephone. Her mother/educational advocate participated in person. During the meeting, Petitioner's advocate raised her concern that Student's speech and language goals being implemented in pull-out sessions, when she believed Student required more assistance applying skills in the real life setting of the classroom. A suggestion was made to implement a combination of pull-out skills development sessions and then work on the goals more within the classroom. Other corrections and modifications were made to Student's IEP in accordance with objections by Petitioner's advocate. (Petitioner's 6-25, 6-26, DCPS Exhibit 11-2)
29. The IEP team discussed Student's social-emotional goals as well as behavior support. Despite the advocates position that these services should be provided within the classroom, the team determined that proper provision of these services necessitated a pull-out environment. (Witness 4's testimony)
30. The advocate raised the issue of Student's recent HOD which she recalled stating the classroom environment Student required as one which was academically challenging, with related services provided within Student's classroom. The advocate viewed her position as being ignored by the rest of Student's team. The advocate had no objections to the IEP goals or content or Student's LRE. (Witness 4's testimony)
31. The team concluded at the July 13, 2018, that Student's LRE was a separate day school and DCPS was to reach out to its "locations" team and OSSE to find the most appropriate school option. (DCPS Exhibit 11-3)

32. The team was not able to state the location of Student's placement; however, the team advised the advocate that the process would be continued through the OSSE placement process. There was no other information conveyed to the advocate relative to the time frame within which she may expect to receive notification of a placement. (Witness 4's testimony)
33. DCPS sent Petitioner a finalized IEP dated July 13, 2018 and a PWN. The IEP includes a statement regarding the use of positive reinforcements to address Student's being easily distracting and difficulty staying on task. The IEP also notes that Student presents with needs in the area of social communication and currently has opportunities to communicate with appropriate models of social language skills. The IEP includes academic goals in the areas of math, reading, and written expression tied to grade level common core standards. The IEP also includes related services goals in the areas of speech/language, emotional/social/behavioral development, and motor skills/physical development. (Petitioner's Exhibit 8-2, DCPS Exhibits 10-1, 10-2, 10-3 through 10-17, 12)
34. The IEP prescribes the following services all outside general education: 30.5 hours per week of specialized instruction, 120 minutes per month each of OT and behavior support services, 240 minutes per month of speech language services and 30 min per month each of consultative services in speech/language, OT and behavioral support. The Other Classroom Aides and Services section indicates that Student should have a visual schedule and predictable routine and a sensory diet to promote self-regulation. The LRE section of the IEP states that Student requires a separate school. (DCPS Exhibit 10-18,10-19)
35. By letter dated August 3, 2018, Parent, through her counsel, provided DCPS with a notice of unilateral placement stating that because DCPS had failed to offer Student a FAPE for SY 2018-2019 with an appropriate IEP, placement or location of services, Petitioner would again place Student at School A and seek reimbursement through filing a due process complaint. (Petitioner's Exhibit 7)
36. On August 16, 2018, DCPS sent Petitioner an email to inform that DCPS and OSSE had confirmed a CIP meeting date and time to discuss Student's location of service for August 30, 2018. Petitioner's attorney confirmed in an email that Petitioner would attend the meeting by telephone and her advocate would attend in person. In the email, Petitioner's noted that the only response to her August 3, 2018, notice had been the email regarding the CIP meeting. Petitioner's counsel reiterated that because no school had been offered by DCPS prior to the start of SY 2018-2019 Student was unilaterally placed at School A. (Petitioner's Exhibit 8-1, 8-3, 8-4)
37. OSSE requires thirty (30) days notification to provide a placement and there was no identifiable reason for delay in providing OSSE with notice of Student's change in placement to a separate school at the July 13, 2018, meeting. The DCPS non-public unit,

separate from the OSSE process, sent a letter to parent about other placements and acted contrary to the established process. The DCPS non-public team sent out the packets to the schools resulting in Petitioner visiting school prior to the CIP meeting. (Witness 10's testimony)

38. On August 30, 2018, DCPS and OSSE conducted the CIP meeting. At that meeting, the OSSE representative explained that the first purpose of the meeting was to determine if Student needed a separate special education day school and the OSSE representative would provide a "state level recommendation". During the meeting, Petitioner's educational advocate advised the team that at the suggestion of DCPS, separate from the OSSE CIP process, 6 to 7 schools had already contacted Petitioner for Student to interview. Petitioner, Student and the advocate had visited three of the schools and scheduled to three others. (DCPS Exhibit 13)
39. After a discussion by the Petitioner and the DCPS representative regarding Student's educational placement needs, the OSSE representative expressed her recommendation that the Student was not in need of a special education day school. She then asked if the MDT team and Student's family agreed. Petitioner expressed her continued belief that School A was the best fit for Student and she did not agree with the OSSE recommendation. Petitioner's advocate expressed that Student's visits to other schools had caused Student anxiety and caused an uptick in Student's disruptive behaviors. The DCPS representative expressed that MDT had determined that a separate day school would be most appropriate and DCPS' opinion had not changed. After the IEP team overrode OSSE's recommendation at the CIP meeting, OSSE's role was to find the location assignment. The OSSE representative informed Petitioner she would receive a location assignment within 10 business days of the CIP meeting. Student could not have attended school until DCPS issued a PWN and transportation had been established for Student. (Witness 11's testimony, DCPS Exhibit 13)
40. During the CIP meeting, Petitioner's educational advocate repeatedly advised the team of Student's unilateral placement at School A as well as her belief that School A is the best fit for Student. However, the OSSE representative advised the team that School A does not have a COA, thus it would not be a school OSSE would be recommending. OSSE advised the advocate that it would send a list of schools that OSSE is considering to parent between August 31, 2018 and September 4, 2018, and provide Petitioner a location assignment by September 17, 2018, ten business days of the August 30, 2018, meeting. The OSSE representative also encouraged the family to review the list and make as many visits as possible "as the OSSE's recommendation will be one of these schools." (DCPS's Exhibit 13)
41. On September 10, 2018, Petitioner's advocate notified one the schools proposed by OSSE that Student became "hysterical" each time the school visit was mentioned and that they had determined that it would cause Student too much harm for Student to visit the school. (Petitioner's Exhibit 8-19)
42. On September 13, 2018, that proposed school forwarded an email notifying OSSE, DCPS

and Petitioner's counsel that Student's family had cancelled a scheduled visit to the school and advised that because of the failure to complete the 2-day Student visit, the school was unable to make a placement decision on Student by the OSSE's deadline of September 17, 2018. (Petitioner's Exhibit 8-16)

43. On September 12, 2018, another school considered by OSSE sent OSSE a letter notifying that it was offering a conditional acceptance for Student pending a school tour by Petitioner and/or Student. (Petitioner's Exhibit 8-23)
44. On September 17, 2018, the OSSE representative forwarded a Notice of Conditional Location Assignment to Student's parent, educational advocate and legal for Student's placement the School that had offered a conditional acceptance. The letter advised Petitioner that "the conditional acceptance indicates that the acceptance is being considered by the program, but that additional steps are required prior to OSSE's issuance of a final official location of assignment." The notice further advised Petitioner that "[o]nce these steps are completed, OSSE will issue an official Location assignment letter to all parties." (Petitioner's Exhibit 8-24)
45. On September 24, 2018, OSSE was notified by School B that Student was accepted at School B and would be placed in its Autism Center program. (Petitioner's Exhibit 8-27)
46. On September 27, 2018, OSSE issued a Notice of Location Assignment for Student to attend School B. (Petitioner's Exhibit 8-28)
47. On October 3, 2018, Petitioner's educational advocate sent a letter to OSSE first stating that Petitioner the school that offered the conditional acceptance was inappropriate for Student. The letter then acknowledged OSSE's assignment letter to School B and advised that Petitioner would like to visit School B to see if its program was appropriate for Student. (Petitioner's Exhibit 8-30)
48. On October 15, 2018, Petitioner forwarded an email to OSSE in response to an email she received from OSSE dated October 12, 2018, from the non-public school payment team. In her email Petitioner stated that Student had been unilaterally placed at School A, and that she was "rejecting the proposed placement by OSSE." (Petitioner's Exhibit 8-36)
49. On October 23, 2018, Student's educational advocate sent an email to OSSE in which she referred to her confusion and concern related to the delay in Student's placement process with the conditional acceptance and then the LOS letter to School B. The advocate requested that OSSE "explain what is happening" as Petitioner had not yet been able to schedule a visit to School B. (Petitioner's Exhibit 8-40)
50. On October 24, 2018, OSSE responded to the advocate's October 23, 2018, email. In the response, OSSE advised that it issued a Notice of Conditional Location of Assignment to School "as they were able to offer acceptance conditioned on a successful school visit." OSSE further advised the advocate that the school, "as part of their admission process, asked for student to complete a 3-day visit." It was OSSE's understanding that "the full 3-

day visit was not completed”, which is why the school never offered a full acceptance for Student. OSSE went on to advise the advocate that OSSE continued to pursue other schools on Student’s behalf to ensure that a full acceptance was obtained. OSSE obtained a full acceptance from School B in a letter dated September 24, 2018, and OSSE issued a Notice of Location to School B on September 27, 2018. (Witness 11’s testimony, Petitioner’s Exhibit 8-39)

51. After Petitioner received a letter which indicated Student had been placed at School B. Petitioner received a telephone call from School B, and she, her mother, and Student went on a two (2) to three (3) hour visit to School B. During Parent’s visit, she looked at a classroom, the lunchroom, and gymnasium. Petitioner also spoke to a school administrator, when she viewed the classroom, the students appeared to be working individually with headphones on. Student remarked that the work posted on the walls of the classroom was “babyish”. Petitioner believed the work was geared toward students two (2) grades below Student’s level; however, the students appeared to be at all different levels of severity of autistic symptoms, and they were each working separately. None of the students Petitioner saw were talking to each other, but some of the students appeared to Petitioner to be non-verbal. (Parent’s testimony, OSSE’s Exhibit 13)
52. During Parent’s visit to School B, she did not speak to a teacher, but the administrator who conducted her tour advised her that students were being taught at their individual levels. Parent noticed that School B had four (4) or five (5) students and three (3) or four (4) staff members in the classroom. During the tour, the administrator spoke to the Student and asked Student whether Student wished to attend the School, to which Student responded, “No”. Parent did not see the classroom that School B proposed for Student, and there was no discussion with School B staff about the basis for Student’s acceptance into School B. (Parent’s testimony)
53. On October 29, 2018, DCPS issued a PWN stating that on September 27, 2018, OSSE issued a location assignment for Student to attend School B and that on October 16, 2018, Petitioner communicated to DCPS by email that she was not accepting the location assignment by OSSE to School B. (DCPS Exhibit 15)
54. On October 30, 2018, Student’s educational advocate forwarded a “follow-up letter” to OSSE about her visit to School B. The advocate advised OSSE that Student became “very upset about changing schools and was uncomfortable with the school and classroom itself.” She also advised OSSE that Student’s “behavior was uncharacteristically inappropriate”, with such behaviors as “running away and crawling on the floor.” The advocate referenced a conversation she had with a staff member at School B who stated that the philosophy of the school is to teach each student based upon the child’s individual level. The advocate advised OSSE that Student required social interactions. She also described students at School B as “significantly lower functioning” than Student. The advocate rejected the placement at School B as “inappropriate” for Student. (Petitioner’s Exhibit 8-43, 44)
55. On October 31, 2018, OSSE forwarded an email to parent and her representatives advising her that OSSE had issued a Notice of Location Assignment on September 27, 2018 and

that OSSE “maintains its location assignment decision”. (Petitioner’s Exhibit 8-45, OSSE Exhibit 15)

56. The DCPS placement monitor assigned to School B is familiar with the autism programming at School B, and credibly testified that Student’s IEP can be appropriately implemented at School B. The curriculum at School B is aligned with common core standards and School B has a model of a teacher and an aide within each classroom. Some of the students at School B have dedicated aides. Positive behavior intervention supports are provided to curb negative behaviors. School B’s curriculum is challenging and the school services both higher and lower functioning students. Student’s pragmatic language ability can be developed with the curriculum and training provided by School B. (Witness 5’s testimony)
57. The monitoring specialist knows that both of the possible classrooms available for Student may contain a high of ten (10) to twelve (12) students. However, the classroom student count has always been lower. School B has a high functioning autism classroom for 3rd to 5th grade students and a low functioning classroom for 3rd to 5th graders. School B modifies the curriculum to meet the needs of individual students. (Witness 5’s testimony)
58. The OSSE representative who testified is familiar with and has visited School B. She has toured the high functioning autism classroom and most students were on grade level academically, with some slight deficits, but highly verbal. Some had more social pragmatic needs and sensory concerns that impacting their ability to be in the classroom. School A serves a wide range of students from kindergarten to grade 12. School B’s autism program is separate from other programs in this school building. (Witness 12’s testimony)
59. School B has a school wide behavioral system. The school uses zones of regulation and visual cues throughout the school. School B has a classroom of same ability peers on or close to grade level, can provide specialized instruction and related services, utilize interventions to help with social pragmatics. School B has reviewed Student’s IEP and records and assured that it can implement the IEP as written and has a full scope of related service providers. School B provides integrated related services and will provide pull out services if needed. School B holds an OSSE COA which it allows OSSE to monitor the school to ensure implementation of the local regulations and ensures the school is complying with IDEA. (Witness 12’s testimony)
60. School A is a private school designed to serve children with high-functioning autism, learning disabilities, Attention Deficit Hyperactivity Disorder (“ADHD”), anxiety and depression. School A serves students from Kindergarten through 8th Grade, with a total of 58 students. All of the students at School A are of Average to Above Average intelligence, and not all of the students have been identified with disabilities. (Witness 1’s testimony)
61. There are 30 children in kindergarten through 5th grade who are in 4 classrooms, where they are grouped according to social, behavioral and academic functioning. Student attends a classroom, with 1 teacher, 1 assistant teacher, and a maximum of 10 students. Children

eat lunch in the multipurpose room or inside of the classroom, and Physical Education takes place outside or within the multipurpose space. Students transition from one classroom to another and may change groupings based upon the individual student's level and abilities; however, all students remain in the same classroom for Social Studies and Science. School A's school day begins at 8:45 a.m. and ends at 3:10 p.m., five days per week. (Witness 1's testimony)

62. School A neither provides, nor implements IEPs. School A utilizes a programming document known as "Compass." It is an internal document written from the standpoint of the child, and is updated three times per year. The domains contained in the Compass are the same for every child; however, the details of each child are different. School A uses Common Core Standards as part of the school curriculum as well as executive functioning programs such as Smarts, Unstuck and on Target, Zones of Regulation and PEERs which are all part of a social skills learning curriculum. (Witness 1's testimony)
63. School A groups students into cohorts by reviewing student records. Once a student begins attending School A, data is collected by the staff, the behavioral specialist, the social specialist and the occupational therapy specialist. This information is processed along with feedback from parents to review and/or revise a student's cohort placement. Occupational therapy services are provided within the student's classroom, "push-in", or outside of the student's classroom, "push-out". The occupational therapist consults with the student's teachers and has a separate space to work, known as the sensory room, which is designed to reduce student anxieties. The therapist uses weights and other equipment. Students are provided with social learning, by the social learning specialist. This component consists of social and emotional support, social skills training, instruction in the use of pragmatic language, and social engagement. (Witness 1's testimony)
64. School A does not have a COA from OSSE, but has a license issued by the Maryland Department of Education. All teachers have earned least a Bachelor's degree, and some teachers have more education. However, School A does not have a requirement that teachers must be certified teachers, certified in the subject in which they teach, certified in special education, or that teachers be certified in handling students with particular disabilities such as autism. School A does not have a social worker to provide behavioral support or counseling services, and does not have a speech and language pathologist to administer speech and language services. School A does not provide extended school year services ("ESY"), and instead provides a social learning camp during the summer months at an additional cost. (Witness 1's testimony)
65. When Student first arrived at School A, Student displayed extreme behaviors such as dropping to the ground, eloping from class and self-injurious behaviors. Student would scream in the classroom, appeared to be emotionally fragile and sensitive, and when in a crisis, would go into repetitive speech. Student was self-debasing with name-calling, as the self-injurious behavior decreased, and Student had a full-time behavioral therapist. Now, Student is able to maneuver through the hallways alone and Student no longer has one-on-one Applied Behavior Analysis ("ABA") support. Student is more available for learning and Student's anxiety has less of an impact on Student's ability to perform class

work. Student engages with peers with fewer emotional crises. Student continues to require “priming”, or preparation for a coming change. It is important that Student is with other students who have similar cognitive and communication skills for peer models, and participation in conversations. (Witness 1’s testimony, Witness 2’s testimony, Witness 3’s testimony)

66. Pull-out related services are provided at School A and Student is prepared for such a transition when it occurs and is goes on as a part of the natural School schedule. Students may also be pulled out by a social specialist about 15 to 30 minutes. Student gets large group OT once per week for 30 and then small group services based on need. There are general education students in the school and possibly in the class with Student. (Witness 1’s testimony, Witness 2’ testimony)

67. Petitioner has made payment to School A of approximately \$4,500.00 and paid for Student’s transportation to and from school. Petitioner paid a one-on-one driver, then a shuttle service. The transportation services amounted to approximately \$140.00 per week, which was paid from a joint checking account maintained for Student’s expenses. After January 2019, Student began taking the OSSE bus and Petitioner submitted invoices for reimbursement. (Parent’s testimony, Petitioner’s Exhibit 41 pg. 2, 41 pg. 12, 41 pg. 1)

CONCLUSIONS OF LAW:

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

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

34 C.F.R. § 300.17 provides:

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

Pursuant to 5E DCMR 3030.14 the burden of proof is the responsibility of the party seeking relief. *Schaffer v. Weast*, 546 U.S. 49, 126 S.Ct. 528 (2005). Petitioner held the burden of production on all issues adjudicated. Respondent(s) held the burden of persuasion all issues to

be adjudicated after Petitioner first established a prima facie case on each of the issues.¹² The normal standard is preponderance of the evidence. See, e.g. *N.G. V. District of Columbia* 556 F. Sup. 2d (D.D.C. 2008) see also 20 U.S.C. §1451 (i)(2)(C)(iii).

ISSUE 1: Whether DCPS denied Student a FAPE by failing to provide Student with an IEP on July 13, 2018, that was reasonably calculated to enable Student to make progress appropriate in light of Student’s circumstances.

Conclusion: Respondent, DCPS, sustained the burden of persuasion by a preponderance of the evidence that the July 13, IEP was reasonably calculated to enable Student to make progress appropriate in light of Student’s circumstances.

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

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

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

¹² 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.

The second, substantive, prong of the *Rowley* inquiry is whether the IEP DCPS developed was reasonably calculated to enable Student to make progress appropriate in light of Student's individual circumstances.

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

The key inquiry regarding an IEP's substantive adequacy is whether, taking account of what the school knew or reasonably should have known of a student's needs at the time, what the IEP offered was reasonably calculated to enable the specific student's progress.... "Any review of an IEP must appreciate that the question is whether the IEP is reasonable, not whether the court regards it as ideal." *Z.B. v. District of Columbia*, 888 F.3d 515 (D.C. Cir. 2018) citing *Andrew F.*, supra, 137 S. Ct. 988.

Petitioner first asserted that the July 13, 2018, IEP failed to comply with the Findings of Fact and Conclusions of Law made in the February 1, 2018, HOD that should have led to an IEP that included specific prescriptions regarding related services and Student's educational placement that the Hearing Officer discussed and made in the HOD.

As the Hearing Officer in the February 1, 2018, HOD aptly pointed out, is not generally within the jurisdiction of hearing officers to enforce a prior HOD. The undersigned Hearing Officer is likewise of the opinion that, in this instance, there is no basis to grant Petitioner's essential request that I enforce findings and/or conclusions of a previous HOD that adjudicated the appropriateness of a previous IEP that is not being adjudicated here.

Nonetheless, this Hearing Officer will discuss, Petitioner's assertion about the February 6, 2018, HOD. In that HOD the Hearing Officer concluded DCPS denied Student a FAPE because the January 30, 2017, IEP that DCPS developed was not reasonably calculated to enable Student to make appropriate progress under the circumstances due to "matters of related services", inadequate present levels of performance, and "erroneous guidelines." The HOD concluded: the IEP did not sufficiently describe Student's LRE on the continuum of alternative placements and did not prescribe a dedicated aide or one-to-one ABA shadow. The HOD also concluded that the placement DCPS proposed in a CES program was inappropriate and that Petitioner had no input in the decision to place Student in a CES program.

As one consideration, among others, regarding “matters of related services” in the January 30, 2017, IEP, the Hearing Officer in the February 6, 2018, HOD concluded that DCPS did an inadequate job of obtaining updated information for the IEP from other sources including Student’s teachers and noted that DCPS had removed a requirement in a prior IEP that all ancillary services be provided in the classroom rather than pull out. However, the Hearing Officer did not expressly conclude or order that the Student’s related services be provided in the classroom rather than pull out.

In the context of determining the appropriateness of CES program DCPS proposed for Student, the Hearing Officer discussed the need for a placement to provide Student “an appropriate peer group” and “good language models.” However, the Hearing did not specifically conclude that Student’s January 30, 2017, IEP, it was inappropriate because it did not specifically state that Student should be in a placement with “an appropriate peer group” and “good language models.” Rather, the Hearing Officer’s discussion and conclusions in this regard were directly related to his analysis of appropriateness of the specific school placement DCPS proposed, the CES program, not the appropriateness of Student’s IEP.

In the February 6, 2018, HOD the Hearing Officer granted Petitioner’s requested relief of reimbursement for payments to School A. However, Petitioner also sought as relief that the Hearing Officer order DCPS to revise Student’s IEP to be aligned with the findings and conclusions of the Hearing Officer decision. Notably, and contrary to that request, the Hearing Officer declined to grant that relief, stating that he “[did] not consider it helpful to try to prescribe the specific IEP details that may be needed to provide FAPE for Student many months in the future in, very likely, changed circumstances.”

Consequently, based on the discussion above, the undersigned Hearing Officer concludes that there is no factual or legal basis to conclude that Student’s July 13, 2018, IEP was not reasonably calculated to enable Student to make progress appropriate in light of Student’s circumstances because it failed to require related services or a placement consistent with the Findings of Fact and Conclusions of Law made in the February 1, 2018, HOD.

Alternatively, Petitioner asserted that the July 13, 2018, IEP was substantively inappropriate because the data available to the team at the time should have led to an IEP that: (1) provided all related services inside the classroom; (2) provided more than 120 minutes per month of OT Services and, (3) specified that the Student’s placement in a classroom with specific requirements regarding the peer group, grade level curriculum and pragmatic language support.

The evidence adduced demonstrates that when Student’s IEP was developed there was agreement by all members of the team as to all the goals and services in the IEP. Although Petitioner’s mother/educational advocate requested at the IEP meeting that related services be provided inside the classroom, there is no indication that position was supported by any other members of the team.

Although, Petitioner presented witnesses who were qualified as experts and who work with Student at School A, including the Student’s teacher who participated in a meeting regarding the development of the Student’s IEP, they expressed no disagreement with any aspects of the IEP and actually testified about how related services are provided at School A. The Head of School,

as well as Student's classroom teacher expressed that some related services are provided as pull out services outside the classroom at School A. Consequently, the Hearing Officer concludes there is insufficient evidence that the July 13, 2018, IEP is deficient because it does not prescribe that related services be provided in the classroom.

There was no evidence to support a finding that Student requires more than 120 minutes per month of OT services. In fact, the DCPS OT credibly testified that the OT services prescribed in the IEP were appropriate to address Student's needs.

Finally, the July 2018 IEP provides for academic goals that are tied to grade level common core standards. The IEP clearly states that Student presents with needs in the area of social communication and Student is provided with appropriate models of social language skills. There was insufficient testimony presented to support a finding that these factors related to grade level curriculum and the social communication opportunities described in the IEP are deficient or would not sufficiently help ensure that Student's needs in these areas are addressed in ■ current educational setting or any future setting.

Consequently, the Hearing Officer concludes there was insufficient evidence that Student's July 13, 2018, IEP is in anyway deficient in the ways alleged by Petitioner, and the Hearing Officer thus concludes that DCPS sustained its burden of persuasion by a preponderance of the evidence that Student's July 13, 2018, IEP was reasonably calculated to enable Student to make progress appropriate in light of Student's circumstances.

ISSUE 2: Whether DCPS and/or OSSE denied Student a FAPE by failing to provide an appropriate IEP and educational placement prior to the beginning of SY 2018-2019, as required by *Leggett v. District of Columbia*.

Conclusion: The evidence supported a finding that the delay in Student being provided a timely appropriate school placement prior to the start of SY 2018-2019 was not the result of action or inaction of OSSE. Rather, the delay was the result of DCPS untimely relaying the required documentation to OSSE for a placement location to be found prior to the start of SY 2018-2019. Thus, the Hearing Officer concludes that Respondent DCPS did not sustain the burden of persuasion by a preponderance of the evidence on this issue. This issue is dismissed with prejudice as to OSSE.

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

The D.C. Circuit Court explained in *Leggett* that, "[a]s interpreted by the Supreme Court, IDEA requires school districts to reimburse parents for their private-school expenses if (1) school officials failed to offer the child a free appropriate public education in a public or private school;

(2) the private-school placement chosen by the parents was otherwise ‘proper under the Act’; and (3) the equities weigh in favor of reimbursement – that is, the parents did not otherwise act ‘unreasonabl[y].’” *Leggett*, 793 F.3d at 66-67 (citing *Carter*, 510 U.S. at 15- 16, 114 S. Ct. 361; 20 U.S.C. § 1412(10)(C)(iii)(III)).

There is no dispute that DCPS did not have an educational placement in place for Student at the beginning of SY 2018-2019. The evidence demonstrates that DCPS finalized Student’s IEP on July 13, 2018, and informed Petitioner’s that the process of determining a school location assignment would be coordinated with OSSE. Instead of immediately providing that notification to OSSE, DCPS did not alert OSSE of the change in Student’s placement to a separate school by the IEP team until a month later. OSSE within a reasonable time thereafter convened a CIP meeting on August 30, 2019. However, that date was already after the school year had begun, and after Petitioner had provided DCPS the 10-day notice of unilateral placement and Student was attending School A for SY 2018-2019.

OSSE procedures provide that a school location will be identified with ten business days following the CIP meeting. OSSE was, therefore, operating on target date of September 17, 2018, to provide Petitioner a location assignment. The evidence demonstrates that although DCPS on its own initiative identified possible schools sooner and Petitioner and Student visited some of these schools, this DCPS action was contrary to OSSE procedures and went against the advice of the DCPS representative most closely involved in shepherding Student’s change in placement process. Consequently, Petitioner became confused and frustrated and most notably Student became anxious and agitated from the confusion of the premature school visits ■ had to endure.

Although School B was finally presented to Petitioner as a location assignment on September 27, 2018, and followed by a PWN from DCPS on October 29, 2018, by that time Student had already attended School A for a month. In light of Student’s displayed anxiety and agitation in visiting the schools that had been proposed, it was not an unreasonable precaution for Petitioner to maintain Student at School A where Student had already made strides. It was reasonable for Petitioner to not enroll Student in School B after SY 2018-2019 had begun, particularly given her concerns about the appropriateness of School B. Petitioner challenged the proposed placement with due process and sought stay put funding, which was granted. This Hearing Officer is persuaded that DCPS’ lack of prompt action to timely provide Student a placement for SY 2018-2019 was a denial of a FAPE and the equities favor Petitioner’s reimbursement.

However, the Hearing Officer does not find, given that School A is not a school that implements IEPs, does not hold an OSSE COA, and is apparently not otherwise monitored to ensure compliance with IDEA in the provision a FAPE to its students, the Hearing Officer does not grant the requested relief of Student’s placement at School A.

Having concluded that the IEP DCPS developed for Student is appropriate and there being no challenge to the LRE of that IEP that Student should be in a separate school along the continuum of educational placements, and given that the parties are currently engaged in the annual review of Student’s IEP and determination of an appropriate placement and school location for SY 2019-2020, the Hearing Officer directs in the order below that the parties promptly convene an IEP

meeting and finalize an IEP for Student so that a placement and school location can be offered to Petitioner for SY 2019-2020.

ISSUE 3: Whether DCPS and/or OSSE denied Student a FAPE by proposing an inappropriate placement and location of services at the School B on September 27, 2018.

Conclusion: Respondents OSSE and DCPS sustained the burden or persuasion by a preponderance of the evidence that the school location offered to Petitioner for Student to attend during SY 2019-2020, albeit offered after the school year began, could implement the Student's July 13, 2018, IEP and is an appropriate placement.

In determining the educational placement of a child with a disability, each public agency must ensure that the placement decision is made by a group of persons, including the parents, and other persons knowledgeable about the child, the meaning of the evaluation data, and the placement options; and is made in conformity with the Least Restrictive Environment provisions of the IDEA; and the public agency must ensure that the child's placement is determined at least annually, is based on the child's IEP, and is as close as possible to the child's home. See 34 C.F.R. § 300.116.¹³

Removing a child with disabilities "from the regular education environment occurs only when the nature or severity of the disability is such that education in regular classes cannot be achieved satisfactorily." 34 C.F.R. § 300.550; 34 C.F.R. §300.114 see also 20 U.S.C. § (a)(5)(A) (a disabled child is to participate in the same activities as non-disabled children to the "maximum extent appropriate"); *Roark ex rel. Roark v. District of Columbia*, 460 F.Supp.2d 32, 43 (D.D.C. 2006) ("The IDEA requires school districts to place disabled children in the least restrictive environment possible.")

Pursuant to D.C. Code § 38-2561.02(c) Special education placements shall be made in the following order or priority; provided, that the placement is appropriate for the student and made in accordance with the IDEA and this chapter: (1) DCPS schools, or District of Columbia public charter schools pursuant to an agreement between DCPS and the public charter school; (2) Private or residential District of Columbia facilities; and (3) Facilities outside of the District of Columbia.

The legal standard under the IDEA is that DCPS "must place the student in a setting that is capable of fulfilling the student's IEP." *Johnson v. Dist. of Columbia*, 962 F. Supp. 2d 263, 267 (D.D.C.

¹³ Pursuant to 34 C.F.R. § 300.115 - Continuum of alternative placements (a) Each public agency must ensure that a continuum of alternative placements is available to meet the needs of children with disabilities for special education and related services. (b) The continuum required in paragraph (a) of this section must-- (1) Include the alternative placements listed in the definition of special education under Sec. 300.38 (instruction in regular classes, special classes, special schools, home instruction, and instruction in hospitals and institutions); and (2) Make provision for supplementary services (such as resource room or itinerant instruction) to be provided in conjunction with regular class placement. Pursuant to DC Code § 38-2561.02. (c) Special education placements shall be made in the following order or priority; provided, that the placement is appropriate for the student and made in accordance with the IDEA and this chapter: (1) DCPS schools, or District of Columbia public charter schools pursuant to an agreement between DCPS and the public charter school; (2) Private or residential District of Columbia facilities; and (3) Facilities outside of the District of Columbia.

2013). *See also O.O. ex rel. Pabo v. Dist. of Columbia*, 573 F. Supp. 2d 41, 53 (D.D.C. 2008) (placement must be in a school that can fulfill the student's IEP requirements).

The evidence demonstrates that DCPS concluded as early as July 13, 2018, that Student was in need of separate school placement. There was no dispute of this by any member of the IEP team including Petitioner and her representatives.

Despite testimony of Petitioner and her advocate of what they saw during their visit to School B, they could not adequately determine the verbal and intellectual levels of the students they observed. They did not even know whether the classroom they observed would have been the classroom to which Student would be assigned. The Hearing Officer found this testimony unpersuasive as to the alleged inappropriateness of School B

The evidence demonstrates through the credible testimony of the DCPS monitor for School B, coupled with the testimony of OSSE's witness, that School B can implement Student's July 13, 2018, IEP and can otherwise provide Student a FAPE. There was credible testimony that School B has students operating on grade level have average level of cognitive functioning and communication skills. In addition, School B has an OSSE COA. There was insufficient evidence presented to refute the evidence presented by Respondents' witnesses as to the appropriateness of School B.

Respondents sustained its burden of persuasion on the proposed placement of Student at School B. There was no material failure or discrepancy between the services proposed for the disabled child and the services required by that child's IEP. *N.W. v. Dist. of Columbia*, 253 F. Supp. 3d 5, 17 (D.D.C. 2017), *quoting James v. Dist. of Columbia*, 194 F. Supp. 3d 131, 139 (D.D.C. 2016). Consequently, the Hearing Officer concludes that Respondents DCPS and OSSE sustained burden of persuasion 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 Hearing Officer has concluded that Student was denied a FAPE by DCPS and has directed that DCPS, in the order below, remedy that denial.

Petitioner has requested reimbursement for her costs of Student attending School A and for transportation to and from school from the start of SY 2018-2019 until the stay put order took effect ordering the LEA to directly pay School A and provide Student transportation services.

It has been previously determined in prior HODs that School A meets the requirements of IDEA for reimbursement. The February 2018 HOD found School A proper despite lack of a COA and ordered reimbursement. COAs are not required for schools in which students are unilaterally placed. The undersigned Hearing Officer considers the evidence presented herein to also support such a conclusion. There is sufficient evidence to support Petitioner's reimbursement to the extent Petitioner provides DCPS satisfactory documentation of payment of the expenses incurred.

The Hearing Officer does not grant Student's placement at School A. As reflected in the order

below, DCPS and Petitioner shall promptly finalize an IEP for Student for SY 2019-2020 and determine an appropriate placement and location of services in sufficient time prior to the start of SY 2019-2020 for as smooth a transition as possible by Student should Student's school location change for SY 2019-2020.

ORDER: ¹⁴

1. Because Student has remained at School A under stay put and SY 2018-2019 is soon coming to a close, DCPS/OSSE shall continue to fund Student's attendance at School A through the end of SY 2018-2019.
2. Having concluded that the IEP DCPS developed for Student is appropriate and there being no challenge to the LRE of that IEP of a separate school along the continuum of educational placements, and given that the parties are currently engaged in the annual review of Student's IEP and determination of an appropriate placement and school location for SY 2019-2020, the Hearing Officer hereby orders DCPS and Petitioner to promptly convene and participate in an IEP meeting to finalize an IEP for Student and that all parties fully and promptly engage in all steps necessary to determine an appropriate educational placement and school location for Student for SY 2019-2020 so that the school location will be identified and offered to Petitioner by July 15, 2019.
3. DCPS shall, within thirty (30) calendar of Petitioner providing DCPS appropriate documentation of payment, reimburse Petitioner her costs (including any deposits) for Student attending School A, and for transportation to and from school, from the start of SY 2018-2019 until the stay put order took effect and the LEA/SEA began to directly pay School A and provide Student transportation services.
4. This issues and claims alleged against OSSE in Petitioner's complaint are hereby dismissed with prejudice.
5. 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.

Copies to: Counsel for Petitioner
 Counsel for LEA

¹⁴ 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.