

District of Columbia
Office of the State Superintendent of Education

Office of Dispute Resolution
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OSSE
Office of Dispute Resolution
May 13, 2022

Parents, on behalf of Student,¹)	
Petitioners,)	
)	Hearing Dates: 3/11/22; 3/14/22
v.)	Hearing Officer: Michael Lazan
)	Case No. 2021-0190
District of Columbia Public Schools,)	
Respondent.)	

HEARING OFFICER DETERMINATION

I. Introduction

This is a case involving an X-year-old student (the “Student”) who is currently eligible for services as a student with Autism Spectrum Disorder. A due process complaint (“Complaint”) was received by District of Columbia Public Schools (“DCPS” or “Respondent”) pursuant to the Individuals with Disabilities Education Act (“IDEA”) on November 19, 2021. The Complaint was filed by the Student’s parents (“Petitioners”). On December 3, 2021, Respondent filed a response. A resolution meeting was held on December 8, 2021, without an agreement being reached. The resolution period expired on December 19, 2021.

This Hearing Officer Determination (“HOD”) was originally sent to the parties through email on April 11, 2022. On May 12, 2022, I was advised that DCPS did not receive a copy of the email by DCPS’s counsel, Attorney B. An inquiry found that, due

¹ Personally identifiable information is attached as Appendix A and must be removed prior to public distribution.

to a technological issue, the HOD was sent to the former email address of Respondent's counsel, and to the former email addresses of two DCPS employees who regularly accept HODs from hearing officers. Staff from the Office of Dispute Resolution also sent the HOD to DCPS on April 12, 2022, but Attorney B did not receive a copy of the HOD until May 12, 2022. There is nothing before me to suggest that the April 11, 2022 email containing the HOD was forwarded to the new email addresses of Attorney B and the DCPS employees. Accordingly, this HOD must be reissued on May 13, 2022.

II. Subject Matter Jurisdiction

This due process hearing was held, and a decision in this matter is being rendered, pursuant to the IDEA, 20 U.S.C. 1400 et seq., its implementing regulations, 34 C.F.R. Sect. 300 et seq., Title 38 of the D.C. Code, Subtitle VII, Chapter 25, and the District of Columbia Municipal Regulations, Title 5-E, Chapter 30.

III. Procedural History

On December 21, 2021, a prehearing conference was held. Attorney A, Esq., counsel for Petitioners, appeared. Attorney B, Esq., counsel for Respondent, appeared. On December 28, 2021, a prehearing order was issued, summarizing the rules to be applied in the hearing and identifying the issues in the case. On January 21, 2022, Petitioners moved to extend the deadline for an HOD to April 4, 2022. This motion was granted by an order of this Hearing Officer issued on January 31, 2022.

Petitioners filed a Motion for Summary Decision on February 2, 2022. This motion was denied by an order issued on March 9, 2022. Respondent filed a Motion to Dismiss on February 17, 2022. This motion was denied by an order issued on March 8, 2022, as revised by an order dated April 9, 2022.

The matter proceeded to trial on March 11, 2022, and March 14, 2022. The hearing was conducted through the Microsoft Teams videoconferencing platform, without objection. After completion of Petitioners' case, Respondent orally moved for a directed verdict on Issue #1 in the Complaint (*infra* at page 3). This motion was denied on the record by this Hearing Officer. After testimony, the parties presented closing arguments and agreed to submit to this Hearing Officer a document containing legal citations supporting their respective positions by March 17, 2022. Both parties submitted their documents on March 17, 2022.

During the proceeding, Petitioners moved into evidence exhibits P-1 through P-21. Respondent objected to exhibits P-2, P-3, P-5, P-13, P-15, and P17 through P-20. These objections were overruled. Exhibits P-1 through P-21 were admitted into evidence. Respondent moved into evidence exhibits R-1 through R-10 without objection. Petitioner presented as witnesses, in the following order: Witness A, the educational and vocational director at Residential Center A; Witness B, a therapist at Residential Center A (expert in the social and emotional needs of adolescents and young adults); and the Student's mother ("Mother"). Respondent presented as witnesses, in the following order: Witness C, a social worker (expert in social and emotional behavior functioning); Witness D, manager of the DCPS CIEP team; and Witness E, a CIEP specialist (expert in special education programming and placement, with a specialization in residential placements).

After the presentation of testimony, evidence, and closing arguments, Respondent sought to submit a supplemental brief in light of a recently issued federal court decision regarding the parties in this case. J.S. v. District of Columbia, Civil Action No. 21-0293

(CKK) (March 22, 2022). This decision pertained to the Student's earlier due process complaint, filed on August 21, 2020, which was assigned to Hearing Officer Peter Vaden and decided through an HOD issued on November 17, 2020. Petitioners agreed to present a supplemental brief on this issue. It was agreed that these briefs were to be submitted to this Hearing Officer by March 30, 2022, and that the timelines for this HOD would be extended by one week to accommodate the parties' desire to supplement the record. On March 25, 2022, Petitioners moved, on consent, to extend the timelines for this HOD to April 11, 2022. On April 1, 2022, an order was issued granting the motion and extending the HOD timelines to April 11, 2022. Petitioners submitted their supplemental brief to this Hearing Officer on March 28, 2022. Respondent submitted its supplemental brief to this Hearing Officer on March 30, 2022.

On March 31, 2022, Respondent sent this Hearing Officer an email arguing that another recent federal court decision, N.G. v. District of Columbia, Civil Action No. 20-2777 (TJK) (ZMF) (March 31, 2022) supported its position. On April 1, 2022, Petitioners sent this Hearing Officer an email responding to this argument. Both emails have been included in the administrative record.

IV. Issues

As identified in the revised Prehearing Order and in the Complaint, the issues to be determined in this case are as follows:

1. Did Respondent fail to develop an appropriate Individualized Education Program ("IEP") for the Student for the 2021-2022 school year? If so, did Respondent act in contravention of 34 C.F.R. 300.320, Andrew F. v. Douglas County School District, 137 U.S. 988 (2017), and Hendrick Hudson Bd. of Educ. v. Rowley, 458 U.S. 176 (1982)? If so, did Respondent deny the Student a Free Appropriate Public Education ("FAPE")?

Petitioners contended that the Student's IEP did not recommend enough specialized instruction hours or behavioral support services.

2. Did Respondent fail to timely provide the Student with a location of services for the 2021-2022 school year? If so, did Respondent violate 34 C.F.R. Sect. 300.323(a) and related authority? If so, did Respondent deny the Student a FAPE?

As relief, Petitioners seek tuition reimbursement or funding for Residential Center A for the 2021-2022 school year.

V. Findings of Fact

1. The Student is an X-year-old who is currently eligible for services as a student with Autism Spectrum Disorder. Though the Student is functioning on an average to above-average cognitive level, the Student's emotional difficulties make it difficult for the Student to function. The Student's speech includes rambling thoughts, and the Student is sometimes incoherent, violent, and restless. The Student sometimes paces back and forth repeatedly. At times, the Student can interact with friends and adults; at other times, the Student cannot interact with anyone, to the point where the Student appears catatonic and unable to speak. Testimony of Witness B.

2. Though the Student is a resident of the District of Columbia, a court in Idaho has determined that the Student is an incapacitated person and has issued Letters of General Co-Guardianship appointing Petitioners as the Student's general co-guardians. P-5; Testimony of Mother.

3. During the 2017-2018 school year, the Student was placed at a general education private school in the District of Columbia. Initially, the Student performed relatively well at this school. By the early spring of 2018, however, the Student's grades declined considerably, and the Student began to have paranoid, fantastic thoughts (about

an apocalypse, for example). The Student's hygiene deteriorated and s/he would no longer do schoolwork. By May, 2018, the Student had to go on medical leave; s/he was hospitalized for over a month during May and June, 2018. Testimony of Mother.

4. A neuropsychological assessment of the Student was conducted by a post-doctoral fellow and a pediatric neuropsychologist at Center A in April, 2018. The evaluators found that the Student scored in the above-average range in cognitive ability, but also found significant weaknesses in his/her social functioning, including difficulty taking the perspective of others, difficulty adapting his/her own perspective to fit the social norms and context of a given environment, difficulty reading social cues, and a readiness to believe extreme and unfounded information gleaned from the internet. The report indicated that the Student has had anxiety since early childhood and experiences significant dysregulation during periods of anxiety or depression, characterized by extreme behavior such as running away from home. The Student was also determined to be prone to interpret his/her environment as being threatening, and to respond without clear regard for consequences. The evaluators wrote in their report that it was essential for the Student to develop a foundation from which s/he could learn to monitor his/her behavior and consequently regulate his/her mood. The report also indicated that the Student's executive functioning skills were weak, and that the Student accordingly needed structure to complete academic tasks. The Student also exhibited deficits in writing. The Student was diagnosed with Autism Spectrum Disorder, Executive Dysfunction (impacting organization, initiation, flexibility, self-monitoring); Attention Deficit Hyperactivity Disorder ("ADHD"), Combined Type; Executive Functioning Deficits in the areas of organization, flexibility, initiation, and monitoring; Generalized

Anxiety Disorder; Severe Depressive Episode with Psychotic Features; and Specific Learning Disorder with Impairment in Organization of Written Expression. P-2-12-14.

5. During the 2018-2019 school year, the Student attended a different general education private school that focused more on one-to-one instruction than his/her previous school. The Student attempted suicide in November, 2018, resulting in hospitalization. The Student then returned to school and made it through to the end of the school year, even getting an “A” grade in some classes. By spring, 2019, the Student told his/her parents that s/he wanted to go to Public School A, a DCPS school. Accordingly, Petitioners asked for an IEP for the Student, who was then placed at Public School A.

Testimony of Mother.

6. The Student began the 2019-2020 school year at Public School A with enthusiasm, even joining the school jazz band. However, school became difficult when, by November, 2019, the Student began losing his/her ability to function and started to become delusional. The student was then hospitalized at Psychiatric Hospital A for over a month. The Student was placed on home instruction by DCPS in January, 2020.

Testimony of Mother.

7. The COVID-19 pandemic shut schools throughout the United States, including in the District of Columbia, in or about March, 2020. As a result, instruction at DCPS became virtual. The Student tried to participate in virtual instruction but was effectively unable to participate. Testimony of Mother.

8. In or about May, 2020, a psychiatrist assessed the Student and concluded that s/he was academically gifted with a serious psychiatric illness, i.e., Bipolar Disorder (Type 1), as indicated by a “fluctuating course” of severe depression and mania with

psychotic elements. The psychiatrist also indicated that the Student had a history of Autism Spectrum Disorder, and concluded that the social and emotional consequences of these disorders made it extremely hard, if not impossible, for the Student to function within a typical public or private school. The evaluator also indicated that the Student presented with ADHD, as well as learning weaknesses in the areas of reading and written expression. In addition to the diagnoses of Bipolar Disorder and ADHD, the Student was diagnosed with Autism Spectrum Disorder, Specific Learning Disorder with impairment in reading, and Specific Learning Disorder with impairment in written expression. The evaluator recommended a therapeutic educational program for the Student, specifically in a residential setting, stating that the Student's age and psychiatric difficulties made it difficult to provide him/her with "social and academic remediation" while at the same time promoting "age-appropriate independence." The psychiatrist stated that "a residential program or therapeutic boarding school offers, I think, the best opportunity for [the Student] to meet the social, emotional, and academic challenges that lay ahead," and that, "(w)ithout such a placement, it is likely that the pattern of psychiatric illness, social isolation, and academic stagnation that has existed over the last two and half years will continue." The psychiatrist also stated that such a program should present with sufficient academic rigor as to prepare the Student for a transition to college, that peers should be of average or above-average cognitive ability, that program staff should include psychiatric and clinical personnel with expertise in managing and supporting individuals with significant psychiatric illness, that the program curriculum should include weekly individual therapy and group therapy two to three times a week, and that the program's students should not have histories of aggressive behavior or substance abuse. P-3.

9. An IEP meeting was held for the Student on May 14, 2020. The meeting resulted in an IEP recommending 26.5 hours per week of specialized instruction outside general education, with 240 minutes per month of direct behavioral support services outside general education, sixty minutes per month of behavior support consultation services, classroom aids and services, and transition services. The “Consideration of Special Factors: Positive Behavior Supports and Services” section of the IEP indicated that the Student had long-standing issues in social functioning, including distorting reality and difficulty taking the perspective of others. The “Consideration of Special Factors: Communication” section of the IEP indicated that the location of services for the Student should provide psychotherapy and ongoing social counseling. The “Area of Concern: Emotional, Social and Behavioral Development” section of the IEP reported on the Student’s hospitalization in November, 2019. The IEP also reported that, at Public School A, the Student often avoided interactions with peers during non-instructional moments and rarely, if ever, interacted socially with peers, but was able to remain focused and on-task most of the time, even though s/he struggled in classes where students had more behavioral autonomy. P-4; Testimony of Mother.

10. The Student was again hospitalized in May, 2020. Testimony of Mother. Petitioners then sent the Student to Residential Center A on or about June 29, 2020. Testimony of Mother. Residential Center A provides treatment and academic instruction for students with mental illnesses. Several months or more are needed for students to receive this treatment, which includes therapeutic interventions, programming to learn life skills, coping strategies, and instruction. Residential Center A includes students of many different ages and is accredited by COGNIA, a national accrediting agency.

Instruction is provided in the main administrative offices of the school, with a computer lab and online classes. Instruction involves groups of six to twelve students in a room, each doing their own educational activity, with little or no group instruction. The courses at Residential Center A are essentially “independent study.” Some courses use textbooks. Residential Center A also offers “choice” classes, including a physical education class, a wellness center, and a cooking group, all of which provide students with credits. For some students, there are also community-based options, including public schools.

Testimony of Witness A; Testimony of Witness B.

11. The student population of Residential Center A consists of students with higher-than-average intelligence, but with mental challenges that prevent them from reaching their potential. Many of these students have attended “wilderness programs” to address their mental difficulties, typically without success. The students live and sleep in groups assigned to multiple “houses” that are miles away from the administrative center. The groups relate to the students’ needs and program status. Some students are grouped in an “intensive” program and reside together in the “intensive” house. Other students are grouped in a “transition” program and reside in the “transition” house. The intensive program contains approximately fourteen to twenty students, and the transition program contains approximately twelve to fifteen students. The intensive program involves more structure and supervision than the transition program, including more assistance for students at the start of the day. The transition program is more community-based and gives students more free time, including for taking walks, shopping, planning meals, and buying food. As of the date of testimony, the Student was being phased into the transition program and house: during the school day, s/he was being grouped with

students in the transition program; after the school day, s/he was living and sleeping with students in the intensive program. Testimony of Witness A; Testimony of Witness B.

12. At each group home at Residential Center A, a “program team” assists students with getting up on time, hygiene, early physical activity, and cooking lunch. Residential Center A provides students with group and individual counseling and therapy throughout the week, including by psychiatrists and nurses. Testimony of Witness A. Group therapy is provided to all students twice each day, five days per week, with one group session on weekends. There are specific groups on social and mental health topics. There is a standard schedule of eight to ten groups, and each student eventually attends sessions in each group. Testimony of Witness B. Residential Center A costs approximately \$16,000 per month. Testimony of Mother. The center also provides students with access to other activities. The Student is an excellent guitarist and likes to teach other students how to play. The Student also enjoys going skiing and playing basketball with the other students. Testimony of Witness B.

13. During the Student’s time at Residential Center A, s/he has been taking classes required to meet Idaho’s graduation requirements. Some days, the Student has “done well,” but other days, s/he has done very little academic work. On such days, the Student can appear to be distracted, in a fog, tired, and unmotivated. Sometimes, this pattern of unproductivity can last for more than a few days. Testimony of Witness A.

14. A due process complaint was filed by Petitioners against the Office of the State Superintendent of Education (“OSSE”) on August 21, 2020. This due process complaint challenged the recommended location of services for the Student’s placement for the 2020-2021 school year, which was at Residential Center B. Petitioners disagreed

with this recommendation and sought placement at Residential Center A for the 2020-2021 school year. On November 17, 2020, Hearing Officer Peter Vaden issued a HOD, ordering OSSE to reimburse Petitioners for their costs for covered tuition and related expenses, including covered transportation expenses, for Student's enrollment at Residential Center A from August 17, 2020, through to the end of the second term of DCPS's 2020-2021 school year. Hearing Officer Vaden found that OSSE denied the Student a FAPE for a portion of the 2020-2021 school year, but denied Petitioners' request for tuition payment for the remainder of the school year. Hearing Officer Vaden also found that Residential Center B was the appropriate setting for the Student for the remainder of the 2020-2021 school year. P-6.

15. An IEP meeting was held for the Student on May 4, 2021. Attending the meeting were the Mother, Witness E, Witness C, and a general education teacher. As a result of information from Residential Center A, the team agreed to increase the Student's behavioral support services by an additional 120 minutes per month, for a total of 360 minutes of behavioral support services per month. Consultation behavior support services were increased by an additional thirty minutes per month, for a total of ninety minutes per month. Petitioners sought twelve hours per week of specialized instruction outside general education, consistent with the program that the Student received at Residential Center A. However, the team did not change the Student's specialized instruction mandate. Petitioners said that the IEP was well written. Testimony of Witness C. There was no disagreement at the meeting, and DCPS again agreed to place the Student in a residential setting, but no specific setting was mentioned. Petitioners were told that referrals would be made for residential programs. A Prior Written Notice

was issued during the meeting without specifying a school. Testimony of Mother;
Testimony of Witness E.

16. The Student's IEP ensuing from the May 4, 2021, meeting included, in the "Consideration of Special Factors: Positive Behavior Interventions and Supports" section, language from the earlier IEP and neuropsychological report. This IEP indicated that the Student had presented with thoughts of physical harm, that the Student attended Residential Center A, and was at risk for social isolation. The IEP also suggested implementing the following, as the Student grows more psychologically stable, "to support the development of social skills and social cognition: a. Psychotherapy; b. Participation in routine social activities; c. Ongoing social coaching; d. Individual and group therapy." In the "Consideration of Special Factors: Communication" section of the IEP, it again states that as the Student grows more psychologically stable, group and individual counseling should be implemented. P-7-2. The "Area of Concern: Emotional, Social and Behavioral Development" section of the IEP referenced the "Psychiatric Summary" written by Psychiatrist A and reviewed the Student's issues during the 2018-2019 and 2019-2020 calendar years, indicating that his/her then-current transcript showed that his/her GPA was 3.08, with thirty-nine of forty-six required credits earned. This section of the IEP also indicated that the Student needed both individual and group counseling to increase his/her ability to positively interact with peers. P-7.

17. A Prior Written Notice was sent to Petitioners on May 11, 2021. No specific location of services was offered. P-8. On June 22, 2021, Petitioners' counsel wrote to Witness E from DCPS and asked her about the Student's proposed location of services for the 2021-2022 school year. Witness E responded on the same day, indicating

that she had submitted all documentation and that she would follow up. On July 8, 2021, Petitioners' counsel again asked Witness E about the proposed location of services for the Student for the 2021-2022 school year. P-8-1. On July 27, 2021, the Mother received an email from School A, a day school, indicating that DCPS recently sent them a referral for the Student to attend the school for the 2021-2022 school year. P-9-1-3; Testimony of Witness E. On July 27, 2021, the Mother also received an email from School B, a day school, asking her if she was interested in sending the Student to the school. P-10-2; Testimony of Witness E.

18. On July 29, 2021, School B sent an email to the Mother indicating that the school could not meet the Student's needs. On August 3, 2021, School A sent an email to the Mother indicating that the school could not meet the Student's needs. P-10; Testimony of Witness E. On August 3, 2021, the Mother received emails from School C and School D, both day schools, asking to schedule an intake interview. P-11-1, P-14-1; Testimony of Witness E. On August 4, 2021, School E, a day school, wrote to the Mother asking to schedule a parent interview. P-12; Testimony of Witness E.

19. On August 4, 2021, Petitioners' counsel sent a letter to DCPS notifying them that they were placing the Student at Residential Center A for the 2021-2022 school year. P-13.

20. On August 18, 2021, School D indicated that it would not accept the Student because his/her programming needs were beyond what its staff could implement. P-14-3. On August 24, 2021, Petitioners' counsel again wrote to Witness E, indicating that: 1) DCPS confirmed, at the May 4, 2021, IEP meeting, that it would propose a residential program for the Student for the 2021-2022 school year; and 2) Petitioners

were receiving referrals to non-public day programs rather than residential programs.

Petitioners asked Witness E why these day programs were being considered. P-15-1.

21. During the spring and summer of 2021, Petitioners heard no information about residential programs for the Student. P-7; Testimony of Mother. DCPS felt that it could only offer the Student a day placement, and that the Student might be able to handle such a school setting. Testimony of Witness D. Petitioners themselves did not ask OSSE for a new location of services, even though they knew that OSSE was ultimately responsible for selecting the residential setting for the Student. Residential Center B was never proposed for the Student. Testimony of Mother.

22. During the summer of 2021, the Student needed constant care, and was manic to the point of not sleeping, with bouts of catatonia where s/he was unable to move, speak, or communicate. Testimony of Mother.

23. The Student continued at Residential Center A for the 2021-2022 school year. The Student typically enters his/her classroom at about 8:30 a.m., after being provided with transportation to the center, and stays in the classroom until approximately 11:30 a.m. At the time of testimony, the Student was working on mathematics and transitional goals, including resume skills and interviewing skills. The Student has completed requirements for science and government. During morning instruction, one instructor typically goes around the room and asks the students if they need help. Two individuals are assigned to the Student's classroom, with one instructor in the classroom at a time (the two individuals rotate). Neither instructor is certified in special education, though one has a current teaching certificate in general education science. The Student usually does not need a lot of instruction "per se" because s/he is "smart." The

instructors mostly support the Student by helping him/her refocus, check his/her work, and tell him/her to slow down to do the best work. There are afternoon study sessions with academic support available. Testimony of Witness A.

24. During the 2021-2022 school year, the Student has received group therapy, individual therapy, and family therapy. The Student's counseling has not been geared specifically toward his/her education; it has been geared more toward general behavior supports. The Student has received group therapy twice a day, five days a week, with one group session on weekends. In therapy, the Student has been working on establishing a "balanced mentality" so that the Student can focus and learn social skills for independent living. When the Student was in Residential Center A's intensive program, his/her individual counseling was provided by Witness B, who is not a licensed counselor, social worker, or psychologist, and who has never worked as a counselor in a public school or private school. Witness B provided the Student with counseling a "few times" a week, for thirty to fifty minutes per session. The Student's individual counseling is now provided by another therapist in Residential Center A's transition program. The Student has also received family therapy with his/her parents and brother through videoconferencing. Testimony of Witness B.

25. During the 2021-2022 school year, the Student has made progress in regard to emotional, social and behavioral goal #2 on the May 4, 2021, IEP, which relates to joining a peer's conversation on an academic or a non-academic topic. The goal is for the Student to verbally engage in a conversation in four out of five opportunities by asking at least one on-topic question and sharing at least one on-topic comment during a ten-minute conversation. Testimony of Witness B; P-6-7. The Student's thinking is now

considered to be “clear” and the Student is considered to be more “productive” by Residential Center A staff. The staff also feel that the Student has a better outlook on his/her life and future, particularly recently. Testimony of Witness A; Testimony of Witness B; Testimony of Mother. The Student is now able to read for pleasure, and is more socially interactive, with healthier communication patterns. Testimony of Witness B; Testimony of Mother; P-7. The Student is “eagerly” trying to get him/herself settled into a less intensive way of operating, is interested in obtaining a volunteer position, and is now easier to engage. Testimony of Mother.

26. In or about November, 2021, DCPS staff met with Residential Center A staff by videoconference and received an update about the Student’s treatment and progress. Witness B and Witness C, among others, were at this meeting, during which Residential Center A staff indicated that the Student wanted to go to community college, which Witness C felt was an amazing feat and showed that the Student was showing good motivation to grow and progress. Testimony of Witness C. There was discussion about the Student’s past pattern of doing well for a period of time, then deteriorating to the point where s/he could not do academic work. The meeting lasted about thirty to forty-five minutes. Testimony of Witness E; Testimony of Witness C.

27. As of the date of hearing, OSSE’s position was that Residential Center B is the Student’s assigned location of services and there was no reason to provide a new location. Testimony of Witness D.

VI. Conclusions of Law

The burden of proof in District of Columbia special education cases was changed by the local legislature through the District of Columbia Special Education Student

Rights Act of 2014. That burden is expressed in statute as the following: “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.” D.C. Code Sect. 38-2571.03(6)(A)(i). Accordingly, on Issue #1, the burden of persuasion is on Respondent if Petitioners present a *prima facie* case. On Issue #2, the burden of persuasion is on Petitioners.

1. Did Respondent fail to develop an appropriate IEP for the Student for the 2021-2022 school year? If so, did Respondent act in contravention of 34 C.F.R. 300.320, Andrew F. v. Douglas County School District, 137 U.S. 988 (2017), and Hendrick Hudson Bd. of Educ. v. Rowley, 458 U.S. 176 (1982)? If so, did Respondent deny the Student a FAPE?

Petitioners contended that the IEP did not recommend enough specialized instruction hours or behavioral support services.

The IEP is the “centerpiece” of IDEA. Honig v. Doe, 484 U.S. 305, 311 (1988). In Hendrick Hudson Bd. of Educ. v. Rowley, 458 U.S. 176 (1982), the Court explained that an IEP must be formulated in accordance with the terms of the IDEA and “should be reasonably calculated to enable the child to achieve passing marks and advance from grade to grade.” Id. at 204; Leggett v. Dist. of Columbia, 793 F.3d 59, 74 (D.C. Cir. 2015); 20 U.S.C. Sect. 1412(a)(5)(A). In Andrew F. v. Douglas County School District, 137 U.S. 988 (2017), the Court held that an IEP must be reasonably calculated “in light of the child’s circumstances.” Id. at 999-1000. The Court also held that parents can

fairly expect school authorities to offer a “cogent and responsive explanation” for their decisions, and that its ruling “should not be mistaken for an invitation to the courts to substitute their own notions of sound educational policy for those of school authorities, to whose expertise and professional judgment deference should be paid.” *Id.* at 1001-1002.

Petitioners’ argument on this issue was unclear. To the extent that there was any argument from Petitioners on this issue, they appeared to suggest that the direct behavioral support services recommended in the Student’s IEP (360 minutes per month) was insufficient because it was less than the amount of behavioral support services provided at Residential Center A. However, Petitioners did not present any expert witnesses, or indeed any witnesses at all, to support this claim. To the contrary, the Mother testified that there was no real disagreement with the IEP created for the Student on May 4, 2021. Moreover, Petitioners did not mention this issue during closing argument. As Respondent pointed out at the hearing in its motion for a directed verdict on this issue, Petitioners effectively abandoned this issue. This Hearing Officer therefore finds that Petitioners did not present a *prima facie* case on this issue.

2. Did Respondent fail to timely provide the Student with a location of services for the 2021-2022 school year? If so, did Respondent violate 34 C.F.R. Sect. 300.323(a) and related authority? If so, did Respondent deny the Student a FAPE?

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. 34 C.F.R. Sect. 300.323(a); 34 C.F.R. Sect. 300.323(c)(2) (“As soon as possible following development of the IEP, special education and related services are made available to the child in accordance with the child's IEP”). There is no dispute that DCPS did not send Petitioners a notice identifying an educational setting for the Student at the start of the 2021-2022 school

year. In fact, DCPS still has not provided the Student with a notice identifying a setting for the 2021-2022 school year.

Even so, Respondent argued that the recent decision by Judge Kollar-Kotelly in the federal appeal of Hearing Officer Vaden's HOD should result in the dismissal of this claim because the court in J.S. affirmed the decision of Hearing Officer Vaden and determined that the Student's location of services should be at Residential Center B, which could implement the Student's IEP. Judge Kollar-Kotelly therefore denied Petitioners' claim for reimbursement at Residential Center A for the latter portion of the 2020-2021 school year.

However, this case is about the 2021-2022 school year, not the 2020-2021 school year. The Student has a new IEP in place, and there is nothing in the record to suggest that Residential Center B was available to the Student at the start of the 2021-2022 school year. To the contrary, at least according to Hearing Officer Vaden's HOD, Residential Center B has a long wait list. It may well be that the Student could not attend Residential Center B at the start of the 2021-2022 school year because no seat was available for him/her at the time.

Certainly, in the summer of 2021, Respondent did not tell Petitioners that Residential Center B would be the Student's location of services for the 2021-2022 school year. Indeed, Petitioners, through counsel, asked DCPS multiple times for a location of services after the finalization of the IEP, mainly during the summer of 2021. DCPS never even mentioned OSSE or Residential Center B in its multiple correspondences to Petitioners, and to this day neither DCPS nor OSSE have offered Residential Center B to the Student for the 2021-2022 school year. Instead, believing

that it could not recommend a residential setting for the Student and that s/he might benefit from a day placement, DCPS contacted a number of special education day schools to see if they might accept the Student. Even though a day school was not appropriate for the Student at the time, per his/her IEP, Petitioners graciously participated in this exercise with DCPS. None of these day schools ended up accepting the Student.

Moreover, there is nothing in the record to suggest that DCPS urged, or even asked, OSSE to offer Petitioners Residential Center B or any other residential setting for the 2021-2022 school year. No witness from either OSSE or Residential Center B was called in this case to show that OSSE considered Residential B as the Student's location of services for the 2021-2022 school year. In fact, there is nothing in the record to suggest that DCPS ever sent OSSE the Student's May 4, 2021, IEP. At the hearing, Witness D said that OSSE's position was that the Student's location of services for the 2021-2022 school year was Residential Center B, the school setting that was deemed appropriate and ordered by Hearing Officer Vaden and Judge Kollar-Kotelly. However, Witness D never explained why Petitioners were not told that Residential Center B would be the Student's location of services for the 2021-2022 school year. Indeed, until the hearsay testimony of Witness D, on March 14, 2022, DCPS never even suggested to Petitioners that Residential Center B was the Student's location of services for the 2021-2022 school year.

DCPS contended that the "presumption of continuity" applies here, and that, therefore, the location of services offered for the 2020-2021 school year should be read to apply to the 2021-2022 school year as well. This principle of law was discussed in Andersen by Andersen v. D.C., 877 F.2d 1018, 1022 (D.C. Cir. 1989), where the court

found that when DCPS failed to provide a student a FAPE, it had the burden of producing evidence and persuading the court of changed circumstances that rendered the district court's determination as to the initial year inappropriate for guiding its order of relief for subsequent years. The court said that "if the handicapped child's circumstances continue unchanged, any placement that was appropriate for him in the initial year would continue to meet his educational needs in succeeding year." Id. at 1024.

This principle is discussed at length in the recent case of A.D. by next friends E.D. v. D.C., No. 20-CV-2765 (BAH), 2022 WL 683570, at *9–10 (D.D.C. Mar. 8, 2022), where parents argued, relying on Andersen, that "[t]here should have been a presumption of continuity" with a prior HOD that favored the parents. The court rejected this argument, finding that the IEP at issue was developed after issuance of the HOD that favored the parents, and the court's "sole task" was to determine whether the IEP at issue provided a FAPE for the second semester of the 2019-2020 school year. Moreover, this Hearing Officer has found no caselaw where the "presumption of continuity" argument is used by a Local Educational Agency ("LEA") to obtain dismissal of a due process complaint alleging FAPE denial for an entirely separate school year.

DCPS also argued that issue preclusion requires dismissal here, pointing to another recent case, N.G. v. District of Columbia, Civil Action No. 20-2777 (TJK) (ZMF) (March 31, 2022). In N.G., the court was presented with an appeal of an HOD by this Hearing Officer, which found that DCPS offered a student a FAPE and denied the parents' request for tuition reimbursement. That HOD referenced evidence used in a prior HOD issued by Hearing Officer Vaden. On appeal before a federal court, the petitioners objected to the consideration of evidence that had also been submitted to

Hearing Officer Vaden, but in the Report and Recommendations for this case, Judge Zia M. Faruqui agreed with the HOD, finding that “There was nothing barring HO Lazan from considering the testimony that underpinned HO Vaden’s decision that [the subject] IEP was effective.” Judge Faruqui also indicated “Nor was there reason for HO Lazan to conclude differently than HO Vaden or this Court did in [that case].”

Respondent focused on a section of the decision by Judge Faruqui that stated that the plaintiffs were precluded from relitigating the same issue through a second due process claim, citing to two cases involving issue preclusion. R.S. by & through Ruth B. v. Highland Park Indep. Sch. Dist., No. 3:16-CV-2916-S, 2019 WL 1330933, at *5 (N.D. Tex. Mar. 22, 2019), aff’d, 951 F.3d 319 (5th Cir. 2020); K.K.-M. v. N.J. Dep’t of Educ., No. cv1711579, 2021 WL 3508805, at *3 (D.N.J. Aug. 10, 2021). Issue preclusion bars successive litigation of an issue of fact or law actually litigated and resolved in a valid court determination essential to the prior judgment, even if the issue recurs in the context of a different claim. Taylor v. Sturgell, 553 U.S. 880, 892 (2008). Respondent claimed that the issues in this case are identical to the issues before Hearing Officer Vaden in the case recently decided by Judge Kollar-Kotelly. This Hearing Officer must disagree. Here, Petitioners claim that no location of services was offered to the Student for the entirety of the 2021-2022 school year. In the case before Judge Kollar-Kotelly, OSSE ultimately offered the Student a location of services that satisfied the requirements of the Student’s IEP for the 2020-2021 school year.

Indeed, Hearing Officer Vaden’s and Judge Kollar-Kotelly’s decisions can be read to favor Petitioners with respect to this issue. Hearing Officer Vaden found that no location of services was timely offered to the Student during the 2020-2021 school year

until October 12, 2020, because Residential Center B had a long waiting list. He also found that OSSE's task was to notify Petitioners of a location of services for the Student in time for the start of the 2020-2021 school year. P-6-29. Because OSSE did not notify Petitioners of an available seat for the Student for the start of the 2020-2021 school year, Hearing Officer Vaden found that OSSE denied the Student a FAPE. Here, similarly, neither OSSE nor DCPS offered the Student a location of services for the start of the 2021-2022 school year, again denying the Student a FAPE.

Respondent also argued that OSSE should be the Respondent in this case, not DCPS, pointing to the decisions of Hearing Officer Vaden and Judge Kollar-Kotelly, who found that OSSE, not DCPS, had violated the Student's right to a FAPE. However, this issue was not raised before Hearing Officer Vaden or Judge Kollar-Kotelly. To this Hearing Officer, the proper Respondent in this case is DCPS, not OSSE, because courts hold that claims against a State Educational Agency ("SEA") are not actionable where the LEA is legally responsible for the Student. Orange County Dep't of Educ. v. A.S., 567 F. Supp. 2d 1165, aff'd in part, rev'd in part 668 F.3d 1052 (9th Cir. 2011) (SEA liable where no LEA was legally responsible for the student's education). In Chavez ex rel. MC v. NM Public Educ. Dep't., 621 F.3d 1275, (10th Cir 2010), the court explained: "given the policy implications of requiring the SEA to intervene in all disputes when the parents claim the LEA is not providing their child a FAPE, we hold that the SEA need not have been part of the administrative process here and reverse the district court on this issue." Similarly, in Ellenberg v. New Mexico Military Inst., 478 F.3d 1262, 1269 (10th Cir. 2007), the court found that the SEA's role is to ensure LEA compliance through the "power of the purse." See also Emma C. v. Eastin, No. C96-4179 TEH, 2007 WL

4554321, at *1–2 (N.D. Cal. Dec. 20, 2007) (same); cf. A.D. v. Creative Minds Int’l Pub. Charter Sch., No. 18CV2430CRCDAR, 2020 WL 6373329, at *8 (D.D.C. Sept. 28, 2020), appeal dismissed sub nom. A. D. by E.D. v. Creative Minds Int’l Pub. Charter Sch., No. 20-7106, 2021 WL 1654481 (D.C. Cir. Mar. 31, 2021) (rejecting argument that the DC Municipal Regulations required OSSE to pay tuition costs).

Indeed, federal law and regulation governs on this issue. 20 U.S.C. Sect. 1413(g) discusses the exceptions to the general rule that the LEA must be liable for the failure to provide students with a FAPE:

A State educational agency shall use the payments that would otherwise have been available to a local educational agency or to a State agency to provide special education and related services directly to children with disabilities residing in the area served by that local educational agency, or for whom that State agency is responsible, if the State educational agency determines that the local educational agency or State agency, as the case may be—

- (A) has not provided the information needed to establish the eligibility of such local educational agency or State agency under this section;
- (B) is unable to establish and maintain programs of free appropriate public education that meet the requirements of subsection (a);
- (C) is unable or unwilling to be consolidated with 1 or more local educational agencies in order to establish and maintain such programs; or
- (D) has 1 or more children with disabilities who can best be served by a regional or State program or service delivery system designed to meet the needs of such children.

Subsections A, B, and D of this section clearly do not apply to the facts in this case. Subsection (B), which relates to the LEA’s inability to provide students with a FAPE, also does not apply. This subsection anticipates the unusual situation where the LEA no longer functions and cannot provide the relief requested in the complaint. For instance, in Lejeune v. Khepera Charter Sch., 327 F. Supp. 3d 785, 800 (E.D. Pa. 2018), the charter school was unable to satisfy settlement agreements that were entered into as a result of due process complaints. This was because the charter school had significant

financial issues. The parties did not identify any funding source for the plaintiff's claims except the SEA, and the Pennsylvania SEA was held to be liable for the breach of the agreements. See also R.J. v. Rivera, No. CV 15-5735, 2016 WL 4366987, at *2 (E.D. Pa. Aug. 16, 2016) (court held an SEA responsible for attorneys' fees incurred in litigating a child's claims for denial of FAPE against a defunct LEA).

It is true that policy in the District of Columbia requires that where the LEA decides that a student needs a residential placement, OSSE selects the location of services. However, even though the local legislature is no doubt aware of this, the law in this jurisdiction remains that it is the LEA that is responsible for the provision of FAPE to students. As stated in 5-E D.C.M.R. Sect. 3002.1(a), "The LEA shall make a free appropriate public education (FAPE) available to each child with a disability, ages three to twenty-two, who resides in, or is a ward of, the District including children who are suspended or expelled and highly mobile children, such as migrant or homeless children, even if they are advancing from grade to grade." There is nothing in the District of Columbia Municipal Regulations, or in any federal caselaw, that states that OSSE must be the Respondent in special education cases brought by parents in the District of Columbia where a residential setting is at issue. Indeed, federal courts have issued multiple rulings holding DCPS responsible for the provision of FAPE where OSSE is considered to be responsible for providing the setting or service. W.S. v. District of Columbia, 502 F. Supp. 3d 102 (D.D.C. 2020) (Brown Jackson, J.) (residential school); cf. Wilson v. District of Columbia, 770 F. Supp. 2d 270 (D.D.C. 2011) (transportation). While Respondent's position is certainly understandable, this Hearing Officer must

disagree and find that DCPS denied the Student a FAPE when it failed to offer the Student a location of services for the 2021-2022 school year.

RELIEF

As relief, Petitioner seeks tuition reimbursement and payment for the 2021-2022 school year at Residential Center A. When school districts deny students a FAPE, courts have wide discretion to ensure that students receive a FAPE going forward. As the Supreme Court stated, the statute directs the Court to “grant such relief as [it] determines is appropriate.” School Committee of the Town of Burlington v. Dep’t of Education, Massachusetts, 471 U.S. 359, 371 (1985). The ordinary meaning of these words confers broad discretion on a hearing officer, since the type of relief is not further specified, except that it must be “appropriate.”

The LEA may be required to pay for educational services obtained for a student by the student’s parent if the services offered by the school district are inadequate or inappropriate, the services selected by the parent are “proper under the Act,” and equitable considerations support the parents’ claim, even if the private school in which the parents have placed the child is unapproved. Florence County School District Four et al. v. Carter by Carter, 510 U.S. 7 (1993). In this connection, courts must consider “all relevant factors” including the nature and severity of the student’s disability, the student’s specialized educational needs, the link between those needs and the services offered by the private school, the placement’s cost, and the extent to which the placement represents the least restrictive educational environment. Branham v. District of Columbia, 427 F.3d 7, 12 (D.C. Cir. 2005).

Petitioners presented two witnesses from Residential Center A, both of whom testified that the Student is burdened with severe mental illness and has benefitted from the program at the school. They testified that the Student has passed classes, become more socially interactive, had healthier communication patterns, and benefitted from the extensive therapy at the school, which includes group therapy twice a day and a session on weekends, as well as individual therapy. They said that, at the time of testimony, the Student was moving to the school's "transition" program, which is geared toward exposing students to the community. The witnesses also described the Student's living arrangements, which involve residing at a house with other similarly situated children. At each house, a program team assists students with getting up on time, hygiene, early physical activity, and cooking lunch.

Petitioners posited that this is a simple case, and that this Hearing Officer should apply the principles in Leggett and award them full tuition reimbursement, since they had no other choice than to place the Student at Residential Center A. DCPS strongly objected to this location of services, pointing to the HOD of Hearing Officer Vaden and especially the Memorandum Decision by Judge Kollar-Kotelly, both of whom expressed concerns about Residential Center A. Judge Kollar-Kotelly found that Residential Center A could not implement the Student's IEP because it provided fewer hours than the IEP recommended and because the school did not have special education teachers on staff. Memorandum Opinion, at 21. The Student now has a new IEP, but there is no question that s/he is not receiving anywhere near 26.5 hours of specialized instruction at

Residential Center A. As of the date of testimony, the Student was only taking a mathematics class, and was mainly engaging in independent study in that class.²

However, Hearing Officer Vaden also found Residential Center A to be “proper under the Act,” a finding that was not the subject of the appeal before Judge Kollar-Kotelly. Referencing Frank G. v. Bd. of Educ., 459 F.3d 356, 365 (2d Cir. 2006), and relying on the fact that OSSE’s chosen school, Residential Center B, was not available at the start of the school year, Hearing Officer Vaden found that Petitioners’ actions were reasonable and that Residential Center A provided “educational instruction specially designed to meet Student’s unique needs, supported by psychiatric and therapeutic services which Student requires to benefit from instruction.”

The same thing happened here. No location of services was offered to Petitioners at the start of the 2021-2022 school year, even though Respondent received several emails from Petitioners’ counsel asking for a location of services. DCPS said that it had no power to provide the Student with a residential placement, and therefore offered Petitioners a day placement. However, no day placement accepted the Student, and such a location of services would not have satisfied the requirements of the IEP. As a result, like Hearing Officer Vaden, this Hearing Officer finds that Residential Center A³ provided the Student with instruction that was designed to meet the Student’s unique needs, supported by therapeutic services which the Student requires to benefit from instruction.

² The Student’s psychiatric evaluation in May, 2020, recommended that the Student should attend a school with sufficient academic rigor to prepare the Student for a transition to the next educational level. P-3.

³ It is noted that other hearing officers and courts have ruled that Residential Center A is an appropriate location of services and have ordered tuition reimbursement accordingly. In Reported Federal Decision A, for example, the court affirmed a reimbursement award for the placement of a student with significant learning issues at Residential Center A.

The IDEA also states that tuition reimbursement may be reduced or denied when parents fail to raise the appropriateness of an IEP in a timely manner, fail to make their child available for evaluation by the district, or upon a finding of unreasonableness with respect to the actions taken by the parents. 20 U.S.C. Sect. 1412(a)(10)(C)(iii). In addition, courts have broad discretion to consider the range of all relevant facts in determining whether and to what extent awarding relief is equitable. Carter, 510 U.S. at 16. Among the most important of these is “whether the parents have cooperated with the [district] throughout the process to ensure their child receives a FAPE.” Bettinger v. N.Y.C. Bd. of Educ., No. 06CV 6889(PAC) 2007 WL 4208560, at *6 (S.D.N.Y. Nov. 20, 2007).

On the surface, it would appear that DCPS was the party that did not cooperate here, not Petitioners. DCPS failed to respond to Petitioners’ request for a residential placement for the 2021-2022 school year. However, Petitioners knew that OSSE, not DCPS, is the agency that selects residential placements for students in the District of Columbia. Petitioners should therefore have contacted OSSE, in addition to DCPS, to find a location of services for the Student for the 2021-2022 school year. Respondent suggested that Petitioners were being tactical and made a conscious choice to “lay low,” rather than contact OSSE, to secure the residential placement of their choice. Petitioners did not have a clear response to this point.

Leggett, with a somewhat similar fact pattern, discusses equitable considerations. The circuit court rejected DCPS’s arguments in that case, emphasizing that school officials did not respond to the parent’s phone calls or emails and that DCPS had not shown any sign of producing an IEP in time for the school year. 793 F.3d at 69.

Certainly, much of the blame for the lack of a placement for the Student during the 2021-2022 school year is attributable to DCPS's failure to effectively respond to Petitioners' emails. However, it is hard to understand why Petitioners themselves did not contact OSSE to find a residential setting for the Student for the 2021-2022 school year. As in J.S. v. Scarsdale Union Free Sch. Dist., 826 F. Supp. 2d 635, 674 (S.D.N.Y. 2011), the record raises questions as to whether Petitioners' apparent cooperation with DCPS was genuine. Importantly, if Petitioners had contacted OSSE in the summer of 2021, OSSE might have been able to place the Student at a residential setting that could implement the IEP and provide the Student with a full 26.5 hours of instruction per week by certified special education teachers, as underscored by the recent decision by Judge Kollar-Kotelly. Accordingly, while Petitioners should be reimbursed for the bulk of their costs for Residential Center A for the 2021-2022 school year, in consideration of the equities, this Hearing Officer finds it appropriate to limit the order for reimbursement to ninety percent of those costs.⁴

VII. Order

As a result of the foregoing:

1. Upon receipt of documentation of payment by Petitioners, as may be reasonably required, Respondent shall, without undue delay, reimburse Petitioners for

⁴ DCPS also argued that Residential Center A was not the Student's least restrictive environment, but DCPS itself recommended a residential location of services for the Student. DCPS did not explain how Residential Center A could possibly be too restrictive when they recommended the same kind of setting on the continuum. DCPS also argued that this Hearing Officer should only order modification of the IEP instead of ordering placement at Residential Center A. However, DCPS did not explain what this new IEP should look like, or point to any other location of services that is currently available for the Student.

ninety percent of their costs of tuition and related expenses for the Student's enrollment at Residential Center A for the 2021-2022 school year;

2. Respondent shall pay for ninety percent of the costs for the Student's enrollment at Residential Center A for the remainder of the 2021-2022 school year;

3. All other requests for relief are hereby denied.

Dated: May 13, 2022

Michael Lazan
Impartial Hearing Officer

cc: Office of Dispute Resolution
Attorney A, Esq.
Attorney B, Esq.
Attorney C, Esq.
OSSE
[REDACTED]/DCPS
[REDACTED]/DCPS

VIII. Notice of Appeal Rights

This is the final administrative decision in this matter. Any party aggrieved by this Hearing Officer Determination may bring a civil action in any state court of competent jurisdiction or in a District Court of the United States without regard to the amount in controversy within ninety days from the date of the Hearing Officer Determination in accordance with 20 USC §1415(i).

Date: May 13, 2022

Michael Lazan
Impartial Hearing Officer