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OSSE
Office of Dispute Resolution
November 27, 2017

Confidential

<p>Parent on Behalf of Student,</p> <p>Petitioner,</p> <p>v.</p> <p>District of Columbia Public Schools (“DCPS”) Local Educational Agency (“LEA”) Respondent.</p> <p>Case # 2017-0219</p> <p>Date Issued: November 4, 2017</p>	<p>CORRECTED HEARING OFFICER’S DETERMINATION ¹</p> <p>Hearing Dates: October 19, 2017 October 26, 2017</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 This “Corrected” HOD is issued to only make typographical and/or grammatical changes and/or to remove personally identifiable information; no substantive changes have been made. The HOD issuance date, November 4, 2017, remains unchanged, as does the applicable appeal date. Personally identifiable information is in the attached Appendices A & B.

JURISDICTION:

The hearing was conducted, and this decision was written, pursuant to the Individuals with Disabilities Act (“IDEA”), P.L. 101-476, as amended by P.L. 105-17 and the Individuals with Disabilities Education Improvement Act of 2004, the District of Columbia Code, Title 38 Subtitle VII, and the District of Columbia Municipal Regulations, Title 5 Chapter E30. The Due Process Hearing was convened on October 19, 2017, and October 26, 2017, at the District of Columbia Office of the State Superintendent of Education (“OSSE”) Office of Dispute Resolution, 810 First Street, N.E., Washington, D.C. 20003, in Hearing Room 2003.

BACKGROUND AND PROCEDURAL HISTORY:

The student or “Student” is age _____ and in grade _____.² The student resides with the student’s parent in the District of Columbia and is a child with a disability pursuant to IDEA, with a disability classification of other health impairment (“OHI”). District of Columbia Public Schools (“DCPS”) is the student’s local educational agency (“LEA”). The student attends a DCPS school (“School A”) in a self-contained special education classroom. The student has attended School A since the start of school year (“SY”) 2017-2018. Prior to attending School A, the student attended another DCPS school (“School B”) where the student was also in a self-contained special education classroom.

At a meeting held on June 8, 2017, DCPS proposed to place the student at a DCPS separate special education school (“School C”) for SY 2017-2018, and to remove the dedicated aide from the student’s individualized educational program (“IEP”). The student’s mother (“Petitioner”) objected and on August 14, 2017, filed the current due process complaint alleging, inter alia, that DCPS denied the student a free appropriate public education (“FAPE”) by failing to propose an appropriate IEP and placement. Petitioner filed a motion for “Stay Put” along with her due process complaint. Petitioner withdrew that motion on September 19, 2017, when the parties agreed that the student would be placed at School A, and School A would be the student’s “Stay Put” placement.

Relief Sought:

In the complaint Petitioner requested that DCPS be ordered to immediately reinstate the student’s dedicated aide in time for the start SY 2017-2018 and that DCPS immediately provide the student placement in an Independence and Learning Support (“ILS”) classroom for SY 2017-2018, and any other relief the Hearing Officer deems necessary.

DCPS Response:

DCPS filed a response to the complaint on August 25, 2017, and denies that there has been any failure to provide the student with a FAPE. DCPS asserted, inter alia, that an IEP meeting was held on April 13, 2017, to review assessments completed as part of the student’s triennial reevaluation, and to review and update the student’s IEP; Petitioner expressed that her main

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

concern was that the student was still at the same level academically. After the team completed a review of all assessment data, the team agreed to all IEP goals. The team determined that the appropriate placement for the Petitioner was specialized instruction 25 hours per week outside of the general education setting and prescribed related services outside the general education setting and to remove the dedicated aide for SY 2017-2018. The team determined that the least restrictive environment (“LRE”) for the student was a self-contained classroom within a general education school.

The IEP team met again on June 8, 2017, to discuss Petitioner’s concerns with the IEP and the location of service (“LOS”). The student’s IEP and placement were modified and DCPS proposed to place the student at School C. Petitioner expressed concerns with the removal of the dedicated aide from the IEP and the student’s placement at School C. The DCPS members of the IEP team explained that at School C the student’s needs would be appropriately met and the student would no longer require the dedicated aide. DCPS asserts it made a FAPE available to the student and has offered an LOS that can implement the IEP and placement and requests that all relief be denied.

Resolution Meeting and Pre-Hearing Conference:

The parties participated in a resolution meeting on August 31, 2017, and did not resolve the complaint. The parties did not mutually agree to proceed directly to hearing. The 45-day period began on September 14, 2017, and ended [and the Hearing Officer’s Determination (“HOD”) was originally due] on October 28, 2017.

The undersigned Impartial Hearing Officer (“Hearing Officer”) convened a pre-hearing conference (“PHC”) on September 14, 2017, and issued a pre-hearing order (“PHO”) on September 20, 2017, outlining, inter alia, the issues to be adjudicated.

Motions:

On October 6, 2017, Petitioner filed two pre-hearing motions that were addressed at the outset of the hearing on October 19, 2017. The first motion was for a notice to appear that was withdrawn because the witness testified voluntarily.³ Petitioner’s second motion requested that the Hearing Officer require DCPS to allow Petitioner’s expert to observe the student at School A.⁴ On October 12, 2017, Respondent filed an opposition to the motion. On October 17, 2017, the Hearing Officer notified the parties I would not be granting Petitioner’s motion and that I would make a formal ruling on the record during the hearing.

At the outset of the hearing on October 19, 2017, I heard from the parties regarding Petitioner’s motion and denied the motion based on my conclusion that the Special Education Student Rights Act of 2014 provides for an observation by a special education designee appointed by the parent of a child with a disability “provided, that the designee [does not have] ... a financial interest in the outcome of litigation.” Id. §103 (5)(A). The law prohibits the observer from disclosing or engaging clients in litigation against the District or the LEA. Id. at (E), and expressly provides

³ Petitioner’s Exhibit 6

⁴ Petitioner’s Exhibit 7

for expert fee recovery by the parent for the expert's engagement for a due process hearing. Id. at (7)(A), (B) and (F).

It is the determination of the Hearing Officer that the observation order is being sought for the purpose of litigation and the expert witness that is seeking the observation has at least a potential financial interest in the outcome of the litigation. Thus, I concluded that Petitioner's request for the identified witness in the due process hearing to observe the student would not be allowed.

The hearing proceeded on October 19, 2017, and was continued to and concluded on October 26, 2017. On October 27, 2017, Petitioner filed an unopposed motion to continue and extend the HOD due date to account for an additional hearing date of October 26, 2017. The motion was granted and the HOD due date was extended by seven (7) calendar days to November 4, 2017.

ISSUES:⁵

The issues adjudicated are:

1. Whether the LEA denied the student a FAPE by failing to develop an appropriate IEP for SY 2017-2018 because the IEP lacks a dedicated aide.
2. Whether the LEA denied the student a FAPE by failing to propose an appropriate placement in the student's LRE in a general education school.

RELEVANT EVIDENCE CONSIDERED:

This Hearing Officer considered the testimony of the witnesses and the documents submitted in the parties' disclosures (Petitioner's Exhibits 1 through 33 and Respondent's Exhibits 1 through 10) that were admitted into the record and are listed in Appendix A.⁶ Witnesses' identifying information is listed in Appendix B.⁷

SUMMARY OF DECISION:

Respondent held the burden of persuasion on both issues to be adjudicated. Petitioner established a prima facie case on both issues before the burden of persuasion fell to Respondent. The Hearing Officer concludes that Respondent was entitled to a directed finding on issue #1

⁵ The Hearing Officer restated the issues at the outset of the hearing and the parties agreed that these were the issues to be adjudicated.

⁶ Any items disclosed and not admitted or admitted for limited purposes were noted on the record and summarized in Appendix A.

⁷ Petitioner presented five witnesses: Petitioner, an educational consultant, one of the student's physicians, an investigator with the firm representing Petitioner and a DCPS speech language pathologist. Respondent presented six witnesses: The special education coordinators at School A, School B and School C, one DCPS special education teacher, DCPS physical therapist, a DCPS paraprofessional support specialist.

regarding the dedicated aide because the parties represented to me that despite the student's IEP stating that the dedicated aide would terminate on July 28, 2017, DCPS and Petitioner agreed to an amendment of the student's IEP to continue the dedicated aide until the June 7, 2018, when the student's IEP would be due for annual review. The parties represented that student has never been without the dedicated aide at School A or School B, and I, therefore, concluded the student suffered no loss or denial of a FAPE in this regard.

As to the alleged inappropriate placement, the Hearing Officer concludes that Respondent did not sustain the burden of persuasion by a preponderance of the evidence that the student's LRE is a separate special education school. The Hearing Officer directed in the order below that the student remain at School A and that DCPS conduct additional evaluations including an assistive technology ("AT") evaluation and an updated psychological evaluation to specifically address the student's non-verbal functioning, and that DCPS convene an IEP meeting for an IEP team to review the evaluations, review and revise the student's IEP as appropriate and determine an appropriate placement for the student, and that DCPS determine an appropriate location of services for the student for the remainder of SY 2017-2018.

FINDINGS OF FACT:⁸

1. Student resides with Petitioner in the District of Columbia, and is a child with a disability pursuant to IDEA, with a disability classification of OHI. The student has been diagnosed with Angelman Syndrome and Agenesis Corpus Callosum with global delays across all developmental levels. Student is non-verbal, but can point at pictures as a form of communication. (Petitioner's testimony, Witness 3's testimony, Respondent's Exhibits 3-21, 3-23, 4-1)
2. Student attends School A, a DCPS school, where Student began attending at the start of SY 2017-2018. At School A, the student is a self-contained special education classroom, i.e., an Independence Learning Support ("ILS") classroom. Prior to attending School A, Student attended School B, another DCPS school during SY 2016-2017. At School B the student was in a self-contained special education classroom, i.e., an Early Learning Support ("ELS") classroom.⁹ (Petitioner's testimony, Witness 10's testimony, Respondent's Exhibit 4-1, Petitioner's Exhibit 31)
3. During most of SY 2016-2017 Student had an IEP dated April 20, 2016, that prescribed the following services: 25 hours per week of specialized instruction outside the general education setting and the following related services: speech-language pathology for 360 minutes per month outside the general education setting and 240

⁸ The evidence (documentary and/or testimony) that is the source of the Findings of Fact ("FOF") is noted within a parenthesis following the finding. A document is noted by the exhibit number. The second number following the exhibit number denotes the page of the exhibit (or the page number of the entire disclosure document) from which the fact was extracted. When citing an exhibit that has been submitted by more than one party separately, the Hearing Officer may only cite one party's exhibit.

⁹ DCPS published descriptions of the ELS and ILS programs do not indicate whether the programs are provided in a general education school or a separate special education school.

minutes per month of occupational therapy outside the general education setting. The IEP also prescribed 30 minutes per month of physical therapy consultation services and a dedicated aide of 27.5 hours per week. The IEP included academic goals in math and reading, and goals in the following areas: adaptive/daily living, communications/speech and language, health/physical, motor skills/physical development. (Respondent's Exhibit 2-1, 2-4, 2-5, 2-6, 2-7, 2-8, 2-9, 2-10, 2-11)

4. During the first reporting period of SY 2016-2017, from August 22, 2016, to October 28, 2016, Student's IEP progress report indicates Student made progress in the math goal, but the reading goal was not introduced. Student made progress on the adaptive and daily living skills goals, two of three communications/speech and language goals, and the health/physical goal. Student made no progress on one communications/speech and language goal and no progress on motor skills/physical development goals. (Petitioner's Exhibit 25-1 through 25-4)
5. During the second reporting period of SY 2016-2017, from October 31, 2016, to January 19, 2017, Student's IEP progress report indicates that Student made progress in academic goals for math and reading. Student made progress on adaptive and daily living skills goals, two of the three communications/speech and language goals, and mastered the health/physical goal. Student made no progress on one communications/speech and language goal and no progress on motor skills/physical development goals. (Petitioner's Exhibit 25-5 through 25-8)
6. On March 9, 2017, a paraprofessional specialist from DCPS' central office conducted an observation of Student to determine if Student continued to be in need of a dedicated aide. As a result of the observation, the DCPS paraprofessional specialist recommended a fade plan to remove Student's dedicated aide by the end of SY 2016-2017, to give Student opportunities to independently function in a self-contained classroom. The paraprofessional specialist recommended Student be provided, and learn to use, a picture exchange communication system and be provided visual supports in the classroom. She recommended Student have opportunities to seek assistance, when needed, by either pointing to what Student wants or grabbing an adult's hand and taking the adult to a preferred activity or using visual supports such as grabbing a picture and giving it to an adult to communicate. The paraprofessional specialist recommended Student be given tools to develop independence and learn to, and experience opportunities to, respond to a visual schedule, follow classroom routines, and seek help when transitioning from groups or activities. (Witness 8's testimony, Respondent's Exhibit 10-1, 10-3)
7. While Student was attending School B, DCPS conducted an annual IEP review on April 14, 2017. During the meeting Petitioner, who was accompanied by an educational advocate, expressed concern that the student remained at the same level academically. During the meeting, the team reviewed evaluations that were conducted as part of the student's triennial evaluation. (Respondent's Exhibit 3-1, 3-20)

8. The evaluations that DCPS conducted included an occupational therapy, physical therapy, adapted physical education, speech language and psychological assessment. The psychologist noted, among other things, that Student does not have a sense of danger or innate ability to apply rules of safety. The student does not show understanding in numbers recognition but will listen to a story being read and make pre-writing scribbles. The evaluator noted that the student likes to participate in classroom activities, but does not understand and is not able to process instructional directions. The student is able to eat independently but is not potty trained and is unable to signal to an adult when and if Student needs to use the bathroom. The student's social interactions with peers are at times aggressive. The psychologist stated that overall the student had made small gains academically, adaptively, emotionally and in use and understanding of language. Student's academic skills were at the pre-academic level. (Respondent's Exhibit 3-1, 3-20, 3-21, 3-24, 3-25, 3-26)
9. The team that met on April 14, 2017, determined Student remained eligible under the OHI classification and determined Student would receive services outside the general education classroom in a self-contained classroom within a general education school. The team also recommended that the student's dedicated aide be phased out and removed by the end of SY 2016-2017. Petitioner objected to removal of the dedicated aide because she believes the student continues to require intensive support for adaptive needs and for safety concerns. Petitioner, through her advocate, expressed that the student had not made progress and needed a more restrictive environment. The DCPS LEA representative stated that DCPS would explore a more restrictive environment that the team would come back to discuss the student's placement. The LEA representative put in a request to DCPS central office for an LRE observation. (Respondent's Exhibit 3-1, 3-13, 3-20, 3-21, 3-24, 3-25, 3-26)
10. Student's IEP developed on April 14, 2017, prescribed the following services: 24.5 hours per week of specialized instruction outside the general education setting and 120 minutes per month of adapted physical education outside the general education setting. The IEP prescribed the following related services: speech-language pathology 360 minutes per month outside the general education setting and 240 minutes per month of occupational therapy outside the general education setting. The IEP also prescribed 30 minutes per month of physical therapy consultation services and a dedicated aide of 27.5 hours per week that would terminate at the end of SY 2016-2017, on June 14, 2017. The team determined the student's school location for SY 2017-2018 would be in the ILS classroom at another DCPS school. However, DCPS noted that it would explore whether a more restrictive setting was appropriate. (Respondent's Exhibit 3-13, 3-27, Petitioner's Exhibit 22)
11. On April 26, 2017, DCPS conducted a classroom observation of the student and the observer recommended that the student could possibly benefit from a more restrictive school setting where academic and behavioral needs can be addressed in a smaller self-contained full-time setting. The observation report also recommended, among other things, the use of assistive technology that supports instruction in the student's LRE and that a consultation should be made prior to a request for AT devices for the

student with the purpose of exploring the use of sensory electronic devices with academic applications and games to meet the student's specific educational needs. (Respondent's Exhibit 9-1,9-7, 9-8)

12. On May 24, 2017, DCPS issued a letter to Petitioner that stated the student would transition to the next grade level in SY 2017-2018 and the student's location was changing to School C, as School C was the closest school to Petitioner's home with space available in an ILS classroom at the student's next grade level. (Respondent's Exhibit 5-1, Petitioner's Exhibit 31)
13. During the fourth reporting period of SY 2016-2017, from April 3, 2017 to June 14, 2017 the student's IEP progress report indicates that the student made progress in the math and reading goals. The student made progress on adaptive and daily living skills goals, two of the three communications/speech and language goals, and mastered one of four health/physical goals, made progress on two others, and the fourth goal was just introduced. The student made progress in all three motor skills/physical development goals. The student made no progress on one communications/speech and language goal. (Petitioner's Exhibit 25-9 through 25-14)
14. On June 8, 2017, School B convened another IEP meeting to discuss Petitioner's concerns about the dedicated aide being removed from the student's IEP at the end of SY 2016-2017, and the proposed change in the student's location of services to School C for SY 2017-2018. At the meeting Petitioner continued to express her opposition to removal of the dedicated aide and the student's placement at School C. Petitioner no longer wanted a more restrictive environment for the student and she would not be sending the student to School C. Although Student was making progress, School B staff did not believe the student was making sufficient progress. DCPS maintained that the student's needs would be best served with the change to a more restrictive placement at School C and consequently, amended the student's IEP to reflect an increase in specialized instruction outside the general education setting by 4.5 hours per week. DCPS issued Petitioner a prior written notice of the changes. (Witness 5's testimony, Witness 6's testimony, Respondent's Exhibit 4-1, 4-20, 4-21 4-22, 4-23)
15. Petitioner objected to the placement at School C principally because School C has a swimming pool. Due to Student's diagnosed Angelman Syndrome Student is very attracted to water and Petitioner believes the student would not be safe even with a dedicated aide because the student would be pre-occupied with the swimming pool. (Parent's testimony, Petitioner's Exhibit 33)
16. The IEP developed on June 8, 2017, prescribed the following services: 29.5 hours per week of specialized instruction outside the general education setting and 120 minutes per month of adapted physical education outside the general education setting. The IEP prescribes the following related services: speech-language pathology 360 minutes per month outside the general education setting and 240 minutes per month of occupational therapy outside the general education setting. The IEP also prescribes 30 minutes per month of physical therapy consultation services and a dedicated aide of

27.5 hours per week that would terminate on July 28, 2017. (Respondent's Exhibit 4-12, 4-13)

17. The paraprofessional specialist who observed Student in March 2017 participated in the June 8, 2017, IEP meeting and shared her recommendations. She stated that with Student's high level of needs it would be in Student's best interest to move to self-contained school, as having a dedicated aide, in her opinion is more restrictive than School C. She expressed that the staff at School C is trained, the class size is appropriate, and the security at School C is sufficient that Student would be safe there even though there is a swimming pool. She agreed that a separate school was the LRE for Student. (Witness 8's testimony)
18. On June 14, 2017, DCPS issued a PWN indicating the changes in the student's IEP, and that the student's location of services for SY 2017-2018 would be School C. (Petitioner's Exhibit 26-1)
19. After Petitioner filed her due process complaint, DCPS convened a resolution meeting ("RSM") to attempt to resolve the complaint. At the RSM, DCPS explained that the team at the school with an ILS classroom that had originally been identified as the student's location of services prior to School C was not a wheelchair accessible building. At the meeting, Petitioner reiterated her concerns about the swimming pool at School C and that if the student saw the swimming pool at all Student would be pre-occupied with the pool and continue to seek out the pool. DCPS also explained that at School C, because there would be more adults in the classroom than were in the student's classroom at School B, the student would no longer require a dedicated aide. The team discussed that the student would benefit from an AT evaluation and an independent evaluation as to Angleman Syndrome. The evaluations were discussed but the team did not move forward to conduct the evaluations. (Witness 2's testimony, Respondent's Exhibit 7-1, 7-2)
20. The parties agreed that during the pendency of the due process complaint, Student would be placed in an ILS classroom at School A, and would have a dedicated aide and School A would be the student's "Stay Put" placement. DCPS and Petitioner have agreed to an amendment of the student's IEP to continue the dedicated aide until the June 7, 2018, when the student's IEP is due for annual review. The parties made oral representations that student has never been without the dedicated aide at School B or since attending School A. (Representations on the record from both counsel)
21. Although School A can implement Student's IEP, Student would benefit from a school building with better toileting facilities, consistent wheelchair accessibility, additional nursing services and integration of all related services in the classroom, which Student does not have access to at School A. (Witness 10's testimony)
22. Student has had significant absences both during SY 2016-2017 and since attending School A because of medical conditions. Student currently uses two electronic

devices, one of which is an iPad, that Petitioner sends to school with Student each day at School A. However, Student did not use either device while attending School B. (Petitioner's testimony, Respondent's Exhibit 4-23)

23. Petitioner engaged the services of an educational consultant and expert witness observed the student at home, reviewed the records, and talked with parent. The consultant observed Student initiate use of electronic devices at home and agrees that an AT evaluation should be conducted to assess the student's needs for a communication system and to ensure the student is using the devices to access the curriculum and peers. The consultant did not support the change in the student's LRE to a separate school. (Witness 1's testimony, Petitioner's Exhibit 17-8)
24. The DCPS speech language pathologist, who worked with the student at School B participated in the student's IEP meetings at School B and recalled the discussion in the meetings about possible psychological non-verbal testing and an AT evaluation. She expressed that an AT evaluation would be beneficial to the student. She supports that recommendation that the student move to School C because the student was frequently absent at School B due to medical needs that might be better addressed at School C. (Witness 4's testimony)
25. Student's medical doctor, who sees Student intermittently regarding Angelman Syndrome, expressed her opinion that Student's expressive communication skills can be increased using AT or sign language and optimizing Student's socialization skills is important as Student does better when interacting with others and Student's social skills are a strength. (Witness 3's testimony)
26. School C is a separate special education school that provides services to students with disabilities up to age twenty-two. School C has no general education students. School C can implement Student's June 8, 2017, IEP and Student can start attending School C immediately. Student would be the sixth child in the assigned classroom with a teacher instructional aide and a dedicated aide for another student. School C has a full time nursing staff and full time related service providers. Student's classroom at School C would be near the swimming pool; however, Student would seldom pass the pool. School C has security to ensure that any and all students are safe in and near the swimming pool and that students do not have access to the pool when they are not using the pool as a part of instruction or related services. (Witness 9's testimony)

CONCLUSIONS OF LAW:

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

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

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.

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)

Pursuant to 5E DCMR 3030.14 the burden of proof is the responsibility of the party seeking relief. *Schaffer v. Weast*, 546 U.S. 49, 126 S.Ct. 528 (2005). In this case, as noted in the PHO and at the hearing, Respondent held the burden of persuasion on both issues to be adjudicated. Petitioner established a prima facie case on both issues before the burden of persuasion fell to Respondent. ¹⁰ The normal standard is preponderance of the evidence. See, e.g. *N.G. v. District of Columbia* 556 F. Supp. 2d (D.D.C. 2008) see also 20 U.S.C. §1451 (i)(2)(C)(iii).

ISSUE 1: Whether the LEA denied the student a FAPE by failing to develop an appropriate IEP for SY 2017-2018 because the IEP: (a) lacks a dedicated aide.

¹⁰ DC Code § 38-2571.03 (6) provides:

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

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

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

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

Conclusion: The Hearing Officer directed a finding in favor of Respondent based on the parties' on the record representations that the student has not been without a dedicated aide anytime during SY 2016-2017 and during SY 2017-2018 and that the parties have agreed to amend the student's IEP to retain the dedicated aide through the end of the IEP period June 7, 2018.

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.

Under the recent Supreme Court decision, *Andrew F. v. Douglas County School District Re-1*, a district must provide "an IEP reasonably calculated to enable a child to make progress appropriate, in light of the child's circumstances." 137 S. Ct. 988, 999 (2017).

"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." *Schaefer v. Weast*, 554 F.3d 47. The "reasonably calculated" qualification reflects a recognition that crafting an appropriate program of education requires a prospective judgment by school officials, informed by their own expertise and the views of a child's parents or guardians; any re-view of an IEP must appreciate that the question is whether the IEP is reasonable, not whether the court regards it as ideal.

Petitioner alleges that the student's IEP for SY 2017-2018 is inappropriate because it did not include a dedicated aide. The evidence demonstrates that despite the student's IEP stating that the dedicated aide would terminate on July 28, 2017, DCPS and Petitioner agreed to an amendment of the student's IEP to continue the dedicated aide until the June 7, 2018, when the student's IEP will be due for annual review. Because the parties represented to the Hearing Officer that student has never been without the dedicated aide, the Hearing Officer concluded the student suffered no loss or denial of a FAPE as a result. The Hearing Officer concluded that Respondent sustained the burden of persuasion by a preponderance of the evidence on this issue.

ISSUE 2: Whether the LEA denied the student a FAPE by failing to propose an appropriate placement in the student's LRE in a general education school.

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

In determining the educational placement of a child with a disability, each public agency must ensure that the placement decision is determined at least annually and is based on the child's IEP. 34 CFR § 300.116(b) (1) (2). *At the beginning of each school year*, each public agency must have *in effect*, for each child with a disability within its jurisdiction, an IEP, as defined in § 300.320. 34 C.F.R. § 300.323(a) (emphasis added).

A student's IEP determines whether an educational placement is appropriate; the placement does not dictate the IEP. *See Roark v. District of Columbia*, 460 F.Supp.2d 32, 44 (D.D.C. 2006); *Spielberg v. Henrico Cty. Public Sch.*, 853 F.2d 256, 258 (4th Cir. 1988) ("Educational placement is based on the IEP, which is revised annually."); 34 C.F.R. § 300.116(b)(2).

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.")

The evidence demonstrates that at the April 2017 IEP meeting Petitioner initially asserted that the student should be placed in a more restrictive environment than the ILS classroom student was in at School B. DCPS advised that a review of LRE would occur, and it did. It was after the review and the proposal to change the student's location of services that Petitioner voiced objections to the change in Student's LRE.

It is clear from the evidence that initially in April 2017 DCPS determined the student would move from the self-contained ELS classroom at School B to the ILS classroom at another DCPS school that had such a classroom at the student's next grade level. The evidence demonstrates that one of the building locations that DCPS considered was eliminated because of the student uses a wheelchair or stroller and that building did not have wheelchair accessibility. Then in May 2017 DCPS sent Petitioner a letter indicating that the closest school to Petitioner's home with an ILS classroom was School C.¹¹

By the June 8, 2017, meeting DCPS decided that the student's hours of specialized instruction would be increased by 4.5 hours per week, so that student would presumably no longer be in a ILS classroom, but would be in a more restrictive setting at School C. The IEP does not at all, however, other than the change in hours of specialized instruction outside general education, indicate exactly what the student's LRE placement is along the continuum of placements. The IEP makes no mention at all of whether the student should be in a self-contained program in a general education school or whether the student should in a separate special education school.

The determination and discussion of the student's LRE should be accompanied by documentation that details the change in LRE and the rationale for the change. If a separate

¹¹ It is not clear from the record whether School C actually has an ILS program, but it was clear that the program ultimately offered by DCPS at School C was a more restrictive setting than the student had at School B.

school is selected or not selected, the Hearing Officer should be able to read the IEP and IEP notes and know what the decision is and the basis for the decision.¹²

In order to change a student's LRE, there must be some justification as to why the LRE must be changed and how the proposed change will better achieve desired outcomes. There was insufficient evidence presented in this case which would advise the Hearing Officer that the student's LRE had to be changed from the ILS classroom to a separate special education school, or that the student could not be maintained at School A with appropriate AT devices and/or additional accommodations. While there is appreciation for the student's learning difficulties and slow progress, it is unclear whether these difficulties are part and parcel of the student's non-verbal state and lack of appropriate tools for effective communication. Consequently, the Hearing Officer concludes based on consideration of the evidence that Respondent did not prevail by a preponderance of the evidence on this issue and the proposed change in Student's LRE was a denial of a FAPE.

At hearing Petitioner asserted that the determination of a change in the student's LRE from an ILS classroom to a general education school to a separate special education school, such as School C, is premature absent the evaluations that Petitioner's witnesses testified are warranted with regard to the student's communications needs and the possible use of AT devices to bolster the student's communication skills and access to the curriculum. Although at the April 2017 meeting there appears to have been some discussion about a possible AT evaluation, it does not appear that at either the April 2017 or June 2017 IEP meetings any additional evaluations were requested either by DCPS or Petitioner.

It is clear from the evidence presented the student would benefit from an AT assessment to direct the provision of devices which may assist the student, who is non-verbal, in communicating with Petitioner, teachers and students. It is also evident that the student would benefit from an evaluation that can target and assess the student's non-verbal functioning. Consequently, in the order below, as relief for the denial of FAPE determined, the Hearing Officer directs DCPS to conduct the aforementioned evaluations.

Ultimately after any evaluations are conducted the parties will again have to address the student's LRE placement and location of services. One reason Petitioner asserts that the student should remain in an ILS program such as the one at School A is so that the student has interaction with non-disabled peers. The evidence indicates, however, that although the student is sociable and currently has contact with non-disabled peers, the overwhelming opposition by Petitioner to the student moving to School C is her apprehension about the student being in a school building with a swimming pool.

¹² See *Brown v. District of Columbia* 179 F. Supp. 3d 15, April 13, 2016, "[I]t appears that no provision of the statute or regulations, by express terms, requires that an IEP include a determination of a student's least restrictive environment and appropriate placement [along the continuum of placements]. However, the undersigned finds that the statute and regulations, read in context, in fact impose such requirement. 20 U.S.C. § 1414(d)(1)(A)(i)(V) (providing that an IEP must include "an explanation of the extent, if any, to which the child will not participate with nondisabled children in the regular class and in activities described in subclause (IV)(cc)[.]""); see also A.I. ex rel. Iapalucci, 402 F. Supp. 2d at 159 (holding that an IEP must include, among other things, a statement regarding "the child's ability to interact with non-disabled children")."

Petitioner presented witnesses who testified that the student's LRE is not a separate school. On the other hand, DCPS presented witnesses, including teacher and service providers who worked with the student at School B who testified that at School B the student was making progress, but they believed the student would make greater progress at School C.

The parties have compromised temporarily on the student's placement in an ILS program on the student's grade level at School A. However, the evidence demonstrates that all the student's needs are not being best met at School A. The Hearing Officer points out that there is a difference between the location of services and an educational program. In the end, it is the best interest of the child that should guide both parties in determining the student's LRE on the continuum of placements and the location services.

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.)

In the complaint Petitioner requested that DCPS be ordered to immediately reinstate the student's dedicated aide in time for the start school year ("SY") 2017-2018 and that DCPS immediately provide the student placement in an ILS classroom for SY 2017-2018, and any other relief the Hearing Officer deems necessary.

The Hearing Officer directs in the order below that the student remain at School A and that DCPS conduct additional evaluations including an assistive technology ("AT") evaluation and an updated psychological evaluation to specifically address the student's non-verbal functioning, and that DCPS convene an IEP meeting for the IEP team to review the evaluations, review and revise the student's IEP as appropriate and determine an appropriate placement for the student, and that DCPS determine an appropriate location of services for the student for the remainder of SY 2017-2018.

ORDER:¹³

1. DCPS shall, within twenty (20) school days of the issuance of this order, conduct an assistive technology ("AT") evaluation and an updated psychological evaluation to specifically address the student's non-verbal functioning.
2. DCPS shall, within ten (10) school days of the completion of the above mentioned evaluations, convene an IEP meeting for the IEP team to review the evaluations, review and revise the student's IEP as appropriate and determine an appropriate placement for

¹³ 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.

the student, and that DCPS determine an appropriate location of services for the student for the remainder of SY 2017-2018.

3. While the provisions above are being completed, the student shall remain at School A.

APPEAL PROCESS:

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

/S/ Coles B. Ruff

Coles B. Ruff, Esq.
Hearing Officer
Date: November 4, 2017

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