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Confidential

Parents on Behalf of Student, [1] Petitioners, v. District of Columbia Public Schools ("DCPS") Local Educational Agency ("LEA") Respondent. Case # 2018-0223 Date Issued: November 26, 2018	HEARING OFFICER'S DETERMINATION Hearing Dates: November 15, 2018 November 16, 2018 Counsel for Each Party listed in Appendix A Hearing Officer: Coles B. Ruff, Esq.

[1] Personally identifiable information is in the attached Appendices A & B.

JURISDICTION:

The hearing was conducted, and this decision was written, pursuant to the Individuals with Disabilities Act ("IDEA"), P.L. 101-476, as amended by P.L. 105-17 and the Individuals with Disabilities Education Improvement Act of 2004, the District of Columbia Code, Title 38 Subtitle VII, and the District of Columbia Municipal Regulations, Title 5 Chapter E30. The Due Process Hearing was convened on November 15, 2018, and November 16, 2018, at the District of Columbia Office of the State Superintendent of Education ("OSSE") Office of Dispute Resolution ("ODR") 1050 First Street, N.E., Washington, D.C. 20003, in Hearing Room 112.

BACKGROUND AND PROCEDURAL HISTORY:

The student or ("Student") is age _____and in grade _____.[2] Student resides with Student's parents ("Petitioners") in the District of Columbia and is a child with a disability pursuant to IDEA with a disability classification of Autism Spectrum Disorder ("ASD"). Student attends a non-public special education separate school ("School A"). District of Columbia Public Schools ("DCPS") is Student's local educational agency ("LEA").

Prior to enrolling in DCPS, Student and Petitioners lived outside the District of Columbia in a state and school district in which Student received special education supports in a full-time program for students with high functioning ASD. After enrolling in DCPS during school year ("SY") 2016-2017, Student educational placement was a self-contained special education program located in a DCPS school.

Petitioners were dissatisfied with Student's DCPS placement, unilaterally placed Student at School A for SY 2017-2018, and filed a due process complaint against DCPS and prevailed. The Hearing Officer in a January 20, 2018, Hearing Officer Determination ("HOD") ordered DCPS to reimburse Petitioners for Student's attendance at School A for SY 2017-2018. DCPS eventually took over transportation to and from School A and began direct payments for Student to attend School A.

In the second half of SY 2017-2018 DCPS convened a multidisciplinary team ("MDT") meeting, updated Student's individualized educational program ("IEP") and provided Petitioners a location of services letter for Student to attend a self-contained special education program in a DCPS school for SY 2018-2019. Petitioners declined DCPS' proposed placement and maintained Student at School A. After notifying DCPS of the unilateral placement and requesting DCPS funding for Student's placement at School A for SY 2018-2019, Petitioners filed the current due process complaint on August 29, 2018, to challenge, inter alia, the DCPS IEP and placement.

Petitioners filed a Motion for Stay-Put Protections in this proceeding. DCPS did not oppose the motion. The Hearing Officer granted Petitioner's motion and ordered DCPS to continue to make and/or facilitate direct payment to School A for Student's attendance at School A for SY 2018-2019 during the pendency of this proceeding and provide Student transportation services.

[2] The student's current age and grade are indicated in Appendix B.

Relief Sought:

Petitioners seek as relief, inter alia, that they be reimbursed for the costs of funding Student's program for summer 2018, that the Hearing Officer order DCPS to fund/place the student at School A throughout, at least, the remainder of SY 2018-2019, until such time as an appropriate offer of FAPE is made, and reimburse for the transportation costs Petitioners paid to transport Student to and from School A from the start of SY 2018-2019 until October 15, 2018, when DCPS transportation began.

LEA Response to the Complaint:

DCPS filed a response to the complaint on September 10, 2018. DCPS denies that there has been any failure to provide Student with a free appropriate public education ("FAPE") and stated, inter alia, that the January 20, 2018, HOD ordered reimbursement for the remainder of SY 2017-2018, not placement for the extended school year ("ESY"). The Hearing Officer found the summer program Petitioners sought for SY 2017-2018 inappropriate and denied Petitioners' request. Student's IEP dated May 1, 2018, provided Student a FAPE in Student's least restrictive environment ("LRE"). ESY was added to the IEP by written amendment between the parties. Evaluations were proposed and requested. The psychological assessment was conducted by DCPS and is dated June 17, 2018. There were two independent assessments, speech and language ("SL") and occupational therapy ("OT"). Both were completed and provided to DCPS for Student's file on or about June 29, 2018.

Resolution Meeting and Pre-Hearing Conference:

The parties did not participate in a resolution meeting and did not mutually agree to proceed directly to hearing in this matter. The 45-day period began on September 30, 2018, and ended [and the HOD was originally due] on November 12, 2018.

Because the parties were not available for hearing prior to the HOD due date, they agreed to a continuance and extension of the HOD due date by 14 calendar days from November 12, 2018, to November 26, 2018. Petitioners filed an unopposed motion to extend the HOD due date that was granted. The HOD is now due November 26, 2018.

The undersigned Impartial Hearing Officer ("Hearing Officer") convened a pre-hearing conference ("PHC") on the complaint on September 19, 2018, and issued a pre-hearing order ("PHO") on September 25, 2018, outlining, inter alia, the issues to be adjudicated.

ISSUES: [3]

The issues adjudicated are:

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

1. Whether DCPS denied Student a FAPE by (a) failing to discuss, determine, or offer an appropriate ESY program/placement or otherwise make an offer of FAPE for summer 2018 and/or (b) by failing to implement Student's amended IEP of June 15, 2018, which required appropriate ESY services.

2. Whether DCPS denied Student a FAPE by creating inappropriate IEPs on both May 1, 2018, and June 15, 2018, because the IEPs contain inaccurate, outdated and contradictory information about the student's educational placement and LRE.

3. Whether DCPS denied the student a FAPE by failing to offer an appropriate educational placement/program for SY 2018-2019 because:
   (a) the educational placement chosen unilaterally by DCPS is unable to implement the IEP as it is written; and/or
   (b) The educational placement in the Communication and Educational Support ("CES") program directly contradicts the ruling of the Hearing Officer in the January 20, 2018, HOD regarding the inappropriateness of the CES program; and/or
   (c) Even without considering the HOD, DCPS knew or should have known, from the data available to the team by August 14, 2018, that the CES program at School B was inappropriate for Student; and/or
   (d) DCPS illegally delegated the educational placement/program decision to a team that did not include the parents or a team knowledgeable about Student, depriving the parents of their right to participate in the placement decision.

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 23 and Respondent's Exhibits 1 through 19) that were admitted into the record and are listed in Appendix A.[4] Witnesses' identifying information is listed in Appendix B.[5]

SUMMARY OF DECISION:

Petitioners had both the burden of production and persuasion on the following issue: #1 (b). Respondent held the burden of persuasion on the following issues #1(a), #2 & #3 after Petitioners established a prima facie case on those issues. Petitioners sustained the burden of persuasion on issue 1 (b). Respondent failed to sustain the burden of persuasion by a preponderance of the evidence on issues #1(a), #2 & #3. The Hearing Officer granted Petitioners' requested relief of Student's continued placement at School A until an offer of FAPE is made following the IEP meeting that the Hearing Officer has directed in the order below to be convened. The Hearing Officer also granted Petitioners reimbursement for Student's 2018

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

[5] Petitioner presented three witnesses: (1) Student's Mother ("Petitioner"), (2) School A's Head of School and (3) School A's Board Certified Applied Behavior Analyst. Respondent presented no witnesses.

summer program and the transportation costs Petitioners incurred transporting Student to and from School A during SY 2018-2019.

FINDINGS OF FACT: [6]

1. Student resides with Petitioners in the District of Columbia and is a child with a disability pursuant to IDEA with a disability classification of ASD. Student attends School A, a non-public special education separate school. DCPS is Student's LEA. (Petitioner's testimony, Petitioner's Exhibit 12-1)

2. Student is high energy and sociable, but socially awkward. Student has difficulty understanding social cues such as personal space and when to make a joke and when not. With typical developing peers Student is interactive and makes friends. Student also has difficulty managing change and will sometimes get overwhelmed and not be able to express feelings. Student is operating at or near grade level on all subjects except math. Student is very verbal and Student's language skills have improved in the last few years. (Petitioner's testimony)

3. Prior to enrolling in DCPS, Student and Petitioners lived outside the District of Columbia, in a state and school district in which Student received special education supports in a full-time program for students with high functioning ASD. After enrolling in DCPS in March 2017, Student was in a self-contained special education CES program, located in a DCPS school. (Petitioner's testimony, Petitioner's Exhibit 2-5 2-6, 2-7, 2-8)

4. Student attended the DCPS CES program from in March 2017 until the end of SY 2016-2017. The others students in the Student's CES classroom were non-verbal, lower functioning and had typical characteristics of higher tier autism. Student came home almost every day angry and upset that the other students would not talk to or play with Student. Student began to display behaviors Student modeled from other students in the classroom such pointing at things Student wanted instead of asking for them. The academic work was not challenging for Student. The CES classroom teacher attempted to work with Student individually but was pulled away by the needs of the other students. (Parent's testimony)

5. DCPS sought to provide Petitioner with another location of services. Petitioner also conducted her own research and suggested to DCPS a number of other sites, all of which were unavailable. DCPS proposed two CES classrooms for Student at two different DCPS schools. Petitioner toured the classrooms and felt they were exactly the same as the DCPS program in which Student was already placed. (Petitioner's Exhibit 2-9, 2-10)

[6] The evidence (documentary and/or testimony) that is the source of the Findings of Fact ("FOF") is noted within parenthesis following the finding. A document is noted by the exhibit number. The second number following the exhibit number denotes the page of the exhibit (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.

6. Petitioners unilaterally placed Student at School A for SY 2017-2018 and on October 4, 2017, filed a due process complaint against DCPS and sought tuition reimbursement and payment for Student attending School A for SY 2017-2018. Petitioners prevailed on their due process complaint in an HOD that was issued on January 20, 2018. (Petitioner's Exhibit 2-1, 2-4, 2-26)

7. Petitioner prevailed on three of the five issues that were adjudicated in the January 20, 2018, HOD: (1) Whether DCPS provided comparable services to Student as prescribed in Student's out of state IEP when Student came to DCPS during SY 2016-2017; (2) Whether DCPS failed to develop an appropriate IEP on May 5, 2017, and (3) Whether DCPS failed to provide Student with an inappropriate educational placement and corresponding location of services for 2017-2018. In pertinent part, in Hearing Officer stated the following in the HOD:

    a. "Instead of an IEP that did not provide clear direction about the classes the Student needed, the Student needed an IEP that assured instruction for a "high-functioning" autistic student, as the Student had received in [Other State]. Such an IEP would have required a classroom that provided challenging academics for the Student, as well as work on pragmatic language, such as how to speak "in turn" during a conversation. The IEP also should have included a mandate for the Student to receive some instruction with nondisabled peers. The IEP does state that the Student "is higher than [the Student's] peers and has a significantly higher aptitude than [the Student's] current class and will benefit from more inclusion in a general education setting." Still, no "inclusion" classes were specifically recommended by the IEP. Applying *Endrew F.*, Respondent did not reasonably calculate the Student's IEP to allow the Student to make "markedly more" than minimal progress at School A."

    b. "There is little in the record about either such school, both of which have "CES" programs. There is a reference in the record from Teacher B indicating that School B[7] may have been appropriate for the Student, and there are other references in the record to the effect that the "CES" classroom in School B had higher-functioning students in it. However, Teacher B did not testify to explain further about her statement (P-14-14), and no witness was called from School B to explain why the school would allow the Student to make meaningful educational progress. Similarly, there was little testimony about School C, which also had higher-functioning students."

    c. "Witness B described it as a pilot program for higher-functioning students, and indicated that a social skills component of the program had not yet been developed. No witness was called from School C to explain its curriculum, and the parent was not told about the pilot program while she

[7] The school identified by the previous Hearing Officer as "School B" in the January 20, 2018, HOD is a different school than is identified as "School B" in the current HOD.

was exploring the school in spring, 2017. Instead, the parent was led to believe that the School C "CES" program was just like the other programs. It is noted that Witness B testified at the hearing that most "CES" programs would be the same as the School A program, including the one at School C."

d. "In sum, there is insufficient evidence in the record to establish that Respondent offered the Student an appropriate educational placement for the 2017-2018 school year. Since Respondent bears the burden of persuasion on this placement issue, Petitioner prevails in regard to this claim."

In the January 20, 2018, HOD the Hearing Officer concluded that the CES programs that DCPS had offered for Student to attend were inappropriate. The Hearing Officer also concluded that the standards for Petitioners' reimbursement for School A were met. He ordered DCPS to pay School A for tuition and related expenses for SY 2017-2018, except for money already paid by Petitioners for the year and reimburse Petitioners the costs they paid A for tuition and related expenses for SY 2017-2018 and for all actual transportation costs associated with travel to and from the school. All other relief requested by Petitioners was denied. (Petitioner's Exhibit 2-4, 2-5, 2-15, 2-17, 2-19, 2-22, 2-23, 2-26)

8. DCPS eventually took over transportation to and from School A and began direct payments for Student to attend School A during SY 2017-2018. In April of 2018 School A asked Petitioners if they intended for Student to return for SY 2018-2019 in order to hold Student's spot. Petitioners were unsure because they had not been offered a different program by DCPS. Consequently, Petitioners signed a contract to hold Student's spot, but did not pay the deposit that was required because they could not afford to do so. (Petitioner's testimony, Petitioner's Exhibit 17)

9. DCPS convened an annual review of Student's IEP on May 1, 2018, with School A representatives and the parent's educational advocate. Petitioner participated by telephone. DCPS provided Petitioners authorization for independent educational evaluations ("IEEs") for both SL and OT evaluations. Petitioner granted DCPS consent to conduct a psychological reevaluation. On May 8, 2018, DCPS issued a prior written notice that it would proceed with evaluating Student. No IEP was discussed or reviewed and Petitioner did not receive a copy of an IEP with the May 1, 2018, date prior to Petitioners filing their due process complaint. (Petitioner's testimony, Respondent's Exhibits 4, 5, 6, 10)

10. DCPS finalized eligibility and created a finalized IEP with a date of May 1, 2018. The IEP included goals in the areas of math, reading, written expression, communication/speech and language, emotional, social and behavioral development, motor skills/physical development. It prescribed 27 hours per week of specialized instruction outside general education and the following related services both outside general education: 180 minutes per month of speech-language pathology and 120 minutes

per month of OT. The IEP also included behavioral support services, but did not indicate the amount of time, only that these services would be delivered inside general education. The IEP noted that Student's LRE was a separate school. The IEP still contained references from the prior IEP that Student would benefit from more inclusion in a general education setting. (Respondent's Exhibit 3, Petitioner's Exhibit 12-1, 12-3, 12-4, 12-5, 12-6, 12-7, 12-8 12-19, 12-10, 12-11)

11. Petitioners agreed to amend Student's IEP to include ESY services without an IEP meeting and on June 15, 2018, DCPS amended Student's IEP to include ESY services. The June 15, 2018, amended IEP stated that Student's LRE was a separate school. The amended IEP maintained the references from the prior IEP that Student would benefit from more inclusion in a general education setting. Petitioner received a copy of the June 15, 2018, IEP within a couple of days of the change and agreed that Student needs a separate school placement. Petitioner has not participated in any IEP meeting since the May 1, 2018, meeting. (Petitioner's testimony, Petitioner's Exhibit 13-1, 13-2, 13-5, 13-16, 13-19)

12. Although DCPS amended Student's IEP for ESY for summer 2018, Student did not attend a DCPS ESY program. Petitioners were willing to consider any options offered for Student's placement by DCPS including a summer program. Petitioners were hoping to receive an offer from DCPS for ESY. When DCPS did not offer one, Petitioners enrolled Student in the summer camp Student attended the previous summer. The program was a six-week day camp that provided academics 4 to 5 hours per day. The other hours were filled with play activity, trips or other non-academics. Petitioners paid $204 for the summer program. (Petitioner's testimony, Petitioner's Exhibit 21)

13. In June 2018, the independent SL and OT evaluations were completed. In June 2018, DCPS conducted a triennial psychological evaluation. An IEP team has not yet reviewed any of these evaluations. (Respondent's Exhibits 6, 7, 10)

14. Because it was unclear where Student would attend school for SY 2018-2019 and Petitioners had received no communication from DCPS regarding Students placement for SY 2018-2019, on August 3, 2018, Petitioners, through counsel, notified DCPS that they were maintaining Student at School A and requested DCPS funding for Student's placement at School A for SY 2018-2019. (Petitioner's testimony, Petitioner's Exhibit 9-2)

15. On August 9, 2018, DCPS provided Petitioners a location of services ("LOS") letter to a self-contained special education program for students with autism in a CES Program located in a DCPS elementary school (School B) for SY 2018-2019. (Petitioner' Exhibit 9-6)

16. On August 14, 2018, DCPS responded to Petitioner's notice of unilateral placement to School A and expressed DCPS' position that it had made FAPE available to Student with an appropriate IEP and placement in the CES classroom at School B. (Petitioner's Exhibit 9-5)

17. DCPS provided Petitioner's an authorization, dated August 6, 2018, for Petitioners to obtain an independent comprehensive psychological evaluation. (Respondent's Exhibit 19)

18. On August 16, 2018, DCPS sent Petitioners an email requesting that Petitioner sign consent for Student to be observed and get records from School A. (Petitioner's Exhibit 9-7)

19. Petitioners toured the CES program at School B a couple of days after the start of SY 2018-2019 and met with the classroom teacher. They were told there were 7 or 8 students in the classroom. Only two students were verbal. The teacher also told Petitioners that none of the students were on grade level and the curriculum was modified down and related services were provided outside the classroom. The program appeared to be very much like the CES program at that Student was in originally during SY 2016-2017. In comparison to the classroom that was subject of prior HOD, it appeared to be the same except a different location. (Petitioner's testimony, Petitioner's Exhibit 9-22, 9-23)

20. Petitioners' educational advocate sent DCPS an email and report on August 28, 2018, as result of Petitioners observations, expressing that the CES program did not comply with Student's IEP and needs and the program was the same as had been previously proposed the year prior. (Petitioner's testimony, Petitioner's Exhibit 9-22, 9-23)

21. DCPS has been responsible for direct payment of Student's tuition and costs to attend School A to date for SY 2018-2019 consistent with the stay-put order that the Hearing Officer issued in the PHO for this current case. (PHO dated September 25, 2018)

22. Student has attended School A for SY 2018-2019 since the start of the school year. From the first day of school in August 2018 until October 12, 2018, Petitioners provided Student transportation from home to School A and from School A to home. The distance from Petitioner's home to School A is 8 miles. Thus, if Petitioners traveled from home to School A and then returned from home to School A to take Student home, the travel distance per day would be 32 miles. DCPS transportation services began transporting Student to and from School A as of October 15, 2018. Petitioners both work and Student's father took Student to and from school on the way to and from his job. Petitioners are seeking reimbursement at the prescribed mileage rate for transporting Student during this period to include the father's travel to work from School A and returning to School A which is approximately 56 miles per day. DCPS standard policy is to reimburse for transportation between a student's home and school. (Petitioner's Exhibits, 6-7, 18)

23. Student has done well attending School A and improved both socially and in academics. Student has had some behavioral challenges this school year that can be attributed to change to new teacher and group of friends and greater academic demands than last year.

However, School A has put interventions in place and Student's behaviors are improving. (Petitioner's testimony)

24. School A is a private school for with 58 total students from kindergarten through eighth grade. There are more children in middle school but almost a 50/50 split between the elementary and middle school population. Not all students have a disability, but all students have unique characteristics such as executive functioning and social challenges. Some students have learning disabilities, Attention Deficit Hyperactivity Disorder ("ADHD") and high functioning Autism. All students are verbal, high functioning and are on high school diploma track. The curriculum mirrors Montgomery County, Maryland Public Schools ("MCPS"). School A has students funded by DCPS and MCPS. School A has approval from the Maryland Department of Education, but does not hold an OSSE Certificate of Approval ("C. of A.") The tuition is $41,000.00 for a ten-month program. (Witness 1's testimony)

25. The number of student in a classroom at School A does not exceed nine students with one teacher and a teacher's aide. Specialists push into the classroom. Academics are differentiated for the needs of the children, but not with downgraded. Students are taught both in the classroom and through outside activities. School A does not provide SL services because most of the students are verbal and the pragmatic language skills are provided in the social learning curriculum. An occupational therapist provides small and large group OT activities. School A uses a program entitled "Unstuck and On Target" as the primary curriculum for social skills, and another program (SMARTS) as an executive functioning curriculum. Social learning specialists are responsible for delivering these programs. (Witness 1's testimony)

26. School A does not use IEPs but uses a document called a Compass that identifies all the core learning areas that a student needs addressing. School A conducts academic assessments in math, reading and writing at the beginning of the year to develop the Compass. The Compass is written from the student's perspective so a student can identify with and take ownership of the goals and his/her progress. (Witness 1's testimony, Petitioner's Exhibit 23)

27. School A has a board certified behavior analyst ("BCBA") on staff. The BCBA is part of the leadership team that decides on the social and academic level cohorts of students. Students with similar social and academic challenges are grouped. The behavioral staff at School A monitor students during recess to help determine what skills need to be worked with each student. (Witness 2's testimony)

28. When Student arrived at School A Student was not very verbal and was dysregulated with behaviors that needed shifting. Within a couple of months Student began to communicate regularly. Student is operating close to grade level and does all assignments. Student's current teacher is certified in special education. Student has needs comparable to the other School A students in social learning and executive functioning. Student is an intellectually curious child who benefits from being around students who challenge Student academically. Any change in Student's educational

program should be managed carefully to account Student's anxieties and fears. It would be detrimental for Student to be put into an environment where there is a lower level of academics or with students with a lower level of functioning on the autism spectrum. (Witness 1's testimony, Witness 2'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. 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.

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). Petitioners had both the burden of production and persuasion on issue #1 (b). Respondent held the burden of persuasion on issues #1(a), #2 & #3 after Petitioners established a prima facie case on issues #1(a), #2 & #3.[8] The

[8] 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

normal standard is preponderance of the evidence. See, *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 DCPS denied Student a FAPE by (a) failing to discuss, determine, or offer an appropriate ESY program/placement or otherwise make an offer of FAPE for summer 2018 and/or (b) by failing to implement Student's amended IEP of June 15, 2018, which required appropriate ESY services.

Conclusion: Respondent did not sustain the burden of persuasion by a preponderance of the evidence on issue (1)(a). Petitioners sustained the burden on persuasion by a preponderance of the evidence on issue (1) (b).

34 C.F.R. 300.106 (a) provides: (1) Each public agency must ensure that extended school year services are available as necessary to provide FAPE, consistent with paragraph (a)(2) of this section.

(2) Extended school year services must be provided only if a child's IEP Team determines, on an individual basis, in accordance with Sec. Sec. 300.320 through 300.324, that the services are necessary for the provision of FAPE to the child.

In reviewing a failure-to-implement claim, a hearing officer must ascertain whether the aspects of the IEP that were not followed were "substantial or significant" or, in other words, whether the deviations from the IEP's stated requirements were "material." See *Catalan ex rel. E.C. v. District of Columbia*, 478 F. Supp. 2d 73, 75 (D.D.C. 2007), aff'd sub nom. *E.C. v. District of Columbia*, No. 07-7070 (D.C.Cir.). Sept. 11, 2007). Where an LEA's failure to implement is material (not merely de minimus), courts have held that the standard for determining whether there has been a denial of FAPE is not tied to whether the student has suffered educational harm. See *Wilson v. District of Columbia*, 770 F. Supp. 2d 270 (D.D.C. 2011) (finding a student had been denied a FAPE, even where the student made academic progress despite the LEA's material failure to implement part of the student's IEP). Rather, "it is the proportion of services mandated to those provided that is the crucial measure for determining whether there has been a material failure to implement." *Turner v. District of Columbia*, 952 F. Supp. 2d 31 (D.D.C. 2013).

As of June 15, 2018, DCPS and Petitioners agreed to amend Student's IEP to include ESY services. Petitioner credibly testified that DCPS did not offer a location of services for Student to attend ESY for summer 2018. As a result, Petitioners placed Student in summer camp where

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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.

Student was provided academic instruction for a good part of the day along with other activities.

Absent any showing by DCPS that it made a FAPE available to Student through an ESY program during summer 2018, the Hearing Officer must conclude Student was denied a FAPE by DCPS failing to offer ESY services. The failure to provide ESY services was substantial and significant and Petitioner sustained the burden of persuasion by preponderance of the evidence on this issue.

Although there was no evidence that in the summer program Student's IEP goals were addressed, based upon Petitioner's testimony, the Hearing Officer concludes Student gained academic and social benefit from being in the program and Petitioners reimbursement for the program is warranted.

ISSUE 2: Whether DCPS denied Student a FAPE by creating inappropriate IEPs on both May 1, 2018, and June 15, 2018, because the IEPs contain inaccurate, outdated and contradictory information about the student's educational placement and LRE.

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

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, *Endrew 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.

In determining the educational placement of a child with a disability, each public agency must ensure that the placement decision (1) is made by a group of persons, including the parents, and other persons knowledgeable about the child, the meaning of the evaluation data, and the placement options; (2) is made in conformity with the Least Restrictive Environment ("LRE") provisions of the IDEA that mandate that to the maximum extent possible, disabled children are to be educated with their nondisabled peers and that special classes, separate schooling, or other removal of children with disabilities from the regular educational environment occurs only if the nature or severity of the disability is such that education in regular classes with the use of supplementary aids and services cannot be achieved satisfactorily; (3) is determined annually; (4) is based on the child's IEP; and (5) is as close as possible to the child's home. 34 C.F.R. 300.114, 34 C.F.R. 300.116.

As IDEA demands, 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." 34C.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.")

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).

The evidence demonstrates that following the May 1, 2018, meeting DCPS finalized an IEP for Student that prescribed an LRE in a separate school. By agreement with Petitioners, DCPS amended Student's IEP on June 15, 2018, to include ESY services. Although Petitioners were not aware that DCPS had finalized an IEP as of May 1, 2018, there appears to have been general agreement at that meeting by the team, which included School A, that Student would remain at School A continuing to receive the services that School A was providing pending the evaluations that the team agreed would be conducted. The IEP that was dated May 1, 2018, as well as the amended IEP dated June 15, 2018, prescribed Student's LRE as a separate school.

The IEP document continued to have language that made reference to Student being in a CES classroom and/or in general education environment some part of the day, that was apparently contradictory to the IEP's stated LRE for Student later in the document. Although the language was in the IEP, there is no evidence this language caused any harm to Student. There is no evidence that the specific language of the IEP, other than Student's LRE was ever discussed and agreed to by an IEP team. Rather, it appears that the language remained in the IEP from the

previous IEP, because no new evaluation data on Student had yet been obtained.

The Hearing Officer does not conclude that based on the apparent contradictions in Student's DCPS IEP, that the May 1, 2018, or June 15, 2018, IEP were substantively flawed such that there was a denial of a FAPE to Student as a result. Student's IEP continued to prescribe an LRE for Student in a separate school and as of the dates of these IEPs Student continued to attend and DCPS continued to pay for Student to attend School A. School A was not actually using the IEP document in any case to implement services to Student. Rather, School A uses a document entitled a Compass to program for Student's academic and social and related services needs.

Consequently, the Hearing Officer concludes that Respondent sustained the burden of persuasion by a preponderance of the evidence that the IEPs were reasonably calculated to provide Student educational benefit and enable a Student to make appropriate progress in light of the Student's circumstances because the IEP continued to prescribe an appropriate LRE and Student continued to attend School A where Petitioners wanted Student to attend.

The IEP team agreed at the May 1, 2018, meeting to conduct evaluations and DCPS granted Petitioner authorization to obtain independent evaluations. These evaluations were apparently completed in June 2018 and DCPS had all of them by late June 2018. However, DCPS had not convened a meeting to review the evaluations prior to Petitioner filing this due process complaint. The Hearing Officer directs in the order below that DCPS convene a meeting to review the evaluations, update Student's IEP and determine an appropriate placement and location of services for Student.

ISSUE 3: Whether DCPS denied the student a FAPE by failing to offer an appropriate educational placement/program for SY 2018-2019 because:
(a) the educational placement chosen unilaterally by DCPS is unable to implement the IEP as it is written; and/or
(b) The educational placement in the CES program directly contradicts the ruling of the Hearing Officer in the January 20, 2018, HOD regarding the inappropriateness of the CES program; and/or
(c) Even without considering the HOD, DCPS knew or should have known, from the data available to the team by August 14, 2018, that the CES program at School B was inappropriate for Student; and/or
(d) DCPS illegally delegated the educational placement/program decision to a team that did not include the parents or a team knowledgeable about Student, depriving the parents of their right to participate in the placement decision.

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

As stated, 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, *Endrew 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.

In determining the educational placement of a child with a disability, each public agency must ensure that the placement decision (1) is made by a group of persons, including the parents, and other persons knowledgeable about the child, the meaning of the evaluation data, and the placement options; (2) is made in conformity with the Least Restrictive Environment ("LRE") provisions of the IDEA that mandate that to the maximum extent possible, disabled children are to be educated with their nondisabled peers and that special classes, separate schooling, or other removal of children with disabilities from the regular educational environment occurs only if the nature or severity of the disability is such that education in regular classes with the use of supplementary aids and services cannot be achieved satisfactorily; (3) is determined annually; (4) is based on the child's IEP; and (5) is as close as possible to the child's home. 34 C.F.R. 300.114, 34 C.F.R. 300.116.

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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).

The evidence demonstrates that DCPS sent an LOS letter to Petitioners informing them that the CES program at School B had been identified as the location where Student's IEP was to be implemented for SY 2018-2019. In response to Petitioners' notification of unilateral placement, DCPS asserted that it had made an offer of FAPE to Student. The evidence clearly demonstrates otherwise.

Based on credible testimony from Petitioner, the CES program at School B included Students functioning at a significant lower level than Student and the program appeared to be comparable to the CES classroom Student had been in during SY 2016-2017, which had previously proved to be inappropriate for Student. In addition, the evidence demonstrates that the CES program DCPS offered for SY 2018-2019 is located in a DCPS school and the program is not a separate special education school as Student's June 15, 2018, IEP prescribes. The LOS DCPS chose is unable to implement Student's IEP as written. Based on these factors alone the Hearing Officer concludes that DCPS offered an inappropriate location of services to Student for SY 2018-2019, and Petitioners were justified in their continued unilateral placement of Student at School A. Thus, the Hearing Officer concludes Student was denied a FAPE as a result of DCPS proposing to implement Student's IEP in the CES program at School B.

The Hearing Officer does not conclude, however, that Respondent denied Student a FAPE because the CES program directly contradicts the ruling of the Hearing Officer in the January 20, 2018, HOD and/or the evaluation data available to the team by August 14, 2018; and/or DCPS illegally delegated the educational placement/program decision to a team that did not include the parents or a team knowledgeable about Student.

First, the January 20, 2018, HOD determined that DCPS has failed to demonstrate the CES programs at the schools presented at that hearing were inappropriate. That Hearing Officer did not conclude that any and all DCPS CES programs were inappropriate for Student.

Second, the evidence demonstrates that Petitioner participated in the May 1, 2018, meeting and the team determined that evaluations would be conducted. Although the evaluation reports were disclosed, there was no testimony at the hearing regarding the evaluation results or recommendations. Thus, the Hearing Officer does not conclude, not withstanding the discussion above regarding Student's LRE, that the data available to a team by August 14, 2018, demonstrated that any and all DCPS CES programs were inappropriate for Student.

The evidence also demonstrates that at the May 1, 2018, meeting Student's LRE in a separate school was determined and is reflected in both the IEPs dated May 1, 2018, and June 15, 2018. Although Petitioner's were not involved in DCPS' inappropriate determination of Student's

location of services for SY 2018-2019, the location in which an IEP is to be implemented is a decision in which parental participation is not required.[9] Petitioners have taken advantage of, and prevailed in, their available recourse as a result of the LEA choosing an inappropriate location of services for Student.

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.)

Under the IDEA, parents who unilaterally decide to place their disabled child in a private school, without obtaining the consent of local school officials, "do so at their own financial risk." *Florence County Sch. Dist. Four v. Carter*, 510 U.S. 7, 15, 114 S.Ct. 361, 126 L.Ed.2d 284 (1993) (quoting *Sch. Comm. of the Town of Burlington v. Dep't of Educ.*, 471 U.S. 359, 374, 105 S.Ct. 1996, 85 L.Ed.2d 385 (1985)). "As interpreted by the Supreme Court, IDEA requires school districts to reimburse parents for their private-school expenses if (1) school officials failed to offer the child a free appropriate public education in a public or private school; (2) the private-school placement chosen by the parents was otherwise "proper under the Act"; and (3) the equities weigh in favor of reimbursement—that is, the parents did not otherwise act "unreasonabl[y]." *Leggett v. District of Columbia*, 793 F.3d 59, 66–67 (D.C. Cir. 2015)(citing Carter, supra, 510 U.S. at 15–16, 114 S.Ct. 361; 20 U.S.C. § 1412(10)(C)(iii)(III)).

The evidence in this case demonstrates that although School A is not an separate special education school and does not have a OSSE C. of A., it can and has provided Student with academic instruction and social skills development that has benefitted Student. It was also previously determined in the January 20, 2018, HOD that School A met the criteria for parental reimbursement. DCPS thereafter took on direct payment for Student's attendance at School A and has continued to pay pursuant to the stay put order of the undersigned Hearing Officer. Consequently, the Hearing Officer concludes that DCPS should continue to fund Student at School A during SY 2018-2019 until DCPS complies with the directives in the order below regarding Student's IEP, placement and location of services.

Petitioners have requested reimbursement for the expenses incurred for Student to attend a program in lieu of ESY for summer 2018 in the amount of $204.00 and reimbursement for the travel expenses for transporting Student to and from School A from the start of SY 2018-2019 until DCPS transportation took effect on or near October 15, 2018. The Hearing Officer concludes that is reasonable to reimburse Petitioners for the costs of taking Student from home to school, returning home and returning to School A from home to take Student home after school ended. This seems reasonable compensation and consistent with DCPS' reimbursement policy

[9] See T.*Y. v. N.Y.C. Dep't of Educ*., 584 F.3d 412, 419 (2d Cir. 2009). Cf. *A.W. ex rel. Wilson v. Fairfax Cnty. Sch. Bd*., 372 F.3d 674, 683 n.10 (4th Cir. 2004)(suggesting parents do not have rights to select school); *White v. Ascension Parish School Board*, 343 F.3d 373 (5th Cir. 2003)(same).

to take a student to and from school. The Hearing Officer finds it unreasonable to also reimburse for the additional mileage of Student's father traveling to and from work.

Because there were no other expenses incurred by Petitioners as presented during the hearing, the Hearing Officer does not see any basis grant any reimbursement for Student attending School A during SY 2018-2019, as pursuant to the stay put order and the order below, DCPS has been responsible for direct payment of Student attendance at School A for SY 2018-2019 thus far, and there is no evidence that Petitioners have incurred any other costs for Student attendance at School A during this period.

ORDER: [10]

1. DCPS shall, effective with the issuance of this order, continue to make and/or facilitate direct payment to the School A [redacted] for Student's attendance at the School A for SY 2018-2019 until DCPS has otherwise complied with the remainder of this order regarding updating Student's IEP and determining an appropriate placement and location of services.

2. DCPS shall, within thirty (30) calendar days of Petitioners providing DCPS documentation of payment, reimburse Petitioners for the program Student attended during summer 2018, in an amount not to exceed $204.00, and Petitioners' transportation costs, at the customary rate for transporting Student from Student's home to School A and returning home (including mileage for the parent returning home and then going back to the school to retrieve Student, for a total not to exceed 32 miles per day) for the days that Petitioners provided Student transportation from the start of SY 2018-2019 until DCPS transportation took effect on or near October 15, 2018.

3. DCPS shall, within 30 business days of the issuance of this order, convene an IEP team meeting to review evaluations of Student that have been conducted and review Student's IEP and revise it as appropriate as result of the team's review of the evaluations and determine an appropriate placement and location of services for Student for the remainder of SY 2018-2019.

4. Within ten (10) business days of the issuance of this order Petitioners shall provide DCPS the requisite consent(s) and/or release(s) of Student's records and/or observations as required for DCPS to effectuate provision # 3 above.

5. In effectuating provision # 3 above, if it is determined Student's placement will not be School A, until such time that an appropriate placement and location of services is identified and a transition plan is developed by DCPS for Student to move to that placement and location of services, DCPS shall continue to fund Student at School A through the end of SY 2018-2019.

[10] 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.

6. All other relief requested by Petitioner is denied.

APPEAL PROCESS:

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

/S/ *Coles B. Ruff*

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Coles B. Ruff, Esq.
Hearing Officer
Date: November 26, 2018

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