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**Confidential**

<p>Parents on Behalf of Student,</p> <p>Petitioners,</p> <p>v.</p> <p>District of Columbia Public Schools          (“LEA”)</p> <p>Respondent.</p> <p>Case # 2018-0035</p> <p>Date Issued: September 28, 2018</p>	<p>CORRECTED HEARING          OFFICER’S          DETERMINATION <sup>1</sup></p> <p>Hearing Dates:          August 20, 2018          August 21, 2018          August 22, 2018</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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<sup>1</sup> 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, September 28, 2018, 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 August 20, 2018, August 21, 2018, and August 22, 2018, at the District of Columbia Office of the State Superintendent of Education (“OSSE”) Office of Dispute Resolution 1050 First Street, N.E., Washington, D.C. 20003, in Hearing Room 112. The parties submitted written closing arguments on September 7, 2018.<sup>2</sup>

## **BACKGROUND AND PROCEDURAL HISTORY:**

The student or (“Student”) is age \_\_\_\_\_ and in grade \_\_\_\_\_.<sup>3</sup> Student’s parents (“Petitioners”) reside in the District of Columbia. Student has been determined eligible for special education and related services pursuant to IDEA with Multiple Disabilities (“MD”) including Autism Spectrum Disorder (“ASD”) and Other Health Impairment (“OHI”). District of Columbia Public Schools (“DCPS”) is Student’s local educational agency (“LEA”). Near the start of school year (“SY”) 2016-2017, Petitioners unilaterally placed Student at a residential treatment center (“RTC”) hereafter referred to “School A”.

Petitioners and DCPS agree that since October 2012 Student’s least restrictive environment (“LRE”) is an RTC. DCPS developed an individualized educational program (“IEP”) for Student on September 1, 2016, and thereafter sought to place Student in an RTC. However, ongoing disputes about Student’s needs, the appropriateness of RTCs that DCPS explored and/or attempted to place Student, the accuracy of the information proposed to be sent to the RTCs, and Petitioners consent to send such information or the lack thereof, has resulted in DCPS not placing Student at an RTC. As a result, Student has remained at School A since Petitioners unilaterally placed Student there in September 2016.

Since September 1, 2016, the parties have convened multiple IEP meetings to consider additional data regarding Student that has principally been provided by School A. On January 8, 2018, DCPS proposed an IEP meeting for January 24, 2018. The parties agreed to reconvene on February 15, 2018. The IEP meeting proceeded on February 15, 2018, and DCPS developed an IEP for Student.

A day prior to the IEP meeting, on February 14, 2018, Petitioners filed this due process complaint asserting DCPS had denied Student a free appropriate public education (“FAPE”)

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<sup>2</sup> On September 18, 2018, Petitioner’s counsel submitted a rebuttal to Respondent’s closing arguments, contrary to what was agreed upon by the parties and ordered by the Hearing Officer at the conclusion of the hearing regarding closing arguments. On September 20, 2018, Respondent’s counsel filed a motion to strike Petitioner’s rebuttal. On September 21, 2018, Petitioner’s counsel filed a response to Respondent’s motion. Any and all filings that were made by either party in this matter after the agreed upon deadline for submissions of September 7, 2018, were considered by the Hearing Officer as untimely filed. Thus, the Hearing Officer has not and will not rule on Respondent’s motion and considers the motion moot.

<sup>3</sup> The student’s current age and grade are indicated in Appendix B.

because, inter alia, DCPS allegedly failed to propose an appropriate placement/location of services for Student for school year (“SY”) 2016-2017 and for SY 2017-2018.<sup>4</sup> Petitioners seek as relief that the Hearing Officer find that the LEA has denied Student a FAPE and order DCPS to reimburse Petitioners for the costs (including tuition, application fees, travel, and related expenses) they have incurred in placing Student at School A through the date of the decision in this case, determine that School A is Student’s “current educational placement” within the meaning of IDEA and order DCPS to place and fund Student at School A until that placement is changed by agreement between Petitioners and DCPS, or through proper IDEA procedures and to place and order DCPS to fund Student at School A prospectively.

### **LEA Response to the Complaint:**

The LEA filed a timely response to the complaint on February 23, 2018. DCPS asserts that the student has not been denied a FAPE. In its response DCPS asserted, inter alia, the following:

Since 2012, DCPS has maintained that Student’s placement/LRE is a residential placement. Petitioners filed a due process complaint on April 8, 2013, challenging, among other things, the residential program that had accepted Student. That acceptance was later rescinded because of Petitioners’ non-support of the program. The Hearing Officer adjudicating Petitioners’ complaint issued an interim order finding that for purposes of the IDEA’s stay-put provision, Student’s current educational placement was 1:1 home instruction for two hours per day, five days a week to be funded by DCPS pending the Hearing Officer’s Determination (“HOD”) in that case. The HOD was issued on May 30, 2013, dismissing Petitioners’ claims.

Petitioners filed an appeal challenging the HOD. While the appeal was pending Petitioners filed for a preliminary injunction to maintain Student’s stay-put placement. The Court granted the preliminary injunction, ordering DCPS to provide “one-on-one instruction for [Student] for two hours per day, five days per week. The order indicates that it is to remain in effect until modified by the Court or by mutual agreement of the parties. DCPS subsequently sought for the Court to vacate the November 19, 2013, order, which was denied. The appeal is still pending and the November 19, 2013, order has never been vacated.

DCPS convened an eligibility meeting on June 7, 2016, and found student eligible for special education and related services. DCPS convened an IEP meeting on August 5, 2016, to develop Student’s annual IEP. A draft IEP was provided to Petitioners in advance of the meeting. On September 1, 2016, the IEP team reconvened and finalized Student’s IEP. DCPS reiterated that it considered Student’s appropriate placement to be a residential setting and stated that it would move forward with identifying a location to implement Student’s IEP.

Petitioners raise no challenge to this IEP aside from its lack of inclusion of a school location, which is not required by the IDEA. On September 9, 2016, DCPS requested Petitioners’ consent

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<sup>4</sup> Petitioners and DCPS have been engaged in years of litigation regarding Student that has resulted in multiple HODs, District Court and D.C. Circuit Court proceedings and decisions. The current due process complaint focuses only on allegations of a denial of a FAPE to Student for SY 2016-2017 and SY 2017-2018 and not matters that were the subject of prior litigation.

to send referral packets to residential schools on the OSSE's list of approved schools. Petitioners requested additional IEP meetings and after multiple reschedules the parties still met on February 1, 2017, and developed Student's IEP. The IEP team issued a prior written notice ("PWN") reiterating DCPS' position that Student's educational placement, i.e., LRE, is residential. Petitioners raise no challenge to this IEP aside from its lack of inclusion of a school location, which is not required by the IDEA.

Petitioners provided DCPS with a consent to send records to residential schools on September 19, 2017. DCPS spent the fall and winter making referrals to residential schools on the OSSE approved list. Several schools rejected Student. One school did not reject Student but indicated on January 15, 2018, that they were at capacity and would keep Student's file open.

On January 8, 2018, DCPS proposed an IEP meeting for January 24, 2018. The parties agreed to reconvene on February 15, 2018, to permit DCPS to incorporate new data into a draft IEP. The draft IEP was sent to Petitioners on February 7, 2018, in advance of the meeting date. The day before the IEP meeting was to be held, Petitioners filed the current complaint. The IEP meeting proceeded on February 15, 2018. Student's new IEP provides that Student will be on a certificate track, a change from Student's prior IEP.

DCPS has not referred Student to residential treatment centers with this newly revised IEP that may cause schools to reconsider their prior denials of Student's admission. Further, DCPS has not referred Student to schools on OSSE's approved psychiatric residential treatment facility list. Accordingly, prospective placement is premature. DCPS asserts that the request for relief, including reimbursement and placement, is inappropriate and unwarranted.

At the outset of the Hearing, Respondent's counsel maintained that if the Hearing Officer should find in Petitioners favor, equity dictates at least a reduction of the reimbursement due to the delay in Petitioners' granting consent for DCPS to provide Student's records to potential residential placements following the development of Student's IEP in September 2016.

### **Resolution Meeting and Pre-Hearing Conference and Procedural History:**

The parties participated in a resolution meeting and did not mutually agree to proceed directly to hearing in this matter. The 45-day period began on March 16, 2018 and ended [and the Hearing Officer's Determination ("HOD") was originally due] on April 30, 2018. The parties were not available on the proposed hearing dates: April 16, 2018 and/or April 17, 2018. The parties agreed on an initial hearing date of May 14, 2018 and agreed to an extension of the HOD due date of 30 calendar days, from April 30, 2018, to May 30, 2018.

The parties appeared for hearing on May 14, 2018. At the hearing Respondent asserted that Petitioners' due process complaint should be dismissed because the Hearing Officer lacked jurisdiction due to Student's stay-put placement. Respondent asserted that the stay-put placement had been determined by a preliminary injunction by the U.S. District Court and that the injunction remained in effect unless and until the Court's order was vacated. Petitioners have previously voiced their objections when DCPS has sought to have the preliminary injunction vacated. The Hearing Officer granted Respondent leave to file a formal motion on the

jurisdictional issue.

On May 18, 2018, Respondent filed a formal motion to dismiss the complaint. On May 25, 2018, Petitioners filed an opposition to Respondent's motion to dismiss. The Hearing Officer concluded that unless and until the preliminary injunction is vacated the Hearing Officer is precluded from granting the relief that Petitioners seek. In their opposition to DCPS' motion, Petitioners asserted that they were seeking an order from the Court to vacate the preliminary injunction.

Petitioners then sought to have the U.S. District Court vacate the preliminary injunction. At this juncture, the Hearing Officer concluded that rather than dismiss Petitioners' claim without prejudice, it was administratively expeditious to continue the hearing and extend the HOD due date to allow sufficient time for Petitioners' motion to be considered and ruled upon by the Court. The Hearing Officer ordered that the matter be continued and set a hearing date that provided a reasonable time for Petitioners' motion to the U.S. District Court to be considered and ruled upon. Accordingly, on May 30, 2018, the Hearing Officer denied DCPS' motion to dismiss Petitioners' due process complaint and continued the hearing by agreement of the parties to August 2018 hearing dates.

Although the preliminary injunction had not been vacated by the August 20, 2018, hearing date, by that date DCPS had withdrawn its opposition with the Court to the preliminary injunction being vacated and agreed that Petitioners' due process complaint could proceed. The due process hearing in this matter was convened on August 20, 21, and 22, 2018. At the conclusion of both parties' respective cases, the parties agreed to submit written briefs by September 7, 2018, in lieu of oral closing arguments.

So as to provide the Hearing Officer with sufficient time to consider the evidentiary record and write this decision, the parties agreed to extend the HOD due date to September 28, 2018.

The undersigned Hearing Officer ("Hearing Officer") convened a pre-hearing conference ("PHC") on March 6, 2018 and issued a pre-hearing order ("PHO") on March 10, 2018, with a revised PHO issued on March 16, 2018, outlining, inter alia, the issues to be adjudicated.

**ISSUES:**<sup>5</sup>

The issues adjudicated are:

1. Whether DCPS denied the student a FAPE by failing to propose an appropriate placement/location of services for SY 2016-2017.
2. Whether DCPS denied the student a FAPE by failing to propose an appropriate placement/location of services for SY 2017-2018.

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<sup>5</sup> The Hearing Officer restated the issues at the hearing and the parties agreed that these were the issues to be adjudicated.

3. If Petitioners prevail on one or both of the issues above, are Petitioners entitled to the requested relief or any portion thereof.<sup>6</sup>

**RELEVANT EVIDENCE CONSIDERED:**

This Hearing Officer considered the testimony of the witnesses and the documents submitted in each party's disclosures (Petitioner's Exhibits 1 through 206 and Respondent's Exhibits 1 through 102) that were admitted into the record and are listed in Appendix 2.<sup>7</sup> The witnesses testifying on behalf of each party are listed in Appendix B.<sup>8</sup>

**SUMMARY OF DECISION:**

Petitioners had the burden of production on the issues adjudicated. The burden of persuasion fell to Respondent as to issues #1 and #2 after Petitioner met a prima facie case. Respondent did not sustain the burden of persuasion by a preponderance of the evidence on issues # 1 and #2. As the PHO noted, if Petitioners prevailed on one or both issues, Petitioners held the burden of establishing the appropriateness of the requested relief.

The Hearing Officer grants Petitioners' reimbursement for Student's placement at School A for SY 2016-2017 and 2017-2018. However, the Hearing Officer did not grant Petitioners' requested relief that School A be Student's prospective placement. The Hearing Officer concluded that because School A does not currently have an OSSE certificate of approval ("C of A") and there was sufficient evidence that there are appropriate RTCs for Student that have an OSSE C of A, the Hearing Officer directs that the parties promptly and cooperatively work to identify and place Student at such an appropriate placement. Petitioners are directed in the order below to provide DCPS with all required consent(s)/release(s) to allow DCPS/OSSE to identify and place Student in an appropriate residential placement.

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<sup>6</sup> Issue #3 is discussed and decided under the Relief section of this HOD.

<sup>7</sup> Any item disclosed and not admitted or admitted for limited purposes was noted on the record and is noted in Appendix A.

<sup>8</sup> Petitioner presented seven witnesses: (1) One of Student's parents ("Parent"), (2) a representative of the residential component of School A, (3) a representative of the educational component of School A, (4) an educational consultant who testified as an expert witness, (5) the center director of Lindamood Bell, (6) an attorney for School A, and (7) another educational consultant who testified as an expert witness. Respondent presented three witnesses: (1) a DCPS education specialist who testified as an expert witness, (2) a DCPS program manager who testified as an expert witness, and (3) the DCPS resolution team manager.

## **FINDINGS OF FACT:<sup>9</sup>**

1. Petitioners reside in the District of Columbia. Student, Petitioners' child, has been determined eligible for special education and related services pursuant to IDEA with MD disability classification including ASD and OHI. DCPS is Student's LEA. Near the start of school year SY 2016-2017, Petitioners unilaterally placed Student at School A, an RTC located outside the District of Columbia. Student has remained at School A ever since. (Parent's testimony, Respondent's Exhibit 74, Petitioner's Exhibit 57)
2. Since October 31, 2012, DCPS has maintained that Student's placement, and LRE is a residential placement. Petitioners filed a due process complaint on April 8, 2013, challenging, among other things, the residential program that had accepted Student. The Hearing Officer adjudicating Petitioners' complaint issued an interim order finding that for purposes of the IDEA's stay-put provision, Student's current educational placement was 1:1 home instruction for two hours per day, five days a week to be funded by DCPS pending the HOD in that case. The HOD was issued on May 30, 2013, dismissing Petitioners' claims. (Respondent's Exhibits 1-1, 1-4, 1-5, 2-1, 2-17, 2-40)
3. Petitioners filed an appeal challenging the HOD. While the appeal was pending Petitioners filed for a preliminary injunction to maintain Student's stay-put placement. The Court granted the preliminary injunction ordering DCPS to provide "one-on-one instruction for [Student] for two hours per day, five days per week. The order indicates that it is to remain in effect until modified by the Court or by mutual agreement of the parties. To date the November 19, 2013, order of the Court has not been vacated.<sup>10</sup> (Respondent's Exhibit 3)
4. On June 23, 2016, Student was found eligible for special education and related services under the disability classification of multiple disabilities, including autism spectrum disorder, hearing impairment and OHI. (Respondent's Exhibits 32, 33)
5. Subsequent to the meeting, DCPS provided Petitioners with an authorization for an independent evaluation ("IEE") for an occupational therapy ("OT") evaluation. (Respondent's Exhibit 34)
6. DCPS offered to convene an IEP meeting in July 2016. (Respondent's Exhibit 35)
7. DCPS convened an IEP meeting on August 5, 2016. Petitioners informed DCPS there would need to be another meeting to complete the IEP. The team was unable to finish the

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<sup>9</sup> The evidence (documentary and/or testimony) that is the source of the Findings of Fact ("FOF") is noted within a parenthesis following the finding. Exhibit numbers are used to identify documents. The second number following the exhibit number denotes the page of the exhibit from which the fact was extracted. When citing an exhibit that has been submitted by more than one party separately, the Hearing Officer may only cite one party's exhibit.

<sup>10</sup> The Court specifically Ordered that "[DCPS] is directed to immediately take all actions necessary to provide one-on-one instruction for [Student] for two hours per day, five days per week, at Lindamood-Bell Learning Processes, commencing effective August 8, 2013 and continuing until further notice, and it is Further ordered that this Order will remain in effect unless modified by the Court or by mutual agreement of the parties, during the pendency of all proceedings in the above captioned case."

development of the IEP and agreed to reconvene on September 1, 2016. (Respondent's Exhibits 36, 37, 39)

8. For some time, Petitioners had searched for an appropriate placement for Student, and in 2016 Student's parent became aware of School A and immediately conducted some research and eventually engaged in the School A's admission process. School A conducted an extensive parent interview and then School A sent two individuals to D.C. to meet, spend time with, and observe Student. The parent later traveled to School A with Student for a site visit. School A was not in session, but the parent saw the residential component. (Parent's testimony)
9. On August 15, 2016, Petitioners, through counsel, provided DCPS notice that Student had been accepted to School A and that a September 2018 admission might be feasible. Petitioners requested that DCPS agree to place and fund Student at School A and requested a response by the scheduled September 1, 2016, IEP meeting. (Petitioner's Exhibit 56)
10. Petitioner provided an independent occupational therapy evaluation to DCPS on August 24, 2016. (Respondent's Exhibit 44-2)
11. After Student's acceptance to School A, there was not an immediate bed available for Student at School A. During Student's September 1, 2016, IEP meeting Petitioners discussed School A with the IEP team. The team expressed optimism that School A could be considered as a possible placement for Student. The team discussed the possibility of Student's placement at School A even though School A did not have an OSSE Certificate of Approval ("C of A"). (Parent's testimony)
12. At the September 1, 2016, IEP meeting the team finalized Student's IEP, which provided for 26.5 hours per week of specialized instruction outside of general education, 8 hours per month of behavioral support services outside of general education, 360 minutes per month of occupational therapy services outside of general education, 240 minutes per month of speech and language services outside of general education, parent training consultative services and a dedicated aide. (Respondent's Exhibit 44, Petitioner's Exhibit 61, 62)
13. DCPS reiterated that it considered Student's appropriate placement to be a residential setting and stated that it would move forward with identifying a location to implement Student's IEP. (Respondent's Exhibit 44)
14. School A notified Petitioners it would have a space for Student after September 5, 2016. Following an incident in which Student engaged in unsafe behaviors, Petitioners' increased concerns about Student's safety caused Petitioners to conclude Student needed to be placed in an residential setting right away and thus, unilaterally placed Student at School A on September 6, 2016. (Parent's testimony)
15. On September 9, 2016, DCPS requested Petitioners' consent to send referral packets to residential schools on the OSSE's list of approved schools. (Respondent's Exhibit 45-3)
16. Petitioners, through counsel, responded on September 14, 2016, and requested another IEP meeting. (Respondent's Exhibit 45-1, 45-2)

17. DCPS replied on September 15, 2016, and expressed a willingness to convene another meeting or to wait at least a month so that a larger sample size of information, data, and observations at School A would be available. DCPS again requested consent to send out referral packets to residential schools on the OSSE approved list. (Respondent's Exhibit 45-2)
18. On September 29, 2016, DCPS identified three residential schools and emailed Petitioners indicating that it sought consent to send the schools Student's IEP and evaluations. (Respondent's Exhibit 46-1)
19. On October 10, and 13, 2016, Petitioners again requested another IEP meeting but did not provide consent for DCPS to refer Student to any residential placements. Petitioners expressed reservations about the proposed schools and requested a phone conversation to discuss the schools. (Witness 9's testimony, Respondent's Exhibit 47-2)
20. On October 14, 2016, DCPS offered to convene a telephone conference to discuss the referrals. Once again on October 27, 2016, DCPS offered Petitioners a telephone conference on the following day with DCPS' Non-Public Unit Director to discuss all referrals. (Respondent's Exhibits 47, 48)
21. Petitioners' counsel had to reschedule, and a conference call was ultimately held on November 15, 2016. (Respondent's Exhibit 48, 49)
22. DCPS sent a consent form on November 15, 2016, to obtain records and requested the documents from School A that could be sent to prospective schools. (Respondent's Exhibit 50-1, Petitioner's Exhibit 198)
23. On December 6, 2016, DCPS proposed an IEP meeting be held on January 6, 2017. Petitioners declined that date and the parties agreed to convene an IEP meeting on February 1, 2017. (Respondent's Exhibit 51-1)
24. On January 31, 2017, Petitioners, through counsel, provided DCPS with educational documents from School A. (Respondent's Exhibit 53)
25. The parties met on February 1, 2017, and developed Student's IEP, which provided for 28.5 hours per week of specialized instruction outside of general education, 240 minutes per month of speech and language services outside of general education, 360 minutes per month of occupational therapy services outside of general education, 360 minutes per month of behavioral support services outside of general education and parent counseling, audiology, speech and OT consultative services. The IEP also provides for assistive technology and a dedicated aide. (Respondent's Exhibits 54, 55)
26. The IEP team issued a PWN reiterating DCPS' position that Student's educational placement, i.e., LRE, is residential. The parties disputed whether Student should be on a diploma or certificate track, with Petitioner insisting that Student remain on a diploma track. (Witness 7's testimony, Petitioner's Exhibit 76)
27. In spring 2017, two DCPS representatives traveled to School A to observe Student. The DCPS representatives met with School A staff but were not afforded the opportunity to meet Student or observe Student, rather they were provided a sequence of very short videos mainly of Student in a classroom setting working in a group on various tasks,

mainly functional skills. They did not observe any academic instruction provided Student. In the videos, Student was demonstrating safe behaviors. The representatives were given a tour of the main school building but did not tour the residential setting. (Witness 8's testimony)

28. Based upon the visit, the DCPS representatives concluded that Student requires consistent access to a staff member during the entire day at school and in the residential setting. The level of severity of Student's behavior was severe requiring physical management procedures to be implemented regularly and sometimes it takes more than one person to de-escalate Student. The representative concluded that Student needed an intensive and comprehensive program and listed the requirements for such a program based on what Student was receiving at School A, Student's evaluations and records: They concluded Student needs a program with evidence-based practices such as Applied Behavior Analysis ("ABA"), teaching of communication skills with visual supports and technology, and a team with a variety of professionals to teach skills. The DCPS representatives reviewed the list of OSSE approved residential programs that would meet Student's needs and visited one. They then wrote a report that included a list of other residential schools that have an OSSE C of A that can provide services to Student comparable to what is being provided Student at School A. (Witness 8's testimony, Respondent's Exhibit 56)
29. Beginning in April 2017, DCPS, through counsel, informed Petitioners of the type of documents it intended to send as part of referral packets. Petitioners, through counsel, responded and indicated Petitioners had more questions and did not grant the consent requested. Petitioners' counsel pointed out to DCPS that in requesting consent DCPS had not complied with the specific requirements for release of documents under 5E D.C.M.R. § 2605 et seq. (Petitioners' Exhibits 77, 78)
30. Prior to the start of SY 2017-2018, DCPS provided Petitioners with two consent forms to permit it to send referral packets with Student's records to residential schools. (Respondent's Exhibit 57, Petitioner's Exhibit 80)
31. On December 5, 2017, DCPS sought records from Petitioners in advance of Student's annual IEP meeting. (Respondent's Exhibit 61)
32. On December 11, 2017, DCPS proposed an IEP meeting for January 5, 2018, and again requested records. DCPS then proposed later dates in January 2018, for the IEP meeting. (Respondent's Exhibit 61)
33. DCPS spent the fall and winter making referrals to residential schools on the OSSE approved list. Several schools rejected Student. One school did not reject Student, but indicated on January 15, 2018, that they were at capacity and would keep Student's file open. (Witness 9's testimony, Respondent's Exhibits 58, 59, 60, 63, 64, 65, 68, 99)
34. Petitioners then asked for DCPS to place Student at School A. DCPS wanted to update Student's IEP and extend the search to additional RTCs on the OSSE list. (Parent's testimony)

35. On January 8, 2018, DCPS proposed an IEP meeting for January 24, 2018. On January 16, 2018, the day before a draft IEP was due to Petitioners, Petitioners provided updated documents to DCPS from School A. (Respondent's Exhibit 67)
36. DCPS provided a draft IEP on January 17, 2018, that did not incorporate the updated data, and proposed that the meeting proceed with the team incorporating the data at the meeting. The parties agreed to reconvene on February 15, 2018, to permit DCPS to incorporate new data into a draft IEP. The draft IEP was sent to Petitioner on February 7, 2018. (Respondent's Exhibits 70, 71)
37. The day before the February 15, 2018, IEP meeting was to be held, Petitioner filed the current due process complaint. The IEP meeting proceeded on February 15, 2018, and DCPS developed an IEP for Student. Student's new IEP provided that Student would be on a certificate track, a change from Student's prior IEP. The parties did not agree to finalize the IEP, and DCPS requested that Petitioners' educational consultant provide written input before finalizing the IEP. DCPS agreed to convene a follow-up IEP meeting on April 12, 2018. (Parent's testimony, Respondent's Exhibits 75, 76)
38. The day of the meeting, Petitioners provided new documents from School A for the team to consider. (Respondent's Exhibit 77)
39. DCPS generated an amended IEP on April 25, 2018, after Petitioner provided a marked-up amendment on April 23, 2018, and a request from Petitioner for another IEP meeting. (Respondent's Exhibits 78, 80)
40. On April 26, 2018, DCPS provided Petitioners eleven consent forms and requested that Petitioners provide consent to DCPS to send Student's records to all RTCs and psychiatric residential treatment facilities ("PRTFs") on OSSE's lists. (Respondent's Exhibits 81)
41. Over the next few months, Petitioners engaged in ongoing correspondence about consent forms and Student's IEP. (Respondent's Exhibits 82, 84, 89, 91, 93)
42. DCPS convened another IEP meeting on August 8, 2018, and amended Student's IEP. (Respondent's Exhibits 96, 101)
43. Petitioners, through counsel, agreed to provide the requested consent for one identified residential school in an August 1, 2018, email. However, Petitioners have yet to provide a recent written consent to DCPS on any RTC to which Student's records will be sent for consideration of Student's admission. DCPS has not referred Student to residential treatment centers with Student's newly revised IEP that may cause schools to reconsider their prior denials of Student's admission. DCPS also has not referred Student to schools on OSSE's approved PRTF list. (Parent's testimony, Witness 9's testimony, Respondent's Exhibit 97-1)
44. Petitioners have heightened concern and have been diligent in investigating the proposed schools for Student because research has uncovered that at least one RTC that was proposed by DCPS was investigated for child abuse. Petitioners also want to ensure that Student is placed in an RTC that will address Student's unique needs. Consequently, Petitioners are not simply relying upon that fact that a proposed RTC holds an OSSE C of A., and have insisted upon supplying accurate and timely information to referral

schools and investigating whether a particular residential placement can meet Student's unique needs. (Parent's testimony, Witness 3's testimony, Witness 6's testimony)

45. Petitioners currently visit Student at School A once per month, have a phone call with Student once per day, and send and receive emails to and from Student. Student loves it at School A, has friends, and has better control of Student's self and behaviors. Student has reported to parent Student's improved behavior and the fact that Student can more readily voice frustration with School A staff and come up with a solution rather than displaying aggression. School A maintains a daily log for each class of what and how Student is doing both in school and the residence. Petitioners are provided bi-weekly reports from staff. There is both a behavior plan and instructional plan that has been developed for Student at the school and the residence at School A. (Parent's testimony)
46. School A provides a language-based educational program to address the academic and behavioral needs of students on the autism spectrum and relies on ABA treatments and interventions. The school serves students ages 3 to 22 on a 32-acre campus. There are sensory rooms and access to outside playgrounds and therapeutic areas. The staff to student ratio differs depending on needs of a given student. Some students have 1 to 1 support. (Witness 2's testimony)
47. When Student first arrived at School A, Student did not engage in the routine easily and did not attend school right away. School A makes changes to Students' program as needed. Sometimes these changes occur on a weekly basis. Student's progress is monitored daily, weekly, monthly. Student is provided direct instruction in reading and math. Student's current education plan does not include much written expression because of Student's OT deficits. However, Student is successful at typing. (Witness 2's testimony)
48. Student's school day was gradually increased in half-hour increments over five months to get Student to a full day of school by January 2017. Student is now able to complete a lesson a day whereas before it would take Student two to three days to complete a lesson in a math concepts program. Student's rate of progress is consistent and Student has greater strength in reading than math. Student receives 8 to 10 hours of academic instruction per week. Student was in a group of 4 students and none of the students in Student's classroom are on high school diploma track. Student is learning foundational academics and working on functional writing skills. Informal instruction is imbedded in Student's school day. (Witness 1's testimony, Witness 2's testimony)
49. Student's program includes one-half hour of reading and math daily, along with swimming, science, art therapy, music therapy, recreation therapy, and functional communication training. On average, Student has 30% group instruction and 60% one-to-one instruction, especially with respect to reading and math. Student is reading and performing math at a first-grade level. The School A academic team meets weekly along with the intervention specialist and residence staff to review Student's progress. Student is also engaged in a plan to increase Student's productive interaction with other students. (Witness 2's testimony)

50. School A Staff is trained in therapeutic crisis intervention. Student has an aversion to noise and is generally unaware of social boundaries, is aggressive toward others and engages in self-injurious behaviors and property destruction. Student is impulsive, quick to escalate, and becomes unaware of surroundings. Student's physical aggression and self-injurious behaviors fluctuates, but it could be that it occurs as much now as it did when Student arrived at School. A staff person is with Student during waking hours seven days a week. Student also has an aide at school. (Witness 1's testimony, Witness 2's testimony)
51. School A does not currently have an OSSE C of A. School A is approved by the state in which it located. The attorney responsible for licensure for School A was asked to pursue the OSSE approval for School A when Student was admitted. As a part of her responsibility, she vets how state rates are set and negotiated. She inquired of OSSE regarding obtaining a C. of A. and spoke with a contact person at OSSE and asked for description of the approval process. She was informed there is an OSSE rate cap and it is less than School A's current rates and that there is no waiver. As a result, she informed the requesting party that School A could not proceed with the OSSE approval process. The difference in the School A and the OSSE rate was more than a \$100 difference in the daily rate that School A charges. (Witness 5's testimony)
52. From the time the Student arrived at School A in September 2016 until April 2018, Petitioners have incurred the costs of Student attending and residing at School A and their expenses for traveling to see Student at School A in to amount of approximately, \$546, 941.16, of which to date, Petitioners have paid \$357,502.91. (Petitioners' Exhibit 178)

#### **CONCLUSIONS OF LAW:**

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

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

34 C.F.R. § 300.17 provides:

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

and (d) Are provided in conformity with an individualized education program (IEP) that meets the requirements of Sec. 300.320 through 300.324.

Pursuant to 5E DCMR 3030.14 the burden of proof is the responsibility of the party seeking relief. *Schaffer v. Weast*, 546 U.S. 49, 126 S.Ct. 528 (2005). In this case, Petitioners carry the burden of production on issues #1 & #2. Respondent held the burden of persuasion on issues #1 & #2 after Petitioner established a prima facie case. Petitioner held the burden of persuasion on issue #3 regarding the requested relief.<sup>11</sup> The normal standard is preponderance of the evidence. See, e.g. *N.G. V. District of Columbia* 556 f. Sup. 2d (D.D.C. 2008) se also 20 U.S.C. §1451 (i)(2)(C)(iii).

**ISSUE 1:** Whether the DCPS denied the student a FAPE by failing to propose an appropriate placement/location of services for SY 2016-2017.

**Conclusion:** Petitioners met the burden of production and established a prima facie case. Respondent did not sustain 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.

"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."

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

In *Andrew F. ex rel. Joseph F. v. Douglas City Sch. Dist.* RE-1, 137 S. Ct. 988 (2017), the U.S. Supreme Court elaborated on the "educational benefits" requirement pronounced in *Rowley*. To meet its substantive obligation under the IDEA, a school must offer an IEP reasonably calculated to enable a child to make progress appropriate in light of the child's circumstances. . . . Any

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<sup>11</sup> Issue #3 is discussed and decided under the Relief section of this HOD.

review of an IEP must appreciate that the question is whether the IEP is reasonable, not whether the court regards it as ideal. . . . When a child is fully integrated in the regular classroom, as the Act prefers, what that typically means is providing a level of instruction reasonably calculated to permit advancement through the general curriculum. . . . If that is not a reasonable prospect for a child, his IEP need not aim for grade-level advancement. But his educational program must be appropriately ambitious in light of his circumstances, just as advancement from grade to grade is appropriately ambitious for most children in the regular classroom. The goals may differ, but every child should have the chance to meet challenging objectives. *Andrew F.*, supra, 137 S. Ct. at 999–1000 (citations omitted).

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

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 IDEA requires that children with disabilities receive education in the regular classroom whenever possible” *Z.B. v. District of Columbia*, 888 F.3d 515 (D.C. Cir. 2018) citing *Andrew F.*, supra, 137 S. Ct. at 999 (quoting *Rowley*, 458 U.S. at 202)

In determining the educational placement of a child with a disability, each public agency must ensure that the placement decision is made by a group of persons, including the parents, and other persons knowledgeable about the child, the meaning of the evaluation data, and the placement options; and is made in conformity with the Least Restrictive Environment provisions of the IDEA; and the public agency must ensure that the child's placement is determined at least annually, is based on the child's IEP, and is as close as possible to the child's home. See 34 C.F.R. § 300.116.

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 City 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).

“Educational placement” means educational program, not the particular institution where that program is implemented.” *White v. Ascension Parish School Board*, 343 F.3d 373 (5<sup>th</sup> Cir. 2003), 39 IDELR 182. A placement is not a physical location, but a program of educational services offered to the student. *Sherri A.D. v. Kirby*, 19 IDELR 339 (5th Cir. 1992).

As previously stated, Petitioners have not challenged the appropriateness of the IEP that DCPS developed for Student on September 1, 2016, for SY 2016-2017. Rather, Petitioners assert that DCPS has denied Student a FAPE because DCPS did not provide a placement or location at which Student's IEP could be implemented.

The evidence reflects that the parties have engaged in protracted litigation for a number of years. In fact, when Petitioners filed the current due process complaint that prior litigation remained pending and resulted in this due process hearing being delayed by months because there was no agreement by the parties, at least to this Hearing Officer, that Student's current placement was a residential placement. The parties, having finally agreed that the hearing on the due process complaint could proceed and the issues alleged by Petitioner could be adjudicated, have in essence engaged in a dispute about "who did, or did not, do what by when?"

Specifically, Petitioners allege that DCPS has failed to identify an appropriate residential placement for Student where Student's IEP can be implemented and where Student's unique needs can be met. On the other hand, DCPS asserts Petitioners have frustrated the placement process by delay and refusing to grant the requested consent so that a placement can be identified.

The evidence demonstrates that an IEP was developed for Student on September 1, 2016, that prescribed that Student's LRE was a residential placement, and that DCPS wanted to immediately identify prospective residential placements for Student to attend. By that time, as result of Petitioners' own research Petitioners had identified School A and had unilaterally placed Student at School A on September 6, 2016. Although there was some notification and discussion about School A with DCPS prior to the unilateral placement and there appears to have been discussion about School A seeking OSSE approval, those efforts appear to have been unsuccessful when School A's attorney abandoned the approval over an apparent disparity between School A rates and OSSE rates.

As a result, DCPS repeatedly sought Petitioners' approval to send Student's IEP and records to potential residential placements for their consideration. Student's parents rightfully were invested in ensuring that any placement that was considered would be able to meet Student's needs. DCPS acquiesced to Petitioners' request to convene another IEP meeting to consider information that might be provided by School A in making a determination about Student's needs in the selection process of an appropriate residential placement.

It appears that based on Petitioners' own research about, and visit to, School A as well as School A staff's visit to meet and observe Student, Petitioners were at least hopeful, if not convinced, that School A could meet Student's needs. Despite how diligent Petitioners believe their efforts to find an appropriate placement for Student were and are, the requirements that DCPS must ensure are met in effectuating a placement are governed by a District of Columbia function carried out by OSSE to ensure the standards are met in any residential placement at which a District of Columbia LEA places a student. This function is encompassed in OSSE certificate of approval process.

It appears from the evidence that DCPS made good faith efforts to identify residential placements for Student during SY 2016-2017. However, the evidence clearly indicates that by the start of SY 2016-2017 there was in fact no residential placement that DCPS had identified, irrespective of whether Petitioners had or had not granted the requested release. Petitioners' requested and DCPS agreed to additional IEP meetings after Student was unilaterally placed at School A and agreed to gather data from School A in the IEP development process.

Whether caused by Petitioners' meeting delays and/or failure to receive required consents, or by some action or inaction on the part of DCPS, DCPS failed to successfully conduct its duty to provide a placement which met Student's LRE within a reasonable time for Student to begin attending school for SY 2016-2017. This situation necessitated Petitioners' actions of locating a placement and providing the funding for the placement by themselves.

DCPS claims this is a procedural violation rather than a substantive violation with respect to the provision of a FAPE. The Hearing Officer does not agree with DCPS' assessment. DCPS' responsibility for forward movement in determining an appropriate placement could have been and should have been more assertive, and perhaps litigious. At bottom, DCPS did not have a placement for Student for SY 2016-2017 and the Hearing Officer must conclude therefore that with the absence of such a placement, Student was denied a FAPE.

**ISSUE 2:** Whether the DCPS denied the student a FAPE by failing to propose an appropriate placement/location of services for SY 2017-2018.

**Conclusion:** Petitioners met the burden of production and established a prima facie case. Respondent did not sustain the burden of persuasion by a preponderance of the evidence on this issue.

As with 2016-2017, Petitioners have not challenged the appropriateness of the IEP that DCPS developed for Student for SY 2017-2018. Rather, Petitioners assert that DCPS has denied Student a FAPE because DCPS did not provide a placement or location at which Student's IEP could be implemented.

Prior to SY 2017-2018 Petitioner had provided DCPS consent to forward Student's records to a list of residential placements. Student was rejected by all of the schools that were selected, save one; and that School did not have a spot for Student. The parties then continued to engage in the IEP development process over the next year. Again, there was back and forth communication between the parties about the identified schools and the granting of consent. As was the case at the start of SY 2016-2017 DCPS had not identified a placement for Student and Student remained at School A and Petitioners continued to pay for School A.

As previously stated, DCPS claims this is a procedural violation rather than a substantive violation with respect to the provision of a FAPE. The Hearing Officer does not agree. DCPS' responsibility for forward movement in determining an appropriate placement could have been and should have been more assertive. DCPS did not have a placement for Student for SY 2017-2018 and the Hearing Officer concludes that the absence of such a placement for Student was denial of a FAPE.

Finally, prior the filing of the current due process complaint the parties appeared to have been on the verge of reaching agreement on an updated IEP for Student. Since this complaint was filed the parties have continued to meet and have apparently reached agreement on an updated IEP for Student for which a placement can be identified. The Hearing Officer urges the parties and directs them in the order below to work cooperatively to promptly identify an appropriate residential placement for Student for SY 2018-2019.

**Remedy:**

A hearing officer may award appropriate equitable relief when there has been an actionable violation of IDEA. *See* 20 U.S.C. § 1415(f)(3)(E)(ii)(II); *Eley v. District of Columbia*, 2012 WL 3656471, 11 (D.D.C. Aug. 24, 2012) (citing *Branham v. District of Columbia*, 427 F.3d at 11–12.) The Hearing Officer has concluded that the student was denied a FAPE by DCPS and has directed that DCPS in the order below remedy that denial.

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)).

In the Hearing Officer’s opinion, absent a residential placement, it was reasonable for Petitioners to have placed Student at School A in both SY 2016-2017 and SY 2017-2018. The Hearing Officer concludes that the evidence supports a finding that School A is a private placement that is “proper under the Act” and that Petitioners are entitled to reimbursement for Student’s attendance at School A for SY 2016-2017 and SY 2017-2018.

After finding the parents of a disabled child eligible for tuition reimbursement, a court may reduce or deny reimbursement under certain circumstances. 20 U.S.C. § 1412(a)(10)(C)(iii). A court may also reduce or deny tuition reimbursement "upon a judicial finding of unreasonableness with respect to actions taken by the parents." § 1412(a)(10)(C)(iii)(III).

The Hearing Officer does not find that Petitioner’s actions warrant a reduction in reimbursement. However, there was insufficient evidence presented and explained during the hearing to substantiate each and every item that Petitioners put forth as having been expended. As Petitioners’ counsel aptly pointed out during the hearing, some of the expenses incurred and submitted may be reimbursable and some may not. Consequently, the Hearing Officer directs in the order below Petitioners to present to DCPS for payment by DCPS/OSSE all reasonable and customary expenses in accordance with DCPS/OSSE policy for review and reimbursement.

Petitioners have also asked as relief that Student be prospectively placed at School A. However, the evidence does not sufficiently support a finding that there is no residential placement that has an OSSE approval that can meet Student's unique needs and there is insufficient evidence that School A cannot seek and obtain OSSE approval. The evidence demonstrates that the reason School A abandoned its pursuit of an OSSE approval was a difference in rates. As Petitioners' counsel pointed out during hearing, when School A's itemized costs are carefully compared with OSSE rates for all services that Student is to be provided pursuant to Student's IEP, there appears to be little difference.

Consequently, despite the evidence of Petitioner's expert witnesses and that of Student's parent and the staff at School A about the services and progress that Student receives and has made at School A, the Hearing Officer will not grant Petitioners' request for Student's prospective placement at School A. The Hearing Officer directs in the order below that Petitioner fully cooperate with DCPS and promptly provide the requisite consent(s)/release(s) so that DCPS can promptly fulfill its obligation to provide Student a FAPE and that approval by OSSE of School A be pursued.

**ORDER:** <sup>12</sup>

1. Within forty-five (45) calendar days of the issuance of this Order, upon satisfactory proof of payment being provided to DCPS by Petitioners, DCPS shall reimburse Petitioners their costs of the student's attendance at School A consistent with OSSE rates, and any additional and customary expenses associated with Student's attendance at School A for SY 2016-2017 and SY 2017-2018 that DCPS and/or OSSE would have been responsible for paying while implementing Student's DCPS IEP(s) in a residential placement during SY 2016-2017 and SY 2017-2018.
2. DCPS shall within sixty (60) calendar days of the issuance of this order identify an appropriate residential placement for Student and coordinate Student's smooth transition to that facility, and/or facilitate, in coordination with OSSE, School A's application for approval by OSSE as a residential school and treatment facility so that Student can perhaps remain at School A until an IEP team determines otherwise.
3. 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 as required for DCPS to effectuate provision # 2 above.
4. In effectuating provision # 2 above, if it is determined Student's placement will not be School A, until such time that residential placement is identified and a transition plan is developed by DCPS for Student to move to that placement, DCPS shall reimburse Petitioners' costs of Student's attendance at School A limited to OSSE rates.

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<sup>12</sup> Any delay in Respondent meeting the timelines of this Order that is the result of action or inaction by Petitioners shall extend the timelines on a day for day basis.

5. All other relief requested by Petitioners is denied.

**APPEAL PROCESS:**

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

*/S/ Coles B. Ruff*

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**Coles B. Ruff, Esq.**

**Hearing Officer**

**Date: September 28, 2018**

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