OSSE
Office of Dispute Resolution
September 30, 2017

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Confidential

Parents on Behalf of Student[1], Petitioners, v. District of Columbia Public Schools ("LEA") Respondent. Case # 2017-0160 Date Issued: September 26, 2017	CORRECTED HEARING OFFICER'S DETERMINATION Hearing Dates: August 28, 2017 August 29, 2017 Counsel for Each Party listed in Appendix A Hearing Officer: Coles B. Ruff, Esq.

[1] Personally identifiable information, including the name of the Respondent, is in Appendices A & B attached to this decision which must be removed prior to public distribution.

This "Corrected" HOD is issued to make typographical and/or grammatical changes only; no substantive changes have been made. The HOD issuance date, September 26, 2017, remains unchanged, as does the applicable appeal date.

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 28, 2017 and August 29, 2017, at the District of Columbia Office of the State Superintendent of Education ("OSSE") Office of Dispute Resolution 810 First Street, N.E., Washington, D.C. 20003, in Hearing Room 2004 and Hearing Room 2006 respectively. The parties submitted written closing arguments on September 8, 2017.

BACKGROUND AND PROCEDURAL HISTORY:

The student is age _____and in grade _____.[2] The student resides with the student's parents in the District of Columbia and is a child with a disability pursuant to IDEA with a disability classification of multiple disabilities ("MD") including other health impairment ("OHI") based on a diagnosis of Attention Deficit Hyperactivity Disorder ("ADHD") and specific learning disability ("SLD"). The student was first determined eligible on May 17, 2013, when the student was in __ grade and attending the student's local District of Columbia Public Schools ("DCPS") school ("School A"). DCPS is the student's local educational agency ("LEA"). The student continued to attended School A in school year ("SY") 2013-2014 and SY 2014-2015.

The student's parent did not enroll the student at School A for school year ("SY") 2015-2016. Rather, they enrolled the student in a private school (School B), where the student remained for SY 2015-2016 and 2016-2017. The student is still attending School B for SY 2017-2018.

The student's parents ("Petitioners") filed the current due process complaint on June 16, 2017, alleging DCPS denied the student a free appropriate public education ("FAPE") by, inter alia, failing to propose an appropriate individualized educational program ("IEP") and educational placement for the student in SY 2015-2016 and SY 2016-2017. Petitioners are seeking reimbursement from DCPS for the student's tuition at School B for SY 2015-2016 and SY 2016-2017, and requesting that the Hearing Officer place the student at School B for SY 2017-2018.

The parties participated in a resolution meeting on June 28, 2017, and did not resolve the complaint. The parties did not mutually agree to proceed directly to hearing. The 45-day period began on July 16, 2017, and ended [and the Hearing Officer's Determination ("HOD") was originally due] on August 30, 2017. On July 11, 2017, the parties filed a motion to continue from the previous hearing dates of August 11 & 14 to the requested dates of August 28 and 29 for a fifteen (15) calendar day continuance and extension of the HOD due date. The motion was granted and the HOD due date was moved to September 14, 2017. At the conclusion of the hearing, the parties requested additional time to file written closing arguments and on August 31,

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

2017, submitted a second motion to continue and extend the HOD due date by twelve (12) calendar days. The motion was granted extending the HOD due date to September 26, 2017.

The undersigned Impartial Hearing Officer ("Hearing Officer") convened a pre-hearing conference ("PHC") on the complaint on July 5, 2017, and issued a pre-hearing order ("PHO") on July 10, 2017, outlining, inter alia, the issues to be adjudicated.

LEA Response to the Complaint:

DCPS filed a timely response to the complaint on June 29, 2017, and denies that there has been any failure to provide the student with a FAPE. DCPS asserts that on January 9, 2015, DCPS provided this student with an IEP that was reasonably calculated to provide the student with meaningful educational benefit. The student's DCPS home school, School A, was able to implement the IEP and placement. DCPS asserts that the student's parent attended the IEP meeting and was allowed to participate fully in the development of the IEP and placement. DCPS asserts it made a FAPE available for the student during SY 2015-2016, and the student's parents decided to unilaterally enroll their child in School B, a general education private school.

DCPS further asserts that on November 21, 2016, an IEP meeting was held and the IEP team included goals in the areas of math, reading, written expression, and emotional, social and behavioral development and School A was able to implement the IEP and placement. The student's parent attended the IEP meeting and was allowed to participate fully in the development of the IEP and placement.

DCPS asserts it made a FAPE available for the student during SY 2016-2017, but the student's parents decided to unilaterally enroll their child in School B. DCPS asserts that School B is not the student's least restrictive environment ("LRE") and Petitioners did not provide appropriate notice of the unilateral placement and their desire to obtain public payment for the student's private education, and as an equitable matter all requested relief should be denied or reduced.

ISSUES: [3]

The issues adjudicated are:

1. Whether the DCPS denied the student FAPE by failing to timely respond to Petitioner's request for a review of the independent evaluation Petitioner submitted to DCPS on June 18, 2015.

2. Whether DCPS denied the student a FAPE by failing to provide the student with an appropriate educational program and/or educational placement for SY 2015-2016, by proposing insufficient hours of specialized instruction and in an appropriate educational setting.

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

3. Whether DCPS denied the student a FAPE by failing to provide the student with an appropriate educational program and/or educational placement for SY 2016-2017, by proposing insufficient hours of specialized instruction and in an appropriate educational setting.[4]

4. Whether School B is a proper placement for the student for reimbursement and prospective placement for SY 2017-2018.

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 49 and Respondent's Exhibits 1 through 9) that were admitted into the record and are listed in Appendix 2.[5] The witnesses testifying on behalf of each party are listed in Appendix B.[6]

SUMMARY OF DECISION:

Petitioners had both the burden of production and persuasion on the following issues above: #1 and #4. Respondent had the burden of persuasion on issues #2, #3. Petitioners did not sustain the burden of persuasion by a preponderance of the evidence on issues #1 and # 4. Respondent sustained the burden of persuasion on issues #2, but did not sustain the burden of proof by a preponderance of the evidence on issue #3. The Hearing Officer concluded that the IEP and placement that DCPS developed for the student on November 2016, was not reasonably calculated to provide the student educational benefit and the student was thus denied a FAPE. As a result, the Hearing Officer directs in the order below that DCPS reimburse Petitioners the tuition and costs for the student attending School B for SY 2016-2017 up to and until DCPS complies with the order below and provides the student an IEP, placement and location of services as directed to do so by the Hearing Officer.

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[4] Petitioners assert the student's IEP should prescribe a full time (for instructional hours) special education program in a general education setting but nothing else in the IEP is being challenged.

[5] Any item disclosed and not admitted or admitted for limited purposes was noted on the record and is noted in Appendix A.

[6] Petitioner presented four witnesses: (1) Petitioner (Mother), (2) Petitioner (Father), (3) and educational consultant and (4) the assistant head of the school of School B where Petitioner seeks to have the student placed by the Hearing Officer. Respondent presented three witnesses: (1) DCPS special educator, and (2) School A special education coordinator, and (3) a DCPS LEA representative.

FINDINGS OF FACT: [7]

1. The student resides with the student's parents in the District of Columbia and is a child with a disability pursuant to IDEA with a disability classification MD including both SLD and OHI based on a diagnosis of ADHD. DCPS is the student's LEA. The student was first determined eligible on May 17, 2013, when the student was in ____ grade and attending School A, the student's local DCPS school. When the student was initially determined eligible, the student was found eligible with OHI disability classification only. (Petitioner's Exhibits, 8-1, 8-17, 35-1)

2. DCPS initial evaluation of the student revealed a full-scale IQ score of 104 with a relative weakness in working memory. Two of the student's academic achievement subtest scores for reading were above average; two were average: word identification and passage comprehension. The reading fluency subtest was poor, at the 6th percentile. The student's math achievement subtests scores were average, except for calculation, which was above average at the 85th percentile. The evaluator concluded the student met the criteria for special education services and made recommendations for interventions, including small group instruction, and preferential seating, close to the front of the room, in larger classroom settings. (Petitioner's Exhibit 6-1, 6-4, 6-5, 6-6, 6-10, 6-11)

3. The student's initial IEP was developed on May 17, 2013, and included goals in the areas of math and reading and prescribed that the student be provided 10.5 hours per week of specialized instruction: 4 hours per week outside general education in reading and 1 hour per week outside general education in math. The student was provided 45 minutes per day of specialized instruction in math in general education and 1 hour per week in reading inside general education. The student received the special education services pursuant to the IEP for the remainder of SY 2012-2013 and was promoted to the next grade for SY 2013-2014. (Petitioners Exhibit 8-1, 8-2, 8-3, 8-4, 8-6, 8-7, 9)

4. The student's report card for SY 2013-2014 indicated the student remained below grade level expectations in reading and written language. The student was operating below grade level in math for three of the four advisories and was rated as proficient and on grade level in math in the fourth advisory. The student's report card reflected either proficient (on grade level) or advanced (exceeding grade level expectations) in all other subjects for each of the four advisories. (Petitioner's Exhibit 12)

5. On March 28, 2014, School A conducted an annual review of the student's IEP, and on May 21, 2014, School A amended the student's IEP to change the specialized instruction to 30 minutes per day each in reading and written expression outside general education, and 1 hour per day in math inside general education. (Petitioner's Exhibit 11-1, l1-8)

[7] The evidence (documentary and/or testimony) that is the source of the Findings of Fact ("FOF") is noted within a parenthesis following the finding. A document is noted by the exhibit number. The second number following the exhibit number denotes the page of the exhibit 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. During SY 2013-2014 the student's parent became concerned that the student was not keeping pace academically. During summer 2014 the student was assessed and provided services at Lindamood Bell Learning Center. The assessment pre-test and retest assessment indicated the student made some progress in reading skills and was operating below grade level in reading. (Mother's testimony, Petitioner's Exhibit 13-1,13-2)

7. During the first and second advisory of SY 2014-2015 the student made progress on the student's IEP goals and mastered one of the student's IEP math goals. (Petitioner's Exhibits 14, 17)

8. However, during SY 2014-2015, the student's parents found that the student developed anxiety about school and began losing self-confidence and self-esteem concerning the student's academic performance. The student's parents observed the student's reading difficulties at home and communicated with the student's teachers, inquiring about additional assistance that could be provided to the student. (Mother's testimony)

9. In December 2014, in response to comments the student wrote during a class assignment, the School A social worker met with the student and the student expressed suicidal ideations. The social worker contacted the student's parent who declined any further school intervention regarding the student's comments, and the student was released from school at the end of the day, as the student normally would have been. (Petitioner's Exhibit 15)

10. Based upon the student's continued challenges in reading and the student's parents requested that the student's disability classification include SLD because the OHI classification did not encompass all of the student's challenges. As a result, DCPS issued a prior notice that it would reevaluate the student. (Petitioner's Exhibit 16-5)

11. In January 2015, School A conducted an Analysis of Existing Data ("AED") for the student, reviewing the student's performance in math reading and written expression as well as talking with the student. The AED noted, among other things, that the student had recently tested below grade level in reading and math on the i-Ready assessments, the student was rated at proficient in writing and language on the student's recent report card, but needed support in the general education setting in writing in terms of organization, spelling, and punctuation. (Petitioner's Exhibit 16-1, 16-2, 16-3, 16-4)

12. On January 9, 2015, School A convened an eligibility meeting at which the student was determined eligible with the MD disability classification, based on SLD in reading and OHI. (Petitioner's Exhibit 18-1, 18-2, 18-3, 18-5, 18-12)

13. School A developed an IEP for the student, dated January 9, 2015. The IEP included goals in the areas of math and reading and prescribed that the student be provided 10 hours per week of specialized instruction, all inside general education: 2.5 hours each for reading and written expression, and 5 hours in math. The IEP included a list of classroom aids and services such as, seat placement close to the teacher, frequent teacher check-ins for understanding, and small group instruction wherever possible. There was

full agreement by all team members, including the student's parents, with the goals and services in the student's IEP. Because School A had teachers trained in the Lindamood Bell method the student's parents requested that the student be in School A's Lindamood Bell ("LMB") program. School A put that in place. The student's special education hours were not increased because the School A wanted to make sure LMB was helping. (Witness 3's testimony, Petitioner's Exhibit 19-1, 19-2 through 19-8, 19-10)

14. On February 23, 2015, School A amended the student's IEP to include classroom and statewide assessment accommodations including, but not limited to, reading of test questions, paper and pencil assessments rather than computer assessments, large print and use of a calculation devise, and speech to text - dictated responses. (Petitioner's Exhibit 20-1, 20-11)

15. During the third report period of SY 2014-2015, the student's IEP progress report, dated April 23, 2015, indicated the student was making progress on all the student's IEP goals. (Petitioner's Exhibit 21)

16. The student's end of year report card for SY 2014-2015 indicated the student was proficient (operating on grade level) in reading, writing and language and math. The student was at least on grade level in all other subjects and was rated as advanced in music, art and physical education. The student was promoted to the next grade. (Petitioner's Exhibit 23)

17. The student's end of year IEP progress report for SY 2014-2015 indicated the student was progressing in all the student's IEP goals and had mastered at least one reading goal and two written expression goals. (Petitioner's Exhibit 23-5 through 23-12)

18. The student made academic progress and the student's classroom teacher was proud of the student's growth. The student was showing some anxiety at school. The School A psychologist used a therapy comfort dog with some of the students in the school and the student was able to benefit from the dog for a time to help with the student's anxiety. The therapy comfort dog program, however, was soon ended. (Witness 3's testimony)

19. During SY 2014-2015, and SY 2015-2016 School A had four special education teachers in both resource and inclusion settings, two counselors and a part time speech pathologist, physical therapist and a school psychologist and access to DCPS assistive technology staff. School A provided services to students with a variety of disability classifications. School A could have continued to implement the student's IEP during SY 2015-2016. In SY 2016-2017 School A had the same offerings with no significant changes in its special education services. (Witness 3's testimony)

20. On June 15, 2016, the student's mother sent an email to School A stating that she had previously informed School A staff that the student's parents were having an independent evaluation conducted of the student and that the evaluator was recommending that the parent pursue a different school option for the student. The email requested that School A staff fill out recommendation forms for the student to be considered for admission to

the recommended schools. The student's teacher agreed to complete the recommendations. (Petitioner's Exhibit 23A)

21. Petitioner had an independent neuropsychological evaluation conducted from April through June 2015. The evaluation noted the student's 2013 DCPS evaluation scores that revealed the student's cognitive strengths and the student's weaknesses in attention and executive functioning noted by the student's School A teachers. The evaluator conducted cognitive, academic and behavioral assessments of the student. Cognitive scores were average. The student had a full-scale IQ score of 106 with relative weaknesses in working memory and processing speed. The student's broad reading score was at the 9th percentile and the student's reading fluency score was at the 5th percentile. The student's math scores were at or near the 25th percentile; the student's broad written language score was at the 32nd percentile. (Petitioner's Exhibit 22-1, 22-2, 22-12, 22-13)

22. The evaluator diagnosed the student with ADHD, generalized anxiety and specific learning disorders in reading, writing, and math. The evaluator noted the student's distress regarding the student's academic performance and recommended the student attend a school that caters to the needs of students with learning differences preferably beginning in the fall of 2015. The evaluator noted that despite the intensive supports at the student's current school the student had not shown expected progress and was performing well below peers across academic areas. (Petitioner's Exhibit 22-6, 22-7)

23. On June 18, 2015, the student's father sent an email to School A's principal requesting assistance in providing a referral to the appropriate person within DCPS to secure a more specialized course of instruction to address the student's learning disabilities. The father's email noted that although School A attempted interventions since the student was found eligible for special education, the interventions had not addressed the student's learning disabilities, and the student had taken a pronounced downturn in self-confidence and self-esteem around the student's learning. The email also noted that the student's parents had recently engaged a professional to conduct an independent evaluation. Petitioners did not provide School A or DCPS with a copy of the independent evaluation to be reviewed during 2015. (Petitioner's Exhibit 24-1, 24-2)

24. On June 22, 2015, School A's principal stated in a return email to the student's father's that she inferred from the father's email that the parent was requesting that an IEP team review the independent evaluation and determine the student's educational placement. Noting that it was the summer-break, the principal copied the DCPS special education support liaison for the school to identify next steps. However, DCPS never received the independent evaluation from Petitioners during 2015. (Petitioner's Exhibit 24-1)

25. On July 1, 2015, the student's father sent School A's principal forms to be completed as a part of the student's application to a private special education school, which the principal acknowledged and agreed to provide to the appropriate school staff for completion. (Petitioner's Exhibit 24A)

26. School B, one of the two private schools to which the Petitioners applied, notified the parents that a space was available for the student to attend for SY 2015-2016. Just before school started for SY 2015-2016 the School A principal telephoned the student's parents to inquire as whether they intended to enroll the student at School A for SY 2015-2016. The student's father stated the student would not be attending School A for SY 2015-2016, but did not communicate to the principal that the student would be attending School B. There was no specific notification to DCPS that the student's parents wanted DCPS to place and/or fund the student at School B. (Father's testimony, Mother's testimony)

27. Petitioners enrolled the student at School B for SY 2015-2016. The student made progress at School B. The student's anxiety about school diminished and the student began to enjoy attending school. The student was in a classroom of eleven students and two teachers, and developed a good relationship with a teacher who identified herself as having a reading disability. By the end of SY 2014-2015 the student's parents were pleased they had made the choice to enroll the student at School B. The student was still struggling academically, but the student's parents believed School B was the appropriate school for the student. (Mother's testimony)

28. Petitioners retained an attorney who on July 20, 2016, sent correspondence to School A notifying School A she was representing Petitioners and requesting that DCPS update the student's IEP for SY 2016-2017. (Petitioner's Exhibit 27)

29. On August 4, 2016, a representative from DCPS responded to the attorney's correspondence by email and indicated that the DCPS Private and Religious Office would be contacted to assist in responding to the request. Petitioner's counsel notified the DCPS representative that Petitioners intended to maintain the student at School B during SY 2016-2017 and sought DCPS funding. (Petitioner's Exhibit 28, 29)

30. On August 16, 2016, DCPS denied the request to fund the student at School B for SY 2015-2016 and stated that DCPS would offer the student a FAPE based on the student's last DCPS IEP, or provide comparable services based on the student's current IEP from another LEA. DCPS requested that the student's latest IEP be forwarded to DCPS. DCPS stated that it would convene an IEP meeting on or before September 22, 2016, to develop a new IEP for the student or adopt the student's IEP from the previous LEA. DCPS requested that Petitioners provide any evaluations and other data available regarding the student to be considered by the IEP team when it met. (Petitioner's Exhibit 30)

31. On August 26, 2016, Petitioners had the student assessed by the independent evaluator who had conducted the neuropsychological evaluation in 2015. The evaluator administered the Woodcock Johnson IV assessment and had the student's classroom teacher and the student at School B complete the Conner's 3 rating scale. The student achievement scores were generally the same. On some subtests, the student scored slightly better, and on others the student scored slightly less. The behavior assessments noted that the student displayed greater confidence in the student's academic abilities and

a stronger emotional state, which was also noted by the student's teacher. (Petitioner's Exhibit 31)

32. On October 7, 2016, DCPS completed a review of the student's June 5, 2015, and August 26, 2016, evaluations. (Petitioner's Exhibit 32)

33. DCPS originally scheduled an IEP meeting for October 17, 2016, but DCPS initially cancelled the meeting date and then reinstated the date, but by that time Petitioners were not available to meet on that date. Petitioners offered other dates in October 2016, but DCPS first available date to convene the meeting was November 21, 2016. (Petitioner's Exhibit 33)

34. On November 21, 2016, DCPS convened an IEP meeting to review the independent evaluations and update the student's IEP. A DCPS psychologist reviewed the evaluations. The student's parent participated along with their attorney and an educational consultant. The team, including the parent and their representatives agreed on the goals and other aspects of the IEP, and agreed that the educational consultant would provide additional data from School B to be added to the IEP. There was also an agreement to collaborate on the social emotional goals and that behavioral supports would be added to the IEP as a related service. The parents requested that the DCPS special educator observe the student at School B after the holidays. (Respondent's Exhibit 5-1, 5-2, 5-3, 5-4, 5-5, 5-6)

35. DCPS provided Petitioners with an IEP document that proposed goals in math, reading, written expression and emotional, social and behavior development. The IEP prescribed that the student be provided ten hours of specialized instruction per week inside general education and 90 minutes per month of behavioral support services, and included a list of classroom aides and services, and classroom and assessment accommodations. The DCPS members of the team agreed that 10 hours of specialized instruction was appropriate based on the student's academic and cognitive profile. The remaining hours of the student's school week would have been in general education in a setting of about 20 students without a special education teacher. Petitioners and their representatives did not agree with the level of specialized instruction in the proposed IEP and wanted the student to remain at School B. (Witness 5's testimony, Respondent's Exhibit 5)

36. On December 2, 2016, DCPS issued a prior written notice ("PWN") stating that the MDT determined the student continues to benefit from specialized instruction in all academic areas and recommended the student receive 10 hours of specialized instruction inside general education with 5 hours in math and written expression and 5 hours in reading and 90 minutes per month of behavioral supports. The PWN stated the student's proposed LRE could be implemented at the student's neighborhood school. The notice indicated that the student's parents and their counsel disagreed with the proposal. (Petitioner's Exhibit 37-1)

37. On January 24, 2017, DCPS conducted a classroom observation of the student at School B. The observer noted that during the student's math and science class the student was

alert and attentive, following directions and routines without redirection, and that the level of activity was appropriate, was organized, on task and cooperative. The DCPS observer had conversations with the School B staff and was informed that School B did have special education teachers and the observer did not see specialized instruction being provided. (Witness 5's testimony, Petitioner's Exhibits 38)

38. On February 3, 2017, the DCPS observer sent an email to Petitioners' counsel noting that, based on the observation of the student at School B in a general education environment, DCPS' position remained the same as it was at the November 21, 2016, IEP meeting, that the student was able to access the student's educational environment without intensive special education supports. The observer noted that DCPS was more than willing to come back to the table and review pertinent data points the parents, school, or consultant had in reference to the IEP, services, or eligibility, and asked for dates of their availability for such a meeting. (Witness 5's testimony, Petitioner's Exhibits 38, 39-1)

39. Petitioners' counsel communicated to DCPS that based on the January 24, 2016, email there was no need to reconvene an IEP meeting at that time. (Petitioner's 39-1)

40. DCPS expressed its position to Petitioners that the program it proposed for the student at School A remained appropriate and did not agree with Petitioners request that DCPS place and fund the student at School B. (Witness 5's testimony)

41. On March 23, 2017, Petitioner's educational consultant conducted an observation of the student at School B and developed a report from her observation. On April 5, 2017, Petitioners provided DCPS the consultant's observation report and requested an IEP meeting to review the report. On May 19, 2017, DCPS convened an IEP meeting to review the consultant's observation report. (Petitioner's Exhibits 41, 42)

42. Petitioner's consultant also observed a classroom at School A along with the student's father. The consultant was of the opinion that School A was inappropriate for the student because of the size of the school. The school had 700 students and the number of students in each class was too many given there was a single special education teacher for each grade. (Witness 1's testimony)

43. On June 16, 2017, Petitioners filed their due process complaint. On August 7, 2017, Petitioners' counsel notified DCPS that the student would attend School B for SY 2017-2018 and requested that DCPS fund the student at School B for SY 2017-2018. (Petitioner's Exhibits 44, 45)

44. The student appears to require behavior support to lessen anxiety, but the student does not need pull out counseling, and does not need to be pulled out of the student's general education classroom setting to receive specialized instruction in the student's academic courses. The student needs to receive the student's services inside the student's general education classroom. The student does not require specialized instruction for physical education ("PE"), Art, Music, lunch, or any electives. When observing the student,

Petitioners' educational consultant noted that the student also does not require supports during transition times. (Witness 1's testimony)

45. School B is a private general education school that has classrooms with a low student to teacher ratio. School B generally caters to students who do not have disabilities pursuant to IDEA, although School B has students who have been identified prior to attending School B as having a disability and who had an IEP in the past. While attending School B, the student has had access to some licensed special educators in some of the student's classes. However, School B does not develop or implement IEPs. School B may extract information from a student's IEP and use the information in a student profile. However, School B does not have or maintain student IEPs and does not offer specialized instruction within the meaning of the IDEA. School B implements what it believes is best for the student. School B does not have an OSSE certificate of approval ("C of A"). (Witness 2's testimony, Petitioner's Exhibit 31-A)

CLUSIONS 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.

Based solely upon the evidence presented at the due process hearing, an impartial hearing officer must determine whether the party seeking relief presented sufficient evidence to prevail. See DCMR 5-3030.34. The normal standard is preponderance of the evidence. See, e.g. *N.G. V. District of Columbia* 556 f. Sup. 2d (D.D.C. 2008). See also 20 U.S.C. §1451 (i)(2)(C)(iii). Pursuant to 5E DCMR 3030.14, the burden of proof is the responsibility of the party seeking relief. [7] *Schaffer v. Weast*, 546 U.S. 49, 126 S.Ct. 528 (2005). In this case, as noted in the PHO and during the hearing, Petitioner held the burden of persuasion on issues #1 and #4. Respondent held the burden of persuasion on issues #2, #3. [8]

[8] DC Code § 38-2571.03 (6) provides:

ISSUE 1: Whether the DCPS denied the student FAPE by failing to timely respond to Petitioner's request for a review of the independent evaluation Petitioner submitted to DCPS on June 18, 2015.

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

34 C.F.R § 300.305 requires that as a part of any reevaluation the IEP Team and other qualified professionals, as appropriate, review evaluations and information provided by the parents of the child.

Petitioners asserted in the complaint they had provided DCPS a copy of an independent evaluation on or about June 18, 2015, and asked that DCPS review the evaluation and DCPS did not timely review the evaluation. However, there is insufficient proof of this fact presented. Neither of the Petitioners could attest to the fact that the evaluation was provided to DCPS in 2015. On the other hand, DCPS witnesses credibly testified that the 2015 evaluation was not provided to DCPS in 2015. The evidence demonstrates that DCPS did not receive the evaluation until 2016 and reviewed that evaluation and the subsequent evaluation update from the same evaluator at the November 2016 IEP meeting.[9] Consequently, the Hearing Officer concludes that Petitioners did not sustain the burden of proof by a preponderance of the evidence on this issue.

ISSUE 2: Whether DCPS denied the student a FAPE by failing to provide the student with an appropriate educational program and/or educational placement for SY 2015-2016, by proposing insufficient hours of specialized instruction and in an appropriate educational setting.

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

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

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

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

[9] FOF #s 24, 25

Conclusion: Based upon the findings and conclusions set forth in the issue above, the Hearing Officer also concludes that Respondent sustained the burden of proof 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.

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.")

Petitioner alleges the student's IEP and placement for SY 2014-2015 were inappropriate because the IEP did not prescribe sufficient hours of specialized instruction in the appropriate setting. The evidence demonstrates that the student's January 9, 2015, IEP was amended to change the student's disability classification to include SLD for reading. The IEP developed included goals in the areas of math, reading and written expression and prescribed that the student be provided 10 hours per week of specialized instruction, all inside general education: 2.5 hours each for reading and written expression, and 5 hours in math.

The IEP also included also a list classroom aids and services such as, seat placement close to the teacher, frequent teacher check-ins for understanding, and small group instruction wherever possible. There was full agreement by all team members, including the student's parents, with the goals and services in the student's IEP. The student's parents requested that the student be in School A's LMB program and School A put that in place.

The evidence also demonstrates that on February 23, 2015, School A amended the student's IEP to include classroom and statewide assessment accommodations including, but not limited to, reading of test questions, paper and pencil assessments rather than computer assessments, large print and use of a calculation devise, and speech to text - dictated responses.

The evidence demonstrates that during the third report period of SY 2014-2015, the student's IEP progress report indicated the student was making progress on all the student's IEP goals and the student's end of year report card indicated the student was proficient (operating on grade level) in reading, writing and language and math. The student was at least on grade level in all other subjects and was rated as advanced in music, art and physical education.

The evidence demonstrates the student's end of year IEP progress report for SY 2014-2015 indicated the student was progressing in all the student's IEP goals and had mastered at least one reading goal and two written expression goals. The student clearly showed academic progress during SY 2014-2015 and was promoted to the next grade.

Although the student was exhibiting anxiety around the student's academics performance and remained below grade level in reading, the evidence, nonetheless, supports a conclusion that at the time the student's IEPs in SY 2015-2016 were developed the student was making academic progress and the IEPs were reasonably calculated to provide the student educational benefit. Thus, the placement proposed by the student's IEP(s) that school year was appropriate. Consequently, the Hearing Officer concludes that Respondent presented sufficient evidence to sustain the burden of proof by a preponderance of the evidence on this issue. In addition to the DCPS having offered an appropriate IEP and placement at that time, the evidence demonstrates that Petitioners did not notify DCPS of their placement of the student at School B and request funding for the placement by DCPS in 2015. [10]

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10 34 C.F.R. § 300.148 provides (Placement of children by parents when FAPE is at issue).
(a) General. This part does not require an LEA to pay for the cost of education, including special education and related services, of a child with a disability at a private school or facility if that agency made FAPE available to the child and the parents elected to place the child in a private school or facility... (c) Reimbursement for private school placement. If the parents of a child with a disability, who previously received special education and related services under the authority of a public agency, enroll the child in a private preschool, elementary school, or secondary school without the consent of or referral by the public agency, a court or a hearing officer may require the agency to reimburse the parents for the cost of that enrollment if the court or hearing officer finds that the agency had not made FAPE available to the child in a timely manner prior to that enrollment and that the private placement is appropriate. A parental placement may be found to be appropriate by a hearing officer or a court even if it does not meet the State standards that apply to education provided by the SEA and LEAs. (d) Limitation on reimbursement. The cost of reimbursement described in paragraph (c) of this section may be reduced or denied--(1) If--(i) At the most recent IEP Team meeting that the parents attended prior to removal of the child from the public school, the parents did not inform the IEP Team that they were rejecting the placement proposed by the public agency to provide FAPE to their child, including stating their concerns and their intent to enroll their child in a private school at public expense; or (ii) At least ten (10) business days (including any holidays that occur on a business day) prior to the removal of the child from the public school, the parents did not give written notice to the public agency of the information described in paragraph (d)(1)(i) of this section;

Just before the start of SY 2015-2016, when Petitioners notified DCPS that they were removing the student from School A, they failed to state that they were placing the student in a private school for which they were requesting payment from DCPS. Without a clear statement that the Petitioners expected DCPS to fund the student at the school they had chosen, DCPS was correct in merely assuming that the Petitioners, like many other parents in the District of Columbia, were simply choosing a private school education for their child. One in which they would bear the costs. Consequently, the Hearing Officer does not conclude that Petitioner's request for relief for reimbursement for the student attending School B for SY 2015-2016 is reimbursable.

ISSUE 3: Whether DCPS denied the student a FAPE by failing to provide the student with an appropriate educational program and/or educational placement for SY 2016-2017, by proposing insufficient hours of specialized instruction and in an appropriate educational setting.

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

In August 2016, Petitioners, through counsel requested that DCPS update the student's IEP and make an offer of FAPE to the student. Although Petitioners placed the student at School B for SY 2015-2016, it was not until August 2016 that Petitioners notified DCPS at the start of SY 2016-2017 that it would be seeking reimbursement for the student's placement at School B.
There was a procedural duty for DCPS to take action to review and update the student's IEP although the student was attending School B. That review did not take place until November 21, 2016.

The evidence demonstrates that when DCPS first evaluated the student the student's academic achievement subtest scores for reading were above average; two were average: word identification and passage comprehension. The reading fluency subtest was poor, at the 6th percentile. Although DCPS amended the student's IEP on January 9, 2015, to include the SLD classification and amended the IEP on February 23, 2015, to add additional accommodations, it was not until Petitioners presented DCPS with the independent psychological evaluation that it was clear the student's reading deficits were sufficiently dire that the student required more specialized instruction than DCPS proposed at the November 2016 IEP meeting.

DCPS reviewed the independent evaluation and the evaluation update that reflected that the student, while attending School B had made modest gains in reading skills. The evaluations clearly indicated the severity of the student's reading deficits beyond what was noted in DCPS' initial evaluation of the student. Although the student while attending School B was not being provided services pursuant to an IEP, the student was, nonetheless, being provided instruction in a setting with a low student to teacher ratio for all academic subjects. It is clear from the student's parent's testimony that the student's entire attitude about school changed by the student being in this new school environment where the student was provided with a lower student to teacher ratio.

Despite the noted reading deficits documented in the independent evaluations, DCPS proposed an IEP for the student that was comparable to the IEP that student had when the student was attending School A. Although the IEP the student had when the student left School A was reasonably calculated to provide the student educational benefit at that time, given the

independent psychological evaluation and the diagnosis in that evaluation and the recommendations for the type of educational setting the student should be provided, it was unreasonable, in the Hearing Officer's opinion, for DCPS to have simply prescribed that the student be provided in essence the same IEP and services the student had when the student left DCPS.

The Hearing Officer credited Petitioners' expert testimony that the student is in need of specialized instruction in all academic subjects based principally upon the student's learning disorder is reading, writing and math. That expert, witness, however, clearly pointed out that the specialized instruction should be provided to the student in the general education setting and pointed out that the student did not need specialized instruction in non-academic subjects, nor does the student need supports during lunch or during transitions.[11] Consequently, the Hearing Officer concludes that Respondent did not sustain the burden of proof by a preponderance of the evidence that the IEP DCPS proposed for the student as a result of the November 23, 2016, meeting was reasonably calculated to provide the student educational benefit. Consequently, the placement proposed by that IEP was inappropriate.

The record supports a finding that DCPS denied the student a FAPE under the IDEA. The Supreme Court has instructed what the Hearing Officer must then consider- - the parental placement. In *Burlington*, the Court explained that, "parents who disagree with the proposed [educational program] are faced with a choice: go along with the [proposed program] to the detriment of their child if it turns out to be inappropriate or pay for what they consider to be the appropriate placement." *Sch. Committee of the Town of Burlington, Massachusetts v. Dep't of Educ.*, 471 U.S. 359, 370 (1985). To avoid compromising a child's right to FAPE, the Court concluded that if, "a court determined that a private placement desired by the parents was proper under the Act and that [a proposed] placement in a public school was inappropriate," the IDEA authorizes, "retroactive reimbursement to parents." *Id.* This result is necessary because, "[t]he Act was intended to give handicapped children both an appropriate education and a free one; it should not be interpreted to defeat one or the other of those objectives." *Id.*

In *Carter*, the Supreme Court reaffirmed its ruling in *Burlington* and explained that, "public educational authorities who want to avoid reimbursing parents for the private education of a disabled child can do one of two things: give the child a free appropriate public education in a public setting, or place the child in an appropriate private setting of the State's choice." *Florence County Sch. Dist. Four v. Carter*, 510 U.S. 7, 13 (1993).

The test of whether a parental placement is "proper under the Act" is whether "the education provided by the private school is 'reasonably calculated to enable the child to receive educational benefits.'" *Carter v. Florence County Sch. Dist. Four*, 950 F.2d 156, 163 (4th Cir. 1984) (quoting *Rowley*, 458 U.S. at 207). It is crucial to distinguish the standard of "properness" required of parental placements from that of "appropriateness" required of school system placements. Parental placements are held to a less strict standard because, "it hardly seems consistent with the Act's goals to forbid parents from educating their child at a school that provides an appropriate education simply because that school lacks the stamp of approval of the

[11] FOF # 46

same public school system that failed to meet the child's needs in the first place." *Carter*, 950 F.2d at 164.

Recently, the United States Court of Appeals for the District of Columbia Circuit issued an opinion in *Leggett and K.E. v. District of Columbia*, 793 F.3d 59 (D.C. Cir. 2015), clarifying the standard for unilateral parental placement tuition reimbursement and explaining both the significance of the failure to have a completed IEP by the start of the school year and the requirements for a parental placement.

The Court determined that a less restrictive setting need not be considered and that the parent's unilateral placement was necessary to provide her with educational benefit because, *"it was the only placement on the record that could have provided K.E. with an education that met her identified needs." Id.* at 72 (emphasis added). In other words, when no other appropriate placement is offered and the parental placement meets the *Rowley* standard, placement and/or reimbursement at the unilateral placement is the appropriate relief.

The evidence demonstrates that the student has benefited from attending School B. With such case law in mind, along with the testimony and documentary evidence in the record that School B has provided educational benefit to the student, the Hearing Officer concludes that Petitioner's request for reimbursement for the student's placement at School B for SY 2016-2017 should be granted. The Hearing Officer directs in the order below that DCPS reimburse Petitioners the tuition and costs for the student to attend School B for SY 2016-2016 and part of 2017-2018 until DCPS has complied with other directives in the order below.

ISSUE 4: Whether School B is a proper placement for the student for reimbursement and prospective placement for SY 2017-2018.

Conclusion: Petitioners did not sustain the burden proof by a preponderance of the evidence with regard to prospective placement.

In addition to seeking reimbursement for the student's tuition at School B, Petitioners' request that the Hearing Officer determine that the student's prospective placement for the remainder of SY 2017-2018 is School B. The Hearing Office declines that request.

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.

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.

"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).

A school district is not required to implement a program that will maximize the handicapped child's potential. *Rowley, 458 U.S. at 198-99*. As noted, 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).

D.K., v. District of Columbia, 983 F. Supp. 2d 138 (October 2, 2013) aptly states:
"Under the IDEA, and for a disabled student, a FAPE requires that the school system provide services in compliance with an IEP. See 20 U.S.C. § 1401(9). "Because McLean School cannot or will not implement D.K.'s IEP, the District cannot place D.K. there. See Johnson, 839 F. Supp. 2d at 179 (a school district may not place a student at a school that cannot provide the services required by the student's IEP); D.C. Code § 38-2561.03(a) (a student with a disability may be placed only in a school that can implement the student's IEP"

Petitioners believe School B to be the most appropriate setting for their child. However, the evidence demonstrates that School B is a general education school that does not develop or implement IEPs. Nor does School B have an OSSE C of A.

While the parents have a right for their child to be educated in the school that they deem best, there is no obligation for a school district to fund the parents' school of choice if the school district can offer an appropriate placement where the student's IEP can be implemented.

DCPS is prohibited (by D.C. Code § 38-2561.03 (Supp. 2010) and 5A of the DCMR §2844)[12] from placing the student at School A because School A lacks an OSSE C of A. However, that same provision does not restrict a Hearing Officer from placing a student at a school that lacks a C of A.

Nonetheless, given the fact that the Hearing Officer has directed in the order below that DCPS amend the student's IEP, the Hearing Officer concludes that DCPS should be given the opportunity to provide a placement and location of services to the student based upon the IEP that the hearing officer has proposed based the evidence demonstrated in this case.

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[12] Consistent with section 3 of the Placement of Students with Disabilities in Nonpublic Schools Amendment Act of 2006, effective March 14, 2007 (D.C. Law 16-269; D.C. Official Code § 38-2561.03(Supp. 2010)), unless the placement of a student has been ordered by a District of Columbia Court, federal court, or hearing officer pursuant to IDEA and after the required findings have been made, no student whose education, including special education or related services, is funded by the District of Columbia government shall be placed in a nonpublic special education school or program that: …(b) Has not received and maintained a Certificate of Approval in accordance with D.C. Official Code § 38-2561.03(Supp. 2010) and its implementing regulations.

Consequently, the Hearing Officer concludes that School B is not the appropriate prospective placement for the student as it will not develop or implement the student's IEP. In addition, coupled with the restriction that DCPS place and fund a student at a school that has an OSSE C of A, the Hearing Officer concludes that DCPS has no obligation to maintain the student's placement at School B beyond the period of reimbursement directed in the order below.

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.

ORDER: [13]

1. The Hearing Officer, having found that the parties agreed to all aspects of the IEP DCPS developed for the student in November 2016 and noticed in DCPS' December 2, 2016, PWN, except as to the hours of specialized instruction and the setting in which those hours are to be delivered, the Hearing Officer therefore directs DCPS to convene an IEP meeting, within ten (10) school days of the issuance of this order, to amend the student's IEP to reflect specialized instruction in all academic subjects in the general education setting. The team shall determine based upon this directive the specific number of hours of specialized instruction the student will receive per week. As noted in the Findings of Fact: the student does not require specialized instruction for non-academic subjects, e.g. PE, Art, Music, and does not require specialized instruction or supports during lunch or during transition times.

2. DCPS shall, on or before December 31, 2017, determine a location of service to implement the student's IEP for remainder of SY 2017-2018 and issue Petitioners a PWN to that effect.

3. DCPS shall, within thirty (30) calendar days of the issuance of this Order, reimburse Petitioners the costs of the student's attendance at School B after Petitioners have provided DCPS satisfactory proof of payment to School B of the student's tuition and costs for the student attending School B for all of SY 2016-2017 and for the portion of SY 2017-2018 until the date DCPS complies with the directive above that DCPS provide the student a placement and location of services for the remainder of SY 2017-2018.

4. All other relief requested by Petitioner is denied.

[13] Any delay in Respondent meeting the timelines of this Order that is the result of action or inaction by Petitioner shall extend the timelines on a day for day basis.

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 26, 2017**

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