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OSSE
Office of Dispute Resolution
April 17, 2020

Confidential

Parents on Behalf of Student,	CORRECTED HEARING OFFICER'S DETERMINATION ¹
Petitioners,	Hearing Dates: February 24, 2020 February 25, 2020 March 13, 2020
v.	
District of Columbia Public Schools ("LEA")	Counsel for Each Party listed in Appendix A
Respondent.	
Case # 2019-0302	
Date Issued: March 19, 2020	<u>Hearing Officer:</u> <u>Coles B. Ruff, Esq.</u>

¹ This "Corrected" HOD is issued to only make typographical and/or grammatical changes and/or to remove personally identifiable information; no substantive changes have been made. The HOD issuance date, March 19, 2020, 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 February 24, 2020, February 25, 2020, and March 13, 2020, 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 423.

BACKGROUND AND PROCEDURAL HISTORY:

The student or (“Student”) is age __ and in grade __.² Student resides with Student's parents (“Petitioners”) in the District of Columbia. Student has been determined eligible for special education and related services pursuant to IDEA with a disability classification of specific learning disability (“SLD”). District of Columbia Public Schools (“DCPS”) is Student's local educational agency (“LEA”).

During school year (“SY”) 2016-2017 Student attended a DCPS school (“School A”) and had an individualized educational program (“IEP”). Petitioners thereafter obtained an independent evaluation in 2017 and based on recommendations of the independent evaluator, Petitioners advised DCPS in summer 2017, that Student had been accepted to a non-public special education day school (“School B”). Student began attending School B in fall 2017 and attended throughout SY 2017-2018.

On August 23, 2018, Petitioners requested DCPS develop an IEP for Student for SY 2018-2019. On December 14, 2018, Petitioners filed a due process complaint requesting reimbursement for Student attending School B for both SY 2017-2018, and SY 2018-2019. The parties reached a settlement agreement and the complaint was withdrawn on January 30, 2019.

DCPS conducted an assessment of Student and reviewed evaluations, conducted an occupational therapy (“OT”) evaluation on May 2, 2019, and on May 9, 2019, convened an eligibility meeting and determined Student met the criteria for SLD.

On June 4, 2019, DCPS convened an IEP meeting and developed an IEP for Student. DCPS proposed implementing the June 4, 2019, IEP at a DCPS school (“School C”). Petitioners visited School C and concluded it could not meet Student's needs and on August 8, 2019, served notice to DCPS of their intent to maintain Student at School B for SY 2019-2020.

On August 23, 2019, Petitioners filed a due process complaint that challenged the appropriateness of the June 4, 2019, IEP and DCPS’ proposed placement of Student at School C. Petitioners withdrew that complaint without prejudice and filed their current due process complaint on December 18, 2019. Student has continued to attend School B for SY 2019-2020 during the

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

pendency of the due process complaint.

Relief Sought:

Petitioners seek as relief that DCPS reimburse Petitioners for the expenses already paid for Student's tuition and related costs at School B for SY 2019-2020 school year and that School B be determined Student's educational placement.

LEA Response to the Complaint:

The LEA filed a response to the complaint on January 6, 2020. The LEA denies that there has been any failure to provide Student with a free appropriate public education ("FAPE"), and stated, inter alia, in its response, the following:

After a review of the psychological assessment, the IEP team determined that Student does not require specialized math instruction and the IEP DCPS developed represents the least restrictive environment ("LRE") for Student. The parent, SPED teacher, LEA representative, and the parent's attorney, were all present for the IEP meeting, and they were notified during the meeting that School C, Student's in-boundary school can implement the IEP as written.

If the IEP team proposed a self-contained setting all day including lunch, despite their conclusions based on data of the student's educational needs, it would violate DCPS's obligation to place students in the least restrictive environment.

DCPS further argues the student can adequately access the proper educational accommodations within the school district and that there is no need for the student to have a private education at this time, nor does the requested private school comply with the certificate of approval requirements under DC regulations.

Finally, the parents seem to have no interest in allowing Student to obtain an education within a DCPS school, despite DCPS' best efforts to propose an appropriate program, placement and accommodations, nor an intention to remove Student from private school. Thus, any relief should be reduced or denied.

Resolution Meeting and Pre-Hearing Conference:

The parties participated in a resolution meeting on January 6, 2020. The parties did not mutually agree to proceed directly to hearing in this matter. The 45-day period began on January 18, 2020, and ended [and the Hearing Officer's Determination ("HOD") was originally due] on March 2, 2020. Petitioners' counsel filed a motion to continue that the Hearing Officer granted, extending the HOD due date to March 19, 2020.

The undersigned Hearing Officer ("Hearing Officer") issued a pre-hearing order ("PHO") on February 17, 2020, outlining, inter alia, the issues to be adjudicated.

ISSUES: ³

The issues adjudicated are:

1. Whether DCPS denied Student a FAPE by failing to provide Student with an appropriate IEP because the June 4, 2019, IEP (a) has an insufficient amount and type of specialized instruction⁴, and/or (b) lacks goals and specialized instruction for math and/or executive functioning.
2. Whether DCPS denied Student a FAPE by failing to provide Student with an appropriate placement for SY 2019-2020.
3. Whether DCPS denied Student a FAPE by failing to allow Petitioners to observe a classroom at the DCPS proposed school.
4. Whether School B is a proper placement for Student.

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 48 and Respondent's Exhibits 1 through 17) 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:

Respondent held the burden of persuasion on issues #1 and #2 after Petitioners established a prima facie case. Petitioners had both the burden of production and persuasion on issues # 3 and #4. Based on the evidence adduced, the Hearing Officer concluded that Respondent sustained the burden of persuasion by a preponderance of the evidence on issues #1 and #2. Petitioners did not sustain the burden of persuasion on issues #3 and #4. Consequently, the Hearing Office dismissed Petitioners' due process complaint with prejudice.

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

⁴ Petitioners assert Student requires all instruction outside the general education setting.

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 three witnesses: (1) Student's parent ("Petitioner") and the following individuals who were designated as expert witnesses: (2), an educational consultant, (3) a School A administrator. Respondent presented four witnesses designated as expert witnesses: (1) a DCPS Psychologist, (2) a DCPS special education teacher, (3) Special Education Coordinator for School C, (4) a DCPS manager of Mathematics.

FINDINGS OF FACT:⁷

1. Student resides with Petitioners in the District of Columbia. Student has been determined eligible for special education and related services pursuant to IDEA with a disability classification of SLD. DCPS is Student's LEA. (Petitioners' testimony, Petitioner's Exhibit 20)
2. Student has been diagnosed with, among other things, Attention Deficit Hyperactivity Disorder ("ADHD"), Specific Learning Disorders in math, written expression, and reading. (Petitioners' Exhibit 4)
3. Student attended School A, a DCPS school, since pre-kindergarten. In July 2016 DCPS conducted a comprehensive psychological reevaluation of Student. The reevaluation noted Student's intellectual functioning was Average with a Full-Scale IQ of 97. Student's academic achievement was Average except in Sentence Reading Fluency and Spelling which were Low Average. Student's math achievement was Average. (Petitioners' Exhibit 3)
4. Student began struggling academically, and social/emotionally in school in 2017 and Petitioners engaged an independent educational advocate who, among other things, conducted a classroom observation of Student at School A. The advocate developed an observation report that outlined Student's strengths and concerns and made recommendations regarding assessments and interventions to address deficits in Student's reading and organization. (Petitioner's testimony, Witness 1's testimony, Petitioners' Exhibit 3-A)
5. On October 27, 2016, DCPS developed an IEP for Student. Petitioners participated in developing the IEP. The IEP included goals in the areas of math, reading, written expression and prescribed specialized instruction of 2 hours per week in reading outside general education and 1 hour each per week of specialized instruction in math and written expression inside general education. The IEP also included classroom and testing accommodations: location with minimal distractions, small group testing, extended time and frequent breaks. (Respondent's Exhibit 5)
6. In May 2017 Petitioners' educational advocate conducted a second classroom observation of Student at School A, based on Petitioners' concern that Student was falling behind in math. The advocate observed that Student required more one to one assistance from the teacher than other students in the class. (Witness 1's testimony, Petitioners' Exhibit 3-D)
7. Petitioners obtained an independent psychological evaluation ("IEE") in July 2017.

⁷ The evidence (documentary and/or testimony) that is the source of the Findings of Fact ("FOF") is noted within parenthesis following the finding. A document is noted by the exhibit number. If there is a second number following the exhibit number that number denotes the page of the exhibit from which the fact was obtained. When citing an exhibit that has been submitted by more than one party separately, the Hearing Officer may only cite one party's exhibit.

Student's July 2017 IEE determined that Student's cognitive functioning was in the High Average range. Student's academic functioning, including reading, math, and written expression, was in the Average range, but at the bottom of that range and significantly below Student's cognitive functioning. The IEE also noted Student's ADHD diagnosis and impairment in the ability to sustain auditory and visual attention. The evaluation also noted social-emotional concerns, specifically, anxiety related to Student's academic struggles. The evaluator made a litany of recommendations including that Student be placed in a school specifically focused on providing intensive remediation with a low student to teacher ratio and noted strategies to assist in Student's executive functioning and organizational challenges associated with ADHD. (Petitioners' Exhibit 4)

8. Based on recommendations of the IEE and their educational advocate, Petitioners advised DCPS in summer 2017, that Student had been accepted to School B, a non-public special education day school. Student began attending School B in fall 2017 and attended throughout SY 2017-2018. (Petitioner's testimony, Witness 1's testimony, Petitioners' Exhibits 4, 7)
9. School B is a non-public special education day school providing services to students with specific learning disorders, ADHD and executive functioning challenges. School B's intermediate division has 93 students, 6 of whom are funded by DCPS. School B has an OSSE certificate of approval ("COA"). School B has classes with a low student to teacher ratio. The smaller classes allow for work tailored to meet students' needs. Student has made academic progress since attending School B, particularly in written expression. Student still has trouble with multi-step math word problems but has recently mastered a math goal related to division. (Witness 2's testimony, Petitioners' Exhibit 16)
10. On August 23, 2018, Petitioners requested DCPS develop an IEP for Student for SY 2018-2019, and maintained Student's attendance at School B. (Petitioner's testimony, Petitioners' Exhibit 7)
11. On December 14, 2018, Petitioners filed a due process complaint requesting reimbursement for Student attendance at School B for both SY 2018-2019, and SY 2017-2018. Petitioners and DCPS reached a settlement agreement and Petitioners withdrew their complaint on January 30, 2019. (Petitioners' Exhibit 9, Respondent's Exhibit 1)
12. Petitioners asked their educational advocate to observe Student at School B in January 2019 and to participate in developing School B's IEP for Student in February 2019. During the observation, Student participated in the classroom, took risks and persevered through the classwork and needed some one-to-one support. (Witness 1's testimony, Petitioners' Exhibit 10)
13. At School B, Student is provided 35 hours per week of specialized instruction and integrated speech and OT services. Student's February 2019 School B IEP indicated Student's instructional level in reading comprehension was on grade level, but the decoding instructional level was one year below. In written expression and math, Student's instructional level was noted as below Student's grade level, with calculation one grade

level below, and word problems two grade levels below. The IEP included goals in reading, written expression and math, and in "Behavior/Executive Functioning." The strategies in this area included the use of a daily planner, graphic organizer, repetition and review and teacher prompting/cueing. There was a single goal of demonstrating improved executive skills by planning a study schedule and following directions for multi-step tasks with 80% accuracy. Petitioners' Exhibit 11)

14. In April 2019, a DCPS psychologist reviewed Student's 2017 IEE, interviewed Student, Student's parent and teacher, reviewed Student's educational records, conducted a classroom observation of Student, and conducted the following assessments: Woodcock-Johnson Tests of Achievement-Fourth Edition ("WJ-IV"), Gray Oral Reading Tests-Fifth Edition ("GORT-5"), and administering rating scales to Student's parent and teacher from the Behavior Assessment for Children 3rd Edition ("BASC-3") that included a brief executive functioning scale. Student's reading functioning was Low Average at the 20th percentile. Student's math function was Average at the 53rd percentile. However, the psychologist noted that Student displayed significant challenges with performing the correct math operation, often adding when subtraction or multiplication was required. The psychologist attributed Student's math errors to Student's difficulty with attention rather than Student's math abilities. During the observation at School B, Student was engaged in the instruction being provided to a small group of three students. The rating scales administered did not indicate elevation in any area except that the parent noted elevation in hyperactivity. (Witness 3's testimony, Respondent's Exhibit 8)
15. DCPS conducted an OT evaluation on May 2, 2019. The OT evaluator concluded that Student had average to superior functioning in fine motor, visual perceptual-motor, neuromusculoskeletal and sensory processing skills and that there was no negative impact in the areas assessed on Student's ability to access academic programming. (Respondent's Exhibit 9)
16. On May 9, 2019, DCPS convened an eligibility meeting. Petitioners participated along with School B representatives. The DCPS psychologist who assessed Student noted during the eligibility meeting that although Student performed in the Average range for math, Student's challenges with reading and attention adversely impacted Student's math performance and Student displayed significant challenges with performing the correct math operation. The team determined Student met the criteria for SLD in reading and written expression. At the eligibility meeting, the team agreed Student did not qualify for OT services. (Respondent's Exhibits 9, 10)
17. On June 4, 2019, DCPS convened an IEP meeting at DCPS Central Office to develop an IEP for Student. Petitioners participated in the meeting with their educational advocate and attorney. School B representatives participated by telephone. The IEP that was developed prescribed 3 hours per week of specialized instruction in general education and 2 hours per week of specialized instruction outside general education. The DCPS members of the team concluded that the IEP goals could be achieved with that number of hours of specialized instruction and that Student did not require goals in the area of math. The team also added classroom and testing accommodations to the IEP including, among other

things, clarification and repetition of directions, the use of a word processor for responses, small group testing and extended time for processing information and responding. All team members agreed to the academic goals in reading and written expression and the classroom and testing accommodations. (Witness 5's testimony, Respondent's Exhibit 12).

18. Petitioners, their representatives, and the School B staff members did not agree with the amount of specialized instruction in the IEP. Petitioners also asserted that the IEP should include goals for math and goals to address Student's executive functioning. Although they asserted Student required services consistent with the level of services Student receives at School B throughout the school day, Petitioners representatives did not request any specific increase in specialized instructional hours in the IEP. They also did not indicate that Student required specialized instruction during lunch or recess or in the specific courses of Art, Music and Physical Education. At School B these courses are not instructed by special education teachers and there is no curriculum or goals that a special education teacher would be needed to implement. At School B, Student takes lunch and recess with all 93 students in School B's intermediate division with supervision by approximately 6 staff members. (Petitioner's testimony, Witness 1's testimony, Witness 2's testimony, Respondent's Exhibit 13, Petitioners' Exhibit 20-A)
19. DCPS proposed implementing the June 4, 2019, IEP at School C, Student's neighborhood school. During the June 4, 2019, meeting the team briefly discussed how the IEP would be implemented at School C. The DCPS representative stated she would contact School C and instructed Petitioners to follow up with School C's special education coordinator for more information about School C. (Witness testimony, Respondent's Exhibits 12, 13, Petitioners' Exhibit 20-A)
20. Petitioners visited School C and concluded it could not meet Student's needs and on August 8, 2019, served notice to DCPS of their intent to maintain Student at School B for SY 2019-2020. (Petitioner's testimony)
21. On August 23, 2019, Petitioners filed a due process complaint. At a resolution meeting on the complaint, the parties agreed that DCPS would review Student's eligibility for goals and specialized instruction in math and agreed to facilitate another visit by Petitioners to School C to observe the school. (Respondent's Exhibit 14)
22. On September 27, 2019, DCPS convened a meeting to determine Student's eligibility for special education services in math. DCPS did not find Student eligible for services in math. Petitioners disagreed. (Petitioners' Exhibit 30)
23. During fall 2019, Petitioners and their advocate made visits to School C to observe. On December 3, 2019, the advocate observed an English class that was co-taught by a general education teacher and special education teacher and that had approximately 23 students. Both teachers circulated the room to answer students' questions and at one point the special education teacher worked one to one with a student. The teacher informed the advocate that students were allowed to use word processors upon request. (Petitioner's testimony, Witness 1's testimony, Petitioners' Exhibit 47)

24. Based upon their observations, Petitioners believed that School C was inappropriate for Student because of the large number of students in classes and because the pace of instruction and transitions were too quick for Student to grasp. Because of these same concerns and because she was informed that in order for Student to receive reading intervention at School C, Student would have to lose an elective class, the advocate also concluded School C was not appropriate for Student. However, Petitioners believed that perhaps the self-contained special education classroom at School C was better suited for Student because there were fewer students and the class was more structured and not as loud as the general education classroom they observed. They were still concerned that the number of students in the self-contained classroom of approximately 15 students was still too many. (Petitioner's testimony, Witness 1's testimony, Petitioners' Exhibit 47)
25. Petitioners eventually withdrew their due process complaint without prejudice and filed their current due process complaint on December 18, 2019. Student has continued to attend School B for SY 2019-2020 during the pendency of the due process complaint. (Petitioner's testimony, Petitioners' Exhibit 1)
26. Student's most recent School B IEP developed on January 23, 2020, indicates Student's instructional level in reading is one-half year below grade level, in math is 1.5 years below grade level, and in written language is 2 years below grade level. The IEP includes four math goals: demonstrating effective calculation in solving word problems, accurately solving whole number calculations within 3-minute time limits, demonstrating understanding of and calculations related to decimals and percentages, and demonstrating knowledge of calculations of fractions and mixed numbers with common and uncommon denominators. The IEP contains one Behavior/Executive Functioning goal related to completing assignments that require independent work with teacher prompts and the use of a student schedule. (Petitioners' Exhibit 41)
27. School C has a large student body and 175 special education students. School C's special education coordinator assisted Petitioners and the advocate when they visited and observed instruction at School C. School C can implement the IEP DCPS developed for Student and can provide the classroom and testing accommodations in the IEP. School C offers specialized reading and math programs. Had Student attended School C during SY 2019-2020, the School C special education coordinator would have scheduled a meeting, working with Petitioners, to smoothly transition Student to School C. Student would have been assigned to a team of teachers, including a special education teacher, to provide Student the specialized instruction prescribed in the DCPS IEP. School C can and does provide specialized programs in math that would be available to Student if Student were to attend School C. "Inclusion" classes, that have both a general education and a special education teacher, can use specialized programs to assist Student with any math challenges. (Witness 4's testimony, Witness 6's testimony)

CONCLUSIONS OF LAW:

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

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 the 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). Petitioners held both the burden of production and persuasion on the following issues: #3 and #4. Respondent held the burden of persuasion on the following issues: #1 and #2 after Petitioners established a prima facie case on issues #1 and #2 . The burden of persuasion shall be met by a preponderance of the evidence.⁸ The normal standard is a 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).

⁸ DC Code § 38-2571.03 (6) provides:

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

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

ISSUE 1: Whether DCPS denied Student a FAPE by failing to provide Student with an appropriate IEP because the June 4, 2019, IEP (a) has an insufficient amount and type of specialized instruction, and/or (b) lacks goals and specialized instruction for math and/or executive functioning.

Conclusion: Respondent sustained the burden of persuasion by a preponderance of the evidence that the IEP DCPS developed on June 4, 2019, was reasonably calculated to provide Student educational benefit in light of Student’s unique circumstances.

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 Cty. 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 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, 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 *Endrew 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 *Endrew F.*, supra, 137 S. Ct. at 999 (quoting *Rowley*, 458 U.S. at 202)

Petitioners assert that the IEP DCPS developed for Student on June 4, 2019, is inappropriate, because it did not include a sufficient amount and type of specialized instruction and did not include goals in the areas of math and executive functioning.

The evidence presented by Petitioner did not sufficiently demonstrate, when countered by the evidence presented by Respondent, that Student was in need of specialized instruction and/or goals in the areas of math or executive functioning. Although Petitioner presented two expert witnesses, Petitioner's educational advocate, and the School B administrator, who have been familiar with Student for the past few years, the Hearing Officer found the testimony of the DCPS psychologist, who actually assessed Student and observed Student in the classroom at School B to be more credible. This witness determined through her own assessment of the Student, that Student's math abilities were solidly in the Average range on standardized testing and concluded that the mistakes Student made in math during the testing were attributable to Student's attention issues and deficits in reading rather than any deficit in Student's academic abilities in math.

The DCPS psychologist administered the following assessments: WJ-IV, GORT-5 and the BASC-3 that included a brief executive functioning scale. Student's reading functioning was Low Average at the 20th percentile. Student's math function was Average at the 53rd percentile. However, the psychologist noted that Student displayed significant challenges with performing the correct math operation, often adding when subtraction or multiplication was required. The psychologist credibly attributed Student's math errors to Student's difficulty with attention rather than Student's math abilities. During her observation of Student at School B, Student was engaged in the instruction being provided to a small group of three students.

Although Student received specialized instruction in math while attending School A and at School B, the recent assessments by the DCPS psychologist and her testimony were convincing that Student did not at the time the IEP was developed require specialized instruction in math. Consequently, the Hearing Officer does not conclude based on the evidence adduced that the IEP

DCPS developed for Student was deficient because it did not include goals or specialized instruction in the area of math.

Petitioners also alleged that the June 4, 2019, IEP is inappropriate because it lacks goals and specialized instruction to target Student's executive functioning. The DCPS psychologist administered rating scales to assess Student's executive functioning. These scales were provided to both Student's parent and teacher. Based upon the psychologist's report and credible testimony, there was no elevation in executive functioning reflected in the rating scales completed by the teacher and parent.

Although Student's School B IEP includes a goal to address executive functioning, the IEP notes strategies including the use of a daily planner, graphic organizer, repetition and review and teacher prompting/cueing, that are strategies similar to those included in the June 4, 2019, IEP classroom and testing accommodations.

Student's most recent School B IEP has a single goal to complete assignments that require independent work with teacher prompts and the use of a student schedule. Although executive functioning is specifically addressed in Student's School B, based upon the evidence adduced, particularly, the assessments conducted by and the testimony of the DCPS psychologist, the Hearing Officer does not conclude that the IEP DCPS developed for Student was deficient because it did not include goals or specialized instruction focused on executive functioning.

The evidence also demonstrated that during the June 4, 2019, IEP meeting Petitioners, their representatives and the School B staff asserted that Student required specialized instruction throughout the school day, they made no specific request for any specific increase in specialized instruction hours per week be included in the IEP other than for instruction math and executive functioning.

The Hearing Officer notes that the evidence demonstrates that at School B, Student does not receive specialized instruction from a special education teacher in any of the following subjects: Art, Music or Physical Education. The Hearing Officer also notes that even at School B, Student does not require specialized instruction during lunch and recess and is generally in a setting during these periods with the full student body of 93 students.

There was insufficient evidence presented that Student required any additional hours of specialized instruction beyond what that IEP prescribed. The Hearing Officer concludes based on the credible testimony of the DCPS witness who led the IEP meeting, as well as the data and testimony from DCPS psychologist, that the number of hours of specialized instruction DCPS placed in the June 4, 2019, IEP to implement the reading and written expression goals was sufficient.

The evidence adduced supports the finding that the level of specialized instruction both inside and outside general education that DCPS proposed for Student in the June 4, 2019, IEP was appropriate and the IEP was reasonably calculated to enable Student to make progress appropriate in light of Student's circumstances. Consequently, the Hearing Officer concludes that Respondent sustained the burden of persuasion by a preponderance of the evidence on this issue.

ISSUE 2: Whether DCPS denied Student a FAPE by failing to provide Student with an appropriate placement for SY 2019-2020.

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

In determining the educational placement of a child with a disability, each public agency must ensure that the placement decision is 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.

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 *Endrew F.*, supra, 137 S. Ct. at 999 (quoting *Rowley*, 458 U.S. at 202)

As discussed in the issue above, the evidence in this case supports the finding that the level of specialized instruction both inside and outside general education that DCPS proposed for Student in the June 4, 2019, IEP was appropriate and reasonably calculated to enable Student to make progress appropriate in light of Student's circumstances.

There was insufficient evidence presented that Student requires special education throughout the school day or that Student's academic and/or social/emotional challenges support a conclusion that Student's unique circumstances require that Student be totally removed from the general education setting such that Student's LRE is a separate special education school.

After the June 4, 2019, IEP was developed, DCPS informed Petitioners that the IEP could be and would be implemented at Student's neighborhood school, School C. The evidence sufficiently demonstrates, through the credible testimony of the School C special education coordinator, that School C can provide Student specialized instruction both inside and outside of general education and can provide Student with a specialized reading program and the accommodations in the IEP to help support Student's academic challenges and challenges with attention related to ADHD. In addition, there was credible testimony from another DCPS witness that School C can also offer Student support through specialized math programming, although math was not an area of need that required specialized instruction to address.

Although Petitioner and Petitioners' educational advocate were of the opinion that School C was

not an appropriate setting for Student because of the large number of students in classes and because the pace of instruction and transitions were too quick for Student to grasp, no specific examples of the pace of instruction or the transitions were described. Thus, the Hearing Officer did not find Petitioner's testimony in this regard convincing.

As previously stated, at School B, during lunch and recess Student is generally in a setting of the full student body of 93 students and there was no evidence that Student has difficulty functioning or navigating in a setting with a large number of students.

Petitioners' advocate also stated that because she was informed that in order for Student to receive reading intervention at School C, Student would have to lose an elective class. However, this assertion was not supported by any other evidence. Based upon the credible testimony of the DCPS witness that Student's IEP could be implemented at School C, the Hearing Officer, did not find the advocate's testimony credible in this regard.

Based upon the evidence adduced, the Hearing Officer concludes that School C could effectively implement the IEP that DCPS developed for Student on June 4, 2019, and could otherwise appropriately address the academic and social/emotional concerns that were noted in Student's evaluations and in the IEP.

Consequently, the Hearing Officer concludes that Respondent sustained the burden of persuasion by a preponderance of the evidence that the educational placement that DCPS offered, both in the IEP and in the school proposed to implement the IEP, was appropriate.

ISSUE 3: Whether DCPS denied Student a FAPE by failing to allow Petitioners to observe a classroom at the DCPS proposed school.

Conclusion: The Hearing Officer concludes that Petitioners did not sustain the burden of persuasion by a preponderance of the evidence on this issue.

The purpose of IDEA is to "ensure that all children with disabilities have available to them a free and appropriate public education that emphasizes special education and related services designed to meet their unique needs and prepare them for further education, employment, and independent living." *M.G. v. District of Columbia*, 246 F.Supp.3d 1,7 (D.D.C. 2017) (citing 20 U.S.C. § 1400(d)(1)(A)).

Parents must have an opportunity to participate in the IEP process, and "procedural inadequacies that "seriously infringe upon the parents' opportunity to participate in the IEP formulation process ... clearly result in the denial of a FAPE." *Cooper v. District of Columbia*, 77 F.Supp.3d 32, 37 (D.D.C. 2014) (*quoting A.I. 3ex rel. Iapalucci v. District of Columbia*, 402 F.Supp.2d 152, 164 (D.D.C. 2005)) (alteration in original). To ensure these requirements are followed, IDEA established procedural safeguards that allow parents to seek a review of IEP decisions they disagree with. *See Middleton v. District of Columbia*, 312 F.Supp.3d 113, 122 (D.D.C. 2018). Section 1415(f)(1)(A) provides "the parents or the local education agency involved in such a complaint shall have an opportunity for an impartial due process hearing ..."

Further, IDEA allows states to create additional procedural and substantive protections if they are consistent with IDEA. *Middleton*, 312 F.Supp.3d at 122. If a state creates a higher standard, "an individual may bring an action under the federal statute seeking to enforce the state standard." *Id.* (quoting *Gill v. Columbia* 93 Sch. Dist., 217 F.3d 1027, 1035).

In 2014, the District of Columbia passed the Student Rights Act. *Id.* The Act "provides district parents with additional procedural safeguards to help make sure parents have the tools they need to stay informed, engaged, and empowered throughout the special education process." See D.C. Council Comm. Rep. on B 20-723 (D.C. 2014) at 1. Recognizing that "parents who do not have a specific background in the subject area ... often cannot adequately evaluate whether their child's instruction is sufficient [and that] parents are concerned that an LEA may limit such access to the point that the observation is unable to provide meaningful input into their child's educational progress," the Student Rights Act expanded on a parent's "right to observe" under the IDEA...⁹

The Act (D.C. Code § 38-2571.03) states in pertinent part the following:

5(A) Upon request, an LEA shall provide timely access, either together or separately, to the following for observing a child's current to proposed special education program:

(i) the parent of a child with a disability; or

(ii) a designee appointed by the parent of a child with a disability who has professional expertise in the area of special education being observed or is necessary to facilitate an observation for a parent with a disability or to provide language translation assistance to a parent; provided, that the designee is neither representing the parent's child in litigation related to the provision of a free and appropriate public education for that child nor has a financial interest in the outcome of such litigation.

(C) A parent, or the parent's designee, shall be allowed to view the child's instruction in the setting where it ordinarily occurs or the setting where the child's instruction will occur if the child attends the proposed program.

(D) the LEA *shall not impose any conditions or restrictions on such observations except those necessary to:*

(i) Ensure the safety of the children in the program;

(ii) Protect other children in the program from disclosure by an observer of confidential and personally identifiable information in the event such information is obtained in the course of an observation by a parent or a designee, or

⁹ *Woodson, et al., v. District of Columbia*, 119 LRP 28316

(iii) Avoid any potential disruption arising from multiple observations occurring in a classroom simultaneously.

(E) An observer shall not disclose nor use any information obtained during the course of an observation for the purpose of seeking or engaging clients in litigation against the District or the LEA.

Generally, a school district has the discretion to determine the actual school location where a Student's IEP is to be implemented, and parents are generally allowed to visit that location before a student's enrollment.

The evidence in this case demonstrates that DCPS provided both Petitioners and their educational advocate full opportunity to visit and observe instruction at School C on multiple occasions. There was no evidence to indicate that DCPS in any way prevented Petitioners from observing a classroom in the school where DCPS proposed to implement Student's June 4, 2019, DCPS IEP. Consequently, the Hearing Officer concludes that Petitioners did not sustain the burden of persuasion by a preponderance of the evidence on this issue.

ISSUE 4: Whether School B is a proper placement for Student.

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

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

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)).

Albeit the evidence demonstrates that since Student has attended School B, Student has made progress and that Petitioners are pleased with and want Student to remain at School B, based upon the evidence adduced, the Hearing Officer did not conclude that Student's appropriate LRE at the time the June 4, 2019, IEP was developed was a separate special education day school, like School B, where Student is totally removed from non-disabled peers.

As already discussed in issues #1 and #2 above, there was sufficient evidence that the IEP DCPS proposed for Student for SY 2019-2020 was reasonably calculated to enable Student to make progress appropriate in light of Student's circumstance and there was sufficient evidence that the IEP could be implemented at School C and that School C was an appropriate placement.

The Hearing Officer, therefore, concludes that despite the progress Student has made at School B, School B is not a placement that DCPS is obligated to fund and therefore, does not grant Petitioner's requested relief of reimbursement for Student's attendance at School B for SY 2019-2020 or Student's prospective placement at School B.

ORDER:

Petitioners' Due Process Complaint is hereby Dismissed with Prejudice and all 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

Coles B. Ruff, Esq.

Hearing Officer

Date: March 19, 2020

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