

**District of Columbia**  
**Office of the State Superintendent of Education**  
Office of Dispute Resolution  
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<b>Parents, on behalf of Student,<sup>1</sup></b>	)	
<b>Petitioners,</b>	)	
	)	<b>Hearing Dates: 2/14/22; 2/15/22; 2/16/22;</b>
<b>v.</b>	)	<b>3/18/22</b>
	)	<b>Hearing Officer: Michael Lazan</b>
<b>District of Columbia Public Schools,</b>	)	<b>Case No. 2021-0159</b>
<b>Respondent.</b>	)	

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**HEARING OFFICER DETERMINATION**

**I. Introduction**

This is a case involving an X-year-old student who is currently eligible for services as a student with a Specific Learning Disability (the “Student”). A due process complaint (“Complaint”) was received by District of Columbia Public Schools (“DCPS” or “Respondent”) pursuant to the Individuals with Disabilities Education Act (“IDEA”) on October 1, 2021. The Complaint was filed by the Student’s parents (“Petitioners”). On October 23, 2021, Respondent filed a response. A resolution meeting was held on October 14, 2021. The matter was not settled. The resolution period expired on October 31, 2021.

**II. Subject Matter Jurisdiction**

This due process hearing was held, and a decision in this matter is being rendered, pursuant to the IDEA, 20 U.S.C. 1400 et seq., its implementing regulations, 34 C.F.R.

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<sup>1</sup>Personally identifiable information is attached as Appendix A and must be removed prior to public distribution.

Sect. 300 et seq., Title 38 of the D.C. Code, Subtitle VII, Chapter 25, and the District of Columbia Municipal Regulations, Title 5-E, Chapter 30.

### **III. Procedural History**

A prehearing conference was held on October 28, 2021. Attorney A, Esq., counsel for Petitioners, appeared. Attorney B, Esq., counsel for Respondent, appeared. A prehearing conference order summarizing the rules to be applied in the hearing and identifying the issues in the case was issued on November 8, 2021, revised on December 7, 2021, and corrected on February 12, 2022.

The hearing was conducted through the Microsoft Teams videoconferencing platform, without objection. Petitioners were again represented by Attorney A, Esq. Respondent was again represented by Attorney B, Esq. This was a closed proceeding.

On October 18, 2021, Petitioners moved for an order requiring Respondent to fulfill its stay-put obligations. An order granting the motion was issued on November 9, 2021. Because of witness and counsel availability, Petitioners moved on November 15, 2021, to extend the Hearing Officer Determination (“HOD”) due date to March 7, 2022, on consent. An order extending the HOD due date accordingly was issued on December 10, 2021.

On December 7, 2021, Petitioners moved for an order requiring Respondent to again fulfill its stay-put obligations and to admit transcripts from a prior proceeding into the record. Respondent opposed the motion on December 14, 2021. On February 7, 2022, the motion was granted in part with respect to stay-put obligations, and in its entirety with respect to admitting transcripts in the record.

On February 8, 2022, Respondent filed a motion to continue the matter to allow it to submit a Notice to Appear. The matter proceeded to trial on February 14, 2022, February 15, 2022, and February 16, 2022, but the parties were not able to finish their presentations because of, among other things, witness availability, extensive testimony, and complex issues. On February 17, 2022, and then again, through a revised motion, on February 28, 2022, Respondent moved to extend the HOD due date from March 7, 2021, to April 8, 2022, on consent. On March 3, 2022, an order was issued denying the continuance motion dated February 8, 2022, and granting the continuance motion dated February 28, 2022, extending the timelines for the HOD to April 8, 2022.

A final hearing was held on March 18, 2022. The parties then agreed that Petitioners would present an oral closing argument that day and DCPS would present a written closing argument on March 22, 2022. It was also agreed that Petitioners could submit a list of legal citations on March 22, 2022. DCPS did present a written closing argument on March 22, 2022, and Petitioners did present a list of legal citations, with parentheticals, on March 22, 2022.

During the proceeding, Petitioners moved into evidence exhibits P-1 through P-70 without objections being filed. Respondent moved into evidence exhibits R-3, R-4, R-10, R-11, R-12, R-33, R-34, and R-36 without objection. Petitioners presented as witnesses, in the following order: Witness A, an educational consultant (expert in special education placement and Individualized Education Program (“IEP”) development); the Student; the Student’s mother (“Mother”); and the Student’s father (“Father”). After presentation of Petitioners’ case, Respondent moved on the record for a directed verdict. This motion was denied. Respondent presented as witnesses, in the following order: Witness B, a

social worker (expert in social work); Witness C, an CIEP team specialist (expert in special education programming and placement); Witness D, a school psychologist (expert in school psychology); and Witness E, a Local Educational Agency (“LEA”) representative at School A (expert in special education). On rebuttal, Petitioners presented as a witness: Witness F, Executive Head of School B.

#### IV. Issues

As identified in the revised Prehearing Order and in the Complaint, the issue to be determined in this case is as follows:

**Did Respondent fail to provide the Student with an appropriate IEP in or about May, 2021? If so, did Respondent act in contravention of 34 C.F.R. 300.320, Endrew F. v. Douglas County School District, 137 U.S. 988 (2017), and Hendrick Hudson Bd. of Educ. v. Rowley, 458 U.S. 176 (1982)? If so, did Respondent deny the Student a Free Appropriate Public Education (“FAPE”)?**

Petitioners contended that the Student’s IEP contained insufficient and/or inappropriate hours and type of specialized instruction to address the Student’s needs; that the IEP’s baselines, goals, and objectives were inappropriate; that the IEP contained other classroom aids and services that “describe the needs of the Student in such a way that the proposed hours of specialized instruction and settings would not meet [his/her] needs”; that the IEP removed important information about the Student that was relevant to his/her needs; and that the IEP failed to address social-emotional challenges known to impact the Student’s ability to access the general education curriculum. As relief, Petitioners seek tuition reimbursement at School B for the entire 2021-2022 school year and related relief, including stay-put payments in full.

## **V. Findings of Fact**

1. The Student is an X-year-old who is eligible for services as a student with a Specific Learning Disability. The Student has average cognitive ability. For the 2017-2018 school year, the Student attended School Z, a DCPS public school. The Student was often pulled out of classes, which caused him/her to miss instruction and made him/her feel “dumb and insecure.” The Student’s most difficult subject was mathematics. Testimony of Student. The Student experienced a heightened level stress at School Z. Testimony of Witness A; Testimony of Witness B.

2. A psychological assessment of the Student was conducted by a DCPS psychologist in November and December, 2017, with a report issued on December 10, 2017. The evaluator assessed the Student through, among other things: a record review; teacher, parent, and Student interviews; and administration of a range of tests, including the Woodcock-Johnson Tests of Cognitive Abilities, Fourth Edition (“WJ-IV COG” Selected Clusters/Subtests), the Wechsler Individual Achievement Test, Third Edition (“WIAT-III”), the Behavior Assessment System for Children, Third Edition (“BASC-3” Teacher, Parent), the Behavior Rating Inventory of Executive Function, Second Edition (“BRIEF-2” Teacher, Parent), and the Revised Children’s Manifest Anxiety Scale, Second Edition (“RCMAS-2” self-report). The evaluator concluded that the Student had a psychological processing weakness in long-term retrieval, including word retrieval. Academic testing using the WIAT-III revealed below-age and grade-level scores in the areas of word reading (i.e., sight-word recognition skills), oral reading fluency, spelling, math fluency for multiplication, oral discourse comprehension (i.e., a listening comprehension task requiring the ability to listen to a story and recall information when

asked questions about the story), and theme development and text organization (i.e., a component of essay composition abilities). Behavior and social-emotional functioning data gathered via interviews, observations, reviews of previous evaluations, and standardized rating scales, such as the BASC-3 and RCMAS-2, suggested that the Student demonstrated symptoms consistent with anxiety. P-51.

3. For the 2018-2019 school year, the Student again attended School Z. The Student's amended IEP, dated February 14, 2019, recommended that the Student receive forty-five minutes of specialized instruction per week inside general education (for reading, written expression, and mathematics); 150 minutes of specialized instruction per week outside general education (ninety minutes for reading and sixty minutes for mathematics); and "Other Classroom Aids and Services." P-59-11. The Student's subsequent IEP, dated May 29, 2019, recommended that the Student receive two hours of specialized instruction per week inside general education for reading, written expression, and mathematics, with "Other Classroom Aids and Services." P-60-10.

4. For the 2019-2020 school year, the Student attended School A, a DCPS public school. The Student's August 13, 2020, IEP recommended that the Student receive ten hours of specialized instruction per week outside general education (three hours for reading, four hours for written expression, and three hours for mathematics) and 2.5 hours of specialized instruction per week inside general education, with no specific subject matter assigned. The IEP also recommended behavioral support services for thirty minutes per month, with "Other Classroom Aids and Services." P-61-12.

5. At School A, reading intervention for eligible students is taught by a special education teacher, who uses the "Reading Plus" program, among other things, to

work on fluency, vocabulary, context clues, and main ideas. Other methodologies at School A include Lexia and the STARI program, which focuses on decoding, fluency, and comprehension. The school was able to provide one-to-one multisensory literacy instruction and other interventions that were mentioned in the “present levels” sections of the Student’s then-current IEP. Testimony of Witness F.

6. At School A, notwithstanding the requirements of the IEP, the Student received instruction through daily “inclusion” classes in English language arts and mathematics. P-48-96. Much of this instruction was language-based. Testimony of Mother. The classes at School A had about twenty to thirty children. The Student did not want to be pulled out of class for instruction and was upset when this happened. The Student also felt that classes were “really hard,” with a lot of homework, which s/he “barely” did. The Student often did not understand what teachers were trying to do and found reading assignments very difficult. The Student felt that s/he didn’t get enough help, and that the help that was provided to him/her was not useful. The Student’s anxiety did not explicitly manifest itself at school, but at home s/he would “have a breakdown.” The Student was not comfortable asking teachers for help at School A, at least in part because the Student did not want to make the teachers think of him/her as unintelligent. The Student also had difficulty with self-organization. Testimony of Witness A; Testimony of Student. In response, teachers at the school sometimes told the Student to skip assignments. Testimony of Mother; Testimony of Witness B.

7. In “IRI” testing conducted in November, 2019, the Student’s instructional reading level was scored one-to-two levels below grade-level. P-26-5. An “AED” meeting was held for the Student on or about December 15, 2020. A document

pertaining to the AED meeting mentioned the Student's 2017 psychological assessment, report cards, and fall 2019 "MAP" mathematics testing (which found that the Student's score had fallen to the 33rd percentile). P-54.

8. In or about January, 2020, the Student began attending School B, a private school for college-bound students with mild to moderate language-based learning differences (a discrepancy between their intellectual abilities and academic achievement in one or more areas, such as reading, writing, oral expression, or math). The school does not accept students who are cognitively impaired or whose main disability is Attention Deficit Hyperactivity Disorder ("ADHD"). The school is approved by the Maryland state educational agency and uses "common core" standards to develop grade-level curricula. School B has approximately 150 students and arts are infused throughout every class. Students have average to above-average cognitive abilities. The majority of students in the school have dyslexia, specific learning disability in reading and/or written expression, mixed expressive and receptive language disorder, and/or central auditory processing disorder. Some students have secondary disabilities of dysgraphia, attentional difficulties, executive functioning, and/or mild anxiety. School B has approximately forty-two full-time teachers who must be certified in at least one evidence-based reading intervention. A "few" teachers hold special education certification, but teachers are not required to be certified as teachers. P-47; Testimony of Witness F. At School B, Fridays are different from the other school days; while staff attend professional development courses, students go to self-selected workshops run by support staff, which typically change monthly. The school also provides guest speakers and special instruction (for wellness, health, antiracism, etc.) for students on Fridays. The student-to-adult ratio in



classes at School B is approximately ten-to-one, though some classes may have lower ratios. Lessons tend to reduce reliance on language and use auditory, visual, and kinesthetic approaches to reduce anxiety. Reading and math classes are grouped by ability, which dictates student schedules. This results in students being grouped mostly with the same students for social studies and science classes. There are no individualized learning plans at the school, which uses a variety of programs to target reading issues, such as Wilson, Phono-Graphix, Orton-Gillingham, and Lindamood-Bell. Other available programs include Sounds in Syllables, RAVE-O, and computer-based programming. All classes use a multisensory program, Step Up to Writing. To address executive functioning deficits, each student uses a planner designed by the school. Teachers check the planner every period. P-47.

9. School B has a thirty-minute reading class and a separate class for English language arts. All students receive daily reading instruction. The reading methodology is based on the Orton-Gillingham approach to instruction. Classes are broken up into groups by areas of need. Information is placed on the “board” in obvious ways so that students know what to expect during the day. The school does not offer related services such as speech and language therapy or occupational therapy. Testimony of Witness F. School B provides students with “check-ins” twice each day. Classroom and testing accommodations are decided by teachers. Breakout rooms are often used during virtual instruction. Testimony of Mother.

10. School B provided additional accommodations for the Student, including: extended time for assignments and exams; answers marked directly on tests; assistive technology (e.g. Read & Write; Webspiration, audio books); text-to-speech software or a

reader during testing situations; a computer with spell-check for written work; small class and group testing; breaks; access to “fidgets”; permission to stand as needed; scrap paper for tests; a calculator and manipulatives for mathematics; a reading rod or ruler; access to a highlighter and graph paper; use of large-font printed materials; reduced-length written assignments; checklists for editing, proofreading, and grammar; reduced copying for assignments; broken-down instructions; chunked assignments; repeated directions and checks for understanding; and use of graphic organizers. P-7; P-40.

11. The Student had difficulty transitioning to School B at first. Testimony of Mother. After the school closed for in-person learning as a result of the COVID-19 pandemic, the Student had a difficult time adapting to online instruction. During the pandemic, School B staff determined that the “Reading Assistant” reading program was inappropriate for online instruction, and the school changed to the “Wordflight” program. Testimony of Witness F; Testimony of Mother.

12. The Student continued at School B for the 2020-2021 school year. In Reading, the Student’s instructor used the Orton-Gillingham, Wilson, Phono-Graphix, and Spell-links methodologies. P-33-7. MAP testing in reading in or about October, 2020, found that the Student was reading below grade-level. P-55-1. The Student continued to have trouble in mathematics and required direct teacher supports, checklists, and graphic organizers, among other things. Testimony of Witness A. The Student felt that School B provided beneficial strategies for memorizing, including for non-academic activities. The Student also benefitted from speech-to-text software; listening to books instead of having to read them; the slow pace of classes, especially mathematics; and the smaller classrooms, which allowed him/her to ask questions and self-advocate. The

Student improved regarding self-organization. Testimony of Student. Class sizes were about six-to-ten students, except for reading and drama. The Student did not experience much anxiety at School B, except during major tests. Testimony of Student; Testimony of Mother. The Student also benefitted from “check-ins” with an advisor, twice each day, five days per week. Testimony of Mother.

13. An “AED” meeting was held for the Student in or about December, 2019. According to Witness B, the parties agreed that no social/emotional concerns needed to be addressed or added to the Student’s IEP. The parties indicated that they had increased confidence that the Student no longer needed to address the “academic stressors” that s/he faced in prior environments, and that this had allowed the Student to make progress. Witness B felt that the Student’s behaviors had “shifted to the positive.” P-1-6.

14. Witness D conducted a Confidential Psychological Triennial Re-evaluation of the Student on January 26, 2021, and January 27, 2021. The evaluation included multiple tests; a record review with respect to grades and attendance; and interviews with the Student, the Student’s parent, and the Student’s teachers. Witness D administered the Reynolds Intellectual Assessment Scales, Second Edition (“RIAS-2”), the Woodcock Johnson Tests of Achievement, Fourth Edition-Form A (“WJ-IV ACH”), and the BASC-3. The Student’s science teacher described the Student as a creative, thoughtful, flexible child who demonstrated an ability to express thoughts in an articulate, organized manner. However, the Student was said to have difficulties with executive functioning, especially time and task management, and struggle with processing information and expressing his/her thoughts in writing. The Student also struggled with self-advocacy, though this issue was considered to be improving. The Student’s

mathematics teacher said that the Student had improved throughout the school year, but struggled with computation and fluency, algebraic reasoning, and quantitative reasoning, and that his/her overall performance remained well below grade-level. The Student's English teacher described him/her as exhibiting strong writing stamina, idea generation, text analysis, discussion participation, and collaboration within the class, though s/he struggled with proofreading, grammar, and attention to detail. The Student's reading teacher described him/her as motivated, with a strong ability to use decoding and encoding strategies independently and comprehend text. The Student described him/herself as having "mixed feelings" regarding virtual learning, which was "bad" at times due to internet issues and "good" at times because it gave him/her more flexibility. The Student's favorite classes were reading and drama, and his/her least favorite subjects were math and science. P-56-1-4.

15. The Student earned a composite intelligence index score of 90 on the RIAS test, in the average range, at the 25th percentile. The Student scored higher on non-verbal intelligence subtests than verbal intelligence subtests. The Student's cognitive memory score was in the average range. On the W-J IV, the Student scored in the average range in passage comprehension and word attack, and in the low average range in letter-word identification and oral reading. The Student's overall mathematics score was in the low range, while the Student scored in the high average range for written language. The Student also scored in the low range for "brief achievement" and academic skills, but in the average range for academic applications. On the BASC-3, parent scale, the Student did not score in the "clinically significant" range but scored in the "at-risk" range for withdrawal. Witness D concluded that the Student should be

identified as a student with a specific learning disability and recommended a variety of accommodations and services for the Student, including teaching chunking strategies in mathematics, using multimodal presentation of information in mathematics, and grading written work primarily on content. P-56. Executive functioning recommendations were included in the report. P-56-15-16; Testimony of Witness C.

16. Witness A observed the Student in his/her virtual English class for thirty minutes on February 2, 2021. The Student actively participated in the lesson in a breakout room. S/he then appeared to be writing when the class discussed their answers. Witness A also interviewed one of the Student's teachers, who indicated, among other things, that the Student was anxious, had strong writing skills but difficulty with proofreading, and would "fall through the cracks" in a larger classroom. P-57-5. During this interview, the teacher stated that the Student's anxiety was not about schoolwork but about being placed in a large group. Testimony of Witness A; P-57-5-6. On or about February 9, 2021, an LEA representative asked School B to permit an observation of the Student. P-2-2.

17. An eligibility meeting was held for the Student on February 9, 2021. The recent psychological assessment was discussed, and DCPS said that they would reconvene to discuss the Student's needs for social and emotional support services. Testimony of Witness A; Testimony of Witness C. Petitioners shared that School B would resume in-person attendance for two days per week, beginning on February 16, 2021. DCPS indicated that the Student was eligible for services as a student with a specific learning disability, and that the Student had needs in spelling and mathematics calculation. DCPS did not agree that the Student had special education needs in other

areas such as reading, writing, and social and behavioral functioning, including with respect to anxiety. Witness A disagreed, stating that the Student was impacted in reading, writing, and mathematics, not just spelling and mathematics calculation.

Witness A requested social, emotional, and behavioral services for the Student through direct behavioral support services. Witness D responded that what the Student was already receiving was working. Though DCPS did not consider the Student's reading skills to be a "big issue," the team agreed that the Student would still benefit from reading goals. P-3-1-3; Testimony of Witness A.

18. On February 22, 2021, School B declined to allow DCPS to observe the Student. P-8-3. The school tried to set up a virtual observation in May, 2021. P-11-10.

19. Teacher reports from May 17, 2021, indicated that the Student was making progress in social studies and writing, and was using accommodations including checklists, graphic organizers, color coding, multi-sensory structured literacy instruction, small group Orton-Gillingham instruction, and one-to-one after-school instruction. At the time, the Student was reading approximately two grades below level at the independent level and approximately at or near grade-level at the instructional level. P-13.

20. Petitioners received two drafts of the Student's IEP prior to the IEP meeting on May 25, 2021. Testimony of Witness A. The initial draft was based mainly on the psychological assessment by Witness D, a Strengths and Difficulties Questionnaire ("SDQ"), and the materials from School B, including testing summaries. SDQ scores did not indicate that the Student had a clinically significant level of social or emotional difficulty. Testimony of Witness B; Testimony of Witness C. Approximately a few days

before the meeting, Petitioners were notified that DCPS did not have the documents that they needed to review. Once they were made aware of this, Petitioners helped DCPS obtain these documents. Testimony of Witness A.

21. The Student's May 25, 2021, IEP meeting was held with Petitioners, a DCPS LEA representative/special education teacher, Witness B, Witness C, and Witness A. At the meeting, DCPS expressed that the Student was eligible for services because s/he had a learning disability with a discrepancy between cognitive and academic scores. Assistive technology was requested by Petitioners to help the Student with executive functioning and organizational issues. Testimony of Witness C; P-26-2. Witness B reported that the Student's behaviors had not impacted his/her academic progress. Witness A objected to this and felt that DCPS had enough data to "check the box," indicating that there would be significant impact on the Student's academics in a public school setting. Witness A wanted to include executive functioning in the "assistive technology" box because the Student used technology to organize homework. DCPS noted that the Student's score on the BASC-3 was not in the "at-risk" or "clinically significant" range for executive functioning, and that, therefore, they would not add that language to the assistive technology box. DCPS indicated that the IEP would not express that the Student had anxiety or executive functioning issues, over Petitioners' objections. DCPS indicated to Petitioners that the recommended five hours of specialized instruction outside general education were designed to address fact fluency (two days per week) and encoding and decoding (three days per week). Behavioral support services (consultation) were increased to 120 minutes per month at Petitioners' request. Testimony of Witness A; P-23-3; Testimony of Mother; Testimony of Father. The team also discussed the IEP

goals. For reading, decoding objectives were added to Goal 1. Witness A proposed a separate decoding goal. DCPS stated that they would write a decoding goal and remove the objectives. For written expression, Witness A said that she did not feel that the Student was on grade-level, and the LEA representative explained that the goal was aspirational, that goals must be aligned to a grade-level standard, and that the goal did not suggest that that the Student was on grade-level. Changes to the IEP were made based on Witness A's suggestions, including additions to some of the baselines; the addition of subtest scores; references to encoding, decoding, and spelling; and changes to the "Other Classroom Aids and Services" section. P-23; P-24; Testimony of Witness A; Testimony of Witness B.

22. DCPS staff had no conversations with School A regarding the May 25, 2021, IEP meeting because the school was not the Student's placement at the time. Testimony of Witness B. Witness C was not sure what had happened at School A. At the May 25, 2021, IEP meeting, DCPS did not consider the Student's program at School A, nor was there any discussion of School A. Testimony of Witness C.

23. The IEP stated that the Student's behavior did not impede his/her learning or the learning of others and indicated that the Student needed assistive technology for voice typing, calculation, feedback, and grammar help. The IEP described the Student's skills by referencing the psychological assessment dated February 2, 2021, the Student's report cards, and teacher reports. It was determined that the Student had below average verbal intelligence and low mathematics calculation skills, and would likely have issues with basic computation, problem solving, and understanding verbal directions. The IEP included three mathematics goals. The IEP indicated that the Student's learning



disability impacted his/her decoding and encoding skills, as well as his/her short-term memory, which would limit his/her access to the general education curriculum. The IEP included three goals in reading. The IEP referenced IRI testing that indicated that the Student was approximately two grades below level at the independent level and approximately at or near grade-level at the instructional level. In written expression, the IEP indicated that the Student's difficulty with both long- and short-term memory could impact his/her encoding skills and written language development, therefore limiting his/her ability to access the general education curriculum and produce grade-level material, and that s/he needed scaffolds and small groups to organize his/her writing and ideas. The IEP contained three goals in written expression. The IEP reported on the Student's recent SDQ, which was compiled through questions to the Student's teachers and parents. The Mother's SDQ indicated that the Student had high emotional distress, but no behavioral difficulties. Both teachers indicated that the Student's emotional distress was slightly raised, and that difficulties impacting his/her life were slightly "raised," but the scores were otherwise average. The IEP stated that the Student had historically presented with anxiety with academic tasks that were perceived as difficult, and would cry, feel helpless, experience sickness, become disengaged, and have difficulties with organization and extreme worry. The IEP indicated that the Student reacted differently in School B compared to School A. S/he was keeping up with assignments at School B, understanding the work presented, and completing assignments as assigned. The IEP indicated that the Student had made significant improvements in addressing anxiety through coping strategies such as exercise and use of "fidgets," but would still benefit from regular, consistent check-ins with mental health providers

working with teachers to support the Student's social emotional progress. The IEP included one social, emotional, and behavioral goal relating to coping strategies. The IEP recommended ten hours of specialized instruction per week inside general education, five hours of specialized instruction per week outside general education, and 120 minutes of behavioral support services (consultation services) per month. The IEP also recommended "Other classroom aids and services": teacher check-ins when needed; pre-teach and re-teach when needed; visual supports; chunked assignments; one-to-one support when needed; a small group setting; computerized access to reading intervention programs; a laptop or computer for written work using enlarged fonts and spell-checks; a task list to break down steps; checklists; graphic organizers; checks for understanding; multisensory instruction; color coding; highlighting; scaffolding; an assignment tracker; and daily check-ins for social/ emotional concerns. The IEP also included a "Post-Secondary Transition Plan." P-26. Behavioral consultation services were supposed to involve a clinician talking to the Student's teachers to provide strategies, at the teacher's discretion, such as prompting or proximity. The clinician, a social worker, would also observe and talk to the Student and conduct another SDQ to see if the coping strategies had been used. Testimony of Witness B.

24. After the issuance of the IEP, Witness A expressed that the Student needed more assistive technology for executive functioning and organization (and not only written expression), that the Student's behavior did impede his/her learning or the learning of others, that the Student's "Area of Concern" sections of the IEP were incomplete because they were specific only to one issue, that two of the Student's mathematics goals were vague and unmeasurable, and that one of the Student's writing

goals was deficient. Witness A indicated that the “Area of Concern” section relating to social, emotional and behavior needs did not describe the impact of executive functioning on the Student’s performance, and that the corresponding goal was defective because it did not address executive functioning. She also indicated that the Student’s specialized instruction mandate did not adequately address his/her needs because the Student needed support in every class, and because there was no mandate for direct behavioral support. Witness A also indicated that the Student required additional classroom aids and services, including evidence-based reading intervention, writing intervention and strategies in all areas, mathematics notes to include strategies and completed examples, mathematics manipulatives, “fidgets,” scaffolding in worksheets, numerous small assessments to accommodate working memory struggles, fact fluency practice, and twice daily check-ins with an advisor for emotional and academic issues. P-26.

25. DCPS issued a Prior Written Notice (“PWN”) for the Student on June 1, 2021. The PWN stated that the Student’s advocate/parents agreed with the plan based on the absence of feedback from them after the updated IEP draft was issued, but that they disagreed with the proposed specialized instruction hours and consultation hours for behavior support. P-27-1. The Student’s report cards from School B for the 2020-2021 school year included A+ grades in drama and physical education, a B+ in English, a B in science, a B- in math, and “Pass” in reading. P-32-1.

26. Petitioners notified DCPS of their decision to place the Student at School B for the 2021-2022 school year by letter dated August 11, 2021. P-29.

27. An observation of the Student was conducted by the dean of students at School B on January 24, 2022. During the observation, the Student maintained his/her

attention, demonstrated an understanding of the material, and benefitted from processing time given by the teacher. The dean indicated that the Student could accommodate a sophisticated and intellectually challenging curriculum with the appropriate accommodations and concluded that the Student had a variety of educational needs, including small class size, clearly structured classwork, adequate processing time, organizational strategies, seating near the front of the class, distance from peers, creative strategies for learning, and breaking down assignments. P-36-4.

28. Witness A's interview with the Student's advisor dated January 21, 2022, indicated that the Student had made "huge" progress academically at School B, asserting that s/he had come to the school sad and barely talking but was now bouncing around the school, bringing life to everyone else. P-37-1. 22. The Student met with his/her advisor two times each day, five days per week. P-37-1. The advisor indicated that the Student was on grade-level, though s/he needed prompts to use his/her tools, and that the Student would be lost in a larger school. P-37-2.

29. The Student wants to go to School C, a public school, for the 2022-2023 school year. P-66.

## **VI. Conclusions of Law**

The burden of proof in District of Columbia special education cases was changed by the local legislature through the District of Columbia Special Education Student Rights Act of 2014. That burden is expressed in statute as the following: "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.” D.C. Code Sect. 38-2571.03(6)(A)(i). Accordingly, on the sole issue in this case, relating to the appropriateness of the Student’s IEP, the burden of persuasion is on Respondent if Petitioners present a *prima facie* case.

**Did Respondent fail to provide the Student with an appropriate IEP in or about May, 2021? If so, did Respondent act in contravention of 34 C.F.R. 300.320, Andrew F. v. Douglas County School District, 137 U.S. 988 (2017), and Hendrick Hudson Bd. of Educ. v. Rowley, 458 U.S. 176 (1982)? If so, did Respondent deny the Student a FAPE?**

Petitioners contended that the Student’s IEP contained insufficient and/or inappropriate hours and type of specialized instruction to address the Student’s needs; that the IEP’s baselines, goals, and objectives were inappropriate; that the IEP contained other classroom aids and services that “describe the needs of the Student in such a way that the proposed hours of specialized instruction and settings would not meet [his/her] needs”; that the IEP removed important information about the Student that is relevant to his/her needs; and that the IEP failed to address social-emotional challenges known to impact the Student’s ability to access the general education curriculum.

The IDEA was enacted to “ensure that children with disabilities have available to them free 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. Dist. of Columbia, 246 F. Supp. 3d 1, 7 (D.D.C. 2017) (citing 20 U.S.C. Sect. 1400(d)(1)(A); 34 C.F.R. Sect. 300.300). Toward that end, school districts must develop a comprehensive plan, known as an IEP, for

meeting the special educational needs of each disabled student. 20 U.S.C. Sect. 1414(d)(2)(A). In Hendrick Hudson Bd. of Educ. v. Rowley, 458 U.S. 176 (1982), the Court explained that an IEP must be formulated in accordance with the terms of the IDEA and “should be reasonably calculated to enable the child to achieve passing marks and advance from grade to grade.” Id. at 204. The IDEA also requires that children with disabilities be placed in the “least restrictive environment” so that they can be educated in an integrated setting with children who are not disabled to the maximum extent appropriate, that is, one that provides a program that “most closely approximates” the education a disabled child would receive if s/he had no disability. Leggett v. Dist. of Columbia, 793 F.3d 59, 74 (D.C. Cir. 2015).

The Court’s decision in Andrew F. v. Douglas County School District, 137 S. Ct. 988 (2017), elaborated on the doctrines established in Rowley. The Court stated that parents can fairly expect school authorities to offer a “cogent and responsive explanation” for their decisions, and that the IEP should be “appropriately ambitious,” a standard “markedly more demanding than the ‘merely more than de minimis’ test applied by the Tenth Circuit.” Id. at 1000-1002. Finding that “instruction that aims so low” would be tantamount to “sitting idly...awaiting the time when they were old enough to drop out,” the Court held that IDEA “demands” a higher standard. Id. (citing to Rowley). The District of Columbia Circuit Court of Appeals has accordingly found that Andrew F. raised the bar on what counts as an adequate education under the IDEA. Z. B. v. District of Columbia., 888 F.3d 515, 517 (D.C. Cir. 2018). Still, the Andrew F. Court cautioned that its ruling “should not be mistaken for an invitation to the courts to

substitute their own notions of sound educational policy for those of school authorities, to whose expertise and professional judgment deference should be paid.” Id. at 1001.

Petitioners presented substantial evidence in support of its contentions that the Student required small classes with a modified instructional approach in academic subjects. Petitioners’ witnesses, particular Witness A, the Student, and the Mother, a former DCPS teacher, testified that the Student struggled with the pace of instruction and difficulty of work in the large general education classes at School A. The Student’s testimony made clear that, even with a special education teacher in the room, s/he did not understand much of the general education material and would come home anxious and upset. The Mother said that the school would simply tell the Student not to do some of the assignments. There was no rebuttal of any of these claims by Witness E, the DCPS witness from School A, who testified about the school in a general way.

Since DCPS continued to recommend School A for the Student, with a similar IEP, it was incumbent upon the members of the IEP team to assess whether the Student was ready to go back to the environment at School A. One would have expected DCPS to go through the Student’s record at School A carefully, considering whether there might be a way to craft a program that would allow the Student to attend without severe anxiety and difficulty understanding the work. However, to the contrary, the DCPS members of the IEP team did not assess the Student’s difficulties at School A at all when calculating the Student’s needs for the May 25, 2021, IEP. At the IEP meeting, Witness C, the general education teacher on the IEP team, had no idea what had happened at School A. Indeed, the DCPS members of the IEP team did not even discuss the Student’s experience at School A when calculating the Student’s program, even though the Student

was to be placed at the same school, in the same kind of classes, where s/he had struggled during the 2019-2020 school year, less than eighteen months previously.

DCPS argued that the Student's earlier educational experience at School A was irrelevant, and that the Student's anxiety had dissipated because teachers had not reported the Student as having much anxiety at School B. DCPS also argued that there was no data indicating that the Student even had anxiety issues. But these issues were in fact discussed in the May 25, 2021, IEP, which stated that the Student had historically presented with anxiety over academic tasks that were perceived as difficult, and would cry, feel helpless, experience sickness, become disengaged, and have difficulties with disorganization and extreme worry. The IEP indicated that the Student reacted differently in School B compared to School A. S/he was keeping up with assignments at School B, understanding the work presented, and completing assignments as assigned. The IEP indicated that the Student had made significant improvements in addressing anxiety through coping strategies such as exercise and use of fidgets, but would still benefit from regular, consistent check-ins with mental health providers working with teachers to support the Student's social emotional progress. Indeed, Witness D admitted that the Student's reduction of anxiety was a function of his/her program at School B. Moreover, in the recommendations section of the psychological assessment conducted by DCPS, Witness D referenced the Student's need to work on anxiety issues at home and stated that to support the Student's executive functioning in school, teachers should provide direct instruction on organization strategies and teach the Student to request and use accommodations independently and utilize self-monitoring checklists.



There is nothing in the record to suggest that the Student would perform as well as s/he had at School B if s/he were to be put back into a bigger school, like School A, with bigger classes and general education students. Even if there was some evidence that the Student might be able to return to a school like School A, it would still be vital for the IEP team to analyze such evidence thoroughly and consider whether the Student might experience the same kind of anxiety issues at School A in the 2021-2022 school year that s/he had had experienced at School A during the 2019-2020 school year. There is nothing in the record, and certainly no medical evidence, to suggest that the Student's anxiety issues had disappeared because of the Student's experiences at School B. The record only suggests that the Student was not especially anxious at School B due to, among other things, its small class sizes, use of small group instruction, appropriate peer groupings, and consistent use of accommodations such as check-ins. M.G. v. District of Columbia, 246 F. Supp. 3d 1 (D.D.C. 2017) (FAPE denial in part because student needed smaller class size); District of Columbia v. Bryant-James, 675 F. Supp. 2d 115, 120 (D.D.C. 2009) (same); cf. Gellert v. District of Columbia Public Schools, 435 F. Supp. 2d 18 (D.D.C. 2006) (student needed a quiet, calm learning environment).

Indeed, Witness D testified to the effect that whatever has been occurring at School B has resulted in the Student's improvement, and Witness D said that she could not say that the Student no longer needs that environment. Witness D did say that DCPS could offer this kind of educational program for the Student, and that may be true. However, there is nothing in the record to suggest that the Student would get this sort of program with the IEP that was recommended on May 25, 2021. Indeed, that IEP only provided for five hours of specialized instruction per week outside general education, and

it appears that such instruction was designed to address existing math fact fluency and decoding issues, not to teach the Student new material.

Moreover, as Petitioners suggested, the “Other Classroom Aids and Services” section of the IEP is phrased so broadly that it could have been implemented in any way a teacher wanted. The IEP does not indicate that these other classroom aids and services needed to be provided every day, or with any sort of schedule. Respondent suggested that teacher discretion is vital to the instruction of children, and this Hearing Officer certainly does not disagree. However, the need for such discretion does not mean that an IEP should be vague. Respondent also pointed out that there is no such schedule from School B, which also has discretion to provide the Student with accommodations as needed. However, the record is clear that one of the most important accommodations, a small group setting, is omnipresent at School B, where all class sizes are small. The record is also clear that School B provides another very important accommodation from the IEP: teacher check-ins when needed. School B provides the Student with check-ins twice each day, five days per week. Even though Witness D said that daily check-ins were a “a particularly good resource,” the Student’s parents could not be assured that School A would provide check-ins for the Student at all, much less twice a day, since the IEP did not provide for that. Z. B. v. District of Columbia, 888 F.3d 515, 522 (D.C. Cir. 2018) (affirming hearing officer who determined that the IEP had to be judged at the time of its creation); S.S. ex rel. Shank v. Howard Road Academy, 585 F. Supp. 2d 56, 66-67 (D.D.C. 2008) (warning against “Monday morning quarterbacking”); N.S. v. District of Columbia, 709 F. Supp. 2d 57, 72 (D.D.C. 2010) (HOD based on information about the placement that was beyond what was prescribed by the IEP).

Petitioners also contended that the IEP contained inappropriate descriptions of the Student, including in the “Area of Concern” sections. Petitioners contended further that the IEP contained inappropriate goals, baselines, and objectives. An IEP is “a written statement for each child with a disability that is developed, reviewed, and revised in a meeting in accordance with 34 C.F.R. Sect. 300.320 through 34 C.F.R. Sect. 300.324.” 34 C.F.R. Sect. 300.22. Among other requirements, an IEP must include a statement of the child’s current educational performance, articulate measurable educational goals, and specify the nature of the special services that the district will provide. 34 C.F.R. Sect. 300.22; 34 C.F.R. Sect. 300.320(a).

Witness A discussed most of the main concerns relating to these issues. Witness A’s main concern with respect to the information in the IEP was that DCPS removed relevant portions of the description of the Student. Witness A’s detailed comments on the IEP (Ex. P-26) focused on the contention that sections of the IEP were written so narrowly that they excluded the Student’s other learning needs that were relevant to the sections at issue. For instance, Witness A stated that the “Assistive Technology” section of the IEP did not reference executive functioning or organization; that the section called “Area of Concern: Reading” needed to include WJ-IV subtest scores and references to anxiety and executive functioning; that the “Area of Concern: Written Expression” section should have discussed the Student’s learning disability, dyslexia, executive functioning issues, and anxiety issues; and that the “Area of Concern: Emotional, Social, and Behavioral Development” section did not mention the then-current impact of the Student’s executive functioning and anxiety issues nor explain how the Student’s emotional issues affected his/her progress.

The IEP mentioned the Student's anxiety levels several times and stated that there was cause for monitoring his/her anxiety. Moreover, while the IEP did not clearly discuss the Student's executive functioning issues, Petitioners were unable to provide any authority within the circuit for the proposition that, absent a showing of substantive harm (which was absent here), FAPE denial should be found when informational sections in a student's IEP are deemed to be less than comprehensive. To the contrary, courts in the circuit have rejected such claims as procedural violations. J.B. by & through Belt v. D.C., 325 F. Supp. 3d 1, 6 (D.D.C. 2018) (rejecting FAPE claims based on present levels as a procedural violation). There is nothing in the record to support the claim that the failure to provide more comprehensive information in the May 25, 2021, IEP impeded the Student's right to a FAPE.<sup>2</sup>

In regard to Petitioners' claims that the IEP goals, baselines, and objectives denied the Student a FAPE, an IEP must include a "statement of measurable annual goals, including academic and functional goals designed to meet the child's needs that result from the child's disability to enable the child to be involved in and make progress in the general education curriculum; and meet each of the child's other educational needs that result from the child's disability." 34 C.F.R. Sect. 300.320 (a)(2)(i).

Petitioners have not presented any persuasive authority to establish that there are specific requirements in the IDEA for goals to have baselines or objectives, at least with respect to this Student. Otherwise, regarding the goals claims, Petitioners argued

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<sup>2</sup>In matters alleging a procedural violation, a hearing officer may find that a child did not receive a FAPE only if the procedural inadequacies: (i) impeded the child's right to a FAPE; (ii) significantly impeded the parent's opportunity to participate in the decision-making process regarding the provision of a FAPE to the parent's child; or (iii) caused a deprivation of educational benefit. 34 CFR Sect. 300.513(a).

throughout the proceeding that the goals improperly referenced grade-level standards, and the Student was not on grade-level. However, Petitioners did not mention that School B's own brochure states that "The school is approved by the Maryland state educational agency and uses common core standard to develop grade-level curriculum." Similarly, DCPS witnesses made it clear that the goals suggesting that Student was supposed to be provided with grade-level curriculum were aspirational.

Petitioners also argued, though the testimony and evidence provided by Witness A, that references in the Student's mathematics goals to teacher-made supports is vague and unmeasurable, that the spelling goal ("Written Expression Annual Goal 3") does not address encoding, and that the emotional, social, and behavioral goals do not address executive functioning or require direct behavioral support services. However, Petitioners presented no caselaw to suggest that IEPs need to contain goals with respect to every possible deficit area for a student. Though executive functioning issues are a concern for this Student, these issues do not have to be addressed through goals. Cf. Z.B. v. District of Columbia, 888 F.3d 315, 527 (D.C. Cir. 2018) (DCPS staff testified that they typically treat executive functioning as a "cross-cutting" factor). As a result, this Hearing Officer is not convinced that the May 25, 2021, IEP was defective because of inappropriate goals, baselines, or objectives, or because it contained an insufficient amount of information about the Student.

Nevertheless, Andrew F. requires hearing officers to consider whether school districts have offered a cogent and responsive explanation for the IEP that they have developed for a student. No such explanation was offered for the instant IEP, which was developed without consideration of the Student's performance in a similar program, at

the same school, less than eighteen months earlier. The result was an IEP that offered the Student the same kind of classes that the Student had been unsuccessful in before.

Accordingly, DCPS did deny the Student an educational benefit, and therefore a FAPE, through the IEP dated May 25, 2021.

### **RELIEF**

As relief, Petitioner seeks tuition reimbursement for the 2021-2022 school year at School B. When school districts deny students a FAPE, courts have wide discretion to ensure that students receive a FAPE going forward. As the Supreme Court stated, the statute directs the Court to “grant such relief as [it] determines is appropriate.” School Committee of the Town of Burlington v. Dep’t of Education, Massachusetts, 471 U.S. 359, 371 (1985). The ordinary meaning of these words confers broad discretion on a hearing officer, since the type of relief is not further specified, except that it must be “appropriate.” If petitioners meet their burden of persuasion (D.C. Code Sect. 38-2571.03(6)(A)(ii), the school district may be required to pay for educational services obtained for a student by the student’s parent, if the services offered by the school district are inadequate or inappropriate, the services selected by the parent are appropriate, and equitable considerations support the parents’ claim, even if the private school in which the parents have placed the child is unapproved. Florence County School District Four et al. v. Carter by Carter, 510 U.S. 7 (1993). Courts must consider “all relevant factors” including the nature and severity of the student’s disability, the student’s specialized educational needs, the link between those needs and the services offered by the private school, the placement’s cost, and the extent to which the placement represents the least

restrictive educational environment. Branham v. District of Columbia, 427 F.3d 7, 12 (D.C. Cir. 2005).

There is substantial evidence that the services School B has provided to the Student have helped him/her progress academically and emotionally, as Witness D from DCPS so stated. The school, which is approved by the Maryland state educational agency and uses common core standards to develop grade-level curricula, provides small classrooms and other accommodations designed specifically to address the needs of children with disabilities like the Student's. School B's classes contain ten students or less. Lessons are minimal on language and heavy on auditory, visual, and kinesthetic approaches to reduce anxiety. The school's teachers are trained in a variety of programs to target each student's identified reading weaknesses. To address executive functioning deficits, each student uses a planner designed by the school, which is easy to follow. Teachers check the planner every period and long-term planning is built in. All students receive daily reading lessons based on Orton-Gillingham instruction methods. Information is placed on the "board" in obvious ways so that students know what to expect during the day. Check-ins are provided twice each day to ensure that students know where they are going and what they should be doing.

Additionally, the record suggests that the Student benefitted from these special education services at School B. Before the Student first attended School B, in November, 2019, the Student was one-to-two levels below grade-level at the instructional level, according to the IRI measure. According to the same IRI measure conducted less than two years later, the Student had improved to at or about approximately grade-level at the instructional level, even under the difficult learning conditions of virtual instruction amid

the COVID-19 pandemic. Witness D agreed that this progress was due to the program at School B. Respondent's main objection to School B was that it does not represent the Student's least restrictive environment. While one could imagine a less restrictive environment for this Student, including a placement with typically developing peers for non-academic classes, there is no showing that there was any such placement available to Petitioners. Leggett v. Dist. of Columbia, 793 F.3d 59, 74 (D.C. Cir. 2015) (parents had no choice when they decided to send student to parental placement). Respondent also suggested that the Student did not receive special education through a special education teacher at School B. While the least restrictive environment can play a role in determining the appropriateness of a parental placement, state law requirements applicable to public schools are not necessarily applicable to private schools in this context and should not be applied in this instance. Leggett, 793 F.3d at 71; Carter, 510 U.S. at 14.

Even so, the IDEA allows that tuition reimbursement may be reduced or denied when parents fail to raise the appropriateness of an IEP in a timely manner, fail to make their child available for evaluation by the school district, or upon a finding of unreasonableness with respect to the actions taken by the parents. 20 U.S.C. Sect. 1412(a)(10)(C)(iii). Under 20 U.S.C. Sect. 1412(a)(10)(C)(iii), a denial or reduction in reimbursement is discretionary. The Supreme Court has suggested that the statutory factors are a non-exhaustive list. Forest Grove Sch. Dist. v. T.A., 557 U.S. 230, 241 (2009) (the "clauses of Sect. 1412(a)(10)(C) are...best read as elucidative rather than exhaustive"). Courts also have broad discretion to consider the range of all relevant facts



in determining whether and to what extent awarding relief is equitable. Carter, 510 U.S. at 16.

The main issue with respect to equities is that DCPS was not allowed to observe the Student at School B in February, 2021, whereas Petitioners' expert was allowed to observe the school at approximately the same time. Though this issue gives this Hearing Officer pause, none of DCPS's witnesses explained that this failure to observe substantively compromised DCPS in any way. Further, there is nothing to suggest that Petitioners themselves had anything to do with the difficulty of DCPS observing the Student, which appears to be attributable, at least in part, to difficulties associated with the pandemic. This Hearing Officer therefore finds that there should be no reduction of equitable grounds, and that Petitioners should be awarded tuition reimbursement and related expenses for School B for the 2021-2022 school year.

## **VII. Order**

As a result of the foregoing, the following is ordered:

Upon receipt of documentation of payment by Petitioners, as may be reasonably required, Respondent shall, without undue delay, reimburse Petitioners their costs for covered tuition and related expenses for Student's enrollment at School B for the 2021-2022 school year.

Dated: April 8, 2022

Michael Lazan  
Impartial Hearing Officer

cc: Office of Dispute Resolution  
Attorney A, Esq.  
Attorney B, Esq.  
OSSE Division of Specialized Education

Hearing Officer Determination  
Michael Lazan, Hearing Officer  
Case # 2021-0159

[REDACTED]/DCPS  
[REDACTED]/DCPS

### **VIII. Notice of Appeal Rights**

This is the final administrative decision in this matter. Any party aggrieved by this Hearing Officer Determination may bring a civil action in any state court of competent jurisdiction or in a District Court of the United States without regard to the amount in controversy within ninety days from the date of the Hearing Officer Determination in accordance with 20 U.S.C. Sect 1415(i).

Dated: April 8, 2022

*Michael Lazan*  
Impartial Hearing Officer