District of Columbia
Office of the State Superintendent of Education
Office of Dispute Resolution
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Parents, on behalf of Student,[1]	)	
Petitioners,	)	
	)	**Hearing Dates: 1/18/22; 1/19/22; 1/20/22;**
v.	)	**1/20/22; 1/24/22; 2/4/22; 3/4/22**
	)	**Case No. 2021-0154**
District of Columbia Public Schools,	)	**Michael Lazan, Hearing Officer**
Respondent.	)	

HEARING OFFICER DETERMINATION

I. Introduction

This is a case involving an X-year-old student (the "Student") who is currently eligible for services as a student with Specific Learning Disorder. 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 September 27, 2021. The Complaint was filed by the Student's parents ("Petitioners"). On October 6, 2021, Respondent filed a response. A resolution meeting was held on October 12, 2021, without an agreement being reached. The resolution period expired on November 5, 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.

[1] 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

On October 29, 2021, a prehearing conference was held. Attorney A, Esq., counsel for Petitioners, appeared. Attorney B, Esq., counsel for Respondent, appeared. On November 8, 2021, a prehearing order was issued, summarizing the rules to be applied in the hearing and identifying the issues in the case. The order was corrected on November 8, 2021, revised on December 7, 2021, and revised twice more on December 8, 2021. On November 8, 2021, Petitioners moved to extend the deadline for a Hearing Officer Determination ("HOD") to March 15, 2022. This motion was granted by this Hearing Officer by an order dated December 8, 2021.

Petitioners filed a Motion for Stay-Put on October 8, 2021. Respondent submitted opposition on October 15, 2021. The motion was granted by an order dated November 12, 2021. On December 3, 2021, Petitioners filed a motion to introduce portions of transcripts from an earlier hearing into the record. On December 9, 2021, Respondent submitted opposition. This motion was granted by an order issued on January 11, 2022. On December 14, 2021, Petitioners moved for DCPS to reimburse them for stay-put expenses during the litigation. This motion was granted in part by the order that was issued on January 11, 2022.

The matter proceeded to trial on January 18, 2022, January 19, 2022, January 20, 2022, January 24, 2022, February 4, 2022, and March 4, 2022, through the Microsoft Teams videoconferencing platform. Attorney A, Esq., represented Petitioners. Attorney

B, Esq., represented Respondent. After testimony, the parties agreed to submit written closing arguments to this Hearing Officer by March 23, 2022.

On March 7, 2022, Petitioners moved, on consent, to extend the timelines for the HOD to April 18, 2022. On March 11, 2022, an order was issued granting the motion and extending the HOD timelines to April 18, 2022. Both parties submitted written closing arguments to this Hearing Officer on March 23, 2021. Petitioners also submitted a citations list to this Hearing Officer. As part of its submission, Respondent attached a document that had not been previously introduced at the hearing. On March 24, 2022, Respondent submitted an email to this Hearing Officer supplementing its closing argument. On March 24, 2022, Petitioners objected to the document that had not been previously introduced, and also to the lateness of Respondent's March 24, 2022, submission. By emails dated March 25, 2022, and March 28, 2022, this Hearing Officer allowed Respondent to supplement its closing argument with legal argument, but did not allow Respondent to submit documents that had not been previously introduced at the hearings.

During the proceeding, Petitioners moved into evidence exhibits P-1 through P-117. Respondent objected to exhibits P-66 through P-70, P-116, and P-117. These objections were overruled. Exhibits P-1 through P-117 were admitted. Respondent moved into evidence exhibits R-1 through R-41without 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); Witness B, interim head of the middle school at Private School A (expert in special education programming and placement); the Student's father ("Father"); and

the Student's mother ("Mother"). Respondent presented as witnesses, in the following order: Witness C, the director of Practice A (expert in clinical psychology, school psychology, and special education programming and placement); Witness D, a DCPS "CIEP" specialist (expert in special education programming and placement); Witness E, director of the DCPS CIEP team (expert in special education programming and placement and reading instruction); Witness F, a CIEP specialist (expert in special education programming and placement); Witness G, an assistant principal at Public School B (expert in special education programming and placement); Witness H, a manager of DCPS behavior support programs (expert in special education programming and placement); Witness I, a DCPS resolution specialist (expert in special education programming and placement); Witness J, a DCPS program specialist (expert in special education programming and placement); and Witness K, a monitoring specialist with DCPS (expert in special education programming and placement). After Respondent's presentation, Petitioners offered a rebuttal through the testimony of Witness B and the Father.

IV. Issues

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

1. Did Respondent fail to provide the Student with an appropriate IEP on or about March 9, 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 IEP contained insufficient and/or inappropriate hours of specialized instruction to address the Student's needs; that some of the present

levels, baselines, impact statements, goals, and objectives were inappropriate, inadequate, outdated, vague, immeasurable, impossible to attain (given the difference in services at a DCPS school), and/or not sufficiently comprehensive to address the Student's identified needs; and that the IEP did not contain adequate/comprehensive recommendations for assistive technology and/or "other classroom aids and services" and/or accommodations and/or modifications. Petitioners also contended that the IEP did not contain any information about the type of appropriate educational placement that was recommended for the Student "along the continuum of placements," nor did it describe any of the Student's needs in an educational placement.

2. Did Respondent deny Petitioners the opportunity to meaningfully participate and/or predetermine its positions at the Student's IEP meeting on March 9, 2021, and through the placement of the Student in the "SLS program"? If so, did Respondent violate 34 C.F.R. Sect. 300.501 and related provisions? If so, did DCPS deny the Student a FAPE?

Petitioners contended that Respondent's decisions regarding the Student's specialized instruction hours and the recommendation for the Specific Learning Support ("SLS") program were predetermined in order to allow Respondent to place the Student in the SLS program. Petitioners contended that their right to meaningfully participate was compromised by, among other things, the failure of DCPS to discuss and determine the placement with Petitioners, Petitioners' inability to properly observe the program, and the predetermination of the placement by DCPS.

3. Did Respondent fail to provide the Student with an appropriate educational placement for the 2021-2022 school year? If so, did Respondent act in contravention of cases such as Endrew F. and Gellert v. District of Columbia, 435 F. Supp. 2d 18 (D.D.C. 2006)? If so, did Respondent deny the Student a FAPE?

Petitioners contended that the SLS program would group the Student inappropriately with lower-functioning students. Petitioners contended that the Student

needs to be in a program with more support and not to be placed in a classroom where students have broader learning needs.

4. Did Respondent deny Petitioners the right to observe the proposed school? If so, did Respondent violate the Special Education Student Rights Act of 2014?

As relief, Petitioners seek tuition reimbursement at Private School A for the 2021-2022 school year and related relief, including related services, transportation, and reimbursement for the Student's stay-put placement.

V. Findings of Fact

1. The Student is an X-year-old who is currently eligible for services as a student with Specific Learning Disability. As of about January, 2022, the Student functioned at approximately two grade levels below expectations in reading and writing. The Student is a weak speller and has issues with handwriting. Testimony of Witness B; R-32. The Student has issues with decoding, encoding, and phonemic awareness. Testimony of Witness H. The Student is on grade level in mathematics, with some weaknesses in division. Testimony of Witness B; Testimony of Mother; Testimony of Witness J.

2. In May, 2017, a psychological evaluation of the Student was conducted by a psychologist at Public School A. On cognitive testing with the Wechsler Intelligence Scale for Children, Fifth Edition ("WISC-V"), the Student scored 101, in the average range. However, on the Woodcock-Johnson Test of Achievement, Fourth Edition ("WJ-IV"), the Student's letter-word identification was in the very low range and his/her word attack skills were in the low average range, though his/her reading comprehension was in

the average range. In written language, the Student's spelling skills were in the low average range and his/her written expression skills were in the very low range. P-60-2.

3. The Student attended Public School A for the 2019-2020 school year. The Student was eligible for services at this time as a result of a meeting on October 6, 2017. The Student's IEP for the 2019-2020 school year was written on April 24, 2019, and amended on December 4, 2019. This IEP recommended that the Student should receive 150 minutes per week of specialized instruction in reading outside general education, ninety minutes per week of specialized instruction in reading inside general education, ninety minutes per week of specialized instruction in written expression inside general education, and forty-five minutes per week of specialized instruction in mathematics inside general education. The IEP also recommended 120 minutes per month of occupational therapy outside general education and two hours per month of speech-language pathology services outside general education. P- 60-17.

4. During the 2019-2020 school year, the Student received five hours per week of specialized instruction in a "pull out" model and one hour per week of additional reading instruction before school. During the 2019-2020 school year, the Student received "intensive" reading intervention, including "Wilson Reading" four times per week, "Double Dose Fundations" four times per week, Lindamood-Bell "Seeing Stars" once per week, and a full-day, six-week Lindamood-Bell program for the summer. However, according to the DCPS Division of Specialized Instruction, the Student did not make adequate progress in response to these interventions and was two years below grade level in reading. R-14-1.

5. Staff at Public School A told the Mother that the Student needed more support than they could provide, as well as a different instructional approach. The staff suggested to the Mother that the Student needed support in all classes involving the use of text, given the Student's reading and writing delays. Testimony of Mother.

6. The Student was then evaluated by DCPS. A confidential psychological re-evaluation of the Student was conducted in December, 2010, and a corresponding report was written on January 17, 2020. The report contained an interview with the Student's general education teacher, who indicated that the Student's weak reading skills remained two years below grade level, which could significantly interfere with his/her performance across the curriculum. However, the teacher said that when texts were read to the Student, s/he could comprehend the material on grade level. The teacher also reported that the Student's writing was clearly challenged, which caused the teacher to allow the Student to implement accommodations, such as scribing, and to "fill in the blanks" rather than hand-write extensive responses. The teacher said that, in the area of mathematics, the Student had strong addition and subtraction skills, but struggled to interpret word problems and operational signs, and had issues with division. Another teacher indicated that the Student struggled with reading and writing, and that difficulties with encoding made his/her writing especially challenging. This teacher said that the Student used speech-to-text software for writing, which was helpful. The teacher reported that, in mathematics, the Student struggled to interpret word problems and was challenged in terms of identifying the correct operation to use. The evaluation also included testing. On the Wechsler Individual Achievement Test, Third Edition ("WIAT-III"), the Student's academic skills were found to be uneven. The Student's overall

mathematics skills were in the average range, while his/her overall reading skills were extremely weak relative to same-age peers. The Student performed in the low range in reading fluency and in the below average range in reading comprehension. In written expression, the Student performed in the low range in spelling single words and in the below average range in "Sentence building," but in the average range in sentence combining and in the above average range in spontaneous compositional writing skills within a ten-minute limit. The evaluator concluded that the Student's especially weak decoding and fluency skills had an adverse impact on his/her comprehension, though the Student used semantic cues and his/her strong language comprehension to "get the gist" of the text s/he read. In line with his/her weak reading skills, the Student's writing was deemed to be compromised by poor spelling. The evaluator concluded that, without the use of speech-to-text software, the Student was severely hampered in his/her ability to physically transfer his/her thoughts to paper. P-60.

7. A speech and language evaluation of the Student was conducted in January, 2020, and a corresponding report was written on January 14, 2020. The evaluator concluded that the Student had made progress in the area of oral communication, presented with strengths in receptive language and language memory, and had mild weaknesses in formulating grammatically complex sentences. No direct services were specifically recommended. P-59.

8. In or about February, 2020, Petitioners met with representatives from Public School B, including Witness G, who indicated to them that the Student would not be a good fit for the SLS program at the school. P-10-2; P-25-1; Testimony of Mother.

9. An occupational therapy evaluation of the Student was conducted in February and March, 2020, as reflected by a report dated March 4, 2020. The evaluation found that the Student presented with strengths in visual perception, manual dexterity, and bilateral hand skills, but decreased visual motor skills, which impacted his/her ability to consistently produce legible written work. No direct or indirect weekly therapy services were specifically recommended by the evaluator. P-62-6.

10. The Student attended Private School A for the 2020-2021 school year. Private School A is a school for children with language-based learning differences. Instruction is grounded in the Orton-Gillingham approach. The school offers daily classes in reading, mathematics, and writing, with two daily arts classes, one daily "club" class that is similar to social studies, one daily science class, and one physical education class. The school provides reading and math intervention for sixty minutes per day, with two teachers working with six or seven students. Some of the school's teachers, but not all, are certified in the District of Columbia. Students receive accommodations such as a Chromebook, text-to-speech software, and books on tape. Testimony of Witness B.

11. In September, 2020, the Student was tested through the "Reading Inventory" measure, which indicated that s/he was reading at Level "I." P-78-1. Private School A wrote its own IEP for the Student on December 8, 2020. This IEP indicated that the Student was approximately on grade level in mathematics and two levels below expectations in reading and written expression. The Student's reading needs were considered to be word retrieval, fluency, vocabulary development, decoding sight words, encoding with multisyllabic words with various syllable types, dropping or substituting articles, guessing unknown words from the first letter, inferencing, using expressive

language, using multisyllabic words, and reading with expression. The Student's writing needs were considered to be introducing a topic with a general statement, providing clear examples, summarizing, capitalizing proper nouns, using grammar, using vocabulary, writing with fluency, editing, revising, and using consistently correct punctuation. The IEP was amended on February 2, 2021. P-73.

12. An IEP meeting was held for the Student on March 9, 2021. The meeting lasted ninety minutes, and Petitioners were active participants. The meeting included Witness A, Witness J, Witness F, an occupational therapist, and Witness I. The team discussed the Student's mathematics, reading, and written expression goals and adapted much of the language from the IEP that had been created by Private School A. The team had a discussion surrounding whether the Student's "Other Classroom Aids and Services" were required or subject to teacher discretion. Petitioners advocated for requiring assistive technology for the Student. DCPS proposed that the Student receive twenty hours per week of specialized instruction outside general education, including for reading, writing, math, science, and social studies. DCPS also proposed two hours per month of speech and language therapy outside general education and 120 minutes per month of occupational therapy outside general education. The IEP team indicated that the Student's classes would have a maximum of twelve students. It was understood at the meeting that the offer was for the SLS program at DCPS, as indicated in the DCPS meeting notes. Petitioners disagreed with the placement and with the recommendations regarding speech and language therapy. P-97; Testimony of Witness F. DCPS did not specifically mention that the Student was assigned to the SLS program, or why the Student needed to be in the SLS program. Staff from Public School A were not involved

with the meeting. Testimony of Mother. No concerns were raised at the meeting with respect to the measurability of the IEP's goals. Testimony of Witness J. The team agreed to a typing goal. Testimony of Mother. Petitioners felt that the Student fit well at Private School A, adding that the Student did not feel "different" at the school. P-2; Testimony of Witness A. DCPS felt that Petitioners were not interested in a public placement. Testimony of Witness J. The meeting largely focused on IEP content rather than the services and placement to be offered. There was no discussion of how the goals in the IEP related to the services in the IEP. Testimony of Witness A.

13. Petitioners and Respondent corresponded on the details of the Student's IEP, and Respondent was provided with additional data. When Petitioners received the finalized IEP, it contained changes that had not been discussed at the IEP meeting. A typing goal was not included as promised, and Petitioners felt that there was not a sufficient discussion of assistive technology. Testimony of Mother. On April 1, 2021, Petitioners sent an email to Respondent indicating that they had issues with the IEP, including that there was no explanation of the basis for specialized instruction hours. P-10-1-2. Petitioners sought to amend the IEP, but DCPS felt that the IEP was appropriate. Testimony of Witness J.

14. The final IEP of March 9, 2021, stated that the Student presented with relative weaknesses in expressive language skills and speech articulation, which impacted his/her ability to communicate effectively in the academic setting. The IEP recommended assistive technology, including speech-to-text, read-aloud, and a tablet, to be approved for home and school. In mathematics, the Student was deemed to be at grade level. The Student's reading and written expression levels were deemed to be two years below grade

level. The IEP recommended twenty hours per week of specialized instruction outside general education, with 120 minutes per month of speech-language pathology outside general education, 120 minutes per month of occupational therapy outside general education, and thirty minutes per month of occupational therapy on a consultation basis (as later clarified through an amendment dated April 1, 2021). For support in writing, the IEP stated that the Student benefitted from scribing. The IEP recommended, at teacher discretion, accommodations such as a speech-to-text programs, access to a laptop in all classes with speech-to-text and read-aloud capabilities, audio books, personal sight-word charts, preferential seating, and other related accommodations such as providing written material in an auditory and leveled format. P-6; P-115.

15. A virtual observation of the Student was conducted at Private School A on March 10, 2021, with Witness A, Witness F, and Witness J attending. According to Witness A, the Student followed all directions and completed all assigned tasks. P-76. Witness J and Witness F reported similarly. P-98; P-3; Testimony of Witness A; Testimony of Witness F; Testimony of Witness J.

16. On or about April 12, 2021, Petitioners learned that DCPS was assigning Public School B as the Student's location of services for the 2021-2022 school year. P-11-2. DCPS suggested to Petitioners that the Student's IEP was to be in effect immediately. Testimony of Mother.

17. The SLS program is designed to meet the individual needs of students who have been diagnosed with a specific learning disability or who demonstrate complex learning needs requiring intensive specialized instruction. All students in the SLS program have IEPs that require at least twenty hours per week of specialized instruction

outside general education. In general, SLS programs implement the same reading and math interventions as the general education classrooms do, except that, during the 2021-2022 school year, SLS programs began using the "STARI" program in addition to other school-wide interventions. P-87-2.

18. The SLS program is "non-categorical," meaning that its classes contain students with a variety of disabilities, including "Other Health Impairment," "Emotional Disturbance," and "Autism," in addition to "Specific Learning Disability." The SLS program has multi-grade classrooms with children who are at least two years below grade level. Testimony of Witness A. The SLS program includes "specials" in a six-day rotation. Testimony of Witness G. An aide accompanies students to their general education specials. Testimony of Witness H.

19. On June 15, 2021, Hearing Officer Keith Seat issued an HOD on a due process complaint that was filed by Petitioners against Respondent on February 1, 2021. This due process complaint challenged the Student's IEP for the 2020-2021 school year and sought tuition reimbursement for Private School A for the 2020-2021 school year. After six days of testimony, Hearing Officer Seat found that Respondent's IEP for the 2020-2021 school year denied the Student a FAPE and ordered DCPS to reimburse Petitioners for tuition, related services, and transportation expenses incurred for the Student to attend Private School A for the 2020-2021 school year, together with compensatory education corresponding to the cost of the Student's 2021 summer program at Private School A. P-70.

20. On June 24, 2021, which was the last day of the 2020-2021 school year, Petitioners, Witness A, Witness G, and Witness F conducted an observation of Public

School B's SLS program. During the observation, Witness G said that, if students were found to be able to access general education classes, those students would be able to transition into general education classes, with or without a paraeducator. A special education teacher would remain in the SLS classroom for those students whose IEP requirements did not allow for academic instruction inside general education. Testimony of Father; Testimony of Witness G. Witness G said that the goal of the SLS program is for students to partner with their general education peers as much as possible. P-51-2. Witness G said that six students had thus far been assigned to the SLS classroom for the 2021-2022 school year, and that general education classes at Public School B could have twenty-five students. P-99. The SLS classroom included ninety minutes of daily reading and written language, with the first thirty minutes being a review. Thirty minutes per day were designed for the delivery of reading intervention. All students in the SLS classroom had access to a Chromebook. It was indicated that students did not typically use speech-to-text programs in the classroom, and that the school's social worker came into the classroom one day per week to teach a lesson, such as self-advocacy. There was one paraeducator assigned to the classroom. P-51-1-3.

21. At the observation at Public School B, a lesson involved flipping a water bottle fifty times and recording the results. Three students were present at the time. One student had a 1:1 nurse and one had interfering behaviors. Testimony of Witness A.

22. The Student remained at Private School A for the 2021-2022 school year. According to a "Leveled Reading Assessment" conducted in September, 2021, the Student was reading and decoding at instructional level "O," with fifty-five correct words per minute. However, testing conducted on October 16, 2021, found that the Student was

reading and decoding at independent level "N," with eighty-one correct words per minute. P-83-3; Testimony of Witness B.

23. Witness D conducted an observation of the Student on December 10, 2021, at Private School A. After observing a morning meeting, Witness D observed the Student's mathematics class. When the class became smaller, the Student engaged more frequently. At one point, s/he quickly answered multiplication questions, and for the facts that s/he was unsure of, s/he independently referenced a multiplication chart. R-24.

24. Private School A wrote an IEP for the Student on January 27, 2022. The IEP stated that the Student was reading and writing two levels below expectations and performing slightly below expectation in mathematics. Private School A's IEP listed the Student's learning needs in reading as word retrieval, vocabulary, decoding sight words, encoding, dropping articles, inferencing, expressive language, sounding out multisyllabic words, reading with expression, and attending to punctuation cues. The IEP indicated that the Student had written expression needs in providing clear examples, summarizing, capitalizing proper nouns, using grammar, using vocabulary, writing with fluency, editing, revising, and consistently using correct punctuation. R-32-4.

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 Issue #1 and Issue #3, the burden of persuasion is on Respondent if Petitioners present a *prima facie* case. On Issue #2 and Issue #4, the burden of persuasion is on Petitioners.

1. Did Respondent fail to provide the Student with an appropriate IEP on or about March 9, 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 FAPE?

Petitioners contended that the IEP contained insufficient and/or inappropriate hours of specialized instruction to address the Student's needs; that some of the present levels, baselines, impact statements, goals, and objectives were inappropriate, inadequate, outdated, vague, immeasurable, impossible to attain (given the difference in services at a DCPS school), and/or not sufficiently comprehensive to address the Student's identified needs; and that the IEP did not contain adequate/comprehensive recommendations for assistive technology and/or "other classroom aids and services" and/or accommodations and/or modifications. Petitioners also contended that the IEP did not contain any information about the type of appropriate educational placement that was recommended for the Student "along the continuum of placements," nor did it describe any of the Student's needs in an educational placement.

The IEP is the "centerpiece" of IDEA. Honig v. Doe, 484 U.S. 305, 311 (1988). In Endrew F. v. Douglas County School District, 137 U.S. 988 (2017), the Court held that an IEP must be reasonably calculated "in light of the child's circumstances." Id. at 999-

1000. The Court also held that parents can fairly expect school authorities to offer a "cogent and responsive explanation" for their decisions, and 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 1001-1002.

Moreover, it is imperative that, to "the maximum extent appropriate," public schools provide students with disabilities an education in the least restrictive environment, which, as emphasized by the Supreme Court, "requires that children with disabilities receive education in the regular classroom whenever possible," Endrew F., 137 S. Ct. at 999. An IEP failing to satisfy these statutory directives may be remedied through an IDEA claim to the extent the IEP "denies the child an appropriate education." Z.B. v. District of Columbia, 888 F.3d 515, 519 (D.C. Cir. 2018).

Petitioners' main argument was that the program that DCPS recommended for the Student for the 2021-2022 school year was the same as the program that Public School A staff swore, under oath, was inappropriate for the Student for the 2020-2021 school year. The record bears this out. The Student's special education teacher at Public School A for the 2019-2020 school year testified before Hearing Officer Keith Seat that the Student did not need a self-contained setting. P-67-44. The Local Educational Agency ("LEA") representative from Public School A for the 2019-2020 school year testified before Hearing Officer Seat that it was not appropriate to place the Student in a self-contained segregated placement with twenty hours of specialized instruction per week. P-67-2220; P-67-225. Witness J testified before Hearing Officer Seat that it was important for the Student to be around other children who are "smarter" than him/her, so that s/he can be

challenged. Witness J also said that the Student would be able to learn from students who are typically developing, and at least hinted that the Student should be in a general education mathematics class, because while "we do see deficits in reading and writing, we don't see those same deficits in math." P-69-22.

Indeed, in his HOD, Hearing Officer Seat explicitly found that the Student did not belong in an SLS classroom. Hearing Officer Seat wrote that Petitioners' visit to Public School A in 2019 made it clear that the SLS program at Public School A was not suitable for the Student, as it was for much lower-functioning children. P-70-24-25.

Nevertheless, at this hearing, DCPS defended its IEP that recommended the SLS program, which is a self-contained program for all academic instruction, including reading, writing, science, socials studies, and mathematics. Witness J's position was that the data supported this program change for the Student. However, it was not entirely clear what data Witness J was referring to, except for the observation of Witness D, which was a snapshot of how the Student functioned at Private School A, not in the SLS program. The main data on the Student that had been compiled since the earlier IEP meetings were reports from Private School A indicating that the Student needed specialized reading instruction, but was at grade level in math.

DCPS took the position that all of the Student's academic classes should be self-contained special education classes, since all academic classes involve reading. DCPS also seemed to suggest that, since the Student appeared to be doing well in the self-contained environment at Private School A, and that Petitioners wanted a self-contained program for the Student, DCPS would recommend the same kind of self-contained program for the Student.

However, the SLS program at Public School B is not the same as the program at Private School A. In fact, when testifying, Witness G, the sole witness from Public School B, did not explain in any real detail how the SLS program at Public School B would teach the Student to read more proficiently. Witness G also did not explain how a teacher could create a mathematics lesson plan that would address the disparate needs of the Student, who was on grade level in math, and the other students, who were at least two levels below grade in math. Instead, Witness G explained generally that the Student would fit in the program, that students in the SLS program tended to be at different levels, and that the makeup of the students in the SLS classroom would allow the Student to flourish.

Instead of providing details about academic class instruction in the SLS program, Witness G asserted that the Student could transition to general education classes if s/he functioned at grade level, and that this approach applied to many students in the program. Witness G and DCPS therefore posited that by assigning the Student to the SLS program, they were in fact assigning him/her to a program that would provide access to general education classes, and that the Student needed to be in the SLS program in order to transition back to public school. A.D. by next friends E.D. v. District of Columbia, No. 20-CV-2765 (BAH), 2022 WL 683570, at *10 (D.D.C. Mar. 8, 2022) (discussion transition services).

However, Witness G candidly admitted that the Student's IEP had to be changed for this kind of transition to occur. Witness G is correct. In the District of Columbia, IEPs must be judged at the time of their creation. Z. B. v. District of Columbia, 888 F.3d 515, 526 (D.C. Cir. 2018); N.W. v. District of Columbia, 253 F. Supp. 3d 5, 16 (D.D.C.

2017) (strategy of not incorporating oral representations into the IEP impedes parents' ability to make informed choices about the services that their children will actually receive); 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"). There is nothing in the Student's IEP to the effect that the Student would be transitioned to general education classes for academic instruction during the 2021-2022 school year.

More convincing than the inconsistent testimony of the DCPS witnesses was the testimony of Witness A, who testified that the Student was inappropriately placed in a cohort of children who were below grade level in every academic class, and that teachers in an SLS program would not be able to differentiate instruction so that the Student could benefit. Witness A testified that the Student does not need to be in special education classes the entire academic day, but needs daily, intensive reading instruction, which the Student's March 9, 2021, IEP did not provide. In fact, there is nothing in the IEP that specifically explains how the Student would receive reading instruction, and Witness G testified that the while the Student would receive ninety minutes of reading instruction per day, s/he would receive only thirty minutes of evidence-based reading interventions per day, which is less than the amount that was provided by Private School A and Public School A.

Respondent also contended that Petitioners' entire case was based on speculation, pointing to the recent decision in Sinclair v. District of Columbia, Civ. No. 19-cv-0434 (TSC) (D.D.C. February 9, 2022) (slip opinion), where the court found that parents were speculating that classes at Anacostia High School would be too challenging for their child. The court found that, if the child had enrolled at the school, the child could have

worked with the school to determine which classes were appropriate. This Hearing Officer agrees that some leeway must be given to school districts to implement IEPs, and therefore finds that Petitioners' claim that the Student would improperly be assigned to Spanish language classes at Public School B is speculative, since Witness G said that the Student would not have to take a Spanish class if it was not appropriate.

However, there was nothing speculative about Petitioners' claim that, at an IEP meeting, the Student was offered the SLS program. Petitioners had no guarantee, and certainly nothing in writing, to state that the Student would be placed in any general education academic classes for the 2021-2022 school year. DCPS could have changed the Student's IEP prior to the start of the school year, based on Witness G's comments, but did not. As the court stated in R.E. v. New York City Dep't of Educ., 694 F.3d 167, 186 (2d Cir. 2012):

> In order for this system to function properly, parents must have sufficient information about the IEP to make an informed decision as to its adequacy prior to making a placement decision. At the time the parents must choose whether to accept the school district recommendation or to place the child elsewhere, they have only the IEP to rely on, and therefore the adequacy of the IEP itself creates considerable reliance interests for the parents. Under the Department's view, a school district could create an IEP that was materially defective, causing the parents to justifiably effect a private placement, and then defeat the parents' reimbursement claim at a Burlington/Carter hearing with evidence that effectively amends or fixes the IEP by showing that the child would, in practice, have received the missing services.

Finally, though Respondent bears the burden of persuasion on this claim (since Petitioners clearly presented a *prima facie* case through the testimony of Witnesses A and B), it is telling that Respondent did not call witnesses from Public School A to explain the basis for their testimony in the prior hearing with Hearing Officer Seat, and to

indicate whether they continue to believe that the Student was inappropriately placed in the SLS program for the 2021-2022 school year.

Petitioners also challenged the goals in the Student's IEP. 34 C.F.R. Sect. 300.320(4)(i) requires that an IEP include "a statement of the special education and related services and supplementary aids and services, based on peer-reviewed research to the extent practicable, to be provided to the child, or on behalf of the child, and a statement of the program modifications or supports for school personnel that will be provided to enable the child to advance appropriately toward attaining the annual goals."

With respect to goals, Petitioners' main point was that the Student's March 9, 2021, IEP was basically a copy of Private School A's IEP, except without the services. However, there is nothing in the record to indicate that these goals and objectives were so unusual or specific to Private School A that a public school could not use them. E.F. v. New York City Dep't of Educ., No. 12–CV–2217 2013 WL 4495676, at *19 (S.D.N.Y. August 19, 2013) (IEP goals can be based on the private school placement); J.L. v. New York City Dep's of Educ, No. 12-CV-1516 2013 WL 625064, at *14 (S.D.N.Y. February 20, 2013) (same). Petitioners also insisted that the goals were incomplete, pointing to Witness A's page-by-page critique of the March, 2021, IEP. Petitioners then asked for an amendment of the IEP, which request was denied. During the hearing, Witness A testified, among other things, that a reading goal in the IEP improperly used eighty percent as a measure for progress, and that the IEP's "Reading goal 4" was not specific enough. Petitioners also contended that the Student should have had a typing goal on the IEP, as promised.

There is no requirement for goals to be as perfect or all-encompassing as Petitioners suggest. This Hearing Officer agrees with the expert testimony of Witness K, who said that the goals were specific to exactly the skill areas that the Student was working on, and that the baselines and goals were measurable. With respect to "Reading goal 2," which related to reading words containing vowel sounds, there is no reason that a teacher cannot use an eighty percent accuracy target as a goal. O.O. ex rel. Pabo v. D.C., 573 F. Supp. 2d 41, 51 (D.D.C. 2008) (approving IEP with goals measuring performance at eighty percent). With respect to "Reading goal 4," which related to identifying details in an independent level literary passage, this Hearing Officer finds the goal to be reasonable and appropriate. While the Student's IEP should have included a typing goal, as was promised in the IEP meeting, there is nothing in the record to suggest that omission was so material as to deny the Student a FAPE. Nor was there sufficient evidence that the IEP's "Area of Concern" sections, which included present levels, baselines, impact statements, and objectives, were inappropriate, inadequate, outdated, vague, immeasurable, or impossible to attain. Indeed, Petitioners' closing statement did not clearly mention present levels, and there is no requirement for IEPs to have impact statements or for goals to have baselines or objectives for learning-disabled students.

Petitioners also contended that the IEP did not contain adequate or comprehensive recommendations for assistive technology or "other classroom aids and services" and accommodations and modifications. However, the IEP did contain recommendations for assistive technology: a tablet, much like the Chromebook that Private School A provided to the Student. Moreover, the "Other Classroom Aids and Services" section of the IEP provides for many interventions, including several that Private School A provided to the

Student, including speech-to-text software, preferential seating, and the use of a scribe. Notably, Petitioners' brief did not mention which assistive technology, aids, services, accommodations, or modification should have been in the IEP. Instead, Petitioners simply referred to exhibits P-9 and P-10, which contain a long list of alleged issues with the IEP. While some of the suggestions in these exhibits (such as a multi-sensory, sequential, diagnostic, prescriptive, evidence-based reading intervention) might have been appropriate for the Student, Petitioners should have raised these issues at the IEP meeting, but they did not. In this instance, DCPS was justified in closing out the IEP process and not changing the IEP with the suggestions made in exhibits P-9 and P-10.

Finally, Petitioners alleged that the IEP did not contain any information about the type of appropriate educational placement that was recommended for the Student "along the continuum of placements," nor did it describe any of the Student's needs in an educational placement. However, Petitioners presented no authority in support of the claim about the continuum, and the IEP certainly did describe the Student's needs through the IEP's "Area of Concern" sections in reading, written expression, math, communication/speech and language, and motor skills/physical development.

In sum, this Hearing Officer finds that the March 9, 2021, IEP denied the Student educational benefit, and therefore a FAPE, only by proposing that the Student attend an inappropriate SLS program, which did not meet the Student's needs.

2. Did Respondent deny Petitioners the opportunity to meaningfully participate and/or predetermine its positions at the Student's IEP meeting on March 9, 2021, and through the placement of the Student in the "SLS program"? If so, did Respondent violate 34 C.F.R. Sect. 300.501 and related provisions? If so, did DCPS deny the Student a FAPE?

Petitioners contended that Respondent's decisions regarding specialized instruction hours and the recommendation for the SLS program were predetermined in order to allow Respondent to place the Student in the SLS program. Petitioners argued that their right to meaningfully participate was compromised by, among other things, the failure of DCPS to discuss and determine the placement with them, their inability to properly observe the program, and the predetermination of the placement by DCPS.

The IDEA requires that school districts offer "[a]n opportunity for the parents of a child with a disability...to participate in meetings with respect to the...educational placement of the child." 20 U.S.C. Sect. 1415(b)(1). Regulations clarify that "[i]n 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 C.F.R. Sect. 300.513(a)(2).

Petitioners did have a substantial opportunity to participate—and did participate—in the March, 2021, IEP meeting. Paolella ex rel. Paolella v. Dist. of Columbia, 210 Fed. Appx. 1, 3 (D.C. Cir. 2006) (determining that parental involvement in the IEP development process indicated meaningful participation such that there was no denial of a FAPE); Cooper v. Dist. of Columbia, 77 F. Supp. 3d 32, 38 (D.D.C. 2014) (finding that a procedural violation of the IDEA did not amount to denial of a FAPE because plaintiff had otherwise had "substantial input" at all stages of IEP development and school placement). Indeed, the record here indicates that Petitioners have been very involved in the development of this Student's IEP, and that DCPS has been responsive to

Petitioners' communications. J.T. v. District of Columbia, 496 F. Supp. 3d 190, 203–04 (D.D.C. 2020), aff'd, No. 20-7105, 2022 WL 126707 (D.C. Cir. Jan. 11, 2022). Petitioners contended that the IEP was predetermined because DCPS kept sending them letters indicating that the Student was supposed to attend the SLS program. Petitioners suggested that DCPS had already decided to place the Student in the SLS program back in December, 2019, pointing to an email. P-18. However, the record suggests that some of these letters were likely sent in error, and Petitioners were not able to extract any admissions from the DCPS witnesses that proved that DCPS was intent on sending the Student to the SLS program as far back as December, 2019. In fact, DCPS did not recommend the SLS program for the Student until March, 2021, more than a year later.

Petitioners also contended that their right to meaningfully participate was compromised by the failure of DCPS to discuss and determine the Student's placement with them. However, the educational placement was discussed at length at the Student's IEP meeting, where Petitioners understood that DCPS was recommending the SLS program. Petitioners suggested that the Student's proposed location of services should have been discussed at the IEP meeting, but they did not back this assertion up with any recent caselaw to clarify that such a discussion is mandatory in IEP meetings in the District of Columbia.[2] Moreover, Petitioners did observe the SLS program, though the

[2] Courts disagree on the duty to discuss a student's proposed school at an IEP meeting. Some cases suggest that the school should be selected at the IEP meeting, as in A.K. ex rel. J.K. v. Alexandria City Sch. Bd., 484 F.3d 682 (4th Cir. 2007). In other cases, courts find that a school does not have to be selected at the IEP meeting. See, e.g., T.Y. v. N.Y.C. Dep't of Educ., 584 F.3d 412, 419 (2d Cir. 2009); A.W. ex rel. Wilson v. Fairfax Cnty. Sch. Bd., 372 F.3d 674, 683 n.10 (4th Cir. 2004); White v. Ascension Parish School Board, 343 F.3d 373 (5th Cir. 2003). In Eley v. District of Columbia, 47 F. Supp. 3d 1 (D.D.C. 2014), the court did rule that the school should have been selected at the IEP meeting. However in Eley, as in A.K., the court was influenced by the fact that the student did not have a school to attend at the beginning of the school year.

observation was on the last day of school. Petitioners contended that the lateness of this observation compromised their ability to know about the Student's prospective placement, but Petitioners had already visited the SLS program at Public School B and knew what was being proposed for the Student. Furthermore, Witness G certainly explained the school setting to Petitioners at length at the meeting on June 24, 2021, which gave Witness A enough information to write a long memorandum about the nature of Public School B's SLS program. This claim is therefore without merit.

3. Did Respondent fail to provide the Student with an appropriate educational placement for the 2021-2022 school year? If so, did Respondent act in contravention of cases such as Endrew F. and Gellert v. District of Columbia, 435 F. Supp. 2d 18 (D.D.C. 2006)? If so, did Respondent deny the Student a FAPE?

Petitioners contended that the SLS program would group the Student inappropriately with lower-functioning students. Petitioners contended that the Student needs a program with more support and should not be placed in a classroom where students have broader learning needs. It has already been ruled in this HOD that the Student's March 9, 2021, IEP was inappropriate because it recommended the SLS program, which DCPS's own staff at Public School A said was inappropriate for the Student. As explained in greater detail in the section of this HOD that discusses Issue #1, Petitioners must prevail on this claim.

4. Did Respondent deny Petitioners the right to observe the proposed school? If so, did Respondent violate the Special Education Student Rights Act of 2014?

According to the Special Education Student Rights Act of 2014, on request, an LEA shall provide timely access to a parent of a child with a disability to observe the child's current or proposed special educational program. D.C. Code, Sect. 38-2571.03(5)(A)(i). The time allowed for a parent, or the parent's designee, to observe the

child's program shall be of sufficient duration to enable the parent or designee to evaluate a child's performance in a current program or the ability of a proposed program to support the child. D.C. Code, Sect. 38-2571.03(5)(B). The LEA shall not impose any conditions or restrictions on such observations except those necessary to ensure the safety of the children in a program, 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 avoid any potential disruption arising from multiple observations occurring in a classroom simultaneously. D.C. Code, Sect. 38-2571.03(5)(D).

Petitioners argued that they did not get to see any general education setting, other than on a group tour, and that they were entitled to observe all potential settings proposed for the Student. However, Petitioners did observe the proposed special education classroom on June 24, 2021, and Witness A gleaned enough information at that time to write a six-page, single-spaced summary of the observation. That document did not indicate that there was any need for Petitioners to see the general education classes at Public School B, and Petitioners did not clearly explain at the hearing why they needed to see the school's general education classes. In fact, it is unclear from the record that Petitioners even asked DCPS to see the general education classrooms during their observation. Petitioners also contended that their special education classroom observation was not valid because it was the last day of school, and few students were in class at the time. However, Petitioners did not point to any specific violation of the statute, which only requires that petitioners have an opportunity to observe a school.

Petitioners did seek another observation of School B on August 30, 2021, which request was refused by Witness G on September 10, 2021. However, Petitioners did not point to any authority indicating that petitioners have the right to ask for observations as many times as they wish, and there is no authority to suggest that parents have the right to observe a proposed placement twice within a three-month period. This Hearing Officer agrees with Petitioners that DCPS could have handled the observation process better. However, because Petitioners did not identify any section of the Special Education Student Rights Act of 2014 that was violated, and given the difficulties of observing students during the COVID-19 pandemic (see P-43-2), this Hearing Officer finds that, on these facts, DCPS did not violate the Special Education Student Rights Act of 2014.

RELIEF

As relief, Petitioner seeks tuition reimbursement and payment for the 2021-2022 school year at Private School A. 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."

The LEA 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 "proper under the Act," 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). In this connection, 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).

Petitioners presented Witness B from Private School A, who testified that the Student is a "classically dyslexic" child who fits in with the other students in the classroom who are also learning disabled. The Student benefits emotionally from being in a classroom with students who have the same kind of issues that s/he has. The instruction at Private School A is grounded in the Orton-Gillingham approach, and the school offers daily classes in reading, mathematics, writing, and science, together with a daily "club" class that is similar to social studies. Two teachers provide reading and mathematics interventions sixty minutes per day for six or seven students. Students receive accommodations such as a Chromebook and text-to-speech software. The Student has passed classes and made progress in reading at Private School A, though even with the school's interventions, the Student remains two years behind grade level in reading and writing. The record, especially the testimony of Witness A, makes it clear that the Student needs, at minimum, an intensive reading program in a small group for at least one hour every day to address his/her issues. The Student receives this kind of instruction at Private School A.

Respondent argued that Petitioners did not present a teacher from Private School A in support of their claims. However, Respondent did not point to any caselaw in support of this contention, and this Hearing Officer is not aware of any such requirement in the caselaw. Witness B came across as knowledgeable and credible, and there is nothing in the record to suggest that Petitioners called Witness B simply to avoid having to call a teacher from Private School A. Respondent also contended that Witness B admitted that Private School A does not individualize its programs for students. While the school does provide all of its students with the same amount of specialized instruction per day, there is nothing in the record to establish that this is improper or that the Student's program is not individualized at Private School A. DCPS may be right that Private School A does not provide students with thirty-five hours of specialized instruction per week, as it claims, since the school's calculation seems to include lunch, physical education, and recess. But the record does not support Respondent's contention that Private School A provides instruction that is not individualized for each student, as evidenced by the IEPs from Private School A that are in the record.

Respondent argued that Private School A is not a placement that provides instruction in the least restrictive environment, which Witness A, in fact, agreed with. This Hearing Officer agrees as well. However, this fact does not mean that reimbursement should be denied. Respondent did not explain how Petitioners had any other options that would provide the Student with the small-group, daily, intensive reading instruction that s/he needed. Leggett v. Dist. of Columbia, 793 F.3d 59, 74 (D.C. Cir. 2015). Respondent contended that Private School A witnesses were biased, but Witness B was credible, though she favored Petitioners' position, much as DCPS's

witnesses favored DCPS's position. Respondent also argued that Private School A does not meet local requirements for providing students with certified teachers, and that the requirements of the District of Columbia Municipal Regulations are binding on parents in tuition reimbursement cases pursuant to the IDEA. While hearing officers can consider these requirements in determining appropriate relief, the failure to comply with these requirements should not lead to the conclusion that the school is improper for a student. As the United States Supreme Court stated in Carter:

> …the Sect. 1401(a)(18) requirements—including the requirement that the school meet the standards of the state educational agency, Sect. 1401(a)(18)(B)—do not apply to private parental placements. Indeed, the school district's emphasis on state standards is somewhat ironic. As the Court of Appeals noted, "it hardly seems consistent with the Act's goals to forbid parents from educating their child at a school that provides an appropriate education simply because that school lacks the stamp of approval of the same public school system that failed to meet the child's needs in the first place." (Citation omitted.)

Florence Cty. Sch. Dist. Four v. Carter By & Through Carter, 510 U.S. 7, 14 (1993).

Respondent also argued that this Hearing Officer should order a modification of the IEP rather than a public school placement, citing to such cases as N.T. v. District of Columbia, 839 F. Supp. 2d 29 (D.D.C. 2012). While such action is an option for hearing officers in determining appropriate relief for a student, it would not be an appropriate remedy in this case, since it would force the Student to leave his/her current school with only a few months left in the school year and without any plan for the Student's immediate future. Block v. District of Columbia, 748 F. Supp. 891, 897 (D.D.C. 1990).

The IDEA states 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 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). In addition, courts 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.

Respondent made no argument on equities, and the record indicates that Petitioners have cooperated with DCPS's requests regarding the Student. Accordingly, this Hearing Officer finds that Petitioners should be reimbursed for the tuition at Private School A for the 2021-2022 school year.

VII. Order

As a result of the foregoing:

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

2. All other requests for relief are hereby denied.

Dated: April 18, 2022

Michael Lazan
Impartial Hearing Officer

cc: Office of Dispute Resolution
Attorney A, Esq.
Attorney B, Esq.
OSSE
[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 USC §1415(i).

Date: April 18, 2022

Michael Lazan
Impartial Hearing Officer