

OSSE
Office of Dispute Resolution
April 16, 2023

Parent on Behalf of Student, ¹	HEARING OFFICER'S DETERMINATION
Petitioners,	Hearing Dates:
v.	March 28, 2023
	March 29, 2023
	March 30, 2023
	March 31, 2023
District of Columbia Public Schools (Local Education Agency "LEA")	Counsel for Each Party listed in Appendix A
Respondent.	
Case # 2023-0002	
Date Issued: April 16, 2023	<u>Hearing Officer:</u> <u>Coles B. Ruff, Esq.</u>

¹ Personally identifiable information is in the attached Appendices A & B.

JURISDICTION:

The hearing was conducted, and this decision was written, pursuant to the Individuals with Disabilities Act ("IDEA"), P.L. 101-476, as amended by P.L. 105-17 and the Individuals with Disabilities Education Improvement Act of 2004, the District of Columbia Code, Title 38 Subtitle VII, and the District of Columbia Municipal Regulations, Title 5 Chapter 5-A30.

BACKGROUND AND PROCEDURAL HISTORY:

The student who is the subject of this due process hearing ("Student") resides with Student's parent ("Petitioner") in the District of Columbia. The District of Columbia Public Schools ("DCPS" or "Respondent") is Student's local education agency ("LEA"). Student has been determined eligible for special education and related services pursuant to IDEA with a disability classification of specific learning disability ("SLD").

Student was first found eligible for special education during school year ("SY") 2012-2013, while Student was attending a public charter school in the District of Columbia ("School A"). School A developed Student's initial IEP on May 7, 2013. Student continued to attend School A with annual IEP updates through the end of SY 2015-2016.

Petitioner unilaterally placed Student at a non-public special education school ("School B") for SY 2016-2017. Petitioner filed a due process complaint ("DPC") against School A seeking reimbursement for the cost of Student attending School B during SY 2016-2017. The DPC resulted in an HOD issued on July 23, 2018, in which the Hearing Officer denied Petitioner's request for reimbursement. Student attended School B for a single school year.

Petitioner's family then moved to New York City. Petitioner placed Student in a non-public school in New York ("School C") for SY 2017-2018. Student resided with Petitioner in New York City and attended School C for SY 2017-2018, SY 2018-2019, and SY 2019-2020. Petitioner returned to the District of Columbia and reenrolled Student in School B for SY 2020-2021.

Petitioner requested a FAPE offer for DCPS in November 2020. DCPS developed an IEP for Student for SY 2021-2022, dated September 7, 2021, to be implemented at Student's neighborhood DCPS school ("School D"). Petitioner rejected the offer of FAPE and maintained Student at School B. On June 9, 2022, DCPS developed an IEP for Student for SY 2022-2023, to be implemented at Student's neighborhood DCPS school ("School E"). On August 25, 2022, Petitioner filed a DPC challenging the IEPs that DCPS developed and seeking reimbursement for Student's attendance at School B. Petitioner withdrew that DPC without prejudice.

On January 6, 2023, Petitioner filed the current DPC challenging both IEPs that DCPS developed. Petitioner asserts, inter alia, that the IEPs and the proposed educational placements are inappropriate because they prescribed too few hours of specialized instruction outside the general education setting. Petitioner seeks reimbursement for the costs of Student's attendance at School B for SY 2021-2022 and SY 2022-2023, retroactive to March 5, 2021, when Petitioner alleges that DCPS should have completed the special education eligibility process for Student and an order placing Student at School B as Student's current educational placement.

LEA Response to the Complaint:

Respondent filed a response to the complaint on January 17, 2023. In its response, DCPS stated the, inter alia, the following:

Student previously attended School A and was first referred for special education on February 23, 2013. On May 7, 2013, School A found Student eligible under the category of a speech-language disorder and changed the disability category to specific learning disability on February 27, 2014. On August 31, 2016, School A issued a prior written notice (“PWN”) that a change in placement was not warranted. Following this decision, Petitioner issued notice of her intent to withdraw Student from School A, as she had privately placed Student at School B.

After attending School B for one year during SY2016-2017, Petitioner’s family moved to New York, where they placed Student in another private school which Student attended until the family returned to the District of Columbia at the start of SY 2020-2021. Upon returning, Petitioner immediately placed Student at School B without notice to DCPS. DCPS’ first interaction or awareness of Student was when DCPS received a referral on November 5, 2020.

Petitioner chose the date of December 11, 2020, for the initial meeting. At that meeting, the team reviewed existing data and determined that a redacted psychological report from New York had an autism diagnosis which had been removed. The team agreed that the next step would be to complete evaluations. DCPS completed evaluations in March 2021.

Unfortunately, Petitioner has failed/refused to enroll Student Student’s neighborhood DCPS school (“School D”) under the robust IEP proposed by DCPS. The IEP team met on June 9, 2022. DCPS proposed an IEP with 5 hours per week of specialized instruction outside general education, 7.5 hours per week of specialized instruction inside general education, 180 minutes per month of occupational therapy, 180 minutes per month of speech therapy, and 180 minutes per month of behavior support services, 1 hour per week of SPED consultation, 30 minutes per month of OT consultation, and 30 minutes per month of speech-language consultation. The statute of limitations bars all claims before January 6, 2021. The LEA made a FAPE available, which Petitioner rejected kept Student at School B. DCPS moves that all relief be denied and this matter be dismissed.

Resolution Meeting and Pre-Hearing Conference:

The DPC was filed on January 6, 2023. The parties participated in a resolution meeting on January 20, 2023. The parties did not mutually agree to shorten the 30-day resolution period. The 45-day period began on February 5, 2023, and ended [and the Hearing Officer’s Determination (“HOD”) was initially due] on March 22, 2023. The parties were unavailable for the dates offered by the independent hearing officer (“IHO”). They requested and agreed on a continuance and extension of the HOD due date, which was extended to April 13, 2023.

The IHO conducted a pre-hearing conference on February 27, 2023, and issued a pre-hearing order (“PHO”) on March 1, 2023, and a revised PHO on March 21, 2023, outlining, inter alia, the issues to be adjudicated.

ISSUES:²

1. Did DCPS deny Student a free appropriate public education (“FAPE”) by failing to timely evaluate Student and confirm Student’s eligibility for special education services during SY 2020-2021?
2. Did DCPS deny Student a FAPE by failing to provide any educational program or offer of placement and/or location of services during SY 2020-2021?
3. Did DCPS deny Student a FAPE by failing to have an IEP in place for Student for the start of the SY 2021-2022?
4. Did DCPS deny Student a FAPE by failing to provide an appropriate educational program and placement and/or location of services for SY 2021-2022, including that (a) the IEP did not provide a sufficient amount of self-contained special education services and (b) that the proposed placement and/or location of services at School D was too large of a setting for Student?
5. Did DCPS deny Student a FAPE by failing to permit Petitioner’s educational consultant to observe the proposed program and placement at School D during SY 2021-2022?
6. Did DCPS deny Student a FAPE by failing to allow Petitioner meaningful participation in the placement process, including failing to provide information about the implementation of the IEP or answer her questions about the program and school during SY 2021-2022?
7. Did DCPS deny Student a FAPE by failing to provide an appropriate educational program and placement and/or location of services SY 2022-2023, including that (a) the IEP did not provide a sufficient amount of self-contained special education services and (b) that the proposed placement and/or location of services at School E was too large of a setting for Student?
8. Did DCPS deny Student a FAPE by failing to respond to Petitioner’s requests to observe the proposed program and placement at School E for SY 2022-2023, thus denying ■■■ meaningful participation in the IEP and placement process?
9. Is ■■■ School B a proper placement for Student?

DUE PROCESS HEARING:

The Due Process Hearing was convened on March 28, 2023, March 29, 2023, March 30, 2023, and March 31, 2023. The hearing was conducted via video teleconference on the Microsoft Teams platform. DCPS counsel requested an unopposed continuance and extension of the HOD due date

²The IHO restated the issues from the PHO at the outset of the due process hearing, and the parties agreed that these were the sole issues to be adjudicated.

to submit written closing arguments. The continuance was granted. The HOD is now due on April 16, 2023. The parties submitted written closing arguments on April 10, 2023.

RELEVANT EVIDENCE CONSIDERED:

The IHO considered the testimony of the witnesses and the documents submitted in each party's disclosures (Petitioners' Exhibits 1 through 53 and Respondent's Exhibits 1 through 23) that were admitted into the record and are listed in Appendix 2.³ A prior HOD regarding Student was admitted an exhibit by the Independent Hearing Officer ("IHO Exhibit 1"). The witnesses testifying on behalf of each party are listed in Appendix B.⁴

SUMMARY OF DECISION:

Petitioner held the burden of production on all issues adjudicated and burden of persuasion on all issues except issues #4 and #7 after Petitioner presented a prima facie case on those issues.⁵ Based on the evidence adduced, the IHO concluded that Petitioner sustained the burden of persuasion of the procedural violations regarding issues #1, #2, and #3, resulting in a denial of a FAPE. DCPS did not sustain the burden of persuasion on issues #4 and #7 regarding the number of hours of self-contained services in the IEPs, but not as to the location of service. Petitioner did

³ Any item disclosed and/or objected to by either party, admitted, not admitted, or admitted for limited purposes was noted on the record and is noted in Appendix A.

⁴ Petitioner presented five witnesses: (1) Student's Mother and the following individuals who were designated as expert witnesses: (2) Petitioner's Educational Consultant, (3) Student's Current Private Therapist/Former School B Therapist, (4) a Former School B Administrator, (5) a Current School B Administrator. Respondent presented six witnesses, five of whom were designated as expert witnesses: (1) a DCPS Resolution/Compliance Specialist, (2) a DCPS Occupational Therapist, (3) a DCPS Social Worker, (4) DCPS LEA Representative for School D, (5) DCPS LEA Representative for School E, (6) a DCPS Non-Public Monitor for School B. The IHO found the witnesses credible unless otherwise noted in the conclusions of law. Any material inconsistencies in the testimony of witnesses that the IHO found are addressed in the conclusions of law.

⁵ DC Code § 38-2571.03 (6) provides:

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

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

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

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

not sustain the burden of persuasion regarding issues #5, #6 , #8 and #9. The IHO granted Petitioner reimbursement for Student's attendance at School B for SY 2021-2021 and SY 2022-2023 but denied Petitioner's request that Student be placed and funded prospectively at School B.

FINDINGS OF FACT:⁶

1. Student resides with Petitioner in the District of Columbia. DCPS is Student's LEA. Student has been determined eligible for special education and related services pursuant to IDEA with a disability classification of SLD. (Respondent's Exhibit 21)
2. Student was first found eligible for special education during SY 2012-2013 while Student was attending School A, a public charter school in the District of Columbia. School A was Student's LEA at the time and developed Student's initial IEP on May 7, 2013. Student continued to attend School A with annual IEP updates through the end of SY 2015-2016. (Respondent's Exhibit 4, IHO Exhibit 1).
3. On February 2, 2016, School A convened an annual IEP review meeting and increased Student's specialized instruction services from 8 hours per week to 12.5 hours per week, including 5 hours per week outside general education. For related services, the IEP provided 180 minutes per month of occupational therapy ("OT") and 20 minutes per month of behavioral support services ("BSS"). The IEP also provided 30 minutes per month of consultation BSS and extended school year ("ESY") services. (Respondent's Exhibit 6, IHO Exhibit 1)
4. Petitioner unilaterally placed Student at School B, a nonpublic special education school, for SY 2016-2017. Petitioner, through counsel, notified School A of the unilateral placement on July 26, 2016, and reserved the right to seek public funding for Student's placement at School B for SY 2016-2017. (IHO Exhibit 1)
5. School B is a private day school for students with language-based disabilities, typically students with learning disabilities and ADHD, and other mild disabilities. Students at School B have average to above average intelligence with some weaknesses and academic functioning with some other condition such as ADHD and/or executive functioning difficulties. There are no non-disabled students at School B. School B holds an OSSE certificate of approval ("COA"). School B has approximately 380 students divided into three divisions: lower school, middle school, and high school. Most of Student's classes have 13 or fewer students with one teacher. (Testimony of Witnesses 1, 2, 3, 4)

⁶ The evidence (documentary and/or testimony) that is the source of the Findings of Fact ("FOF") is noted within parentheses following the finding. A document is noted by the exhibit number. If there is a second number following the exhibit number, that number denotes the page of the exhibit from which the fact was obtained. When citing an exhibit that has been submitted by more than one party separately, the Hearing Officer may only cite one party's exhibit.

6. With OSSE's participation, School A convened a change of placement meeting in August 2017 to consider whether Student required a change to a more restrictive placement than School A. School A issued a PWN dated August 31, 2017, that stated inter alia:

“The IEP team has determined that a change in placement is not warranted for [Student]. Following this decision, the parent issued notice of her intent to withdraw [Student] from [School A]; she has privately placed [Student] at [School B]. ...The IEP team and OSSE met on three separate occasions to discuss a potential change in placement for [Student]. Following a review of data submitted by the parent and school team, OSSE issued a recommendation against placement. Members of the school team agreed that the data does not support placement at this time because [Student] has made significant progress on [Student's] IEP goals since both the start of the year and since [the] new IEP was developed in February, and is performing at or above grade level in many areas. With the IEP supports and services that are in place, the school team believes [Student] is making and will continue to make progress and that a more restrictive environment is not warranted. Parent and her advocate/attorney disagree with this determination.” (Respondent's Exhibit 11A-1)

7. Student attended School B until the end of SY 2016-2017 when Petitioner's family moved to New York City. Petitioner unilaterally placed Student at School C, a nonpublic school in New York, for SY 2017-2018 for fourth grade. Petitioner then sought reimbursement from the New York City Department of Education (“NYC-DOE”) for Student's attendance at School C. (IHO Exhibit 1, Petitioner's Exhibit 2)
8. Petitioner and NYC-DOE entered a settlement agreement that reimbursed Petitioner for Student's attendance at School C for SY 2017-2018. The settlement agreement notes that the New York State Education Department did not approve School C to provide special services or programs for students with disabilities. (Petitioner's testimony, Petitioner's Exhibits 2)
9. On March 6, 2018, Petitioner filed a DPC against School A seeking reimbursement for the cost of Student attendance at School B for SY 2016-2017. Petitioner asserted, inter alia, that School A had proposed an inappropriate IEP and placement for Student for SY 2016-2017. The DPC resulted in an HOD issued on July 23, 2018, in which the Hearing Officer concluded that School A had not denied Student a FAPE. The Hearing Officer concluded that School A met its burden of persuasion that its proposal to continue the February 2, 2016, IEP, program, and educational placement for Student into SY 2016-2017 was reasonably calculated to enable Student to make progress appropriate in light of Student's circumstances. The Hearing Officer denied Petitioner's requested reimbursement for Student's attendance at School B. (IHO Exhibit 1)
10. Student continued to reside with Petitioner in New York City and attended School C for SY 2018-2019 and SY 2019-2020 for fifth and sixth grades, respectively. Petitioner also reached settlement agreements with NYC-DOE that reimbursed Petitioner for Student's unilateral placement at School C for SY 2018-2019 and SY 2019-2020. During the three

years that Student attended School C, NYC-DOE did not develop IEPs for Student that prescribed a least restrictive placement (“LRE”) in a separate special education school. (Petitioner’s testimony, Petitioner’s Exhibits 3, 6)

11. Petitioner had an independent neuropsychological evaluation conducted of Student in November/December 2019, when Student was age [REDACTED] and in [REDACTED] grade at School C. Petitioner was seeking a better understanding of the nature of Student’s cognitive strengths and weaknesses and to support Student’s academic functioning. (Petitioner’s testimony, Petitioner’s Exhibit 4)
12. Student’s intellectual functioning was assessed using the Wechsler Intelligence Scale for Children, 5th Edition (WISC-V), which measures abilities in five discrete domains, including the ability to reason with verbal and nonverbal information, understand visual-spatial relationships, working memory, and processing speed. These five index scores yielded a measure of Student’s overall intelligence in the average range with a Full Scale IQ of 97 at the 42nd percentile. Student’s verbal expression and reasoning skills were commensurate with same-age peers and in the average range (106, 66th percentile). Student’s nonverbal reasoning abilities were also within normal limits (100, 50th percentile). Student’s understanding of visual-spatial relationships fell in the high average range (111, 77th percentile). Student’s working memory, or the ability to attend to information, hold it in mind, and manipulate it, was average and commensurate to same-age peers (91, 27th percentile). Student’s visual processing speed, or ability to perceive, process, and respond to incoming visual information, was weaker and in the low average range (80, 9th percentile). (Petitioner’s Exhibit 4)
13. Student’s basic reading skills were well below age expectations. Student’s ability to decode unfamiliar words and recognize single words were borderline relative to same-age peers. Student’s silent reading fluency was in the borderline range. When Student was tasked to read passages aloud, Student’s overall reading fluency was impaired. Student’s difficulties with decoding words in conjunction with inattention made it more challenging for Student to infer meaning from text. Student’s reading comprehension fell in the impaired range. When Student was asked to read a passage aloud and then answer questions without referring back to the passage, Student’s reading comprehension fell within the borderline range. (Petitioner’s Exhibit 4)
14. Student’s spelling skills were consistent with decoding abilities and in the borderline range. Likewise, Student was slow to generate simple written sentences with performance below age expectations. Student’s ability to communicate effectively in writing using proper conventions, grammar, and syntax was borderline. A qualitative review revealed that Student was able to formulate simple sentences. However, Student struggled to write complex sentences, incorporate details and use punctuation and capitalization. Additionally, it was difficult to decipher Student’s handwriting due to poor letter formation and alignment and spelling difficulties. (Petitioner’s Exhibit 4)
15. Student exhibited relative strengths in math. Student’s performances ranged from low average to average. Student’s untimed math computation skills were low average.

Students' ability to solve word problems requiring more applied problem-solving was commensurate to same-age peers. Student's automaticity for math facts was low average, as Student completed fewer problems in the time frame relative to same-age peers. (Petitioner's Exhibit 4)

16. The evaluator concluded that overall, the evaluation results were consistent with a diagnosis of Autism Spectrum Disorder ("ASD"). She noted that Student displayed social-communication deficits, including difficulties sustaining reciprocal conversations and inconsistent nonverbal social-communication behaviors. The evaluator noted that Student exhibited several hyperactive and impulsive behaviors consistent with a diagnosis of ADHD, predominantly inattentive presentation. (Petitioner's Exhibit 4)
17. Student's emotional and behavioral dysregulation were also areas of concern. The evaluator noted that Student was easily angered when asked to engage in non-preferred tasks and had difficulties using appropriate coping mechanisms. Also, Student's social communication and executive functioning difficulties impact Student's ability to express emotions and resolve frustrations. The evaluator noted that Student exhibited clinically significant depressive symptoms, which presented as irritability, social stress, poor self-esteem, and feeling little control over life. (Petitioner's Exhibit 4)
18. The evaluator recommended that Student continue to need a "special education placement with a balance of academic instruction, language-based intervention, behavioral supports, and social instruction infused throughout the curriculum." The evaluator noted that the school program should provide a low student-teacher ratio and a supportive and structured classroom setting where concepts could be further broken down and reviewed, and instructions scaffolded, yet with students with similar cognitive abilities so that Student would continue to be challenged intellectually. (Petitioner's Exhibit 4)
19. Petitioner's family returned to the District of Columbia in 2020, and Petitioner re-enrolled Student in School B for SY 2020-2021 in seventh grade. Petitioner submitted a child-find referral form to DCPS dated October 26, 2022, seeking an offer of special education services from DCPS. DCPS received the referral on November 5, 2022. (Respondent's Exhibit 12, Petitioner's Exhibit 8)
20. On December 11, 2020, DCPS convened an initial screening meeting. Petitioner provided DCPS with the 2019 neuropsychological evaluation but did not initially provide DCPS with the portion of the evaluation report noting the ASD diagnosis. Petitioner did not provide an IEP for Student from New York for DCPS to review and either adopt or provide comparable services pending its evaluation of Student. The team determined that more information was needed before confirming Student's eligibility for special education services and agreed that DCPS would conduct updated psychological, speech/language, and OT assessments. On January 8, 2021, DCPS sent the parent the consent to evaluate forms to sign, which she returned. (Respondent's Exhibit 15, Petitioner's Exhibits 9, 12)

21. DCPS completed its speech-language and psychological testing in February 2021, and the evaluation reports were completed on March 3, 2021, and March 8, 2021, respectively. The speech-language evaluation revealed areas of weakness for Student with an educational impact that required speech-language as a related service. (Respondent's Exhibit 15A, 15B)
22. The psychologist conducted a virtual assessment of Student's cognitive ability and academic functioning. The DCPS psychologist assessed Student for consideration of ASD, SLD, and OHI disabilities. She assessed Student's cognitive functioning using the Reynolds Intellectual Assessment Scales, Second Edition (RIAS-2). Student earned a Composite Intelligence Index or CIX of 89, within the Below Average range, which exceeds the performance of 23% of individuals at Student's age. (Respondent's Exhibit 15A)
23. Student earned a Verbal Intelligence Index (VIX) of 82, within the Below Average range. On the Nonverbal Intelligence Index (NIX), Student earned NIX of 99, within the Average range. Student earned a Composite Memory Index (CMX) of 89, within the Average range of working memory skills. Student's performance on nonverbal tasks was a relative strength. Although Student's CIX was a reasonable estimate of general intelligence, a statistically significant discrepancy existed between Student's NIX of 99 and VIX of 82, generally demonstrating better-developed nonverbal intelligence or spatial abilities. (Respondent's Exhibit 15A)
24. Student's academic functioning was assessed with the Woodcock-Johnson Test of Academic Achievement-Fourth Edition (WJ-IV). Student's academic performance was variable. Student displayed challenges in oral reading, decoding, spelling, and reading comprehension. Student's performance in math was a relative strength. (Respondent's Exhibit 15A)
25. Student's scores for the WJ-IV were as follows:

Cluster/ Subtests	Standard Score	Percentile	Qualitative Description
Reading	85	15	Low Average
Letter-Word*	85	15	Low Average
Identification			
Passage Comprehension*	85	16	Low Average
Word Attack	78	7	Low
Oral Reading	77	6	Low
Math	96	38	Average

Applied Problems*	100	50	Average
Calculation*	92	31	Average
Writing	74	4	Low
Spelling	64	1	Very Low
Writing Samples	94	35	Average

(Respondent's Exhibit 15A)

26. The psychologist interviewed Student, Petitioner, and some School B staff members. She also observed Student during a virtual reading class at School B. The psychologist noted that during her observation, Student transitioned and read pages aloud from the class's current reading selection. The student was asked to read aloud twice during the observation. During Student's first reading, Student displayed some reading errors, such as hesitations and repetition. During Student's second reading, Student made similar reading errors, including mispronunciations and substitutions. Student also displayed hesitation and was observed to read some portions slower due to challenges with decoding. Additionally, Student also omitted words. The psychologist noted that during the observation Student had some difficulty staying on task. Specifically, Student was not following along in Student's book while other students were reading. Student also answered some questions in an off-task manner. (Respondent's Exhibit 15A)
27. The DCPS psychologist noted the following regarding Student's social-emotional presentation: Student may experience a level of depression consistent with the findings of Student's previous evaluation. Student's mother reported to the psychologist that Student is sometimes withdrawn, pessimistic, and/or sad. She also noted that Student displayed some behaviors that suggested somatic concerns. Student's teachers shared with the psychologist Student's challenges with attention. The DCPS psychologist recommended that Student be considered for eligibility as a student with other health impairment ("OHI"). (Respondent's Exhibit 15A)
28. On March 20, 2021, Petitioner signed a contract with School B for Student to attend School B for SY 2021-2022. (Respondent's Exhibit 23)
29. On March 25, 2021, DCPS observed Student at School B in a virtual writing class. DCPS conducted OT testing on April 8, 2021. The OT evaluation report was completed on May 31, 2021. The OT evaluation was delayed due to the illness of DCPS's OT evaluator. The OT evaluation revealed areas of weakness for Student with an educational impact that required OT as a related service. (Witness 5's testimony, Respondent's Exhibit 15C, 15D).
30. DCPS convened an eligibility meeting for Student on June 14, 2021, at which the team reviewed the updated assessments. The team discussed that Student met the criteria for OHI, as noted in the DCPS psychologist's evaluation report. The team determined that Student did not meet the criteria for ASD. Petitioner asked that the team consider Student's previous classification of SLD. Although there was no significant discrepancy between

Student's cognitive and academic performance, after reviewing all the data, the IEP team agreed to confirm Student's primary disability classification as SLD and noted Student's attentional challenges. The team agreed that Student would receive specialized instruction in math, reading, written language, and the related services of speech-language and OT. DCPS informed Petitioner that it would contact her with a proposed date for a meeting to develop Student's IEP. (Respondent's Exhibit 16, Petitioner's Exhibit 19)

31. On July 7, 2021, DCPS proposed an IEP meeting date of August 10, 2021. On July 9, 2021, Petitioner's attorney replied to the email that School B was not available the week of August 10, 2021, and proposed the week of August 16, 2021. DCPS then proposed an earlier date: August 2, 2022. Petitioner's attorney replied that August 2, 2021, did not work and again requested the week of August 16, 2022. On July 28, 2021, DCPS sent an email "re-proposing" September 7 or 9, 2021, for the IEP meeting. On July 29, 2021, Petitioner's attorney's office sent an email agreeing to meet on September 7, 2021. DCPS confirmed September 7, 2021, as the meeting date in an email dated August 4, 2021. (Petitioner's Exhibit 21)
32. On August 2, 2021, Petitioner provided DCPS notice of her intent to continue Student's placement at School B for SY 2021-2022 and her continued desire that DCPS offer a program and placement that could meet Student's needs. DCPS denied Petitioner's request for funding Student's placement at School B in a response letter dated August 27, 2021. (Petitioner's Exhibit 20)
33. On September 7, 2021, DCPS developed an IEP for Student, which prescribed the services in the chart below, including 12.5 hours per week of specialized instruction, with five of those hours outside general education. It also prescribed speech-language, OT, and BSS.

SPECIAL EDUCATION AND RELATED SERVICES

Special Education Services

Service	Setting	Begin Date	End Date	Time/Frequency
Specialized Instruction	Outside General Education	09/07/2021	09/06/2022	5 hr per wk
Specialized Instruction	General Education	09/07/2021	09/06/2022	7.5 hr per wk

Related Services

Service	Setting	Begin Date	End Date	Time/Frequency
Occupational Therapy	Outside General Education	09/07/2021	09/06/2022	180 min per mon
Behavioral Support Services	Outside General Education	09/07/2021	09/06/2022	180 min per mon
Speech-Language Pathology	Outside General Education	09/07/2021	09/06/2022	180 min per mon

Consultation Services

Service	Begin Date	End Date	Time/Frequency
Specialized Instruction	09/07/2021	09/06/2022	1 hr per wk
Occupational Therapy	09/07/2021	09/06/2022	60 min per yr
Speech-Language Pathology	09/07/2021	09/06/2022	30 min per mon

34. The IEP also prescribed that the classroom aids and services listed in the chart below would be made available to Student:

Other Classroom Aids and Services

This section documents aids, services, and other supports only provided in regular education classes or other education-related settings to enable children with disabilities to access the curriculum and are not accommodations provided in the Statewide-Assessment.

Extended time for all assignments, seat cushion as needed, slant board as needed, graphic organizers, sight word bank, multi-sensory materials for spelling practice, near point models, reduced expectation for copying from the board, fill-in notes, visual timer, verbal reminders and prompting to initiate a task and remain on task, reading strategy checklist for when Student encounters difficult words and frequent repetition of previously taught skills, modified homework assignments as needed, audiobooks, reading tracker, visuals for Student to track academic progress, scribe as needed, fidgets, noise-canceling headphones, visual divider, chunking of directions, chunking of written assignments, have Student repeat directions for understanding, extra time for transitions, preferential seating next to the teacher with minimal distractions; a behavior chart that tracks if Student initiated writing work quickly and did personal best to complete the assignment. When possible, increase the font size (20pt) on worksheets and computer (150% when possible) - Access to high contrast screen option to minimize eye fatigue -Minimize writing demands -Increase use of typing in lieu of handwriting. Speech-to-text software -Adapted paper (e.g., bold and/or raised line baseline and ceiling) - Spacers for writing - Bold and enlarged graph paper for math problems - Alternative work positions/seating to maximize attention through subtle movement (e.g., rocker, stool) - Highlighter for editing and/or boundary awareness - Movement breaks as needed.

35. The IEP included the following classroom and testing accommodations:

Classroom Accommodations	Statewide or Alternate Assessment Accommodations
<i>Presentation</i>	<i>Presentation</i>
Read Aloud for Non-ELA/Literacy Assessments	Read Aloud for Non-ELA/Literacy Assessments
<i>Response</i>	<i>Response</i>
Human Scribe, Speech-to-Text, Human Signer, or External Assistive Technology for Constructed Responses on ELA/Literacy Assessments	Human Scribe, Speech-to-Text, Human Signer, or External Assistive Technology for Constructed Responses on ELA/Literacy Assessments
<i>Setting</i>	<i>Setting</i>
Location with minimal distractions	Location with minimal distractions
Individual testing	Individual testing
<i>Timing and Scheduling</i>	<i>Timing and Scheduling</i>
Extended Time	Extended Time
Frequent Breaks	Frequent Breaks

37. The IEP noted the following about Student's behavior: "Student is described as eager to learn, seeks to establish positive relationships with peers. Student at times presents with attentional issues, was diagnosed with ADHD, Combined type, low frustration tolerance, can be rigid in [Student's] thinking, and has avoided challenging tasks. During the 2020-2021 school year, Student made strides in the social-emotional domain but continues to struggle with positive peer interactions, inattention, and rigid thinking. Student would benefit from behavior support services to address inattention, perspective thinking, and low frustration tolerance." (Respondent's Exhibit 19-2)

38. The IEP noted that Student is visually impaired and stated, "[Student] has been diagnosed with Intermittent Esotropia Alternating, Refractive Amblyopia, Fusion with Defective Stereopsis, Suppression of Binocular Vision, Oculomotor Dysfunction Saccadic Movement, and Oculomotor Dysfunction Pursuit Movement. [Student's] visual accommodations are listed with the classroom aids and services." (Respondent's Exhibit 19-2)

39. The IEP stated the following regarding Student's communication skills: "[Student] presents with a disabling oral communication deficit, as Student oral communication skills in the areas of expressive language, syntactic, supralinguistic, and metalinguistic language skills appear to be inadequate for navigating Student's academic environment consistently in the classroom given classroom modifications and accommodations." The IEP prescribes the following assistive technology: Student utilizes spellcheck, speech to text, a word processor, and a calculator." (Respondent's Exhibit 19-2)
40. The IEP included goals in the academic areas of math, reading, and written expression. Regarding math, the IEP cites Student's 2020 WJ-V average math scores. The IEP stated the following about Student's disability impacts in math: The student's difficulty with division and fractions (calculation) and attention impedes Student ability to access the general education curriculum without specialized instruction services in math. (Respondent's Exhibit 19-3)
41. The IEP included three annual math goals: Goal 1: By 2022, when given problems with one-variable equations, Student will successfully solve equations with variables on both sides (including exponents, distribution, and collecting like terms), improving expressions and equations skills with 80% accuracy in 4 out of five trials. Goal 2: By 2022, when presented with ten problems multiplying a fraction with a whole number, Student will correctly multiply 8 of 10 fractions and express the product as an improper fraction and a mixed number, as administered by a teacher in three of four consecutive trials. Goal 3: Student will be able to independently take notes and apply math calculation skills for given word problems and various math scenarios in 4 out of 5 trials, with 100% accuracy, throughout the IEP year. (Respondent's Exhibit 19-3, 4)
42. Regarding reading, the IEP noted Student's 2020 WJ-V scores in reading. The IEP noted that Student scored 221 on the Reading section of the MAP testing. Spring 2020-2021 and on Student's 4th Quarter Report Card 2020-2021 included the following School B grades: Performing Arts A, Reading A, English A, Math A, Science C+, Global Citizenship A. The IEP stated the following about Student's disability impacts on reading: Student's difficulty with phonics, decoding grade-level text, and reading fluency impede Student's ability to access the general education curriculum without specialized instruction services in reading. (Respondent's Exhibit 19-6)
43. The IEP included two reading goals: Goal 1: By September 2022, when given a grade-level nonfiction passage, Student will identify the main idea and provide at least three details related to the main idea with 90% accuracy in three out of four trials. Goal 2: When presented with text on Student's instructional level, Student will use context clues to determine the meaning of unfamiliar words in reading grade-level materials with 80% accuracy, as measured by written work samples, by 2022. (Respondent's Exhibit 19-7)
44. Regarding Written Expression, the IEP noted Student's 2020 WJ-V scores in written language. Student's overall performance revealed that Student writing skills fell in the Low range (SS = 74). The Spelling subtest measured Student's ability to write orally presented words correctly. Student was able to spell words such as "camp," "saw,"

"water," and "nice." Student had more difficulty spelling words such as "dinner," "laugh," "already," and "juice. (Respondent's Exhibit 19-9)

45. The IEP stated the following about how Student's disability impacts in writing: Student's weak spelling and phonics skills accompanied with inattention and Student's slow work pace when writing affects Student's ability to access the general education curriculum without specialized instruction services in writing. The IEP included three written expression goals: Goal 1: with the use of tools (graphic organizer, spacer, clipboard, timer, word processor, Student will write a five-paragraph essay with an introduction, supporting details, and a conclusion with 80% accuracy as measured by teacher rubric in 2 out of 3 trials, by 2022. Goal 2: By 2022, when given writing assignments in the general curriculum, [REDACTED] will edit Student writing for spelling, punctuation, and grammar with 80% accuracy in 4 out of 5 trials, as measured by teacher rubric across all settings. Goal 3: By September 2022, with the use of a graphic organizer, Student will write a paragraph that includes a topic sentence, at least three supporting details, and a conclusion with 80% accuracy in 4 out of 5 trials as measured by a pre-writing teacher rubric. (Respondent's Exhibit 19-10)
46. Regarding related services, the IEP included the following for speech-language present level of performance ("PLOP"): Student demonstrated strengths in Student articulation and speech fluency skills, hearing and speaking vocabulary skills, understanding the underlying perceptual relationships between words (synonyms/antonyms), idiomatic knowledge, ability to identify and understand implied information, as well as oral comprehension of language (simple, complex, and embedded sentence types). Student demonstrated weaknesses in the ability to understand and use morpheme expression, ability to correct syntax errors, describing intentions and thoughts of communication partners and characters in a text, detecting, and interpreting multiple meaning words, and interpreting figurative language. Additionally, mild difficulties were noted with word retrieval. (Respondent's Exhibit 19-10)
47. The IEP included four speech-language goals: Goal 1: After listening to a grade-level paragraph read aloud and asked to name a homonym/homophone (e.g., words that sound the same but have different meanings) from the text, Student will verbally identify and define the word, for 8 out of 10 homophone pairs for 3 sessions. Goal 2: Given a hypothetical or actual problem-solving scenario reported by Student or presented by the clinician, Student will demonstrate basic comprehension of cognitive perspectives by: a) Explaining at least one emotion felt by each participant in the scenario, and b) explaining the intention/perspective of each participant in 4 out of 5 proposed problem scenarios during 3 different sessions. Goal 3: Student will demonstrate increased knowledge of grammatical morphemes by verbally producing irregular past tense verbs (e.g., caught) and auxiliary verbs (e.g., were) when commenting or asking questions in 9 out of 10 opportunities for 3 separate sessions. Goal 4: Given 3 possible answer choices as needed, Student will interpret the meanings of common idioms, metaphors, and similes in 4 out of 5 opportunities during 3 separate sessions. (Respondent's Exhibit 19-11)
48. Regarding Student's emotional and behavioral support, the IEP stated the following about the impacts of Student's disability: Student at times presents with attentional issues, was

diagnosed with ADHD, Combined type, low frustration tolerance, can be rigid in Student thinking, and has avoided challenging tasks. During the 2020-2021 school year, Student made strides in the social-emotional domain but continues to struggle with positive peer interactions, inattention, and rigid thinking. The IEP had three BSS goals: Goal 1: By September 2022, when presented with a class-based task, Student will demonstrate agency with regard to work habits (e.g., self-starting assignments, working through to completion) by identifying and naming the feeling that is causing a barrier to completing the task (e.g., "I am feeling overwhelmed by..." "I'm feeling distracted by ...") given 4 out of 5 opportunities. Goal 2: By September 2022, given task directions, after the teacher checks for understanding and/or necessary materials, Student will start the task and/or ask for clarification within an amount of time as predetermined by staff and remain on-task until completion with no more than 2 verbal or visual cues from teacher/staff given 4 out of 5 opportunities. Goal 3: By September 2022, Student will demonstrate appropriate social skills, cooperative learning, and peer relationships given 4 out of 5 opportunities. (Respondent's Exhibit 19-12 through 19-18)

49. Regarding OT, the IEP stated the following about the impacts of Student's disability and Student's skill baseline: Student's challenges with fine motor precision and manual dexterity impact Student's ability to produce written work both via handwriting or, alternatively, keyboarding. Student's written work is a challenge to read by the unfamiliar reader. Strokes are not smooth despite formation being correct, impacting legibility. Student benefits historically from bold baselines and use of highlighter to complete editing and writing assignments. (Respondent's Exhibit 19-19)
50. The IEP included two OT goals with objectives. Goal 1: By September 2022, Student will demonstrate functional written communication to maximize independence with prevocational skills as measured by mastery of objectives 4 out of 5 trials. The goal objectives: (1) Student will independently copy a three-sentence paragraph using modified paper/adaptations as needed with at least 80% accuracy for baseline orientation 4 out of 5 trials with adaptations as needed. (2) Student will independently complete simple prevocational forms with 80% accuracy for staying within boundaries with adaptations/accommodations as needed 4 out of 5 trials. Goal 2: By September 2022, Student will demonstrate functional fine motor manipulation and dexterity skills to maximize independence with producing written work as measured by mastery of goals with adaptations/accommodations as needed 4/5 trials. The goal objectives: (1). With vision occluded, Student will demonstrate functional manual dexterity and finger awareness to depress keys (related to pointer, index, and ring fingers) above/below the home row and return to the home row with 50% accuracy 4 out of 5 trials. (2). Once oriented to the home row, Student will not cross keyboard midline and sustain left- and right-hand usage appropriately during 3 sentence typing passage with no more than 1 verbal reminder 4 out of 5 trials. (3). Student will demonstrate functional finger isolation by isolating pointer, middle, and ring fingers to access appropriate keys and return to the midline during functional typing task 4 out of 5 trials. (4). Student will use moderate visual regard to copy a 3-sentence passage with no more than 2 errors 4 out of 5 trials within 4 minutes using appropriate use of caps lock and punctuation keys. (Respondent's Exhibit 19-19, 19-20)

51. Petitioner, her attorney, and School B staff participated in the IEP meeting with the DCPS staff. Petitioner and her attorney agreed with all aspects of the IEP except the number of hours and the setting of the specialized instruction. They agreed with the academic and related services goals, the number of related services hours, their frequency and setting, the classroom and testing accommodations, and the other classroom aides and services. Petitioner and her representative opposed the proposed hours and setting of the specialized instruction. They believed that Student needed an IEP with 30 hours per week of special education services. Petitioner noted that while Student was in New York, the LEA funded Student's placement in a full-time special education school and that little had changed in Student's need for support since then. (Petitioner's testimony, Respondent's Exhibit 20, Petitioner's Exhibit 24)
52. The DCPS staff members who participated in the IEP meeting proposed the amount and setting of specialized instruction in the IEP based on Student's identified needs in the areas of concern in math, reading, and written expression and addressed in the academic goals. In the opinion of the DCPS staff members, there was no specific educational data that would have required specialized instruction throughout the school day and in non-academic subjects or activities. Despite the Student's identified emotional and behavioral support needs, no data indicated that Student required either specialized instruction or related services during lunch and recess and in non-academic settings. (Testimony of Witnesses 8, 9, 10)
53. DCPS proposed implementing the IEP at School D, Student's then neighborhood DCPS school. In October 2021, Petitioner contacted School D to schedule a visit to the proposed program for herself and her educational consultant. After DCPS requested information about the consultant and her relationship with the family, DCPS informed Petitioner that while it could accommodate Petitioner's observation, it would not allow the consultant because she "performs a role that is clearly representative of the clients' interests through oral and written correspondence, in meetings, and in supportive testimony in litigation." Petitioner's attorney replied to the DCPS email asking that the observation be permitted but was informed by DCPS's attorney that the school system's position remained the same. (Petitioner's Exhibits 25, 26)
54. Petitioner scheduled a visit to School D in early December 2021. A staff member DCPS central office toured School D with Petitioner. They first visited a language arts class led by a general education teacher and assisted by a special educator. The parent observed the special educator working with a self-selected small group. She later asked the teacher if the students she worked with were the only students in the class with an IEP, but the special educator said she offers support to all the students. Petitioner also observed a language arts resource class taught by the same special educator from the earlier class. When Petitioner later requested additional information, the School D staff member directed Petitioner to the DCPS website to review the DCPS special education programs that were available at School D. However, after reviewing the DCPS website, Petitioner's educational consultant did not believe that the information provided Petitioner sufficient information on the special education programs at School D to adequately inform Petitioner of how Student's needs would be met. (Petitioner's testimony, Witness 1's)

55. Petitioner's educational consultant is familiar with School B. She has participated in person and virtual meetings at School D and conducted classroom observations at School D for some of her other clients. (Petitioner's testimony, Witness 5 testimony)
56. On January 20, 2021, Petitioner contacted School D again, stating that she had looked through the information on the websites but could not find the answers to all her questions and again asked that the questions be answered. By the time Petitioner filed her DPC, she had yet to receive a response to the parent's questions about the proposed program. (Petitioner's testimony)
57. Student's academic functioning and progress in math and reading as measured by the MAP over time reveal that Student is generally performing above grade level in math as reflected in percentile rank and slightly below grade level in reading. Student's MAP score performance is reflected in the charts below. Student's scores and percentile are bolded.

MATH:

Term/ Year	Grade	RIT Score (+/- Std Err)	RIT Growth	Growth Projection	Percentile Range
SP22	8	224- 227 -230	4	5	38- 43 -49
WI22	8	225- 228 -231			44- 50 -56
FA21	8	220- 223 -226			40- 46 -52
SP21	7	217- 220 -223			30- 36 -42
SP17	3	198- 201 -204	2	12	42- 50 -58
FA16	3	196- 199 -202			71- 78 -84

READING:

Term/ Year	Grade	RIT Score (+/- Std Err)	RIT Growth	Growth Projection	Percentile Range
FA22	9	211- 214 -217			33- 40 -47
SP22	8	214- 217 -220	5	4	32- 39 -47
FA21	8	209- 212 -215			29- 36 -44
SP21	7	218- 221 -225			48- 56 -65
SP17	3	178- 181 -184	8	12	12- 16 -22
WI17	3	179- 183 -187			19- 25 -33
FA16	3	170- 173 -176			15- 21 -27

58. On June 9, 2022, DCPS held Student's annual IEP meeting. Petitioner, her attorney, her educational consultant, and School B staff participated in the IEP meeting with the DCPS staff. The June 9, 2022, IEP had the same number of hours of specialized instruction as the previous IEP: 5 hours per week of special education outside of the general education setting and 7.5 hours per week of specialized instruction inside the general education classroom, as well as 180 hours per month of OT, 180 minutes per month of BSS, and 180 minutes per month of speech-language service. The IEP goals were updated, and there were fewer academic goals than in the previous IEP: two goals for area: math, reading, and written expression, with no objectives. Petitioner, her attorney, and her consultant agreed with all aspects of the IEP except the number of hours of specialized instruction. DCPS proposed implementing the IEP at School E, Petitioner DCPS neighborhood school. Petitioner disagreed with the IEP. She also expressed concern about the number of transitions Student had in recent years and explained that Student required significant

support to assist with the jump to a high school setting. (Petitioner's testimony, Respondent's Exhibits 20, 21, Petitioner's Exhibit 39)

59. On July 14, 2022, Petitioner notified DCPS of Student's continued placement at School B for SY 2022-2023 and her continued request that DCPS offer Student a program and placement that meets Student's needs. DCPS denied Petitioner's request for funding in its response letter. (Petitioner's Exhibit 40)

60. Petitioner contacted School E to visit and learn more about the special education program at School E. When Petitioner filed her current DPC, she had received no response from School E regarding her request to schedule a visit. (Petitioner's testimony)

CONCLUSIONS OF LAW:

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

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

34 C.F.R. § 300.17 provides:

A free appropriate public education or FAPE means special education and related services that--
(a) Are provided at public expense, under public supervision and direction, and without charge;
(b) Meet the standards of the SEA, including the requirements of this part; (c), Include an appropriate preschool, elementary school, or secondary school education in the State involved;
and (d) Are provided in conformity with an individualized education program (IEP) that meets the requirements of Sec. 300.320 through 300.324

Pursuant to 5A DCMR 3053.6, the burden of proof is the responsibility of the party seeking relief. *Schaffer v. Weast*, 546 U.S. 49, 126 S.Ct. 528 (2005). The burden of persuasion shall be met by a preponderance of the evidence. See, e.g., *N.G. V. District of Columbia* 556 f. Sup. 2d (D.D.C. 2008) see also 20 U.S.C. §1451 (i)(2)(C)(iii). Petitioners held the burden of production on all issues adjudicated. DCPS held the burden of persuasion on issues #4, & #7 after Petitioner presented a prima facie case on those issues. 7 Petitioners held the burden of persuasion on issues #1, #2, #3, #5, #6, #8 and #9.

⁷ DC Code § 38-2571.03 (6) provides:

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

(i) Where there is a dispute about the appropriateness of the child's individual educational program or placement or of the program or placement proposed by the public agency, the public agency shall hold the burden of

ISSUE 1: Did DCPS deny Student FAPE by failing to timely evaluate ■■■ and confirm Student's eligibility for special education services during SY 2020-2021?

ISSUE 2: Did DCPS deny Student a FAPE by failing to provide any educational program or offer of placement and/or location of services during SY 2020-2021?

ISSUE 3: Did DCPS deny Student a FAPE by failing to have an IEP in place for Student for the start of the SY 2021-2022?

Conclusion: Petitioner sustained the burden of persuasion by a preponderance of the evidence that DCPS engaged in procedural violations in the three issues listed above and that combined DCPS' failures resulted in a denial of FAPE to Student.

Under the IDEA, states, as well as the District of Columbia, that receive federal educational assistance must establish policies and procedures to ensure that a FAPE is made available to disabled children. *Reid v. District of Columbia*, 401 F.3d 516, 519 (D.C.Cir. 2005). Under the Act's child-find requirement, the District must "ensure that '[a]ll children with disabilities residing in the [District] . . . who are in need of special education and related services are identified, located, and evaluated.'" *Scott v. District 18 of Columbia*, 2006 WL 1102839, at 8 (D.D.C. Mar. 31, 2006) (quoting *Reid*); 20 U.S.C. § 1412(a)(3). "As soon as a child is identified as a potential candidate for services, DCPS has the duty to locate that child and complete the evaluation process." *Long v. District of Columbia*, 780 F.Supp.2d 49, 56 (D.D.C.2011).

Pursuant to 34 C.F.R. § 300.323 (c) Initial IEPs; provision of services. Each public agency must ensure that— (1) A meeting to develop an IEP for a child is conducted within 30 days of a determination that the child needs special education and related services; and (2) As soon as possible following development of the IEP, special education and related services are made available to the child in accordance with the child's IEP.

Pursuant to D.C. Code § 38-2561.02(a) (2)(A) an LEA shall assess or evaluate a student who may have a disability and who may require special education services within 60 days from the date that the student's parent or guardian provides consent for the evaluation or assessment. The LEA shall make reasonable efforts to obtain parental consent within 30 days from the date the student is referred for an assessment or evaluation. Once the eligibility determination has been made, the

persuasion on the appropriateness of the existing or proposed program or placement; provided, that the party requesting the due process hearing shall retain the burden of production and shall establish a prima facie case before the burden of persuasion falls on the public agency. The burden of persuasion shall be met by a preponderance of the evidence.

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

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

District must conduct a meeting to develop an IEP within 30 days. 34 CFR § 300.323(c)(1); *G.G. ex rel. Gersten v. District of Columbia*, 924 F.Supp.2d 273, 279 (D.D.C.2013).

Pursuant to 34 C.F.R. § 300.323 at the beginning of each school year, each public agency must have an IEP effect for each child with a disability within its jurisdiction. Prior to July 1, 2018, pursuant to D.C. Code § 38-2561.02(a), DCPS would have been allowed up to 120 days to complete the eligibility determination process so long as it ensured that an IEP was timely developed for Student for the 2021-2022 school year. See former D.C. Code § 38-2561.02(a); *Leggett v. District of Columbia*, 793 F.3d 59, 70 (D.C. Cir. 2015)

A failure to evaluate a child in a timely manner is a procedural violation of the IDEA. See, e.g., *Idea Pub. Charter Sch. v. District of Columbia*, 374 F. Supp. 2d 158, 167 (D.D.C. 2005). Procedural violations may only be deemed a denial of FAPE 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 § 300.513(a)(2). See, also, *Brown v. District of Columbia*, 179 F. Supp. 3d 15, (D.D.C. 2016) "[t]here must be some rational basis to believe that procedural inadequacies compromised the pupil's right to an appropriate education, seriously hampered the parents' opportunity to participate in the [IEP] formulation process, or caused a deprivation of education benefits." *Id.* at 25-26 (citations and internal quotations omitted.)

The evidence demonstrates in the case that DCPS received a referral from Petitioner on November 5, 2020, for special education services. DCPS convened an initial meeting in response to the referral on December 11, 2021. Petitioner provided DCPS Student's 2019 neuropsychological evaluation. Petitioner expressed disagreement with the ASD diagnosis in that evaluation. Although Student had attended School C in New York and NYC-DOE had funded Student's attendance at School C for three years pursuant to the settlement agreements, there was no prior IEP from New York that Petitioner presented to DCPS for DCPS to either adopt or offer comparable services under until DCPS conducted its own evaluation.

Pursuant to D.C. Code § 38-2561.02(a) (2)(A), DCPS was to complete its evaluation of Student within 60 days from the date that Petitioner provided consent for DCPS to evaluate. Petitioner provided consent on or near January 8, 2021. As a result, DCPS should have completed its evaluation and eligibility determination by March 8, 2021. DCPS completed its psychological and speech language evaluations in February 2021 with those evaluation reports completed in early March 2021. However, DCPS did not complete the OT evaluation until late May 2021 and did not determine Student's eligibility until June 14, 2021.

The evidence demonstrates that Petitioner signed a contract with School B for Student to attend for SY 2021-2022 in March 2021. Although there is clear indication that Petitioner preferred that Student remain at School B, she was entitled to an offer of FAPE from DCPS with an IEP developed on or near April 11, 2021. DCPS' evaluation and eligibility process lasted an additional two months. Although during this period, DCPS continued to deal with challenges of the Covid-19 pandemic, and the evaluations and observations were conducted virtually, the OT evaluator's unavailability appears to have been the reason for DCPS' delay. Nonetheless, DCPS completed the eligibility process in sufficient time that it could have offered Student a FAPE prior to SY 2021-2022. Pursuant to 34 C.F.R. § 300.323 (c) (1) DCPS was required to develop an IEP for

Student within 30 days of the eligibility determination. Pursuant to 34 C.F.R. § 300.323 (c) (2) as soon as possible following development of the IEP, special education and related services are made available to the child in accordance with the child's IEP.

The evidence demonstrates that on July 7, 2021, DCPS proposed an IEP meeting date of August 10, 2021. Rather than proposing to develop an IEP with the required 30 days following Student's eligibility determination, DCPS proposed a date nearly 60 days following the eligibility determination. Petitioner's counsel promptly responded requesting that the meeting be held during the following week when School B staff would be available. DCPS proposed an earlier date of August 2, 2021.

When that date did not work for Petitioner and School B, Petitioner's counsel reiterated the request for the meeting to be held the week of August 16, 2021. DCPS then proposed dates after SY 2021-2022 would have started: September 7, or 9, 2021. The parties then agreed on September 7, 2021, and Student's IEP was developed on that date. It was as of that date that Petitioner was finally provided an offer of FAPE and the proposed implementation of the IEP at Student's neighborhood DCPS school.

Although the evidence demonstrates that Petitioner had already signed a contract with School B and notified DCPS in July 2021 of her unilateral placement of Student at School B, Petitioner was nonetheless entitled to an offer of a FAPE prior to the start of the SY 2021-2022. See *Leggett v. District of Columbia*, 793 F.3d 59, 70 (D.C. Cir. 2015). As previously stated, had DCPS completed its evaluation, eligibility, and IEP process in a timely manner, Petitioner would have been offered a FAPE from which she could freely make a choice in April 2021. Instead that choice was not provided until nearly five months later.

Pursuant to 34 C.F.R. § 300.323 at the beginning of each school year, each public agency must have an IEP effect for each child with a disability within its jurisdiction. Although, a failure to evaluate a child in a timely manner is a procedural violation of the IDEA, the fact that DCPS not only failed to evaluate Student timely, but also failed to develop Student's IEP timely and failed to ensure that the IEP was provided prior to the start of SY 2021-2022, leads the IHO to conclude that DCPS' failures in this regard, impeded Student's right to FAPE, significantly impeded Petitioner's opportunity to participate in the decision-making process regarding the provision of FAPE. Thus, the IHO concludes that Petitioner sustained the burden of persuasion by a preponderance of the evidence that DCPS denied Student a FAPE.

ISSUE 4: Did DCPS deny Student a FAPE by failing to provide an appropriate educational program and placement and/or location of services for SY 2021-2022, including that (a) the IEP did not provide a sufficient amount of self-contained special education services and (b) that the proposed placement and/or location of services at School D was too large of a setting for Student?

ISSUE 7: Did DCPS deny Student a FAPE by failing to provide an appropriate educational program and placement and/or location of services SY 2022-2023, including that (a) the IEP did not provide a sufficient amount of self-contained special education services and (b) that the proposed placement and/or location of services at School E was too large of a setting for Student?

Conclusion: Respondent did not sustain the burden of persuasion by a preponderance of the evidence that the IEPs that it developed for Student on September 7, 2021, and June 9, 2022, were reasonably calculated to enable Student to make progress appropriate in light of Student's circumstances.

The Individuals with Disabilities Education Act ("IDEA") was enacted to ensure that all disabled students receive a "free appropriate public education." 20 U.S.C. § 1400(d)(1)(A). "Commonly referred to by its acronym 'FAPE,' a free appropriate public education is defined as 'special education and related services that' are 'provided at public expense, under public supervision ...,' and that 'meet the standards of the State educational agency;' as well as 'conform[] with [each disabled student's] individualized education program.'" *Charles H. v. District of Columbia*, 2021 WL 2946127 (D.D.C. June 16, 2021) (quoting 20 U.S.C. § 1401(9)) (alterations in original). "Special education" is defined as "specially designed instruction, at no cost to parents, [that] meet[s] the unique needs of a child with a disability." 20 U.S.C. § 1401(29). "Related services," on the other hand, are defined as "such developmental, corrective, and other supportive services ... as may be required to assist a child with a disability to benefit from special education." *Id.* § 1401(26)(A).

"Under [the] IDEA and its implementing regulations, students with disabilities ... are entitled to receive [a] FAPE through an Individualized Education Program (or IEP)." *Charles H.*, 2021 WL 2946127 (quoting 20 U.S.C. § 1401(9)(D)). An IEP is a written document that lays out how the student will obtain measurable annual goals and that mandates specific special education and related services that the student must receive. 20 U.S.C. § 1414(d)(1)(A)(i). It is created for each student by a special "IEP Team," consisting of the child's parents, at least one regular-education teacher, at least one special-education teacher, and other specified educational experts. *Id.* § 1414(d)(1)(B). An IEP is the main tool for ensuring that a student is provided a FAPE. See *Charles H.*, 2021 WL 2946127 (quoting *Lofton v. District of Columbia*, 7 F. Supp. 3d 117, 123 (D.D.C. 2013)). " (*Robles v. District of Columbia* 81 IDELR 183 D.D.C. August 26, 2022)

In *Board of Education v. Rowley*, the United States Supreme Court set forth a two-part inquiry for determining whether a school district has satisfied the FAPE requirement. First, the state must have "complied with the procedures set forth in the Act." *Rowley*, 458 U.S. at 206. Second, the IEP that is developed must be "reasonably calculated to enable the child to receive educational benefits." *Rowley*, 458 U.S. at 206-07. To be appropriate under 34 C.F.R. § 300.324, the IEP must consider the (i) strengths of the child; (ii) concerns of the parents; (iii) results of the initial or most recent evaluation; and (iv) academic, developmental, and functional needs of the child.

The second substantive prong of the *Rowley* inquiry is whether the IEP developed was reasonably calculated to enable Student to make progress appropriate in light of Student's individual circumstances. In *Endrew F. ex rel. Joseph F. v. Douglas Cty. Sch. Dist.* RE-1, 137 S. Ct. 988 (2017), the U.S. Supreme Court elaborated on the "educational benefits" requirement pronounced in *Rowley*: To meet its substantive obligation under the IDEA, a school must offer an IEP reasonably calculated to enable a child to make progress appropriate in light of the child's circumstances. . . . Any review of an IEP must appreciate that the question is whether the IEP is reasonable, not whether the court regards it as ideal. . . . When a child is fully integrated in the regular classroom, as the Act prefers, what that typically means is providing a level of instruction

reasonably calculated to permit advancement through the general curriculum. . . . If that is not a reasonable prospect for a child, his IEP need not aim for grade-level advancement. But his educational program must be appropriately ambitious in light of his circumstances, just as advancement from grade to grade is appropriately ambitious for most children in the regular classroom. The goals may differ, but every child should have the chance to meet challenging objectives. *Endrew F.*, supra, 137 S. Ct. at 999–1000 (citations omitted).

Pursuant to *Schaefer v. Weast*, 554 F.3d 470 (U.S. App. 2009), the Hearing Officer must “focus on the adequacy of the IEP at the time it was created, and ask if it was reasonably calculated at that time to enable the student to receive educational benefits.”

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

Removing a child with disabilities "from the regular education environment occurs only when the nature or severity of the disability is such that education in regular classes cannot be achieved satisfactorily." 34 C.F.R. § 300.550; 34 C.F.R. §300.114 see also 20 U.S.C. § (a)(5)(A) (a disabled child is to participate in the same activities as non-disabled children to the "maximum extent appropriate"); *Roark ex rel. Roark v. District of Columbia*, 460 F.Supp.2d 32, 43 (D.D.C. 2006)

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

The essence of Petitioner's assertion regarding the IEPs that DCPS developed for Student for SY 2021-2022 and SY 2022-2023 is that they provide insufficient hours of specialized instruction outside general. The evidence demonstrates that in the development of both IEPs, as documented in the IEP meeting notes and the testimony of Petitioner’s and DCPS’ witnesses, the IEPs were collaboratively developed by DCPS, Petitioner, her attorney, the School B staff, and in the case of the June 9, 2022, IEP, with the participation by Petitioner’s educational consultant.

The IEPs prescribed the same level and setting of specialized instruction and related services. They include academic goals in math, reading, and written expression. The IEPs also include goals and objectives in the related services of speech-language, emotional, social, and BSS, OT. Petitioner and her representatives and the School B staff members who testified all agreed with each component of the IEPs except the number of hours of specialized instruction outside the general education setting and, thus, the resulting LRE. Petitioners and their consultant advised DCPS that they believed Student required placement in a "full-time" special education day school entirely removed from the general education setting or where Student would be provided 30 hours per week of special education services.

The evidence demonstrates that Student was first determined eligible for special education when Student attended School A and received annual IEP updates from School A through February 2,

2016, when Student was in [REDACTED] during SY 2015-2016. For [REDACTED], SY 2016-2017, Petitioner unilaterally placed Student in School B and eventually sued School A for reimbursement and lost. The Hearing Officer concluded, considering dulling testimony, that the evidence supported a conclusion that the level of services prescribed for Student by School A, principally the 12.5 hours per week of specialized instruction, including five hours per week outside general education, was appropriate. The Hearing Officer denied Petitioner reimbursement for Student attendance at School B during SY 2016-2017. Petitioner's consultant assisted Petitioner when Student attended School A and was involved in Petitioner's decision to place Student at School B in SY 2015-2016 and for, which a Hearing Officer found was more restrictive than Student required.

Petitioner successfully obtained reimbursement once she moved to New York and placed Student at School C. She unilaterally placed Student in School C for three consecutive years and obtained reimbursement from NYC-DOE. Petitioner asserts that this proves that the New York LEA agreed that Student needed an IEP and placement totally removed from general education as she now seeks from DCPS.

However, the facts do not fully support this contention. First, New York State does not recognize School C as a special education school. Secondly, although School C apparently serves students with learning disabilities, there was no IEP provided to DCPS or disclosed for this hearing to indicate Student's need for a separate special education school as Student's least restrictive environment. There is evidence in the neuropsychological that at School C, student benefitted from a low student-to-teacher ratio, but nothing regarding whether Student was totally removed from classes with non-disabled peers during Student's three years at School C.

Although Student was apparently provided small group instruction at School C, Student's academic deficits don't reflect that Student needs specialized instruction in classes and activities that don't require significant reading and writing which are Student academic deficits. Although, Student's math functioning is clearly on grade level, Student's reading and written expression abilities are significantly below grade level. Petitioner's witnesses all testified that they agreed with the academic and related service goals in the IEPs. There was no indication that any other goals were requested or required to address Student's academic and related service needs.

As the DCPS witnesses pointed out, there was no data offered at the IEP meetings about specific classes such as art, music, and physical education ("P.E.") to indicate that Student's deficits impacted Student's performance to the extent that Student needed specialized instruction in these other subjects. Petitioner's consultant testified that everyone agreed on the present levels of performance ("PLOS"). She requested specific changes to the IEP to which the DCPS team members agreed. She objected solely to the hours and setting of the specialized instruction in the IEP. In her testimony, the consultant acknowledged that neither she nor anyone representing Petitioner requested a specific number of hours of specialized instruction. But the educational consultant also noted in her testimony that none of the team's DCPS members explained how they arrived at the specific number of hours of specialized instruction proposed during the meeting.

Although the DCPS witnesses testified in support of the number of hours of specialized instruction and made comments such as "the PLOs drive the goals in the IEP and the goals determine the

service hours,” there is no evidence that the DCPS members discussed a specific number of hours and how they related to subjects and classes during the school day that would require Student to use reading and writing skills, which are clearly Student’s deficits, in addition to significant inattention.

Because Petitioner provided DCPS no prior IEP, the only benchmark or prior IEP that DCPS could use as a model, was Student's School A IEP. Although that IEP was developed for Student developed five years earlier, Student is now in high school and admittedly Student's abilities have changed, the amount and setting of specialized instruction that DCPS developed in June 2021 oddly correspond to the that in the February 2016 IEP: specifically, 12.5 hours per week, including 5 hours per week outside general education.

The evidence demonstrates, as noted by the psychologist who evaluated Student in 2019 and the DCPS psychologist who evaluated Student in 2021, that Student's overall intellectual functioning is in the average range. However, Student’s basic reading skills were well below age expectations. Student's reading comprehension were impaired. Student also performed below age expectations in written expression. Additionally, Student’s handwriting is difficult to decipher, Student's displays social communication and executive functioning difficulties, clinically significant depressive symptoms, and poor self-esteem.

The psychologist in the 2019 evaluation stated that Student continued to need a “special education placement with low student-teacher ratio and a structured classroom setting where concepts could be further broken down and reviewed, and instructions scaffolded, yet with students with similar cognitive abilities.”

The DCPS psychologist observed that Student displayed challenges in oral reading, decoding, spelling, and reading comprehension. She noted that during the observation Student had difficulty staying on task. Specifically, Student was not following along while other students were reading, gave off-topic responses, and struggled with positive peer interactions, inattention, and rigid thinking. Based on her work with Student and multiple classroom observations of Student, Petitioner's educational consultant credibly testified that Student needs small class sizes or a low teacher/student ratio to address anxiety, attention, social communication, inflexibility, or rigidity.

Based upon the evidence of Student's significant deficits and the lack of a cogent explanation of how the team derived the specific number of hours of specialized instruction, or that the number of hours reflected had any basis other than they were the same number of hours that Student was provided in the School A IEP, the IHO concludes that the IEPs that DCPS developed prescribed an insufficient number of hours of specialized instruction outside general education. It is apparent from Student's deficits that Student should undoubtedly be provided specialized instruction outside general education in any course or subject with significant reading and writing, which would cover most of Student's instructional day. Indeed, the number of hours prescribed in these two IEPs is insufficient, and the IEPs were not reasonably calculated to enable Student to make progress appropriate in light of Student's circumstances.

Petitioner asserts that Student should have a program totally removed from non-disabled peers. Although Student attended School C, a private school with a low student-to-teacher ratio prior to

Petitioner requesting a FAPE from DCPS, there is insufficient evidence that Student had a placement totally removed from non-disabled peers during those three years.

Although Petitioner's witnesses testified that Student would need special education services throughout the school day, their testimony did not convince the IHO that Student could not successfully function in a setting with typically developing non-disabled peers in classes that did not involve significant reading and writing, and much less settings like lunch and recess.

Consequently, the IHO concludes there was insufficient evidence that Student is need of a setting as restrictive as a separate special education school. As a result the IHO directs in the order below that DCPS convene an IEP meeting to review the available data of Student's academic and social-emotional progress as well as progress in related service areas and consider and determine the specific number of hours of specialized instruction and setting of same that are required given Student's attentional issues, tendency to isolate, low peer interaction, and need for low student to teacher ratio in courses that involve significant reading and writing.

The team shall specifically discuss and determine Student's LRE and the courses that Student will be required to and is likely to take during the grade level in SY 2023-2024, determine the placement, have a fulsome discussion and consideration of the location of service and have a representative of the location attend and participate in that meeting so that Petitioner is fully and timely informed of the specifics of the offer of FAPE that is being made such that she can clearly make a reasoned choice of her preference of education setting for her child.

Lastly in these issues, Petitioner asserts that the schools or location of service where DCPS proposed to implement the two IEPs it developed are too large of a setting for Student. However, because the IHO has determined that the IEPs are inappropriate, the IHO concludes that it is premature to consider the appropriateness of a school location when an appropriate IEP, which is the prerequisite to the location, has yet to be crafted.

ISSUE 5: Did DCPS deny Student a FAPE by failing to permit Petitioner's educational consultant to observe the proposed program and placement at School D during SY 2021-2022?

ISSUE 6: Did DCPS deny Student a FAPE by failing to allow Petitioner meaningful participation in the placement process, including failing to provide information about the implementation of the IEP or answer her questions about the program and school during SY 2021-2022?

ISSUE 8: Did DCPS deny Student a FAPE by failing to respond to Petitioner's requests to observe the proposed program and placement at School E for SY 2022-2023, thus denying her meaningful participation in the IEP and placement process?

Conclusion: Petitioner did not sustain the burden of persuasion by a preponderance of the evidence on these issues.

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

In 2014, the District of Columbia passed the Student Rights Act. The Act "provides district parents with additional procedural safeguards to help make sure parents have the tools they need to stay informed, engaged, and empowered throughout the special education process." See D.C. Council Comm. Rep. on B 20-723 (D.C. 2014) at 1. Recognizing that "parents who do not have a specific background in the subject area ... often cannot adequately evaluate whether their child's instruction is sufficient [and that] parents are concerned that an LEA may limit such access to the point that the observation is unable to provide meaningful input into their child's educational progress," the Student Rights Act expanded on a parent's "right to observe" under the IDEA...⁸

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

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

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

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

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

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

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

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

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

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

⁸ *Woodson, et al., v. District of Columbia*, 119 LRP 28316

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

DCPS proposed implementing the September 7, 2021, IEP at School D, Student's then neighborhood DCPS school. In October 2021, Petitioner contacted School D to schedule a visit along with her educational consultant. After DCPS requested information about the consultant, DCPS informed Petitioner that while it could accommodate Petitioner's observation, it would not allow the consultant because she "performs a role that is clearly representative of the clients' interests through oral and written correspondence, in meetings, and in supportive testimony in litigation."

Petitioner scheduled a visit to School D in early December 2021, and was able to visit with the assistance of a DCPS central office staff member. Petitioner toured School D and visited classes and spoke with special educators. When Petitioner later requested additional information, the School D staff member directed Petitioner to the DCPS website to review the DCPS special education programs available at School D. Petitioner's educational consultant was already familiar with School D and had visited School D several times for and with other clients. The consultant also conducted research of DCPS' special education programs on the website.

Although the basis for School D rejecting the consultant's visit is suspect, in this circumstance, the fact that Petitioner was able to visit and confer with her consultant who was familiar with School D and its programs, and both agreed that School D was not appropriate for Student based upon the information, the IHO does not conclude that DCPS's actions impeded Student's right to FAPE, significantly impeded Petitioner's opportunity to participate in the decision-making process regarding the provision of FAPE.

On July 14, 2022, Petitioner notified DCPS of Student's continued placement at School B for SY 2022-2023 and her continued request that DCPS offer Student a program and placement.

Petitioner contacted School E to visit and learn more about the special education program at School E. When Petitioner filed her current DPC, she had received no response from School E regarding her request to schedule a visit. There was insufficient evidence that Petitioner made enough efforts in requesting a tour or information about School E. The fact that Petitioner did not get a return phone call from minimal attempts does not reflect action from which the IHO can conclude that DCPS's actions impeded Student's right to FAPE, significantly impeded Petitioner's opportunity to participate in the decision-making process regarding the provision of FAPE.

ISSUE 9: Is School B a proper placement for Student?

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

The purpose of IDEA is to "ensure that all children with disabilities have available to them a free and appropriate public education that emphasizes special education and related services designed

to meet their unique needs and prepare them for further education, employment, and independent living." *M.G. v. District of Columbia*, 246 F.Supp.3d 1,7 (D.D.C. 2017) (citing 20 U.S.C. § 1400(d)(1)(A)).

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

Removing a child with disabilities "from the regular education environment occurs only when the nature or severity of the disability is such that education in regular classes cannot be achieved satisfactorily." 34 C.F.R. § 300.550; 34 C.F.R. §300.114 see also 20 U.S.C. § (a)(5)(A) (a disabled child is to participate in the same activities as non-disabled children to the "maximum extent appropriate"); *Roark ex rel. Roark v. District of Columbia*, 460 F.Supp.2d 32, 43 (D.D.C. 2006) ("The IDEA requires school districts to place disabled children in the least restrictive environment possible.")

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

Pursuant to D.C. Code § 38-2561.02(c) Special education placements shall be made in the following order of priority; provided, that the placement is appropriate for the student and made in accordance with the IDEA and this chapter: (1) DCPS schools, or District of Columbia public charter schools pursuant to an agreement between DCPS and the public charter school; (2) Private or residential District of Columbia facilities; and (3) Facilities outside of the District of Columbia.

The legal standard under the IDEA is that DCPS "must place the student in a setting that is capable of fulfilling the student's IEP." *Johnson v. Dist. of Columbia*, 962 F. Supp. 2d 263, 267 (D.D.C. 2013). See also *O.O. ex rel. Pabo v. Dist. of Columbia*, 573 F. Supp. 2d 41, 53 (D.D.C. 2008) (placement must be in a school that can fulfill the student's IEP requirements).

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

At School B, Student is with no general education students. Although Petitioner asserts that Student needs special education throughout the school day and must be totally removed from non-

disabled peers, as previously stated the evidence does not support that Student requires a placement totally removed from non-disabled peers.

Albeit the evidence demonstrates that since Student has attended School B, Student has made progress and that Petitioner wants Student to remain at School B, based upon the evidence adduced, the IHO does not conclude that Student's appropriate LRE was or is a separate special education day school, like School B, where Student is totally removed from non-disabled peers. The IHO, therefore, concludes that despite the progress Student has made at School B, School B is not a placement that DCPS is obligated to place to fund beyond the period of reimbursement noted below.

Relief Grated:

Under the IDEA, parents who unilaterally decide to place their disabled child in a private school, without obtaining the consent of local school officials, “do so at their own financial risk.” *Florence County Sch. Dist. Four v. Carter*, 510 U.S. 7, 15, 114 S.Ct. 361, 126 L.Ed.2d 284 (1993) (quoting *Sch. Comm. of the Town of Burlington v. Dep’t of Educ.*, 471 U.S. 359, 374, 105 S.Ct. 1996, 85 L.Ed.2d 385 (1985)). “As interpreted by the Supreme Court, IDEA requires school districts to reimburse parents for their private-school expenses if (1) school officials failed to offer the child a free appropriate public education in a public or private school; (2) the private-school placement chosen by the parents was otherwise “proper under the Act”; and (3) the equities weigh in favor of reimbursement—that is, the parents did not otherwise act “unreasonabl[y].” *Leggett v. District of Columbia*, 793 F.3d 59, 66–67 (D.C. Cir. 2015) (citing *Carter*, supra, 510 U.S. at 15–16, 114 S.Ct. 361; 20 U.S.C. § 1412(10)(C)(iii)(III)).

The evidence has demonstrated that for SY 2021-2022 and SY 2022-2023 DCPS failed to offer Student a FAPE. Petitioner has requested a relief that DCPS reimburse her for the costs of Student attending School B for the past two school years. School B is a private day school for students with language-based disabilities, typically students with learning disabilities and ADHD, and other mild disabilities. Students at School B have average to above average intelligence with some weaknesses and academic functioning with some other condition such as ADHD and/or executive functioning difficulties. School B holds an OSSE certificate of approval (“COA”). The Hearing Officer concludes that School B is “proper under the Act” for purposes of reimbursement and there is no evidence that Petitioner acted unreasonably in any manner that would require withholding of or a reduction in the amount of reimbursement.

ORDER:

1. DCPS shall, within thirty (30) calendar days of the issuance of this order, convene an IEP meeting and review and revise Student’s IEP consistent with the conclusions of law in this HOD. The team shall review the available data of Student’s academic and social-emotional progress as well as progress in related service areas and consider and determine the special education services, including the specific number of hours of specialized instruction and

the setting of same that meets Student's individual needs particularly considering Student's attentional issues, tendency to isolate, low peer interaction, and need for low student to teacher ratio in courses that involve significant reading and writing.

2. The team shall specifically discuss and determine Student's LRE and the courses that Student will be required to and is likely to take during the grade level in SY 2023-2024, determine the placement and have a fulsome discussion and consideration of the location of service, have a representative of the location attend and participate in that meeting so that Petitioner is fully and timely informed of the specifics of the offer of FAPE that is being made such that she can make a reasoned choice of her preference of an educational setting for her child.
3. Petitioners shall promptly provide the requisite consent(s) and/or release(s) for DCPS to facilitate DCPS's compliance with the provisions above.
4. Within thirty (30) calendar days of Petitioners providing DCPS appropriate documentation of payment, DCPS shall, consistent with DCPS and/or OSSE published procedures, reimburse Petitioner for the costs for Student attending School B from the start of SY 2021-2022 and SY 2022-2023, until the end of SY 2022-2023.
5. All other relief requested by Petitioners is denied.

APPEAL PROCESS:

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

/S/ *Coles B. Ruff*

Coles B. Ruff, Esq.

Hearing Officer

Date: March 16, 2023

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