

District of Columbia
Office of the State Superintendent of Education

Office of Dispute Resolution
1050 First Street, N.E., Washington, DC 20002
(202) 698-3819 www.osse.dc.gov

Parent, on behalf of Student,¹)	
Petitioner,)	
)	Hearing Dates: 4/3/24; 4/4/24; 4/5/24
v.)	Hearing Officer: Michael Lazan
)	Case No. 2024-0020
District of Columbia Public Schools,)	
Respondent.)	

HEARING OFFICER DETERMINATION

I. Introduction

This is a case involving an X-year-old student (the “Student”) who is currently ineligible for services. A due process complaint (“Complaint”) was received by District of Columbia Public Schools (“DCPS” or “Respondent”) pursuant to the Individuals with Disabilities Education Act (“IDEA”) on January 31, 2024. The Complaint was filed by the Student’s parent (“Petitioner”). On February 21, 2024, Respondent filed a response. A resolution meeting was held on February 12, 2024, without an agreement being reached. The resolution period expired on March 1, 2024.

II. Subject Matter Jurisdiction

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

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

Sect. 300 et seq., Title 38 of the D.C. Code, Subtitle VII, Chapter 25, and the District of Columbia Municipal Regulations (“DCMR”), Title 5-A, Chapter 30.

III. Procedural History

On March 12, 2024, a prehearing conference was held. Attorney A, Esq., counsel for Petitioner, appeared. Attorney B, Esq., counsel for Respondent, appeared. On March 15, 2024, a prehearing conference order was issued, summarizing the rules to be applied in the hearing and identifying the issues in the case.

The matter proceeded to trial on April 3, 2024, April 4, 2024, and April 5, 2024. The hearing was conducted through the Microsoft Teams videoconferencing platform, without objection. During the proceeding, Petitioner moved into evidence exhibits P-1 through P-36. Respondent objected to exhibits P-14, P-26, P-28, and P-30. Exhibits P-26 and P-28 were then withdrawn, and the other objections were overruled. Exhibits P-1 through P-36 were admitted, except for P-26 and P-28. Respondent moved into evidence exhibits R-1 through R-32 without objection.

Petitioner presented as witnesses, in the following order: Witness A, an expert in special education; Witness B, an expert in special education policy, procedure, and eligibility; and herself. Respondent presented as witnesses: Witness C, a special education coordinator at School A (expert in special education and Individualized Educational Program (“IEP”) programming); Witness D, a special education teacher (expert in special education); Witness E, a school psychologist (expert in school-based psychology); Witness F, a special education teacher; Witness G, a teacher; and Witness H, a social worker.

After the completion of testimony and evidence on April 5, 2024, the parties presented oral closing statements. DCPS provided a final list of legal citations on April 8, 2024.

IV. Issues

As identified in the prehearing conference order and in the Complaint, the issues to be determined in this case are as follows:

1. Did Respondent fail to evaluate the Student during the 2022-2023 and 2023-2024 school years? If so, did Respondent deny the Student a Free Appropriate Public Education (“FAPE”)?

Petitioner contended that, in December 2022, DCPS failed to conduct a thorough evaluation of the Student. Petitioner also contended that the reopened request for an evaluation in June 2023 was not timely completed, and that the evaluation did not include a “Conners” assessment.

2. Did Respondent fail to determine the Student to be eligible for services at the January 2024 eligibility meeting? If so, did Respondent deny the Student a FAPE?

Petitioner contended that the Student should be found to be eligible as a student with Other Health Impairment because of the Student’s Attention Deficit Hyperactivity Disorder (“ADHD”).

As relief, Petitioner is seeking compensatory education and related relief.

V. Findings of Fact

1. The Student is an X-year-old who is currently ineligible for services. The Student has been diagnosed with ADHD and post-traumatic stress disorder (“PTSD”). Testimony of Witness A. The Student has issues with emotions, self-control, and focus at home. Testimony of Petitioner. Working memory is an area of weakness for the

Student. Testimony of Witness B. Petitioner has stated that the Student does well in school, enjoys school, and works well with the other students. Testimony of Witness A.

2. The Student attended School A, a DCPS public school, for the 2021-2022 school year. The Student was in a dual-language program at School A. The Student's grades during the 2021-2022 school year were virtually all in the "3" range. P-20.

3. The Student continued at School A for the 2022-2023 school year. The Student was able to complete work without any type of modification, including in math. Testimony of Witness A. The Student's math instruction was taught in Spanish, and his/her off-task behaviors took place more often in the Spanish-speaking math class. Testimony of Witness B.

4. On November 6, 2022, Petitioner sent DCPS a letter, written by a social worker/therapist, which confirmed that the Student received outside therapy for ADHD, combined type, and PTSD, unspecified. The letter indicated that the Student struggled with focusing and staying on topic, and needed help. Auditory issues were also raised, and an IEP was suggested by the therapist. P-5.

5. In or about December 2022, Petitioner received a response to the therapist's letter from a staff member at School A. Petitioner then met with the staff member. Testimony of Petitioner. An Analysis of Existing Data ("AED") meeting was held for the Student in January 2023. It was reported that, given the Student's middle-of-year ("MOY") i-Ready assessment, the Student was functioning below grade level in math. Petitioner did not raise the Student's writing issues. Petitioner was in agreement with the team's decision to rely on existing data and determine that the Student was ineligible for services. Testimony of Witness C.

6. The Student's May 2023 i-Ready test in math put him/her at the 56th percentile. P-7-1. Petitioner made another request for an evaluation on or about June 15, 2023. DCPS sent an acknowledgement of this request on June 16, 2023, and proposed another AED meeting for June 23, 2023, but the team did not meet at that time due to Petitioner gaining legal representation for this case. An AED meeting was scheduled for July 13, 2023, but no psychologist was present, so the meeting was cancelled. Testimony of Witness C.

7. At the time, the Student was working on a variety of math subjects, and s/he had a wide range of math skills. The Student could count forward by ones from any number less than 100, add and subtract within five, use a number line to add or subtract one or two from numbers up to twenty, and express numbers from eleven to nineteen using tens and ones. The Student's math strengths were comparing, contrasting, and classifying attributes of two-dimensional shapes (circle, square, rectangle, triangle, hexagon) and three-dimensional shapes (cube, cone, cylinder, sphere), defining attributes of two-dimensional shapes, identifying shapes as two-dimensional ("flat") or three-dimensional ("solid"), partitioning circles and rectangles into halves and fourths, using the words "halves," "fourths," and "quarters," using the phrases "half of," "fourth of," and "quarter of," and describing equal parts of circles, rectangles, and squares using terms such as "halves," "fourths," and "quarters." In the area of algebra and algebraic thinking, test results indicated that the Student's skills were below grade level. P-15-8.

8. At the time, the Student's i-Ready diagnostic assessments indicated that s/he could recognize numerals up to 100, count forward from any number to 120, compare and order two-digit numbers, group up to 100 objects in sets of ten, add within

ten, add three one-digit numbers, understand that the number ten is composed of ten ones and that the teen numbers are composed of a ten and one, two, three, four, five, six, seven, eight, or nine ones, and understand that the numbers 10, 20, 30, 40, 50, 60, 70, 80, and 90 refer to one, two, three, four, five, six, seven, eight, or nine tens. P-15.

9. Growth was reported for the Student in all areas of math. In algebra and algebraic thinking, s/he progressed in using equations to solve joining problems with numbers to ten, using equations to solve take-away problems with numbers to ten, relating addition and subtraction to part-part-whole concepts, adding and subtracting within ten, solving addition word problems within ten, solving subtraction word problems within ten, identifying and finding sums for double-addition facts, solving addition problems by counting on with numbers to ten, solving basic subtraction facts by counting back to subtract 1, 2, or 3, solving subtraction problems for separation or take-away situations, solving addition problems for combining, joining, or comparison situations, and representing and determining an unknown number in an addition or subtraction equation. P-15.

10. In the area of measurement and data, the Student progressed in identifying measurable attributes of objects using informal language (how long, wide, thick, deep, short, or tall objects are, or how much they weigh or hold), comparing measures of familiar objects, directly comparing the length of two objects and describing the difference (longer, taller, shorter, thicker), directly comparing the weight of two objects and describing the difference (heavier, lighter), sorting objects according to one or more attribute, telling time to the hour and half hour on an analog clock or a digital clock, describing how objects may be measured or categorized, and organizing, representing,

and interpreting several categories of data in a picture or bar graph with up to three categories. P-15.

11. In the area of geometry, the Student's progressed in using vertices, angles, and sides to identify, describe, sort, and classify two-dimensional shapes, combining and separating two-dimensional shapes to create other two-dimensional shapes and predict the results, and finding the total number of square units in a rectangle divided into same-size squares. P-15.

12. During the 2022-2023 school year, the Student's grades were in the "3" range in reading and math for every term, though for term three, "2" was referenced in measurement and data. The Student scored in the "2" range in written expression for three of the four terms. P-6-2.

13. At an AED meeting for the Student held on November 3, 2023, Petitioner stated that her earlier concerns were ignored. The team discussed how the Student had used the "cool-off corner" when s/he was upset in class. The team felt it did not have enough information. P-11; P-12; P-15. The team agreed to require a psychological evaluation and acknowledged that the Student had ADHD. Testimony of Witness C.

14. A psychological evaluation of the Student was conducted by Witness E in or about December 2023. Classroom observations of the Student and interviews with Petitioner and the Student's teachers were also conducted. The psychological evaluation tests included the Kaufman Test of Educational Achievement-Third Edition ("KTEA-3") and the Wechsler Intelligence Scale for Children-Fifth Edition ("WISC-V"). The evaluation reported that the Student scored in the lower limits of the high average range for overall intelligence. On the KTEA, the Student scored in the average range for math

and written expression and in the high average range for overall reading. P-6. On the Conners-4 scale, teacher scales reflected concern for hyperactivity and indicated that the Student showed signs of ADHD. P-33-2. During the evaluation, the Student was active. S/he swung his/her feet under the table and sometimes stood, but s/he was nevertheless able to perform the tests. The Student also sometimes made off-topic comments, but s/he was redirected. Testimony of Witness E.

15. During this evaluation, the teachers who Witness E interviewed indicated that the Student did not have any problems with depressed mood or anxious thoughts. Witness G, an ELA teacher, reported that the Student called out a lot, but what s/he said was related to the lessons. Witness G noted that the Student's group was fairly active and that s/he did not need as much redirection and was not as active as some other students. Witness G described the Student as cheerful and said that s/he participated a lot and loved learning and helping other people solve problems. Witness G noted that the Student had become upset a couple of times, but this had improved since the beginning of the school year. P-6.

16. In her math class, which was taught in Spanish, Witness F described the Student to Witness E as analytic, smart, happy, sweet, and empathetic, and a good friend to others. The Student was able to produce work when focused but got distracted easily. It was difficult for him/her to maintain attention for an extended period of time. Witness F said that the Student was sometimes affected when a task required a series of steps, and s/he needed some time to calm down if someone bothered him/her or said something that made him/her feel sad or angry. P-6; Testimony of Witness E. In Witness F's bilingual math class, Witness F provided a weekly homework packet. Students could submit their

homework to earn a sticker, but there was no system in place to collect the homework.

Most students in the class did not turn in their homework. The Student turned in his/her homework a few times when s/he saw friends getting stickers. Testimony of Witness F.

17. Witness G stated that the Student did not always complete work in her ELA class, but that very few students finished all their work all the time. Witness G reported that the Student's work was not incomplete significantly more than the other students in the class, and that s/he was not one of the students who rarely completed their work. Both teachers, Witness F and Witness G, indicated that the Student presented with ADHD symptoms in the school setting, but that those behaviors did not have a significant impact on his/her schoolwork or peer interactions. Students with ADHD often have trouble completing and remembering to turn in assignments, and they might have problems navigating pure conflicts and making and retaining friends, but the Student did not show these symptoms, according to the two teachers. Testimony of Witness E; P-6

18. Witness E conducted a one-hour observation of the Student as part of the evaluation. During the observation, about twenty students in the class were seated at desks for independent reading time. The Student was seated near the board and remained in his/her seat looking at books. When a timer sounded, the students put away their books. One teacher left with six of the students and the rest of the students moved to the carpet. The Student participated in the discussion about vocabulary. Ten minutes into the observation, the Student requested to use the bathroom and left the room. S/he returned approximately five minutes later and rejoined the group quietly. P-6-4.

19. Functional Behavioral Assessments ("FBAs") were written for the Student in January and February 2024. The FBAs indicated that the Student was close to average

in all areas except hyperactivity and concentration, and that his/her attention issues were inconsistent. The Functional Analysis Screening Tool (“FAST”) was administered as part of the FBAs. According to the FAST results, the Student’s teachers felt that the function of the Student’s behavior was connected to gaining attention from peers. A Problem Behavior Questionnaire Profile was also administered as part of the FBAs. This measure asks eighteen questions that focus on areas of possible functions of the Student’s behavior. These areas include escape, attention, gain items or activities, sensory stimulation, and change of setting. The Student scored highest in gaining attention from an adult, gaining an item or activity, and escaping peers. A Strengths and Difficulties Questionnaire (“SDQ”) was also completed for the Student’s FBAs. The SDQ indicated that the Student had a problem with hyperactivity and concentration. P-8; P-9.

20. An eligibility meeting was held for the Student on March 1, 2024. Part of the purpose for this meeting was to review the addendum to the psychological evaluation, including the parent’s Conners scale. During this meeting, the team went over the psychological evaluation report and determined that the Student would not qualify as a student with Other Health Impairment under IDEA. The team recommended that the Student might benefit from a 504 plan. The team was influenced by the fact that the Student was performing at grade-level standards. Teachers consistently reported that s/he was performing within grade-level expectations. Testimony of Witness C.

21. A Section 504 plan was then drafted, under which the Student would meet with a social worker for sixty minutes per month for behavior support services and receive frequent breaks, preferential seating, and access to noise buffers. To meet the Student’s academic needs, teachers would check for understanding, break assignments

into chunks, clarify directions for assignments, tests, and quizzes, and provide extended time for all class tests and quizzes and statewide testing. Testimony of Witness B; P-14.

22. During the 2023-2024 school year, the Student has been able to complete work without any modification, including in math. Testimony of Witness A. The Student's "exit tickets" in math have showed that s/he understands the work. The Student has also been testing at or near grade level on in-class assessments. Testimony of Witness C. The Student has shown a strong foundation in math because s/he knows how to recognize the value of digits. The Student can add and subtract using three-digit numbers up to 1000. Testimony of Witness F.

23. The Student has been social and outgoing in class at School A. The Student likes to help others in class. However, the Student occasionally gets upset and needs time in a "cooldown" area. Testimony of Witness G. The Student can also be distracted in class, especially in math since it is taught in Spanish. When the Student misses the gist of the group math instruction, s/he may get interventions in a small group within the math class or redirection, which s/he responds to. Testimony of Witness F.

24. The Student has made progress in reading fluency, comprehension, and especially writing. In ELA and social studies classes, the Student is considered bright. The Student is curious, willing to share, enthusiastic, and has a "pretty good" memory. The Student was placed in a higher reading group, working on writing structured paragraphs, using topic sentences, multiple details, and concluding sentences, all of which s/he can do. The Student is enthusiastic about "everything" and calls out or talks to friends when s/he should not. Still, the Student responds to prompts. Testimony of Witness G.

25. For the first and second terms of the 2023-2024 school year, the Student received “2” grades in math, approaching grade level, and “3” grades in reading, at grade level. The report cards indicated that the Student has made significant growth in self-awareness. Testimony of Witness F; P-6; R-25.

26. On “DIBELS” reading tests, the Student history is as follows: s/he scored 360, at benchmark, in June 2022; 415, at benchmark, in January, 2023; 476, at benchmark; and in January 2024, 357, at benchmark. P-7.

27. On i-Ready testing in math, the Student’s history is as follows: the 47th percentile on January 31, 2022; the 51st percentile on June 2, 2022; the 51st percentile on September 6, 2022; the 26th percentile on January 9, 2023 (a drop to below grade level in math proficiency, based on the four domains of geometry, algebra and algebraic thinking, measurement and data, and numbers and operations); the 46th percentile on March 24, 2023 (a big increase); and the 45th percentile on September 5, 2023. P-16-6.

28. On i-Ready testing in reading, the Student’s history is as follows: the 74th percentile on September 22, 2022; the 39th percentile on March 22, 2023; the 58th percentile on June 20, 2023; and the 70th percentile on September 1, 2023. P-7; P-15; P-17.

29. Directions cannot be repeated for Students on the i-Ready test, which is administered in a large group setting. Testimony of Witness A. Students work on their own, and the tests can be exhausting. Testimony of Witness F.

VI. Conclusions of Law

The burden of proof in District of Columbia special education cases was changed in 2014. The law states that “(w)here there is a dispute about the appropriateness of the

child's individual educational program or placement, 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 establishes "a *prima facie* case." D.C. Code Sect. 38-2571.03(6)(A)(i). The issues here do not directly relate to the appropriateness of the Student's program or placement. As a result, as indicated in the prehearing conference order, which was agreed to by the parties, the burden of persuasion is on Petitioner. Schaffer v. Weast, 546 U.S. 49 (2005).

1. Did Respondent fail to evaluate the Student during the 2022-2023 and 2023-2024 school years? If so, did Respondent deny the Student a FAPE?

Petitioner contended that, in December 2022, DCPS failed to conduct a thorough initial evaluation of the Student. Petitioner also contended that the reopened request for an initial evaluation in June 2023 was not timely completed, and that the evaluation was incomplete because it did not include a Conners assessment.

December 2022

A child's initial evaluation or re-evaluation must consist of two steps. First, the child's evaluators must "review existing evaluation data on the child," including any evaluations and information provided by the child's parents, current assessments, classroom-based observations, and observations by teachers and other service providers. 34 C.F.R. Sect. 300.305(a)(1). Second, based on a review of the existing data and input from the child's parents, the evaluators must identify what additional data, if any, is needed to assess whether the child has a qualifying disability and, if so, administer such assessments and other evaluation measures as needed. 34 C.F.R. Sect. 300.305(a)(2)(c). The Local Educational Agency ("LEA") is required to "[u]se a variety of assessment tools and strategies to gather relevant functional, developmental, and academic

information about the child, including information provided by the parent.” 34 C.F.R. *Sect.* 300.304(b). A student must be “assessed in all areas related to the suspected disability.” 34 C.F.R. 300.304(c)(4).

Especially for an initial evaluation, at least some formal assessments may be required. James v. District of Columbia, 194 F. Supp. 3d 131, 142 (D.D.C. 2016) (the “Summary of Existing Data” that the District of Columbia prepared in response to a guardian’s request for an updated psychological assessment of a teenager with an intellectual disability did not fulfill the district’s obligation to re-evaluate the student).

But that is not what happened here. Petitioner requested an evaluation in or about December 2022, but DCPS decided to rely on existing data and, after a meeting, found the Student ineligible because s/he was doing well in school. Petitioner pointed out that the Student was below grade level in math, but Respondent contended that it had a lot of in-class materials to review for the Student, such as TRC, DIBELS, i-Ready data, and classroom work.

However, one can take judicial notice of the fact that virtually every student who is to be evaluated for special education has been subject to in-class assessments, which the authors of the IDEA surely knew when they wrote the law in 1975. Congress put the IDEA rules in place so that more objective measures can be used for students with special needs. For instance, here, the record indicates that the Student’s i-Ready testing may have been skewed by the placement of the Student in a large group, where the Student performs less well.

At the very least, a comprehensive psychological evaluation was required in this situation to objectively determine if the Student’s academic and social emotional levels

were affected by his/her ADHD. This Hearing Officer agrees with Petitioner that Respondent violated the IDEA by failing to conduct an evaluation in compliance with 34 C.F.R. Sect. 300.304.

However, this is a procedural violation. A hearing officer may find that a procedural violation caused the denial of a FAPE in any of three circumstances: the procedural inadequacy “(i) [i]mpeded the child’s right to a FAPE; (ii) [s]ignificantly 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) [c]aused a deprivation of educational benefit.” 34 C.F.R. Sect. 300.513(a)(2). In the District of Columbia, courts have found that a parent should show that the failure to evaluate resulted in substantive harm to the student. McLean v. District of Columbia, No. 16-2067, 264 F. Supp. 3d 180, 183-84 (D.D.C. Sept. 5, 2017); Suggs v. District of Columbia, 679 F. Supp. 2d 43 (D.D.C. 2010).

Here, though the school district delayed the evaluation far too long and Petitioner rightly felt frustrated with the process, and while Petitioner raised legitimate concerns about the Student, who had some below-grade-level scores in math and was diagnosed with ADHD and PTSD, the record makes it clear that Petitioner did actively participate in the process, including several meetings, and that the school district was ultimately right that this Student did not need special education services, as described in the section devoted to Issue #2.

June 2023

D.C. Code Section 38–2561.02 is entitled “Assessment and placement of a students with a disability — General.” In Section (a)(2)(a), beginning on July 1, 2018, the

Local Educational Agency (“LEA”) is required to “assess and evaluate” and 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.” This section continues by stating that “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.” The section also states that “a referral for an evaluation or assessment for special education services may be oral or written. The LEA shall document any oral referral within three business days of receipt.”

Petitioner argued that, after her request for an evaluation in June, 2023, the school should have gotten the parent to sign a consent and conducted evaluations within 90 days, which would have been September 13th, 2023. The AED meeting was not scheduled until November 3rd, 2023, and the evaluation was not completed until the litigation in March, 2024. Clearly, DCPS was late in evaluating the Student, and the delays here are almost entirely attributable to DCPS, which should have had a psychologist available for the AED meeting in July, 2023, but did not. No psychologist was available until November, 2023, and then the psychological evaluation was not completed until last month, though the parent contributed to the delay by being slow to respond to a request for a ratings scale. As a result, this Hearing Officer agrees that DCPS violated the D.C. Code by failing to timely evaluate the Student after the June, 2023 request for an evaluation. However, this too is a procedural violation. Due to the finding on Issue #2, *supra*, the Student is not eligible for services and therefore DCPS cannot be found to have denied the Student a FAPE.

2. Did Respondent fail to determine the Student to be eligible for services at the January 2024 eligibility meeting? If so, did Respondent deny the Student a FAPE?

Petitioner contended that the Student should be found to be eligible as a student with Other Health Impairment because of the Student's ADHD.

There is no dispute that the Student has ADHD. The issue is whether the Student was adversely affected by his/her disability in the school environment, as required by the applicable regulations. "Other Health Impairment" is an appropriate classification if a student has limited strength, vitality, or alertness with respect to the educational environment that adversely affects the child's educational performance. 34 C.F.R. Sect. 300.8(c)(9). When determining if a disability "adversely affects a child's educational performance," states can set their own rules.

The regulations underscore that "(t)he IEP Team shall develop an IEP only for an eligible child with disabilities who requires special education services." "Specially designed instruction" means adapting, as appropriate to the needs of an eligible child under this part, the content, methodology, or delivery of instruction to address the unique needs of the child that result from the child's disability, and to ensure access of the child to the general curriculum, so that the child can meet the educational standards within the jurisdiction of the public agency that apply to all children. 34 C.F.R. Sect. 300.39(b)(3).

Neither the IDEA nor federal regulations define "adversely affects a child's educational performance." Greenland Sch. Dist. v. Amy N., No. 02-cv-136, 2003 WL 1343023, at *8 (D.N.H. Mar. 19, 2003), aff'd, 358 F.3d 150 (1st Cir. 2004). But the core of educational performance is "academic performance." Maus v. Wappingers Cent. Sch. Dist., 688 F. Supp. 2d 282, 294 (S.D.N.Y. 2010).

Petitioner argued that a child need not fail in school to be determined to be eligible for special education services, which is of course true. Petitioner argued that, though the Student is testing at or near grade level, s/he has a diagnosed medical condition and teachers have noted behaviors consistent with ADHD. Petitioner argued, pointing to the Student's recent FBA, that s/he has exhibited numerous off-task behaviors and "magnified emotionality," which increases off-task behaviors in class, and that s/he has been especially impacted in math, where his/her i-Ready scores have been below grade level in some instances.

In support of her claims, Petitioner pointed to an SDQ that indicated that the Student had a high score in hyperactivity. Petitioner therefore appeared to suggest, through Witness B, that this Student needs two teachers in the classroom, frequent breaks, clarified and repeated directions, preferential seating, special check-ins, and individually chunked assignments. Petitioner argued the Student regressed, had difficulty telling time on an analog clock, had difficulty solving multistep problems, and that there were many concerns with his/her writing skills, including misspelled words, illegible handwriting, capitalization errors, and following directions.

However, these arguments are inconsistent with the points made by two of the Student's teachers, who said that, though s/he has some attentional issues in class and occasionally gets upset and needs time in a "cooldown" area, the Student has been doing very well in class, both academically and behaviorally. The Student has not had any problems with depressed mood or anxious thoughts. Witness G reported that the Student does not need as much redirection and is not as overly active as some other students. Witness G described the Student as cheerful and said that s/he participates a lot and loves

learning. The Student also helps other students solve problems and can be a leader in class. Witness F described the Student as analytic, smart, happy, sweet, and empathetic, and a good friend to others.

Witness F did indicate that the Student gets distracted easily, can find it difficult to maintain attention for a prolonged period, and is sometimes affected when a task requires a series of steps. Witness F also indicated that the Student needs some time to calm down if someone bothers him/her or says something that makes him/her feel sad or angry. But Witness F also testified that small-group instruction in class reinforced the lessons so that the Student was able to progress, especially in math, where the Student struggled because the instruction was in Spanish. Witness F made it clear that the Student's main problem in math class was the fact that it was in Spanish, not the fact that it was a math class. The Student's "exit tickets" in math showed that s/he understood the work. The Student also tested at or near grade level in classroom assessments, showed a strong foundation in math because s/he knew how to recognize the value of the digits, and could add and subtract using three-digit numbers up to 1000. Witness F also testified, without rebuttal, that if the Student were in an English-only math class, small groups would not have been as needed, which makes sense since recent psychological testing put the Student on grade level in math overall.

Witness F did indicate that the Student does not always do his/her homework, but Witness F also said that homework was not checked and that most students do not turn in their homework. Witness G also stated that the Student does not always complete his/her work, but Witness G also said that very few students in the Student's classroom finish all their work all the time. Witness G reported that the Student's work was not incomplete

significantly more than the other students in the class, and that s/he was not one of the few students who rarely completed their work. Similarly, in H.R. v. W. Windsor-Plainsboro Bd. of Educ., No. CV223103MASJBD, 2023 WL 4744284, at *12 (D.N.J. July 25, 2023), a student needed extra help with his reading, but that was not enough to establish that he was still eligible for special education and related services, since a third of his general education class required the same type of help.

Indeed, in ELA and social studies classes, the Student is considered bright. The Student is curious, willing to share, enthusiastic, and has a “pretty good” memory. The Student was placed in a higher reading group, working on writing structured paragraphs, using topic sentences, multiple details, and concluding sentences, all of which s/he can do. The Student can be very enthusiastic about “everything that we learn,” call out or talk to friends when s/he should not and require some reminders to stay on task and be responsive in class. But the Student is very responsive to those reminders and has made progress in reading fluency, comprehension, and especially writing.

Petitioner also pointed to the fact that the Student was recommended for “chunking” as an accommodation in the Section 504 plan, and that chunking is more of a modification than an accommodation. Petitioner therefore appeared to suggest that the use of “chunking” was specially designed instruction. But there is virtually nothing in the record to suggest that “chunking” was used much with Student, who gets his/her math issues addressed through small-group instruction. Witness A said that the Student was able to complete work without any type of modification, including in math.

Petitioner argued that the Student has been consistently at least one grade level below standard in several math areas, pointing to i-Ready scores in measurement and data

for the entire 2022-2023 school year. Petitioner contended that the Student has always been below grade level in math, and that the Student regressed in geometry during the 2023-2024 school year, according to the i-Ready measure.

But most of the Student's testing has shown otherwise. Recent psychological testing indicated that the Student is on grade level in math, and even the i-Ready testing in math, from January 2022 to May 2023, consistently indicated that the Student was near the 50th percentile overall, with one test in January 2023 that was an outlier. Moreover, the record suggests that the Student's i-Ready scores may have been depressed because they were administered in a group setting, and the Student can have a challenging time taking tests in a large group, which was a main reason for the Section 504 plan.

Petitioner also contended that the Student had special education needs in writing, but there is insufficient evidence of this in the record. While some of the Student's writing scores were below grade level on report cards, the Student was placed in a higher reading group, where s/he has worked on writing structured paragraphs, using topic sentences, multiple details, and concluding sentences, all of which s/he can do. In fact, the record establishes that the Student has made special progress in writing, pursuant to the testimony of Witness G. The Student also tested in the average range in writing, pursuant to his/her recent psychological evaluation.

Where general education provides enough accommodations and modifications to allow a student to make meaningful progress in all academic areas, courts often deny requests for eligibility. In Day v. Kipp DC Pub. Charter Sch., No. 19-CV-1223-RBW-ZMF, 2021 WL 3507602, at *9–10 (D.D.C. Jan. 20, 2021), the school district created a Section 504 plan to address a student's issues, which included (unlike the Student) falling

test scores, grades, and a declining emotional state. The student in that case also had difficulty finishing assigned tasks, working within time limits, initiating non-preferred tasks, and working independently. The evaluations indicated that the student's behaviors significantly and negatively impacted his/her ability to learn each day. Even so, the court determined that the student was not eligible for services, ruling that special education "is mandated only when a disabled child needs it to access their education—in other words, when special education is the solution to the child's problem, and not some other accommodation or treatment." The court added that the IDEA only requires schools to provide a "basic floor of opportunity" for disabled children through special education and other services, rather than to "maximize" the potential of children with disabilities.

Petitioner pointed to cases finding that students such as this Student are "twice exceptional," and it is certainly true that gifted students can be eligible for services if they need them. The U.S. Office of Special Education Programs ("OSEP") has stated that students who have high cognition, have disabilities, and require special education and related services are protected under the IDEA and its implementing regulations. Letter to Anonymous, 55 IDELR 172 (OSEP 2010). However, under 34 C.F.R. Sect. 300.8, a child must meet a two-prong test to be considered an eligible child with a disability: (1) have one of the specified impairments (disabilities); and (2) because of the impairment, need special education and related services. The OSEP letter goes on to explain that "a child with high cognition and ADHD could be considered to have an 'other health impairment,' and could need special education and related services to address the lack of organizational skills, homework completion and classroom behavior, if appropriate." But this Student does not have a poor grasp of organizations skills or poor classroom

behavior, and the Student's homework issues are no different than others in his/her class.

This Hearing Officer must therefore find that the Student does not need special education support to receive an appropriate education at this time and was not denied a FAPE, though DCPS should keep a careful watch on this Student going forward.

VII. Order

As a result of the foregoing:

The Complaint is hereby dismissed with prejudice.

Dated: April 15, 2024

Michael Lazan
Impartial Hearing Officer

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

VIII. Notice of Appeal Rights

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

Date: April 15, 2024

Michael Lazan
Impartial Hearing Officer