

District of Columbia
Office of the State Superintendent of Education
Office of Dispute Resolution
1050 First Street, N.E., Third Floor, Washington, DC 20002
(202) 698-3819 www.osse.dc.gov

Parents, on behalf of Student,¹)	
Petitioners,)	Hearing Dates: 7/20/20; 7/21/20;
)	7/28/20; 8/4/20
v.)	Hearing Officer: Michael S. Lazan
)	Case No. 2020-0107
District of Columbia Public Schools,)	
Respondent.)	

HEARING OFFICER DETERMINATION

I. Introduction

This is a case involving an X-year-old student who is currently eligible for services as a student with Specific Learning Disability (the “Student”). A due process complaint (“Complaint”) was received by District of Columbia Public Schools (“DCPS” or “Respondent”) pursuant to the Individuals with Disabilities Education Act (“IDEA”) on May 14, 2020. The Complaint was filed by the Student’s parents (“Parents” or “Petitioners”). This Hearing Officer was appointed to this case on May 15, 2020. On May 26, 2020, Respondent filed a response. A resolution meeting was held on May 29, 2020. The resolution period expired on June 13, 2020.

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.

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

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

III. Procedural History

A prehearing conference was held on June 24, 2020. Attorney A, Esq., and Attorney B, Esq., counsel for Petitioners, appeared. Attorney C, Esq., counsel for Respondent, appeared. A prehearing conference order was issued on June 29, 2020, as revised on June 30, 2020, summarizing the rules to be applied in the hearing and identifying the issues in the case.

On July 24, 2020, Respondent moved for a continuance to extend the timelines for this Hearing Officer Determination (“HOD”) with no opposition from Petitioners. The motion was granted and the HOD due date was moved from July 28, 2020, to August 24, 2020. The matter was heard on July 20, 2020, July 21, 2020, July 28, 2020, and August 4, 2020, through the Microsoft Teams video conferencing platform, on consent. Petitioners were again represented by Attorney A, Esq., and Attorney B, Esq. Respondent was again represented by Attorney C, Esq. This was a closed proceeding. During the proceeding, Petitioners moved into evidence exhibits P-1 through P-42 without objection. Respondent moved into evidence R-1 through R-26, including R-1a, R-1b, and R-11a, without objection.

Petitioners presented as witnesses, in the following order: Witness A, an educational consultant (expert in special education); Witness B, director of speech language and literacy services at School B (expert in speech-language pathology); Witness C, associate head of the elementary division of School B (expert in occupational therapy); and the Student’s mother (“Mother”). Respondent presented as witnesses, in

the following order: Witness D, a special education coordinator (expert in special education and IEP development, programming, and placement); Witness E, an occupational therapist (expert in occupational therapy and placement and programming as related to occupational therapy); Witness F, a speech-language pathologist (expert in speech-language pathology and programming and placement as related to speech-language pathology); Witness G, the Local Educational Agency (“LEA”) representative for School C (expert in special education programming and placement), and Witness H, a program specialist at the DCPS central office (expert in special education programming and placement). After Respondent’s witnesses had finished, Petitioners presented rebuttal by recalling Witness B and presenting the Student’s father as a witness. The parties submitted closing briefs to this Hearing Officer on August 17, 2020.

IV. Issues

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

1. Did Respondent fail to offer the Student an appropriate Individualized Education Program (“IEP”) on or about August 19, 2019, and August 26, 2019? If so, did Respondent act in contravention of 34 C.F.R. Sect. 300.320, Andrew F. v. Douglas County School District, 137 U.S. 988 (2017), Hendrick Hudson Bd. of Educ. v. Rowley, 458 U.S. 176 (1982), and related authority? If so, did Respondent deny the Student a Free Appropriate Public Education (“FAPE”)?

Petitioners contended that the Student’s IEP did not provide specialized instruction for all classes or classes with a small class size and a low student-to-teacher ratio. Petitioners also contended that the IEP did not require that speech and language therapy or support be integrated into the Student’s classroom, and that the Student be taught a specific reading methodology.

2. Did Respondent fail to offer the Student an appropriate placement/school for the 2019-2020 school year? If so, did Respondent act in contravention of 34 C.F.R. Sect. 300.116, related laws and provisions, and the principles articulated in cases such as Gellert v. District of Columbia, 435 F. Supp. 2d 18 (D.D.C. 2006)? If so, did Respondent deny the Student a FAPE?

Petitioners contended that School C did not offer the Student evidence-based interventions in literacy; classes with appropriate groups of other students; classes with appropriate sizes and student-to-teacher ratios; and multi-sensory instruction (i.e., instruction broken down and/or paired with visuals; Petitioners contended that School C's instruction is too focused on expressive and receptive language skills).

As relief, Petitioners seek reimbursement for School B for the 2019-2020 school year.

V. Findings of Fact

1. The Student is an X-year-old currently eligible for services as a student with Specific Learning Disability. P-20-1. Cognitively, the Student is in the average range. The Student has been diagnosed with Attention Deficit Hyperactivity Disorder ("ADHD"), Combined Type; Specific Learning Disorders in Reading, Written Expression, and Mathematics; Mixed Receptive-Expressive Language Disorder; and Adjustment Disorder with Anxiety. P-2. The Student's learning disabilities impact his/her skills in language, mathematics, and other academic areas. The Student also has issues with attention, following directions, and retaining information. The Student benefits from, among other things, a small academic classroom, individualized instruction, repetition, redirection, and physical cues. Testimony of Witness A; Testimony of Witness B; Testimony of Witness C; Testimony of Mother.

2. The Student has significant reading and writing issues. The Student has problems with basic skills involving sound symbol knowledge, decoding, working with sight words, fluency, phonemic awareness, rate, and prosody. The Student tends to read in small chunks and can have issues understanding words in context. Testimony of Witness A; Testimony of Witness B. The Student has speech and language issues in three areas: “form,” “content,” and pragmatic speech and language. The Student is a “social butterfly” and “does okay” but can have a hard time communicating with peers. Testimony of Witness B; R-24-90. The Student also has issues with planning and executive functioning. With such a student, it is important to maintain the right “level of arousal” so s/he can respond to stimuli in an even way and regulate emotions. The Student benefits from interventions such as movement breaks and a quiet workspace. Testimony of Witness E.

3. The Student attended School A PCS for the 2017-2018 school year and received reading instruction through the Wilson methodology in a small group. Testimony of Witness A. The Student made consistent, meaningful progress on his/her reading goals during the school year (for instance, in word naming and letter sound). School A staff amended the Student’s IEP in October, 2017, to add a new goal and rigor to his/her program. During the school year, the Student progressed from level “B” to level “D” on the Fountas and Pinnell measure. The Student also made progress on i-Ready testing: in August, 2017, the Student scored 370 in literacy and 365 in mathematics, at the kindergarten level; in November, 2017, these scores increased to 454 and 428, respectively, at the early first grade level. In February, 2018, the Student regressed, with scores of 409 in literacy, at the early first grade level, and 409 for

mathematics, at the kindergarten level. These declines were a function of the winter break and lengthy testing sessions, as reported by a School A PCS psychologist. R-24 at 72-74; R-6-4; R-5-8.

4. A comprehensive psychological assessment of the Student was conducted by an independent psychologist from October through December, 2017. The assessment was the subject of a report by the psychologist dated January 6, 2018. In addition to interviewing the Student and Parents, the psychologist tested the Student on a wide range of measures, including the Wechsler Intelligence Scale for Children, 5th Edition (“WISC-V”); the Kaufman Tests of Educational Achievement, 3rd Edition (“KTEA-3”); the Test of Variables of Attention, 8th Edition (“TOVA-8”); the Wide Range Assessment of Memory and Learning, 2nd Edition (“WRAML-2”); the Story Memory subtest of the Neuropsychological Assessment, 2nd Edition (“NEPSY-II”); the Inhibition and Visuomotor Precision subtests of the Tests of Auditory Processing Skills, 3rd Edition (“TAPS-3”); the Auditory Comprehension, Word Discrimination, and Figure Ground subtests of the Comprehensive Assessment of Spoken Language, 2nd Edition (“CASL-2”); the Expressive Vocabulary, Receptive Vocabulary, and Sentence Expression subtests of the Conners Comprehensive Rating Scale (“CCRS”), Parent and Teacher Versions; the Behavior Rating Inventory of Executive Functions, 2nd Edition (“BRIEF-2”), Parent and Teacher Versions; the Behavior Assessment Scale for Children, 3rd Edition (“BASC-3”), Self-Report, Rorschach Inkblot Test; and the Exner Scoring System Sentence Completion Projective Test. On the WISC-V, the Student’s Global Ability IQ was 107, within the average range, at the 68th percentile. Testing to assess the Student’s attention, through the TOVA, was consistent with a diagnosis of ADHD. On the NEPSY-II, the Student

showed difficulty with inhibition and self-monitoring. On the KTEA-3, the Student's performance was in the low average range, indicating difficulty with verbal fluency, cognitive flexibility, concentration, and word finding. In reading comprehension, the Student scored in the borderline range, though in word reading, the Student scored in the low average range. In spelling and written expression, the Student scored in the low average range. In math computation, the Student scored in the average range. On the TAPS-3, the Student scored in the average range in auditory comprehension but had difficulty with phonemic discrimination. On the CASL-2, the Student scored in the average range for receptive vocabulary. On the BRIEF-2, one of the Student's teachers indicated that the Student was "Borderline Clinically Significant" in working memory, though another teacher disagreed on this point. The psychologist recommended specialized, individualized instruction focused on the needs of students with academic disabilities, and high levels of support to address the Student's language, attention, and executive functioning issues. P-2.

5. An IEP meeting was held for the Student on March 16, 2018. The resulting IEP, as amended on June 25, 2018, contained "Area of Concern" sections and corresponding goals in mathematics, reading, written expression, and adaptive/daily living skills, communication/speech and language, and motor skills/physical development. The IEP recommended eighteen hours of specialized instruction per week: two hours of reading, three hours of mathematics, two hours of written expression, and one hour of "specialized instruction" inside general education; and three hours of reading, three hours of mathematics, three hours of written expression, and one hour of "specialized instruction" outside general education. The IEP also called for two hours of

speech-language pathology per week (0.5 hours inside general education, 1.5 hours outside general education) and one hour of occupational therapy per week (0.5 hours inside general education, 0.5 hours outside general education), as well as thirty minutes of speech-language pathology “consultation” per month. The IEP also recommended “Other Classroom Aids and Services” including, among other things, preferential seating on the carpet, access to visual schedules as appropriate, additional visual supports (during instruction and to aid in transitions or directions), the visual aid of an alphabet strip, highlighted or adaptive paper for writing, modified instruction and instructional materials, additional receptive language opportunities, increased small group instruction, frequent encouragement or praise for positive behaviors, individualized instruction for new content and/or rote memorization skills, increased checks for understanding, increased “think time,” planned “ignoring” during times of academic frustration, access to a fidget, sensory strategies to incorporate daily routines to help reduce auditory distraction, dividers during writing tasks, brightly colored papers, movement breaks, “bumpy seats,” enlarged worksheets and tests, and modeling. The IEP also recommended classroom accommodations, including location with minimal distractions, extended time, and flexible scheduling. Extended school year services were also recommended. R-5.

6. Petitioners expressed concern about the Student’s educational performance and sought the advice of Witness A, who wrote a report on April 18, 2018, after consultation with Parents. This report recommended that the Student receive specialized instruction outside general education for all classes, to address the Student’s academic, attentional, and language-based issues. Witness A pointed to the Student’s

difficulty meeting educational goals as well as the Student's academic levels, which she felt had not increased (or had increased only slightly) in the last several years. P-3.

7. A psychological assessment of the Student was conducted by a psychologist from School A PCS in April and May, 2018. The evaluator conducted an observation, interviews with the Student's teachers, the Key Math 3 Diagnostic Assessment Form B ("Key Math 3"), the Comprehensive Test of Phonological Processing – 2nd Edition ("CTOPP-2"), and the Behavior Assessment System for Children, 3rd Edition ("BASC-3"), Parent and Teacher Rating Scale. During the first observation, on May 2, 2018, the Student had some difficulty staying on task and following directions but was on task approximately ninety percent of the time. During the second observation, on May 17, 2018, the Student again had some difficulties paying attention and taking direction and was often fidgety. The Student needed frequent support from teachers to help him/her follow along and correct mistakes. On the CTOPP-2 subtests, the Student's scores ranged between below average, well below average, and poor (in phonological memory). On the BASC-3, the Student's teachers indicated that the Student was functioning in the average range in every area except study skills, where one teacher indicated that the Student was at-risk. Petitioners' scores for the Student indicated more severe emotional issues, with several areas, such as externalizing problems, deemed "clinically significant." The psychologist indicated that the Student's most significant area of difficulty was "rapid naming," which affects how the Student remembers words. P-6.

8. An occupational therapy assessment of the Student was conducted in April and May, 2018, by an occupational therapist at School A PCS. The evaluator conducted

the Beery Buktenica Developmental Test of Visual Motor Integration, 6th Edition (“VMI-6”), the Bruininks-Oseretsky Test of Motor Proficiency (“BOT-2”), and the Test of Visual Perceptual Skills (“TVPS-3”). On the VMI-6, the Student scored in the below average range in two subtests, and in the low range on one subtest (visual perception). On the BOT-2, the Student scored in the below average range on four of five subtests. On the TVPS-3, the Student scored in the average range in six of seven subtests. The evaluator stated that the Student was effectively able to manipulate fine motor objects and wrote with fair legibility, but presented with difficulties with respect to speed, neatness, and accuracy when copying. P-4.

9. A speech and language assessment of the Student was conducted in May, 2018, by a psychologist at School A PCS. The psychologist tested the Student on the Expressive One-Word Picture Vocabulary Test, Fourth Edition (“EOWPVT-4”), the Receptive One-Word Picture Vocabulary Test, Fourth Edition (“ROWPVT-4”), and the Test of Word Finding, Third Edition (“TWF-3”). Observations and teacher interviews were also conducted. Teachers told the psychologist that the Student had trouble following directions, remembering what people said, answering questions, thinking of the right word to say, and writing down thoughts. On the EOWPVT-4, the Student scored at the 19th percentile, in the average range. On the ROWPVT-4, the Student scored at the 6th percentile, in the below average. The Student demonstrated weakness in word finding, particularly in semantics, on the TWF-3. P-5.

10. Petitioners elected to place the Student at School B for the 2018-2019 school year. School B is a private day school for students with learning differences and language-based learning disabilities, with a relatively low number of students. The

students are grouped by age and ability, with approximately twelve students per classroom, though academic classes have fewer students. The school offers “specials” classes in performing arts and physical education. Testimony of Witness C.

11. School B creates its own IEPs for Students. The School B IEP dated October 26, 2018, restated the Student’s levels of academic performance, based on testing the school conducted in September, 2018. Goals and objectives were written for reading, written language, mathematics, academic behavior/executive functioning, speech/language, occupational therapy, and oral language. The Student was recommended for 32.75 hours per week of specialized instruction, with integrated speech/language therapy (360 minutes per month) and occupational therapy (180 minutes per month). This School B IEP indicated that the Student’s word fluency in reading was 17.5 words per minute. P-8.

12. At School B, the Student was placed in a classroom with students who had significant language issues, with a speech teacher in the room. Staff provided Orton-Gillingham-based phonetic and explicit instruction. Testimony of Witness A. The reading programs at the school reflected “high intensity,” evidence-based instruction that was diagnostic, prescriptive, and tailored for the Student. Testimony of Witness B. The speech and language teacher at School B pushed into the classroom and worked with students on literacy, including such areas as word definitions and plural words. Testimony of Witness B. The Student was more emotionally engaged at School B than s/he was at School A PCS. Testimony of Mother.

13. By the middle of the 2018-2019 school year, per mid-year reading assessments at School B, it was determined that the Student was benefitting from visual

representations of sounds and was making progress in phonological awareness, but was having difficulty with decoding. In mathematics, the Student was able to count to twenty-eight but had issues understanding “fewer” and “less” and questions involving “skip counting.” The Student was deemed to be making progress in writing, particularly in writing “CVC” words, but had trouble writing sentences, spelling, and capitalizing, among other things. P-9.

14. At the end of the 2018-2019 school year, the Student was at the pre-primer level 1 in reading and writing, unchanged from the beginning of the school year. Students at this level are still working on recognizing letters and “print concepts,” such as reading pages from left to right. Testimony of Witness A; Testimony of Witness B.

15. The Student’s end-of-school-year progress report from School B for the 2018-2019 school year indicated that the Student had made gains in phonological awareness, sound-symbol knowledge, blending words, and answering questions about texts. The Student continued to have trouble with auditory discrimination and little progress was noted in writing, though the Student could generate simple sentences. Spelling issues were also noted. The report did not point to much progress in mathematics since the Student did not understand the bulk of the curriculum and was inconsistent in calculation, math fact fluency, number sense, and other areas. P-16.

16. The Student’s speech-language progress summary from School B, dated May, 2019, indicated inconsistent improvement in semantics/vocabulary, continued errors in spontaneous speech, and improvement in following one-step directions, answering “wh” questions, and identifying irregular plural words. P-12. An

occupational therapy annual report from School B dated June 6, 2019, indicated that the Student was progressing on occupational therapy goals. P-13.

17. A School B IEP was written for the Student on May 8, 2019. This IEP restated the Student's levels of academic performance, based on testing the school had conducted in January, 2019, March, 2019, and April, 2019. Goals and objectives were written for reading, written language, mathematics, academic behavior/executive functioning, speech/language, occupational therapy, and oral language. The Student was again recommended for 32.75 hours per week of specialized instruction at School B, with integrated speech/language therapy (360 minutes per month) and occupational therapy (180 minutes per month). P-11.

18. Petitioners referred the Student to DCPS on or about July 8, 2019. P-19. Petitioners provided DCPS with documentation relative to the Student at about this time. Testimony of Mother.

19. During the summer of 2019, the Student attended School B and worked with two different remedial programs. The Student's progress reports reported indicated that the Student had made some gains through the summer instruction, particularly in decoding and phonological awareness, through the "Road to Reading and Spelling" program. P-17; P-18; Testimony of Witness B; Testimony of Witness F.

20. The July date of Petitioners' referral made it difficult for Respondent to gather data in the "usual way." Testimony of Witness H. Witness H wrote a draft IEP using data supplied by Petitioners. Respondent did not know the Student was attending summer school and therefore did not observe the Student at the time. Testimony of Witness H; R-7.

21. An IEP meeting was held for the Student on August 19, 2019. Testimony of Mother; P-19. The IEP team did not have necessary documents for the Student's summer school program at this meeting. As a result, the parties agreed to reconvene on August 26, 2019. Testimony of Mother; Testimony of Witness F.

22. Another IEP meeting was held for the Student on August 26, 2019. At this meeting were Petitioners, a special education teacher, Witness D, Witness E, Witness F, Witness H, and one of Petitioners' lawyers. Respondent's staff asked about the Student and quickly came to an opinion about an appropriate program for him/her. Respondent's staff felt that the Student was progressing in a small environment with tailored assignments and fewer distractions, but also felt that a "full-time" special education program was not appropriate because of least restrictive environment ("LRE") considerations. Petitioners understood that the Student's academic classes would be in a self-contained setting at the assigned school. Respondent's staff felt that the "Other Classroom Aids and Services" in the IEP would help the Student in the general education environment. Respondent accordingly recommended the same aids and services that School A PCS had recommended. Respondent also required that the Student receive a location with minimal distractions and added consultation services to focus on generalizing skills. Petitioners felt that they had participated fully in the meeting, though "not much time was given" to them. Petitioners made clear that they did not agree with the IEP. Testimony of Witness F; Testimony of Witness H; Testimony of Mother; P-20.

23. The IEP that was drafted by Witness H in August, 2019 relied on language from the IEP of School A PCS, which uses the same database as Respondent. The IEP reported on the Student's academic situation, drawing on the assessments provided by

Petitioners. Testimony of Witness D. The IEP contained “Area of Concern” sections and corresponding goals for mathematics, reading, written expression, and adaptive/daily living skills, communication/speech and language, and motor skills/physical development. In academic areas, the IEP incorporated information from the 2019 School B IEP and the summer tutorial report from School B. The adaptive/daily living skills section indicated, among other things, that the Student requires frequent redirection, benefits from routine, asks for help appropriately, and is often distracted by peers. The IEP recommended twenty hours of specialized instruction per week outside general education, with 240 minutes of speech-language pathology per month, 240 minutes of occupational therapy per month, thirty minutes of occupational therapy “consultation” per month, and sixty minutes of speech-language pathology “consultation” per month. The IEP recommended the same kind of “Other Classroom Aids and Services” that were recommended by School A PCS, and again recommended classroom accommodations, including location with minimal distractions, extended time, and flexible scheduling. Extended School Year (“ESY”) services were also recommended for the Student. P-20.

24. On or about September 12, 2019, School C was recommended for the Student. P-21A. The Student’s proposed class was an “SLS” (“Specific Learning Support”) classroom with eleven students, manifesting a variety of disabilities, from three grades. Three students, including the Student, would have been in the lowest grade at the time. The SLS class, accompanied by a “para-educator,” went to “specials,” ate lunch, and had recess with general education classes in the two higher grades. The SLS program used the Wilson methodology for reading. The Student’s proposed reading teacher had recently been trained in this methodology, which provides “explicit” remedial

instruction in basic reading skills, like decoding. Wilson instruction was provided daily for one hour, with approximately nine students in the classroom split into two groups. The classroom also used the “Do the Math” intervention. P-23-1; Testimony of Mother. The school offered “specials” including library, gym, and art, with approximately twenty-seven students in each class. Testimony of Witness G.

25. On September 18, 2019, Petitioners and Witness A observed the Student’s proposed placement at School C. Petitioners observed the proposed SLS classroom and two “specials,” which contained eighteen to twenty students. Petitioners the teachers were not nurturing and that the students in the classroom were not doing the assigned work. Petitioners also felt that the school was not diverse enough. Testimony of Mother; P-22. Petitioners and Witness A were also concerned about, among other things, the female-to-male ratios in the classrooms, the ages of the students in the classrooms, the use of differentiation in the SLS classroom, the SLS teacher’s reliance on students’ receptive language skills, and the class sizes in the “specials,” lunch, and recess. P-22; P-23; Testimony of Witness A; Testimony of Mother.

26. Petitioners rejected the IEP and placement at School C and kept the Student at School B. The Student was initially taught reading at School B for the 2019-2020 school year in a small group with two other students, but the Student did not make adequate progress in this group according to school staff. As a result, School B tried to teach the Student reading in a dyad. After this approach was also unsuccessful, School B staff changed the Student’s reading program to require 1:1 instruction (some inside the classroom, some outside). This instruction was eventually provided through the Phono-

Graphix program during the 2019-2020 school year. Testimony of Witness A;
Testimony of Witness B; Testimony of Witness C.

27. During the 2019-2020 school year at School B, the Student made progress in reading, including in discriminating words that rhyme, phonological awareness, identifying letter sounds, decoding, encoding, high frequency “red” words, blending sounds, and segmenting sounds. In written language, the Student improved in spelling, but continued to have issues with spelling rules. The Student made other improvements in writing, including syntax. In mathematics, the Student showed strengths in, among other things, understanding place value, solving addition and subtraction problems, and understanding odd and even numbers. Testimony of Witness A; Testimony of Witness B; P-36; P-37.

28. The Student also experienced regression at School B during the 2019-2020 school year. For instance, in May, 2020, on a test of “CVC” nonsense words, the Student scored lower than s/he had the previous winter. Testimony of Witness A; Testimony of Witness B; P-40. The Student also continued to have issues with executive functioning, attention, expressive language, and working memory, and would rush through work and not retain skills. P-36. At the end of the Student’s second year at School B, s/he was being taught at a first-grade instructional level in reading, though s/he could not read traditional first grade books fluently. Testimony of Witness B.

29. After the onset of the COVID-19 pandemic, School B delivered instruction to students through a video conferencing platform. From approximately March, 2020, to the end of the school year, the Student received approximately four hours of video instruction per day, from either a speech-language pathologist or a teacher,

in reading, writing, mathematics, speech, music, performing arts, science, and social studies. Testimony of Mother. The Student had difficulty with virtual learning, particularly regarding attentional issues and following sequences. Testimony of Witness C. However, some related service providers reported that they had productive sessions with the Student during their virtual learning sessions. Testimony of Witness A; Testimony of Witness B.

30. School B staff are concerned about the Student's rate of progress have continued to "tweak" his/her program. They consider the Student to be among the most impacted students in his/her classes and would like to see more rapid progress. The Student's working memory has been a barrier to his/her progress at School B. Testimony of Witness B.

31. DCPS, through Witness H, sought to observe the Student at School B during the 2019-2020 school year. The first planned observation did not occur, however, because Petitioners wanted it to include Witness A, who was not available. Petitioners did not consent to another observation because of the timing of the request. Petitioners subsequently agreed to allow additional observations of the Student at School B. Testimony of Mother; Testimony of Witness D; Testimony of Witness H.

VI. Conclusions of Law

The burden of persuasion in District of Columbia special education cases was changed in 2014. The District of Columbia code now 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 burden of persuasion for Issue #1 is therefore on Respondent (if Petitioners present a prima facie case). The burden of persuasion for Issue #2 is on Petitioner since this issue does not directly involve the appropriateness of the child’s IEP or placement. Schaffer v. Weast, 546 U.S. 49 (2005).

1. Did Respondent fail to offer the Student an appropriate IEP on or about August 19, 2019, and August 26, 2019? If so, did Respondent act in contravention of 34 C.F.R. Sect. 300.320, Andrew F. v. Douglas County School District, 137 U.S. 988 (2017), Hendrick Hudson Bd. Of Educ. v. Rowley, 458 U.S. 176 (1982), and related authority? If so, did Respondent deny the Student a FAPE?

Petitioners contended that the Student’s IEP did not provide specialized instruction for all classes or classes with a small class size and a low student-to-teacher ratio. Petitioners also contended that the IEP did not require that speech and language therapy or support be integrated into the Student’s classroom,² and that the Student be taught a specific reading methodology.

School districts must develop a comprehensive plan, known as an IEP, for meeting the special educational needs of each disabled student. 20 U.S.C. Sect. 1414(d)(2)(A). In Hendrick Hudson Bd. Of Educ. V. Rowley, 458 U.S. 176 (1982), the Court explained that an IEP must be formulated in accordance with the terms of the IDEA and “should be reasonably calculated to enable the child to achieve passing marks and advance from grade to grade.” Id. At 204. The IDEA also requires that children with

²In their closing brief, Petitioners did not argue that the Student needs an “integrated” classroom with a speech-language pathologist in the room, and there is no evidence in the record to suggest that the Student needs any such “integrated” program. Indeed, per Witness B’s testimony, after providing the Student with such an “integrated” program for the 2018-2019 school year, School B stopped providing that program for the Student during the 2019-2020 school year. This claim is without merit.

disabilities be placed in the “least restrictive environment” so that they can be educated in an integrated setting with children who are not disabled to the maximum extent appropriate, that is, one that provides a program that “most closely approximates” the education a disabled child would receive if s/he had no disability. Leggett v. Dist. of Columbia, 793 F.3d 59, 74 (D.C. Cir. 2015); 20 U.S.C. Sect. 1412(a)(5)(A).

The Court’s decision in Andrew F. v. Douglas County School District, 137 S. Ct. 988 (2017), elaborated on the doctrines established in Rowley. The Court stated that parents can fairly expect those authorities to offer a “cogent and responsive explanation” for their decisions, and that the IEP should be “appropriately ambitious,” a standard “markedly more demanding than the ‘merely more than de minimis’ test applied by the Tenth Circuit.” Id. at 1000-1002. Finding that “instruction that aims so low” would be tantamount to “sitting idly...awaiting the time when they were old enough to drop out,” the Court held that IDEA “demands” a higher standard. Id. (citing to Rowley). Still, the Court cautioned that its ruling “should not be mistaken for an invitation to the courts to substitute their own notions of sound educational policy for those of school authorities, to whose expertise and professional judgment deference should be paid.” Id. At 1001.

Witness A testified that she considered the Student’s IEP to be inappropriate because the Student has a severe learning disability and needs a “full-time” special education program, such as the program at School C. Witness A testified that the DCPS IEP would put the Student in two hours of “general education” classes each day, and that this exposure to general education peers and larger classrooms would be inappropriate. Witness A testified that the Student would not be able to follow directions in these classes and would have trouble with distractibility. Witness A pointed out that the

Student has issues with attention even in groups of two or three students. Witness B and Witness C, both from School C, testified in accord.

However, none of Petitioners' witnesses mentioned that School C assigns an aide to all "specials" classes, in addition to lunch and recess. The purpose of this aide is to address student behavioral issues, such as the Student's inattentiveness. None of Petitioners' witnesses backed up their testimony with specific examples of the Student's problems in managing large, non-academic groups of children, even though the Student had apparently attended general education "specials" at School A PCS. Indeed, there is nothing in the record to establish that the Student has ever had any significant issues in general education "specials" in his/her school history. Nor is there any evidence in the record to suggest that the "specials" at School C are chaotic or poorly run, or that they involve work in any academic areas such as reading, writing, or mathematics.

Witness A also testified that that the Student would have trouble with multi-step directions in "specials," lunch, and recess. But Witness A's testimony lacked foundation, at least to an extent, since she did not observe any of the "specials," "lunch" or "recess" periods and did not share any specific information about the nature of the "specials," lunch and recess at School C. Witness F, on the other hand, works at School C and is an expert in speech-language pathology and programming and placement as it relates to speech-language pathology. This witness credibly testified that the Student's language issues were not so severe that they would be a bar to instruction in School C's "specials."

Witness A's testimony also sidestepped the sections of the IEP that were meant to address the Student's issues in "specials," lunch and recess. The "Other Classroom Aids and Services" listed in the IEP were written to assist the Student in the general education

(and special education) setting, including preferential seating, access to visual schedules, and sensory strategies. The IEP also contained a requirement for “location with minimal distractions,” which should have protected the Student from a large class with children who were excessively loud or distracting. The IEP also included a requirement for 240 minutes per month of speech-language pathology and 240 minutes per month of occupational therapy, together with sixty minutes per month of speech-language pathology consultation and thirty minutes per month of occupational therapy consultation. As Witness F suggested, the related services were also intended to help the Student in the general education, as well as the special education, environment.

Petitioners’ argument also did not consider that the Student benefitted from his/her interactions with non-disabled peers at School A PCS. This was the testimony of both an occupational therapist and a teacher at an earlier hearing before Hearing Officer Vaden,³ where the teacher stated that the Student was “a child who thrives from learning from [his/her] peers, who learns so much just from watching [his/her] peers and being a part of the interactive learning structures that happen in the classroom.” R-24 at 91, 94. As in Jackson v. District of Columbia, No. CV 19-197 TJK/DAR, 2020 WL 3318034, at *14 (D.D.C. June 2, 2020), report and recommendation adopted, No. CV 19-197 (TJK/DAR), 2020 WL 3298538 (D.D.C. June 18, 2020), where a parent wanted full-time special education instruction for a student who was placed outside general education

³In their briefs, the parties devoted considerable time to Respondent’s contention that Hearing Officer Vaden’s decision on remand, corresponding to the 2018-2019 school year, should control the decision of this Hearing Officer for the 2019-2020 school year. However, Respondent provided no support for this position, which is without merit, as HODs have no binding precedential value. While this Hearing Officer has considered evidence that was also available to Hearing Officer Vaden, the text of his decision on remand has no bearing on this HOD.

81.54% of the time but spent “specials,” lunch, and recess with nondisabled peers, Petitioners could not explain how the district could have comported with the least restrictive environment requirement “[t]o the maximum extent possible” by writing an IEP that required “total isolation from nondisabled peers.” 20 U.S.C. Sect. 1412(a)(5)(A). Accordingly, this Hearing Officer agrees with Respondent that the Student’s IEP correctly recommended twenty hours per week of specialized instruction outside general education.

Witness A and Witness B also testified that the Student needed an IEP that was more specific in terms of his/her reading program. Parents do not ordinarily have the right to dictate to school districts which instructional methodologies to use. The U.S. Department of Education has stated that “there is nothing in the [IDEA] that requires an IEP to include specific instructional methodologies.” 71 Fed. Reg. 46,665 (2006). As the Court stated: “once a court determines that the requirements of the Act have been met, questions of methodology are for resolution by the States.” Rowley 458 U.S. at 208; see also Fairfax Cty. Sch. Bd. v. Knight, No. 1:05CV1472 (LMB), 2006 WL 6209927, at *8 (E.D. Va. Aug. 23, 2006), aff’d, 261 F. App’x 606 (4th Cir. 2008) (“it is not the place of this Court to pass upon the relative merits of educational theories and methodologies”); S.M. v. Hawai’i Dep’t of Educ., 808 F. Supp. 2d 1269, 1278 (D. Haw. 2011) (IEP did not specifically need to require the ABA methodology).

As Petitioners noted, the commentary to the 1999 IDEA regulations does give hearing officers some leeway to require a methodology on an IEP where “there are circumstances in which the particular teaching methodology that will be used is an integral part of what is ‘individualized’ about a student’s education” and “will need to be

discussed at the IEP meeting and incorporated into the student's IEP." Fed. Reg. Vol. 64, No. 48 (March 12, 1999) at 12552. The commentary explained that, "(f)or a child with a learning disability who has not learned to read using traditional instructional methods, an appropriate education may require some other instructional strategy." Id.

However, Petitioners do not claim the Student's IEP should have recommended a specific reading methodology. Petitioners' claim is instead that the IEP should have included a recommendation for an evidence-based literacy program. Witness G testified that the Wilson program, as used by School C, *is* such a program. None of Petitioners' witnesses testified that the Wilson program is not evidence-based or that there was any need for the Student's IEP to include a recommendation for an evidence-based literacy program. Witness B suggested that the Student currently needs a recommendation for Phono-Graphix on his/her IEP, and that the more demanding Wilson methodology has not worked for him/her because of its difficult mastery standards. But Petitioners only came to this position recently. Petitioners did not request that the Student receive instruction through the Phono-Graphix program at the IEP meeting on August 26, 2019. Indeed, School B appears to have used a different methodology for the Student's reading at the start of the 2019-2020 school year, since the School B IEP of May 8, 2019, made no mention of Phono-Graphix. Instead, the School B IEP referred to the Orton-Gillingham approach to reading, which is, ironically enough, a basis for the Wilson methodology according to Witness B.

Moreover, there is persuasive evidence that the Wilson methodology worked well for the Student when s/he was at School A PCS. As pointed out by the Student's special education teacher at School A PCS (R-24-72-74), the Student made consistent

meaningful progress on his/her reading goals during the 2017-2018 school year (for instance in word naming and letter sound). School A staff, in fact, amended the Student's IEP goals in October, 2017, to add rigor to the program. The teacher also testified that the Student progressed from level "B" to level "D" on the Fountas and Pinnell measure. R-24-73. I-Ready testing for the 2017-2018 school year also showed that the Student made progress under the Wilson program. The Student's beginning-of-year i-Ready score in literacy was 370, at the kindergarten level. This score jumped to 454, at early first grade level, in November, 2017, less than three months later. While the Student's score subsequently decreased to 409 (at the kindergarten level) in February, 2018, this regression was attributed to school breaks and testing length by the School A PCS psychologist. Under the circumstances, the record does not establish any need for DCPS to include additional language relating to evidence-based literacy interventions on the Student's August 26, 2019, IEP.

Petitioners also argued that Respondent did not meet its burden of persuasion because the IEP team did not include any DCPS staff that knew the Student personally. Petitioners pointed out that the only people at the IEP meeting who knew the Student were the Petitioners. However, Petitioners did not consider the context of the August 26, 2019, IEP meeting in their analysis. Because Petitioners first sought intervention from DCPS on July 8, 2019, DCPS was not given much time to explore the Student's issues in greater detail. Moreover, the Student, who was new to DCPS, had recently been comprehensively evaluated by School A PCS through psychological, occupational therapy, and speech-language pathology assessments. Those assessments were available to the IEP team at the time of the IEP meeting. Respondent also had no way to observe

the Student because it was never told that the Student was attending summer school at School B.

Petitioners also argued that Witness H, in drafting the Student's IEP for the 2019-2020 school year, was wrong to focus on the earlier program at School A PCS.

Petitioners suggested that a student's needs change from year to year, and that it was inappropriate for Respondent to base so many conclusions on documents describing the Student's performance from the 2017-2018 school year instead of the 2018-2019 school year. However, as already noted in this HOD, the available documentation suggested that School A PCS's program for the Student was effective for him/her. In fact, the Student's reading scores increased more at School A PCS in the 2017-2018 school year than they did at School B in the 2018-2019 school year.⁴ It was therefore reasonable for Respondent to create a program similar to the program at School A PCS, particularly since School A PCS uses the same reading program as the school that Respondent ultimately proposed for the Student at School C. As a result of the foregoing, this Hearing Officer finds that the IEP dated August 26, 2019, was formulated in accordance with the requirements of the IDEA and conveyed meaningful educational benefit to the Student. Petitioners' claim of FAPE denial based on the August 26, 2019, IEP must be denied.

⁴The Student's performance at School B during the 2018-2019 school year was mixed. Witness A did not testify that the Student made impressive progress once s/he moved to School B in August, 2018. Instead, Witness A testified that the Student progressed in some areas and regressed in others, and Witness B testified that she would have liked the Student to have progressed faster. Indeed, the Student's reading level did not progress at all during the 2018-2019 school year; as Witness B noted, the Student began that school year at "pre-primer level 1" and ended the school year at the same level.

2. Did Respondent fail to offer the Student an appropriate placement/school for the 2019-2020 school year? If so, did Respondent act in contravention of 34 C.F.R. Sect. 300.116, related laws and provisions, and the principles articulated in cases such as Gellert v. District of Columbia, 435 F. Supp. 2d 18 (D.D.C. 2006)? If so, did Respondent deny the Student a FAPE?

Petitioners contended that School C did not offer the Student multi-sensory instruction (i.e., instruction broken down and/or paired with visuals); instead, they contended, School C's instruction was too focused on expressive and receptive language skills. Petitioners also contended that School C did not offer the Student evidence-based interventions in literacy, classes with appropriate groups of other students, and classes with appropriate sizes and student-to-teacher ratios.

One of a hearing officer's primary responsibilities is to determine if a student's IEP is reasonably calculated to enable the child to receive additional benefits. Rowley, 458 U.S. at 176. Most due process claims therefore relate to the IEP, the "centerpiece" of the Act. Honig v. Doe, 484 U.S. 305, 311 (1988). Nevertheless, petitioners may bring claims based upon an inappropriate placement in certain situations, even if the school placement can implement the student's IEP. Gellert, 435 F. Supp. 2d at 18; Holmes v. District of Columbia, 680 F. Supp. 40 (D.D.C. 1988); 34 C.F.R. Sect. 300.116. Courts accordingly rule that placements can violate the IDEA if the assigned school contains an environment that allows bullying. Shore Regional High School Board of Education v. P.S., 381 F.3d 194 (3d Cir. 2004) (placement would subject a student with an emotional disability to continued bullying); M.L. v. Federal Way School District, 394 F.3d 634 (9th Cir. 2005) (if the abuse is so severe that the child can derive no benefit from the services that he or she is offered by the school district, the child has been denied a FAPE).

Most of these issues have already been addressed in this HOD⁵ or were abandoned by Petitioners during closing argument.⁶ The main remaining claim involves the peer grouping that would have been provided for the Student at School C.

Petitioners contended that Respondent would have grouped the Student in classes that contained too many older children. The Mother's email of September 18, 2019 also mentioned these claims, and Witness A reiterated them in her report of December 4, 2019.

Witness A's December 4, 2019 report indicated that seventy-two percent of the students in the proposed SLS special education class were older than the Student. The report also indicated that the children assigned to the SLS class would attend "specials," including lunch and recess, with older general education students, so an even greater percentage of children would be older than the Student during those "specials." Witness A's report indicated that this would be a "concern" for the Student, and her testimony added that the Student's low academic levels would make this problem all the worse.

⁵The contentions relating to evidence-based literacy interventions, class size and student-teacher ratios at School C are addressed in the section of this HOD concerning Issue #1.

⁶In their closing brief, Petitioners did not mention their claim that School C failed to offer the Student any multi-sensory instruction or evidence-based instruction and instead offered instruction that was too focused on the Student's expressive and receptive skills. In fact, Witness G made clear that the school offers instruction through the Wilson program, a multi-sensory program that is an evidence-based intervention. Witness G testified that four teachers at School C are trained to teach this program, including the teacher who would have been assigned to the Student for the 2019-2020 school year. Nor did Petitioners' brief contend that the Student would have been denied a FAPE had s/he been assigned to a class that mostly included children of the opposite sex. In fact, none of Petitioners' witnesses clearly contended that the Student's assignment to School C was inappropriate on this basis. Nor is this Hearing Officer aware of any caselaw, in any jurisdiction, sustaining a parent's contention that a student can be denied a FAPE because an assigned classroom contained too many members of the opposite sex.

However, Witness A did not specifically connect this issue to the Student's academic functioning or school day. Unlike in Gellert or Shore Regional High School Board of Education, there is no evidence that the Student's classroom would be hectic or that the Student would be subject to bullying at School C. Nor did Witness A point to anything in the record to suggest that the Student is particularly susceptible to older students, or that the older students in the subject SLS classroom are particularly unruly. The evidence instead suggests that the Student would be able to cope with the older students in his/her classes. The Student eagerly talks to peers and has been characterized as a "social butterfly" by staff at School A PCS. R-24-90. There is no clear reason to believe that the program at School C is inappropriate for the Student because there would be older students in the Student's classrooms.

Finally, Petitioners pointed to a "School Report Card" from DCPS indicating that School C was a low-performing school. Petitioners appear to suggest that the children at School C are difficult to educate and could be difficult to manage, especially in a large classroom setting. However, Petitioners did not point to any authority to suggest that such speculation should result in a finding of FAPE denial in a case involving an otherwise appropriate IEP and placement. It is noted that recent caselaw in the District of Columbia reiterates that the main inquiry with respect to a school assignment is whether the school can implement a student's IEP. As stated in 2019 by Judge Rosemary Collyer: "(t)he benchmark under IDEA for determining the appropriateness of a student's educational placement is that DCPS must place the student in a setting that is capable of fulfilling the student's IEP." R.B. v. District of Columbia, No. CV 18-662 (RMC), 2019

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WL 4750410, at *12 (D.D.C. Sept. 30, 2019) (citing Johnson v. District of Columbia, 962 F. Supp. 2d 263, 267 (D.D.C. 2013)). Petitioners' claim must therefore be dismissed.

VII. Order

As a result of the foregoing, this case is hereby dismissed with prejudice.

Dated: August 24, 2020

Michael Lazan
Impartial Hearing Officer

cc: Office of Dispute Resolution
Attorney A, Esq.
Attorney B, Esq.
Attorney C, Esq.
OSSE Division of Specialized Education
[REDACTED]/DCPS
[REDACTED]/DCPS

VIII. Notice of Appeal Rights

This is the final administrative decision in this matter. Any party aggrieved by this Hearing Officer Determination may bring a civil action in any state court of competent jurisdiction or in a District Court of the United States without regard to the amount in controversy within ninety (90) days from the date of the Hearing Officer Determination in accordance with 20 U.S.C. Sect 1415(i).

Dated: August 24, 2020
Corrected: August 25, 2020

Michael Lazan
Impartial Hearing Officer