

District of Columbia
Office of the State Superintendent of Education
Office of Dispute Resolution
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Confidential

Parents on behalf of Student¹)	Case No. 2021-0026
)	
Petitioner,)	Hearing Dates: July 28-29, 2021
)	
v.)	Conducted by Video Conference
)	
District of Columbia Public Schools,)	Date Issued: August 23, 2021
)	
Respondent.)	Terry Michael Banks,
)	Hearing Officer

HEARING OFFICER DETERMINATION

INTRODUCTION

Petitioners are the parents of an X-old student (“Student”) attending School A. On March 11, 2021, Petitioners filed a *Due Process Complaint Notice* (“*Complaint*”) alleging that the District of Columbia Public Schools (“DCPS”) denied the student a free appropriate public education (“FAPE”) by failing to provide an appropriate Individualized Education Program (“IEP”) and placement for the 2020-21 school year. DCPS filed *District of Columbia Public Schools’ Supplemental Response* (“*Response*”) on March 26, 2021, denying that it had failed to provide a FAPE in any way.

SUBJECT MATTER JURISDICTION

This due process hearing was held, and a decision in this matter is being rendered, pursuant to the Individuals with Disabilities Education Improvement Act (“IDEIA”), 20 U.S.C. Section 1400 *et seq.*, its implementing regulations, 34 C.F.R. Sect. 300 *et seq.*, Title

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

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

PROCEDURAL HISTORY

Petitioner filed the *Complaint* on March 11, 2021 alleging that DCPS denied Student a FAPE by failing to provide an appropriate IEP and placement for the 2020-21 school year. DCPS filed its *Response* on March 26, 2021 and asserted that (1) the IEP team met on February 24, 2020 and proposed an IEP that prescribed 30.5 hours of specialized instruction outside of general education, and 60 minutes each of occupational therapy (“OT”) and behavior support services (“BSS”) along with Classroom Accommodations, and Other Aids and Supports, (2) Petitioners participated fully in the IEP team meeting, (3) DCPS placed Student at School A, (4) the IEP team met again on January 11, 2021 and proposed an IEP that prescribed 30.5 hours of specialized instruction outside of general education, and 60 minutes each of occupational therapy (“OT”) and behavior support services (“BSS”) along with additional Classroom Accommodations, and Other Aids and Supports, (5) Petitioners participated fully in the IEP team meeting, and (6) DCPS has provided Student an appropriate IEP and placement for the 2020-21 school year.

The parties participated in a resolution meeting on March. 24, 2021 that did not result in a settlement. The resolution period ended on April 10, 2021. A prehearing conference was conducted by video conference on April 15, 2021, and an Amended Prehearing Order was issued on April 20, 2021.

The hearing was conducted on July 28-29, 2021 by video conference and was closed to the public. Respondent’s *Disclosure Statement*, filed July 7, 2021, contained a witness list of four witnesses and including Respondent DCPS’ Exhibits R-1 through R-12. Petitioner filed objections on July 13, 2021 to DCPS’ Exhibits R4, R6-R8, and R10 on grounds of Lack of Authentication. Petitioners also objected to expert testimony from Witness G, as he was not designated as an expert in Respondent’s *Disclosure*. Petitioners’ objections to DCPS’ exhibits were overruled, and Respondent’s Exhibits R1-R12 were admitted into evidence at the opening of Respondent’s direct case.

Petitioner’s Disclosures were also submitted on July 7, 2021, containing a witness list of five witnesses, and documents P1-P57. Petitioner later filed a supplemental disclosure on July 21, 2021, adding P58. DCPS filed objections to the original disclosure on July 12, 2021, and to the supplemental on July 26, 2021, on the grounds that supplemental disclosures for the hearing that had been continued were not specifically authorized. DCPS objected to expert testimony from Witness A and Witness C on grounds of hearsay, relevance and their resumes did not support expert designations. DCPS objected to the expert designation of Witness B on the grounds that her resume did not support the expert designation and has demonstrated bias. I overruled the objections to the expert qualifications of the three witnesses and as to the preclusion of testimony from Witness B on grounds of bias.

DCPS also objected to P6, 33, 34, 39, 47-52, and P57 on the basis of hearsay, relevance, and authentication, as to P33 that it contains opinions of counsel, and as to P48, that it contains opinions of a non-disclosed witness. I overruled objections to P6, P33, P34,

P47, P50, P52, P57, and P58. Thus, Petitioners' Exhibits P1-P47, and P50, P51 (except pages P51:3-7), and P52 - P58 were admitted into evidence.

Petitioner presented as witnesses in chronological order: Petitioner/mother, Witness A, Witness B, Witness C, and Petitioner/mother. Petitioner offered Witness A as an expert in Psychology, Witness B as an expert in Psychology, and Witness C was offered as an expert in Behavioral Programming and Social Education for Educationally Disabled Students, and I allowed opinion testimony from each of these witnesses. Respondent presented as witnesses in chronological order: Witness D, Witness E, Witness F, and Witness G. Witness D was offered as expert in Psychology, and Witness E and Witness F were offered as experts in Special Education Programming and Placement. Petitioner did not object to these witnesses' qualifications, and I allowed each to offer opinion testimony in their respective areas of expertise. Witness G was not allowed to give opinion testimony as he was not designated as an expert in Respondent's *Disclosure Statement*. Nevertheless, he was allowed to give the reasons, including the opinions of members of the IEP team, for decisions he made on behalf of DCPS. Petitioner/mother offered rebuttal testimony at the conclusion of Respondent's direct case.

After the close of testimony on July 29, 2021, I authorized counsel to file written closing statements on or before August 2, 2021. On August 1, 2021, I was notified by Petitioners' Attorney C that Attorney A was ill and would not be able to comply with this filing deadline. On August 2, 2021, I tolled the deadline to file the closing statements and subsequently set a new deadline of August 9, 2021. The parties filed written closing statements on August 9, 2021.

ISSUES

As identified in the *Complaint* and the *Amended Prehearing Order*, the issues to be determined in this case is as follows: whether DCPS denied Student a FAPE by failing to provide an appropriate IEP and placement for the 2020-21 school year. The IEP was inappropriate primarily for failing to prescribe a setting in a residential facility and for failing to ensure the consistent collection of behavior data regarding Student.

FINDINGS OF FACT

1. Student is X years old and was in grade D at School A during the 2020-2021 school year.² School A is a nonpublic special education day school that provides special education services to students with emotional and behavioral disabilities and other related disorders.³

2. On September 18, 2017, when Student was in grade C at School B, DCPS completed a Psychological Triennial Reevaluation. Student was receiving services as a

² Petitioner's Exhibit ("P:") 38 at page 1, electronic page 641. The exhibit number and page are followed by the electronic page number in the disclosure in parentheses, i.e., P38:1 (641).

³ P15:3 (195).

student with a Developmental Delay (“DD”).⁴ S/he had a prior diagnosis of Attention Deficit Hyperactivity Disorder (“ADHD”) for which s/he was prescribed medication. Student was originally identified as eligible for services due to aggression, inattention, self-regulation issues, sensory processing, social skills, and anxiety.⁵ On the Wechsler Intelligence Scale for Children (“WISC-V”), Student’s full scale IQ (93) was in the Average range, as s/he was in all other subtests but the Verbal Comprehension Index (“VCI”), in which s/he scored (84) in the Low Average range.⁶ On the Woodcock-Johnson Tests of Achievement (“WJ-IV”), Student’s subtests ranged from Average in Sentence Reading Fluency, Passage Comprehension, Calculation, Applied Problems, and Spelling, to High Average in Letter-Word Identification and Writing Samples, to Superior in Word Attack.⁷ On the Behavior Assessment System for Children (“BASC-3”) and the Conners Behavior Assessment System (“Conners-3”), Student’s teachers’ scores reflected clinically significant elevations in aggression and conduct problems, and at-risk ratings in hyperactivity and adaptability.⁸ On the Conners, scores were elevated for inattention, hyperactivity/impulsivity, and defiance/aggression. Examiner A concluded that Student required services to address ADHD symptoms:

Academically, [Student’s] performance on the WJ-IV: ACH and WJ-IV: OL suggests at age and grade level functioning in the areas of sight word recognition, decoding, reading fluency, reading comprehension, math calculation, applied math, spelling, written expression, oral expression, and listening comprehension. Thus, at this time [Student] does not exhibit any academic skill deficits based upon [his/her] performance... However, a recent classroom based assessment, Fountas and Pinnell, conducted in second grade, suggest that [s/he] would benefit from support in the area of inferential reading comprehension.

Behavior and social-emotional functioning data gathered via social and developmental history, interviews, previous evaluations, observations, standardized rating scales such as the BASC-3 and Conners-3 suggest that [Student] is a sweet-natured youngster who nonetheless appears to demonstrate symptoms consistent with a student with Attention Deficit Hyperactivity Disorder, Predominately Inattentive Presentation coupled with anxiety and sensory processing weaknesses.⁹

3. Student’s final grades for the 2017-18 school year were as follows: Basic in Reading, Writing & Language, Math, Music, and World Languages, Proficient in Speaking and Listening, Social Studies, and Health & Physical Education, and Advanced in Art. Student needed frequent prompting to comply in five of the twelve behavioral categories.¹⁰

4. Student was admitted as an inpatient to Facility A from October 2, 2018

⁴ P2:1 (15).

⁵ *Id.* at 3-4 (17-18).

⁶ *Id.* at 9 (23).

⁷ *Id.* at 14 (28).

⁸ *Id.* at 16 (30).

⁹ *Id.* at 19-20 (33-34).

¹⁰ P5:1 (61).

through October 31, 2018. Thereafter, s/he entered a partial hospitalization program at Facility A. S/he was diagnosed with ADHD and an Unspecified Mood Disorder. Upon discharge, Facility A recommended a more restrictive educational setting for Student:

During individual, group and family therapy, [Student] is easily agitated and irritable with staff, peers, and family. [Student] continues to require prompts from adults to use identified coping strategies; [s/he] is unable to use them independently. [Student] does best when given choices and visual representation of materials as opposed to verbal representations. Additionally, [Student] is still unable to maintain focus during groups and family session without continuous prompts from staff concerning expectations... [Student] is often unable to focus on tasks and it has been observed that [s/he] requires redirection every five minutes.

[Student] has demonstrated that [s/he] requires increased adult support to remain on task and maintain safety levels, both individually and in a group setting. It is the recommendation of the treatment team that [Student] receive significant modifications to [his/her] instructional program. This should include a therapeutic classroom setting for [his/her] entire school day in order to access grade level content in [his/her] Least Restrictive Environment.¹¹

5. In February 2019, Petitioners enrolled Student in grade F¹² at School A.¹³ S/he was placed a grade A/D classroom in July 2019, with two other students, a special education teacher, and an educational assistant. On July 8, 2019, School A issued an Educational Update, reporting on Student's progress:

In all academic areas, [Student] has shown difficulty in working independently and completing [her/his] assigned work without frequent prompting to stay on task. During independent work, [Student] is frequently observed choosing answers at random, and skipping over large sections of

In Reading, an assessment on May 30, 2019 placed her/him in the 11th percentile, with a grade C equivalence, one grade below grade F. In Math, Student testing level placed her/him at the ninth month of grade C.¹⁴

6. A synopsis of School A's reports on Student's maladaptive behaviors from February 7, 2019 through March 11, 2021 is found in Attachment A.

7. On July 12, 2019, School A issued a Social Emotional Update.¹⁵ "Since [his/her] admittance to [School A], [Student's] target behaviors have included inappropriate language, impolite interactions, leaving [his/her] location, not following directions, disruptive behaviors, and physical aggression. These behaviors are generally attention

¹¹ P6:1 (65).

¹² P10:1 (145).

¹³ P15:3 (195); P24:1 (387).

¹⁴ *Id.* at 2 (158). *See also*, 2018-19 Report Card at P10:1 (145).

¹⁵ P12:1 (159).

seeking or the result of impulsivity. There was also one incident involving sexually inappropriate behavior with a peer, however, there has not been any sign of such behavior since.¹⁶ [Student] also shows extreme difficulty with attending to tasks as [s/he] is easily distracted both by external factors as well as internal thoughts or stimuli. Since [his/her] admittance, [Student] has needed to be separated from [his/her] peers on a number of occasions due to the level of disruption [her/his] behavior is causing in the classroom. Much of [his/her] behavior seems to be focused on receiving the attention of a particular peer...¹⁷

8. Student's teacher, Teacher B, served her last day at School A on July 26, 2019. She was replaced by Teacher C, who had been a substitute at School A for about a year.¹⁸

9. On October 1, 2019, when Student was in grade A at School A, Witness D completed a Comprehensive Psychological Reevaluation. The evaluation was conducted to determine if Student's classification remained appropriate. "Record review reveals a longstanding history of behavioral/emotional problems to include physical and verbal aggression, anxiety, elopement, and problems with self-regulation, attention, sensory processing, and appropriate social interaction with peers and adults. These problems continue with increased concern for anxiety, elopement, disruptive behaviors, and off-task behaviors. Moreover, by school report, [Student] is most times unavailable for learning though [s/he] is said to be more than capable of accessing the curriculum and completing assignments.¹⁹ Witness D reported Student's history of having been adopted at birth by Petitioners; Student is African-American, while Petitioners are Caucasian. The family lived in Ottawa, Canada until Student was 22 months old, then moved to Kingston, Jamaica in August 2011. The family relocated to Washington, D.C. in August 2014, and Student enrolled in School C. After Student exhibited "challenging behaviors" there, Petitioners moved him/her to School D in December 2014 for grade M. Petitioners enrolled Student in School B for grade H in the fall of 2015. There s/he was found eligible for services for DD. Two years later, his/her classification was changed to Other Health Impairment ("OHI") to address his/her ADHD symptoms. In February 2019, Petitioners enrolled Student at School A.²⁰ Student's partial hospitalization at Dominion Hospital was from November 2018 through January 2019. S/he is prescribed Intuniv, Olanzapin, Lithium, and Seroquel.²¹

On the WISC-V, Student's full-scale IQ (83) was Low Average, and her/his Fluid Reasoning (79) was Very Low, but her/his Verbal Comprehension Index (106) and General Ability Index ("GAI"; 95) were Average. Witness D attributed the difference in IQ and GAI to weaknesses in working memory and processing speed.²² The results of testing for academic achievement on the WJ-IV were not available.²³ His/her final grades for the 2018-19 school year included Secure in Reading, Art, and Speaking & Listening, and Developing in Writing, Mathematics, Social Studies, and Health & Physical Education.²⁴ On the Conners-3, the

¹⁶ See P9:1 (143).

¹⁷ P12:1 (159).

¹⁸ P18:11, 14, 18(263, 266, 270).

¹⁹ P15:1 (193).

²⁰ *Id.* at 3 (195).

²¹ *Id.* at 19 (209).

²² *Id.* at 9-11 (201-03).

²³ *Id.* at 11 (203).

²⁴ *Id.* at 12 (204).

scores reflected clinical significance in Inattention, Hyperactivity/Impulsivity, Executive Functioning, Defiance/Aggression, and Peer Relations.²⁵ On the BASC-3, his/her teacher's responses led to Clinically Significant scores in Aggression, Conduct Problems, and Depression, and At-Risk scores in Hyperactivity, Anxiety, and Somatization. Petitioners' scores were Clinically Significant in Aggression and Conduct Problems, and At-Risk in Anxiety, Hyperactivity, Depression, Attention Problems, Somatization, and Adaptability.²⁶ Witness D concluded that Student required a change in classification:

In summary, while [Student] certainly presents with symptoms typically associated with ADHD, [Student's] profile primarily reflects the impact of significant emotional distress (anxiety and depression). Moreover, it appears that [Student's] ability to effectively access [her/his] intellectual abilities and be available for learning is greatly compromised by these difficulties. In consideration of the above findings, [Student] appears to meet the criteria for a disability classification of Emotional Disturbance...

In terms of behavioral support, [Student] continues to need ongoing help to improve [her/his] social skills and [his/her] coping skills. In addition, [Student] will most likely benefit from a clear, consistent behavioral plan. [Student's] plan should include a provision for when [s/he] needs time to cool down and modulate [her/his] reactions...²⁷

10. On October 14, 2019, Witness A completed a Psychological Evaluation of Student at the request of Petitioners and Witness B, their educational consultant.²⁸ Student's current medications were guanfacine, olanzapine, lithium, and Seroquel. Witness A explained Student's inner turmoil regarding her/his adoption and adoptive family:

[Student] knows that [her/his] birth mother chose [her/his] parents for [her/him] prior to [his/her] birth. [Student] visited [her/his] birth parents when [s/he] was 7 months old when [Student's] family was in South Carolina to finalize the adoption. [Student] has photos from when [his/her] parents first met [her/his] birth parents, and from that time as well. [Student] is aware that the adoption plan was made because [her/his] birth mother feared she would not be able to care for [him/her] in the way she wanted to do. However, [Student] also knows that [his/her] birth mother has three older half-siblings, and one full-sibling who is eighteen months younger than [her/him]. [Student] knows that [her/his] birth mother chose to parent these other children. [Student's] birth mother may also have another young child. [Student's] birth mother stopped engaging in contact with the family when [Student] was around 3 years old, at about the same time [his/her] brother was born. [Student] reportedly loved [her/his] brother, but demonstrated typical jealousy. When [Student's] behavior became extreme about 18 months ago, [s/he] spoke a lot about [his/her] birth mother. [Student] would say that she

²⁵ *Id.* at 13 (205).

²⁶ *Id.* at 14-15 (206-07).

²⁷ *Id.* at 17 (209).

²⁸ P16:1 (213).

was better than [her/his] current family, and that it was bad that [s/he] was black while they were white. [Student] regularly spoke about [her/his] birth mother and fantasized about living with her. [S/he] reportedly concocted detailed stories about [her/his] life with [her/his] birth family. At the same time, [s/he] lashed out, utilizing racist language against [his/her] family. [Student] asked every member of [her/his] extended family if they felt [s/he] was part of the family. [Student's] parents feel [Student] began to recognize that in choosing [Petitioners], [Student's] birth mother also gave [her/him] up. Now, though [Student] mentions [his/her] siblings in South Carolina, [s/he] is reportedly less negative and [her/his] focus on race has diminished...²⁹

[Student] shared that [her/his] family is "very nice." [S/he] indicated that [s/he] gets along with [her/his] parents. When asked about [her/his] adoption, [Student] described feeling "kinda sad." [S/he] stated that [s/he] wants to be with [her/his] other family. [Student] indicated that [s/he] knows them "a little." [Student] shared that it is really hard because [s/he] thinks about them a lot. [S/he] noted that they have "like eight kids already..." [Student] explained that [s/he] sometimes thinks of hurting ██████ (e.g., hitting ██████) to receive care from others. [S/he] indicated that [s/he] feels others do not care about [her/him], except [her/his] mother, father, brother, and kids from [his/her] old school. [S/he] then specifically stated that kids at [School A] do not care about [her/him]...³⁰

Witness A interviewed the following individuals to get their impressions of Student: Witness B, Psychiatrist A, Social Worker A, Social Worker B, Teacher A, and Witness F.³¹ Witness A measured Student's Attention, Executive Functioning, and Behavior using the Behavior Rating Inventory of Executive Function ("BRIEF-2"), the Developmental Neuropsychological Assessment ("NEPSY-II"), the Delis-Kaplan Executive Functioning System ("D-KEFS"), and the Test of Variables of Attention ("TOVA"). On the TOVA, Student evinced "severe distractibility," and his/her overall performance was "suggestive of attentional difficulties," possible hyperactivity, or possible underlying neurological impairment.³² Her/his performance on the K-DEFS "indicates poor cognitive flexibility, impulsivity, inattention, difficulty self-monitoring, and difficulty following multi-step directions."³³ On the BRIEF-2, Petitioners rated Student as Very Elevated for overall Behavior Regulation, Emotion Regulation, Cognitive Regulation, and Global Executive Skills, and Elevated for Self-Monitor. Student's teacher rated him/her Very Elevated overall for Cognitive Regulation and High Average for Working Memory and Organization of Materials.³⁴

Witness A analyzed Student's emotional functioning, personality, thinking, and coping skills with the Millon Pre-Adolescent Clinical Inventory ("M-PACI") and the Multidimensional Anxiety Scale for Children ("MASC-2"), and Petitioners completed the

²⁹ *Id.* at 2-3 (214-15).

³⁰ *Id.* at 4 (216).

³¹ *Id.* at 5-7 (217-19).

³² *Id.* at 10 (222).

³³ *Id.* at 11 (223).

³⁴ *Id.*

Child Mania Rating Scale (“CMRS”). On the CMRS, the parents’ ratings were more consistent with ADHD than mania, but Witness A noted that Student was on medication. On the MASC-2, Student rated him/herself as Very Elevated for Tense/Restless, as Elevated for Physical Symptoms and Panic, as Slightly Elevated for Separation Anxiety/Phobias, Social Anxiety, and Performance Fears, and High Average for Generalized Anxiety, Humiliation/Rejection, and overall. Petitioners rated her/him as Very Elevated overall, as well as for Separation Anxiety/Phobias, Generalized Anxiety, Physical Symptoms, Panic, and Tense/Restless, Elevated for Humiliation/Rejection, and as Slightly Elevated for Social Anxiety and Obsessions and Compulsions.³⁵ Student’s M-PACI scores suggest “[s/he] is highly conflicted about independence and dependence. [S/he] is searching for [her/his] identity. [Student] seems ambivalent about [her/his] dependency needs, and is likely to go back and forth between cooperating and being compliant, and asserting [his/her] autonomy. [Student’s] M-PACI is consistent with the instability [s/he] demonstrate both emotionally and socially...[Student] does not feel a sense of control, and [s/he] does not know how to regulate [his/her] behaviors. As such, [Student] rarely recognizes both the causes and effects of [his/her] actions. [S/he] acts on impulse, leading to problematic behaviors and interactions that create a negative cycle... [Student’s] M-PACI indicates that [s/he] experiences symptoms of depression and anxiety. [S/he] is self-pitying, and [s/he] unwittingly undermines the good things in [her/his] life. Given these feelings and experiences, [Student] tends to seek reassurance from others, and [s/he] deeply fears separation from those who provide support...”³⁶

This data supports the understanding that [Student’s] attachments are highly disordered. While [s/he] does not meet full criteria for a specific attachment disorder, [s/he] displays symptoms of both Reactive Attachment Disorder... and Disinhibited Social Engagement Disorder... [Student’s] attachments are highly insecure. [S/he] deeply fears abandonment. Despite [her/his] adoption a day after [her/his] birth, [Student] feels deeply wounded by the loss of [her/his] birth family. [S/he] feels deeply rejected, especially because [s/he] knows [his/her] birth mother kept her other children... This is deeply confusing and painful for [Student]. Given this, while [s/he] loves and appreciates [his/her] family, [s/he] fantasizes about the life [s/he] might have had with [her/his] birth family...

[Student’s] sense of self and fear of abandonment is consistent with those of a traumatized child. Despite all [his/her] parents have done to help [him/her] feel steady and safe, [Student] is traumatized by the loss of [her/his] birth family and the related rejection [s/he] feels. [Student] is extremely fragile. [S/he] can quickly go from seemingly stable, to seemingly unstable...”³⁷

Witness A diagnosed Student with Post-Traumatic Stress Disorder, Pediatric Bipolar Disorder, Anxiety Disorder, and ADHD:

³⁵ *Id.* at 13-14 (225-26).

³⁶ *Id.* at 15 (227).

³⁷ *Id.* at 16 (228).

Though [s/he] has a high level of familial support, [Student] continues to fear [s/he] will be abandoned again. [S/he] also has general fears about being harmed. [Student's] adoption trauma presents as a form of Post-Traumatic Stress Disorder... [Student] escapes to fantasy, imagining and creating a life with [his/her] birth family, while sometimes rejecting and lashing out at [her/his] family whom [s/he] loves and deeply needs...

[Student] was previously diagnose with Pediatric Bipolar Disorder (PBD)..., and [s/he] is medicated for it. History and underlying emotional data suggest the ongoing presence of this diagnosis, though it is important to understand [Student's] PBD in the context of [her/his] trauma and attachment disorder... [Student] also meets criteria for a secondary diagnosis of Anxiety Disorder, Unspecified... [Student] experiences specific fears along with the significant social fear inherent in this trauma and attachment symptoms. Student has come to experience significant social and performance anxiety due to fear of judgment. [Student] experiences feelings of low self-worth, and tends to be self-deprecating. As mentioned, [s/he] tended to rely on "fight" or "flight" reaction to cope with stress.

Although symptoms of ADHD and mania frequently overlap, and while ADHD symptoms are common in trauma, [Student] additionally meets criteria for a diagnosis of Attention-Deficit Hyperactivity Disorder, Combined Type... with related executive functioning weaknesses. [Student] struggles in both high and low arousal situations. [S/he] struggles with inattention, distractibility, impulsivity, and hyperactivity. [Student] struggles to sit still, to focus [her/his] attention, thoughts, and conversation, and to inhibit [her/his] feelings and behaviors... [Student] struggles to follow multi-step directions, self-monitor for accuracy, and display cognitive flexibility. [S/he] requires a high level of redirection and repetition. [Student] displayed weaknesses in organization and planning. [Student] finds it extremely hard to sit still...[Student's] limited frustration tolerance and difficulty sustaining focus and motivation for challenging and boring tasks is also part of [her/his] ADHD.

... [Student's] difficulties have an educational impact. [Student] remains at risk for falling behind [her/his] peers. [S/he] requires significant support. [Student] must continue to educated in a very "considerate" environment. In a highly structured, nurturing, low stress inducing environment that includes safety and support measures, [Student] is most likely to reach [her/his] full potential. [Student] requires a small staff to student ratio, a positive behavior modification system, and social-emotional support within the day to day instruction. [Student] requires an environment that continues to support [her/his] intellectual strengths providing appropriate opportunities for learning, while also supporting [her/his] significant emotional needs, ensuring [her/his] (and [his/her] peers') safety, and providing the academic and ADHD support [s/he] requires. A highly therapeutic setting remains the least restrictive environment for [Student]...

[Student] requires small group attention and an emotionally supportive environment for students with learning and attentional needs. In a regular public school setting, and even in a traditional “ED” or “LD” classroom, [Student] remains highly likely to become emotionally overwhelmed, and therefore, to fail to participate/attend and too fall below grade level despite [his/her] intellect. The least restrictive environment recommended for [Student] remains a placement in a small, self-contained therapeutic school that is supportive, highly structured, and able to meet and support [Student’s] attentional, social-emotional, and behavioral needs as well. A therapeutic boarding school should be considered for [Student] if [his/her] needs cannot be met otherwise. However, this should be considered with great caution given [his/her] attachment/abandonment difficulties...³⁸

[Student] should continue to receive the following accommodations in the classroom and during formal, informal, and standard testing include: 50% extended time, advance notice of tests, preferential seating, flexible and multi-day testing, extra time for processing information, location of testing with minimal distractions, repetition of oral and written directions as needed, small group setting, and supervised movement breaks during testing.³⁹

11. On November 19, 2019, School A administered the WJ-IV to Student.⁴⁰ Student scored in the Average range in Reading, Basic Reading Skills, Written Language, Broad Written Language, Written Expression, Academic Skills, Academic Applications, and Brief Achievement. S/he scored in the Low Average range in Broad Reading, Mathematics, and Broad Achievement. S/he scored in the Low range in Reading Fluency, Broad Mathematics, Math Calculation Skills, and Academic Fluency.⁴¹

12. On January 2, 2020, Petitioner/father sent an email to Social Worker A and Witness F questioning School A’s capability to implement Student’s IEP:⁴²

It is not clear to us that [Teacher C] is following the BIP or the mandated accommodations in the IEP. [Student] only randomly receives homework, and written information about expectations, assignment instructions, and deadlines are not given to us and/or to [her/him] in writing except in random email “reminders,” which often mean we hear about it for the first time within a day or two of any deadline. Papers do not come home in any organized binder, folder, or method to help [her/him] keep track of anything. Folders we have given [her/him] to organize work have disappeared. If [s/he] does get a homework assignment, it is either poorly planned or has wildly unrealistic expectations and certainly do not meet any of the accommodations recommended by [Witness A]...⁴³

³⁸ *Id.* at 19-22 (231-34).

³⁹ *Id.* at 23 (235).

⁴⁰ P17:1 (245).

⁴¹ *Id.* at 2 (246).

⁴² P20:1 (309).

⁴³ *Id.* at 2 (310).

[Student] should have been able to recount to us what the instructions were and to take responsibility for [his/her] own work and actions. However, where [s/he] is right now, [s/he] can't. That's why [s/he] has academic supports and behavioral accommodations and we have no idea whether they are being followed because we have no information. Individually, these things may seem small, but together, we feel they are giving us a picture that makes us question [Teacher C's] abilities in the classroom and we are not certain about how well she is implementing the behavioral plan, providing [her/him] supports in the moment, or even following the basic level or accommodations – written instructions, organizers, in-class breaks, lined paper, etc. While we recognize [Student's] behavior may have deteriorated over this period, we feel the classroom environment under [Teacher C] is exacerbating the situation.

As things stand now, we are concerned that [Student] is not receiving the instruction and support [s/he] needs. Our feeling is not that the [School A] program is not working for [Student], but perhaps more that the [School A] program is not being consistently or properly implemented or that we don't have the right measures in place so we don't yet know if it will work for him...

We recognize that [School A] is having a hard time filling the teacher position and that [Teacher C] has agreed to stay until you find a permanent teacher. However, our discussion on December 13 makes us fear that the behavioral interventions that are in [Student's] BIP, outdated as it may be, are not being properly implemented. We realize it is a challenging classroom (and we understand how challenging [Student] can be), but it seems clear to us that [Teacher C] needs more behavioral support than she has been getting in her current role. Needed support includes helping her to consistently implement the behavior plan, especially when [Student] is agitated or disruptive, set clear expectations, and to routinely provide written as well as verbal instructions to [Student]...

We would like to receive consistent daily updates about social emotional behavior. While some days will be more challenging than others, we need more communication, not less. We also do not want to hear "I told [her/him] every day this week [s/he] was having a test" or "I told [her/him] that [s/he] can do better." We fear that these types of comments don't help someone with ADHD and low executive functioning, and could instead damage [his/her] already fragile self-esteem.

We would like [Student] to have a dedicated one-to-one aide in the classroom....

Finally, we really would like to see an improvement in the documentation we receive from [School A]. As [Witness B] stated during the meeting on December 13th, the packet of information we received had no updated behavioral data since July... We are beginning to have little faith in documents when there are consistent errors (like the fact that it took months to have the BIP and IEP reflect [her/his] mood disorder diagnosis or that the

current draft version of [her/his] IEP indicating [s/he] has seizures; [s/he] doesn't) or don't reflect current diagnoses or statements from professionals time and time again...⁴⁴

13. In January 2020, Petitioners retained Witness C, a behavioral expert, to develop a program to be implemented in the home to address Student's behavior.⁴⁵ The Home Behavior & Skills Program was provided to DCPS on January 22, 2021.⁴⁶ Witness C recommended that School A adopt the use of ABC Data forms to improve the documentation of Student's behavior in the classroom.⁴⁷

14. On February 14, 2020, School A developed a Behavior Intervention Plan ("BIP") for Student.⁴⁸ The targeted behaviors were aggression, inappropriate interactions, leaving his/her location, not following directions, disruptive behavior, and off-task behavior. The plan included eight pages of instructions to the staff to modify Student's behavior. Some aspects of the plan include, but are not limited to, the following: Establishing Behavioral Expectations – Student will be given verbal explanations about upcoming activities and what would be expected of him/her, including a review of behavioral expectations each morning; avoidance of negative feedback. Written Schedule of Activities – Student will be provided with a visual schedule of school activities, and s/he should be warned of changes as soon as possible. School Work Guidelines – Avoid long detailed instructions, and allow adequate time for his/her responses. Work demands should be tailored to promote success. Praise and Attention Schedule – Student will receive verbal praise throughout the day for correct responses and expected behaviors. Token Economy – Student will earn rewards for appropriate behavior. S/he will lose tokens for exhibiting targeted behaviors, and if s/he fails to earn tokens during a period, staff will provide a clear explanation why. Additional rewards include small amounts of junk food and drinks, five-minute play time with toys s/he likes, and coupons to be used in the school store. Training Modalities – The plan lists a number of strategies to use to teach Student social skills. Prompts to Task – When Student is not following directions, staff is directed to break down instructions into small steps and to calmly repeat ignored instructions without "over prompting." Managing Non-Dangerous, Uncooperative Behaviors – Staff is directed to use gentle prompts to address non-dangerous behaviors. If the behaviors are disruptive, teachers are directed to separate Student from classmates, without removing [her/him] from the classroom, while using prompting strategies to get her/him back on track. Managing Dangerous Behaviors – Staff is directed to use Crisis Prevention Institute ("CPI") approved physical intervention when needed to control dangerous behavior. Data Collection – Staff is directed to take data after every 25-minute time block on incidents of targeted behaviors.⁴⁹

15. On February 24, 2020, DCPS completed an Amended IEP. Student was

⁴⁴ *Id.* at 2-5 (308-13).

⁴⁵ P39:1 (670).

⁴⁶ *Id.*

⁴⁷ Testimony of Witness C. The ABC data forms are found at P34:1 (563)(at home), P47:1 (743), P50:1 (759), P51:1 (847), P52:1 (873), and P57:1 (899).

⁴⁸ P7:1 (75). The document is dated "2/14/19," but in Student enrolled in School A in February 2019, making February 14, 2019 an unlikely date for a BIP. More specifically, the first paragraph cites an October 2019 evaluation, and the document includes a chart of Student's behaviors from June 2019 – January 2020.

⁴⁹ *Id.* at 7-15 (81-89).

classified with Multiple Disabilities, Emotional Disturbance and Other Health Impairment.⁵⁰ The Consideration of Special Factors reported that Student will often provoke classmates through name calling, inappropriate language, verbal aggression, and invasion of personal space, making threats and physical aggression towards peers and staff, and engaging in attention-seeking behaviors from his/her peers.⁵¹ The Math Present Levels of Academic and Functional Performance (“PLOP”) reported [her/his] WJ-IV scores from the November 19, 2019 assessment described in paragraph 11 above. On a February 2020 STAR math assessment, his/her score placed her/him at a grade C level, two years below his/her current grade.⁵² Similarly, the Reading PLOP reported her/his Reading scores from the WJ-IV. Her/his score on the STAR assessment for reading placed her/him at a grade E level, three years below her/his current level, but an observer of the testing reported that Student’s cavalier approach to the assessment made “unlikely that [his/her] scores on this assessment are indicative of [her/his] true reading skills.”⁵³ In Written Expression, in addition to reporting Student’s WJ-IV scores, it was noted that while Student is able to generate strong ideas from writing, s/he “has difficulty putting these ideas on paper... [Student] is able to write an average of 5 sentences, but is working on focusing all of [her/his] sentences around a single topic, and using introduction and closing sentences, as well as proof-reading [his/her] class work.”⁵⁴ In Emotional, Social, and Behavioral Development (“Behavior”), the PLOP gave a brief synopsis of Witness A’s evaluation. It also reported on observations of Student in class:

[Student] has had time periods in which [s/he] was able to demonstrate progress, but [her/his] behavior varies day to day and throughout each day. When stable, [Student] is able to remain in the classroom, complete [his/her] work, get along with [her/his] peers and process difficult situations. In times of stability, [Student] shows great pride in [her/his] progress. However, [Student] also has periods of time where [s/he] has difficulty in the classroom. This includes frequently eloping from class, often with no identifiable trigger. [Student] has needed to be separated from the class due to the level of disruption of unsafe behavior... [S/he] has had periods where [s/he] has required one on one support throughout much of the school day to stay on task, keep safe, and remain supervised while out of location, prompting the team to consider and approve a dedicated aide.

When [Student] is in the classroom, at times [s/he] has difficulty sustaining attention to task, even with multiple supports available including sensory items, movement breaks, and increased proactive attention...

...[A]t times, [Student] is able to interact with other in a prosocial manner, and has several friends outside of school through [her/his] neighborhood and sports. However, [Student] has had difficulty in [his/her] social relationships at school, at home, and in the community. [S/he] will often provoke [her/his]

⁵⁰ P21:1 (315).

⁵¹ *Id.* at 2 (316).

⁵² *Id.* at 4 (318).

⁵³ *Id.* at 7-8 (321-22).

⁵⁴ *Id.* at 10 (324).

peers through name calling, inappropriate language, verbal aggression, and invasion of personal space. [Student] has also displayed some threats and physical aggression towards peers and staff...⁵⁵

The IEP team prescribed 30.5 hours of specialized instruction outside general education, and one hour each per month of occupational therapy (“OT”) behavioral support services (“BSS”) outside general education, and a dedicated aide throughout each day. The team also prescribed a number of additional accommodations including, but not limited to, repetition of oral and written directions and checks for understanding, small group setting, preferential seating, location with minimal distractions, supervised movement and sensory breaks during testing and instruction, graphic organizers and speech to text software, manipulatives and math tools, advance notice of tests, quizzes, and assignments, breakdown of long-term and/or multi-task assignments into manageable parts, clear limits and directions, etc. ⁵⁶

16. Teacher D replaced Teacher C at the beginning of March 2020.⁵⁷

17. On the Third Quarter Interim Report, dated March 11, 2020, Student earned a C in English Language Arts/Literacy (“ELA”), and his/her provided generally positive comments about Student’s performance, but noted that “[S/he] still struggles to maintain focus.” In Writing, Student earned an A. Teacher comments noted improved written work with one-on-one assistance, but did not complete all classroom assignments, and does not do well on tests due to his/her distractibility. Student earned a B in Math. Here, the teacher noted that Student completes classroom and homework assignments, but lacks confidence and becomes frustrated and unfocused on tests. In Science, Student earned an A, and teacher comment were entirely positive. S/he also received an A in Social Studies, but the teacher noted that Student had difficulty staying focused. “[His/her] 1:1 support has significantly aided in [his/ability] to follow along so that [s/he] does not miss key information.” Student earned a C in Art and Physical Education, and both teachers noted his/her distractibility.⁵⁸

18. Due to the COVID-19 pandemic, School A closed on March 16, 2020. Instructional packets were sent home and students were instructed to watch tutorials online to prepare for the implementation of virtual learning. Virtual learning was initiated on April 6, 2020 with two 30-minute classes of direct instruction of core academic classes per week, plus one 30-minute Physical Education class and one 30-minute Art class per week. This schedule was maintained until the end of the school year in June 2020.⁵⁹

19. On May 26, 2020, DCPS issued Student’s IEP Progress Report for the period January 27 – April 8, 2020.⁶⁰ In Math, Student was reported to be progressing on two goals, while four had not yet been introduced. In Reading, s/he was progressing on three goals, and two were just introduced. In Behavior, the four goals were just introduced. Student had mastered one OT goal, was progressing on three, and two were just introduced. In Motor

⁵⁵ *Id.* at 13-14 (327-28).

⁵⁶ *Id.* at 20 (334).

⁵⁷ P22:38 (376).

⁵⁸ P24:7-8 (393-94).

⁵⁹ Respondent’s Exhibit (“R:”) 10 at page 1, electronic page 248. The exhibit number and page are followed by the electronic page number in the disclosure in parentheses, i.e., R10:1 (248).

⁶⁰ P25:18 (418).

Skills, s/he was progressing on two goals, making no progress on two, and two were not yet introduced.

20. For the 2019-20 school year, Student was reported to have earned a grade of “P = Pass (COVID-19)” for each subject and was performing “ON Grade Level” throughout the first three quarters of the school year.⁶¹ On the 4th Quarter Distance Learning Interim Report, dated May 29, 2020, Student’s ELA, Math, and Social Studies/Reading teachers provided largely positive comments about Student’s academic performance, although his/her Math teacher reported incomplete assignments. Student’s Physical Education teacher reported that Student had not joined any of the class’ Zoom calls. His/her Science teacher report that Student needs frequent reminders to be attentive, is easily distracted, and requires encouragement to listen attentively.⁶²

21. On June 8, 2020, School A and Petitioners developed an Individualized Continuity of Learning Plan to be implemented while School A is closed due to the COVID-19 restrictions. Petitioners were concerned that the dedicated aide might “hinder [Student’s] current routine,” and would not want that service continued if their concerns were realized.⁶³ The plan included goals in Math, Reading, Writing, Behavior, and Motor Skills.⁶⁴ Student would receive 5-7 hours of specialized instruction, 30 minutes of counseling, and 30 minutes of OT weekly, and 2 hours per day of services from the dedicated aide.⁶⁵ “Once the school system is able to resume regular programming, the services outlined in the IEP will be implemented in their entirety.”⁶⁶

22. From July 1 – August 19, 2020, School A provided 30-minutes of virtual instruction each day. In addition, Student met virtually with [her/his] dedicated aide 1.5 hours on Mondays, 1.25 hours on Tuesdays, one hour on Wednesdays, 1.5 hours on Thursdays, and 1.5 hours on Fridays.⁶⁷

23. On July 23, 2020, DCPS issued Student’s IEP Progress Report for the period April 9 – June 19, 2020.⁶⁸ In Math, Student was reported to be progressing on two goals, a third was just introduced, and two had not been introduced. In Reading, s/he was progressing on four goals and one had not yet been introduced. In Written Expression, s/he was progressing on all three goals. In Behavior, s/he was progressing on one goal, one was just introduced, and two were not yet introduced.

24. From September 2, 2020 to February 22, 2021, School A provided virtual instruction from 9:00 to 2:30 daily, with individual meeting times with the dedicated aide 11:30 – 12 2:30 – 3:00, and 9-12:00 and 1:00 -3:00 on Wednesdays. Counseling was provided from 10:30 – 11:00 on Wednesdays.⁶⁹

⁶¹ P24:1-2 (387-88). The report card was blank as to grade level performance for the fourth quarter.

⁶² *Id.* at 3-4 (389-90).

⁶³ P23:1 (381).

⁶⁴ *Id.* at 2-3 (382-83).

⁶⁵ *Id.* at 4 (384).

⁶⁶ *Id.* at 1 (381).

⁶⁷ R10:1 (248).

⁶⁸ P25:32 (432).

⁶⁹ R10:1 (248); P26:1 (445).

25. On November 19, 2020, when Student was in grade D, DCPS issued Student's IEP Progress Report for the period August 31 – October 30, 2020.⁷⁰ Student was reported to be progressing on five Math goals and one was not yet introduced. In Reading, Student was progressing on two goals, and progressing on three goals in Written Expression. In Behavior, s/he was making no progress on one goal, and three goals had not yet been introduced. Social Worker A noted that during distance learning, “[s/he] has also engaged in frequent inappropriate interactions including cursing, threatening, and instigating. [Student] may engage in these behaviors verbally or through the chat feature in Zoom.” In Motor Skills, s/he was progressing on two goals and two were not yet introduced.

26. On December 2, 2020, School issued a Social/Emotional Update – Annual Review of Student, authored by Social Worker A.⁷¹ School A had been operating in a distance learning format since March 2020. Student was in a grade A/D classroom with three other students. The dedicated aide provided support in the virtual classroom as well as individually “during asynchronous times.” Given the limitations of distance learning, “the IEP team agreed that the social emotional goal related to [Student] being able to accurately describe [his/her] role in a social situation and identify an effective solution was the most appropriate to be targeted... Given the nature of distance learning, [Student's] other social emotional goals were not able to be directly targeted as noted on [her/his] Individualized Distance Learning Plan.”

During distance learning, [Student's] parents have created the expectation in the home that [Student] complete [her/his] school day at [her/his] desk in [her/his] room. Most often, [Student] complies with this instruction, however [s/he] will at times state that [s/he] has permission from [her/his] parents to be in an alternative location (which is always checked with [her/his] parents and proves to be inaccurate). [Student] continues to work on remaining safe at home with support from Dr. Allen. [Student] has demonstrated increased aggressive behaviors this fall, particularly towards [her/his] mother. [Student] has demonstrated an increase in verbally aggressive behaviors towards staff and students over the past month ... Throughout the first quarter, there were increased opportunities for [Student] to engage virtually with peers, although most of the time is structured academic time. [Student] has shown support for peers through kind words and offering to help them. [Student] has also used inappropriate language towards peers, sometimes without a known antecedent.⁷²

27. On December 17, 2020, Petitioner's Attorney C notified DCPS that Petitioner wanted Student to be placed in a residential setting;

We understand that [Student] is struggling significantly at school and not making the expected progress. It is therefore our intention to request that DCPS move [Student] to a more intensive residential placement at the

⁷⁰ P29:1 (531).

⁷¹ P32:1 (559).

⁷² *Id.* at 1-2 (559-60).

upcoming IEP meeting.⁷³

28. On January 4, 2021, School A issued Student's Educational Update.⁷⁴ The report noted that Student requires frequent prompting and other measures to remain on task.

During virtual learning, [Student] has shown difficulty working independently and completing [his/her] assigned work across academic subjects without frequent prompting to stay on task. During independent work, [Student] sometimes choose not to complete work and is often prompted to complete a task. There are days [Student] will come to class and is upset due to things that have occurred before logging on the computer to start [her/his] day. [His/her] mood and behavior that took place in [his/her] home setting will carry into the morning meeting as well as academic classes. [Student] will express verbally or via chat that something took place at home resulting in [her/his] behavior. When this occurs, [Student] is not as responsive or willing to participate in class discussion. [Student] is redirected to join [her/his] 1:1 in a breakout room on Zoom to receive additional support. [Student] is working on strategies to stay on task during class time as well as during sessions with [his/her] dedicated aide and sessions with booth [his/her] special education teacher and dedicated aide.

In Reading, Student's strength in talking about topics of interest to him. S/he is able to retain information and make connections to the text. S/he has comprehension skills and "accurately answers comprehension questions relating to text... [Student] can identify important details and information from text and apply it to graphic organizers." Student often avoids reading both individually with her/his aide and in group sessions, but is more inclined to read and share her/his thoughts when the topic particularly interests her/him. In Written Expression, Student can produce a paragraph with five sentences and provide supporting details, but "[s/he] does not include closing sentences and struggles with wrapping up [his/her] writing. In Math, Student was reported to be capable of the multi-digit addition problems and multiplication problems currently being taught in her/his class."⁷⁵

29. On January 11, 2021, DCPS convened an IEP Annual Review.⁷⁶ In The Consideration of Special Factors, it was noted that Student had been in a virtual learning environment since March 2020. During that period, s/he "has exhibited the following maladaptive behaviors: leaving location verbal aggression/threats, not following directions, disruptive behaviors, off task behavior, turning off [her/his] camera during instruction, threats to others, and property abuse (reported by parents). Aggression has not been tracked during distance learning, however, parents report that [Student] is engaging in aggression in the home." This section includes a detailed description of measures taken by staff to address these maladaptive behaviors during virtual learning.⁷⁷ In the Math PLOP, Student was described as being able to handle the material presented to him/her, including grade level

⁷³ P33:1 (561).

⁷⁴ P36:1 (625).

⁷⁵ *Id.* at 1-2 (625-26).

⁷⁶ P38:1 (641).

⁷⁷ *Id.* at 4 (644).

geometry, with the assistance of [her/his] aide.⁷⁸ In Reading, s/he was described as being able to read aloud at grade level, and comprehend at grade level. S/he needs improvement in editing her/his work and avoids reading unless s/he is interested in the topic.⁷⁹ Similarly, in Written Expression, s/he is capable of handling the material presented to him/her, but does not include closing sentences, and focuses on the main topic only if s/he is interested in the topic.⁸⁰ In Behavior, it was noted that s/he earned 80% of his/her behavioral points in July 2020 64% in August, 77% in September, 58% in October, 65% in November, and 78% in December. During the past quarter, s/he left her/his location 0.66 times per month, had 6 incidents of impolite interactions per month, 12 incidents per month of not following directions, an average of 1.3 incidents per month of disruptive behaviors, and an average of 8.7 incidents per month of off-task behavior. While the school did not track aggressive behavior due to the virtual setting, it was noted that Petitioners reported aggression in the home. The statistic regarding leaving her/his location did not include instances when Student turned off her/his camera. S/he did so 14% of the time in July, 27% of the time in August, 64% of the time in September, 72% of the time in October, 47% of the time in November, and 52% of the time in December. Due to the virtual setting, only one goal was addressed: to be able to describe his/her role in a social situation and identify an effective solution. Student was described as making progress on this goal, but continues to avoid conversations related to his/her wrongdoing and wrongly denies engaging in social conflicts known to have occurred. The Behavior PLOP also provided a brief synopsis of Witness A's evaluation.⁸¹

The IEP team prescribed 30.5 hours of specialized instruction per week outside general education, one hour each per month of OT and BSS outside general education, and a dedicated aide 6.5 hours per day.⁸² The least restrictive environment was determined to be a small group instruction in a therapeutic, non-public day school.⁸³ Petitioners objected to the placement, insisting on placement in a residential treatment facility based on Student's level of progress and behavior in the home.⁸⁴

30. On February 12, 2021, DCPS issued Student's IEP Progress Report for the period November 21, 2020 – January 29, 2021.⁸⁵ Student was reported to be progressing on two Math goals and three were just introduced. In Reading, Student was progressing on one goal, and progressing on three goals in Written Expression. In Behavior, s/he was making no progress on one goal, and three goals had not yet been introduced. Special Education Coordinator A noted that “[Student] continues to avoid conversations about [his/her] own involvement in situations and will frequently deny engaging in conflicts or negative behaviors that are known to have occurred.” In Motor Skills, three goals were just introduced and three were not yet introduced. Social Worker A reported that sometimes, “[s/he] may keep [his/her] camera off, not engage or complete tasks as assigned, disrupt the classroom, or engage in verbal insults or threats.”

⁷⁸ *Id.* at 6 (646).

⁷⁹ *Id.* at 9 (649).

⁸⁰ *Id.* at 11 (651).

⁸¹ *Id.* at 13-16 (653-56).

⁸² *Id.* at 23-24 (663-64).

⁸³ *Id.* at 25 (645); P40:1 (675).

⁸⁴ P40:1 (675).

⁸⁵ P44:1 (691).

31. Beginning February 22, 2021, School A added in-person instruction Mondays and Thursdays from 1:00 – 3:00. Student’s schedule otherwise remained unchanged. Beginning March 18, 2021, Student began a hybrid schedule: in-person for full days on Thursdays and Fridays, Mondays and Tuesdays unchanged, Wednesdays switched to full time with a dedicated aide from 9:00 – 12:00 and 1:00 – 3:00, with all related services provided in-person.⁸⁶

32. In the spring of 2021, School A issued Student’s Report Card for the third quarter.⁸⁷ In ELA, Student was Developing in Reading and Secure in Writing, Speaking and Listening, and Research/Inquiry. In Mathematics, s/he was Developing in Operations and Algebraic Thinking, Secure in Number and Operations in Base Ten and Number and Operations – Fractions. In Science, Student was Developing in Scientific Thinking and Inquiry, Earth Science, and Physical Science. In Social Studies, Student was Secure in The Land and People Before European Exploration and Age of Exploration, and Developing in Settling the Colonies to the 1700s. In Art, s/he was Developing in Creating Meaningful Artwork, and Beginning in four other categories. In Health & Physical Education, Student was Secure in Demonstrating Motor Skills, Developing in Determining Fitness and Use of Strategies to Improve Health and in Applying Mental and Social Strategies to Learn and Perform Physical Activity, and Beginning in three categories.

33. On May 5, 2021, DCPS issued Student’s IEP Progress Report for the period February 1, 2021 – April 16, 2021.⁸⁸ Student was reported to have mastered one Math goal, to be progressing on goals and two were not yet introduced. In Reading, Student was progressing on one goal and one was not yet introduced. In Writing, s/he was progressing on all three goals. In Behavior, s/he was making progress on one goal, and three goals were just introduced. Social Worker A noted that “[Student] has shown some positive peer interactions, including offering support to peers who were having a difficult time, using polite language, and turn taking. [Student] has also engaged in behaviors that are not socially expected including verbally aggressive language, cursing, and disruptive behavior (especially laughing at peers and interrupting). During [his/her] 11 person days, [Student] displayed 6 instances of verbal aggression and 9 instances of disruptive behavior.” In Motor Skills, s/he was progressing on two goals, two were just introduced, and two were not yet introduced.

34. On June 11, 2021, Social Worker A notified Petitioner/mother that “As you know, we don’t think our █████ school program is a good fit for [Student], but we are servicing [him/her] until a new placement can be found, wherever it may be.”⁸⁹ In School A’s █████ school, to which Student would advance for the following school year, behavior counseling is provided in small groups rather than individually. School A’s Director of Education testified that School A staff believed that Student would be unable to control his/her emotions in the company of her/his peers in these sometimes highly charged sessions.⁹⁰

⁸⁶ R10:1 (248).

⁸⁷ P43:1 (689).

⁸⁸ P44:14 (704).

⁸⁹ P49:1 (755).

⁹⁰ Testimony of Witness F.

35. Witness A testified that she last saw Student in June 2021 and has reviewed the ABC data forms completed by School A staff. Witness A testified that a residential placement may now be the “right place” for Student due to the increase in acting-out behaviors that have heightened safety concerns.

36. Witness B testified that Student requires a residential placement because the Student’s maladaptive behaviors have deteriorated since s/he entered School A, including verbal and physical aggression, elopement, profanity, and work avoidance. A residential facility would afford Student therapeutic treatment throughout the day.

37. Witness D testified that Student’s profile does not fit that of a child who requires a residential placement, and School A is capable of serving Student’s needs. Witness D was aware of Student’s history of cursing, elopement, threatening behavior, and self-harm. Witness D was not aware of the suicidal/homicidal threats uttered on February 10, 2021.⁹¹

38. Witness E opined that Student did not require a residential placement because s/he was able to access the curriculum and was making academic progress. She was also concerned that Student’s sense of abandonment would be exacerbated by a residential placement. Witness E conceded that Student’s behavior had not improved at School A.

39. Witness F, School A’s Director of Education, opined that Student was not on the witness’ “radar” for a residential placement, because Student had made academic progress. However, Witness F testified that School A’s ██████ school, to which Student would progress for the following school year, was not appropriate for Student. School A provides social/emotional counseling in a group setting, rather than individually as Student received it to date. School A staff did not believe Student was capable of controlling his/her emotions in emotionally charged group counseling sessions.

CONCLUSIONS OF LAW

Based upon the above Findings of Fact, the arguments of counsel, and this Hearing Officer’s own legal research, the Conclusions of Law of this Hearing Officer are as follows: The burden of proof in District of Columbia special education cases was changed by the local legislature through the District of Columbia Special Education Student Rights Act of 2014. That burden is expressed in statute as the following:

In special education due process hearings occurring pursuant to IDEA (20 U.S.C. § 1415(f) and 20 U.S.C. § 1439(a)(1)), the party who filed for the due process hearing shall bear the burden of production and the burden of persuasion; except, that: Where there is a dispute about the appropriateness of the child’s individual educational program or placement, or of the program or placement proposed by the public agency, the public agency shall hold the burden of persuasion on the appropriateness of the existing or proposed program or placement; provided, that the party requesting the due process hearing shall retain the burden of production and shall establish a prima facie

⁹¹ Testimony of Witness D. Student’s comments on February 10, 2021 are found at P50:13 (771).

case before the burden of persuasion falls on the public agency. The burden of persuasion shall be met by a preponderance of the evidence.⁹²

In this case, the issues involve the appropriateness of an IEP and placement. Under District of Columbia law, DCPS bears the burden of persuasion on those issues. The burden of persuasion shall be met by a preponderance of the evidence.⁹³

Whether DCPS denied Student a FAPE by failing to provide an appropriate IEP and placement for the 2020-21 school year. The IEP was inappropriate primarily for failing to prescribe a setting in a residential facility and for failing to ensure the consistent collection of behavior data regarding Student.

The Supreme Court’s first opportunity to interpret the predecessor to IDEA, The Education of the Handicapped Act (“EHA”), came in *Board of Education of the Hendrick Hudson Central School District v. Rowley*.⁹⁴ The Court noted that the EHA did not require that states “maximize the potential of handicapped children ‘commensurate with the opportunity provided to other children.’”⁹⁵ Rather, the Court ruled that “Implicit in the congressional purpose of providing access to a ‘free appropriate public education’ is the requirement that the education to which access is provided be sufficient to confer some educational benefit upon the handicapped child...⁹⁶ Insofar as a State is required to provide a handicapped child with a ‘free appropriate public education,’ we hold that it satisfies this requirement by providing personalized instruction with sufficient support services to permit the child to benefit educationally from that instruction... In addition, the IEP, and therefore the personalized instruction should be formulated in accordance with the requirements of the Act and, if the child is being educated in the regular classrooms of the public school system, should be reasonably calculated to enable the child to achieve passing marks and advance from grade to grade.”⁹⁷

More recently, the Court considered the case of an autistic child under IDEA who, unlike the student in *Rowley* was not in a general education setting.⁹⁸ The Tenth Circuit had denied relief, interpreting *Rowley* “to mean that a child’s IEP is adequate as long as it is calculated to confer an ‘educational benefit [that is] merely... more than *de minimis*.”⁹⁹ The Court rejected the Tenth Circuit’s interpretation of the state’s obligation under IDEA. Even if it is not reasonable to expect a child to achieve grade level performance,

... [h]is educational program must be appropriately ambitious in light of [his/her] circumstances, just as advancement from grade to grade is appropriately ambitious for most children in the regular classroom. The goals

⁹² D.C. Code Sect. 38-2571.03(6)(A)(i).

⁹³ *Schaffer v. Weast*, 546 U.S. 49 (2005).

⁹⁴ 458 U.S. 176, 187 (1982).

⁹⁵ *Id.* at 189-90, 200

⁹⁶ *Id.* at 200.

⁹⁷ *Id.* at 203-04.

⁹⁸ *Andrew F. ex rel. Joseph F. v. Douglas County School District RE-1*, 137 S.Ct. 988 (2017).

⁹⁹ *Id.* at 997.

may differ, but every child should have the chance to meet challenging objectives... It cannot be the case that the Act typically aims for grade-level advancement for children with disabilities who can be educated in the regular classroom, but is satisfied with barely more than *de minimis* progress for those who cannot.¹⁰⁰

In *Endrew*, the Supreme Court held that an IEP must be designed to produce more than minimal progress in a student's performance from year to year:

When all is said and done, a student offered an educational program providing 'merely more than *de minimis*' progress from year to year can hardly be said to have been offered an education at all. For children with disabilities, receiving instruction that aims so low would be tantamount to 'sitting idly... awaiting the time when they were old enough to drop out...' The IDEA demands more. It requires an educational program reasonably calculated to enable a child to make progress appropriate in light of the child's circumstances."¹⁰¹

Residential placement is appropriate for a disabled child if it is necessary for the child to receive benefit from his or her educational instruction:

If placement in a public or private residential program is necessary to provide special education and related services to a child with a disability, the program, including non-medical care and room and board, must be at no cost to the parents of the child.¹⁰²

Petitioners argue that Student "is not making progress in [his/her] current therapeutic day program."¹⁰³ However, for the 2019-20 school year, Student was on grade level until school closed due to the COVID-19 restriction. On the last Progress Report prior to the filing of the *Complaint*, Student was progressing on two Math goals, on his/her Reading goal, and on three Written Expression goals. S/he was Secure in Number and Operations in Base Ten and Number and Operations – Fractions, Secure in Social Studies – the Land and People Before European Exploration and Age of Exploration, and Secure in Demonstrating Motor Skills. On the last achievement assessment administered to Student on November 19, 2019, Student scored in the Average range in Reading, Basic Reading Skills, Written Language, Broad Written Language, Written Expression, Academic Skills, Academic Applications, and Brief Achievement. S/he scored in the Low Average range in Broad Reading, Mathematics, and Broad Achievement. S/he scored in the Low range in Reading Fluency, Broad Mathematics, Math Calculation Skills, and Academic Fluency.

Petitioners dismiss the significance of these measures of proficiency because "*the very purpose of the [School A] program is to address [Student's] social and emotional needs*

¹⁰⁰ *Id.* at 1000-01 (citations omitted).

¹⁰¹ 137 S.Ct. at 1000-01.

¹⁰² 34 C.F.R. §300.104.

¹⁰³ Parent's Closing Argument at 4.

and behaviors.”¹⁰⁴ Attachment A contains a synopsis of the reports emailed to Petitioners from Student’s teachers and dedicated aide throughout her/his time at School A until the *Complaint* was filed. Suffice it to say that the best case that can be made is that his/her behavior did not improve. It is probably more accurate to say that the maladaptive behaviors increased in frequency and severity over the two-year period. These behaviors included rudeness, uncooperativeness, and off-task behavior on the lower end of the maladaptive scale. They also included insubordination, cursing, disrespectful comments to staff, extremely profane comments to staff, refusal to work, eloping from class on a daily basis, disrupting the class with off-task behavior, loud talking, interfering with classmates’ work, and taunting peers on a higher level of the maladaptive scale. Finally, Student was physically aggressive towards staff and peers. During virtual learning, very little was accomplished because Student routinely did not participate; s/he routinely turned off his/her camera and microphone, and when s/he did participate, s/he was often disruptive, causing the teacher to mute his/her microphone or direct him/her, usually unsuccessfully, to log into the breakout room. In the months just prior to the filing of the *Complaint*, Student threatened to kill his/her brother, sent threatening messages to his/her teacher and aide, was routinely profane to her/his teacher and aide, sent threatening and profane messages to classmates, interrupted Teacher D’s presentations, and often logged off from classes early. Petitioners also submitted ABC data logs revealing that Student’s aggressive behaviors have significantly increased since the filing of the *Complaint*.¹⁰⁵

Petitioners cite *North v. District of Columbia Board of Education*¹⁰⁶ in support of their position that Student requires a residential placement. *North* is distinguishable in one significant respect; none of the parties in *North* disputed the student’s need for a residential placement. Here, DCPS insists that a therapeutic day school is Student’s least restrictive environment. However, *North* supports Petitioners on the weight to be given to the child’s social/emotional development in determining the appropriate placement. In *North*, DCPS argued that the student’s issues were social/emotional, not educational, and that it should not be held responsible for providing living arrangements unrelated to the child’s educational needs. The court rejected the premise that the student’s social/emotional needs were not linked to ■ educational needs:

It may be possible in some situations to ascertain and determine whether the social, emotional, medical, or educational problems are dominant and to assign responsibility for placement and treatment to the agency operating in the area of that problem. In this case, all of these needs are so intimately intertwined that realistically it is not possible for the Court to perform the Solomon-like task of separating them... For these reasons, the Court finds that plaintiff’s federal rights to appropriate educational placement are properly invoked, and that the Court should exercise its legal and equitable jurisdiction, and it will therefore grant the relief requested by plaintiffs.¹⁰⁷

¹⁰⁴ *Id.*, emphasis provided in text.

¹⁰⁵ *See* P58.

¹⁰⁶ 471 F.Supp. 136 (D.D.C. 1979).

¹⁰⁷ *Id.* at 141.

Petitioner's also rely on *Kruelle v. New Castle County School District*.¹⁰⁸ There the school district denied responsibility for a residential placement, arguing that the student's educational needs could be met at a non-public day school, and that "any necessity for residential placement arose from social and emotional problems clearly beyond the competency and responsibility of school officials."¹⁰⁹ Citing *North*, the court upheld the lower court's ruling that the student's combination of handicaps required placement in a residential facility:

The relevant question in the present case is whether residential placement is part and parcel of a "specially designed instruction to meet the unique needs of a handicapped child..." And we cannot conclude that the district judge misapplied the statutory standard in determining that "because of his combination of physical and mental handicaps, (Paul) requires a greater degree of consistency of programming than many other profoundly retarded children" and that "it would appear that full-time care is necessary in order to allow Paul to learn."¹¹⁰

In *Seattle School District, No. 1 v. B.S.*,¹¹¹ like Student, the child exhibited frequent behavioral problems including physical and verbal aggression, oppositionality, tantrums, and attention difficulties. The school district determined that the child's least restrictive environment was a self-contained classroom, rejecting the opinion of an independent evaluator who concluded that the child was unable to progress outside a residential school environment. Despite the child's academic proficiency, the court upheld the lower court's determination that a residential placement was appropriate and necessary.¹¹²

Petitioners cite a more recent case in which maladaptive behaviors were similar to those committed by Student, but less frequently observed than in Student's case. In *Linda E. v. Bristol Warren Regional School District*,¹¹³ the student was reported to have pushed a student down, was unconcerned about misbehaving, and was guilty of rudeness, disruptive behavior, and theft, and was "out of control" on the school bus. The court rejected the school districts argument that the student's behaviors were "segregable from the learning process," and found that the school district had failed to meet its burden of proving that it had provided an appropriate placement.¹¹⁴

It is true that Petitioners did not complain about the placement at School A until they hired legal counsel in December 2020. However, they were in constant contact with Student's teachers from the inception of Student's enrollment. Petitioners expressed disappointment with Teacher B's departure in July 2019, and with Teacher C's early lack of specificity in her daily reports to them. Petitioners also complained that Teacher C had inadequate support to handle Student's behavior. In January 2020, Petitioners hired Witness C, a behavioral expert, to develop a home program to attempt to moderate Student's antisocial behavior at home. On

¹⁰⁸ 642 F.2d 687 (3rd Cir. 1981).

¹⁰⁹ *Id.* at 690.

¹¹⁰ *Id.* at 694.

¹¹¹ 82 F.3d 1493 (9th Cir. 1996).

¹¹² *Id.* at 1502.

¹¹³ 758 F.Supp.2d 75 (D.R.I. 2010).

¹¹⁴ *Id.* at 90-92.

January 2, 2020, Petitioners complained of School A's failure to implement the IEP and BIP with fidelity, but they did not object to the IEP developed on February 24, 2020. However, with the IEP Annual Review upcoming in early 2021, Petitioners requested a residential placement.

Witness A, who completed a very thorough psychological evaluation of Student in 2019, opined in her evaluation that Student's least restrictive environment was a therapeutic day school. However, she warned that "A therapeutic boarding school should be considered for [Student] if [his/her] needs cannot be met otherwise. However, this should. Be considered with great caution given [his/her] attachment/abandonment difficulties..." At the hearing, however, once Witness A had an opportunity to review the daily behavioral reports over the last two years, she testified that that a residential placement may now be the "right place" for Student due to the increase in acting-out behaviors that have heightened safety concerns. Witness F, School A's Director of Education, testified that Student did not require a residential placement. However, he also conceded that School A was not capable of handling Student in its [REDACTED] school because they did not believe s/he would be able to control his/her emotions in a group counseling session.

Student's setting at School A was highly restrictive. Student was in a class of no more than five students with a teacher and a dedicated aide. Nevertheless, s/he was out of control for much of most school days. S/he eloped from the classroom repeatedly, and this was allowed to happen apparently to allow instruction to continue without interruption, and to minimize physical and verbal aggression on Student's part. Therefore, I conclude that DCPS has failed to meet its burden of proving that it provided Student an appropriate IEP by failing to provide a residential placement at the IEP meeting on January 11, 2021.

RELIEF

For relief, Petitioner requests an order requiring DCPS to place Student in a residential facility for the 2020-21 school year and the 2021-22 school year.

ORDER

Upon consideration of the *Complaint*, DCPS' *Response*, the exhibits from the parties' disclosures that were admitted into evidence, the testimony presented during the hearing, and the parties' written closing statements, it is hereby

ORDERED, that DCPS shall convene an IEP meeting within fifteen (15) days of the issuance of this Order to develop an IEP providing Student a placement in a residential facility, preferably one with experience in handling children suffering trauma due to adoption or abandonment.

APPEAL RIGHTS

This decision is final except that either party aggrieved by the decision of the Impartial Hearing Officer shall have ninety (90) days from the date this decision is issued to file a civil action, with respect to the issues presented in the due process hearing, in a district court of the United States or the Superior Court of the District of Columbia as provided in 34 C.F.R. §303.448 (b).

Terry Michael Banks

Terry Michael Banks
Hearing Officer

Date: August 23, 2021

Copies to: Attorney A, Esquire
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