

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

District of Columbia Public Schools)	Case No. 2022-0074
)	
Petitioner,)	Hearing Dates: June 16-17, 2022
)	August 5 and 11, 2022
v.)	
)	
Parents on behalf of Student¹)	Conducted by Video Conference
)	
Respondents.)	Date Issued: August 22, 2022
)	
)	Terry Michael Banks,
)	Hearing Officer

HEARING OFFICER DETERMINATION

INTRODUCTION

Petitioners are the parents of an X-year-old student (“Student”) attending School A. On April 26, 2022, 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 her/him appropriate Individualized Education Programs (“IEPs”) and placements for the 2021-22 and 2022-23 school years, failing to find Student eligible for speech and language services (“S/L”), and failing to find Student eligible for behavior support services (“BSS”). On May 6, 2022, DCPS filed *District of Columbia Public Schools’ Supplemental Response* (“*Response*”), denying that it had denied Student 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 38 of the D.C. Code,

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

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

PROCEDURAL HISTORY

On April 26, 2022, Petitioners filed a Due Process Complaint alleging that DCPS denied Student a FAPE by failing to provide appropriate IEPs and placements for the 2021-22 and 2022-23 school years, failing to find Student eligible for S/L services, and by failing to find Student eligible for BSS. On May 6, 2022, DCPS filed its *Response* in which it refuted allegations in the *Complaint* denying that it had denied Student a FAPE, *inter alia*, as follows:

1. DCPS developed an IEP on or about March 31, 2021 for the 2021-22 school year providing 10 hours of specialized instruction per week, 240 minutes per year of consultation services, as well as classroom aids and services and accommodations. The IEP was amended by agreement on June 4, 2021 to change Student's disability classification.
2. On March 1, 2022, DCPS proposed an IEP of 10 hours of specialized instruction per week and 240 minutes per year of consultation, as well as classroom aids and services, and accommodations. The IEP team appropriately determined that Student did not require S/L support or BSS and that the IEP provides appropriate programming to meet all areas of identified need.
3. Because Student's needs can be met in his/her neighborhood school, School B, a private school placement is not Student's least restrictive environment ("LRE"), and all reimbursement and placement relief should be denied.

The parties participated in a resolution meeting on May 11, 2022 that did not result in a settlement. The prehearing conference in this case took place by video conference on May 17, 2022. The Prehearing Order was issued on June 1, 2022.

On June 6, 2022, at Respondent's request, I issued a Notice to Appear to Witness A, an employee of the District of Columbia Office of the State Superintendent of Education ("OSSE"). On June 15, 2022, OSSE filed *Office of the State Superintendent of Education's Motion for Order to Show Cause or Alternatively to Quash the Notice to Appear for [Witness A]*. OSSE argued that Respondent issued the Notice to solicit testimony from Witness A concerning Student's residency during the 2020-21 and 2021-22 school years, but no relevant testimony would be forthcoming because OSSE had not investigated Petitioners' residency for the 2021-22 school year. OSSE requested that Witness A's testimony be limited to the 2020-21 school year or that the Notice be quashed.

The due process hearing was conducted on June 16-17 and August 5 and 11, 2022 by video conference. The hearing was closed to the public at Respondents' request. Petitioners filed disclosures on June 9, 2022 containing a witness list of four witnesses and proposed Exhibits P1-P33. Respondents filed no objections to Petitioners' proposed exhibits and Petitioners' Exhibits P1-P33 were admitted into evidence. Respondent also filed disclosures on June 9, 2022, containing a witness list of eleven witnesses and documents R1 through R-18. Petitioners objected to

Respondent's Exhibits R4 and R5A on grounds of relevancy; those documents related to Petitioners' residency, which Petitioners assert was not raised as a defense by DCPS. Petitioners also objected to their being called as witnesses for DCPS on the issue of relevancy, and as to Student being listed as a witness for DCPS at all. Rulings on the objections to witnesses' testimony were deferred until the witnesses were called.

After hearing arguments on Petitioners' objections to Respondent's disclosures, I overruled the objections to Respondent's proposed Exhibits R4 and R5A and notified OSSE that its Motion to Quash was denied. OSSE's investigation had determined that Petitioners were not residents of the District during the 2020-21 school year, and I concluded that Witness A may have relevant testimony about Petitioners residency during the 2021-22 school year. Respondent's Exhibits R1-R18 were admitted into evidence.

Due to witness availability issues at the end of the school year, Respondent elected to present its direct case first; Petitioners were not prepared to proceed until later in the summer, when Respondent's witnesses might not be available. Respondent presented as witnesses in chronological order: Witness A, Witness B, Witness C, Witness D, Witness E, Petitioner/mother, Witness F, Witness G, Witness H, and Witness J. Witness B was admitted as an expert in Speech and Language Therapy ("SLP"), Witness C was admitted as an expert in Social Work, Witness D was admitted as an expert in Psychology, Witness E, Witness F, and Witness G were admitted as experts in Special Education, Witness H was admitted as an expert in Inclusion Programming, Assessments, and Literacy, and Witness J was admitted as an expert in Special Education Programming and Placement.

On July 29, 2022, before testimony resumed on August 5, 2022, Petitioners submitted supplemental disclosures, proposed Exhibits P34-P38, and Respondent submitted proposed Exhibits R19-R21. Neither party filed objections and all supplemental exhibits were admitted into evidence.

Petitioners presented as witnesses in chronological order: Witness K, Witness L, and Respondent/mother. Witness K and Witness L were admitted as experts in Special Education. At the conclusion of testimony, counsel for the parties provided oral closing arguments. Counsel were authorized to file relevant case citations by midnight on August 12, 2022. That day, Petitioners filed *Petitioners' Closing Authorities* and Respondent filed *District of Columbia Public Schools' Case Citations*.

ISSUES

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

1. Whether DCPS denied Student a FAPE by failing to provide appropriate IEPs and placements for the 2021-22 and 2022-23 school years. Petitioners assert that Student requires full-time special education services in a small group environment.
2. Whether DCPS denied Student a FAPE by failing to find Student eligible

for S/L services.

3. Whether DCPS denied Student a FAPE by failing to find Student eligible for BSS.
4. Whether School A is a proper placement for Student.

FINDINGS OF FACT

1. Student is X years old and was in grade A at School A during the 2021-21 school year.² School A is a non-public school offering full-time special education services only to students with disabilities.³

2. On May 15, 2017, Student was first found to be eligible for special education services with a classification of Other Health Impaired (“OHI”) due to his/her history of epilepsy, café au lait spots, and Attention Deficit Hyperactivity Disorder (“ADHD”).⁴

3. On or about November 27, 2018, Examiner A completed a Cognitive and Academic Testing report.⁵ On the Wechsler Intelligence Scale for Children (“WISC-V”), Student scored in the High Average range in Verbal Comprehension (113), in the Low Average range in Full Scale IQ (81), Fluid Reasoning (85), and Working Memory (85), and Extremely Low in Visual Spatial (69), and Processing Speed (59).⁶ While Examiner A reported that Student’s exhibited high effort during testing and that his/her scores were valid, Examiner A drew no substantive conclusions about Student’s scores and made no educational recommendations.

4. On April 23, 2019, DCPS completed a Psychological Reevaluation. Petitioners requested the evaluation out of a concern for Student’s difficulties with reading and his/her tendency to reverse letters and numbers when writing.⁷ On the WISC-V, Student scored in the High Average range in Verbal Comprehension (111), and in the Low range in Full Scale IQ (76), Fluid Reasoning Index (74), Visual Spatial Index (72), Working Memory Index (72), and Processing Speed Index (72).⁸ On the Woodcock-Johnson Tests of Achievement (“WJ-IV”), Student scored in the Low Average range in Broad Written Language (80), in the Low range in Broad Mathematics (71), and in the Very Low range in Broad Achievement (65), Academic Fluency (65), Broad Reading (61), and Reading Fluency (52). On the Behavior Rating Inventory of Executive Function (“BRIEF-2”), Petitioners’ rating scales resulted in a Clinically Significant score only in Working Memory (T=80), while teachers scores were Clinically Significant in Inhibition (T=70), Self-Monitoring (T=82) and Task Monitoring (T=82). On the Behavior

² Petitioners’ Exhibits (“P:”) 26 at page 3 (265). The exhibit number and exhibit page numbers are followed by the electronic page number in the disclosure in parentheses, i.e., P:26:3 (265).

³ Testimony of Witness L.

⁴ Respondent’s Exhibits (“R:”) 11 at page 1 (264). The exhibit number and exhibit page numbers are followed by the electronic page number in the disclosure in parentheses, i.e., R:11:1 (264).

⁵ P2:1 (13).

⁶ *Id.* at 4 (16).

⁷ R11:6 (269). Neither party offered this evaluation as an exhibit. This data was provided in Examiner E’s May 19, 2021 reevaluation, which is discussed below.

⁸ *Id.*

Assessment System for Children (“BASC-3”), Petitioners’ rating scales resulted in scores within normal limits. The teachers’ scores were in the Clinically Significant range in Aggression (T=74), Conduct Problems (T=78), Learning Problems (T=82) and Atypicality (T=74), and in the At Risk range in Hyperactivity (T=69), Attention Problems (T=66), Anger Control (T=66), Bullying (T=67), and Executive Functioning (T=64).⁹ Examiner E concluded that Student met the eligibility criteria for Multiple Disabilities: OHI and Specific Learning Disability (“SLD”):

The information gathered in this evaluation indicates that [Student] is currently performing at least 2 grade levels below expectations in math, reading, and writing, despite receiving consistent, evidence-based interventions for the past two years. Based on [his/her] WISC-V and WJ-ACH scores, [s/he] also presents with a significant discrepancy between [her/his] verbal reasoning abilities (High Average) and [his/her] reading skills (Very Low). These factors alone suggest that [s/he] would meet the criteria for a Significant [*sic*] Learning Disability (SLD) using the criteria for either model. In addition, [Student’s] current disability classification of OHI is still applicable regarding how [her/his] medical history (epilepsy; Hypomelanosis of Ito/Café-au-lait spots; and Attention Deficit/Hyperactivity Disorder) likely contributes to [his/her] learning challenges. Based on the information gathered and the specified guidelines above, [Student] meets the eligibility criteria for Multiple Disabilities (MD).¹⁰

At Petitioner/mother’s request, the IEP team removed OHI as an eligibility classification and classified Student with an SLD.¹¹

5. On April 14, 2020, when Student was in grade C at School B, DCPS completed an IEP Annual Review.¹² In Consideration of Special Factors, the IEP indicated that Student’s behavior does not impede his/her learning or that of other children, his/her communication needs do not impact his/her ability for direct communication and do not impede his/her academics, and s/he does not require any type of assistive technology (“A/T”). In Mathematics, the Present Levels of Academic Achievement and Functional Performance (“PLOP”) reported that on an August 28, 2019 i-Ready assessment, Student had an overall score of 377, which did not meet the grade C expectation of 428. On January 3, 2020, Student scored 380. The math goals addressed understanding place values and naming and counting up to 1000.¹³ In Reading, Student was tested on January 3, 2020 using the Text Reading and Comprehension (“TRC”) and Dynamic Indicators of Basic Early Literacy Skills (“DIBELS”) assessments. The results indicated that Student was reading at the level of the middle of grade E (one grade below grade C). The goals addressed recognizing 30 grade C sight words and reading grade level words with long or short vowel patterns, common prefixes, and/or common suffixes.¹⁴ In Written Expression, the PLOP indicated that while Student understands that “we write from left to right... [s/he] does not demonstrate comprehension. [S/he] is undeveloped to the task, purpose, and audience. This includes little to no text-based evidence. [S/he] does not use language to express ideas with clarity. [Student’s] response to the prompt does not demonstrate command of the conventions of standard English at

⁹ *Id.* at 6-7 (269-70).

¹⁰ *Id.* at 8 (271).

¹¹ *Id.*

¹² P3:1 (19).

¹³ *Id.* at 4 (22).

¹⁴ *Id.* at 5-6 (23-24).

the appropriate level of complexity. [S/he] has frequent and varied errors in mechanics, grammar, and usage... [Student's] skills in written expression are below grade level.” The goal was to be able to complete a three-sentence narrative.¹⁵ In Emotional, Social, and Behavioral Development (“Behavior”), the IEP determined that Student no longer required BSS.¹⁶ The IEP team prescribed five hours per week of specialized instruction outside general education, five hours inside general education, and four hours per year of specialized instruction consultation services. Other Classroom Aids and Services included, but were not limited to, use of a slant board to assist viewing reading material, use of a guided reader or a straight edge as a guide when reading, one minute visual breaks every 20 minutes, untimed or increased timed testing, enlarged font, breaking larger tasks into manageable chunks, and use of multiple teaching modalities (i.e., visual supports, manipulatives, repeated verbal prompts, and modeling).¹⁷

Witness C testified that she prepared the Behavior section of the Progress Report for the period ending April 8, 2020, and that Student had mastered all of his/her goals. She also testified that neither petitioner disagreed with the decision to terminate BSS. Witness E, Student’s special education teacher during the 2020-21 school year, also testified that Student did not require BSS because s/he had mastered his/her Behavior goals, was easily redirected, and exhibited no behaviors that were disruptive or impeded learning. With respect to communication, Witness E testified that Student has always been intelligible. Witness E also opined that Student’s progress was demonstrated in his/her mastery of goals and testing at grade level.

6. One month later, on May 5, 2020, DCPS conducted another IEP Annual Review.¹⁸ The Consideration of Special Factors was unchanged. The Math PLOP and goals were not materially changed; the PLOP revealed Do the Math assessments in January and February 2020, but no quantitative results.¹⁹ The Reading and Written Expression PLOPs and goals were not changed.²⁰ The IEP also did not change Student’s services or Other Classroom Aids and Services.²¹

7. During the summer of 2020, when Student was rising to grade F at School B, Student received reading intervention in 15 sessions at Facility A. On August 10, 2020, Facility A issued a Summative Student Profile that was prepared by the intervention teacher and the Director of the clinic.²² The Phonemic Awareness Skills Assessment (“PASA”) was administered to assess the ability to manipulate sounds, absent of print and letters. “Phonological awareness in [grade E] is one of the two strongest predictors of [grade F – two grades ahead] reading ability.” His/her scores indicated that his/her strengths included rhyme recognizing and isolating the initial sounds in words. Her/his weaknesses included tasks involving identifying individual sounds that make up simple words.²³ In decoding, his/her strengths were in Letter Identification, Consonant Letter Sounds, Short Vowel Letter Sounds, and decoding simple CVC (closed) syllable words. His/her

¹⁵ *Id.* at 6-7 (24-25).

¹⁶ *Id.* at 7 (25).

¹⁷ *Id.* at 8 (26).

¹⁸ R6:14 (124).

¹⁹ *Id.* at 16 (126).

²⁰ *Id.* at 18-20 (128-30).

²¹ *Id.* at 21 (131).

²² P4:1 (33).

²³ *Id.* at 5 (37)

weaknesses were Closed Syllables with Digraphs and Blends and Multisyllabic words.²⁴ At the end of 15 sessions, Student achieved “mastery” (90 or 100%) on 6 of 9 PASA subtests. On the decoding post-assessment, s/he recognized all the letters of the alphabet, the sounds of each letter, and demonstrated stronger knowledge of the short vowel sounds, but scored 0/5 with long vowel sounds.²⁵

8. On August 19, 2020, Examiner B completed a Speech-Language Evaluation Report. Petitioners requested the evaluation out of concerns for Student’s articulation.²⁶ Petitioner/mother testified that they solicited the evaluation because they disagreed with the IEP team’s decision not to provide S/L services. On the Clinical Evaluation of Language Fundamentals (“CELF-5”), on five of the nine subtests – Recalling Sentences, Understanding Spoken Paragraphs, Word Definitions, Semantic Relationships, and Pragmatic Profile – Student’s scaled scores fell within the Average range. S/he was below average in Word Classes, Following Directions, Formulated Sentences, and Sentence Assembly.²⁷ His/her Overall Language, Core Language, Receptive Language, Expressive Language, Language Content, and Language Memory scores all fell below the average range for Student’s chronological age.²⁸ Examiner B found Student’s articulation, oral motor structures and functions, and fluency to be age-appropriate.²⁹ Overall, Examiner B concluded that

[Student] is currently presenting with age-appropriate articulation and speech intelligibility what is within normal limits. Oral motor functioning, voice, and speech fluency were all judged to be within normal limits for [her/his] chronological age. However, [Student] is currently exhibiting a moderate delay in the area of Receptive Language and mild delays in the areas of Expressive Language, Language Content, Language Memory, and overall Language. Speech-Language therapy is recommended 1-2xs/week for an hour each session. [Student’s] prognosis for improvement is good given consistent attendance at speech-language therapy sessions, cooperation and motivation during the sessions, and consistent completion of carryover activities provided by the Speech-Language Pathologist.”³⁰

9. On September 1, 2020, Examiner C completed a Developmental Evaluation Report. Petitioners sought the examination out of concern for Student’s reading and writing.³¹ Student’s history included a diagnosis of ADHD, a diagnosis of epilepsy, and that Student had been retained in grade C at School B.³² Examiner C administered the Comprehensive Test of Phonological Processing (“CTOPP-2”) to evaluate Student’s reading processing skills. On the Phonological Awareness Composite test, Student’s standard score of 73, 1.8 standard deviations below the mean compared to same-age peers, indicated that “[Student] had difficulty manipulating speech sounds.” On the Phonological Memory Composite, his/her score was 1.4 standard deviations below the

²⁴ *Id.*

²⁵ *Id.* at 8 (40).

²⁶ P5:1 (43).

²⁷ *Id.* at 4 (46).

²⁸ *Id.*

²⁹ *Id.* at 9 (51).

³⁰ *Id.* at 10 (52).

³¹ P6:1 (55).

³² *Id.* at 1-2 (55-56).

mean, indicating poor reading of familiar material and can impair decoding of new words. On the Rapid Symbolic Naming Composite, s/he scored 1.6 standard deviations below the mean, indicating poor reading fluency.³³ Student's reading fluency and comprehension abilities were tested through the Gray Oral Reading Tests ("GORT-5"). His/her Oral Reading Quotient of 68 was 2.1 standard deviations below the mean, indicating that s//he reads slower than expected. On subtests, Student's reading rate, accuracy, fluency, and comprehension were all "below expectations compared with same-aged peers."³⁴ On the Test of Written Spelling ("TWS"), Student's score was 3.7 standard deviations below the mean.³⁵ Examiner C concluded that Student's scores warranted a diagnosis of developmental dyslexia:

[Student] is a [Y]-year-old engaging young [REDACTED] who presents with difficulty decoding (i.e., reading), encoding (i.e., spelling), and manipulating sounds in spoken language. [Student's] reading is characterized by halting reading, omitting words, substituting phonologically related words, and required cues for decoding. [His/her] spelling is characterized by letter reversals, letter omissions, and vowel substitutions. [His/her] phonological awareness is characterized by difficulty omitting parts of words and identifying sounds by position in the word. [His/her] phonological memory is characterized by difficulty recalling digit and nonsense words. [His/her] rapid naming is characterized by difficulty naming digits and letters. [Student's] performance today is consistent with a diagnosis of development dyslexia.³⁶

Examiner C's recommendations included, but were not limited to, an occupational therapy evaluation to rule out dysgraphia, an audiological evaluation to rule out hearing loss, and intensive, research-based reading intervention at least four days per week in a small group of no more than two other children, a multi-modal learning environment, printed copies of all assignments, double time on all tests and quizzes, and reduced homework assignments.³⁷

10. On January 5, 2021, Student was administered an i-Ready Reading assessment. S/he scored one grade above [REDACTED] grade level in Vocabulary, at grade level in Phonological Awareness, Phonics, High-Frequency Words, and Comprehension; Informational Text, and one grade below grade level in Comprehension: Literature.³⁸

11. On January 29, 2021, DCPS completed an Independent Assessment Review of Examiner B's Speech and Language Evaluation.³⁹ Examiner D was critical of Examiner B's failure to provide information related to Student's relative strengths and weaknesses. Witness D contacted Witness B for further clarification, but Witness B said that the assessment protocols were no longer on file and she could not provide any additional information. Hence, Witness D opined that Student's scaled and standard scores reported in Witness B's evaluation should be interpreted with caution.⁴¹

³³ *Id.* at 3-5 (57-59).

³⁴ *Id.* at 5-6 (59-60).

³⁵ *Id.* at 6 (60).

³⁶ *Id.* at 7 (61).

³⁷ *Id.* at 7-8 (61-62).

³⁸ R12:1 (306).

³⁹ P9:1 (73).

⁴¹ *Id.* at 14 (86).

In light of her concerns about Examiner B's evaluation, Examiner D administered two subtests to measure Student's receptive and expressive language skills, using the Comprehensive Assessment of Language Fundamentals ("CASL-2"). In Sentence Comprehension, Student correctly answered 20 of 24 prompts. Witness D concluded that Student "should be able to understand and identify a variety of language concepts, word combinations, and word order. [S/he] should be able to understand directions and comprehend explanations when completing assignments and participating in discussions in her/his learning environment." In Sentence Expressions, which measures the ability to use accurate syntax, grammatical morphemes, sentence structure, and word order, Student correctly responded to 14 of 24 prompts. His/her relative strengths were her/his ability to produce a variety of simple, compound, and complex sentence structures, and frequently used correct word order. S/he had difficulty when given two or three sentences and was asked to combine the ideas in one sentence. Examiner D concluded that Student's performance indicated that s/he "should be able to produce a variety of sentence structures and grammatical morphemes when participating in discussions in [his/her] learning environment and engaging socially with [her/his] teachers and peers."⁴² Examiner D informally assessed Student's pragmatic language skills and concluded that his/her pragmatic language skills are considered to be developmentally appropriate and functional to participate in social activities in [his/her] learning environment."⁴³ Examiner D reached the following conclusions about Student:

Based on the information provided in the IEE, parent and teacher feedback, observations in [his/her] learning environment, language samples, and supplemental assessments completed by the reviewer, [Student] presents with functional and appropriate articulation, voice, fluency, receptive vocabulary, expressive vocabulary, and pragmatic language skills. [Student] was judged to be 100% intelligible during conversational speech, and no consistent sound errors or patterns were indicated on the GFTA-3...

The CELF-5 which was completed in the IEE suggested a moderate delay in [Student's] receptive language skills and a mild delay in [his/her] expressive language skills; however, these results should be interpreted with caution. The evaluator who completed the IEE did not explain [Student's] standard scores or performance by including specific areas of strengths and specific areas that require further development related to any of the subtests administered... Further, the evaluator indicated in the IEE that on the first day of testing, [Student] was tired and appeared to be falling asleep during testing procedures. No information related to how this behavior might have adversely impacted [Student's] performance on certain subtests was provided in the IEE... The American Speech-Language and Hearing Association (2021) states: "Given the nuance and subtle nature of strengths and deficits that may children demonstrate, standardized assessments alone are not sufficient to capture the variety of language details that constitute an individual's profile." Therefore, the scores from the CELF-5 should not be used as the sole determining measure of [Student's] receptive and expressive language skills.

⁴² *Id.* at 15 (87).

⁴³ *Id.* at 16 (88).

The reviewer collected additional data to supplement the results of the IEE. Parent and teacher feedback through interviews and observational rating scales, multiple observations of [Student's] performance in [his/her] learning environment, additional language subtests, and two language samples completed by the reviewer. Parents and teachers provided feedback and shared that [Student] uses complete sentences, answers questions, recalls events, and expresses [his/her] thoughts and ideas... Given this additional information, [Student] presents with many functional receptive and expressive language skills needed to complete assignments, participate in discussions in [her/his] learning environment, and engaged socially with [his/her] peers.⁴⁴

Examiner D opined that Student did not require S/L services. She testified that Student's current report card is consistent with her findings in that Student was meeting expectations in Speaking and Listening.

12. On February 5, 2021, DCPS issued an IEP Progress Report for the second reporting period of the 2020-21 school year.⁴⁵ In Mathematics, Student was reported to have mastered the goals relating to understanding place values and counting up to 1000. Although Student was reported to be progressing on the goal relating to one-step word problems, the teacher comments related to a Reading goal.⁴⁶ In Reading, Student was reported to be progressing on the goals of reading grade level words with irregular spellings and reading words with long and short vowel patterns, and common prefixes and suffixes. In Written Expression, the goal of writing a three-sentence composition was just introduced.⁴⁷

13. On February 10, 2021, DCPS issued Student's second term report card for the 2020-21 school year. His/her grades were as follows: Proficient in Speaking and Listening, Social Studies, and Science, and Basic in Reading, Writing & Language, Math, Health & Physical Education, and World Languages. In the twelve positive behavioral categories that were graded, Student performed independently in seven, with limited prompting in three, and with frequent prompting in two (following directions and participating in class discussions).⁴⁸ In English Language Arts ("ELA") his/her ability to "read and understand literature and informational texts on grade level" and to "read accurately and fluently" were rated as Developing.⁴⁹ His/her ability to "write opinions, supported by reasons, about subjects or texts" and "write informative/explanatory texts to examine a subject and describe ideas and information clearly" were rated as Basic. In Math, his/her ability to solve multiplication and division problems within 100 was rated as Developing, while his/her ability to multiply and divide from memory or handle two-step word problems was rated as Basic.⁵⁰

14. On February 10, 2021, DCPS convened a multidisciplinary team ("MDT") meeting to review Examiner B's Speech and Language Evaluation.⁵¹ Witness F, DCPS' LEA

⁴⁴ *Id.* at 16-17 (89-89).

⁴⁵ P11:1 (99).

⁴⁶ *Id.* at 2 (100).

⁴⁷ *Id.* at 3-4 (101-2).

⁴⁸ P12:1 (103).

⁴⁹ The three descriptive categories were Basic, Developing and Secure.

⁵⁰ P12:1-2 (103-104).

⁵¹ R14:7 (342).

Representative, noted that the evaluation did not explicitly recommend school-based services, but Petitioners stated that DCPS should provide them. Witness K, Petitioners' educational consultant, supported Petitioners' position, citing below average subtest scores on the CELF-5. Examiner D reiterated the concerns she raised in her January 29, 2021 Review. Witness K stated that the evaluation revealed weaknesses in higher order thinking, receptive and expressive language skills, multi-step directions, and executive functioning skills. Teacher A, Student's general education teacher, and Teacher B (Witness E), Student's special education teacher, stated that they had not observed difficulties with Student's language skills in the classroom. Over the objections of Petitioners and Witness K, the MDT determined that Student did not require S/L services.⁵²

15. On March 31, 2021, when Student was in grade F at School B, DCPS completed an IEP Annual Review.⁵³ The Consideration of Special Factors was unchanged from the previous IEP. In Mathematics, the PLOP reported that on a February 19, 2021 i-Ready assessment, Student scored 391, below the grade F expected range of 449-556, and two grade levels below his/her current grade.⁵⁴ Because these results were not consistent with a higher level of performance in class, Student was administered a Grade F Diagnostic Assessment. While quantitative results were not reported, "[Student] showed some strengths in areas that fall within the [grade F] level according to Common Core State Standards. For example, when looking at Numeration, Patterns and Relationships, [redacted] can determine what the pattern is in order to solve the problem. [S/he] can solve some multiplication problems with visual supports, solve some division equations, and represent some word problems with multiplication or division equations... Although [Student] showed many strengths in Numeration, Patterns and Relationships, [s/he] needs continued work with word problems involving multiplication and division, especially word problems involving multiple steps. However, [his/her] biggest areas of needs are in Measurement, Geometry and Data Analysis..." The goals addressed two-step word problems, identification of geometric shapes, and identification of data points on a chart.⁵⁵

In Reading, the PLOP reported the results of Examiner C's September 2020 Developmental Evaluation. On a February 2021 i-Ready assessment, scored 547, which is within the expected range for grade F, 449-556. "Therefore, this assessment indicates that [Student] is reading on grade-level." Student was administered the Phonemic Awareness Skills Assessment ("PASA") on March 1, 2021. Quantitative results were not provided, but "The PASA assessment suggests that [his/her] phonological awareness strengths include rhyme production, onset fluency, blending phonemes, deleting initial phonemes, and substituting initial phonemes." Student was administered the Language Essentials for Teachers of Reading and Spelling ("LETRS") on March 8, 2021. Again, quantitative results were not provided, but "[Student's] strengths included: uppercase and lowercase letter naming, letter-sound correspondence, closed syllable words with short vowels and single consonants, and closed syllable words with short vowels and digraphs... [His/her] relative weaknesses are letter-sound correspondence for short vowels "o" and "e," multisyllabic words, long vowel=Vce words and vowel team syllables... encoding whole words, which speaks to [his/her] spelling deficit in writing." The goals involved spelling grade level words and reading words with common vowel teams that have the vowel pattern highlighted.⁵⁶

⁵² *Id.* at 8 (343).

⁵³ R6:27 (137).

⁵⁴ *Id.* at 29 (139).

⁵⁵ *Id.* at 29-31 (139-41).

⁵⁶ *Id.* at 31-35 (141-45).

In Written Expression, the PLOP reported the results of Examiner C's September 2020 Developmental Evaluation. On a March 15, 2021 Organization of Ideas assessment, Student scored one grade below grade level. On an Editing and Revision Assessment that day, Student demonstrated beginning skills in editing and revision. Student was reported to be below grade level in Spelling based on a Primary Spelling Inventory given that day. S/he was also below grade level in Sentence Paragraph Composition on another assessment given on March 15th. The goals involved organization, editing, and revision of written work, and correction of spelling errors.⁵⁷

The IEP team prescribed five hours of specialized instruction per week inside general education, five hours outside, and four hours per year of specialized instruction consultation services.⁵⁸ The Other Classroom Aids and Services were not materially changed.⁵⁹ Classroom Accommodations included, but were not limited to, clarification/repetition of directions, masking tools, Read Aloud for assessments, small group testing, human scribe, preferential seating close to the teacher, extended time on assessments, and frequent breaks.⁶⁰

Witness D (Examiner E) testified that she concurred with the IEP team's decision not to prescribe S/L services because she observed no significant communication deficits during her testing of Student. She also agreed that Student did not require BSS because s/he was able to access the curriculum with minimal redirection. On cross-examination, Witness D conceded that the gap between Student's cognitive scores and achievement scores was "concerning." When I asked Witness D to identify evidence of Student's academic progress in the record, she cited the PLOP in the March 31, 2021 IEP which is also cited at page 28 of her May 19, 2021 report.⁶¹ On redirect, she also cited January 5, 2021 i-Ready Reading scores indicating Student reading at grade level.⁶²

Witness K, Petitioners' educational consultant, testified that she requested that DCPS prescribe additional hours of specialized instruction for Student; she requested that Student be placed in a self-contained class outside of general education in all academic classes (math, reading, written expression, science, and social studies). Witness K opined that the IEP was not appropriate because Student requires 1:1 support due to his/her severe deficits as is evinced by his/her below several grade levels performance. Witness K also opined that S/L and behavior were areas of need that the IEP did not address.

16. On May 19, 2021, DCPS completed a Psychological Reevaluation Report.⁶³ Petitioners requested the evaluation to determine if the addition of a reclassification of OHI would be appropriate, although in 2019, when Student's classification was changed from OHI to SLD, Petitioner/mother did not believe that OHI was an accurate representation of Student's presentation due to a lack of seizures for over a year.⁶⁴ Petitioners cited Student's difficulty understanding directions and completing work independently as reasons for the proposed reclassification. Teacher A, Student's grade F general education teacher at School B, reported that Student needs frequent redirection to stay on task and significant support to complete grade level academic

⁵⁷ *Id.* at 36-38 (146-48).

⁵⁸ *Id.* at 39 (149).

⁵⁹ *Id.* at 40 (150).

⁶⁰ *Id.* at 42-43 (152-53).

⁶¹ R11:28 (291).

⁶² R12:1 (306).

⁶³ R11:1 (264).

⁶⁴ *See*, n. 10, *supra*.

tasks.⁶⁵ Examiner E interviewed Petitioners, Teacher A, and Student, and observed Student in class on two occasions for a total of 85 minutes. On the Wechsler Individual Achievement Test (“WIAT-4”), Student scored in the Average range in Sentence Composition (90), in the Very Low range in Written Expression (77), Spelling (70), and Reading Comprehension (70), and in the Extremely Low range in Total Achievement (66), Reading (66), Word Reading (62), Mathematics (64), Math Problem Solving (62), and Numerical Operations (68).⁶⁶ On supplemental subtests, Student scored in the Average range in Oral Language (102), and in the Extremely Low range in Basic Reading (68), Decoding (67), Phonological Processing (69), Orthographic Processing (61), and on the Dyslexia Index (63).⁶⁷ Examiner E interpreted these scores as follows:

According to the National Reading Panel (2000) and modified by Grizzle et al. (2009), the 5 main components of the reading process include phonemic awareness (rhyme, blend, segment, manipulate), phonics (decoding), fluency (orthography and prosody), language (vocabulary and syntax), and comprehension (executive functioning). Taken together, [Student’s] difficulties with phonemic awareness and decoding appear to be negatively impacting [his/her] ability to recognize words quickly, retain those words to build [his/her] vocabulary and comprehend novel passages presented at [his/her] grade-level. These challenges also affect [her/his] ability to spell words correctly and translate [his/her] thoughts into written form using complex structures and syntax.⁶⁸

On the BRIEF-2, none of the Petitioners’ rating scales produced Clinically Elevated or At-Risk scores. However, Teacher A’s responses yielded Clinically Elevated scores in the Behavior Regulation Index (T=76), the Emotion Regulation Index (T=80), the Cognitive Regulation Index (70), and the Global Executive Composite (T=76).⁶⁹

Overall, results from the BRIEF-2 suggest that [Student’s] executive functioning delays are more pronounced in the school setting, where academic and social demands are higher. In the contexts of the classroom and assessment settings, children with inhibitory control difficulties may start an activity or task before listening to instructions, before developing a plan, or before grasping the organization or gist of the situation. Children with elevated self-monitoring scores tend to show limited awareness of their behavior and the impact it has on their social interactions with others. Children with difficulties regulating their emotions tend to have big emotional reactions to seemingly minor events. [Student’s] heightened emotional reactivity at school may be related in part to difficulties readjusting back into social interactions with peers after being at home for almost a year.

[Student’s] cognitive processing abilities also appear to be underdeveloped. [S/he] appears to have difficulty moving freely from one situation or aspect of a problem to another as the circumstances demand (Shift). These weaknesses compromise

⁶⁵ R11:1 (264).

⁶⁶ *Id.* at 21-22 (284-5).

⁶⁷ *Id.* at 23 (286).

⁶⁸ *Id.* at 25 (288).

⁶⁹ *Id.* at 30 (293).

efficiency of problem solving and result in a tendency to get stuck or focused on a topic or problem...

Taken together, [Student] will continue to need additional explanations or demonstrations using a multi-modal approach (visual, verbal, tactile) to grasp the demands of new tasks. [S/he] also continues to benefit from adults helping [him/her] manage the quantity of information delivered and minimizing distractions so that work is manageable for [her/him] and [s/he] is fully able to attend to the task at hand. [Student] will also benefit from social skills coaching focused on increased self-awareness and conflict resolution.⁷⁰

The Conners 3rd Edition Short Form (“Conners-3”) is designed to assess ADHD in children 6-18 years old. Petitioner’s responses yielded a Very Elevated rating in Learning Problems (72) and High Average/At Risk on the Executive Functioning Scale (63). Teacher A’s ratings were in the Very Elevated range in Inattention (81), Defiance/Aggression (90), and Peer Relations (90), and High Average/At Risk in Hyperactivity/Impulsivity (66) and Learning Problems/Executive Functioning (66).⁷¹

Parent and teacher ratings based on the past month suggest that [Student] has significant challenges sustaining attention and interacting positively with peers in the school setting. There is general parent and teacher agreement regarding [Student’s] learning difficulties and underdeveloped executive functioning skills. [Student] will continue to benefit from a high level of structure and support (i.e., multiple prompts, visual reminders, modeling, and positive reinforcement) to remain fully engaged in [his/her] classroom activities and improve [his/her] relationships with peers.⁷²

Examiner E opined that Student met the eligibility criteria for OHI and SLD.⁷³

The information gathered in this evaluation indicates that [Student] is currently performing below grade level expectations in math, reading, and writing, despite receiving consistent interventions and accommodations since [s/he] was first found eligible for specialized instruction in 2017. Based on [his/her] former WISC-V and current WIAT-4 scores, [s/he] also presents with a significant discrepancy between [his/her] verbal reasoning abilities (High Average) and academic skills (ranging primarily from Very Low to Extremely Low). These challenges are also represented by [her/his] benchmark data, work samples and progress monitoring data. These factors alone support [her/his] continuing eligibility under the Significant Learning Disability (SLD) classification. In addition, [Student] meet the eligibility criteria for OHI as described above. Based on the information gathered and the specified guidelines above, [Student] meets the eligibility criteria for Multiple Disabilities (MD) given that [his/her] needs related to each classification are complex and interwoven...⁷⁴

⁷⁰ *Id.* at 31-32 (294-5).

⁷¹ *Id.* at 32 (295).

⁷² *Id.* at 33 (296).

⁷³ *Id.* at 35 (298).

⁷⁴ *Id.* at 38 (301).

17. On June 4, 2021, DCPS issued an Amended IEP to reflect the change of her/his eligibility classification to MD (SLD and OHI).⁷⁵

18. On June 22, 2021, DCPS issued an IEP Progress Report for the final reporting period of the 2020-21 school year.⁷⁶ In Mathematics and Reading, the three goals in each subject were just introduced or not introduced. In Written Expression, the two goals had not been introduced.

19. On August 19, 2021, Petitioners notified DCPS by email that they intended to enroll Student at School A for the 2021-22 school year and requested that DCPS fund the placement.⁷⁷

20. On November 2, 2021, when Student was in grade A at School A, it developed Student's Diagnostic Prescriptive Goals & Annotations ("DPG"). Student was in School A's Boost Program and was prescribed 30 minutes per week each of S/L services and BSS.⁷⁸ The DPG prescribed the following classroom accommodations: small group instruction, repetition of directions, simplification of directions, check for understanding, visual and tactile graphics, human reader for tests, and 18-point fonts, scribe/dictation, extended time, use of fidgets, small classroom setting, preferential seating, sensory tools, visual organizers, graphic organizers, multisensory materials, and calculation devices.⁷⁹ The Math PLOP reported Student's score of 167 on a fall 2021 Map assessment, indicating a performance level at grade E, three grades below Student's. In Reading, his/her MAP score of 166 was also at grade E level. In Written Language, no performance level was reported, but it was noted that Student required a scribe to get his/her thoughts onto paper, has difficulty remembering writing conventions, and requires maximum support to access each step of the writing process when composing a paragraph.⁸⁰ In S/L, the PLOP reported Student's Average scores on Examiner E's May 2021 WIAT-4, and Examiner B's August 2020 CELF-5 scores. The PLOP provided that "[Student's] needs in the area of expressive language impact [his/her] ability to consistently and meaningfully participate in classroom activities and access the curriculum. [S/he] requires ongoing language supports in order to express [his/her] thoughts/ideas."⁸¹ In Social Emotional/Behavioral, Student was reported to be able to be a positive peer leader by modeling expected behavior but had difficulty managing emotions, causing her/him to be unfocused in class in class by calling out, putting his/her head down, and refusing participation. "In individual and group counseling sessions, [Student] has responded positively to opportunities to process emotional difficulties in class. [S/he] enjoys doing well in school and has shown [s/he] is capable of making positive connections with both [his/her] peers and with staff."⁸²

The Math goals involved adding and subtracting within 20, adding and subtracting two-digit numbers without regrouping, solving single-step addition and subtraction word problems, and matching fractions to pictures.⁸³ In Reading, the goals involved summarizing stories, stating the main idea in instructional level texts, defining vocabulary words, identifying story elements

⁷⁵ P18A:1 (181).

⁷⁶ P19:1 (199).

⁷⁷ R16:1 (398).

⁷⁸ P21:3 (207).

⁷⁹ *Id.* at 4-5 (210-11).

⁸⁰ *Id.* at 6-8 (12-14).

⁸¹ *Id.* at 9-10 (215-16).

⁸² *Id.* at 11 (217).

⁸³ *Id.* at 12-13 (218-19).

(title, subtitle, caption), reading grade C level (two grades below Student's) sight words in context and in isolation, reading and spelling with long vowel patterns, and reading and spelling two-syllable words.⁸⁴ In Written Expression, the goals involved composing sentences with nouns, verbs, adjectives, using proper capitalization and punctuation, and composing paragraphs.⁸⁵ In S/L, the goals involved formulating 3-4 sentence oral or written summaries when retelling personal or curricular information and producing written narratives to answer inferential questions, draw conclusions, state opinions, and make predictions with multiple paragraphs.⁸⁶ In Behavioral, the goals involved identifying his/her emotions and developing a coping strategy.⁸⁷

21. On February 17, 2022, Witness A, OSSE's Director of Enrollment and Residency, issued a Residency Investigation Summary Report in which OSSE determined that neither petitioner resided in the District during the 2020-21 school year.⁸⁸ OSSE forwarded Petitioners a Notice of Finding of Non-Residency.⁸⁹ The Notice indicated that if Petitioners accepted the finding, they would be required to pay non-resident tuition.⁹⁰ On February 24, 2022, Petitioner/father accepted the finding.⁹¹ OSSE acknowledged receipt of the tuition payment for the 2020-21 school year on March 9, 2022.⁹² OSSE did not investigate Petitioners' residency for the 21-22 school year.⁹³

22. On March 1, 2022, when Student was in grade A at School A, DCPS completed an IEP Annual Review; Petitioners were represented by counsel.⁹⁴ In Mathematics, the PLOP reported that when Student returned to in-person learning in the fall, s/he scored 167 on a MAP assessment and 179 in December 2021. Both scores reflect a grade E performance level, three grades below Student's grade. The goals involved two-digit addition and subtraction, identification of geometric shapes, identification of data points on charts, and addition and subtraction of fractions with like denominators.⁹⁵ In Reading, the PLOP reported that on a MAP assessment in the fall of 2021, Student scored 166, commensurate with the average for a grade E student. In December, s/he scored 196, an increase from the 3rd to the 35th percentile. The PLOP repeated information concerning the PASA and LETRS that was provided in the March 31, 2021 IEP. The goals involved reading two-syllable words, defining grade-level multisyllabic words, and identifying the main idea in instructional level texts.⁹⁶ In Written Expression, the PLOP reported that Student "requires a scribe to get [his/her] thoughts on paper. [S/he] has difficulty remembering writing conventions (capitalization, ending punctuation) when [s/he] corrects or composes sentences... In addition, [Student] requires maximum supports to access each step of the writing process when composing a paragraph." The PLOP also provided information from the 2020-21 school year that was not provided in the March 2021 IEP: s/he organized ideas at a grade C level, (one grade below her/his grade that school year), s/he had developed editing and revising skills at

⁸⁴ *Id.* at 14-16 (220-22).

⁸⁵ *Id.* at 17-18 (223-24).

⁸⁶ *Id.* at 18-19 (225-26).

⁸⁷ *Id.* at 21 (227).

⁸⁸ P33:4 (334).

⁸⁹ *Id.* at 5 (335).

⁹⁰ *Id.* at 8 (338).

⁹¹ *Id.* at 11 (341).

⁹² *Id.* at 12 (342).

⁹³ Testimony of Witness A.

⁹⁴ R6:63-64 (173-74). Neither party submitted meeting notes.

⁹⁵ *Id.* at 66-68 (176-78).

⁹⁶ *Id.* at 69-72 (179-82).

a grade C level, and understood spelling concepts at a grade E level (two grades below his/her grade that year). The goals involved developing a draft using a planning organizer and making revisions using an editing checklist, and correcting spelling errors highlighted by the teacher using a dictionary or a word processing spell-check.⁹⁷ Student's services, Other Classroom Aids and Services, and Classroom Accommodations were unchanged from the previous IEP.⁹⁸

23. On or about April 18, 2022, School A issued Student's third quarter report card for the 2021-22 school year. His/her grades were as follows: 5 ("Demonstrates outstanding performance") – Music and Drama, 4 ("Consistently meets performance") – Art, Physical Education, Reading, and Science & Social/Studies, 3 ("Satisfactorily meets performance") – Math and Writing. In the eight graded Task Completion categories, Student performed Independently in two categories, and with Limited Prompting in six. The Report Card indicated that Student was performing below grade level in Reading, Writing, and Math.⁹⁹ In Math, Reading, and Written Language, Student was making progress on all of his/her goals, in S/L, s/he had mastered the goal of formulating 3-4 sentence oral or written summaries, and was progressing on the other goal, and was making progress on his/her Behavioral goal.¹⁰⁰

24. On or about June 15, 2022, School A issued Student's fourth quarter report card for the 2021-22 school year. His/her grades were as follows: 5 – Music and Drama, 4 - Art, Physical Education, Reading, and Science & Social Studies, 3 – Math and Writing. In the eight graded Task Completion categories, Student performed Independently in three categories, with Limited Prompting in four, and with Frequent Prompting in one. The Report Card indicated that Student was performing below grade level in Reading, Writing, and Math.¹⁰¹ In Math, Student had mastered the goal of addition and subtraction within 20, and was making progress on the other three goals with accuracies ranging from 40-80% on the various problems s/he is asked to solve.¹⁰² In Reading, Student had mastered the goal of summarizing stories with 40% accuracy, mastered the goal of stating the main idea and 3-4 details with 50% accuracy, mastered the goal of defining vocabulary words with 80% accuracy, mastered the goal of reading grade C level words in isolation and in context with 80% accuracy, and was making progress on three other goals.¹⁰³ In Written Language, Student had mastered the goal of composing a sentence with a noun with 60% accuracy, a verb with 50% accuracy, and one or more adjectives with 10% accuracy, and was making progress on the two other goals.¹⁰⁴ In Speech, Student had mastered the goal of formulating 3-4 sentence oral or written summaries, and was making progress on the goal of producing written narratives.¹⁰⁵ In Behavior, s/he was making progress on identifying his/her emotions.¹⁰⁶

25. Student was Administered MAP assessments in Math and Reading in the fall, winter, and spring of the 2021-22 school year. His/her fall scores were 166 in reading. and 167 in

⁹⁷ *Id.* at 73-75 (183-85).

⁹⁸ *Id.* at 76-80 (186-90).

⁹⁹ P28:1 (287).

¹⁰⁰ *Id.* at 14-24 (300-310).

¹⁰¹ P34:25 (26). Petitioners' Exhibits P34 – P38 were filed separately; the parenthetical page refers to that separate Adobe file.

¹⁰² *Id.* at 12-14 (13-15).

¹⁰³ *Id.* at 15-18 (16-19).

¹⁰⁴ *Id.* at 19-20 (20-21).

¹⁰⁵ *Id.* at 21-22 (22-23).

¹⁰⁶ *Id.* at 23 (24).

Math. His/her winter scores were 196 in Reading and 179 in Math. His/her spring scores were 210 in Reading and 171 in Math. Student's "Norms Grade" in Reading improved from two grades below level to one grade above grade level. The Math Norms Grade remained three grades below grade level.¹⁰⁷ Witness L, School A's Director of Lower and Middle School, conceded that Student likely is not reading at a level higher than grade level, but asserted that Student did progress one grade level during the year.

26. Witness G, DCPS' Central Office IEP Specialist, observed Student at School A on June 1, 2022 to determine the appropriateness of School A as a placement.¹⁰⁸ Witness G opined that Student does not require placement in a non-public day school, because s/he has plateaued in Math, has shown normal growth over three years in Reading, and would benefit from being educated among non-disabled peers (i.e., social skills, self-esteem, leadership opportunities).

27. Witness H, School B's Assistant Principal, also opined that Student did not require a non-public placement, because s/he was reading on grade level as shown on the i-Ready assessment of January 5, 2021 and from a social/emotional standpoint, s/he was outgoing and creative.

28. Witness L, School A's Director of Lower and Middle School, testified that School A is a full-time day school for students with disabilities, K-12. The enrollment is 180 students with 65 in K-8. Students in the Standard Program have a student to teacher ratio of 6:1, while those like Student, in the BOOST Program, have a student to teacher ratio of 3:1. School A uses a school-wide behavior modification plan, "Positive Behavior Intervention & Support" that rewards appropriate behavior throughout the day. Student also receives reading intervention in a small group of three students. S/he receives reading intervention through the Orton-Gillingham method four days per week for 30 minutes each day. Witness L opined that Student requires a small group environment; s/he needs someone in close proximity to keep him/her on track. When asked if Student made progress during the 2021-22 school year, Witness L cited Student's performance on standardized assessments as proof that s/he had. Witness L stated that Student had improved one grade level in MAP testing in Reading. She also reported that they saw a decrease in inappropriate behavior throughout the year, and Student responded well to redirection.

When asked if Student had made progress at School A during the 2021-22 school year, Witness K, Petitioners' educational consultant, asserted that Student was making progress due to the intensive support Student is receiving at School A, citing School A's year-end progress report and year-end assessment scores.

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:

¹⁰⁷ P37:2 (40).

¹⁰⁸ R19:1 (416).

Where there is a dispute about the appropriateness of the child's individual educational program or placement, or of the program or placement proposed by the public agency, the public agency shall hold the burden of persuasion on the appropriateness of the existing or proposed program or placement; provided, that the party requesting the due process hearing shall retain the burden of production and shall establish a prima facie case before the burden of persuasion falls on the public agency. The burden of persuasion shall be met by a preponderance of the evidence.¹⁰⁹

Two of the issues in this case involve the alleged failure of DCPS to provide an appropriate IEP and placement. Under District of Columbia law, DCPS bears the burden as to these issues. Petitioners bear the burden as to all other issues. The burden of persuasion must be met by a preponderance of the evidence.¹¹⁰

Whether DCPS denied Student a FAPE by failing to provide appropriate IEPs and placements for the 2021-22 and 2022-23 school years. Petitioners assert that Student requires full-time special education services in a small group environment.

Whether DCPS denied Student a FAPE by failing to find Student eligible for S/L services.

Whether DCPS denied Student a FAPE by failing to find Student eligible for BSS.

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*.¹¹¹ 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.'" ¹¹² 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..." ¹¹³ 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."¹¹⁴

More recently, the Court considered the case of an autistic child under IDEA who, unlike

¹⁰⁹ D.C. Code Sect. 38-2571.03(6)(A)(i).

¹¹⁰ *Schaffer v. Weast*, 546 U.S. 49 (2005).

¹¹¹ 458 U.S. 176, 187 (1982).

¹¹² *Id.* at 189-90, 200

¹¹³ *Id.* at 200.

¹¹⁴ *Id.* at 203-04.

the student in *Rowley* was not in a general education setting.¹¹⁵ 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*.’”¹¹⁶ 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 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.¹¹⁷

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.”¹¹⁸

Residency

Respondent raised Petitioners’ residency as an issue shortly before the hearing by requesting the appearance of Witness A, OSSE’s Director of Enrollment and Residency. As stated in the Prehearing Order, challenges to jurisdiction may be made at any time. DCPS asserted that Petitioners have not established valid residency in the District and, therefore, it is under no obligation to offer Student a FAPE.

District law requires that all students in DCPS, public charter schools, or whose education is funded by the District, establish residency annually.

All students enrolled in District of Columbia public schools and public charter schools funded by the District of Columbia or a student for whom educational services are paid by the District of Columbia shall provide proof of residency in the District or pay tuition pursuant to § 38-302. A determination of residency status shall be made annually for each such student.¹¹⁹

¹¹⁵ *Endrew F. ex rel. Joseph F. v. Douglas County School District RE-1*, 137 S.Ct. 988 (2017).

¹¹⁶ *Id.* at 997.

¹¹⁷ *Id.* at 1000-01 (citations omitted).

¹¹⁸ 137 S.Ct. at 1000-01.

¹¹⁹ D.C. Code § 38-306.

OSSE is responsible for establishing such rules and procedures to carry out residency verification.¹²⁰ OSSE is also responsible for resolving disputes as to parents' residency:

The review of all contested residency cases within DCPS and public charter schools, the promulgation of procedures for residency verification, and the enforcement of residency and tuition payment requirements shall be the sole and exclusive responsibility of the Office of the State Superintendent of Education ("OSSE"), or its designee, as provided in these regulations.¹²¹

Petitioners were found not to have been residents of the district throughout the 2020-21 school year and were forced to pay tuition for Student's attendance at School B that year. Despite Petitioners' questionable residency status, and despite the statutory requirement to verify District students' residency annually, Witness A testified that OSSE did not investigate Petitioners' residency during the 2021-22 school year. Petitioner/mother testified that she lived in the District during that school year and has signed a lease to remain in the District for the 2022-23 school year. In the absence of an investigative record to verify Petitioner/mother's residence, or a determination by OSSE that Petitioner/mother did not adequately verify her residency, Petitioner/mother's testimony as to her residency is uncontroverted. However, as it did for the 2020-21 school year, in the event OSSE determines that Petitioner/mother did not have valid residency during the two school years at issue, it has the authority to recover any tuition payments the District has made on Student's behalf from Petitioners.

IEP for the 2021-22 School Year

The issue is whether DCPS developed an IEP for Student for the 2021-22 school year that was calculated to enable him/her to make progress appropriate in light of her/his unique circumstances. When DCPS developed Student's IEP for the 2020-21 school year, Student was performing at least one grade below grade level in Math and Reading. In Written Expression, while Student was aware that the normal convention is writing left to right, s/he did not demonstrate comprehension, did not use language to express ideas with clarity, and "does not demonstrate command of the conventions of standard English at the appropriate level of complexity." Witness C, School B's Social Worker, and Witness E, his/her special education teacher, testified that Student had mastered all of [her/his] Behavior goals, and Witness E testified that Student was easily redirected, and exhibited no behaviors that were disruptive or impeded learning. Witness E also testified that Student's speech has always been intelligible. At the IEP meeting, despite Examiner E's recommendation in her April 2019 Psychological Reevaluation, that Student be classified MD, Petitioner/mother specifically requested that the OHI classification be rescinded, which request the IEP honored. Thus, the record reflects that there was no disagreement to terminate BSS and no persuasive evidence that Student required speech services at that time. The April 14, 2020 IEP team prescribed five hours per week of specialized instruction outside general education, five hours inside general education, and four hours per year of specialized instruction consultation services.

In August 2020, Examiner B completed a Speech-Language Evaluation in which Student exhibited age-appropriate articulation, oral motor structures and functions, and fluency. Due to a

¹²⁰ D.C. Code § 38-308.

¹²¹ 5-A DCMR § 5000.2.

moderate delay in the area of Receptive Language and *mild* delays in the areas of Expressive Language, Language Content, Language Memory, and overall Language, Examiner B recommended that Student receive S/L therapy. Speech-Language therapy is recommended 1-2xs/week for an hour each session. However, Examiner D was critical of Examiner B's failure to provide information related to Student's relative strengths and weaknesses, and when Examiner D could not get clarification from Examiner B, Examiner D performed additional subtests. Examiner D found that Student presented with functional and appropriate articulation, voice, fluency, receptive vocabulary, expressive vocabulary, and pragmatic language skills, was 100% intelligible during conversational speech, and had no consistent sound errors or patterns. Witness D opined that Student did not require S/L services, citing Student's February 10, 2021 Proficient grade in Speaking & Listening. At the MDT meeting to review Examiner B's evaluation, Student's general and special education teachers stated that they had not observed difficulties with Student's language skills in the classroom.

The February 10, 2021 report card also reported that Student's ability to read and understand grade level literature and informational texts was "Developing," and his/her ability to write opinions supported by reasons was "Basic," as was his/her ability to multiply and divide from memory or handle two-step word problems. The February 5, 2021 Progress Report revealed that the only goal Student mastered was a Math goal to understand place values and to count up to 1000.

The Math PLOP on the March 31, 2021 IEP revealed that Student was performing two grades below grade level on the latest i-Ready assessment. However, s/he scored at grade level on the Reading assessment. In Written Expression, Student continued to perform below grade level. The IEP team did not change Student's services from the previously prescribed 10 hours of specialized instruction per week.

On May 19, 2021, Examiner E conducted a Psychological Reevaluation. In one of her interviews, Teacher A, Student's general education teacher, stated that Student "needs frequent redirection to stay on task and significant support to complete grade level academic tasks." I note that Teacher A participated in the March 31, 2021 IEP meeting, but the meeting notes do not reflect any comments by her during the meeting.¹²² While Student scored in the Average range in Sentence Composition and Oral Language, her/his scores on all other WIAT-4 tests ranged from Low to Very Low to Extremely Low, including Extremely Low in Total Achievement (66), Basic Reading (68), Decoding (67), Word Reading (62), Mathematics (64), Math Problem Solving (62), and Numerical Operations (68). On the Conners, Examiner E found that Student has significant challenges sustaining attention and interacting positively with peers in the school setting, and would benefit from "a high level of structure and support... to remain fully engaged in [his/her] classroom activities and improve [his/her] relationships with peers." Examiner E reiterated her previous opinion that Student should be classified MD to reflect both his/her SLD and OHI. The IEP team amended the IEP on June 4, 2021 to make this classification change, but Student's services were not changed; no behavioral goals or services were added to address the OHI classification, and Student's specialized instruction remained at 10 hours per week.

The only objective, meaningful academic progress cited by DCPS' witnesses between the

¹²² R11-18 (346-53).

April 14, 2020 IEP and the June 4, 2021 amendment of the March 31, 2021 IEP was Student's i-Ready Reading assessment score in February 2021, reflecting that s/he was reading at grade level. This one data point is insufficient to establish overall progress for several reasons. First, this score appears to be an outlier. Examiner E evaluated Student on two occasions. In 2019, Student's Broad Reading score of 61 was in the Very Low range, and the May 2021 reading scores were in the Extremely Low range. In 2020, Examiner C found Student's Oral Reading Quotient to be 2.1 standard deviations below the mean and his/her reading rate, accuracy, fluency, and comprehension to be "below expectations compared with same-aged peers." And when Student enrolled in School A in the fall of 2021, his/her MAP score was three grades below grade level, and s/he needed a human scribe to get his/her thoughts onto paper. DCPS cited no data to reflect that Student made material progress in Math or Written Language during the 2020-21 school year.

In addition, despite Student's general education teacher's report that Student needed frequent redirection to stay on task and significant support to complete grade level academic tasks, Examiner E's finding in May 2021 that Student has significant challenges sustaining attention and interacting positively with peers, and the IEP's adding OHI as an additional classification, the IEP team failed to add behavioral services to address Student's inattention and interpersonal issues. As for Communication services, the record does not support Petitioners' contention that Student required S/L services. Examiner D provided persuasive reasons to discount the CELF-5 scores in Examiner B's evaluation. Examiner D's reevaluation of Student revealed functional and appropriate articulation, voice, fluency, receptive vocabulary, expressive vocabulary, and pragmatic language skills, s/he was 100% intelligible during conversational speech, and had no consistent sound errors or patterns. Moreover, Witness D and Student's general education and special education teachers during the 2020-21 school year all stated that Student exhibited age-appropriate language skills in the classroom setting.

DCPS' justification for not increasing the level of Student's specialized instruction is its determination that Student's academic performance is commensurate with his/her cognitive capabilities. Witness G opined that Student's Math performance level has already "plateaued." Respondent's counsel argued that Student's low WIAT and WJ-IV achievement scores are commensurate with his/her Full Scale IQ of 76. However, this ignores the fact that Student has consistently scored in the Average or High Average range in verbal reasoning. Thus, it is quite conceivable that Student could make more progress with more intensive support. Instead, DCPS has resisted Petitioners' requests to prescribe a small class environment with more individualized attention. In her/his first year in a more intensive setting, Student mastered numerous goals and advanced a grade level in Reading performance.

For all of these reasons, I conclude that DCPS has failed to meet its burden of proving that it provided Student an appropriate IEP for the 2021-22 school year by failing to provide additional specialized instruction and BSS.

IEP for the 2022-23 School Year

In the previous section I found that DCPS failed to meet its burden of proving that the June 4, 2021 IEP was appropriate for Student. For the same reasons, I find that DCPS has failed to meet its burden of proving that Student's March 1, 2022 IEP was appropriate; it failed to prescribe BSS to address student's inattention and other behavioral issues and failed to increase his/her

specialized instruction from a level that had been proved ineffective in producing academic progress. Student's success in mastering IEP goals and in improved Reading scores in his/her first year at School A suggests that his/her least restrictive environment is more restrictive than DCPS was willing to offer.

Whether School A is a proper placement for Student.

“[A] parent's unilateral private placement is proper under the Act so long as it is ‘reasonably calculated to enable the child to receive educational benefits.’”¹²⁷ Here, the record reflects that Student has derived educational benefits at School A. Student's fourth quarter report card for the 2021-22 school year reveals that s/he mastered one Math goal, four Reading goals, one Written Language goal, and one Speech goal, including formulating 3-4 sentence oral and written summaries, and was making progress on all other goals, including producing written narratives. In Reading, Student performance on MAP assessments reveals that s/he progressed at least one grade level during the school year.

In *School Committee of the Town of Burlington, Massachusetts v. Department of Education of the Commonwealth of Massachusetts*,¹²⁸ the Court approved reimbursement of tuition where parents elect to unilaterally place children in private schools rather than to accept inappropriate IEPs.

A final judicial decision on the merits of an IEP will in most instances come a year or more after the school term covered by that IEP has passed. In the meantime, the parents who disagree with the proposed IEP are faced with a choice: go along with the IEP to the detriment of their child if it turns out to be inappropriate or pay for what they consider to be the appropriate placement. If they choose the latter course, which conscientious parents who have adequate means and who are reasonably confident of their assessment normally would, it would be an empty victory to have a court tell them several years later that they were right but that these expenditures could not in a proper case be reimbursed by the school officials. If that were the case, the child's right to a *free* appropriate public education, the parents' right to participate fully in developing a proper IEP, and all of the procedural safeguards would be less than complete. Because Congress undoubtedly did not intend this result, we are confident that by empowering the court to grant “appropriate” relief Congress meant to include retroactive reimbursement to parents as an available remedy in a proper case.¹²⁹

I conclude that Petitioner's choice of School A as a unilateral placement was reasonably calculated to, and did, in fact, enable the child to receive educational benefits. Therefore, I conclude that Petitioners have met their burden of proving that School A is a proper placement under the Act, and they are entitled to be reimbursed by DCPS for expenses paid to School A in furtherance of the placement for the 2021-22 school year.

¹²⁷ *Leggett v. District of Columbia*, 793 F.3d 59, 70 (D.C. Cir. 2015), citing *Rowley*, 458 U.S. at 207.

¹²⁸ 471 U.S. 359 (1985).

¹²⁹ *Id.* at 370.

RELIEF

For relief, Petitioners request an order requiring DCPS place Student at [REDACTED] for the 2022-23 school year and to reimburse Petitioners for their expenses incurred at [REDACTED] beginning with the 2021-22 school year.

ORDER

Upon consideration of the *Complaint*, Respondents' *Response*, the exhibits from the parties' disclosures that were admitted into evidence, the testimony presented during the hearing, the parties' closing arguments, *Petitioners' Closing Authorities*, and Respondent's *District of Columbia Public Schools' Case Citations*, it is hereby

ORDERED, that Respondent shall place and fund Student's placement at School A for the 2022-23 school year.

IT IS FURTHER ORDERED, that Respondent shall reimburse Petitioners for their expenses paid to School A for Student's placement at School A for the 2021-22 school year.

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 22, 2022

Copies to: Attorney A, Esquire
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OSSE Office of Dispute Resolution
OSSE Division of Specialized Education
[REDACTED]/DCPS
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