

**District of Columbia  
Office of the State Superintendent of Education**

Office of Dispute Resolution  
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<b>Parents, on behalf of Student,<sup>1</sup></b>	)	
<b>Petitioners,</b>	)	
	)	<b>Hearing Dates: 9/29/21; 9/30/21; 10/13/21;</b>
<b>v.</b>	)	<b>11/15/21</b>
	)	<b>Hearing Officer: Michael Lazan</b>
<b>District of Columbia Public Schools,</b>	)	<b>Case No. 2021-0061</b>
<b>Respondent.</b>	)	

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**HEARING OFFICER DETERMINATION**

**I. Introduction**

This is a case involving an X-year-old student (the “Student”) who is currently eligible for services as a student with Multiple Disabilities (Specific Learning Disability, Other Health Impairment). A due process complaint (“Complaint”) was received by District of Columbia Public Schools (“DCPS” or “Respondent”) pursuant to the Individuals with Disabilities Education Act (“IDEA”) on May 11, 2021. The Complaint was filed by the Student’s parents (“Petitioners”). On June 4, 2021, Respondent filed a response. The resolution period expired on June 10, 2021.

**II. Subject Matter Jurisdiction**

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

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

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

### **III. Procedural History**

On July 23, 2021, Petitioners moved for a continuance to extend the deadline for a Hearing Officer Determination (“HOD”) to October 15, 2021. This motion was granted by a Hearing Officer order dated July 24, 2021. A prehearing conference was held on June 23, 2021. Attorney A, Esq., counsel for Petitioners, appeared. Attorney B, Esq., counsel for Respondent, appeared. A prehearing conference order was issued on June 28, 2021, summarizing the rules to be applied in the hearing and identifying the issues in the case. The prehearing conference order was amended on June 28, 2021.

On August 4, 2021, Respondent moved to dismiss. Petitioners filed opposition to the motion on August 9, 2021. On September 9, 2021, the motion was denied and the matter proceeded to hearings. The hearings were conducted through the Microsoft Teams videoconferencing platform, without objection. Petitioners were represented by Attorney C, Esq. Respondent was again represented by Attorney B, Esq. This was a closed proceeding.

The matter proceeded to trial on September 29, 2021, and September 30, 2021. Respondent moved for a directed verdict on September 30, 2021. The motion was denied on the record by this Hearing Officer. The parties did not complete testimony on these dates. As a result, the parties added the date of October 13, 2021, to finish the case. However, the parties were not able to complete testimony on this date either. On October 14, 2021, Respondent moved to extend the timelines on consent to add an additional hearing date. The motion was granted on October 14, 2021, and the deadline for the

HOD was changed to December 6, 2021. The final day of testimony was November 15, 2021. After testimony concluded, the parties agreed to submit briefs, which were received by this Hearing Officer on November 22, 2021.

During the proceeding, Petitioners moved into evidence exhibits P-1 through P-65, exclusive of exhibit P-16. Respondent objected to exhibits P-2 through P-9, P-12 through P-18A, P-21, P-27, P-28, P-35, P-37, P-41 through P-45, P-47A, P-48 through P-54, P-56 through P-57A, and P-60 through P-65. The objections were overruled except for exhibit P-51, which was withdrawn. Exhibits P-1 through P-15, P-17 through P-50, and P-52 through P-65 were admitted. Respondent moved into evidence exhibits R-1 through R-26 without objection. Petitioners presented as witnesses, in the following order: Witness A, an independent education consultant (expert in special education programming and placement); Witness B, associate head of School B's elementary school (expert in occupational therapy and special education private school administration); the Student's mother ("Mother"); and Witness C, director of speech, language and literacy services at School B (expert in speech and language pathology and literacy). Respondent presented as witnesses: Witness D, a speech and language pathologist (expert in speech and language pathology); Witness E, a monitoring specialist for Respondent; Witness F, an occupational therapist (expert in occupational therapy, including sensory processing); Witness G, a Local Educational Agency ("LEA") representative at School A (expert in special education programming and placement); Witness H, a special education coordinator at School C; Witness I, a manager on DCPS's CIEP team (expert in special education programming and placement and literacy); Witness J, a social worker (expert in social work and the provision of behavior support

services for special education students); and Witness K, an LEA representative (expert in special education programming and placement). After Respondent's presentation, Petitioners recalled Witness A and the Mother on rebuttal.

#### **IV. Issues**

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

**1. Did Respondent fail to provide the Student with an appropriate Individualized Education Program ("IEP") for the 2019-2020 school year? If so, did Respondent act in contravention of 34 C.F.R. 300.320, Endrew F. v. Douglas County School District, 137 U.S. 988 (2017), and Hendrick Hudson Bd. of Educ. v. Rowley, 458 U.S. 176 (1982)? If so, did Respondent deny the Student a Free Appropriate Public Education ("FAPE")?**

Petitioners contended that the Student's IEP did not recommend necessary specialized instruction hours, speech and language therapy services, or behavioral support services. Petitioners also contended that the IEP did not contain a specific reading program or methodology, or identify the Student's school setting (i.e., "location of services").

**2. Did Respondent fail to provide the Student with an appropriate IEP for the 2020-2021 school year? If so, did Respondent act in contravention of 34 C.F.R. 300.320, Endrew F., and Rowley? If so, did Respondent deny the Student a FAPE?**

Petitioners contended that the Student's IEP did not recommend necessary specialized instruction hours, speech and language therapy services, or behavioral support services. Petitioners also contended that the IEP did not contain a specific reading program or methodology or identify the Student's school setting (i.e., location of services).

**3. Did Respondent fail to provide Petitioners with specific, requested information as to the proposed placement or allow Petitioners' educational**

**consultant to speak with any representative from the proposed placement for the 2020-21 school year? If so, did Respondent deny the Student a FAPE?**

**4. Did Respondent convene an “AED” meeting in or about January, 2021, without the participation of Petitioners or the Student’s current instructional staff? If so, did Respondent deny the Student a FAPE?**

**5. Did Respondent improperly fail to arrange a meeting to review the Student’s new psychological assessment in or about January, 2021? If so, did Respondent deny the Student a FAPE?**

**6. Did Respondent fail to propose an appropriate IEP or placement for the Student for the 2021-22 school year? If so, did Respondent act in contravention of 34 C.F.R. 300.320, Endrew F., and Rowley? If so, did Respondent deny the Student a FAPE?**

As relief, Petitioners seek tuition reimbursement for School B for the 2019-2020, 2020-2021, and 2021-2022 school years.

## **V. Findings of Fact**

1. The Student is an X-year-old who is currently eligible for services as a student with Multiple Disabilities (Other Health Impairment, Specific Learning Disability). The Student has been diagnosed with Attention Deficit Hyperactivity Disorder (“ADHD”) and has significant difficulty paying attention to direction and picking up cues. The Student also has difficulties with memory retrieval, processing speed, organizational skills, initiating tasks, and following multi-step directions, among other issues. Testimony of Witness A; P-33. Academically, the Student has writing and reading issues, particularly in reading fluency and comprehension. The Student is also distracted by smells and noise, and has speech and language deficits and sensory integration issues. Testimony of Witness A. The Student’s biggest need is to address his/her self-regulation and attention issues, which impacts him/her “every minute of the day.” Testimony of Witness B.

2. When the Student was very young, Petitioners noticed the Student manifesting articulation issues, as well as issues with peers. Testimony of Mother. The Student spent the 2016-2017 school year at School D, a general education private placement. The Student participated appropriately in all social and academic activities, but struggled with mastery of the pre-reading curriculum, and was reportedly frustrated by the fact that many of his/her friends were already reading and writing. P-2-2-3.

3. In March, 2017, the Student was assessed through a comprehensive neuropsychological evaluation. The evaluation included the Behavior Assessment System for Children, Third Edition (“BASC-3,” Teacher and Parent); Behavior Rating Inventory of Executive Function, Second Edition (“BRIEF-2,” Parent); Children's Memory Scale; “CTOPP-2”; Jordan Left-Right Reversal Test (“Jordan-3”); Kaufman Tests of Achievement, Third Edition (“KTEA-3”); Kingsbury Background Questionnaire; NEPSY, Second Edition (“NEPSY-2”); Test of Early Reading Ability, Third Edition; and Woodcock-Johnson IV Tests of Cognitive Abilities (“WJ-IV”). The Student required frequent redirection and encouragement to complete tasks and took numerous breaks during each session during which s/he played with the examiner or a family member. The Student’s teacher rated him/her as having a slightly elevated score on the “attention problems” scale on the BASC-3. The Student was found to be below average in sustained auditory attention, and the evaluator found that the Student’s performance and behaviors indicated the presence of ADHD with mixed hyperactivity and inattention. The testing indicated the Student had issues with short-term memory and difficulty with tasks such as rapidly naming shapes. The Student’s basic reading skills ranged from below average to average. The Student struggled to identify letters and read

individual words on the WJ-IV. The evaluator recommended a specialized educational setting for the Student with a low student-to-teacher ratio, hands-on project-based learning, and intensive reading instruction integrated into the Student's daily routine, together with individualized instruction in reading and spelling using a multisensory, evidence-based method. The evaluator also recommended work on reading fluency and spelling patterns through a structured program. P-2.

4. In March, 2017, a speech and language assessment of the Student was conducted, including the Test of Auditory-Processing Skills-Third Edition ("TAPS-3") and Clinical Evaluation of Language Fundamentals-5 ("CELF-5"). The evaluator found that the Student had "solid" cognitive ability but unexpectedly low oral language skills in certain areas and significantly weak literacy skills consistent with a language-based learning disability. The Student's social pragmatic skills and phonological skills were appropriate during tasks, but his/her ability to use those skills in reading and writing was labored and inconsistent. The Student also demonstrated weak memory and language processing in a variety of tasks. The Student's literacy skills were far below typical age level and cognitive expectations, with weak reading and written expression skills. The Student was diagnosed with Mixed Receptive/Expressive Language Disorder and considered "at-risk" for Specific Learning Disorder with impairment in Reading and Specific Learning Disorder with impairment in Written Expression. To address these areas of weakness, the evaluator recommended speech and language services at a frequency of two forty-five minute individual sessions per week. P-3.

5. Petitioners enrolled the Student at School B for the 2017-2018 school year. The school is expressly for students with learning disabilities; all of the

approximately 380 students in the school have a disability. Testimony of Witness B.

The school provides “integrated” instruction with two teachers in some academic classes, including a speech and language pathologist trained in reading and writing. Some teachers at the school are certified special education teachers. The school tries to incorporate movement into the classes. The curriculum includes a social studies class called “club,” which is not based on texts. Approximately forty-five students go out for lunch and recess (where there are no pandemic-related restrictions). Most classes have about nine students, with two instructors. Testimony of Witness B.

6. The School B Individual Learning Plan (“ILP”) dated May 16, 2018, provided the Student with thirty-five hours of specialized instruction per week, with speech and language therapy and occupational therapy as integrated services, provided by a speech and language therapist and an occupational therapist, respectively. This ILP indicated that the Student had issues with phonological awareness, sound/symbol knowledge, decoding, encoding, reading comprehension, and letter formation, as well as generating ideas, formulating simple sentences, using appropriate capitalization and end marks, and spacing appropriately between words. The ILP required reading and writing interventions, including small-group instruction with the Orton-Gillingham methodology, together with repeated and “choral” readings, extra processing time, teacher-made materials, phonological awareness training, a “structural analysis” approach, use of graphic and semantic organizers, visual-concrete support, cursive instruction, storyboarding, oral rehearsal prior to writing, direct instruction in writing, and modeling. The ILP also addressed the Student’s mathematics needs, with small group instruction and a focus on using appropriate symbols and understanding math vocabulary and



concepts. The ILP also reviewed the Student's behavior/executive functioning, indicating that s/he did not follow directions, organize his/her workspace, follow routines, or self-advocate. Strategies were recommended to address these issues, including "chunking," a visual schedule, prompting, repetition and review of directions, and redirection. The ILP required extended time, paraphrasing of directions, a testing location with minimal distractions, small group settings (for testing, discussion, and instruction), supervised movement breaks during tests, and verbatim reading of at least some portion of tests or vocabulary. P-4.

7. The Student was observed by Witness A on May 31, 2018, during a morning meeting, a whole group reading activity, and a break. A teacher and a speech and language therapist were present in the room. The Student experienced difficulties, including in regard to complying with rules, keeping away from other students' personal space, initiating off-task behavior, and yelling out before being called on. The Student's teacher indicated to Witness A that the Student had phonological weaknesses, an immature voice, and needed more time on tasks. P-7.

8. The Student's end-of-year progress report from School B for the 2017-2018 school year indicated that the Student was receiving Orton-Gillingham based instruction and that the Student's NWEA MAP score in reading was 162, at the 14th percentile. The report indicated that the Student had been assessed through the Profile of Phonological Awareness ("Pro-PA"), the Wilson Foundations Inventory ("Foundations"), and the Qualitative Reading Inventory ("QRI"). On the Pro-PA, the Student made progress in blending, deleting, substituting, and core knowledge. The Student's teacher also reported progress in phonological awareness skills. In writing, the Student was

taught in part through the “Framing Your Thoughts” curriculum. The progress report indicated that the Student “developed” as a writer during the year and demonstrated strong gains in mathematics. In regard to behavioral issues, the “Zones of Regulation” and “Social Thinking Curricula” programs were used. The report card indicated that the Student responded to positive praise, was hard working, and was “developing” in social skills in most areas. P-9.

9. The Student made progress in speech and language issues during the 2017-2018 school year, including with respect to oral language, memory, social pragmatics, and articulation. The Student’s progress in oral language was “slow” and “steady.” In regard to memory and language, the Student improved in following two-step directions. P-7. The Student received direct speech and language services for approximately six months during this school year. The Student also received private tutoring during the year through a private arrangement. P-8.

10. DCPS conducted a comprehensive psychological reevaluation of the Student on July 2, 2018. The reevaluation report, issued on July 11, 2018, provided the results of testing on the BASC-3, the Reynolds Intellectual Assessment Scales-Second Edition (“RIAS-2”), and the WJ-IV. On RIAS-2 testing, the Student scored a 108 in the composite intelligence index, in the average range. The Student scored 96 in the composite memory subtests, also within the average range. On the WJ-IV, the Student scored 78 in broad reading, in the low range, though some subtests, such as reading fluency skills, were in the average range. In broad written language, the Student scored 99, in the average range. The Student’s overall broad mathematics score was 88, in the low average range. The evaluator recommended that the Student be determined to be

eligible as a student with specific learning disability and other health impairment, characterizing the Student as “struggling with basic reading and reading comprehension.” It was also noted that the Student displayed significant hyperactivity, impulsivity, and inattention as evidenced by clinical observation and parent reports.

11. An occupational therapy assessment of the Student was conducted in July, 2018. The occupational therapy report, dated July 19, 2018, addressed ongoing concerns, including sensory issues, behavioral regulation issues, and fine motor issues. The assessment found that the Student required verbal supports and scaffolds to access tasks. When engaged and attentive to tasks, the Student demonstrated functional skills, with the ability to grasp writing tools, scissors, and other classroom tools and materials. The evaluator found that the Student had reduced attention to task and sensory issues that impacted his/her access to the general education setting. R-4.

12. Witness D conducted additional testing of the Student in July, 2018. Witness D administered the CASL-2, reviewed assessments, and conducted a clinical observation of the Student. Witness D found that the Student demonstrated relative strengths in his/her receptive and expressive vocabulary attainment, lexical semantic skills, grammar/syntax skills, nonliteral language skills, inferencing skills, pragmatic language skills, phonological awareness skills, language memory skills, following directions skills, and narrative comprehension skills. The Student had relative weaknesses in his/her narrative production skills and articulation. The Student demonstrated significant attention and focus issues for the duration of the evaluation. Witness D felt that the Student’s attention and focus issues could belie linguistic strengths within his/her educational setting, and recommended repetition, firm delivery of

instructions, limited options for behavioral responses, frequent and regular breaks, verbal and/or visual signals for transition (countdown clock), reduced environmental (visual) distractions, and verbal cues for an appropriate speaking voice. Witness D felt that the Student had much more difficulty paying attention than the typical students she tested.

Testimony of Witness D; R-5.

13. DCPS determined that the Student was eligible for services at an eligibility meeting on July 24, 2018. R-7A; Testimony of Witness D. The Student's initial IEP, dated August 27, 2018, determined that the Student's behavior did not impede his/her learning or that of other children, and recommended "Area of Concern" sections in mathematics, reading, written expression, and motor skills/physical development. The Student was recommended for five hours per week of specialized instruction in general education and five hours per week of specialized instruction outside general education, with occupational therapy for 240 minutes per month outside general education. The IEP also provided for extra time for processing information and formulating oral/written responses during class discussion and instruction, location of testing with minimal distractions, paraphrasing/simplification of oral and written directions, and repetition of oral and written directions as needed. Additionally, the IEP provided for small-group settings during testing, class discussion, and instruction, and supervised movement breaks during test sessions. Additionally, the Student was recommended for classroom accommodations and modifications that included prompting and repetition of instructions/class rules, small group instruction, reduced demand for rapid response, visual supports, self-rehearsals, and peer modeling. Moreover, to support executive functioning and planning, visuals and a personalized checklist were recommended. P-11.

14. Witness A conducted another observation of the Student at School B on September 18, 2018. The observed classes contained ten students in two grades, co-taught by a full-time special education teacher and a speech and language pathologist. Witness A noted that the Student had difficulty participating and during a transition, and needed a break due to behavioral issues. Witness A observed the Student again on October 22, 2018, for morning meeting, writing class, and performing arts class. The special education teacher was absent that day and the Student had difficulty attending to task. P-12.

15. The Student was assigned to the “SLS” classroom at School A during the 2017-2018 and 2018-2019 school years. This classroom was “cross-categorical,” serving students in all disability categories, with a 12:2 student-to-teacher ratio (including a certified special education teacher and a teaching assistant). In the classroom, “guided reading” was the main reading mode, though the Lexia and Wilson Foundations programs were also used. An aide accompanied students to “specials,” lunch, and recess. In general education classes such as specials, the class size limit was twenty-five students per class, and the classes were not writing-intensive. Testimony of Witness G; testimony of Witness I.

16. The Student continued to attend School B for the 2018-2019 school year. The Student was approximately at a Pre-Primer level in reading at the start of the school year. P-17-1. The Student was placed in a classroom with a speech and language pathologist as a co-teacher for mathematics, reading, writing, and other areas. Testimony of Witness C. The instruction was based on the Orton-Gillingham methodology. P-13-4.

17. An ILP meeting took place for the Student on March 12, 2019. The team reviewed the Student's then-current levels and determined that the Student was at the Pre-Primer level, meaning that the Student could read words in isolation but not in a paragraph. The Student was reading approximately twenty-seven words per minute. The team discussed the Student's sensory needs (visual, auditory, and olfactory), executive functioning needs, speech and language issues, and accommodations. They also discussed the Student's need to improve attention to task and redirection to task, receive visuals and prompts, take appropriate breaks, and use strategies. P-14. The Student's ILP dated March 12, 2019, recommended 33.5 hours of specialized instruction per week with integrated speech and language therapy and occupational therapy, together with 180 minutes per month of speech and language therapy and occupational therapy. The ILP indicated that the Student's reading needs included decoding, fluency, comprehension, and sound-symbol knowledge. The Student was considered to have written expression needs in encoding, paragraph writing, writing fluency, and punctuation. The Student continued to have issues following rules and attending to task, including following multi-step directions. The ILP recommended that the Student receive explicit teaching, clear and consistent procedures and routines, small-group instruction, and Orton-Gillingham methodology. Additional interventions were provided for mathematics, including manipulative materials. The ILP recommended accommodations and interventions including repeated readings, extra processing time, graphic organizers, and visual-concrete support for retelling. The ILP noted that the Student craved peer attention, engaged in work avoidance, had trouble starting new tasks, and benefitted from small

groups. The ILP also found that the Student needed supports in receptive language, specifically following oral directions, and occupational therapy. P-13.

18. The Student's end-of-year progress report from School B for the 2018-2019 school year indicated that the Student made excellent gains in phonological awareness skills and gains in other areas such as reading "CVC" words. It indicated that the Student benefitted greatly from "controlled lists" to read words with a strategic approach. The Student had difficulty with comprehension, continuing to be at the Pre-Primer 1 instructional level and struggling to read Pre-Primer 2 passages accurately. The Student benefitted from role-playing in writing, because s/he had issues understanding story structure. The Student required prompts to formulate a complete sentence and then add sentences. The Student's writing contained capitalization and punctuation errors. The Student was taught through a multi-sensory approach in math, where s/he struggled with reversals and had issues with, among other things, math facts fluency. The Student was taught "emotional vocabulary" and practiced engaging in a community classroom with other students. Breaks were considered to be effective for the Student. P-17. On the NWEA Map measure, administered in the spring of 2019, the Student's score in mathematics was 192, an eleven-point improvement from the score in the spring of 2018. In reading, the Student also increased by eleven points, from 178 to 189. P-15.

19. On July 22, 2019, an IEP meeting was held for the Student, in which the Student's behavioral issues were discussed. Testimony of Witness A. However, the team did not have all of the Student's current information, so the meeting was rescheduled. P-18; P-18A; P-22.

20. The Student continued to attend School B for the 2019-2020 school year. A speech and language pathologist worked within the classroom's writing group and did other group work, including the morning meeting. Testimony of Witness C. Petitioners did not elect to provide the Student with speech and language services for the 2019-2020 school year. P-21. An IEP meeting was held for the Student on September 23, 2019. The team discussed the Student's behavioral issues. Witness A said that the Student had sensory needs, olfactory sensitivity, self-regulation issues, and executive functioning issues. Witness A also said that the Student had communication issues that affected his/her pragmatic language, perspective-taking, articulation skills, and self-advocacy, noting that the Student spoke with an immature voice. DCPS did not agree with Petitioner's request for speech and language services but added six other classroom aids and services at their request. The DCPS team agreed to add a statement about the impact of executive functioning and attention deficits. School B was asked how it was addressing the Student's reading, since his/her overall reading had not improved much. DCPS recommended twenty hours of instruction per week outside general education with 240 minutes of occupational therapy per month, and indicated that they would later determine a specific location to serve the Student. P-23; P-24; Testimony of Mother; Testimony of Witness A. DCPS offered to have a social worker and special education program specialist review documents to determine if there was a need for behavioral supports and services. P-24-4. A representative from School B agreed to provide DCPS with supporting documentation regarding the Student's behavior. DCPS team members said they would reach out to this representative about an observation of the Student and



also meet with the Student's 1:1 reading teacher to discuss the Student's behavior and executive functioning concerns and their academic impact. P-23-4.

21. The IEP resulting from the September 23, 2019, IEP meeting contained the same "Area of Concern" sections as the prior IEP. It reported on the Student's levels in reading and mathematics from School B. The IEP indicated that the Student's issues significantly impacted his/her ability to access grade-level concepts, and that his/her ADHD symptoms specifically impacted his/her ability to follow multi-step directions and retain concepts. It reported that the Student had weaknesses in sounds, symbol knowledge, decoding, reading fluency, reading comprehension, writing fluency, and paragraph writing, among other things. The IEP indicated that the Student engaged in avoidant behaviors and experienced academic fatigue. It also indicated that the Student was receiving 1:1 reading instruction for one hour per day at School B, due to his/her slow progress. The Student remained at the Pre-Primer level in reading. The IEP recommended specialized instruction outside general education for twenty hours per week, with occupational therapy for 240 minutes per month and the same "Other Classroom Aids and Services" as recommended by the earlier IEP. P-22.

22. On September 30, 2019, DCPS sent a Prior Written Notice to Petitioners explaining the reasons for the IEP. The notice said that the Student continued to require specialized instruction and occupational therapy to meet his/her academic needs, as well as support his/her challenges with inattention, hyperactivity, and executive functioning. The notice indicated that the Student had pervasive weaknesses in attention and executive functioning skills. P-25. On October 10, 2019, DCPS sent Petitioners a letter indicating

that the Student would again be placed at School A for the forthcoming school year. P-27-3.

23. In January, 2020, an informal reading assessment indicated that the Student had made notable gains since the fall, including in regard to sight words. However, the Student's reading teacher felt that his/her reading fluency continued to be an area of concern, and the Student struggled with inferencing. P-28-3-4; P-50A-2.

24. School B's ILP dated February 20, 2020, recommended thirty-five hours of specialized instruction per week for the Student. No direct occupational therapy or speech and language therapy services were listed for the Student, though they were recommended. The ILP indicated that the Student was now on instructional level "2" in reading and writing, and had added strengths to his/her profile, including with respect to reading "CVC" words, recalling details from text, and writing topic and concluding sentences. The Student continued to have needs in multiple areas, including with respect to two-syllable words, reading "nonsense words," addressing awkward phrasing and intonation, inferential thinking, writing complete sentences, and punctuation. The Student's mathematics skills were determined to be at instructional level "3," an improvement from the prior ILP, when the Student was at instructional level "1." The ILP indicated that the Student struggled with behavioral difficulties, including difficulties in executive functioning, attention, expressive language, and working memory. It noted that the Student struggled to successfully plan multi-step assignments, sustain his/her attention for extended periods, and shift his/her attention back to work after becoming distracted. The ILP also indicated that the Student rushed through work, made errors despite mastery of a concept, and required teacher redirection to return to an academic

task after s/he had become distracted. This ILP again indicated that the Student benefitted from frequent movement breaks and sitting at the teacher's desk to complete his/her work without the added verbal stimuli of peers. P-28.

25. After the commencement of the COVID-19 pandemic, the Student received virtual instruction daily, with a somewhat reduced schedule, a 1:1 reading class, a small-group math class, and a writing class. The school day lasted for approximately four to four-and-a-half hours per day. Testimony of Witness B.

26. An IEP meeting was held for the Student on May 6, 2020. Petitioners indicated that the Student needed speech and language therapy. School B reported that the Student was approaching the third-grade level in reading and that his/her decoding and attention issues impacted his/her reading at times, even during 1:1 reading sessions. Petitioners therefore sought 1:1 reading services from DCPS and requested that the Student's current 1:1 mandate be discussed in the IEP. DCPS said that it would not provide 1:1 reading services and that it would not include information about the services in the IEP, but then said that it would review the previous IEP, and that if 1:1 reading services were referenced, it would add a similar notation to the current IEP. Petitioners argued that the Student required a social, emotional, and behavioral section in his/her IEP relating to following multi-step directions, self-advocacy, executive functioning, and organization. DCPS decided to change the section relating to other classroom aids and services as a result of the Student's behavioral issues, with the DCPS team agreeing to add a computer with access to speech-to-text and text-to-speech capabilities. DCPS denied the request for a special educator in specials, lunch, and recess because there was no data presented to support that request. Testimony of Witness A; P-30; P-31.

27. The Student's IEP dated May 6, 2020, was marked "no" with respect to "Positive Behavior Interventions and Supports" and indicated that the Student did not have communication issues. The IEP repeated information from the Student's ILP dated February 21, 2020, and indicated that the Student had made notable gains as evidenced by the "DERMA" measure. The IEP also said that the Student's reading fluency and sight word vocabulary had improved. The IEP indicated that the Student's reading disabilities compromised his/her ability to engage in the learning process, maintain attention, organize materials and information, and use effective independent learning skills in the general education curriculum. The IEP stated that the Student's inattention, coupled with his/her avoidant behaviors, adversely impacted his/her ability to demonstrate independence in the general education curriculum without accommodations and supplemental supports. The IEP stated that the Student was easily distracted by noise and accordingly needed increased support to complete challenging or prolonged tasks. The IEP also indicated that the Mother felt that direct occupational therapy intervention did not make a difference in the Student's attention issues or sensory-seeking behaviors. The IEP again recommended specialized instruction outside general education for twenty hours per week, with occupational therapy for 240 minutes per month and the same "Other Classroom Aids and Services" as the earlier IEP, though it added access to a computer for researching assignments. P-31.

28. The Student was assigned to School C for the 2020-2021 school year. Petitioners were not able to visit the school because of the COVID-19 pandemic. Testimony of Witness A. Petitioners sought to speak with a School C official, but DCPS asked Petitioners to submit questions instead. Petitioners posed twenty-two questions to

DCPS about the school, which DCPS answered. Petitioners then sought to ask additional questions, but DCPS declined to answer the additional questions. P-35; P-36; P-37;

Testimony of Witness A.

29. Petitioners rejected the IEP and the Student continued at School B for the 2020-2021 school year, during which instruction was virtual until approximately January.

Testimony of Witness B. School B issued a progress report on the Student in October, 2020, indicating that the Student had profited from a high degree of structure and predictability, with choices built into his/her daily program, modeling, and frequent check-ins, and was making progress on sight words and decoding. P-45. The Student received “3” grades (indicating developing skills with inconsistent responses) in all reading objectives but one. In written expression, the Student received “2” grades (indicating no progress) in four of the objectives, “3” grades in three of the objectives, and “4” grades (indicating mastery with cues) in three of the objectives. P-45.

30. In or about January, 2021, School B resumed in-person instruction for four days per week. Testimony of Witness B. In or about January, 2021, Petitioners learned that DCPS wanted to reevaluate the Student. Petitioners therefore did not proceed with the occupational therapy assessment that they had planned. However, Petitioners had already planned for a neuropsychological assessment, which they continued to pursue.

Testimony of Mother.

31. The January 19, 2021, observation report by Witness A found the Student volunteering, sharing, and participating, though the Student repeatedly called out and had difficulty with “materials management.” The Student’s teacher shared that “pre-teaching” helped the Student, who did not need as many directions as before. P-47A.

32. Psychologist A evaluated the Student on February 8, 9, and 20, 2021. The evaluation consisted of conversations with Petitioners, the Student, and teachers; behavioral observations; and administration of the WISC-V, WJ-IV, VMI, Children's Memory Scale ("CMS"), Comprehensive Test of Phonological Processing-2nd Edition ("CTOPP-2"), Test of Word Reading Efficiency-2nd Edition ("TOWRE-2"), Jordan-3, Gray Oral Reading Test-5 ("GORT-5," Form A), BRIEF-2, Achenbach Child Behavior Checklist ("CBCL," Parent Form), and Conners-3, Parent Short form. The results of the achievement tests indicated that the Student warranted a diagnosis of Specific Learning Disability in Reading, specifically reading fluency and comprehension (ICD-10 F81.0) and Specific Learning Disability in Mathematics, specifically math fluency and calculation (ICD-10 F81.2). The Student's overall academic skills fell within the average range (35th percentile), but with a notable weakness in math calculation skills. The Student's reading profile revealed weak basic reading skills that undermined his/her reading comprehension skills, though word reading was in the average range (65th percentile). Per the TOWRE-2 measure, the Student's overall reading efficiency on timed tasks involving both sight-word reading and phonemic decoding skills fell in the average range (35th percentile). Reading comprehension on the silent reading passage comprehension subtest was within the average range (45th percentile). However, the Student's reading fluency skills fell in the very low range (5th percentile), the speed of his/her oral reading fell in the low average range (16th percentile), and the accuracy of his/her reading fell in the very low range (5th percentile). In addition, the Student's oral reading comprehension skills ranged from very low to low average (9th percentile). In

written language, the Student's performance ranged from low average to average. The Student performed better on highly structured and briefer tasks. P-53.

33. An AED meeting was scheduled for the Student on February 8, 2021, to review existing data, determine whether formal assessments were needed, and plan for the Student's future programming. Petitioners were not available and wanted to reschedule. P-49. DCPS proceeded without Petitioners, reviewed existing data, and recommended a comprehensive psychological assessment, occupational therapy assessment, and a speech and language assessment for the Student. Testimony of Witness I; P-52. On February 8, 2021, DCPS created a document called "Analysis of Existing Data," which largely outlined the Student's recent performance at School B based on School B's ILPs and reports. This document stated that the Student presented with inattentiveness, impulsivity, low frustration tolerance, distractibility, and sensory issues. P-57A. On February 25, 2021, DCPS sought consent for a psychological assessment, a speech and language assessment, and an occupational therapy assessment. P-52-2. Petitioners were willing to sign the consent forms only if they could meet with DCPS first to discuss the assessment by Psychologist A. Petitioners wanted to know, among other things, which evaluations were being considered for the Student before consenting. Testimony of Mother.

34. The School B ILP of February 17, 2021, recommended the Student for 34.25 hours of specialized instruction with integrated occupational therapy and speech language therapy, with direct occupational therapy for 45 minutes per week. The ILP indicated that the Student was at the "3.5" instructional level in reading, with continued weaknesses in comprehension, inferencing, and vocabulary. Growth was reported in

fluency, self-correction, and independent work. In written language, the Student was at the “4.0” instructional level, showing better relevance to topics and self-advocacy, but with continued weaknesses in sentence structure, fluency, and editing, among other areas. The Student was also at the “4.0” instructional level in mathematics. In terms of behavior, the Student continued to present with difficulties in executive functioning, attention, expressive language, and working memory. S/he struggled to plan a multi-step assignment successfully, sustain attention for an extended period, and shift attention back to work after becoming distracted. The Student also was observed to rush through work and benefit from frequent movement breaks and sitting at the teacher's desk to complete work. P-50. At this time, the Student was reading fifty-five words per minute with improved decoding, per the DERMA measure. P-50A-2.

35. On April 7, 2021, Respondent sent Petitioners a Prior Written Notice indicating that, in order for DCPS to make an eligibility determination and offer the Student a FAPE, it required a speech assessment, occupational therapy assessment, and comprehensive psychological assessment. The notice indicated that DCPS requested consent on February 25, 2021, and immediately following the initial data review meeting. DCPS followed up with a second request on March 25, 2021, but counsel for Petitioners indicated that they was unable to sign the consent forms. The notice then stated that, “pursuant to 34 C.F.R. Sect. 300.300(d)(4)(i), if a parent of a child who is home-schooled or placed in a private school by the parents at their own expense does not provide consent for the initial evaluation or the reevaluation, or the parent fails to respond to a request to provide consent, the public agency may not use the consent override procedures (described in paragraphs (a)(3) and (c)(1) of this section); and...the public agency is not



required to consider the child as eligible for services under §§300.132 through 300.144.”

P-55.

36. A speech and language assessment of the Student was conducted by School B on May 5 and 6, 2021. The Student’s math teacher completed School B’s “Speech-Language Pathology Department Teacher Checklist” prior to this assessment and noted that her primary concerns were the Student’s ability to follow oral directions and to engage in turn-taking conversation with his/her peers. The Student scored in the average range in nine of ten subtests on the TAPS-4, in the average range on the CREVT-3, but below average on all index scores in the CELF-5, ranging from the 12th percentile to the 16th percentile, with lower scores in receptive language. The Student also scored below average in the Test of Narrative Language-Second Edition (“TNL-2”), which measures the ability to answer questions about stories, retell stories, and create stories with picture cues. The Student also received scores that were “Borderline Impaired” or “Delayed in Social Language Development Index” on the Social Language Development Test-Elementary: Normative Update (“SLDT-E:NU”), which assesses social language skills (i.e., social interpretation and interaction with friends, such as taking someone else’s perspective). The evaluator concluded that the Student’s main deficits were in following oral directions, generating clear and cohesive narratives, and engaging in social interactions. P-56; Testimony of Witness C. The assessment was sent to DCPS on March 12, 2021. P-54.

37. By May, 2021, the Student was at the fourth-grade reading level with a relatively low fluency rate of approximately sixty-seven words per minute. The Student benefitted from “tandem reading” to help model appropriate phrasing and intonation, and

was reported to have improved in comprehension, though s/he had a difficult time organizing ideas for oral expression and at times left out pertinent details and main ideas. The Student received a “3” in all reading and written language goals, with mathematics marks ranging from “3” to “5.” P-61; Testimony of Witness I. The progress report indicated that the Student was inconsistent in improving attention skills but made progress in executive functioning. P-61-7-8. The Student’s RIT score in math progressed from 175 in spring 2019 to 199 in spring 2021. P-62-2. In reading, the Student’s RIT score advanced from 173 in spring 2019 to 206 in spring 2021. P-62-4.

38. The Student’s triennial evaluation was legally due in or about July, 2021. Testimony of Witness I.

39. The Student continues to attend School B in the 2021-2022 school year. The Student has been adjusting to a new location and has continued to miss cues, blurt out in class, and have issues with peers. Testimony of Witness A. Still, it is obvious that the Student has made significant progress in being able to read information and participate in class. Testimony of Witness B.

## **VI. Conclusions of Law**

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: “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.” D.C. Code Sect. 38-

2571.03(6)(A)(i). Accordingly, on Issues #1, #2, and #6, relating to the appropriateness of the Student’s IEP and placement, the burden of persuasion is on Respondent if Petitioners present a *prima facie* case. On the other issues, the burden of persuasion is on Petitioners.

**1. Did Respondent fail to provide the Student with an appropriate IEP for the 2019-2020 school year? If so, did Respondent act in contravention of 34 C.F.R. Sect. 300.320, Endrew F. and Rowley? If so, did Respondent deny the Student a FAPE?**

Petitioners contended that the IEP did not recommend necessary specialized instruction hours, speech and language therapy services, or behavioral support services. Petitioners also contended that the IEP did not contain a specific reading program or methodology, or identify the Student’s school setting (i.e., location of services).

The IEP is the “centerpiece” of IDEA. Honig v. Doe, 484 U.S. 305, 311 (1988). In Rowley, the Court explained that an IEP must be formulated in accordance with the terms of the IDEA and “should be reasonably calculated to enable the child to achieve passing marks and advance from grade to grade.” Id. at 204. The IDEA also requires that children with disabilities be placed in the “least restrictive environment” (“LRE”) so that they can be educated in an integrated setting with children who are not disabled to the maximum extent appropriate, that is, one that provides a program that “most closely approximates” the education a disabled child would receive if s/he had no disability. Leggett v. Dist. of Columbia, 793 F.3d 59, 74 (D.C. Cir. 2015); 20 U.S.C. Sect. 1412(a)(5)(A).

In 2017, the Supreme Court addressed a split amongst the circuit courts regarding what the IDEA means when it requires school districts to provide an “appropriate” level of education to children with disabilities. In Endrew F., the Court held that an IEP must be reasonably calculated “in light of the child’s circumstances.” Id. at 999-1000. The Court also held that a student’s educational progress must be “markedly more” than merely “de minimis” for a FAPE to be provided, and that a student’s educational program must be “appropriately ambitious.” Id. at 1000-1001. The Court also held that parents can fairly expect school authorities to offer a “cogent and responsive explanation” for their decisions, and that its ruling “should not be mistaken for an invitation to the courts to substitute their own notions of sound educational policy for those of school authorities, to whose expertise and professional judgment deference should be paid.” Id. at 1001-1002. The District of Columbia Circuit Court of Appeals has accordingly found that Endrew F. raised the bar on what counts as an adequate education under the IDEA. Z. B. v. District of Columbia., 888 F.3d 515, 517 (D.C. Cir. 2018).

First, Petitioners argued that the Student needs extra adult help in lunch, recess, and specials. Petitioners contended that the Student would have spent more than one-third of his/her school year in a general education setting with no special education support, and that this IEP was not sufficiently individualized for the Student. Petitioners’ concern was that the Student, who has ADHD and is very distractible, could not possibly have managed lunch, recess, and specials without more support, which the IEP did not provide. Petitioners insisted that this Hearing Officer should not consider whether aides might ultimately be assigned to the Student’s classes in lunch, recess, and specials. There was no such requirement in the September 23, 2019, IEP.

An IEP is judged at the time that it was created, though evidence that “post-dates” the creation of an IEP is relevant to the inquiry to whatever extent it sheds light on whether the IEP was objectively reasonable at the time it was promulgated. Id. at 522; S.S. ex rel. Shank v. Howard Road Academy, 585 F. Supp. 2d 56, 66-67 (D.D.C. 2008) (warning against “Monday morning quarterbacking”). In A.T. v. District of Columbia, No. CV 16-1086 (CKK), 2021 WL 1978792, at \*10 (D.D.C. May 18, 2021), parents argued that the IEP must be strictly judged only on the basis of its terms at the time it was created. In A.T., as here, the IEP did not provide for any additional adults in the room for lunch and recess. However, the parents were told at an IEP meeting that adults would be supervising these activities, and the court accordingly affirmed the hearing officer and rejected the parents’ claims.

Petitioners did not testify that they believed that the Student would be without an aide in lunch, specials, and recess at the time of the IEP meeting. Nor did Petitioners specifically ask for an aide in lunch, specials, and recess at the IEP meeting, suggesting that they may have known that such an aide would be provided, notwithstanding the absence of language in the IEP. This Hearing Officer therefore infers that, although the IEP should have included a reference to the aides in lunch, recess, and specials, DCPS was not engaging in Monday morning quarterbacking in this instance. Under the circumstances, this Hearing Officer finds this omission in the IEP to be a procedural violation that does not deny the Student a FAPE.

Petitioners also argued that Respondent did not provide a cogent and responsive explanation for its decisions, contending that the qualified special educators presenting testimony for DCPS provided no evidence that their expertise had been applied to assess

the Student's education in any significant way. Petitioners therefore contended that DCPS provided the Student with a generic IEP that was not sufficiently individualized, which resulted in inadequate behavioral support for the Student. Petitioners pointed out that the Witness A, Witness B, and Witness C explained how complicated the Student's special education needs were and underscored that Witness B described the Student's greatest areas of need in the classroom as centered around self-regulation, focus, attention, and executive functioning skills.

However, DCPS presented two expert witnesses who attended the IEP meeting on September 23, 2019, both of whom suggested that they recommended twenty hours per week of specialized instruction for the Student because there was insufficient data supporting Petitioners' position that the Student needed specialized instruction outside of academics and that the Student would benefit developmentally from interaction with non-disabled peers. Witness F, a highly credentialed occupational therapist, exercised her professional expertise by discussing the importance of the Student's 240 minutes per month of occupational therapy, which provided the Student with sensory interventions to help him/her stay calm and regulate and address his/her behavioral concerns. Witness F also discussed the Student's "Other Classroom Aids and Services" in the IEP, which were selected specifically for the Student and were available to address the Student's needs in general education. These services included repetition of oral and written directions as needed, prompting, repetition of instruction/class rules, small group instruction, reduced demand for rapid response, visual supports, self-rehearsals and peer modeling.

Petitioners also argued that the Student should have received behavioral support services to address his/her needs in regard to attentional issues. However, to the extent

that Petitioners suggested that the Student required counseling, this service was not provided to the Student at School B or requested by Petitioners at the IEP meeting. Moreover, there is nothing in the record to establish that counseling would have helped the Student with behavioral issues. Petitioners did not otherwise explain how behavioral support services would have helped the Student cope better during instruction at school.

Petitioners also argued that the Student's reading instruction was not sufficiently intensive in the September 23, 2019, IEP, suggesting that the Student needed the Orton-Gillingham-based instruction provided at School B. Issues relating to methodology in IEPs are ordinarily at the discretion of the school district. The United States Department of Education has stated that "there is nothing in the [IDEA] that requires an IEP to include specific instructional methodologies." 71 Fed. Reg. 46,665 (2006). As the Supreme Court has stated: "once a court determines that the requirements of the Act have been met, questions of methodology are for resolution by the States." Rowley, 458 U.S. at 208; see also Fairfax Cty. Sch. Bd. v. Knight, No. 1:05CV1472 (LMB), 2006 WL 6209927, at \*8 (E.D. Va. Aug. 23, 2006), aff'd, 261 F. App'x 606 (4th Cir. 2008) ("it is not the place of this Court to pass upon the relative merits of educational theories and methodologies"); S.M. v. Hawai'i Dep't of Educ., 808 F. Supp. 2d 1269, 1278 (D. Haw. 2011) (IEP did not specifically need to require the ABA methodology). The commentary to the 1999 IDEA regulations does give hearing officers some leeway to require a methodology in an IEP where "there are circumstances in which the particular teaching methodology that will be used is an integral part of what is 'individualized' about a student's education" and "will need to be discussed at the IEP meeting and incorporated into the student's IEP." Fed. Reg. Vol. 64, No. 48 (March 12, 1999) at 12552. The

commentary explained that, “(f)or a child with a learning disability who has not learned to read using traditional instructional methods, an appropriate education may require some other instructional strategy.” Id.

This argument is premised on a student showing significant benefit in the program provided by the private school. At least as of September 23, 2019, the Student had not made impressive progress in reading at School B. The Student began instruction at School B in September, 2018, when s/he was determined to be at a Pre-Primer level. By September 23, 2019, the Student was still at a Pre-Primer level, notwithstanding School B’s small-group Orton-Gillingham instruction. As a result, this Hearing Officer finds that the lack of a specific reading methodology in the IEP did not deny the Student a FAPE for the 2019-2020 school year.

Petitioners also argued that the Student’s September 23, 2019, IEP was inappropriate because it did not provide the Student with speech-language pathology. Petitioners pointed to the testimony of Witness C, who described the Student’s difficulties with following directions, narrative comprehension and production, and social pragmatic language, as well as the Student’s literary needs. However, Witness D, an expert in speech-language pathology who tested the Student in 2018, found that, overall, the Student presented with relative strengths in receptive and expressive vocabulary attainment, lexical semantic skills, grammar/syntax skills, supralinguistic functioning, nonliteral language skills, inferencing skills, pragmatic language skills, phonological awareness skills, language memory skills, following directions skills, and narrative comprehension skills. Petitioners contended that Witness D’s testimony was compromised because she questioned some of the testing completed by School B and



expressed interest in more in-depth information about the Student's language abilities. However, the Student received two different speech and language assessments during this approximate time period, and Witness D did not say that DCPS needed more information to assess the Student's speech and language issues thoroughly. Moreover, Petitioners' position was undermined by their decision not to provide the Student with direct speech-language therapy during most of his/her time at School B, even though this was recommended by School B.

Finally, Witness C's request for speech and language therapy was premised on School B's position that a speech and language therapist can appropriately address a student's literacy needs. Testimony in the hearing advanced the position that a speech and language therapist may be able to address a student's literacy needs if they have special credentials, like Witness C. However, there is no requirement for public school districts to use speech and language therapists to provide reading services, which are ordinarily provided by special education teachers. Accordingly, this Hearing Officer finds this claim to be without merit.

Lastly, Petitioners contended that the September 23, 2019, IEP was invalid because it did not mention the Student's school (i.e., location of services). The duty to discuss a student's proposed school at an IEP meeting is an issue on which courts disagree. Some cases suggest that the school should be selected at the IEP meeting. A.K. ex rel. J.K. v. Alexandria City Sch. Bd., 484 F.3d 682 (4th Cir. 2007). In other cases, courts find that a school does not have to be selected at the IEP meeting. T.Y. v. N.Y.C. Dep't of Educ., 584 F.3d 412, 419 (2d Cir. 2009); A.W. ex rel. Wilson v. Fairfax Cnty. Sch. Bd., 372 F.3d 674, 683 n.10 (4th Cir. 2004); White v. Ascension Parish School

Board, 343 F.3d 373 (5th Cir. 2003). Within the District of Columbia Circuit, a prominent case is Eley v. District of Columbia, 47 F. Supp. 3d 1 (D.D.C. 2014), where the court did rule that the subject student's school should have been selected at the IEP meeting. However in Eley, as in A.K., the court was influenced by the fact that the student did not have a school to attend at the beginning of the school year. Petitioners did not so argue here, nor point to any other authority within the circuit holding that the failure of a school district to identify a school at an IEP meeting per se denies a student a FAPE. Accordingly, in sum, this Hearing Officer finds that DCPS did not deny the Student a FAPE through its IEP dated September 23, 2019.

**2. Did Respondent fail to provide the Student with an appropriate IEP for the 2020-2021 school year? If so, did Respondent act in contravention of 34 C.F.R. 300.320, Endrew F. v. Douglas County School District, 137 U.S. 988 (2017), and Hendrick Hudson Bd. of Educ. v. Rowley, 458 U.S. 176 (1982)? If so, did Respondent deny the Student a FAPE?**

The Student's IEP for the 2020-2021 school year was written on May 6, 2020. Petitioners' contentions pertaining to this IEP were the same as for the September 23, 2019, IEP. In fact, the IEP for May 6, 2020, was much the same as the IEP from September 23, 2019. It also recommended that the Student receive specialized instruction outside general education for twenty hours per week, with occupational therapy for 240 minutes per month and the same "Other Classroom Aids and Services," though it added access to a computer for researching assignments.

This same kind of IEP might again have been appropriate for the Student if the Student's progress during the 2019-2020 school year continued to be limited. However, school districts must review a student's program every year, and the record makes clear that the Student's 2019-2020 school year at School B was successful. The Student was at

the Pre-Primer level at the start of the school year. The ILP from February 20, 2020, indicated that the Student was then on instructional level "2" in reading and writing, and had added strengths, including with respect to reading CVC words, recalling details from text, and writing topic and concluding sentences. By the IEP meeting on May 6, 2020, School B was reporting that the Student was approaching third-grade level in reading and had been receiving 1:1 reading instruction, which had helped the Student finally make gains in reading. The Student made these impressive gains despite the disruptions caused by the COVID-19 pandemic, and the Mother herself stated that the Student's reading improved especially during this time period.

DCPS should have explored why the Student was making these gains. However, instead of exploring this issue in depth, DCPS took the position that the data provided by School B was difficult to verify because School B used its own measures for progress. DCPS therefore turned down Petitioners' request for 1:1 reading services on the IEP. Indeed, when Petitioners requested that the Student's current 1:1 mandate be mentioned in the IEP, DCPS said that they would not even mention the 1:1 services unless they had been referenced in the previous IEP.

At the hearing, DCPS did not present any evidence to suggest that School B was exaggerating, embellishing, or inaccurate when it reported on the Student's reading levels during the 2019-2020 school year. To the contrary, the Student's gains at School B were confirmed by the subsequent report of Psychologist A from February, 2021. As discussed, the Student was at the Pre-Primer level at the start of the 2019-2020 school year. By February, 2021, some of the Student's test scores had improved so much that s/he was now in the average range in overall reading efficiency per the TOWRE-2, at the

thirty-fifth percentile. The Student's reading comprehension on the silent reading passage comprehension subtest of the TOWRE-2 was also within the average range, at the 45th percentile. This should have led DCPS to conclude that the Student needed to have more intense reading services if s/he was going to be continue to progress in reading. There is nothing in the record to establish that the Student would have benefitted from reading instruction in self-contained classes, especially classes consisting of students with mixed disabilities. Witness A pointed out that it would be difficult for the Student to benefit from group instruction in such a class, which would presumably contain students who had entirely different needs than the Student. DCPS did not clearly rebut Witness A's contention during testimony.

It is noted that the May 6, 2020, IEP provided for twenty hours of specialized instruction outside general education without any emphasis on reading services. While the IEP contained interventions such as small-group instruction in the "Other Classroom Aids and Services" section, "small group" was not defined, these interventions did not target reading, and there was no specific requirement to provide these interventions regularly.

Accordingly, while this Hearing Officer agrees with the school district on all other points with respect to this IEP, including with respect to the need for speech and language therapy or behavioral support services, this Hearing Officer also agrees with Witness A that, at this point, it was clear that this Student needed a more intensive and specialized reading program. DCPS therefore denied the Student a FAPE when it failed to provide the Student with an appropriate reading program in the May 6, 2020, IEP.

**3. Did Respondent fail to provide Petitioners with specific, requested information as to the proposed placement or allow Petitioners' educational**

**consultant to speak with any representative from the proposed placement for the 2020-21 school year? If so, did Respondent deny the Student a FAPE?**

Petitioners contended that DCPS failed to involve them in the placement discussions regarding School C, pointing out that DCPS did not allow them to speak with someone from School C in the summer of 2020, when the school was closed because of the COVID-19 pandemic.<sup>2</sup>

Congress sought to protect individual children by providing for parental involvement in the formulation of a child's IEP. Rowley, 458 U.S. at 208. Accordingly, applicable law and regulation requires that parents of a child with a disability be afforded an opportunity to participate in meetings with respect to the educational placement of the child. 34 C.F.R. Sect. 300.501(b)(1); 34 C.F.R. Sect. 300.513(a)(2)(ii). Congress repeatedly emphasized throughout the Act the importance, indeed the necessity, of parental participation in both the development of the IEP and any subsequent assessments of its effectiveness." Honig, 484 U.S. at 311. To that end, the IDEA establishes procedural safeguards that provide parents with "both an opportunity for meaningful input into all decisions affecting their child's education and the right to seek review of any decisions they think inappropriate." Id. at 311–12.

DCPS could not allow Petitioners access to School C during the relevant time period because of complications related to the COVID-19 pandemic. Petitioners instead requested a phone call with School C to understand more about the proposed school.

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<sup>2</sup> Petitioners' contentions regarding parental involvement in connection to the 2019-2020 IEP and placement were not raised in the Prehearing Order (that was agreed to by both parties) or clearly mentioned in the Complaint. As a result, such contentions may not be addressed by this Hearing Officer. The IDEA and its implementing regulations provide that a party requesting an impartial hearing may not raise issues at the impartial hearing that were not raised in its original due process complaint notice unless the other party agrees. 20 U.S.C. Sect. 1415(f)(3)(B); 34 C.F.R. 300.508(d)(3)(i), 300.511(d).

Respondent indicated that it was willing to respond to a list of questions from Petitioners. Petitioners did not continue to insist on the phone call and sent Respondent twenty-two questions about School C. Respondent answered with a professional response to each of these questions in a three-page document. Petitioners then asked Respondent additional questions, which Respondent failed to answer. However, Petitioners did not present any authority indicating that a school district can deny a student a FAPE when it does not respond in writing to questions about a school assignment, and this Hearing Officer is not aware of any such authority in the applicable caselaw. This claim must be dismissed.

**4. Did Respondent convene an “AED” meeting in or about January, 2021, without the participation of Petitioners or the Student’s current instructional staff? If so, did Respondent deny the Student a FAPE?**

**5. Did Respondent improperly fail to arrange a meeting to review the Student’s new psychological evaluation in or about January, 2021? If so, did Respondent deny the Student a FAPE?**

Both of these issues are appropriately addressed within this section since both involve Petitioners’ request for a meeting to discuss the Student’s recent assessment by Psychologist A. Petitioners’ position was that they should have been allowed participate in a meeting with DCPS to discuss Psychologist A’s assessment and determine whether additional assessments are needed. DCPS scheduled an AED meeting to discuss these issues and invited Petitioners to the meeting on February 8, 2021. However, Petitioners were unable to attend the meeting and requested that the meeting be rescheduled. Respondent decided to meet anyway and would not meet with Petitioners subsequently to discuss the assessment of Psychologist A and future assessments. Instead, Respondent sent Petitioners a consent form and sought a full evaluation of the Student through a

psychological assessment, speech and language assessment, and occupational therapy assessment.

The applicable regulation states as follows:

The parents of a child with a disability must be afforded an opportunity to participate in meetings with respect to:

(i) The identification, evaluation, and educational placement of the child; and

(ii) The provision of FAPE to the child.

(2) Each public agency must provide notice consistent with §300.322(a)(1) and (b)(1) to ensure that parents of children with disabilities have the opportunity to participate in meetings described in paragraph (b)(1) of this section.

(3) A meeting does not include informal or unscheduled conversations involving public agency personnel and conversations on issues such as teaching methodology, lesson plans, or coordination of service provision. A meeting also does not include preparatory activities that public agency personnel engage in to develop a proposal or response to a parent proposal that will be discussed at a later meeting.

34 C.F.R. Sect. 300.501(b)(3).

An “AED Meeting” is a meeting created by DCPS to provide an opportunity for DCPS to review existing data about a student, including formal and informal evaluative measures, to determine whether additional documentation is necessary to consider the student’s eligibility for special education services, and for the participants to discuss appropriate programming for the student. As suggested by Witness I, the meeting also includes preparatory activities by public agency personnel to develop a proposal or response to a parent proposal that will be discussed at a later meeting, i.e., a forthcoming IEP meeting. To this Hearing Officer, this kind of meeting falls within the exceptions in 34 C.F.R. Sect. 300.501(b)(3) since it includes “preparatory activities” to develop a proposal that will be discussed at a later meeting. This Hearing Officer is not aware of

any federal authority to the contrary, in the circuit or otherwise. Petitioners cited to a Colorado administrative decision where a meeting was deemed an IEP meeting because the parent was invited, the meeting was held in advance of the IEP issuance, the team as constituted could be considered an IEP team, and the meeting involved evaluation and placement and/or the provision of FAPE. However, Petitioners did not show that the AED meeting participants could be considered an IEP team, since no representatives of the Student's current school were at the meeting. While this Hearing Officer agrees with Petitioners that Respondent should have met with them to discuss the evaluation of Psychologist A, this Hearing Officer does not find that DCPS's failure to meet rose to the level of FAPE denial. These claims must be dismissed.

**6. Did Respondent fail to propose an appropriate IEP or placement for the 2021-22 school year? If so, did Respondent act in contravention of 34 C.F.R. 300.320, Endrew F. v. Douglas County School District, 137 U.S. 988 (2017), and Hendrick Hudson Bd. of Educ. v. Rowley, 458 U.S. 176 (1982)? If so, did Respondent deny the Student a FAPE?**

School districts are required to have an IEP in place for each disabled student. 34 C.F.R. Sect. 300.323(a); Alfonso v. District of Columbia, 422 F. Supp. 2d 1 (D.D.C. 2006) (awarding tuition reimbursement because DCPS failed to finalize a student's IEP before the start of the school year). Respondent did not provide the Student with an IEP or placement for the 2021-2022 school year.

Respondent contended that it did not have to provide an IEP or placement for the Student because Petitioners failed to consent to evaluate the Student after the AED meeting on February 8, 2021. DCPS requested consent on February 25, 2021. After counsel for Petitioners indicated that Petitioners were unable to sign the consent forms because they wanted to attend an AED meeting first to discuss the evaluation of



Psychologist A, DCPS sent Petitioners a Prior Written Notice on April 7, 2021, to inform them that, pursuant to 34 C.F.R. Sect. 300.300(d)(4)(i), if a parent of a child who is home-schooled or placed in a private school by the parents at their own expense does not provide consent for the initial evaluation or the reevaluation, or if the parent fails to respond to a request to provide consent, the public agency may not use the consent override procedures and the public agency is not required to consider the child as eligible for services under 34 C.F.R. Sect. 300.300.132 through 34 C.F.R. Sect. 300.300.144.

In support of its position on this issue, DCPS did not cite to any on-point authority. Instead, DCPS referred to Z.B. v. District of Columbia, 888 F.3d 515 (2018), where the court stated that it was an error for DCPS to merely rely on parentally-initiated assessments in evaluating a special education student. In Z.B., the court indicated that a school district has an “affirmative obligation” to conduct a full and individual initial evaluation of a student, which of course it does. However, Petitioners do not seek to preclude DCPS from evaluating the Student. Rather, Petitioners only sought to have a meeting to discuss the recent assessment by Psychologist A before agreeing to consent. To this Hearing Officer, this request was reasonable. Among other things, DCPS needed to review the detailed assessment of Psychologist A before endeavoring to reevaluate the Student to avoid duplication of some of Psychologist A’s testing.

DCPS suggested that it could not hold such a meeting because the Student’s triennial reevaluation was due, and it did not want to be late with its reevaluation. However, the record establishes that the triennial evaluation was due in July, 2021. There was more than enough time for DPCS to meet with Petitioners to discuss Psychologist A’s assessment before reassessing the Student. DCPS did not explain why a

meeting could not be rescheduled a week or two later on a more convenient date for Petitioners. Further, no one from DCPS could explain why, after receiving a copy of the Student's completed psychoeducational evaluation on March 12, 2021, it did not move forward with convening a meeting to review the report. As confirmed by Witness K, it is standard practice for DCPS to convene an AED meeting to review any new outside assessment received from a student's parents.

Additionally, as pointed out in the interim order on DCPS's motion to dismiss, this Hearing Officer finds that DCPS's interpretation of this regulation is not consistent with caselaw. The little authority that exists in this general area of law tends to favor parents. In Dep't of Educ., State of Haw. v. M.F. ex rel. R.F., 840 F. Supp. 2d 1214, 1228–30 (D. Haw. 2011), clarified on denial of reconsideration sub nom. Dep't of Educ. v. M.F. ex rel. R.F., No. CIV. 11-00047 JMS, 2012 WL 639141 (D. Haw. Feb. 28, 2012), parent challenged their child's IEPs for the 2008-2009 and 2009-2010 school years and sought tuition reimbursement for the 2009-2010 school year only. In summer 2008, the parent had contacted the school district and informed it that its services were not needed for the 2008-2009 school year. The school district therefore did not create an IEP for the Student for the 2008-2009 school year. After a hearing officer ordered the reimbursement anyway, the State of Hawaii argued to a federal court that the student's unilateral withdrawal from public education in July 2008 excused it from preparing further IEPs until the student's parents requested services in December 2009. The court rejected this contention, finding that a parental withdrawal must be in writing to assure that the parents intend to withdraw the student from the school district.

This Hearing Officer therefore finds that DCPS denied the Student a FAPE when it failed to provide Petitioners with an IEP for the Student for the 2021-2022 school year.

### **RELIEF**

As relief, Petitioners seek tuition reimbursement for School B.

A school district may be required to pay for educational services obtained for a student by the student's parent, if the services offered by the school district are inadequate or inappropriate, the services selected by the parent are appropriate, and equitable considerations support the parents' claim, even if the private school in which the parents have placed the child is unapproved. Florence County School District Four et al. v. Carter by Carter, 510 U.S. 7 (1993). Courts must consider "all relevant factors" including the nature and severity of the student's disability, the student's specialized educational needs, the link between those needs and the services offered by the private school, the placement's cost, and the extent to which the placement represents the least restrictive educational environment. Branham v. District of Columbia, 427 F.3d 7, 12 (D.C. Cir. 2005).

As discussed, the Student's primary need for the 2019-2020 and 2020-2021 school years was to improve in reading and writing. Petitioners therefore placed the Student at School B, which specializes in providing remedial instruction in reading and writing for students with average cognitive ability. At first, the Student did not make significant gains, even though reading instruction was provided in a small group. The school then switched the Student's reading instruction to daily 1:1 sessions using the Orton-Gillingham methodology. This change resulted in the Student making substantial progress in reading and writing during the 2019-2020 school year, which s/he began at a

Pre-Primer level. Recent reports indicate that the Student was functioning at about the fourth-grade level by May 14, 2021, which represents excellent progress. P-60-3.

Moreover, School B provided the Student with small class sizes in all classes, and reduced reading demands where possible, such as in the “club” classroom. The record also suggests that the school ably managed the COVID-19 pandemic in such a manner that the Student continued to progress in reading through virtual instruction. DCPS insisted that the Student needs to be in some general education classes to satisfy the federal LRE requirement. However, DCPS could not or did not offer the Student the reading instruction s/he needs in its general education setting, and there is nothing in the record to suggest that Petitioners had any other options than to send the Student to a school like School B, which provides intensive daily reading instruction. This Hearing Officer therefore finds that Petitioner’s choice to send the Student to School B for the 2020-2021 and 2021-2022 school years was reasonably calculated, and therefore “proper” under the IDEA.

Tuition reimbursement may be reduced or denied when parents fail to raise the appropriateness of an IEP in a timely manner, fail to make their child available for evaluation by the district, or upon a finding of unreasonableness with respect to the actions taken by the parents. 20 U.S.C. Sect. 1412(a)(10)(C)(iii). Under 20 U.S.C. Sect. 1412(a)(10)(C)(iii), a denial or reduction in reimbursement is discretionary.

To the extent that Respondent argued that an award of tuition reimbursement should be reduced or denied because of Petitioner’s failure to consent to evaluations, this Hearing Officer finds that Petitioner’s insistence on a meeting prior to consent was understandable. As noted earlier, there is nothing in the record to suggest that Petitioners

refused to consent to evaluations in February and March, 2021. Instead, this Hearing Officer finds that Petitioners' request for a meeting was mainly an attempt to get more information about future testing to avoid unnecessarily duplicative testing of the Student. DCPS saw this request as manipulative, but DCPS did not explain how Petitioners could gain an unfair advantage by insisting on a meeting before granting consent. Moreover, Respondent did not provide any authority in support of its position that Petitioners' action warrants a reduction in reimbursement. Petitioners therefore prevail and are awarded tuition reimbursement for all services provided by School B for the 2020-2021 and 2021-2022 school years.

#### **VII. Order**

As a result of the foregoing:

1. Respondent shall reimburse Petitioners for all tuition expenses at School B for the 2020-2021 and 2021-2022 school years.
2. All other requests for relief are hereby denied.

Dated: December 6, 2021

Michael Lazan  
Impartial Hearing Officer

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

### **VIII. Notice of Appeal Rights**

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

Date: December 6, 2021

Michael Lazan  
Impartial Hearing Officer