

District of Columbia
Office of the State Superintendent of Education

Office of Dispute Resolution
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OSSE
Office of Dispute Resolution
December 09, 2022

Public Charter School A,)	
Petitioner,)	
)	Hearing Dates: 11/1/22; 11/11/22;
v.)	11/18/22
)	Hearing Officer: Michael Lazan
Parents,)	Case No. 2022-0163
Respondents.¹)	

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 Specific Learning Disability. A due process complaint (“Complaint”) was filed by Public Charter School A (“Petitioner”) pursuant to the Individuals with Disabilities Education Act (“IDEA”) on September 6, 2022. On September 16, 2022, the Student’s parents (“Parents” or “Respondents”) filed a response.

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

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

III. Procedural History

A prehearing conference was held on October 3, 2022. Attorney A, Esq., counsel for Petitioner, appeared. Attorney B, Esq., counsel for Respondents, appeared. A prehearing conference order was issued on October 6, 2022, summarizing the rules to be applied in the hearing and identifying the issues in the case.

The hearings were conducted through the Microsoft Teams videoconferencing platform, without objection. Petitioner was again represented by Attorney A, Esq. Respondents were represented by Attorney C, Esq. This was a closed proceeding.

The matter proceeded to trial on November 1, 2022, November 11, 2022, and November 18, 2022. On October 5, 2022, Respondents moved to extend the timelines to accommodate these hearing dates, on consent. The motion was granted on October 13, 2022, and the deadline for the Hearing Officer Determination (“HOD”) was changed to December 9, 2022.

Closing arguments were presented on November 18, 2022, after the close of testimony. The parties were invited to submit lists of citations after closing arguments. The parties submitted these written statements on November 22, 2022.

During the proceeding, Petitioner moved into evidence exhibits P-1 through P-27 without objection. Respondents moved into evidence exhibits R-1 through R-38, exclusive of exhibits R-15 and R-34, without objection. Petitioner presented as witnesses: Witness A, a senior change-of-placement coordinator for the Office of the State Superintendent of Education (“OSSE”) (expert in special education placement), and Witness B, a co-director of student services at Public Charter School A (expert in special education). Respondents presented as witnesses: Witness C, a clinical psychologist

(expert in psychology); Witness D, a director of jurisdictional services at School B (expert in special education); Witness E, an associate director of a private educational group (expert in special education); and the Student's mother ("Mother").

IV. Issues

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

Did Petitioner fail to appropriately develop an Individualized Education Program ("IEP") and/or provide an appropriate educational placement for the Student for the 2022-2023 school year? If so, did Petitioner act in contravention of 34 C.F.R. Sect. 300.321(a)(1), 34 C.F.R. Sect. 300.320, Endrew F. v. Douglas County School District, 137 U.S. 988 (2017), Hendrick Hudson Bd. of Educ. v. Rowley, 458 U.S. 176 (1982), and related authority? If so, did Petitioner deny the Student a Free Appropriate Public Education ("FAPE")?

Respondents argued that the recommended IEP and placement do not provide a sufficient amount of specialized instruction for the Student, and that the Student needs a "full-time" setting. Respondents also argued that the Student would be inappropriately placed in a bilingual classroom environment.

V. Findings of Fact

1. The Student is an X-year-old who is eligible for services as a student with Specific Learning Disability. The Student has challenges with reading and writing, and issues with math, though the Student is determined to succeed. A main concern for the Student is his/her rate of reading, because s/he reads more slowly than other students of his/her age and grade. The Student also has issues with phonological processing and attention. The Student's math fluency issues are in part a function of the Student's difficulty in reading. Testimony of Witness B.

2. In or about the 2018-2019 school year, the Parents elected to send the Student to Public Charter School A, which is a “bilingual school.” The Parents have “language backgrounds,” and they felt that encouraging the Student to learn a second language when s/he is young was a good idea. At about this time, the Parents noticed that the Student had issues with reading. Testimony of Mother.

3. During the 2019-2020 school year, the Student continued at Public Charter School A, where a speech/language pathologist provided the Student with “Tier 2” Response to Intervention (“RTI”) services. R-3-1. MAP testing was conducted for the Student during this year. On February 10, 2020, the Student scored 181 on the MAP measure for math, representing the 97th percentile in terms of growth and the 71st percentile in terms of achievement. In reading, the Student scored 169, representing the 93rd percentile in terms of growth and the 43rd percentile in terms of achievement. R-4.

4. The Student continued at Public Charter School A for the 2020-2021 school year. An Orton-Gillingham-based tutor was hired for the Student for this school year. Testimony of Mother. For the 2020-2021 school year, which was virtual, the Student was able to work online, and did reasonably well. Testimony of Mother; R-5. One of the Student’s teachers for the 2020-2021 school year indicated that the Student had a happy and friendly disposition, was hardworking and responsible, but had difficulties with attention and task management. This teacher indicated that the Student had average skills in decoding, sight word knowledge, and oral reading, but had difficulty with reading rate, understanding written directions, and reading comprehension. In math, this teacher rated the Student as “strong” in conceptual understanding, but with difficulties in word problems, knowing which procedure to use, using columns, and

reading tables. In written expression, the teacher indicated that the Student had significant difficulties with handwriting, spelling, organizing ideas in writing, writing with sufficient detail, and using correct grammar and punctuation. R-8-3-4.

5. For the 2020-2021 school year, the Student's grades averaged 3.7 on a scale from 1.0 to 4.0. Testimony of Witness B. The Student's report card for the 2020-2021 school year indicated that, in "Literacy in English," s/he met or exceeded expectations in all sub-categories during every term. In math, the Student approached or met expectations in all sub-categories. R-5.

6. The Student continued at Public Charter School A for the 2021-2022 school year. The Student received RTI services during this school year, consisting of direct speech therapy for thirty minutes per week and fifteen minutes of speech consultation per quarter. This instruction was intended to help the Student work on phonemic awareness, articulation, letter sounds, and blends, among other things. The Student also received reading intervention from a general education teacher and an "intervention teacher," twice a week for thirty minutes per session. The Student was supposed to receive work on sight words, decoding, retelling, sequencing stories during retelling, recalling details, decoding work on blending, segmenting, syllabication, daily timed repeated reading, and "before" reading strategies, among other things. R-7.

7. One of the Student's teachers during the 2021-2022 school year indicated that the Student was not on grade level in reading and writing. In terms of reading skills, the teacher said that the Student had difficulty with decoding, reading recall, and drawing inferences, as well as some difficulty with remembering sound symbol associations, with sight word knowledge, and with oral reading. In written language, the teacher indicated

that the Student struggled with writing in sufficient detail, organizing his/her ideas in writing, copying from the board, and using appropriate grammar and spelling. Concerns were also indicated with the Student's oral language skills, memory, and work completion. In math, the teacher indicated that the Student had been successful with single-digit operations but struggled with multiple digits, multiple operations, mastering math concepts, conducting math calculations, completing word problems, and reading tables and graphs. R-8.

8. At about this time, the Parents were not sure that the Student was doing well at school and therefore sought an assessment from Witness C, a psychologist. Testimony of Mother. Witness C tested the Student through, among other measures: the Behavior Assessment Scales for Children, Third Edition ("BASC-3") (parent scale); Beery-Buktenica Developmental Test of Visual-Motor Integration, Sixth Edition ("VMI"); Behavior Rating Inventory of Executive Functioning, Second Edition ("BRIEF-2"); Parent and Teacher Comprehensive Test of Phonological Processing, Second Edition ("CTOPP-2"); Conners 3 (parent and teacher scales); Delis-Kaplan Executive Function System ("D-KEFS"); Gray Oral Reading Test, Fifth Edition ("GORT-5"); Jordan Left-Right Reversal Test; Test of Variables of Attention, Eighth Edition ("TOVA-8"); Test of Word Reading Efficiency, Second Edition ("TOWRE-2"); Wechsler Intelligence Scale for Children, Fifth Edition ("WISC-V"); Wide Range Assessment of Memory and Learning, Second Edition ("WRAML-2"); Woodcock Johnson Tests of Achievement, Fourth Edition ("WJ-IV"), Form A; Woodcock Johnson Tests of Cognitive Ability, Fourth Edition ("WJ-IV-C"); and Woodcock Johnson Tests of Oral Language, Fourth

Edition (“WJ-IV-O”). Two classroom teachers and a private tutor provided information to Witness C about the Student’s academic and functional classroom skills. R-8.

9. Also part of the Student’s evaluation was an observation conducted by Witness C. During the observation, Witness C found, among other things, that the Student actively participated in several activities and was easily redirected, though the Student needed verbal or gestural prompts, had difficulty expressing his/her thoughts coherently, had issues with spelling and handwriting, missed some instruction, appeared internally distracted by the environment, and did not write with detail. R-8A-3.

10. The results of the testing on the Student showed that, on the WISC-V, the Student earned a Full Scale IQ of 102, with a General Ability Index (“GAI”) of 112 (at the 79th percentile). Testing indicated that the Student’s attention and executive functioning were below average, that his/her memory and learning were mostly in the average range, that his/her phonological processing was below average, and that his/her oral language was below average in rapid picture-naming but average in oral comprehension. On the TOVA-8, which tests variables of attention, three of the Student’s subtest scores were in the “very poor” range. On the WJ-IV, the Student’s reading scores ranged from “average” (in word attack) to “low” (in sentence reading fluency and oral reading). On the GORT-5, the Student’s reading rate, fluency, and comprehension were considered to be “poor” and his/her reading accuracy was considered to be “very poor.” The Student’s math skills were deemed to be “average” in regard to applied problems but “very low” in math facts fluency. In written expression, the Student’s scores ranged from “low average” to “average.” On the BASC-3, teachers found that Student scored in the “clinically significant” range in overall cognitive

regulation, and one teacher found the Student to be in the “clinically significant range” in “global executive composite.” One teacher found that the Student was at the “at-risk” level in behavior regulation, emotional regulation, and global executive skills. Parent ratings showed less concern with respect to behavioral regulation, emotional regulation, and global executive composite. On the Conners-3, one teacher scored the Student in the “clinically significant” level in most areas by, particularly in regard to hyperactivity and impulsivity, though the other teacher did not feel the same way overall. R-8.

11. Overall, Witness C found that the Student’s cognitive profile was “complex” because the Student’s subtest scores varied. The evaluation showed that the Student had orthographic issues and difficulty with verbal fluency, labeling common objects, retrieving verbal and visual information on demand, oral comprehension, phonological processing, blending, and auditory discrimination. The Student had more difficulty with less-structured visual and verbal information when s/he did not have guidance about how to organize the material. The Student had difficulty with tasks that required him/her to multitask, and with visual-motor tasks that required him/her to scan and sequence information. The Student also had issues with attention, executive functioning, encoding, and alternating between tasks. The Student had relative strength in his/her verbal narrative memory and was able to recall important plot points and details in organized material. The Student’s reading was considered to be more than one year below grade level, and the Student’s writing was considered to be hindered by poor spelling skills and limited mastery of writing conventions. The Student’s skills at the individual word level were relatively stronger but were below grade level. In math, the Student had difficulties with “procedural memory,” math fact fluency, calculation skills,

and symbol processing. Witness C recommended a comprehensive speech and language evaluation to provide more information about the Student's receptive and expressive language skills, and to identify whether the Student would profit from additional language support. Testimony of Witness C; R-8. Witness C recommended a small, highly structured classroom, and said that a bilingual program would not be a good fit for the Student, who was diagnosed with Specific Reading Disorder (dyslexia), Mathematics Disorder, Disorder of Written Expression, and Attention-Deficit Hyperactivity Disorder ("ADHD"), predominantly inattentive type. R-8.

12. The report from Witness C surprised staff at Public Charter School A, though they did not disagree with the report. Testimony of Mother. The Student was referred for special education by the Parents on November 2, 2021. R-6. An eligibility meeting was then held on December 9, 2021, and the Student was found to be eligible for services. At the meeting, Public Charter School A staff agreed with Witness E, the Parents' expert, that the Student's primary issue was his/her learning disability, because the type of ADHD that the Student was diagnosed with is the "inattentive" type, not the "hyperactive/constant movement" type. The team agreed to meet by January 7, 2022, to create the Student's IEP. P-9.

13. As of December 2021, the Student's general education teacher said that, in math, the Student was successful with single-digit operations but struggled with multiple digits and multiple operations, calculations, word problems, and tables and graphs. In reading and writing, the Student had difficulty with decoding, reading recall, and drawing inferences, as well as some difficulty in remembering sound symbol associations, sight word knowledge, and oral reading. The Student also struggled with writing in sufficient

detail, organizing his/her ideas, copying from the board, and using appropriate grammar and spelling. On a Fountas and Pinnell reading assessment administered in October 2021, the Student read at an Instructional “Level F.” On an NWEA MAP Reading Assessment administered in October 2021, the Student’s score was in the 32nd percentile for achievement. His/her previous score (from winter 2020) was in the 59th percentile. R-13A.

14. Witness E observed the Student at Public Charter School A on December 6, 2021. The Student struggled with some of the reading, had issues following directions, and displayed inattentive behavior. After the one-to-one instructor left, the Student was not focused and left his/her seat. The Student was not oppositional, but was not confident either. Testimony of Witness E.

15. Before the Student’s IEP meeting, a senior inclusion manager from Public Charter School A sent the Parents a draft class schedule for the Student. P-6. The Parents were also provided with a draft of the IEP. The Parents then suggested changes to the IEP. P-7.

16. The IEP meeting for the Student was held on January 7, 2022. The resulting IEP stated that the Student had difficulty with sustaining attention and with executive functioning skills, such as processing multi-step instructions, multiple pieces of information, visual-motor tasks that required him/her to scan and sequence information, and rapid symbol processing. The IEP also stated that the Student presented with articulation deficits and, referencing the Student’s neuropsychological evaluation, had weaknesses in the areas of categorization, naming words with the same initial letter, vocabulary, and varied performance with oral comprehension. The IEP reported that the

Student's disability classification of Specific Learning Disability affected his/her access to the general education by causing deficits in math calculation, problem solving, phonemic awareness, orthographic processing, decoding, reading fluency, reading comprehension, language processing, and vocabulary. The IEP included goals in math, reading, written expression, cognitive skills, and communication/speech and language. The IEP discussed the neuropsychological evaluation of Witness E throughout the "Area of Concern" sections. R-13A.

17. The Student's IEP recommended specialized instruction in reading for one hour per week inside general education and four hours per week outside general education, specialized instruction in math for one hour per week inside general education and one hour per week outside general education, and specialized instruction in written expression for one hour per week inside general education and two hours per week outside general education. Speech-language pathology outside general education was recommended for thirty minutes per week, along with speech-language consultation services for thirty minutes per week. "Other Classroom Aids and Services" included: direct, explicit, multisensory instruction in a structured, sequential, diagnostic and prescriptive intervention program in reading, writing, and spelling; multimodal supports; explicit instruction; a task analysis checklist; electronic graphic organizers; an editing checklist; a list of math operation keywords; anchor charts; vocabulary word banks; sight word banks; a guided reading strip; breaking instructions into short, sequential steps; dividing work into short "mini-assignments;" building reinforcement and opportunities for feedback at the end of each task; giving the Student a copy of the teacher's notes (or those of a competent peer); allowing the Student to dictate extended writing assignments;

a teacher check-in near the beginning of independent work time to break down tasks; collecting explicit data on task completion; using a visual schedule; “brain and movement breaks”; using a visual timer; setting time limits for independent assignments with clear expectations; giving the Student “thinking time” and advanced warning that s/he will be called on; seating the Student in the front row of the classroom or as close to the teacher as possible, facing the direction of instruction/active display; and modeling the correct production after the Student makes an error with articulation. Accommodations also included clarification/repetition of directions, markup tools, a location with minimal distractions, and individual testing. R-13A.

18. At the IEP meeting, the Parents expressed concern about the Student’s learning, but did not specifically say that the IEP was problematic. Testimony of Mother. After the IEP meeting, the Parents asked for additional changes to the IEP, which was redrafted and sent back to them. P-8; P-9. After the changes were made, the Parents said that they were “good” with the IEP as it was last sent to them. P-9. When the Parents wrote that they were “good” with the IEP, they were not agreeing to all of the provisions of the IEP. The Parents felt that there were limits to what Public Charter School A could do. Testimony of Mother.

19. In or about January 2022, the Parents applied to School B for the Student. School B accepted him/her in about April 2022. Testimony of Mother.

20. Witness B was responsible for delivering the Student’s specialized instruction at Public Charter School A. During instruction outside general education, Witness B went over drills, then worked with the Student in a small group on reading, testing the Student’s reading comprehension by working on phonics and phonemic

awareness goals. Witness B provided Orton-Gillingham-based reading instruction.

Witness B also worked with the Student on math, again starting with drills designed to improve fluency. From the start, the Student responded to the instruction and made gains. The Student sometimes struggled when s/he was with Witness B, reading rather slowly. However, the Student worked through the text with increasing competence. The Student also received small-group instruction inside the classroom three times a week, during which Witness B either worked on the Student's goals or assisted him/her with fulfilling assignments. Testimony of Witness B; P-10-23.

21. The Student's IEP was amended on April 6, 2022, primarily to add a speech goal, a section on "Motor Skills/Physical Development," and occupational therapy services (thirty minutes per week outside general education, and thirty minutes per week of consultation). R-20; R-21.

22. For the third reporting period of the 2021-2022 school year, the Student was reported to have progressed on three math goals (two of which were just introduced), six reading goals (one just introduced), all six writing goals, and both of the two cognitive goals. It was noted that the Student progressed on three of four goals for communication/speech and language (with no progress on the fourth goal). It was also reported that, as of March 1, 2022, the Student was reading at Fountas and Pinnell "Level K" with consistent proficiency, suggesting readiness for higher-level texts. It was also indicated that the Student still required "heavy" support to help organize his/her thoughts for writing. R-23.

23. On MAP testing conducted in April 2022, the Student earned a score of 201 in math, representing growth at the 96th percentile and achievement at the 64th

percentile. On MAP testing conducted on June 16, 2022, the Student's math score increased to 210, equating to the 98th percentile in growth and 74th percentile in achievement. On a MAP reading test conducted on June 8, 2022, the Student earned a score of 218, equating to the 99th percentile in growth and the 90th percentile in achievement. R-24.

24. OSSE requires a formal test measure called the Partnership for Assessment of Readiness for College and Careers ("PARCC"). Testimony of Witness B. In spring 2022, on the "English Language Arts and Literacy" PARCC test, the Student scored at "Level 3" ("approaching expectations"), which was better than 68 percent of same-age students in the District of Columbia. P-24-1-2. On the math PARCC test, the Student scored at "Level 4" ("meeting expectations"), which was better than 78 percent of same-age students in the District of Columbia. P-24-3-4.

25. The Parents notified DCPS on June 9, 2022, that it intended to place the Student at School B. R-25.

26. Based on the Student's report card for the 2021-2022 school year, the Student was functioning at the "beginning" level or "approaching grade level" in most sub-categories of "Literacy in English" for the first two terms. For the third term, the Student was functioning "on" or "above" grade level in all but one sub-category. For the fourth term, the Student approached grade-level standards in five of the seven sub-categories. Four of the seven sub-categories related to skills that had not been covered during the third term. In math, for the first two terms of the 2021-2022 school year, the Student was functioning at the "beginning" level, "approaching grade level," or grade-level range. For the third term, the Student was deemed to be at grade level in two of six

sub-categories, but at the “beginning” level in two sub-categories. For the fourth term, the Student was “approaching grade level” in two sub-categories and at the “beginning” level in three sub-categories. R-26.

27. Based on the Student’s IEP progress report for the fourth reporting period of the 2021-2022 school year, the Student mastered two math goals and made progress on the three remaining math goals. In reading, the Student mastered four goals and made progress on the remaining four goals. In writing, the Student mastered two written expression goals and made progress on the remaining four goals. The Student also mastered one of two cognitive goals and progressed on two of four communication/speech and language goals, with two of the goals not introduced. R-27.

28. By the end of the 2021-2022 school year, the Student was reading at the Fountas and Pinnell independent “Level L,” with 97 percent accuracy and 90 percent comprehension accuracy. P-20-6. The Student was also reading at instructional “Level M,” responding to inferential comprehension questions with a 100% accuracy average over 5 trials. P-20-7. The Student seemed happy at Public Charter School A at the end of the 2021-2022 school year. Testimony of Mother.

29. On August 18, 2022, OSSE held a change-of-placement meeting in regard to Parents’ request for a non-public placement for the Student. OSSE received documents from Public Charter School A, considered conversations with the school team and the Parents, and participated in a change-of-placement meeting. Over the objection of the Parents, who were not seeing the Student’s progress at home, OSSE agreed with Public Charter School A on the Student’s placement there, noting that the Student was not receiving the maximum number of specialized instruction hours, that the school had

not exhausted its resources, and that the Student had made progress over the course of the past year. Testimony of Witness A; P-21.

30. The Student has attended School B for the 2022-2023 school year. School B is a non-public school for students with learning disabilities, serving approximately 380 students. The school conducts its own testing on students at the start of the school year. The school uses a multi-sensory, systematic, explicit, Orton-Gillingham-based approach, and class sizes are small. School B uses a program called “Writing Revolution” for direct, explicit instruction in writing. Social studies is taught through “academic clubs,” so there is no need for a textbook. Testimony of Witness D. School B tested the Student in September 2022, through measures designed by the school. On October 7, 2022, School B deemed the Student to be at “PAF Level 75” in reading, with 67 words correct per minute and 84 percent accuracy. R-31. The scores suggested that the Student was more than a year below grade level. Testimony of Witness D. The Student was therefore placed in a small reading group with a 2:1 student-to-teacher ratio and a fifty-minute block. The reading teacher is trained in the Orton-Gillingham approach. Testing showed that the Student’s skills in math were stronger than in reading, but still not on grade level. The Student had difficulty with fluency, used inefficient strategies, and had issues with abstract representation. For math instruction, two teachers are assigned to a class of approximately nine students. In writing, where two teachers instruct a class of twelve, the Student has a “lot to say,” but does not fully express his/her thoughts, has issues with establishing a main idea, and sometimes disregards conventions. The Student also appears to be aware of his/her difficulties. When teachers work with the Student, s/he sometimes looks to see if his/her work is different than the other students’

work. The Student also has difficulty transitioning in the building and making sure that s/he has the materials for class. Testimony of Witness D.

31. Witness E observed the Student at School B in October 2022. Witness E felt that the Student's focus was better than it had been at Public Charter School A, though the Student did get distracted. The Student seemed happy and excited, followed directions, and was more willing to do the work. Testimony of Witness E.

VI. Conclusions of Law

In this case, filed by the Local Education Agency ("LEA"), Public Charter School A, the burden of persuasion is on the filing party. 38 D.C. Code Sect. 2571.03(6)(A).

Did Petitioner fail to appropriately develop an IEP and/or provide an appropriate educational placement for the Student for the 2022-2023 school year? If so, did Petitioner act in contravention of 34 C.F.R. Sect. 300.321(a)(1), 34 C.F.R. Sect. 300.320, Endrew F. v. Douglas County School District, 137 U.S. 988 (2017), Hendrick Hudson Bd. of Educ. v. Rowley, 458 U.S. 176 (1982), and related authority? If so, did Petitioner deny the Student a FAPE?

Respondents argued that the recommended IEP and placement do not provide for a sufficient amount of specialized instruction for the Student, and that the Student needs a "full-time" setting. Respondents also argued that the Student would be inappropriately placed in a bilingual classroom environment.

The IEP is the "centerpiece" of IDEA. Honig v. Doe, 484 U.S. 305, 311 (1988). In Endrew F. v. Douglas County School District, 137 U.S. 988 (2017), 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 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 Endrew F. decision reaffirmed the Court’s holding in Board of Education v. Rowley, 458 U.S. 176 (1982), in particular the statement that if a child is fully integrated in the regular classroom, passing marks and advancement from grade to grade through the general curriculum will ordinarily satisfy the IDEA standard, though a footnote to the opinion warns that, “This guidance should not be interpreted as an inflexible rule,” and is not a holding that every child advancing from one grade to the next “is automatically receiving an appropriate education.” Id. at 1001 n.2 (citation omitted). The Court stressed that it is imperative that, to “the maximum extent appropriate,” public schools provide students that have disabilities with an education in the least restrictive environment, which, as emphasized by the Court, “requires that children with disabilities receive education in the regular classroom whenever possible.” Id. at 999.

An IEP failing to satisfy these statutory directives may be remedied through an IDEA claim to the extent the IEP “denies the child an appropriate education.” Z.B. v. District of Columbia, 888 F.3d 515, 519 (D.C. Cir. 2018). A school district may be required to pay for educational services obtained for a student by the student’s parents, 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). In so ruling, 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).

The LEA contended that this is a “straightforward” case, underscoring that the Student made demonstrable progress during the 2021-2022 school year that cannot reasonably be disputed. The LEA argued that the IEP was reasonably calculated, and that the Student accordingly did well at Public Charter School A, according to multiple data sources, including the Fountas and Pinnell measure, MAP testing, and PARCC testing, all of which showed that the Student made meaningful progress after the IEP was created in January 2022. The LEA argued that the proposed reading program (i.e., one hour of specialized instruction inside general education and four hours of specialized instruction outside general education) is similar to the small-group reading instruction that School B provides to the Student. The LEA pointed out that its proposed program recommended substantial services in math, writing, and other subjects. The program provided the Student with one hour per week of specialized instruction inside general education and one hour per week of specialized instruction outside general education in math, and one hour per week of specialized instruction inside general education and two hours per week of specialized instruction outside general education in writing, together with occupational therapy and speech and language pathology for thirty minutes per week as a direct service and thirty minutes per week as consultation.

The LEA underscored that the Student's IEP of January 7, 2022, was created through collaboration between the parties, especially noting that the Parents and their expert, Witness E, participated in the creation of the IEP. The LEA noted that, to make

the program even clearer to the Parents, it proposed a specific service schedule, but the Parents did not request more or different services during the IEP creation process, and the Parents said that “we are good” with the IEP in an email dated January 28, 2022. The LEA pointed out that there is no evidence that, prior to June 2022, the Parents requested a change or increase in services, even though they decided in April 2022 to send the Student to School B. The LEA contended that the Student made strong progress on his/her initial IEP goals for the third and fourth quarter of the 2021-2022 school year, and mastered many of the IEP goals within five months, even though the goals were designed to be mastered over the course of a full year.

The Parents agreed that the case is straightforward, but argued that the case should be resolved in their favor because the LEA failed to meet its burden of persuasion. They argued that they did not have to prove that the Student needs a self-contained program, but that the LEA had to prove that the recommended program would deliver a FAPE to the Student. They argued that the LEA did not do so, because it presented only two witnesses and neither witness really knew what they were talking about. The Parents argued that Witness A, from OSSE, had no role in the case and no background in special education, and that her opinion therefore did not mean much. They argued that the LEA witness, Witness B, had only an undergraduate degree in biology, limited experience, and no degree in special education, making him unqualified to testify about or supervise a special education program. The Parents argued that Witness B’s thirty-hour training course in Orton-Gillingham-based instruction did not qualify him to teach Orton-Gillingham-based instruction.

The Parents also argued that the LEA did not present a psychologist to contradict Witness C, who, after a neuropsychological evaluation of the Student, recommended a more restrictive placement for him/her. The Parents noted that Public Charter School A did not present any certified special educator to disagree with the two certified special educators that they presented. The Parents underscored that the LEA is bound by the terms of the IEP and cannot rely on any contentions that the co-teaching programs at Public Charter School A for the 2022-2023 school year are relevant to this determination, because the Parents were never told about the change to co-teaching before the start of the 2022-2023 school year.

Moreover, the Parents dismissed the LEA's points about the Student's progress during the 2021-2022 school year. They contended that any supposed progress based on the Fountas and Pinnell measure was speculative, because no testimony was presented on what the Fountas and Pinnell levels mean, and that the Student did not make progress on fluency. The Parents pointed out that the testing conducted by School B showed that the Student's reading is still well below grade level, and that the MAP testing results were meaningless because the Student had the questions read to him/her, which was not the case in earlier MAP testing. Finally, the Parents underscored the credentials of Witness E, who has about thirty years of experience working in the field of special education.

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. Z. B., 888 F.3d 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").

At the time of the Student's IEP meeting in January 2022, the Student had never had an IEP before, though the Student received RTI services at Public Charter School A. Even without IEP services, the Student did well at Public Charter School A during the 2020-2021 school year, which ended only seven or so months before the January 7, 2022, IEP. The Student's earlier performance is reflected in his/her report cards for the 2020-2021 school year, when the Student's grades averaged 3.7 on a scale of 1.0 to 4.0. The Student's report card for the 2020-2021 school year indicated that, in "Literacy in English," the Student met or exceeded expectations in all sub-categories during every term. In math, the Student approached or met expectations in all sub-categories during every term.

Nevertheless, after receiving an evaluation from Witness C that raised issues about the Student's academic performance, the Parents sought special education services from Public Charter School A. In response to the Parent's request for services, the LEA found the Student eligible for services as a student with Specific Learning Disability and recommended a program for the Student. Though this was the Student's first IEP, the LEA did not propose a program that reflected an incremental approach to providing services. To the contrary, the LEA recommended a program that offered the Student a significant amount of specialized instruction. In the area of reading alone, which is at the heart of this dispute, the IEP recommended one hour of specialized instruction inside general education and four hours of specialized instruction outside general education, which is similar, though not identical, to the amount of small-group instruction that School B provides to the Student. The Student's IEP also recommended one hour per week of specialized instruction inside general education and one hour per week of

specialized instruction outside general education in math, and one hour per week of specialized instruction inside general education and two hours per week of specialized instruction outside general education in written expression. The IEP also provided for speech and language pathology, occupational therapy (which was added through amendment), and a wide range of accommodations to help the Student in the general education classroom. The IEP's "Other Classroom Aids and Services" included direct, explicit, multisensory instruction in a structured, sequential, diagnostic, and prescriptive intervention program in reading, writing, and spelling, as well as breaking instructions into small, sequential steps, dividing work into short "mini-assignments," giving the Student a copy of the teacher's notes (or those of a competent peer), allowing the Student to dictate extended writing assignments, having a teacher check in with the Student near the beginning of independent work time, "brain and movement breaks," "thinking time," advanced warning that the Student will be called on to provide him/her with time to formulate answers, seating the Student in the front row of the classroom or as close to the teacher as possible, a location with minimal distractions, and individual testing.

The data in the record reveals that the Student made progress after the creation of the IEP during the 2021-2022 school year. Before the implementation of the IEP, according to the Fountas and Pinnell assessment administered in October 2021, the Student read at instructional "Level F." By the end of the school year, the Student earned a score of independent "Level L" on the Fountas and Pinnell measure, with 97 percent accuracy and 90 percent comprehension, as Witness B testified. At this time, the Student was also reading at instructional "Level M."

Consistent with these scores, the Student's spring, 2022 PARCC testing revealed that, in the 2021-2022 school year, s/he was functioning better than over half of his/her same-age peers in the District of Columbia, both in "English Language Arts and Literacy" and mathematics. On the "English Language Arts and Literacy" PARCC test, the Student scored at "Level 3" ("approaching expectations"), which was better than 68 percent of same-grade students in the District of Columbia and better than 56 percent of same-grade students at Public Charter School A. On the mathematics PARCC test, the Student scored at "Level 4," ("meeting expectations"), which was better than 78 percent of same-grade students in the District of Columbia and better than 67 percent of same-grade students at Public Charter School A. P-24-3-4.

Moreover, the Student's IEP progress reports indicated that s/he responded to the instruction that the IEP recommended. Witness E (the Parents' witness) testified that it should take a student a full year to master IEP goals, and Witness E also testified that the Student's IEP goals were acceptable. There is no dispute that the Student made meaningful progress on his/her IEP goals during the five or so months that the IEP was implemented at Public Charter School A. In reading, the Student was deemed to have already mastered four goals by the end of the 2021-2022 school year. In the four other reading goals, which were to be mastered at 90 percent accuracy, the Student demonstrated 80 percent accuracy by the end of the school year. In math, the Student mastered two of his/her five goals, with progress in the three other goals. In written expression, the Student mastered two of three goals, and made progress on the remaining goal. The Student also mastered one of two cognitive goals.

One of the Parents' main objections was that the credentials of the LEA witnesses, particularly Witness B (the only witness who actually taught the Student), were suspect, though there is nothing in the record to suggest that the credentials of Witness B were questioned during the IEP creation process. This Hearing Officer found Witness B to be credible. His demeanor was thoughtful and professional, there was no showing that he testified in a manner that was inconsistent with his prior statements, and his testimony simply made sense. There was also no suggestion of any bias in Witness B's testimony. Moreover, Witness B was not the only person involved in creating the IEP that is now being challenged. The IEP team included a general education teacher and senior inclusion manager from Public Charter School A, and it was the senior inclusion manager who actually drafted the IEP. It does not appear that any objections were raised to the credentials of any Public Charter School A staff at the time of the IEP meeting.

The Parents relied on the testimony of Witness E, who suggested that the program at Public Charter School A was inadequate. Witness E's opinion relied heavily on her observation of the Student at Public Charter School A on December 6, 2021. However, Witness E did not observe the Student at Public Charter School A during the time period that the IEP was in effect (nor did Witness C, the psychologist who testified that the Student needed to be placed at School B to receive an appropriate education).

The Parents also objected to the use of MAP testing in this case, arguing that the LEA's MAP test was effectively meaningless because it was read to the Student, whereas it was not read to the Student prior to the IEP meeting. The Parents made a fair point in this regard. But the Parents were unable to explain away the Student's improvement in the Fountas and Pinnell scores during the 2021-2022 school year. Witness E suggested

that the Fountas and Pinnell measure is becoming outdated. However, Witness E did not argue that the Fountas and Pinnell measure is meaningless, and the Parents did not submit any documentation corroborating their position on this issue, which was not emphasized during closing argument. It is noted that courts have long referenced the Fountas and Pinnell measure when reviewing the decisions of hearing officers. See, e.g., M.B., et al. v. Chester County Intermediate Unit, No. CV 19-2622-KSM, 2022 WL 541779, at *6 (E.D. Pa. Feb. 22, 2022). In fact, the Parents' own evidence references this measure in several documents.

The Parents also stated that there is no evidence in the record to establish that the jump from "Level F" to "Level L" or "Level M" on the Fountas and Pinnell measure was meaningful. However, a document in the record, submitted by the Parents, says otherwise. This document, a chart indicating the meaning of Fountas and Pinnell levels and growth, indicated that the Student's progress from Fountas and Pinnell "Level F" to "Level L" constituted more than a year's worth of growth. R-22-15. This was corroborated by one of the Student's IEP progress reports, which discussed the Student's reading goals. One reading goal asked the Student to read an "authentic text," which was considered to be one year above the Student's baseline reading level, with 97 percent accuracy, at a fluency rate of at least 84 words per minute, and with at least 80 percent comprehension. Witness B determined that the Student mastered this goal because his/her baseline reading level increased from "Level F" to "Level L," which represented at least one year's worth of growth. R-27-6.

The Parents also pointed to the School B assessment data, which indicated that the Student was functioning at a lower level than the LEA had determined. However, this

data was not based on nationally normed testing, and this data could not have been considered by the IEP team at the time of the IEP meeting because the Student started at School B in September 2022.

Witness E also pointed out that the Student's fourth-term grades at Public Charter School A represented a concerning drop from the Student's third-term grades. Witness E noted that there are more "2" grades ("approaching standards") in the fourth term than there were in the third term. However, different skills were tested in the fourth term. By this Hearing Officer's count, there are twenty-two sub-categories in the "Literacy in English" section of the Public Charter School A report card. The school did not grade the Student on every single sub-category during every single term. In the third term, the Student was graded in seven sub-categories. In the fourth term, the Student was also graded in seven sub-categories; however, four of these sub-categories tested the Student on skills that were not assessed during the third term. It cannot be said that the Student declined from the third term to the fourth term in those four sub-categories. The Student did decline from a "4" ("exceeding standards") in the third term to a "2" in the fourth term in one sub-category, and from a "3" ("meeting standards") to a "2" in another sub-category. But no other grade went down in reading during the fourth term. Additionally, none of the grades in the Student's math sub-categories went down between the third and fourth term.

The Parents also argued that the Student's reading fluency issues were not adequately addressed by the IEP or Public Charter School A, pointing to the testimony of Witness D, who indicated that the Student still had fluency concerns when s/he enrolled at School B. However, fluency was addressed in the Student's IEP. One of the reading

goals indicated that the Student “will read an authentic text one year above baseline, with 97% accuracy, with a fluency rate of at least 84 words per minute, and at least 80% accuracy for comprehension.” This is one of the reading goals that the Student mastered by the end of the school year. While the Student’s reading fluency continues to be a concern, Public Charter School A only had access to the Student while his/her IEP was in effect for about five months. An IEP need not aim for “grade-level advancement,” though a child’s “educational program must be appropriately ambitious in light of his circumstances.” Endrew F., 137 S.Ct. 1001.

Through Witness C and Witness E, the Parents also argued that Public Charter School A, which is a bilingual school, was inappropriate for the Student because the Student needed to focus on only one language to advance. But the Parents did not mention this issue during their closing argument or present any authority to suggest that an otherwise valid IEP could be deemed to deny a student a FAPE because the school implementing the IEP was a bilingual school. It is also noted that the Parents themselves originally selected Public Charter School A for the Student.

As a result, this Hearing Officer must agree with the decision of the IEP team that the recommended program for the Student for the 2022-2023 school year was appropriate. As OSSE pointed out, the Parents did not really give the LEA a full chance to implement its program, which was only in effect for five or six months. The recommended program would have allowed the Student to remain in general education classes, which satisfies the Supreme Court’s mandate to place children with disabilities in the regular classroom whenever possible. While the choice of these Parents is certainly understandable in light of the Student’s deficits, they are not entitled to reimbursement

for placing the Student in an “optimal” placement. K.S. v. D.C., 962 F. Supp. 2d 216, 225 (D.D.C. 2013) (the “Cadillac” of educational placement is not required).

VII. Order

As a result of the foregoing, this Hearing Officer finds:

1. Petitioner did not deny the Student a FAPE through its IEP and placement of the Student at Public Charter School A for the 2022-2023 school year;
2. The Parents’ contentions must be dismissed with prejudice.

Dated: December 9, 2022

Michael Lazan
Impartial Hearing Officer

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

VIII. Notice of Appeal Rights

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

Date: December 9, 2022

Michael Lazan
Impartial Hearing Officer