

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

Office of Dispute Resolution
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OSSE
Office of Dispute Resolution
December 27, 2022

Parents, on behalf of Student,¹)	
Petitioners,)	
)	Hearing Dates: 9/6/22, 9/7/22, 11/7/22;
v.)	11/14/22; 11/17/22; 12/5/22.
)	
)	Hearing Officer: Michael Lazan
District of Columbia Public Schools,)	Case No. 2022-0085
Respondent.)	

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 10, 2022. The Complaint was filed by the Student’s parents (“Petitioners”). On May 24, 2022, Respondent filed a response. A resolution meeting was held on May 24, 2022. The meeting did not result in a settlement. The resolution period expired on June 9, 2022.

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.

¹ 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-A, Chapter 30.

III. Procedural History

A prehearing conference was held on June 24, 2022. Attorney A, Esq., counsel for Petitioners, appeared. Attorney B, Esq., counsel for Respondent, appeared. A prehearing conference order was issued on June 29, 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. Petitioners were again represented by Attorney A, Esq. Respondent was again represented by Attorney B, Esq. This was a closed proceeding.

After being assigned to this case, this Hearing Officer immediately sought to schedule hearing dates. Because of witness and counsel availability, the parties agreed to hearings on July 26, 2022, July 27, 2022, July 28, 2022, and August 2, 2022. On July 12, 2022, Respondent sent an email to this Hearing Officer and Petitioners' counsel seeking an adjournment of the hearing dates due to witness availability. There was no objection. The hearings were rescheduled for September 6, 2022, September 7, 2022, September 8, 2022, and September 12, 2022. On July 19, 2022, DCPS moved on consent for a continuance to accommodate the new hearing dates. The Hearing Officer Determination ("HOD") due date was extended to September 23, 2022, by an order dated July 23, 2022.

Hearings proceeded on September 6, 2022, and September 7, 2022. However, Petitioners' expert witness contracted COVID-19 and was too ill to testify. To allow Petitioners to present their case first and enable DCPS to present its case in its entirety thereafter, the first dates that the parties could find for the remainder of the hearing were

November 7, 2022, November 14, 2022, and November 17, 2022. On September 16, 2022, Petitioners accordingly moved for a continuance until December 13, 2022, on consent. This motion was granted by order on September 22, 2022.

The matter proceeded on November 7, 2022, November 14, 2022, and November 17, 2022. However, the matter did not conclude on November 17, 2022. The parties agreed to finish the testimony and evidence on December 5, 2022. On December 4, 2022, DCPS moved to extend the HOD due date to December 27, 2022, on consent. The motion was granted on December 4, 2022. Closing arguments were presented on December 5, 2022. The parties were invited to submit lists of citations after closing arguments. Petitioners submitted a list of citations on December 12, 2022. Respondent submitted a list of citations on December 13, 2022.

During the proceeding, Petitioners moved into evidence exhibits P-1 through P-81, without objection. Respondent moved into evidence exhibits R-1 through R-15 without objection. Petitioners presented as witnesses, in the following order: the Student's father ("Father"); the Student's mother ("Mother"); Witness A, Director of Special Program at School A (expert in educational psychology and special education programming); and Witness B, an educational consultant (expert in special education programming and placement). Respondent presented as witnesses: Witness C, a social worker (expert in social work and related behavioral programming and placement); and Witness D, a Local Educational Agency ("LEA") representative and program specialist (expert in special education programming and placement).

IV. Issues

As identified in the 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”) on May 20, 2020? 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 IEP: 1) contained inappropriate hours of specialized instruction; 2) recommended predetermined hours of specialized instruction in order to place the Student in the Specific Learning Support (“SLS”) program; 3) did not provide the Student with education in the least restrictive environment (“LRE”) and provided an inappropriate justification for the Student’s proposed LRE; 4) failed to adequately describe the Student’s placement along the continuum of alternative placements and/or record the “intention of the team” with regard to the Student’s placement; 5) contained inappropriate goals and objectives that were provided without a reasonable and cogent explanation, that were copied from School A’s individual education plan (“ILP”) in math and written expression, that disregarded the rest of School A’s ILP, and that could not be mastered with twenty hours of specialized instruction per week; 6) recommended inappropriate “Other Classroom Aids and Services” that had not changed since the Student’s 2018 IEP; and 7) recommended insufficient behavioral support services.

2. Did Respondent fail to provide the Student with an appropriate IEP on June 1, 2021? 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?

Petitioners contended that the IEP: 1) contained inappropriate hours of specialized instruction; 2) recommended predetermined hours of specialized instruction in order to place the Student in the SLS program; 3) did not provide education in the LRE and provided an inappropriate justification for the Student's proposed LRE; 4) failed to adequately describe the Student's placement along the continuum of alternative placements and/or record the "intention of the team" with regard to the Student's placement; 5) was not supported by a cogent and reasonable explanation of the goals, objectives, accommodations, and services recommended therein; and 6) contained inappropriate "Other Classroom Aids and Services" that had not changed since the Student's 2018 IEP.

3. Did Respondent fail to afford Petitioners a meaningful opportunity to participate in the placement process relating to the May 20, 2020, and June 1, 2021, IEPs? If so, did Respondent violate 34 C.F.R. Sect. 300.501(b) and related provisions? If so, did Respondent deny the Student a FAPE?

Petitioners contended that the Student's placement and hours of specialized instruction were predetermined, that Petitioners were not provided with an opportunity to observe the proposed setting (relating to the June 1, 2021, IEP only), and that Petitioners were not part of any discussion or determination of the Student's LRE or appropriate placement along the continuum.

As relief, Petitioners seek reimbursement of all costs for the "Special Program" at School B, including tuition, transportation, related services, and other expenses.

V. Findings of Fact

1. The Student is an X-year-old who is eligible for services as a Student with Multiples Disabilities (Specific Learning Disability, Other Health Impairment). The Student has been diagnosed with Attention Deficit Hyperactivity Disorder ("ADHD").

Testimony of Father. The Student exhibits low mental stamina and frustration tolerance, low self-esteem, and challenges with managing anxiety and depression. The Student's social emotional challenges and ADHD impacts his/her ability to access the general education curriculum without appropriate supports in place. R-14-10.

2. In or about the 2015-2016 school year, Petitioners placed the Student at School A, a private school for students of average to above-average cognitive ability who have learning issues. At that time, the Student had significant issues with written expression and math. Testimony of Father; Testimony of Witness B. Petitioners sought tuition reimbursement for this placement by filing a due process complaint. An HOD was issued by Impartial Hearing Officer ("IHO") Keith Seat on December 17, 2017, which stated that the then-proposed IEP and placement in an SLS classroom was inappropriate for the Student because, among other things: 1) s/he needed additional interventions to benefit from electives; 2) s/he needed more one-to-one support to address issues relating to narcolepsy; 3) the IEP did not adequately describe the Student's LRE and placement; and 4) the other children in the SLS program appeared to be functioning well behind the Student academically. P-45. The Mother observed the SLS program in or about 2017. Testimony of Mother.

3. SLS students are students who have been identified with a specific learning disability or other disability where behavior is not the primary impediment to accessing the general education curriculum. P-63-21. The SLS program is designed to meet the individual needs of students who have been diagnosed with a specific learning disability or who demonstrate complex learning needs that require intensive specialized instruction. Students in the SLS program have full-time IEPs (20 or more hours of

specialized instruction outside of general education). The SLS program utilizes the Scholastic research-based reading interventions “Read 180” and “System 44,” as well as “Spell Read” and “Lexia.” SLS students should be scheduled together, separate from other students and programs. P-62-23. The SLS program has students with multiple cognitive and achievement ranges, typically three years below grade level. The program is non-categorical, meaning that students with cognitive impairment can be placed in the program. Testimony of Witness B. Students in the SLS program receive instruction in a classroom with no more than twelve students, an aide, and a certified teacher. Testimony of Witness D.

4. DCPS conducted a psychological evaluation of the Student in the summer of 2018. A corresponding report was issued in August 1, 2018. Behavior Assessment Scale for Children, Third Edition (“BASC-3”) testing was administered to evaluate the Student’s general social-emotional functioning across settings. Overall, few concerns were noted in the areas of externalizing problems, but several areas of clinically significant concern were endorsed by both the Student and the Mother, including anxiety, hyperactivity, and attention problems. Teacher-reported data suggested the impact of anxiety, executive functioning deficits, and symptoms of ADHD, and concerns were noted regarding depression. The Student reported that s/he was easily distracted, struggled to complete hard tasks, often lost track of his/her place during work, and had difficulty finishing things. Academically, the Student demonstrated a variable cognitive profile with notable strengths in verbal comprehension, solving novel problems, and visual spatial reasoning, with relative weaknesses in working memory and processing speed. The Student earned low-average overall achievement scores, with particular

deficits in mathematics (5th percentile). The Student was deemed to be underperforming in written expression (low-average range), compared to his/her verbal comprehension score. R-3.

5. The Student continued to attend School A for the 2018-2019 and 2019-2020 school years, with DCPS agreeing to fund the placement at public expense.

Testimony of Father. During the Student's August 7, 2019, IEP meeting for the 2019-2020 school year, DCPS proposed that the Student be transitioned to a general education public school environment and offered corresponding suggestions to Petitioners. DCPS also spent some time reviewing the Student's Measures of Academic Progress ("MAP") scores across time. DCPS pointed out that the Student was in the high-average range in reading and had consistently outperformed his/her School A peers and national data. P-2-27-P-2-29; Testimony of Mother. The IEP team recommended "Area of Concern" sections for math, written expression, and emotional, social and behavioral development, but not for reading. Similar to prior recommendations, the IEP team recommended twenty hours of specialized instruction per week outside general education, with 240 minutes per month of behavioral support services. P-2.

6. School A's ILP for the Student dated January 21, 2020, recommended 33.5 hours of specialized instruction per week, with counseling from a psychologist for forty-five minutes per week and occupational therapy for forty-five minutes per week. The Student was listed as reading at instructional level 6/7 in reading, with particular issues in comprehension and decoding skills. The Student was also listed at instructional level 6/7 in written language, with issues noted in writing fluency, multi-paragraph structure, and revisions. In math, the Student was again listed at instructional level 6/7,

with issues noted in fractions, percentages, decimals, and algebra. The ILP devoted a section to academic behavior/executive functioning, noting the Student's difficulty in following directions, organizing work space, returning homework as expected, and following through with assignments. Another section of the ILP, entitled "Social Behavioral," indicated that the Student needed to use self-calming strategies. Another section, entitled "Psychological Services," listed the Student's issues as anxiety, executive functioning, self-confidence, self-esteem, ADHD, fatigue, stamina, and self-advocacy. The ILP indicated that the Student was engaging, friendly, insightful, and well-liked. P-55.

7. On February 3, 2020, Petitioners filed a due process complaint against DCPS, alleging that the Student was denied a FAPE through the IEP of August 2019, and requesting tuition for School A. P-46. This due process complaint was withdrawn without prejudice. P-52.

8. An IEP meeting was held for the Student on May 20, 2020. At this meeting, a School A representative stated that other students at School A read better than the Student and that the Student continued to have challenges with reading, though DCPS staff said that the Student was scoring in the average range in reading. The School A representative stated that the Student needed instruction broken down into concrete steps, especially as assignments became more complex and sophisticated. The representative was also worried about the Student being in a class of twenty-five to thirty students. R-5. The "school team" from School A reported that, with occupational therapy and behavior supports, the Student made progress with respect to sleep issues, and that s/he was able to manage with five-minute breaks. P-15-9; P-18-6. Petitioners had an opportunity to

speak and participate at the meeting. There were no objections to the “Other Classroom Aids and Services” section of the IEP. Testimony of Father; Testimony of Mother.

9. The IEP based on the May 20, 2020, IEP meeting again recommended twenty hours of specialized instruction per week outside general education for the Student, with 120 minutes per month (a fifty percent reduction) of behavioral support services. The “Area of Concern” sections of the IEP, including present levels of performance and goals, continued to include math, written expression, and emotional, social and behavioral development. Goals in this IEP were adopted from a School A IEP. The reasons for the recommended twenty hours of specialized instruction per week and the reduction in monthly behavioral support services were not made clear to Petitioners during the IEP meeting. Testimony of Father; Testimony of Mother. There was no mention of the Student’s forthcoming move to School B at the time. DCPS understood that the Student would be in a full-time special education placement at School A for the 2020-2021 school year. Testimony of Witness D.

10. The May 20, 2020, IEP stated that the Student experienced symptoms of ADHD, including inattentiveness, sensitivity to internal and external distractions, and hyperactivity, as well as anxiety and depression. The IEP indicated that the Student earned high academic marks when appropriately supported and did not require a behavior intervention plan “to address these issues,” as the issues were successfully mitigated with specialized instruction and therapeutic services. The IEP stated that the Student was evidencing a mature ability to cope with increasingly sophisticated social matters at school. The IEP recommended the same “Other Classroom Aids and Services” and accommodations that had been recommended in previous IEPs, including access to nap

space, frequent movement breaks, use of fidgets, academic instruction in a multi-sensory presentation (including auditory, visual, and tactile supports such as graphic organizers and manipulatives), brief and clear directions for tasks and activities, repetition of instructions as needed, frequent feedback from teachers, ensuring eye contact when giving important directions, breaking tasks/projects into smaller and more manageable parts, modified assignment output, extended time to complete tests and assignments, preferential seating, completion of tasks/tests over multiple sessions or multiple days, use of technology for written expression, use of a timer and schedule to teach time management and self-monitoring, limiting distractions, one-to-one assistance/instruction, and a modified course schedule to address missed assignments and tardiness related to narcolepsy issues. P-7.

11. On June 29, 2020, the Student's school assignment ("location of services") for the 2020-2021 school year was designated as the SLS program at School C, a DCPS public school. P-8-1.

12. On or about July 31, 2020, Petitioners sent a letter to Respondent indicating that Petitioners were unilaterally placing the Student in School B's Special Program, which "is specifically designed for high aptitude students with learning disabilities." This program offered the Student special education support and the opportunity to be educated alongside his/her peers who did not have disabilities. P-9-3. On or about July 31, 2020, Petitioners' then-advocate sent a letter to Respondent through counsel indicating that Petitioners unilaterally planned to place the Student in the Special Program at School B unless DCPS reconsidered its offer. P-10-4. On August 3, 2020, Petitioners notified Respondent that they sought tuition costs for School B. P-11-3.

13. On August 18, 2020, DCPS acknowledged receipt of the August 3, 2020, letter from Petitioners, but DCPS did not change its position that it had offered the Student a FAPE for the 2020-2021 school year through the May 20, 2020, IEP. DCPS asked Petitioners when they had made their decision on School B, when they had made the deposit, and when they had signed the financial agreement with School B. P-12-2.

14. For the 2020-2021 school year, the Student attended the Special Program at School B. The Student tested to get into School B, which has a competitive program with no “slower” tracks. The school is based on a philosophy that students are “met where they are” emotionally. The school serves about 1,200 children. Class sizes at School B range from fifteen to twenty students per class, but children in the Special Program get their own ungraded class with less than ten students. This class, led by one teacher with special education training, lasts forty minutes per day, five days per week. The class concentrates on reading, written language, and verbal communication. The teacher works on, among other things, standardized test questions, test strategies, writing emails well, spelling words out, missed assignments, trying new strategies, monitoring, and check-ins. Students in the Special Program must fulfill the academic requirements of the school, but they do not have to take a full load of academic classes during their first year. The Special Program provides its own language class, as well as accommodations and modifications of the general curriculum, though students are expected to do all of the work. Special Program students can take history or social studies over the summer, they must be able to handle the school’s hallways and lunch rooms, and they should not have issues that could be characterized as emotional disturbance. Testimony of Witness A; Testimony of Father; Testimony of Mother. Annual tuition at School B is approximately

\$23,000, plus \$3,500 for the Special Program. Testimony of Father; Testimony of Mother; Testimony of Witness A.

15. For the 2020-2021 school year at School B, the Student's instruction was mostly on a virtual basis. Because of the virtual learning, instruction was challenging for the Student, who had issues getting through the day. Testimony of Father. School B tried to "push" students to attend school in person, with varying degrees of success. The Student was sometimes anxious about attending school in person and had issues with math, attention, and executive functioning. The Student failed math. Still, the Student did not have any significant behaviors that interfered with his/her learning. The Student did not take history class like students who were not in the Special Program; instead, s/he took history during the summer of 2021. Testimony of Witness A.

16. According to the report card from School B dated February 2, 2021, the Student received an "F" in algebra, "C" in scripture, "B" in English, "A" in chorus, "F" in art, and "F" in biology. P-26

17. According to the report card from School B dated March 23, 2021, the Student's algebra grades were "F" for the first two marking periods and "D" for the third marking period. The Student's grades in English were "C+" for the first marking period and "B" for the second and third marking periods. The Student's grades in biology were "F" for the first marking period, "C" for the second marking period, and "B" for the third marking period. P-58-1.

18. DCPS held an "AED" meeting for the Student on March 25, 2021. Testimony of Witness C. A representative from School B attended this meeting. The team was told that the Student was by then being educated in a "hybrid" model and that

his/her grades were improving, but that s/he still had trouble attending. The Student's sleep issues had improved and s/he no longer needed naps. Petitioners told DCPS at this meeting that they wanted a less restrictive setting. Testimony of Witness D.

19. A Strengths and Difficulties Questionnaire ("SDQ"), which is a brief behavioral questionnaire, was administered to the Student, the Mother, and two of the Student's teachers in or about spring 2021. Teacher A, a biology teacher, found that the Student's overall stress level, behavioral difficulties, hyperactivity, concentration, and relations with others were average, but that the Student had high emotional distress. Teacher B, an English teacher, found that the Student's overall stress was very high, that his/her emotional distress was high, and that s/he had difficulties getting along with other people, but that the Student had average behavioral difficulties. R-10-8-9.

20. An IEP meeting was held for the Student on May 18, 2021. A School B representative attended this meeting. DCPS sought to adjourn the meeting to update the IEP with data from School B. Testimony of Witness C; Testimony of Witness D.

21. In spring 2021, a school psychologist conducted a psychoeducational evaluation of the Student and issued a corresponding report on May 18, 2021. The Student's full-scale IQ score was 117, in the high-average range. Academic testing showed that the Student was in the average range in written expression, reading, and writing, and in the low-average range in math. The evaluator conducted behavioral testing, including Conners, Third Edition ("Conners-3"), and BASC-3. Teacher B, the Student's English teacher, described him/her as "unfocused, aloof, and reserved," though the Student accepted help quite well. Through Conners-3 testing, Teacher B indicated "very elevated" concerns about the Student's inattention, learning problems, and

executive functioning. Parent and teacher ratings also indicated "very elevated" concerns about peer relations. BASC-3 scales were administered for the Student and the Mother, but not for a teacher. P-24.

22. At the Student's June 1, 2021, IEP meeting, the team had access to the comprehensive psychological evaluation that had just been conducted, and Petitioners had an opportunity to speak and participate. No objections were made to the "Other Classroom Aids and Services" section of the IEP. Testimony of Mother. There was no clear discussion about why DCPS recommended twenty hours of specialized instruction per week for the Student. Testimony of Witness B. It was reported that the Student was sometimes late for school because s/he overslept. R-11-2. Petitioners asked the DCPS team to explain the proposed setting. Witness D explained the proposed setting and inquired about the Student's setting at School B. The Mother said that the Student was with typically developing peers and received support in the Special Program, with a one-to-one executive functioning coach for daily check-in and check-out. P-30.

23. The June 1, 2022, IEP recommended that the Student receive twenty hours of specialized instruction per week outside general education, with 180 minutes (an increase of sixty minutes) per month of behavioral support services. "Other Classroom Aids and Services" were left unchanged. The "Area of Concern" sections of the IEP, including present levels of performance and goals, continued to include math, written expression, and emotional, social and behavioral development. Another "Area of Concern" section, with goals, was added for reading. R-10.

24. The Student's final grades for the 2020-2021 school year were an "F" in math, "C+" in biology, "A" in chorus, a "B" in English, "D" for art, and "B" in scripture. P-81.

25. The Student's DCPS school assignment for the 2021-2022 school year was again the SLS program at School C, a DCPS public school. P-34-1. On or about August 17, 2021, Petitioners sought to observe the program at School C, but were told on November 29, 2021, that observations were not being conducted due to protocols established because of the COVID-19 pandemic. P-35-7; P-38-1.

26. For the 2021-2022 school year, the Student continued in the Special Program at School B, where instruction was in-person. Testimony of Father. The Student's academic performance improved during in-person instruction. Testimony of Father. The Student's grades improved, especially in math. Testimony of Mother. For the 2021-2022 school year, the Student's year-end grades were a "C+" in English, "B" in geometry, "C+" in chemistry, "B" in Spanish, "B" in a religion class, and "A" in chorus. P-60-01.

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 Issue #1 and Issue #2, 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 Issue #3, the burden of persuasion is on Respondent.

1. Did Respondent fail to provide the Student with appropriate IEP on May 20, 2020? 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 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 into a regular classroom, passing marks and advancement from grade to grade through the general curriculum will ordinarily satisfy the IDEA standard. However, 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 who 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 that fails to satisfy these statutory directives may be remedied through an IDEA claim to the extent that the IEP “denies the child an appropriate education.” Z.B. v. District of Columbia, 888 F.3d 515, 519 (D.C. Cir. 2018).

Petitioners contended that the Student’s May 20, 2020, IEP: 1) contained inappropriate hours of specialized instruction; 2) recommended predetermined hours of specialized instruction in order to place the Student in the SLS program; 3) did not provide the Student with education in the LRE and provided an inappropriate justification for the Student’s proposed LRE; 4) failed to adequately describe the Student’s placement along the continuum of alternative placements and/or record the “intention of the team” with regard to the Student’s placement; 5) contained inappropriate goals and objectives that were provided without a reasonable and cogent explanation, that were copied from School A’s ILP in math and written expression, that disregarded the rest of School A’s ILP, and that could not be mastered with twenty hours of specialized instruction per week; 6) recommended inappropriate “Other Classroom Aids and Services” that had not been changed since the Student’s 2018 IEP; and 7) recommended insufficient behavioral support services.

DCPS’s main argument was that the documentation it received in connection to this IEP led it to write the language in the IEP that recommended that the Student receive twenty hours of specialized instruction per week outside general education. DCPS

emphasized that School A's ILP, which was issued less than five months earlier, recommended that the Student receive 33.5 hours of specialized instruction weekly, with counseling from a psychologist for forty-five minutes per week. The ILP listed the Student as below grade level in reading, written expression, and math, indicating that the Student had a wide range of behavioral concerns, including difficulty following directions, organizing work space, returning homework as expected, and following through with assignments. The Student's issues included anxiety, executive functioning, self-confidence, self-esteem, ADHD, fatigue, stamina, and self-advocacy.

DCPS also pointed to remarks made by a School A representative at the May 20, 2020, IEP meeting, which led DCPS to believe that the Student needed a full-time special education program for the 2020-2021 school year. This representative characterized the Student as, among other things, continuing to have challenges in reading and needing instruction broken down into concrete steps, especially as assignments become more complex and sophisticated. The representative was also worried about the Student being in a class of twenty-five to thirty students.

DCPS also referenced a due process complaint that Petitioners filed on February 3, 2020, which also led DCPS to believe that the Student continued to need a restrictive setting to be properly educated. In this prior complaint, Petitioners contended that, under IDEA, the Student qualified for a learning disability and three separate conditions under "other health impairment" (narcolepsy, epilepsy, and ADHD). Petitioners also contended that, since 2015, the Student had been diagnosed with Generalized Anxiety Disorder, and that these disabilities had the combined effect of preventing the Student from accessing the general education curriculum without significant modifications and supports,

including a significant amount of one-to-one instruction. Petitioners accordingly sought tuition reimbursement for School A for the 2019-2020 school year.

Finally, DCPS underscored that Petitioners did not suggest to DCPS that they were considering placing the Student in a less restrictive placement for the 2020-2021 school year. This must have been the case, since Witness A testified that School B required a deposit from Petitioners in or about spring 2020 to secure a spot for the Student at the school for the 2020-2021 school year.

DCPS had a point here, and the record is not clear as to why Petitioners did not mention to DCPS that they were considering placing the Student at School B, in a mostly general education setting, for the 2020-2021 school year. However, while DCPS was justified in offering the Student a more restrictive placement than the one s/he eventually attended, the placement that DCPS offered was in the SLS program, a highly restrictive program that includes students who function well below grade level. The persuasive testimony of Witness B indicated that the Student would be inappropriately placed in the SLS program because s/he functioned at a much higher level than the students in the SLS program, some of whom could be cognitively impaired. Based on the information in the record, the SLS program appears to be geared to students who function below grade level in reading. The SLS program utilizes the Scholastic research-based reading interventions “Read 180” and “System 44,” as well as “Spell Read” and “Lexia.” The Student tested as having an IQ of 117 and was reading on grade level, meaning that s/he did not need any special reading interventions. Indeed, DCPS’s witnesses said that the Student needed a highly restrictive placement solely because of the Student’s behavioral issues, though the Student did exhibit any particularly alarming or severe behaviors. As Petitioners pointed

out, DCPS never contemplated adding new behavioral services or interventions to the Student's IEP to help manage his/her behavioral issues in a general education setting for at least part of the academic day, and DCPS offered no explanation as to why a less restrictive setting could not have been contemplated in this regard. Moradnejad v. District of Columbia, 177 F. Supp. 3d 260, 279 (D.D.C. 2016) (Special classes, separate schooling, or other removal of children with disabilities from the regular educational environment should occur only if the nature or severity of the disability is such that education in regular classes with the use of supplementary aids and services cannot be achieved satisfactorily.).

There is nothing in the record to convincingly rebut the contention of Witness B that the Student was improperly placed in the SLS classroom. Indeed, no witness was called from School C to even describe the SLS program at School C. Though DCPS has the burden of persuasion on this issue, it presented no evidence to describe the functional levels of the students in the SLS program at School C, or the instruction in the classroom in the SLS program at School C, to rebut Petitioners' contention that the Student should not be grouped with much lower-functioning peers during the entirety of the school day. Nor is there anything in the record to suggest that "differentiation of instruction" could somehow be employed by staff in the SLS program at School C to bridge the gap between the SLS students and the Student, who has since achieved good grades at a general education school.

Notably, IHO Seat's 2017 HOD found that the SLS program was inappropriate for the Student for similar reasons. As IHO Seat stated on December 17, 2017:

...the other children in the SLS program appeared far behind Student academically; observed group activities were at least

3 grade levels below Student. A classroom of students with differing intellectual, social, and behavioral needs may satisfy the IDEA as long as “a core group [is] operating at an intellectual level sufficiently comparable” to Student’s to permit Student to continue making academic progress. S.F. v. New York City Dept. of Educ., 2011 WL 5419847, at 17 (S.D.N.Y. 2011), quoting Walczak v. Fla. Union Free Sch. Dist., 142 F.3d 119, 133-34 (2d Cir. 1998).

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In closing, DCPS argued that not all SLS classrooms are alike, but DCPS did not explain why the SLS classroom at School C was any different from the SLS classroom that was proposed for the Student and rejected by IHO Seat less than three years earlier. DCPS also argued that issues relating to the SLS program were not mentioned in the Prehearing Conference Order, which governs the jurisdiction in this case, per the agreement of the parties. However, the Prehearing Conference Order clearly did address this issue when it noted Petitioners’ allegation that the Student’s IEP contained inappropriate hours of specialized instruction, which is a reference to Petitioners’ claim that the SLS program was inappropriate for the Student for the 2020-2021 school year. Petitioners’ contention that the SLS program was inappropriate because of its student population was mentioned many times in the Complaint, and paragraph eleven of the Complaint specifically discussed IHO Seat’s conclusion that the SLS program was inappropriate for the Student. The issue of the inappropriateness of the SLS program was also raised by Petitioners during their opening statement and throughout testimony in the case, making it clear that DCPS was on full notice that this issue would be raised to support Petitioners’ claims.

Other claims by Petitioners were less convincing. While Petitioners had a point when they noted that the accommodations, modifications, and “Other Classroom Aids

and Services” on the Student’s IEP were repeated from prior IEPs, these modifications were agreed to by Petitioners at the IEP meeting, and there is nothing in the record to show that any imperfections in the accommodations and modifications would have had any material impact on the Student. The record suggests that the accommodations and modifications listed in the IEP did not even have to be used by teachers if the teachers deemed them unnecessary. Claims that the IEP was predetermined appear to be premised on the fact that the draft IEP was effectively a fait accompli, but the record indicates that Petitioners were allowed a full opportunity to discuss the provisions in the IEP at the May 20, 2020, IEP meeting. The LEA is allowed to meet and draft an IEP prior to the IEP meeting. There is no proof in the record that Respondent refused to change any of the language in the draft IEP at the IEP meeting. Petitioners contended that some the goals in the IEP were lifted from School A’s ILP, but just because some of the goals are taken from a private school’s IEP does not mean that such IEP goals are per se invalid. Courts have ruled that school districts can adopt private school IEP goals when creating their own IEPs. E.F. v. New York City Dep’t of Educ., No. 12–CV–2217 2013 WL 4495676, at *19 (S.D.N.Y. August 19, 2013) (permissible for IEP team to determine goals based on the private school placement); J.L. v. New York City Dep’t of Educ., No. 12-CV-1516 2013 WL 625064, at *14 (S.D.N.Y. February 20, 2013). Moreover, there is no requirement that a public school system must adopt all of a private school’s goals in its IEP if it chooses to adopt some of them. Petitioners also claimed that the IEP goals could not be mastered with the services that the IEP recommended, but Petitioners did not present a clear argument on this issue. Petitioners also claimed that the IEP failed to adequately describe the Student’s placement along the continuum of alternative

placements and/or record the “intention of the team” with regard to the Student’s placement. These claims, too, were not clearly explained during closing argument and are not supported by the record. Finally, in regard to Petitioners’ claim that DCPS improperly reduced the Student’s behavioral support services on this IEP, this Hearing Officer agrees that it is curious that DCPS recommended a reduction in behavioral support services for the Student while also arguing that the restrictiveness of the placement was premised on the Student’s behavioral issues. However, there is nothing in the record to suggest that the difference in behavioral support services would have adversely affected the Student, who does not receive any behavioral support services at School B.

Still, DCPS denied the Student educational benefit, and therefore a FAPE, when it recommended that the Student receive an overly restrictive placement consisting of twenty hours of specialized instruction per week outside general education in the SLS program for the 2020-2021 school year.

2. Did Respondent fail to provide the Student with an appropriate IEP on June 1, 2021? 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?

Petitioners contended that the IEP: 1) contained inappropriate hours of specialized instruction; 2) recommended predetermined hours of specialized instruction in order to place the Student in the SLS program; 3) did not provide education in the LRE and provided an inappropriate justification for the Student’s proposed LRE; 4) failed to adequately describe the Student’s placement along the continuum of alternative placements and/or record the “intention of the team” with regard to the Student’s

placement; 5) was not supported by a cogent and reasonable explanation of the goals, objectives, accommodations, and services recommended therein; and 6) contained inappropriate “Other Classroom Aids and Services” that had not changed since the Student’s 2018 IEP.

The same rationale that applied to the analysis of Issue #1 also applies to the analysis of the June 1, 2021, IEP (except that, arguably, DCPS’s recommendation for the SLS program was even more inappropriate in the June 1, 2021, IEP). By June 2021, DCPS had evidence that the Student was able to manage fairly well in a general education environment. Although the Student had academic difficulties in math and initially failed biology at School B at the beginning of the 2020-2021 school year, s/he ended up with a “C+” grade in biology and passed all his/her other courses. The school came across as a setting where students are expected to meet high academic standards. Importantly, the unrebutted testimony of Witness A was that the Student did not have any significant behavioral issues at School B during the 2020-2021 school year.

DCPS pointed to the more recent SDQ and Conners-3 test results, which indicated that the Student’s English teacher felt that the Student’s overall stress was very high, that his/her emotional distress was high, and that s/he was aloof and had difficulties getting along with other people. However, the Student ended up getting a “B” grade in English, and the Student’s biology teacher found that the Student’s overall stress level, behavioral difficulties, hyperactivity, concentration, and relations with others were average. DCPS also argued that the May 2021 psychological evaluation indicated that the Student was at the same low academic levels as s/he had been during psychoeducational testing in 2018.

However, the Student was considered to be in the average range in written expression in May 2021, while s/he was in the low-average range in written expression in 2018.

DCPS also contended that it had no access to information from School B, which was not responsive to DCPS's requests for data. However, at the IEP meeting of May 18, 2021, a School B representative appeared to enable DCPS to ask pertinent questions about the school. A School B representative was also at the March 25, 2021 AED meeting. Further, DCPS did not make clear why additional information from School B would have changed its recommendations for the Student. Again, no witness was called from the SLS program at School C to explain why this Student, who was functioning in a general education environment, could possibly need as restrictive a setting as the reading-focused SLS program at School C.

As for Petitioners' other contentions, this Hearing Officer must repeat some of the analysis offered with respect to the same matters in Issue #1. The accommodations, modifications, and "Other Classroom Aids and Services" in this IEP were again repeated, but these accommodations and modifications were again agreed to by Petitioners at the IEP meeting, and there is nothing in the record to show that these accommodations and modifications were required if teachers deemed them to be unnecessary. As for predetermination claims, there was no proof that DCPS would not have changed the provisions of the draft IEP. Petitioners were allowed a full opportunity to discuss the provisions in the IEP at the June 1, 2021, IEP meeting, and it is appropriate for the LEA to draft an IEP prior to an IEP meeting. Petitioners alleged that the goals, objectives, accommodations, and services were not "cogently" or adequately explained, but they did not clearly expound on this theory during their closing argument, nor did Petitioners

clearly explain their theory that the IEP failed to adequately describe the Student's placement along the continuum of alternative placements and/or record the "intention of the team" with regard to the Student's placement.

Nevertheless, DCPS denied the Student educational benefit, and therefore a FAPE, when it recommended that the Student receive an overly restrictive placement consisting of twenty hours of specialized instruction per week outside general education in the SLS program for the 2021-2022 school year.

3. Did Respondent fail to afford Petitioners a meaningful opportunity to participate in the placement process relating to the May 20, 2020, and June 1, 2021, IEPs? If so, did Respondent violate 34 C.F.R. Sect. 300.501(b) and related provisions? If so, did Respondent deny the Student a FAPE?

Petitioners contended that the Student's placement and hours of specialized instruction were predetermined (an issue that has already been addressed), that Petitioners were not provided with an opportunity to observe the proposed setting (relating to the June 1, 2021, IEP only), and that Petitioners were not part of any discussion or determination of the Student's LRE or appropriate placement along the continuum.

During closing argument, Petitioners clarified this claim, contending that this issue mostly concerned their contention that they were excluded from the process of selecting a school for the Student, and that they should have been included in the decision to place the Student in the SLS program at School C. Petitioners effectively argued that DCPS should discuss a student's proposed school at an IEP meeting. Some cases suggest that a 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 point to any other authority within the circuit holding that the failure of a school district to identify a school at an IEP meeting denies a student a FAPE, and it is clear from the record that Petitioners knew that DCPS was going to recommend the SLS program for the Student going forward.

Finally, in regard to Petitioners' contention that they were not allowed to observe the SLS classroom, they were entitled to such an observation pursuant to D.C. Code Sect. 38-2571.03(5)(A)(i). However, this Hearing Officer agrees with DCPS that this exclusion was a procedural violation that does not rise to the level of FAPE denial, because Petitioners had previously observed the SLS program and knew what it was well before they filed the Complaint. It is also noted that DCPS's reluctance to allow Petitioners to observe appears to have been rooted in difficulties associated with the COVID-19 pandemic, which was a major concern for schools, students, and parents alike at the time of the IEP meeting in June, 2021. This claim must be dismissed.

RELIEF

As relief, Petitioners seek tuition reimbursement for the Special Program at 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).

At the August 7, 2019, IEP meeting, DCPS itself suggested that the Student had been remediated by the program at School A and needed to transition to a general education school. As a result, after the Student had completed his/her year at School A, Petitioners looked into general education schools with special education supports for the Student. They settled on the Special Program at School B, to allow the Student to progress further. At first, the Student struggled, especially in math, and the Student did fail his/her math class for the 2020-2021 school year. However, with the supports offered through the Special Program, the Student has done well at the School B overall. The Special Program includes a special class for its students for forty minutes each day, five days per week. The teacher in this class provides a mini-lesson and works on, among other things, missed assignments, trying new strategies, monitoring, and check-ins. Students in the Special Program must still fulfill the academic requirements of the school, but classes are restructured for less homework, and students do not have to take a full load of classes during their first year. The Student's most recent grades showed that this

approach has worked for the Student; s/he passed all his/her classes during the 2021-2022 school year. The Student's year-end grades consisted of a "C+" in English, "B" in geometry, "C+" in chemistry, "B" in Spanish, "B" in a religion class, and "A" in chorus. As numerous courts have recognized, this placement is consistent with the "strong congressional preference" for integrating children with disabilities in regular classrooms. Oberti by Oberti v. Bd. of Educ. of Borough of Clementon Sch. Dist., 995 F.2d 1204, 1213–14 (3d Cir. 1993). 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. 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. Leggett v. District of Columbia, 793 F.3d 59, 73 (D.C. Cir. 2015) (ruling that although a district had to reimburse a parent for a student's placement in an out-of-state boarding school, it did not have to pay for noneducational services such as horseback riding). During closing argument, Respondent contended that it would be inappropriate for it to be asked to pay for religious instruction, which represents, from a review of the record, one of the Student's classes each day. Petitioners had the right to rebuttal but did not address this argument.

However, the percentage of religious instruction is not entirely clear from the record, and neither Petitioners nor Respondent suggested how the award might be appropriately reduced on this basis. The record suggests that the Student received one

class daily that is religious in nature. This Hearing Officer therefore finds that a conservative estimate of the amount of religious instruction in the Special Program at School B is approximately ten percent of the Student's total instruction. Petitioners will therefore be awarded tuition reimbursement for the Student for the Special Program at School B for the 2020-2021 and 2021-2022 school years, less ten percent.

VII. Order

As a result of the foregoing:

1. Respondent shall reimburse Petitioners for all of the Student's tuition, transportation, related services, and other expenses for the Special Program at School B for the 2020-2021 and 2021-2022 school years, less ten percent;
2. All other requests for relief are hereby denied.

Dated: December 27, 2022

Michael Lazan
Impartial Hearing Officer

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

/DCPS
/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 27, 2022

Michael Lazan
Impartial Hearing Officer