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OSSE
 Office of Dispute Resolution
 December 22, 2023

Confidential

<p>Parent on Behalf of Student, ¹</p> <p>Petitioner,</p> <p>v.</p> <p>District of Columbia Public Schools (Local Education Agency “LEA”)</p> <p>Respondent.</p> <p>Case # 2023-0143</p> <p>Date Issued: December 22, 2023</p>	<p>HEARING OFFICER’S DETERMINATION</p> <p>Hearing Dates:</p> <p>November 14, 2023 November 15, 2023 November 16, 2023 November 17, 2023</p> <p>Counsel for Each Party listed in Appendix A</p> <p><u>Hearing Officer:</u> <u>Coles B. Ruff, Esq.</u></p>
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¹ Personally identifiable information is in the attached Appendices A & B.

JURISDICTION:

The hearing was conducted, and this decision was written, pursuant to the Individuals with Disabilities Act (“IDEA”), P.L. 101-476, as amended by P.L. 105-17 and the Individuals with Disabilities Education Improvement Act of 2004, the District of Columbia Code, Title 38 Subtitle VII, and the District of Columbia Municipal Regulations, Title 5A Chapter E30.

BACKGROUND AND PROCEDURAL HISTORY:

The student who is the subject of this due process hearing ("Student") resides with Student's parent ("Petitioner") in the District of Columbia. The District of Columbia Public Schools ("DCPS" or "Respondent") is Student's local education agency ("LEA"). Student has been determined eligible for special education and related services pursuant to IDEA with multiple disabilities ("MD"), including specific learning disability ("SLD") and other health impairment (“OHI”) due to Attention Deficit/Hyperactivity Disorder (“ADHD”).

DCPS first determined Student eligible for special education on November 21, 2019, with a disability classification of speech-language impairment ("SLI") when Student attended Student's neighborhood DCPS school ("School A"). DCPS developed Student's initial individualized education program ("IEP") on December 18, 2019, and updated the IEP annually. Student's IEP was most recently updated on May 9, 2023. Student currently attends a non-public day school ("School B") where Student's parent unilaterally placed Student at the start of school year ("SY") 2020-2021.

Petitioner filed a due process complaint (“DPC”) on July 31, 2023, asserting that DCPS denied Student a free appropriate public education (“FAPE”) because, inter alia, the IEPs and placements that DCPS proposed for Student for SY 2021-2022, SY 2022-2023 and SY 2023-2024 were/are allegedly inappropriate.

Relief Sought:

Petitioner requests that DCPS reimburse them for the tuition and related expenses already paid to School B for SY 2021-2022, SY 2022-2023, and SY 2023-2024 and declare School B Student’s current educational placement.

LEA Response to the Complaint:

Respondent filed a response to the DPC on August 11, 2023. In its response, DCPS stated, inter alia, the following:

Student was determined to be eligible on November 21, 2019. An IEP meeting was convened on December 18, 2019, for the initial IEP. On March 12, 2020, the annual IEP meeting was held, and Student was provided with an IEP with goals in math, reading, written expression, speech-language pathology (“SLP”) and cognitive. The team then determined the appropriate placement was 3 hours of specialized instruction in general education, 4 hours of specialized instruction outside general education, 240 minutes per month of SLP, and 1 hour per week of specialized instruction consultation. The team determined the IEP and placement was the least restrictive

environment (“LRE”) for Student. Petitioner withdrew Student from DCPS at the end of SY 2019-2020 and unilaterally enrolled Student at School B.

On March 18, 2021, the IEP team met and proposed the annual IEP with math, reading, written expression, SLP, and cognitive goals. The team then determined the appropriate placement was 4 hours of specialized instruction in general education, 4 hours of specialized instruction outside general education, and 240 minutes per month of SLP. The team also proposed other classroom aides and services, e.g., repetition of directions with direct and explicit instructions; teacher checking for understanding; frequent movement and sensory breaks; access to math manipulatives; and supports relating to executive functioning skills (checklists, organizers, etc.). The IEP team determined that this was the LRE for Student. DCPS made a FAPE available to Student for SY 2020-2021.

On October 7, 2021, the IEP team met and proposed the annual IEP with math, reading, written expression, SLP, and cognitive goals. The team then determined the appropriate placement was 5 hours of specialized instruction in general education, 7 hours of specialized instruction outside general education, 240 minutes per month of SLP, and 30 minutes per month of SLP consultation. The team also proposed other classroom aides and services. The IEP team determined that this was the LRE for Student. DCPS made a FAPE available for Student for SY 2021-2022.

On September 16, 2022, the IEP team met and proposed the annual IEP with math, reading, written expression, SLP, and cognitive goals. The team then determined the appropriate placement was 5 hours of specialized instruction in general education, 7 hours of specialized instruction outside general education, 240 minutes per month of SLP, and 30 minutes per month of SLP consultation. The team also proposed other classroom aides and services. The IEP team determined that this was the LRE for Student. DCPS made a FAPE available for Student for SY 2022-2023.

On May 9, 2023, the IEP team met and proposed the annual IEP with goals in math, reading, written expression, and SLP. The team then determined the appropriate placement was 6 hours of specialized instruction in general education, 7 hours of specialized instruction outside general education, 240 minutes per month of SLP, 1 hour of special education consultation per month, and 30 minutes per month of SLP consultation. The team also proposed other classroom aides and services. The IEP team determined that this was the LRE for Student. DCPS made a FAPE available for the student for SY 2023-2024. Student’s parent was able to fully participate in all decision-making.

Petitioner has not reasonably participated in good faith as a collaborative partner in the IEP process and has not provided appropriate notice of decision-making regarding the unilateral placement of Student and her desire to obtain public payment for her child’s private education. As an equitable matter, the Petitioner’s actions should be found to establish no intent to enroll or attend a DCPS school, and all relief should be denied or reduced. Finally, School B is neither proper nor appropriate.

Resolution Meeting and Pre-Hearing Conference:

The DPC was filed on July 31, 2023. The parties participated in a resolution meeting on August 23, 2023. The parties did not mutually agree to shorten the 30-day resolution period. The 45-day

period began on August 31, 2023, and ended [and the Hearing Officer's Determination ("HOD") was originally due on October 14, 2023. The impartial hearing officer ("IHO" or "Hearing Officer") offered the following hearing date(s): October 2, 2023, and October 3, 2023. The parties were not available for the dates offered. They requested and agreed to the hearing dates noted below. The parties agreed to submit a continuance motion for 48 calendar days, extending the HOD due date to December 1, 2023. At the conclusion of the hearing, Petitioner requested a twenty-one (21) day extension of the HOD due date to allow sufficient time for the parties to submit written closing arguments, which both parties agreed to file and did file on December 8, 2023. The HOD is now due December 22, 2023.

The IHO conducted a pre-hearing conference and issued a pre-hearing order ("PHO") on August 28, 2022, outlining, inter alia, the issues to be adjudicated.

ISSUES: ²

The issues adjudicated are:

1. Did DCPS deny Student a FAPE by failing to propose an appropriate educational program and placement for SY 2021-2022, including a sufficient type and amount of specialized instruction?
2. Did DCPS deny Student a FAPE by failing to propose a timely and appropriate educational program and placement for SY 2022-2023, including a sufficient type and amount of specialized instruction?
3. Did DCPS deny Student a FAPE by failing to propose an appropriate educational program and placement for SY 2023-2024, including a sufficient type and amount of specialized instruction?
4. Did DCPS deny Student a FAPE by predetermining Student's IEP hours of service for SY 2021-2022, SY 2022-2023, and SY 2023-2024?
5. Did DCPS deny Student a FAPE by failing to allow Student's parent and educational consultant to observe the DCPS proposed placement?
6. Is School B a proper placement for Student?

DUE PROCESS HEARING:

The Due Process Hearing was convened on November 14, 2023, November 15, 2023, November 16, 2023, and November 17, 2023. The hearing was conducted via video teleconference on the Microsoft Teams platform. The parties submitted written closing arguments on December 8, 2023.

RELEVANT EVIDENCE CONSIDERED:

The IHO considered the testimony of the witnesses and the documents submitted in each party's disclosures

² The IHO restated the issues from the PHO at the outset of the due process hearing, and the parties agreed that these were the sole issues to be adjudicated. During the hearing, based upon stipulation by Petitioner's Counsel as to the timeliness of the IEPs for SY 2021-2022 and SY 2023-2024, mentioned in issues #1 and #2, and in response to the directed finding requested by DCPS Counsel, the IHO determined that timeliness of those two IEPs was no longer at issue.

(Petitioners' Exhibits 1 through 54 and Respondent's Exhibits 1 through 21) that were admitted into the record and are listed in Appendix 2.³ The witnesses testifying on behalf of each party are listed in Appendix B.⁴

SUMMARY OF DECISION:

Petitioners held the burden of persuasion on issues #4, #5, & #6. DCPS held the burden of persuasion on issues #1, #2, and #3 after Petitioner presented a prima facie case on those issues. Based on the evidence adduced, the IHO concluded that DCPS did not sustain the burden of persuasion by a preponderance of the evidence on issues #2 and #3. Petitioners did not sustain the burden of persuasion on issues #4, #5, and #6. The IHO directed DCPS to reimburse Petitioner for the cost of Student's tuition at School B for SY 2022-2023 and for SY 2023-2024 up until a new IEP is developed, and directed DCPS to convene an IEP meeting to review and revise Student's IEP with updated data and to prescribe specialized instruction outside general education such that Student is in a special education setting outside general education for all core academic subjects. The IHO also directed DCPS to determine an appropriate location of service to implement Student's IEP for the remainder of SY 2023-2024.

FINDINGS OF FACT:⁵

1. Student resides with Petitioner in the District of Columbia. DCPS is Student's LEA. Student has been determined eligible for special education and related services pursuant to IDEA with a disability classification of MD, including SLD and OHI due to ADHD. Student currently attends School B, a nonpublic school day school. (Mother's testimony, Respondent's Exhibit 20)
2. Student's parents provided DCPS with an independent speech-language evaluation conducted in April/May 2019 when the Student was in [grade] and attending School A, Student's neighborhood DCPS school. A DCPS speech-language pathologist reviewed that evaluation in October 2019, when Student was in first grade at School A. The

³ Any item disclosed and/or objected to by either party, admitted, not admitted, or admitted for limited purposes was noted on the record and is noted in Appendix A.

⁴ Petitioner presented four witnesses: (1) Student's Mother (Petitioner) and the following individuals who were designated as expert witnesses: (2) an Independent Psychologist who evaluated Student, (3) Petitioner's Educational Consultant, (4) an Administrator at School B. Respondent presented four witnesses, who were designated as expert witnesses: (1) a DCPS Speech-Language Pathologist who provided Student services at School A, (2) a DCPS Special Education Teacher who provided instruction to Student at School A, (3) a DCPS Non-Public School Monitoring Specialist, (4) DCPS LEA representative who is a Special Education Teacher and participated in the development Student's IEPs. The IHO found the witnesses credible unless otherwise noted in the conclusions of law. Any material inconsistencies in the testimony of witnesses that the Hearing Officer found are addressed in the conclusions of law.

⁵ The evidence (documentary and/or testimony) that is the source of the Findings of Fact ("FOF") is noted within parentheses following the finding. A document is noted by the exhibit number. If there is a second number following the exhibit number, that number denotes the page of the exhibit from which the fact was obtained. When citing an exhibit that has been submitted by more than one party separately, the Hearing Officer may only cite one party's exhibit.

evaluation review included input from the Student's teacher and a classroom observation of Student. The evaluator found that Student presented with overall average abilities across all vocabulary and language evaluations and had age-appropriate pragmatic language abilities. Student had significant delays in articulation skills, which reduced Student's overall intelligibility in academic tasks and social interactions across the general education setting. The evaluator concluded that Student may benefit from simplification and/or repetition of directions in the classroom, visual supports to refer to, teacher check-ins for understanding of directions, or a peer buddy available for Student to gain clarification, repetition, or as a model in following multistep directions. (Witness 4's testimony, Respondent's Exhibit 7)

3. On November 21, 2019, DCPS first determined Student eligible as a child with a disability pursuant to IDEA with a disability classification of SLI while Student was in ____ grade at School A. DCPS developed Student's initial IEP on December 18, 2019. The IEP noted communication/speech-language as the only area of concern and included speech-language goals. The IEP prescribed 180 minutes per month of SLP and no specialized instruction. (Respondent's Exhibits, 9, 10, 11)
4. Student's parents engaged an independent psychologist ("evaluator") who conducted a neuropsychological evaluation ("IEE") of Student in October 2019 to assess Student's cognitive and academic abilities and to generate recommendations for Student's educational and emotional needs. The evaluator noted that Student had met regularly with a tutor for reading intervention. Student's parent completed ratings scales, which indicated significant concern with working memory and regulation of emotions. The evaluator administered the Wechsler Intelligence Scale for Children-Fifth Edition ("WISC-V") and found that Student's Verbal Comprehension Index fell in the High Average range with a score of 118. However, Student scored in the Low Average range with a score of 88 on the Working Memory Index and in the Extremely Low range with a score of 69 on the Processing Speed Index. Student's full-scale IQ was not reported because it was not representative of Student's overall profile. (Witness 1's testimony, Petitioner's Exhibit 50)
5. Student's academic scores were below Student's grade level and generally about one year below age equivalency for reading and written language, and nearer to Student's grade and age level in math. The evaluator interviewed Student's School A classroom teacher, who expressed concern regarding Student's executive functioning and foundational reading skills. The teacher reported that academically, Student was "somewhat" below grade level in writing and math and "far" below grade level in reading. The evaluator diagnosed Student with ADHD with accompanying weaknesses in executive functioning, working memory, and output speed. She recommended that Student attend school in a small classroom setting with a high teacher-to-student ratio. (Witness 1's testimony, Petitioner's Exhibit 50)
6. Student's parent provided DCPS with the IEE, which a DCPS psychologist reviewed and generated a review report dated January 5, 2020. DCPS produced an evaluation summary report dated January 16, 2020. As a result of the IEE results and recommendations, DCPS updated Student's IEP to include academic goals in math, reading, written expression, and

specialized instruction. In March 2020, DCPS schools closed due to the COVID-19 pandemic and then shifted to distance learning for the duration of SY 2019-2020. Consequently, many of Student's academic goals were not introduced until the fourth quarter of the school year starting in April 2020. (Witness 5's testimony, Respondent's Exhibits 11-A, 11-B, 12-C)

7. Student earned passing marks and was promoted to the next grade at the end of SY 2019-2020. Student's teacher noted on Student's end of year report card that Student's reading was below the expected benchmark for Student's grade. (Respondent's Exhibit 12A)
8. Petitioner withdrew Student from DCPS at the end of SY 2019-2020 and unilaterally enrolled Student in School B at the start of SY 2020-2021 in ____ grade. School B began the year with 100% virtual learning but gradually transitioned to in-person learning and continued the year with a mix of virtual and in-person learning. (Mother's testimony)
9. On January 21, 2021, School B developed an educational learning plan for Student. School B staff determined Student's instructional level in reading was in the pre-kindergarten to kindergarten range. School B developed goals in the areas of reading, written language, math, academic behavior/executive functioning, and speech-language. (Mother's testimony, Witness 3's testimony, Petitioner's Exhibits 4, 5, 6)
10. DCPS convened an annual IEP review meeting on March 18, 2021. DCPS proposed an IEP that prescribed 4 hours per week of specialized instruction inside the general education setting per week, 4 hours per week of specialized instruction outside the general education setting per week, and 240 minutes of direct SLP per month. Everyone, including Student's parents, agreed to the IEP goals. The IEP included classroom aids and services such as repetition of directions with direct and explicit instructions, teacher checking for understanding, frequent movement and sensory breaks, access to math manipulatives, and supports relating to executive functioning skills including checklists and organizers. (Witness 4's testimony, Respondent's Exhibit 13).
11. Student's parent disagreed with the proposal and requested a full-time special education placement. (Mother's testimony, Respondent's Exhibit 14)
12. Student's School A teacher and speech-language pathologist participated in the meeting and believed that a combination approach of push-in and pull-out specialized instruction was a reasonable approach that benefitted Student's comfort level and met Student's education needs. Because Student had been an active member of the general education classroom at School A and could participate fully, Student's former teacher, saw no factors that indicated that Student needed to be totally removed from the general education setting. (Witness 4's testimony, Petitioner's Exhibit 13)
13. On May 7, 2021, the parents filed a DPC. On or about July 13, 2021, the parties entered into a settlement agreement whereby DCPS agreed to reimburse Student's parents for the expenses incurred at School B for SY 2020-2021. (Mother's testimony)
14. On October 7, 2021, DCPS convened an IEP meeting at which Petitioner and her

educational consultant at the time participated. A DCPS special education teacher obtained data from School B and School A, including Student's IEP progress reports and report cards and Student's psychological evaluation(s), and presented a draft IEP for the meeting. Student's parent and advocate were encouraged to participate, and the IEP team incorporated their input. The IEP included goals in the following areas: math, reading, written expression, cognitive to address the Student's executive functioning, and speech-language. There was general agreement as to the present levels of performance and the IEP goals. (Witness 7's testimony, Respondent's Exhibit 16)

15. The resulting IEP prescribed 5 hours per week of specialized instruction inside the general education setting, 7 hours per week of specialized instruction outside the general education setting, 240 minutes monthly of direct SLP, and 30 minutes monthly of speech-language consultation services. At the conclusion of this meeting, the team offered to implement this proposed IEP at School A, Student's neighborhood DCPS school. Although there had been an increase in Student's specialized instruction Petitioner and her representative at the meeting expressed disagreement and asked for what they considered a full-time special education IEP. (Mother's testimony, Witness 7's testimony, Respondent's Exhibits 15, 16, 17)
16. The notes from the October 7, 2021, IEP meeting indicate that in response to Petitioner's request, the DCPS special educator asked if there's data to support a full-time special education school. Petitioner's attorney said he would submit a written explanation of their thinking for DCPS to consider. Petitioner's consultant stated that there were 27 goals that have been agreed to be added and that the IEP proposal should be greater. Petitioner's attorney stated that "[Student] should be educated with [Student's] nondisabled peers if appropriate." DCPS did not receive a written explanation from Petitioner other than the notification of Student's unilateral placement at School B for SY 2022-2023. (Witness 7's testimony, Respondent's Exhibit 16-4, Petitioner's Exhibit 19)
17. At the start of SY 2022-2023, the IEP that DCPS developed October 7, 2021, remained current and was available for Student to be provided the services prescribed by the IEP. In early September 2022, DCPS contacted the parents to schedule an analysis of existing data ("AED") and an IEP meeting. Petitioner, through counsel, agreed to meet but shared that updated testing was being completed and Petitioner would need more time to be ready to develop an IEP. On September 16, 2022, DCPS convened an AED meeting. The DCPS team requested consent from the parents to complete updated assessments, including an IEE review and speech-language assessment. No additional data was presented to change the level of services prescribed in the previous IEP that DCPS developed on October 7, 2021. DCPS updated the dates in the IEP and agreed to reconvene to update the IEP after the evaluations were reviewed. The September 16, 2022, IEP could have been implemented at School A, Student's neighborhood DCPS school. (Mother's testimony, Witness 7's testimony, Petitioner's Exhibits 20, 22, Respondent's Exhibit 19)
18. Because Student was not making as many gains as expected, Student's parents engaged the same independent psychologist who evaluated the Student in 2019 to conduct a reevaluation, which she conducted in October 2022 when Student was [age] and in _____

grade at School B. She confirmed some previous diagnoses of ADHD and learning disability in reading and writing. She made some new diagnoses, including anxiety disorder based on teacher and parent reports, a language disorder related to difficulty understanding multistep directions and verbal expression and word retrieval, and a learning disorder in math. (Witness 1's testimony Petitioner's Exhibit 25)

19. Student's reading had improved. Specifically, Student's phonological processing, but Student's reading fluency remained problematic. Students' reading scores were generally at the first-grade level, with reading fluency slightly below the first-grade level. Student's reading comprehension was at the second-grade level. Student's spelling score was slightly below first-grade level, but otherwise, Student's writing scores were between first grade and second-grade level. Students' math scores were second to third grade, with math facts fluency in first grade. The evaluator concluded that Student had shown some small progress since attending School B relative to the last testing in 2019. She recommended a low student-to-teacher ratio (6 to 8 students for one teacher), small group or one-to-one reading intervention, daily help with structure and planning, and repetition to address executive functioning concerns. The evaluator concluded that Student needed a small classroom environment all day and intensive reading and writing intervention to improve reading abilities and spelling and writing. (Witness 1's testimony Petitioner's Exhibit 25)
20. On November 17, 2022, a DCPS psychologist completed a review of the October 2022 IEE reevaluation and recommended that Student be found eligible for services as a student with multiple disabilities, including SLD and OHI. On December 12, 2022, the IEP team convened and agreed to the new eligibility classification of MD including SLD and OHI, and agreed to meet again to develop an IEP. (Petitioner's Exhibits 28, 30, Respondent's Exhibit 19A)
21. On January 31, 2023, DCPS sent its first email to the parents attempting to schedule an IEP meeting based on the new eligibility and assessment data. DCPS offered dates in early April for the meeting. Student's parents and representatives were unavailable for the proposed dates and selected April 18, 2023, instead. After confirming the meeting date, DCPS contacted the parent to inform her that the date was no longer available and offered new dates. The meeting was rescheduled for May 9, 2023. (Respondent's Exhibit 2-8, 2-35, 2-20)
22. In January and March 2023, School B provided DCPS with work samples, test results, progress reports, related services treatment summaries, and other relevant educational documents for DCPS's review and consideration. (Witness 2's testimony, Witness 3's testimony)
23. At the beginning of the May 9, 2023, meeting, DCPS stated that despite receiving data from School B, the data had yet to be reviewed or added to the draft IEP. The team reviewed the IEP and agreed to make changes and updates to the present levels of performance ("PLOP") and goals based on the data and input from Petitioner and her educational consultant. Upon discussion of service hours, DCPS proposed 13 hours per week of specialized instruction, 6 hours per week of support in the general education

setting, 7 hours per week outside general education, and 240 minutes per month of direct speech/language services. These were the service hours provided in the draft IEP. The IEP included classroom aids and services such as repetition of directions with direct and explicit instructions, teacher checking for understanding, frequent movement and sensory breaks, access to math manipulatives, and supports relating to executive functioning skills such as checklists and organizers. (Witness 2's testimony, Petitioner's Exhibit 34, Respondent's Exhibits 20, 21)

24. A DCPS special education teacher prepared the PLOPs in the IEP that were drawn from Student's most recent evaluation and data provided by School B. There was general agreement as to the IEP goals. DCPS had identified all areas of academic and non-academic needs for Student. DCPS increased the specialized instruction outside general education by one hour in the IEP based on Student's showing some progress in reading as reflected in Student's most recent psychological evaluation. No additional data was ever provided as to why Student required specialized instruction in every part of the school day. (Witness 7's testimony, Respondent's Exhibits 20, 21)
25. The DCPS representative and the meeting stated that the data did not support an increase in hours and that full-time IEPs were usually reserved for students who made no progress of with severe intellectual disabilities. (Witness 2's testimony, Witness 7's testimony, Petitioner's Exhibit 34)
26. DCPS informed Petitioner that the IEP could be implemented at Student's neighborhood DCPS school, School A, and the school would decide how the IEP service hours would be implemented. DCPS informed the parent that a meeting would be held 30 days after Student began attending School A to review Student's progress and IEP implementation. Petitioner rejected the DCPS proposal as inappropriate and requested that DCPS provide Student with a full-time special education program. (Mother's testimony, Witness 2's testimony, Witness 7's testimony, Petitioner's Exhibit 34)
27. Following the IEP meeting on May 17, 2023, Petitioner contacted DCPS and requested to observe the proposed program at School A. Petitioner's educational consultant also followed up but did not receive a response. On May 25, 2023, the School A principal told Petitioner that he was working with the DCPS central office on setting up an observation. However, neither Petitioner, nor her consultant received any further communication from anyone from DCPS regarding their request. (Mother's testimony, Witness 2's testimony)
28. Student finished fourth grade at the end of SY 2022-2023 at School B. On August 2, 2023, Petitioner notified DCPS of her intent to continue Student's placement at School B and to seek funding from DCPS. Student has continued at School B for SY 2023-2024 school year, for _____ grade. (Mother's testimony, Petitioner's Exhibit 41).
29. School B is a nonpublic school in the District of Columbia, certified by OSSE as special education day school, and has a current OSSE certificate of approval ("COA"). All students at School B have some form learning challenge, but not all students have been found eligible for special education pursuant to IDEA and have an IEP. Although most of Student's classes

at School B have less than ten students and are instructed by a special education teacher, in some classes and activities, Student is with as many as fifteen students. Some of the Student's teachers at School B are not certified special education teachers, and some of the adults leading some of Student's classes and activities are not certified teachers. (Witness 3's testimony, Witness 6's testimony, Petitioner's Exhibit 52)

30. Student has made slow but steady progress in reading, writing, and math since attending School B. Student has also progressed in social and emotional functioning. Despite Student's progress at School B, Student continues to have deficits in reading, writing, and math, as well as difficulty with attention, executive functioning, language, and anxiety. (Mother's testimony, Witness 1's testimony, Witness 2's testimony, Witness 3's testimony)

31. Student has grown socially since attending School B. Student started School B as a quiet and shy and reluctant to speak in class; now Student has friends and participates regularly in the classroom. Student is more self-confident and more confident in Student's academic abilities. (Mother's testimony, Witness 3's testimony)

CONCLUSIONS OF LAW:

Pursuant to IDEA §1415 (f)(3)(E)(i), a decision made by a hearing officer shall be made on substantive grounds based on a determination of whether the child received a free appropriate public education ("FAPE").

Pursuant to IDEA §1415 (f)(3)(E)(ii), in matters alleging a procedural violation, a hearing officer may find that a child did not receive FAPE only if the procedural inadequacies impeded the child's right to FAPE, significantly impeded the parent's opportunity to participate in the decision-making process regarding the provision of FAPE, or caused the child a deprivation of educational benefits. An IDEA claim is viable only if [DCPS'] procedural violations affected the student's substantive rights." *Lesesne v. District of Columbia*, 447 F.3d 828, 834 (D.C. Cir. 2006)

34 C.F.R. § 300.17 provides:

A free appropriate public education or FAPE means special education and related services that--
(a) Are provided at public expense, under public supervision and direction, and without charge;
(b) Meet the standards of the SEA, including the requirements of this part; (c), Include an appropriate preschool, elementary school, or secondary school education in the State involved;
and (d) Are provided in conformity with an individualized education program (IEP) that meets the requirements of Sec. 300.320 through 300.324

Pursuant to 5E DCMR 3030.14, the burden of proof is the responsibility of the party seeking relief. *Schaffer v. West*, 546 U.S. 49, 126 S.Ct. 528 (2005). The burden of persuasion shall be met by a preponderance of the evidence. See, e.g., *N.G. V. District of Columbia* 556 f. Sup. 2d (D.D.C. 2008) see also 20 U.S.C. §1451 (i)(2)(C)(iii).

DCPS held the burden of persuasion on issues #1, #2, & #3 after Petitioner presented a prima facie case on those issues. Petitioner held the burden of production on #4, #5, & #6. 6

⁶ DC Code § 38-2571.03 (6) provides:

ISSUE 1: Did DCPS deny Student a FAPE by failing to propose an appropriate educational program and placement for SY 2021-2022, including a sufficient type and amount of specialized instruction?

Conclusion: Respondent sustained the burden of proof by a preponderance of the evidence that the IEP that DCPS developed for Student in SY 2021-2022 was reasonably calculated to enable Student to make progress appropriate in light of Student's circumstances.

The Individuals with Disabilities Education Act ("IDEA") was enacted to ensure that all disabled students receive a "free appropriate public education." 20 U.S.C. § 1400(d)(1)(A). "Commonly referred to by its acronym 'FAPE,' a free appropriate public education is defined as 'special education and related services that' are 'provided at public expense, under public supervision ...;' and that 'meet the standards of the State educational agency;' as well as 'conform[] with [each disabled student's] individualized education program.'" *Charles H. v. District of Columbia*, 2021 WL 2946127 (D.D.C. June 16, 2021) (quoting 20 U.S.C. § 1401(9)) (alterations in original). "Special education" is defined as "specially designed instruction, at no cost to parents, [that] meet[s] the unique needs of a child with a disability." 20 U.S.C. § 1401(29). "Related services," on the other hand, are defined as "such developmental, corrective, and other supportive services ... as may be required to assist a child with a disability to benefit from special education." *Id.* § 1401(26)(A).

"Under [the] IDEA and its implementing regulations, students with disabilities ... are entitled to receive [a] FAPE through an Individualized Education Program (or IEP)." *Charles H.*, 2021 WL 2946127 (quoting 20 U.S.C. § 1401(9)(D)). An IEP is a written document that lays out how the student will obtain measurable annual goals and that mandates specific special education and related services that the student must receive. 20 U.S.C. § 1414(d)(1)(A)(i). It is created for each student by a special "IEP Team," consisting of the child's parents, at least one regular-education teacher, at least one special-education teacher, and other specified educational experts. *Id.* § 1414(d)(1)(B). An IEP is the main tool for ensuring that a student is provided a FAPE. See *Charles*

(A) In special education due process hearings occurring pursuant to IDEA (20 U.S.C. § 1415(f) and 20 U.S.C. § 1439(a)(1)), the party who filed for the due process hearing shall bear the burden of production and the burden of persuasion; except, that:

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

(ii) Where a party seeks tuition reimbursement for unilateral placement, the party seeking reimbursement shall bear the burden of production and the burden of persuasion on the appropriateness of the unilateral placement; provided, that the hearing officer shall have the authority to bifurcate a hearing regarding a unilateral placement; provided further, that if the hearing officer determines that the program offered by the public agency is appropriate, it is not necessary to inquire into the appropriateness of the unilateral placement.

(B) This paragraph shall apply to special education due process hearings resulting from complaints filed after July 1, 2016.

H., 2021 WL 2946127 (quoting *Lofton v. District of Columbia*, 7 F. Supp. 3d 117, 123 (D.D.C. 2013))." (*Robles v. District of Columbia* 81 IDELR 183 D.D.C. August 26, 2022)

In *Board of Education v. Rowley*, the United States Supreme Court set forth a two-part inquiry for determining whether a school district has satisfied the FAPE requirement. First, the state must have "complied with the procedures set forth in the Act." *Rowley*, 458 U.S. at 206. Second, the IEP that is developed must be "reasonably calculated to enable the child to receive educational benefits." *Rowley*, 458 U.S. at 206-07. To be appropriate under 34 C.F.R. § 300.324, the IEP must consider the (i) strengths of the child; (ii) concerns of the parents; (iii) results of the initial or most recent evaluation; and (iv) academic, developmental, and functional needs of the child.

The second substantive prong of the *Rowley* inquiry is whether the IEP developed was reasonably calculated to enable Student to make progress appropriate in light of Student's individual circumstances. In *Andrew F. ex rel. Joseph F. v. Douglas Cty. Sch. Dist.* RE-1, 137 S. Ct. 988 (2017), the U.S. Supreme Court elaborated on the "educational benefits" requirement pronounced in *Rowley*: To meet its substantive obligation under the IDEA, a school must offer an IEP reasonably calculated to enable a child to make progress appropriate in light of the child's circumstances. . . . Any review of an IEP must appreciate that the question is whether the IEP is reasonable, not whether the court regards it as ideal. . . . When a child is fully integrated in the regular classroom, as the Act prefers, what that typically means is providing a level of instruction reasonably calculated to permit advancement through the general curriculum. . . . If that is not a reasonable prospect for a child, his IEP need not aim for grade-level advancement. But his educational program must be appropriately ambitious in light of his circumstances, just as advancement from grade to grade is appropriately ambitious for most children in the regular classroom. The goals may differ, but every child should have the chance to meet challenging objectives. *Andrew F.*, supra, 137 S. Ct. at 999–1000 (citations omitted).

Pursuant to *Schaefer v. Weast*, 554 F.3d 470 (U.S. App. 2009), the Hearing Officer must "focus on the adequacy of the IEP at the time it was created, and ask if it was reasonably calculated at that time to enable the student to receive educational benefits."

The key inquiry regarding an IEP's substantive adequacy is whether, taking account of what the school knew or reasonably should have known of a student's needs at the time, the IEP offered was reasonably calculated to enable the specific student's progress.... "Any review of an IEP must appreciate that the question is whether the IEP is reasonable, not whether the court regards it as ideal." *Z.B. v. District of Columbia*, 888 F.3d 515 (D.C. Cir. 2018) citing *Andrew F.*, supra, 137 S. Ct. 988.

Removing a child with disabilities "from the regular education environment occurs only when the nature or severity of the disability is such that education in regular classes cannot be achieved satisfactorily." 34 C.F.R. § 300.550; 34 C.F.R. §300.114 see also 20 U.S.C. § (a)(5)(A) (a disabled child is to participate in the same activities as non-disabled children to the "maximum extent appropriate"); *Roark ex rel. Roark v. District of Columbia*, 460 F.Supp.2d 32, 43 (D.D.C. 2006)

"The IDEA requires that children with disabilities receive education in the regular classroom whenever possible" *Z.B. v. District of Columbia*, 888 F.3d 515 (D.C. Cir. 2018) citing *Andrew F.*, supra, 137 S. Ct. at 999 (quoting *Rowley*, 458 U.S. at 202)

Petitioner asserts that the IEP that DCPS developed for Student on October 7, 2021, was inappropriate because it did not provide a sufficient type and amount of specialized instruction. Petitioner asserts that at the Student warranted a full-time special education program with special education services provided throughout Student's school day.

DCPS convened an annual IEP review meeting on March 18, 2021, to update Student's initial IEP after Student had been attending School B. DCPS proposed an IEP that prescribed 4 hours per week of specialized instruction inside the general education setting per week, 4 hours per week of specialized instruction outside the general education setting per week, and 240 minutes of direct SLP per month. The evidence demonstrates that everyone, including the Student's parent, agreed to the IEP goals and the amount, and setting for the Student's related services. The IEP also included classroom aids and services such as repetition of directions with direct and explicit instructions, teacher checking for understanding, frequent movement, sensory breaks, and supports to address Student's executive functioning deficits, including checklists and organizers.

Student's parent disagreed with the proposal, and she and her representatives at the meeting requested a full-time special education placement totally removed from the general education setting. Student's School A teacher and speech-language pathologist participated in the meeting and helped determine the goals. They testified that based on the Student having been an active member of the general education classroom at School A and participating fully in the general education setting, the amount and setting of the specialized instruction in the IEP were appropriate to meet the Student's needs. Student's special education teacher credibly testified that that a combination approach of push-in and pull-out specialized instruction was a reasonable approach that benefitted Student's comfort level and met Student's education needs. She testified that she saw no factors indicating that Student needed to be totally removed from the general education setting.

Petitioner challenged that IEP by filing a DPC that the parties settled. DCPS convened a meeting on October 7, 2021, to update Student's IEP. That IEP prescribed an increase in specialized instruction to 5 hours per week inside the general education setting and 7 hours per week outside the general education setting. The IEP also prescribed 240 minutes monthly of direct SLP, and 30 minutes monthly of speech-language consultation services.

Although there had been an increase in Student's specialized instruction Petitioner and her representatives at the meeting expressed disagreement and asked for what they considered a full-time special education IEP.

Although Petitioner and her witnesses testified that Student's deficits warranted specialized instruction throughout the school day, the IHO gave the School A witnesses who had provided Student instruction and SLP services while Student attended School A greater weight as to Student's needs when the March 8, 2021, IEP developed. They had worked with Student in a general education setting during Student's last year at School A in which Student made passing marks and was promoted to the next grade. Although these witnesses did not participate in development of Student's IEP on October 7, 2021, no significant data indicated that Student warranted total removal from the general education setting, as Petitioner asserts.

The DCPS special educator who participated in the development of the IEP credibly testified that she observed Student at School B and considered the data from School A and School B and increased the amount of specialized instruction in the IEP both inside and outside general education to address the goals, that had been developed. The evidence demonstrates that no IEP team member, including Petitioner and her representatives in the meeting, objected to the PLOPs, goals, related services, classroom aides, and services and accommodations in the IEP. The sole disagreement was the amount and setting of the specialized instruction.

In response to Petitioner's request, the DCPS special educator asked for data to support a full-time special education school. Petitioner's attorney said he would submit a written explanation of their thinking for DCPS to consider. DCPS did not receive a written explanation from Petitioner other than the notification of Student's unilateral placement at School B.

Although Petitioner presented a psychologist who had evaluated Student and recommended that Student be in a school setting with low student to teacher ratio, that witness also stated that her testimony was not based on any review of Student's IEP, or the instruction and services provided in a public-school setting. Although the witness from School B testified about Student's deficits and the services Student received at School B, that witness had never taught or evaluated Student or observed Student in a general education setting.

Although Petitioner asserted that Student needs to be in a special education setting throughout the school day, the support for Student's unique needs throughout the school day exists in the full complement of services in the IEP as testified to by the DCPS witnesses and as supported by the document itself. The IEP includes not only specialized instruction, but related services, accommodations, and other classroom aids and services. IDEA's mandate that students be educated in the least restrictive environment and have access to non-disabled peers compelled DCPS to develop an IEP that was both academically challenging for Student, and that provided Student the opportunity to be educated alongside Student's non-disabled peers.

Based upon the academic goals, the amount of specialized instruction, related services, accommodations, and classroom aids and services, including, among other things, individualized instruction in the IEP both inside and outside of the general education setting, along with the testimony of DCPS's witnesses, and the educational data that was available to the team at the time that the October 7, 2021, IEP was developed, the IHO concludes that the IEP was reasonably calculated to enable Student to make progress appropriate in light of Student's circumstances.

ISSUE 2: Did DCPS deny Student a FAPE by failing to propose a timely and appropriate educational program and placement for the 2022-2023 school year, including a sufficient type and amount of specialized instruction?

Conclusion: Respondent did not sustain the burden of proof by a preponderance of the evidence that the IEP that DCPS developed for Student in SY 2022-2023 was reasonably calculated to enable Student to make progress appropriate in light of the child's circumstances.

The overall purpose of the IDEA is to ensure that “all children with disabilities have available to them a free appropriate public education that emphasizes special education and related services designed to meet their unique needs and prepare them for further education, employment, and independent living.” 20 U.S.C. § 1400(d)(1)(A). *See Boose v. Dist. of Columbia*, 786 F.3d 1054, 1056 (D.C. Cir. 2015) (the IDEA “aims to ensure that every child has a meaningful opportunity to benefit from public education”).

The starting point in this analysis is that “the IEP is the vehicle through which school districts typically fulfill their statutory obligation to provide a free appropriate public education and that officials must have an IEP in place for each student with a disability “[a]t the beginning of each school year. U.S.C. § 1414(d)(2)(A)); 34 C.F.R. 300.322(a), 300.323(a). *See also Dist. of Columbia v. Wolfire*, 10 F. Supp. 3d 89, 95 (D.D.C. 2014) (“there is no requirement that the child be currently enrolled in a public school in order to trigger the LEA’s obligation to develop an IEP for that child”); *Dist. of Columbia v. Oliver*, 2014 WL 686860, at 6 (D.D.C. 2014).

Pursuant to 34 C.F.R. § 300.324 (b) (1) Each public agency must ensure that, subject to paragraphs (b)(2) and (b)(3) of this section, the IEP Team— (i) Reviews the child’s IEP periodically, but not less than annually, to determine whether the annual goals for the child are being achieved; and (ii) Revises the IEP, as appropriate, to address— (A) Any lack of expected progress toward the annual goals described in § 300.320(a)(2), and in the general education curriculum, if appropriate; (B) The results of any reevaluation conducted under § 300.303; (C) Information about the child provided to, or by, the parents, as described under § 300.305(a)(2); (D) The child’s anticipated needs; or (E) Other matters.

As previously stated, pursuant to *Schaefer v. Weast*, 554 F.3d 470 (U.S. App. 2009), the Hearing Officer must “focus on the adequacy of the IEP at the time it was created, and ask if it was reasonably calculated at that time to enable the student to receive educational benefits.”

The key inquiry regarding an IEP’s substantive adequacy is whether, taking account of what the school knew or reasonably should have known of a student’s needs at the time, the IEP offered was reasonably calculated to enable the specific student’s progress....“Any review of an IEP must appreciate that the question is whether the IEP is reasonable, not whether the court regards it as ideal.” *Z.B. v. District of Columbia*, 888 F.3d 515 (D.C. Cir. 2018) citing *Andrew F.*, supra, 137 S. Ct. 988.

The evidence demonstrates that at the start of SY 2022-2023, the IEP that DCPS developed October 7, 2021, remained current and was available for Student to be provided the services prescribed by the IEP. Based on the evidence, the IHO concluded that the IEP that DCPS developed on October 7, 2021, was appropriate. The evidence demonstrates the DCPS wanted to update the Student's IEP, but the Petitioner and her representatives informed the DCPS that Petitioner was obtaining additional evaluations, and the IEP could not yet be updated. DCPS, nonetheless, convened an IEP meeting on September 16, 2022, and timely updated Student's IEP with the express intent to reconvene once evaluations were completed. Thus, the IHO concludes that DCPS had a valid, appropriate, and timely IEP in place for Student at the start of SY 2022-2023.

The evidence demonstrates that because Student was making fewer gains than expected at School B, Student's parents engaged the same independent psychologist who evaluated Student in 2019 to conduct a reevaluation in October 2022. This evaluator concluded that Student's phonological processing had improved, but Student's reading fluency remained problematic. Students' reading scores were generally at the first-grade level, with reading fluency slightly below the first-grade level. Student's reading comprehension was at the second-grade level. Student's spelling score was slightly below first-grade level, but otherwise, Student's writing scores were between first and second grade.

The evaluator concluded that Student had shown some small progress since attending School B relative to the evaluator's last testing in 2019. She recommended a low student-to-teacher ratio (6 to 8 students for one teacher), small group or one-to-one reading intervention, daily help with structure and planning, and repetition to address executive functioning concerns. The evaluator concluded that Student needed a small classroom environment all day and intensive reading and writing intervention to improve reading abilities and spelling and writing.

On December 12, 2022, the IEP team convened and agreed to the new eligibility classification of MD including SLD and OHI, and agreed to meet again to develop an IEP. On January 31, 2023, DCPS sent its first email to the parents attempting to schedule an IEP meeting based on the new eligibility and assessment data. DCPS offered dates in early April for the meeting. The meeting was eventually held on May 9, 2023.

The evidence demonstrates that the IEP team agreed to make changes and updates to the PLOPs and goals based on the data and input from Petitioner and her educational consultant. Upon discussion of service hours, DCPS proposed 13 hours per week of specialized instruction, 6 hours per week of support in the general education setting, 7 hours per week outside general education, and 240 minutes per month of direct SLP.

The IEP included classroom aids and services such as repetition of directions with direct and explicit instructions, teacher checking for understanding, frequent movement and sensory breaks, access to math manipulatives, and supports relating to executive functioning skills, such as checklists and organizers. DCPS increased the specialized instruction outside general education by one hour. Although the DCPS special educator testified that there was no additional data was ever provided as to why Student required specialized instruction in every part of the school day, there was sufficient data based on the evaluation and Student's lack of significant progress for there to have been a significant increase in Student's level of specialized instruction beyond a mere hour. The DCPS special educator's testimony did not provide persuasive reasoning for the slight increase in specialized instruction of one hour.

The testimony provided by the evaluator who conducted Student's most recent evaluation that indicated Student slow progress, coupled with the testimony from Petitioner's educational consultant, outweighed the testimony from the DCPS special educator, who had not recently observed Student at School B prior to the development of this IEP. Although the evaluator could not speak to the IEP and services in a public school, she could speak to Student's lack of significant progress based on her recent evaluation and Student's continued difficulties in reading and writing that were far below grade level. The evaluator credibly testified that given Student's deficits in

reading, writing, and math, the Student would need interventions and a low student-to-teacher ratio in any courses involving reading and writing.

Based on this testimony and Student's updated evaluations, the IHO concludes that Student required a level specialized instruction outside general education that at least supported Student in all core academic subjects. Consequently, the IHO concludes that the IEP that DCPS developed for Student on May 9, 2023, was not reasonably calculated to enable Student to make progress appropriate in light of Student's circumstances.

ISSUE 3: Did DCPS deny Student a FAPE by failing to propose an appropriate educational program and placement SY 2023-2024 school year, including a sufficient type and amount of specialized instruction?

Conclusion: Respondent did not sustain the burden of proof by a preponderance of the evidence that the IEP that DCPS developed for Student in SY 2023-2024 was reasonably calculated to enable Student to make progress appropriate in light of the child's circumstances.

The IEP that DCPS developed on May 9, 2023, remains Student's current IEP for SY 2023-2024. The IHO, having already concluded that this IEP was not reasonably calculated to enable Student to make progress appropriate in light of Student's circumstances, the evidence compels the IHO also to conclude that DCPS denied Student a FAPE by failing to propose an appropriate educational program and placement for SY 2023-2024.

ISSUE 4: Did DCPS deny Student a FAPE by predetermining Student's IEP hours of service for the 2021-2022, 2022-2023 and 2023-2024 school years?

Conclusion: Petitioner did not sustain the burden of proof by a preponderance of the evidence that DCPS predetermined Student's IEP hours of service for SY 2021-2022, SY 2022-2023, and SY 2023-2024.

IDEA requires that "Parents must have an opportunity to participate in the IEP process, and "procedural inadequacies that "seriously infringe upon the parents' opportunity to participate in the IEP formulation process ... clearly result in the denial of a FAPE." *Cooper v. District of Columbia*, 77 F.Supp.3d 32, 37 (D.D.C. 2014) (*quoting A.I. 3ex rel. Iapalucci v. District of Columbia*, 402 F.Supp.2d 152, 164 (D.D.C. 2005)) (alteration in original). To ensure these requirements are followed, IDEA established procedural safeguards that allow parents to seek a review of IEP decisions they disagree with. *See Middleton v. District of Columbia*, 312 F.Supp.3d 113, 122 (D.D.C. 2018). Section 1415(f)(1)(A) provides "the parents or the local education agency involved in such a complaint shall have an opportunity for an impartial due process hearing ..."

Petitioner asserts that DCPS refused to engage in a meaningful discussion about increasing the specialized instruction hours in each of the IEPs that Petitioner's DPC challenged. As evidence of predetermination, Petitioner principally points to two factors: that prior to the May 9, 2023, IEP meeting, DCPS had not reviewed School B data that had been provided and that the comment by the DCPS special educator at the meeting stated that that total removal from general education was reserved for students with severe intellectual disabilities. Other than these two factors, there was no other evidence of predetermination. The DCPS witness did not recall making the comment,

and she credibly testified that despite not having reviewed the School B data prior to the May 2023 IEP meeting, the data was presented during the meeting and thoroughly discussed by the team. The fact that the amount and setting of the specialized instruction in the final IEP was the exact amount in DCPS' draft IEP was not sufficient evidence for the IHO to conclude that DCPS had predetermined Student's IEP hours of service for SY 2023-2024, much less for the IEPs for SY 2021-2022 and 2022-2023.

The evidence demonstrates that Petitioner and her representatives had a full and unbridled opportunity to contribute to developing Student's IEPs at each meeting. Petitioners' educational consultant provided feedback on the draft IEP and testified that Student's needs were addressed in the IEP, except for the hours of specialized instruction. Although Petitioners and their representatives disagreed with the IEP, they had a full opportunity to and did express their disagreement.

The IHO concludes that Petitioner did not sustain the burden of proof by a preponderance of the evidence on this issue.

ISSUE 5: Did DCPS deny Student a FAPE by failing to allow Student's parent and educational consultant to observe the DCPS proposed placement?

Conclusion: Petitioner did not sustain the burden of proof by a preponderance of the evidence that DCPS failed to allow Student's parent and her educational consultant to observe the DCPS proposed placement.

IDEA allows states to create additional procedural and substantive protections if they are consistent with IDEA. *Middleton*, 312 F.Supp.3d at 122. If a state creates a higher standard, "an individual may bring an action under the federal statute seeking to enforce the state standard." *Id.* (quoting *Gill v. Columbia* 93 Sch. Dist., 217 F.3d 1027, 1035).

In 2014, the District of Columbia passed the Student Rights Act. The Act "provides district parents with additional procedural safeguards to help make sure parents have the tools they need to stay informed, engaged, and empowered throughout the special education process." See D.C. Council Comm. Rep. on B 20-723 (D.C. 2014) at 1. Recognizing that "parents who do not have a specific background in the subject area ... often cannot adequately evaluate whether their child's instruction is sufficient [and that] parents are concerned that an LEA may limit such access to the point that the observation is unable to provide meaningful input into their child's educational progress," the Student Rights Act expanded on a parent's "right to observe" under the IDEA...⁷

The Act (D.C. Code § 38-2571.03) states in pertinent part the following:

⁷ *Woodson, et al., v. District of Columbia*, 119 LRP 28316

5(A) Upon request, an LEA shall provide timely access, either together or separately, to the following for observing a child's current to proposed special education program:

(i) the parent of a child with a disability; or

(ii) a designee appointed by the parent of a child with a disability who has professional expertise in the area of special education being observed or is necessary to facilitate an observation for a parent with a disability or to provide language translation assistance to a parent; provided, that the designee is neither representing the parent's child in litigation related to the provision of a free and appropriate public education for that child nor has a financial interest in the outcome of such litigation.

(C) A parent, or the parent's designee, shall be allowed to view the child's instruction in the setting where it ordinarily occurs or the setting where the child's instruction will occur if the child attends the proposed program.

(D) the LEA *shall not impose any conditions or restrictions on such observations except those necessary to:*

(i) Ensure the safety of the children in the program;

(ii) Protect other children in the program from disclosure by an observer of confidential and personally identifiable information in the event such information is obtained in the course of an observation by a parent or a designee, or

(iii) Avoid any potential disruption arising from multiple observations occurring in a classroom simultaneously.

(E) An observer shall not disclose nor use any information obtained during the course of an observation for the purpose of seeking or engaging clients in litigation against the District or the LEA.

Generally, a school district has the discretion to determine the actual school location where a Student's IEP is to be implemented, and parents are generally allowed to visit that location before a student's enrollment. Petitioner asserts that DCPS denied her and her educational consultant the opportunity to observe the program that DCPS proposed to implement at School A for SY 2023-2024.

The evidence demonstrates that Petitioner and her consultant contacted the School A principal about observing School A and its special education program. They testified that the principal told them he would coordinate the observation with DCPS and get back to them. They testified that they did not receive a return call. They did not testify that they made any other attempts to observe the program at School A. They did not call the principal again or show up at School A to inquire why they did not receive a return call. Based on this scant evidence, the IHO cannot conclude that Petitioner or her consultant made any significant or repeated efforts to conduct an observation and that the evidence that they are not aware of a return call from the principal is insufficient for the IHO to conclude that DCPS refused to allow them the opportunity to observe. The IHO concludes that evidence does not support a finding of action or inaction by DCPS impeded the Student's right

to FAPE, significantly impeded Petitioner's opportunity to participate in the decision-making process regarding the provision of FAPE, or caused the Student a deprivation of educational benefits. Petitioner did not sustain the burden of proof by a preponderance of the evidence on this issue.

ISSUE 6: Is School B a proper placement for Student?

Conclusion: Petitioner did not sustain the burden of proof by a preponderance of the evidence that School B is a proper placement for Student.

In determining the educational placement of a child with a disability, each public agency must ensure that the placement decision is made by a group of persons, including the parents and other persons knowledgeable about the child, the meaning of the evaluation data, and the placement options; and is made in conformity with the Least Restrictive Environment provisions of the IDEA; and the public agency must ensure that the child's placement is determined at least annually, is based on the child's IEP, and is as close as possible to the child's home. See 34 C.F.R. § 300.116.

Removing a child with disabilities "from the regular education environment occurs only when the nature or severity of the disability is such that education in regular classes cannot be achieved satisfactorily." 34 C.F.R. § 300.550; 34 C.F.R. §300.114 see also 20 U.S.C. § (a)(5)(A) (a disabled child is to participate in the same activities as non-disabled children to the "maximum extent appropriate"); *Roark ex rel. Roark v. District of Columbia*, 460 F.Supp.2d 32, 43 (D.D.C. 2006) ("The IDEA requires school districts to place disabled children in the least restrictive environment possible.")

"The IDEA requires that children with disabilities receive education in the regular classroom whenever possible" *Z.B. v. District of Columbia*, 888 F.3d 515 (D.C. Cir. 2018) citing *Endrew F.*, supra, 137 S. Ct. at 999 (quoting *Rowley*, 458 U.S. at 202)

Pursuant to D.C. Code § 38-2561.02(c) Special education placements shall be made in the following order of priority; provided, that the placement is appropriate for the student and made in accordance with the IDEA and this chapter: (1) DCPS schools, or District of Columbia public charter schools pursuant to an agreement between DCPS and the public charter school; (2) Private or residential District of Columbia facilities; and (3) Facilities outside of the District of Columbia.

The legal standard under the IDEA is that DCPS "must place the student in a setting that is capable of fulfilling the student's IEP." *Johnson v. Dist. of Columbia*, 962 F. Supp. 2d 263, 267 (D.D.C. 2013). See also *O.O. ex rel. Pabo v. Dist. of Columbia*, 573 F. Supp. 2d 41, 53 (D.D.C. 2008) (placement must be in a school that can fulfill the student's IEP requirements).

A student's IEP determines whether an educational placement is appropriate; the placement does not dictate the IEP. See *Roark v. District of Columbia*, 460 F.Supp.2d 32, 44 (D.D.C. 2006); *Spielberg v. Henrico Cty. Public Sch.*, 853 F.2d 256, 258 (4th Cir. 1988) ("Educational placement is based on the IEP, which is revised annually."); 34 C.F.R. § 300.116(b)(2).

Under the IDEA, parents who unilaterally decide to place their disabled child in a private school,

without obtaining the consent of local school officials, “do so at their own financial risk.” *Florence County Sch. Dist. Four v. Carter*, 510 U.S. 7, 15, 114 S.Ct. 361, 126 L.Ed.2d 284 (1993) (quoting *Sch. Comm. of the Town of Burlington v. Dep’t of Educ.*, 471 U.S. 359, 374, 105 S.Ct. 1996, 85 L.Ed.2d 385 (1985)). “As interpreted by the Supreme Court, IDEA requires school districts to reimburse parents for their private-school expenses if (1) school officials failed to offer the child a free appropriate public education in a public or private school; (2) the private-school placement chosen by the parents was otherwise “proper under the Act”; and (3) the equities weigh in favor of reimbursement—that is, the parents did not otherwise act “unreasonabl[y].” *Leggett v. District of Columbia*, 793 F.3d 59, 66–67 (D.C. Cir. 2015) (citing *Carter*, supra, 510 U.S. at 15–16, 114 S.Ct. 361; 20 U.S.C. § 1412(10)(C)(iii)(III)).

When determining whether a placement is appropriate, the D.C. Circuit has pointed to a list of factors to consider, 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." *Id.* at 12 (*Branham*, 427 F.3d at 11. citing *Bd. of Educ. of Hendrick Hudson Cent. Sch. Dist.*, 458 U.S. at 202).

Petitioner was obviously not satisfied with Student's educational program when Student last attended a DCPS school during SY 2020-2021 and unilaterally placed Student at School B. The evidence demonstrates that Student has made some academic and social-emotional progress since attending School B. Understandably, Petitioner is satisfied with Student’s progress at School B and wants Student to continue attending.

Although at School B, Student is excluded from interaction with non-disabled peers, there was no evidence that at School B, the Student is receiving special education services during lunch and recess and in classes or activities at School B where there is no certified teacher providing instruction. Although the IHO concluded that the most recent IEP that DCPS developed was inappropriate because it did not prescribe specialized instruction in all core courses that involve reading and writing, there was insufficient evidence presented that Student's disabilities are such that Student cannot receive a FAPE in a setting where Student has access to non-disabled peers. Therefore, the IHO concludes that Student's LRE is not a separate special education school and that School B is not an appropriate prospective placement for Student.

However, there is sufficient evidence that School B meets the requirements for Petitioner to be reimbursed for Student's tuition and costs for Student's attendance at School B for SY 2022-2023 and the first half of SY 2023-2023, based upon DCPS not having provided an appropriate IEP on May 9, 2023. Although School B does not meet Student's LRE, given the nature and severity of Student’s disabilities, Student’s specialized educational needs appear to have been addressed while Student has attended School B.

ORDER:

1. Within ten (10) business days of its receipt from Petitioner of documentation of her payments to School B, DCPS shall reimburse Petitioner for her payment to School B of

Student's tuition and costs for attending School B for SY 2022-2023 and for SY 2023-2024 up to the date that DCPS complies with the provision #2 below.

2. Within ten (10) school days of the issuance of this order, DCPS shall convene an IEP meeting to review and revise Student's IEP with updated data and to prescribe specialized instruction outside general education such that Student is in a special education setting outside general education for all core academic subjects. DCPS shall also, within this timeframe, determine an appropriate location of service to implement Student's IEP for the remainder of SY 2023-2024.
3. All other relief requested by Petitioner is denied.

APPEAL PROCESS:

The decision issued by the Hearing Officer is final, except that any party aggrieved by the findings and decision of the Hearing Officer shall have ninety (90) days from the date of the decision of the Hearing Officer to file a civil action with respect to the issues presented at the due process hearing in a District Court of the United States or a District of Columbia court of competent jurisdiction, as provided in 20 U.S.C. §1415(i)(2).

/S/ Coles B. Ruff

Coles B. Ruff, Esq.
Hearing Officer
Date: December 22, 2023

Copies to: Counsel for Petitioner
 Counsel for LEA
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