

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

Parents on behalf of Student¹)	Case No. 2023-0122
)	
Petitioner)	Hearing Dates: November 8, 9 and 20, 2023
)	
v.)	Conducted by Video Conference
)	Date Issued: December 11, 2023
District of Columbia Public Schools)	
)	Terry Michael Banks,
Respondent)	Hearing Officer

AMENDED HEARING OFFICER DETERMINATION

INTRODUCTION

Petitioners are the parents of an X-year-old student (“Student”) attending School B. On June 27, 2023, Petitioners filed a Due Process Complaint Notice (“*Complaint*”) alleging that the District of Columbia Public Schools (“DCPS”) denied Student a free appropriate public education (“FAPE”) by failing to provide her/him an appropriate Individualized Education Programs (“IEP”) and placements for the 2022-23 school year. On July 7, 2023, DCPS filed *District of Columbia Public Schools’ Response*, denying that it had denied Student a FAPE in any way.

SUBJECT MATTER JURISDICTION

This due process hearing was held, and a decision in this matter is being rendered, pursuant to the Individuals with Disabilities Education Improvement Act (“IDEIA”), 20 U.S.C. Section 1400 *et seq.*, its implementing regulations, 34 C.F.R. Sect. 300 *et seq.*, Title 38 of the D.C. Code, Subtitle VII, Chapter 25, and the District of Columbia Municipal Regulations, Title 5-E, Chapter 30.

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

PROCEDURAL HISTORY

On June 27, 2023, Petitioner filed the *Complaint* alleging that DCPS denied Student a FAPE by (1) failing to provide an appropriate IEP on January 20, 2022, (2) failing to provide a location of services for the 2022-23 school year, (3) proposing an inappropriate location of services on October 24, 2022, (4) failing to provide an appropriate IEP and placement on January 13, 2023, and (5) failing to permit Petitioners to observe the proposed placement at School B from the request on February 8, 2023 until June 14, 2023.

On July 7, 2023, DCPS filed its *Response*, in which it refuted allegations in the *Complaint* denying that it had denied Student a FAPE in any way. DCPS asserted that (1) After receiving the initial referral for evaluations on or about December 1, 2021, it found Student eligible for services on January 20, 2022, developed an appropriate IEP and informed the parents that the Location of Services (“LOS”) would be offered to them once they provided written consent for services; (2) Petitioners provided initial consent for services to DCPS on October 5, 2022, and DCPS notified Petitioners that School A was the LOS on October 24, 2022; (3) The previous IEP was current and in effect for the beginning of the 2022-23 school year. DCPS updated Student’s IEP on January 13, 2023, it offered a FAPE, and School A was capable of implementing the IEP; (4) On February 8, 2023, DCPS notified Petitioners that School A was Student’s LOS. On March 1 and 13, 2023, DCPS “reached out” to the parents to ask if they intended to enroll Student at School A, but Petitioners elected to maintain Student’s enrollment at School B; (5) In March 2023, Petitioners were informed that School A was not providing school-day observations of classrooms, and were given information about open house opportunities and a link to a virtual tour of the school. On June 14, 2023, Petitioners were given the opportunity to visit the school for an additional tour; and (6) School B’s restrictive environment renders it an improper and inappropriate placement for Student.

The parties participated in a resolution meeting on July 18 2023 that did not result in a settlement. A prehearing conference was not conducted due to schedule conflicts. The *Prehearing Order*, as to which the parties collaborated prior to its finalization, was issued on August 24, 2023.

The due process hearing was conducted on November 8, 9, and 20, 2023 by video conference. The hearing was closed to the public at Petitioners’ request. Petitioners filed Five-day Disclosures on November 1, 2023, containing a witness list of three witnesses and documents P1 through P-36. Respondent filed no objections to Petitioners’ disclosures. However, during the second day of hearings, it was determined that a third day would be necessary to complete testimony. Subsequently, it was agreed that the hearings would be concluded on November 20, 2023. In anticipation of that additional day of hearings, at which Petitioner’s counsel intended to elicit rebuttal testimony, Petitioners filed supplemental disclosures P37-P41 on November 13, 2023, to which Respondent filed objections on November 15, 2023. I sustained the objections to each of the proposed supplemental exhibits on grounds of relevance and authentication. and Thus, Petitioners’ Exhibits P1--36 were admitted into evidence.

Respondent filed timely disclosures on Novmeber 1, 2023 then Revised Disclosures on November 2, 2023 including a witness list of nine witnesses and documents R1 through R20. Respondent filed a Supplemental disclosure, R-15, on September 28, 2023, the curriculum vitae of Witness G. Petitioners filed objections to Respondent’s disclosures on September 28, 2023. Petitioners objected to expert testimony from Witness C, Witness D, and four other witnesses that

were not ultimately called as witnesses because DCPS did not disclose curriculum vitae of the proposed experts as required in the *Prehearing Order*. The objection was sustained. At the beginning of Respondent's direct case, Respondent's Exhibits R1-R20 were admitted into evidence.

Petitioner presented as witnesses in chronological order: Witness A, Witness B, and Petitioner/mother. Witness A was admitted as an expert in Psychology, and Witness B was admitted as an expert in Speech & Language Pathology. At the conclusion of Witness A's direct testimony, DCPS moved to strike her testimony because she testified to having conducted rating scales shortly before the hearing that were provided to Petitioners' counsel but not disclosed to Respondent. I deferred ruling on the objection until the completion of her testimony. At the beginning of the second day of hearings, after Petitioners had completed their direct case, I struck Witness A's opinion testimony for Petitioners' failure to disclose the witness' recently completed rating scales.²

Respondent presented as witnesses in chronological order: Witness C, Witness D, Witness E, Witness F. and Witness G. Witness E and Witness F were admitted as experts in Occupational Therapy, and Witness G was admitted as an expert in Special Education. At the conclusion of Respondent's direct case, Petitioner/mother and Witness B provided rebuttal testimony. testimony, the parties' counsel gave oral closing arguments. The Hearing Officer authorized the parties to submit authorities upon which they rely on or before November 22, 2023. On November 22, 2023, Petitioners filed *Petitioners' Closing Authorities*. On November 28, 2023, Respondent's counsel filed an authority as to which Petitioners objected as untimely by email. By reply email, the Hearing Officer sustained the objection and did not consider the filing in developing this decision.

ISSUES

As identified in the *Complaint* and the *Prehearing Order*, and as modified on the first day of hearings, the issues to be determined in this case are as follows:

1. Whether DCPS denied Student a FAPE by failing to provide an appropriate IEP for the 2022-23 school year on January 20, 2022. Specifically, Petitioners believe that an insufficient amount of service hours were proposed and that Student requires a "highly structured, small, specialized environment throughout the school day."

² 34 CFR Section 300.512 (b)(1) provides that at least five business days prior to a hearing conducted pursuant to § 300.511(a), each party must disclose to all other parties all evaluations completed by that date and recommendations based on the offering party's evaluations that the party intends to use at the hearing.² In her testimony, Witness A opined that Student required support throughout the day. I asked her if his/her cognitive deficiencies alone would require support throughout the day and she opined that they would not. However, when I asked if her/his behavior alone would require support throughout the day, and she said it would. The rating scales conducted by Witness A related directly to Student's behavior. Therefore, because Witness A conducted additional assessments of Student related solely to her/his behavior, provided those assessments to Petitioners' counsel, but those assessments were not disclosed to Respondent, I struck Witness A's opinion testimony. Her testimony regarding an evaluation that was previously conducted by a psychologist no longer in practice at Witness A's firm was not stricken.

2. Whether DCPS denied Student a FAPE by failing to provide a location of services for the 2022-23 school year.
3. Whether DCPS denied Student a FAPE by proposing an inappropriate location of services on October 24, 2022. Specifically, Petitioners assert that the class size of 20 is too large for Student, the building size is too large, and the mix of preK3 and preK4 students is inappropriate.
4. Whether DCPS denied Student a FAPE by failing to provide an appropriate IEP and placement on January 13, 2023. Specifically, Petitioners believe that an insufficient amount of service hours were proposed and that Student requires a “highly structured, small, specialized environment throughout the school day.”
5. Whether DCPS denied Student a FAPE by failing to permit the parents to observe the proposed placement at School A from the request on February 8, 2023 until June 14, 2023.
6. Whether School B is an appropriate placement for Student.

FINDINGS OF FACT

1. Student is X years old and was enrolled in grade Q at School C during the 2021-22 school year.³

2. On December 1, 2021, when Student was Y years old, Petitioner/mother requested that Student be evaluated to determine her/his eligibility for special education services.⁴

3. On December 13, 2021, Examiner A, a physical therapist at Facility A, completed at Physical Therapy Assessment Report of Student.⁵ Examiner A found that Student had strengths in walking and functional mobility, running, handling balls, coordination, jumping, negotiating stairs, and balance, and presented no concerns in terms of gross motor skills. Her/his score on the Developmental Assessment of Young Children (DAYC-2) indicated Average gross motor performance. “[Student] does not exhibit any abnormal movement or movement patterns that could represent an obstacle for [her/him] benefitting from the gross motor component of [her/his] current educational program.”⁶

4. On December 13, 2021, Witness E, an occupational therapist at Facility A, completed a Comprehensive Occupational Therapy Initial Evaluation of Student.⁷ Witness E interviewed Teacher and Teacher B at School C who expressed concern with Student’s working memory and processing two-step instructions. S/he earned a standard score of 87 on the measure of fine motor skills on the DAYC-2, indicating that her/his fine motor skills were slightly below

³ Petitioners’ Exhibit (“P:”) 11 at page 1 (111). The exhibit number and exhibit page numbers are followed by the electronic page number in the disclosure in parentheses, i.e., P11:1 (111), P3:1 (27),

⁴ Respondent’s Exhibit (“R:”) 3 at page 1 (32). The exhibit number and exhibit page numbers are followed by the electronic page number in the disclosure in parentheses, i.e., R3:1 (32),

⁵ P2:1 (19),

⁶ P2: 6-7 (24-25).

⁷ P3:1 (27).

her/his same aged peers. On the Child Sensory Profile 2, Student presented in the “Less than Others” range in Touch Processing, Body Position processing, Oral Sensory processing, Conduct associated with sensory processing, Social Emotional responses associated with sensory processing, and Attentional responses associated with sensory processing. S/he scored in the “Just Like the Majority of Others” in Auditory processing, Visual processing and Movement processing.⁸

[Student] presented with difficulties with maintaining body positions due to lower muscle tone within [her/his] core as noted during [her/his] evaluation. [S/he] appeared fidgety and often changed [her/his] body position during the evaluation which can cause [Student] to lose [her/his] attention on a task or miss information during an activity. Although [his/her] lower muscle tone does not interfere or prevent [him/her] from participating in or completing gross or fine motor activities, it can affect a child’s ability to maintain postures. During the evaluation, [Student] supported [her/himself] by leaning on [his/her] mother or supporting [him/herself] on extended arms. These areas for growth may impact [Student’s] learning and participation in the educational environment by limiting [his/her] ability to optimally focus and functionally attend to classroom instruction when in a classroom environment.⁹

Examiner B’s recommendations included, but were not limited to, receiving additional time to complete fine motor tasks, use of a slanted surface to support and position the wrist during drawing and writing tasks, breaking motor sequences into smaller steps for completion, use of a shorter pencil to encourage an appropriate grasping pattern, brief movement breaks every 1.5 – 2.0 hours throughout the day, using multi-sensory methods to teach letters, and use of fidgets.¹⁰

5. On January 5, 2022, Witness C, a Facility A school psychologist, completed a Comprehensive Psychological Evaluation of Student. Petitioners requested the evaluation “due to concerns with auditory processing (i.e. remembering and following single and multi-step directions). Parent referral is also notable for presence of atypical body movements (i.e. inconsistent eye contact, flaps hands when excited, hesitant on stairs and difficulties with balance).”¹¹ Teacher A completed a questionnaire and reported that Student was creative, curious, in. reading, listening to stories, is innovative in her/his play, and takes care of her/his own needs. Teacher A stated that Student has “age-appropriate understanding of academic concepts and participates in social interactions with adults and peers, but has difficulty remembering and processing multi-step directions, and sustains minimal attention to staff-led activities, requiring staff support to assist [Student] in maintaining attention to classroom activities through to completion.”¹²

Witness C administered Student the Wechsler Preschool and Primary Scale of Intelligence (“WPPSI-IV”), but noted that intelligence measures of children Student’s age may change

⁸ *Id.* at 11(37).

⁹ *Id.* at 12 (38).

¹⁰ *Id.* at 12-13 (38-39).

¹¹ P5:1 (51).

¹² *Id.* at 3 (53).

substantially and should be interpreted cautiously. Student scored in the Low Average range in Verbal Comprehension (89), Visual Spatial (89), and on the General Ability Index (“GAI” - 88). Witness A opined that Student’s verbal and visual-spatial reasoning are developing evenly and within the average range compared to same-age peers and her/his GAI score is not indicative of a delay compared to same age peers, s/he may benefit from staff support in the form of proximity to the teacher, repetition of directions, modelling, flexible seating, movement breaks, encouragement, and redirection to maintain participation and communicate his/her knowledge.¹³

On the Behavior Assessment System for Children (“BASC-3”), Petitioner/mother and Teacher A completed rating scales. Petitioner/mother’s responses were within the typical range on all scales and Teacher A’s responses were mildly elevated on the anxiety, depression, and attention problems scales. Inconsistencies and fluctuating scores across settings/between raters are common as there are different expectations that can be situationally dependent in the home and school environments. “Overall, parent and teacher responses suggest no significant social-emotional nor adaptive delays compared to same-age peers, as scores were within the typical range on the externalizing, internalizing, behavior symptoms, adaptive skills composites.”¹⁴ On the Autism Spectrum Rating Scales (“ASRS”), Petitioner/mother and Teacher A again completed rating scales. In Social Communication, Petitioner/mother’s responses were within the typical range, but Teacher A’s responses were within the very elevated range.

[Student] often chooses to play alone, has difficulty playing with others, and does not often respond when spoken to by other children... [Student] avoids looking at adults when there is a problem, and teacher responses suggest [Student] does not often respond when spoken to by adults... [Student] does not often notice social cues nor show interest in the ideas of others...¹⁵

With respect to Unusual Behaviors, Teacher A’s responses were within the very elevated range.

[Student] has difficulty tolerating changes in routines and activities and insists on keeping certain objects with [her/him] at all times. Teacher responses additionally suggest in the school setting, [Student] can persevere on details, insist on certain routines/doing activities the same way each time, and demonstrates a strong reaction/becomes upset with change in routine.¹⁶

Witness C opined that despite Petitioner/mother’s responses of typicality, Teacher A’s responses suggest Student “presents with many characteristics associated with Autism Spectrum Disorder (Total T-Score: Parent = 43, Teacher = 79)...” and “ may benefit from staff support to decrease behavioral rigidity, and build attention and social communication skills to navigate learning and social activities with increased independence.”¹⁷

After discussing the OSSE-defined criteria for autism (“ASD”) and developmental delay, Witness C concluded that Student “may” meet the criteria for ASD, but deferred the final

¹³ *Id.* at 4-5 (54-55).

¹⁴ *Id.* at 6 (56).

¹⁵ *Id.* at 7 (57).

¹⁶ *Id.* at 8 (58).

¹⁷ *Id.* at 8 (58).

determination to a multidisciplinary team (“MDT”).¹⁸ Her recommendations included, but were not limited to the following: (1) specialized instruction to increase independence in following routines/transitioning and build joint attention and social interaction skills, (2) visuals (i.e. pictures, models) paired with verbal directions, and repetition of instructions when needed to attend to and complete multi-step activities, (3) presenting work demands into short, rapid cycles of work/break/work/break to build stamina for sustained joint attention and task completion, (4) flexible seating with clearly defined external structures to move within a given area, and (5) preferential seating near staff to promote verbal/nonverbal communication.¹⁹

6. On January 7, 2022, Witness G, the Evaluation Coordinator at Facility A, completed an Educational Evaluation Report on Student. Witness G administered the Woodcock-Johnson Tests of Early Cognitive and Academic Development (“ECAD”) to measure Student’s Early Academic Skills. Student’s scores were High Average in overall Early Academic Skills (111) and Letter-Word Identification (116), and Average in Number Sense (99) and Writing (109). Witness G concluded that Student had age-appropriate academic skills: “Based on parents and teacher information, [Student] appears to have age-appropriate knowledge of academic concepts. [Student] knows [her/his] letters and numbers... Based on the results of this testing, [Student] should have little trouble meeting the early achievement demands of [grade Q].”²⁰

7. On January 7, 2022, Examiner B, a speech language pathologist at Facility A, completed an Initial Speech and Language Assessment Report due to Petitioners’ “concerns about a potential auditory processing issue.”²¹ Examiner B interviewed Teacher A, who reported that while Student had problems with inattention, s/he evinced no communications concerns:

[Student] can sustain minimal attention and will hyper focus on animal toys the entire day. [Teacher A] shared those behaviors like the lack of focus at times may impact [Student’s] learning; however, [her/his] lack of focus doesn’t affect or impact other children in [her/his] class. In addition, [Teacher A] indicated that [Student] does not have difficulty interacting and communicating with adults or peers.²²

Articulation, voice, and fluency were not assessed as Petitioners express no concerns in these areas.²³ Student’s receptive and expressive vocabulary skills were assessed through the Comprehensive Assessment of Spoken Language (“CASL-2”). Testing revealed Student’s receptive and expressive vocabulary skills to be in the Average range and within age expectations.²⁴ Student’s receptive and expressive language skills were assessed through the DAYC-2. Her/his receptive and expressive language skills were also found to be in the Average range and age-appropriate.²⁵

¹⁸ *Id.* at 11 (61).

¹⁹ *Id.* at 12 (62).

²⁰ *Id.* at 7 (71).

²¹ P7:1 (73).

²² *Id.* at 4 (76).

²³ *Id.* at 7 (79).

²⁴ *Id.* at 8 (80).

²⁵ *Id.* at 9 (81).

Student's pragmatic language skills were assessed using the Clinical Evaluation of Language Fundamentals ("CELF-2), utilizing checklists completed by Teacher A and Petitioner/mother. Teacher A's responses indicated inadequate communication skills at school, while Petitioner/mother's suggested adequate communication abilities at home.²⁶ Examiner B concluded that Student "may have difficulties initiating and maintaining play and communication with classmates and teachers, taking turns, introducing new topics, using, and understanding nonverbal signals."²⁷ Examiner B offered recommendations for Petitioners to implement at home, but offered no opinion as to eligibility, goals, or classroom practices to address Student's pragmatic language issues.

8. On January 20, 2022, an MDT determined that Student qualified for special education services with a classification of Developmental Delay.²⁸

9. On January 20, 2022, DCPS convened an IEP team to develop an initial IEP for Student. The team determined that Student's behavior was the factor impairing his/her academic progress and recommended goals in the following Areas of Concern: Adaptive, Communication, Cognitive, Social/Emotional ("Behavior"), and occupational therapy ("OT"). DCPS informed Petitioners that an LOS would be offered upon receipt of their signed consent to receive services. Petitioner/mother expressed reservations about removing Student from School C and asked if the IEP could be implemented at School C. Witness D, a Facility C speech language therapist, suggest that they pose that question to School C, but that School was not obligated to implement the IEP. Petitioners were informed that an Individual Services Plan ("ISP") could be developed if Student remained at School C, but there was a waitlist for speech services.²⁹

The Consideration of Special Factors indicated that Student's behavior impedes his/her learning or that of others and presents with pragmatic language deficits, but does not require the use of assistive technology.³⁰ In Adaptive, the Present Levels of Academic Achievement and Performance ("PLOP") reported that Student's teachers noted that Student is creative, curious, innovative with her/his play and has age-appropriate understanding of academic concepts, as confirmed on the ECAD. The only cited need was in the area of transitioning between activities. The goal was, given verbal/gestural prompts, Student will follow a given classroom routine and make transitions between classroom activities in three out of five consecutive opportunities.³¹ In Cognitive, the PLOP reported Student's GAI and ECAD scores and that s/he presents with behavioral rigidity, difficulty consistently maintaining attention to classroom activities, and has difficulty maintaining reciprocal social interactions with others. The three goals were: (a) with fading staff support to promote independence, Student will follow multi-step directions to complete academic tasks from start to finish with 80% accuracy in 4/5 consecutive academic tasks, (b) with fading staff support, s/he will participate in a group learning activity (i.e. morning meeting, imitating actions, etc.) by following multi-step directions and remaining in the area for the duration of the activity, up to ten minutes, (c) to promote attention and consistent participation, with fading staff support to independence, given two or more categories (i.e. short/tall, colors, locations, etc.)

²⁶ *Id.* at 11 (83).

²⁷ *Id.* at 12 (84).

²⁸ P9:3 (93).

²⁹ P10:1-3 (107-9).

³⁰ P11:2 (112).

³¹ *Id.* at 3 (113).

and a set of 8-20 objects, Student will correctly sort the objects into groups with 80% accuracy, and (d) to address behavioral rigidity and transitioning from self-directed task to teacher-led tasks, Student will engage in a staff-led turn-taking/reciprocal activity with at least one other peer by following multi-step directions for participation and responding to social bids for up to five turns.³²

In Communication, the PLOP reported the results of Examiner B's Speech and Language Assessment Report. The goals were: (a) to enhance pragmatic language, Student will initiate play interaction with peers in unstructured and structured settings by inviting one to two peers to play or by suggesting a game at least twice per therapy day for 3 consecutive weeks, (b) to enhance pragmatic language, s/he will take turns with a preferred and nonpreferred toy/game/object/book with two different peers twice per therapy day for 3 consecutive weeks, (c) to enhance pragmatic language, Student will initiate a back-and-forth conversation exchange (for example, greeting and asking about a shared interest, such as a TV show, or asking if the peer enjoys crafts/art, etc.) with three of the previously identified classmates independently with 80% success across 3 consecutive weeks, and (d) to enhance pragmatic language, s/he will introduce a new conversation topic during a structured and unstructured activity twice per therapy day for 3 consecutive weeks.³³

In Behavior, the PLOP reported that although the Psychological Evaluation revealed Student's overall social-emotional development to be within the average range, s/he can have difficulty regulating his/her emotional responses when there are changes in routine, novel activities, transitions between activities, or when denied access to preferred items. The goal was: when upset, Student will participate in co-regulation/self-regulation activities and return to classroom activity within three minutes in 4/5 days per week for two consecutive weeks. In Motor Skills, the PLOP reported the findings of Witness E's Occupational Therapy Initial Evaluation. While most of her/his motor skills were within normal functioning limits, his/her needs included maintaining sitting postures for the duration of an activity, decreasing her/his need for movement input such as walking, walking in circles and/or jumping during activities, and improving her/his attention during activities. The goals were: (a) Student will participate in sensory diet activities throughout her/his day as created by his/her treating Occupational Therapist to decrease the need to engage in sensory seeking behaviors, (b) to demonstrate improved balance between flexor and extensor musculature (cocontraction), s/he will maintain a functional sitting posture with upright head and trunk, hips at 90 degrees and feet flat on the floor, without support from arms during a fine motor activity for 5 minutes, (c) to demonstrate improved arm strength and stability, which are needed as a foundation for controlled movement, Student will wheelbarrow walk for a distance of 10 feet without stopping and with support provided at her/his feet, 4 out of 5 consecutive trials, and (d) using a multisensory approach and adaptations as needed, s/he will improve his/her foundational fine motor skills by holding fine motor tools with a functional grasp and open webbed space for 80% of a writing tasks, 3 out of 3 trials, over 3 consecutive sessions.³⁴

The IEP team prescribed five hours per week of specialized instruction inside general education, two hours per month of speech and language services (one hour each inside and outside general education), two hours per week of behavioral support services ("BSS"), and 15 minutes per week of behavioral consultation services. Other Classroom Aids and Services included:

³² *Id.* at 3-5 (113-15).

³³ *Id.* at 6-8 (116-18).

³⁴ *Id.* at 9-12 (119-22).

Visuals (i.e. pictures, models) paired with verbal directions, and repetition of instruction when needed to attend to and complete multi-step activities and/or elaborate on her/his thoughts and maintain conversation with others, presenting work demands in short, rapid cycles of work/break/work/break to build stamina for sustained joint attention and task completion, flexible seating with clearly defined external structures to move within a given area, while continuing to stay in close proximity to the group learning/social activity, preferential seating near staff to promote verbal/nonverbal communication, and facing the focal point of instruction and away from extraneous visual/auditory distractions to promote attention to task, transition objects and tools (i.e. individualized visual schedule linked to areas of interest, timer, item to hold, picture cue, etc.) to support independence in transitioning between activities, structured roles during unstructured times in the school day (errands, staff appointed leadership, specific jobs during arrival or morning meeting) to continue building social skills with adults and peers; encouraging play and social interaction, providing structured and unstructured activities to work on initiate, maintain and introduce new topics, and utilizing the sensory diet created by Student's treating Occupational Therapist throughout her/his school day.³⁵

10. On January 20, 2022, DCPS issued a Prior Written Notice ("PWN") memorializing the development of the IEP. The PWN reported that prior to the start of the IEP meeting, Petitioners provided verbal consent for the Initial Provision of Services but had provided written consent. "In order to provide [Student] with access to a Free and Appropriate Public Education (FAPE), the IEP Team proceeded in holding an Initial IEP meeting on 01/20/2022... Parents were provided a draft copy and provided input throughout the IEP meeting. Parents were notified that the Consent for Initial Provision form needs to be completed/signed and returned in order for the IEP to be finalized."³⁶

11. On June 1, 2022, Examiner C completed an independent, untitled analysis of Student's speech and language skills. Petitioners requested the evaluation to secure "in-person testing and to reflect on the progress they have seen in the past 6-months since the [Facility A] evaluation."³⁷ On the CELF-2, Student scored in the Average range in Core Language (91), Receptive Language (90), Expressive Language (91), and Language Structure (97) and Below Average in Language Content (84) on the Core Language Indexes.³⁸ On the Pragmatic Activities Checklist, Student scored in the Average range on the Core Language Index (91), Receptive Language Index (90), Expressive Language Index (91), and Language Structure Index (97), and Below Average on the Language Content Index (84). Student's score on the Language Content Index "[r]eflects [Student's] difficulties with vocabulary and [her/his] weaknesses interpreting the meaning of concepts in simple and complex instructions, as well as [her/his] difficulty comprehending associations and relationships among words."³⁹

Examiner C found nothing to corroborate Petitioners' concerns about auditory processing:

There were few occasions during today's evaluation for which [Student] repeated a word incorrectly or misheard instruction. It was difficult to determine if it was

³⁵ *Id.* at 13 (123).

³⁶ P12:1 (127).

³⁷ P14:2 (138).

³⁸ *Id.* at 3 (139).

³⁹ *Id.* at 6-7 (142-43).

due to inattention or problems related to hearing and/or processing. [His/her] overall testing behavior showed good effort and focus for structured activities, particularly those with visual supports.⁴⁰

Examiner C offered the following recommendations:

It is recommended that [Student] receive speech and language therapy to address social-pragmatic weaknesses with specific focus on recognizing perspectives/character motivation and emotions, story comprehension, making inferences, predictions and story retell. In the classroom, [Student] will benefit from specific social skills instruction, conversational scaffolds and accommodations to aid [her/him] in answering questions accurately, as well as small class size or small group learning as effective strategies to promote [Student's] vocabulary and concept development.⁴¹

12. On September 8, 2022, Examiner D completed an independent Neuropsychological Assessment Report: Developmental Evaluation. Petitioners requested the evaluation because they had a “question regarding whether [Student] presents with Attention Deficit/Hyperactivity Disorder (ADHD), Autism Spectrum Disorder (ASD), or any other condition.”⁴² On the Developmental Profile, Student was Well Above Average in Social-Emotional Development (134), Above Average in Cognitive (120), Average in General Development (99) and Adaptive Behavior (92), and Below Average in Physical (80), and Communication (78).⁴³ Student’s score indicated that s/he is developing as expected, or better, than her/his peers in most areas of development, with weaker skills than other children her/his age in physical development and communication skills.⁴⁴ Student’s intellectual profile was assessed on the Stanford Bine Intelligence Scales (“SB-5”). S/he scored in the High Average range in Fluid Reasoning (112), and in the Average range in Full Scall IQ (100), Nonverbal IQ (103), Verbal IQ (97), Knowledge (91), Quantitative Reasoning (105), Visual Spatial (91), and Working Memory (100).⁴⁵ On the Expressive Vocabulary Test (“EVT-3”), Student’s standard score of 91 was in the Average range.⁴⁶ On the Peabody Picture Vocabulary Test (“PPVT-5”), his/her standard score of 95 was also in the Average range as well as on the Beery-Buktenica Developmental Test of Visual-motor Integration (“VMI-6”) where his/her score was 93.⁴⁷

On the Behavior Rating Inventory or Executive Functioning (“BRIEF-2”), rating scales completed by Petitioners, the Global Executive Composite score of 61 was one point above the threshold for Elevated but nine points below Clinically Significant.⁴⁸ On the Vineland Assessment of Adaptive Behavior Skills, Student’s composite scores were all Average: Adaptive Behavior Composite (“ABC”) (95), Communication (93), Daily Living Skills (93), and Socialization (103),

⁴⁰ *Id.* at 8 (144).

⁴¹ *Id.* at 9 (145).

⁴² P15:1 (147).

⁴³ *Id.* at 8 (154) and 22 (168).

⁴⁴ *Id.* at 8 (154).

⁴⁵ *Id.* at 21 (167).

⁴⁶ *Id.* at 22 (168).

⁴⁷ *Id.* at 23 (169).

⁴⁸ *Id.* at 24 (170).

except Motor (85).⁴⁹ On the Behavior Assessment System for Children (“BASC-3”), Petitioners submitted rating scales. There were twenty-five categories. Petitioners rated Student Elevated on the Emotional Control Index and the Overall Executive Functioning Index, Mild Elevation in Depression, Attention Problems, Activities of Daily Living, Anger Control, Emotional Self Control, Executive Functioning, and Negative Emotionality, and Average in the remaining sixteen categories.⁵⁰ On the Conners Early Childhood, both a teacher and Petitioners rated Student clinically significant in Atypical Behaviors.⁵¹ On the Gilliam Autism Rating Scale, Student scored below the first percentile on the Autism Index and Social Communication, in the third percentile in Social Interaction, and in the 9th percentile in Emotional Response.⁵² On the Autism Diagnostic Observation Schedule (“ADOS-2”), Student has a Moderate Level of ASD Symptoms.⁵³

Examiner D opined that intensive intervention would be required for Student to make “appropriate rate and level of progress:”

[Student’s] distractibility, the need for redirection back to task, and routinized play behaviors/speech interfered with [her/his] ability to complete testing in a timely manner; some subtests or items needed repeated. [His/her] cognitive rigidity (becoming upset when [s/he] could not see [his/her] mother immediately during a transition and insistence on completion of repetitive play) and restricted interests (pretending to be animals or talking about animals) were other challenges that impacted testing. [Student] displayed weaknesses in semantic understanding of language and appropriate reciprocal interactions. [Student’s] weakest cognitive area was in verbal visual spatial functioning, which required [Student] to have an understanding of positional words, and is an aspect of functional communication. [His/her] ability to integrate visual information with fine motor skills was solid; however, [s/he] displayed weaknesses in controlling the utensil... Given [his/her] challenges, [s/he] needs intensive special education and therapeutic interventions to address [her/his] areas of need.⁵⁴

Based on the results of the ADOS-2, observation, interviews with her/his parents, teacher, and speech therapist, and Student’s record, Examiner C diagnosed Student with ASD, Level 1 Social Communication, Level 1 Restricted, Repetitive Patterns of Behavior, Without Accompanying Intellectual Impairment, Without Accompanying Language Impairment (F84.0):⁵⁵

[His/her] greatest obstacles to academic success at this time is [his/her] ability to comply with structured non-preferred tasks without [her/his] parents in the room, [her/his] distractibility, and [her/his] difficulty shifting [her/his] attention between tasks. [S/he] will require higher levels of structure and systematic prompting to master new skills so that [s/he] can access the curriculum...

⁴⁹ *Id.* at 24-25 (170-71).

⁵⁰ *Id.* at 26 (172),

⁵¹ *Id.*

⁵² *Id.* at 27 (173).

⁵³ *Id.*

⁵⁴ *Id.* at 13 (159).

⁵⁵ *Id.* at 13-14 (159-60).

An appropriate educational setting for [Student} would have the following characteristics: 1. Special Education Teachers and Applied Behavioral Analysts with advanced training in remediating behaviors more associated with autism. 2. Small group setting with high teacher to student ratio 3. Daily speech language therapy with pull-out and push-in service delivery modalities 4. Systematic instruction with Differential Reinforcement of Low Rates Behaviors and Alternative Behaviors 5. Social skills and play skills instruction 6. Regular curriculum-based assessment and data collection to track [her/his] progress 7. Multisensory instruction with visual prompts, schedules, and pictographs 8. Predictable structure and routine 9. Access to sensory regulation tools (e.g., deep pressure, fidgets, sensory breaks).⁵⁶

In addition, Examiner C recommended that Student receive (1) an IEP with a classification of ASD and a program with providers highly trained in applied behavior analysis, (2) instruction designed for Students with ASD, (3) behavior support to help her/him learn to focus and improve her/his ability to engage with others, (4) effective communication and commands: “[Student’s] distractibility makes it hard for her/him to encode all of the information given in directions. [S/he] should have visual cues whenever possible, and a visual schedule to guide [her/him] through each hour of the school day,” (5) a token economy, and (6) social skills and pragmatic language interventions.⁵⁷

13. On October 3, 2022, Petitioner/mother contacted Witness G and inquired as to “what kind of options would exist for [Student} if we wanted to enroll [her/him] at DCPS?”⁵⁸ On October 5, 2022, Witness G advised Petitioner/mother to provide written consent for services on a form that would be sent to her by email.⁵⁹ Later that day, Petitioners electronically signed the Consent for Initial Provision of Special Education and Related Services.⁶⁰ On October 11, 2022, DCPS issued a PWN indicating its intent to initiate services to Student.⁶¹ On October 24, 2022, DCPS notified Petitioners that Student’s IEP services would be provided at School A in a general education classroom.⁶² Later that morning, Petitioner/mother replied, expressing surprise that DCPS proposed a general education setting based on a “10 month old IEP,” and attached a copy of Examiner C’s evaluation. Petitioner/mother’s email also requested that Petitioners be “able to visit the classroom prior to agreeing to the placement so we can see the environment for ourselves?”⁶³ Later that day, Witness G responded, noting that Student had not “accessed the supports outlined in the current IEP, DC Public Schools and IDEA require that Early Stages offer an IEP in the least restrictive environment (general education classroom) before considering a more restrictive placement,” and would consider revising the IEP after thirty days of attendance. Witness G also advised Petitioner/mother to contact School regarding an observation.⁶⁴

14. On November 11, 2022, Petitioners’ attorney, Attorney B, notified DCPS that

⁵⁶ *Id.* at 14-15 (160-61).

⁵⁷ *Id.* at 16-17 (162-63).

⁵⁸ P17:4 (180).

⁵⁹ *Id.* at 1 (177).

⁶⁰ R12:1 (104).

⁶¹ P16:1 (175).

⁶² R14:1 (107); P19:5 (187).

⁶³ P19:4-5 (186-87).

⁶⁴ *Id.* at 3 (185).

Petitioners would enroll Student at School B on November 28, 2022 and that, due to DCPS' failure to develop an appropriate IEP or placement, Petitioners held DCPS responsible for funding the placement at School B.⁶⁵ On December 6, 2022, DCPS replied, declining to fund the placement at School B and noting that School B does not hold a Certificate of Approval ("COA") from the Office of the State Superintendent of Education ("OSSE").⁶⁶

15. On January 13, 2023, DCPS convened an IEP Annual Review meeting.⁶⁷ Attorney A noted that the draft IEP sent to Petitioners in advance of the meeting had no new information, including Examiner C's evaluation. Administrator A, Facility A's Center Director, offered to discuss the evaluation during the meeting, but Attorney A objected to not having information from the evaluation included in the draft. Witness B, School B's Director of Clinical Services, reported that Student is not receiving direct speech services at School B, but is being seen in group. As for self-regulation, School B had not seen it as an issue with Student. Attorney A objected to the amount of service hours because Examiner C's evaluation recommended a smaller sized highly supported classroom. She also objected to the lack of direct BSS. Witness G reiterated that School A would remain the LOS.⁶⁸

16. The January 13, 2023 IEP classified Student with a Developmental Delay.⁶⁹ The Consideration of Special Factors noted that the January 2022 Psychological Evaluation conducted by Facility A found that Student did not demonstrate significant social/emotional delays compared to same-aged peers but could have difficulty regulating her/his emotional responses when there are changes in routine, novel activities, transitions between activities, and/or when denied access to preferred items, and may withdraw or present with externalizing behaviors. It also reported on Examiner D's findings, including a "well above average" rating on the Developmental Profile, that her/his global executive functioning abilities fell in the borderline clinical range on the BRIEF-P, that the BASC-3 rating scales indicated at-risk scores related to symptoms of depression, attention problems, and the ability to complete age-appropriate tasks during her/his day, that the Conners revealed clinically significant ratings as to emotional control, defiant/aggressive behaviors, and atypical behaviors, and that ADOS-2 found a moderate level of ASD symptoms. The Communication section was substantively unchanged from the previous IEP.⁷⁰

In Adaptive, the PLOP reported that at School B, Student has "strong letter awareness, overall phonological awareness, a wide and varied vocabulary, s/he transitions between activities, but would benefit from supports as s/he can become stuck if particularly invested in an activity. Student is very active and distractible during seated activities, but will participate if given flexibility for movement and answer questions when asked directly. Small groups and individual work with a teacher are more successful, and s/he is respectful and follows classroom rules easily. The Vineland revealed that Student is not exhibiting significant delays in adaptive functioning, with an ABC score in the Average range. An Occupational Therapy Full Evaluation was completed on November 17, 2022 by Examiner E in which she recommended weekly therapy sessions. The goal was: with fading support, Student will independently transition when encountering unanticipated shifts in daily schedule/routine/settings, 80% of the time across three consecutive

⁶⁵ P23:1 (205).

⁶⁶ *Id.* at 3 (207).

⁶⁷ P24, R15, R16.

⁶⁸ R15:2-5 (209-12).

⁶⁹ R16:3 (115).

⁷⁰ *Id.* at 3-4 (115-16).

weeks as determined by teacher and therapist reports.⁷¹ In Cognitive, the PLOP reported Examiner C's diagnosis of ASD and Student's results on the SB-5, the BRIEF-P, the Developmental Profile, the WPPSI-IV, the ECAD, and the BASC-3. The goals were: (a) with fading staff support, Student will follow multi-step directions to complete an academic task/table top activity from start to finish with 80% accuracy, (b) with fading staff support, s/he will actively participate in a group learning activity (i.e., morning meeting, imitating actions, etc.) by completing teacher or peer-initiated activities with in 4/5 group activities per week, and (c) s/he will engage in a staff-led turn-taking/reciprocal activities for a minimum of ten minutes with at least one other peer by participating and responding to social bids for up to five turns in 4/5 opportunities across a period of three consecutive weeks.⁷²

In Communication, the PLOP reported Examiner D's diagnosis of ASD and her recommendation of pragmatic language intervention and continued speech therapy. It reported Witness B's observations of Student, four weeks after her/his enrollment, that s/he a wide and varied vocabulary, is frequently off-topic socially and needs support with scripts to have reciprocal interactions. The PLOP also reported Examiner C's findings on the CELF-P and her recommendations of speech and language therapy to address social-pragmatic weaknesses, in the classroom s/he should receive social skills instruction, conversational scaffolds and accommodations to aid her/him in answering questions accurately, and small class size or small group learning to improve vocabulary and concept development. The PLOP also recounted the results of the January 2022 Speech and Language Evaluation by Examiner B. The goals were: (a) to increase pragmatic language, Student will initiate play interaction with peers in unstructured and structured settings by inviting one to two peers to play or by suggesting a game at least twice per therapy day for 3 consecutive weeks, (b) to increase pragmatic language, s/he will initiate a back-and-forth conversational exchange with a peer (e.g., greeting and asking about a shared interest, such as a TV show, or asking if the peer enjoys crafts/art, etc.) in 80% of opportunities in 3 out of 5 sessions, (c) to increase pragmatic language skills, given various cues and/or prompts (as determined by treating speech-language pathologist), Student will accurately identify the emotions exhibited in a presented social scenario in 80% of opportunities in 3 out of 5 sessions, and (d) to increase pragmatic language skills, given various cues and/or prompts (as determined by treating speech-language pathologist), Student will demonstrate appropriate response (e.g., facial expression, body language, verbal response) to a presented social scenario in 80% of opportunities in 3 out of 5 sessions.⁷³

In Behavior, the PLOP reported the results of Examiner D's evaluation, particularly the diagnosis of ASD, the BASC and the Conners. Her/his areas of need were difficulty regulating her/his emotional responses when there are changes in routine, novel activities, transitions between activities, and/or when denied access to preferred items. The goal was: s/he will maintain appropriate responses during peer and adult interactions by using and or participating in co/regulation and or self/regulation activities.⁷⁴ In Motor Skills, the PLOP reported the results of the evaluations conducted by Examiner A and Examiner E. The PLOP stated that the information in the two evaluations was consistent. Student's areas of need included improving his/her ability to maintain sitting postures for the duration of an activity, decreasing his/her need for movement

⁷¹ *Id.* at 5-6 (117-18).

⁷² *Id.* at 6-9 (118-21).

⁷³ *Id.* at 9-14 (121-26).

⁷⁴ *Id.* at 15-16 (127-28).

input such as walking, walking in circles and/or jumping during activities, and improving his/her attention during activities. The goals were: (a) Student will participate in sensory diet activities throughout her/his day as created by her/his treating occupational therapist to decrease the need to engage in sensory seeking behaviors with 80% positive responses, as measured 4 out of 5 days consecutively over 3 weeks, (b) to demonstrate improved balance between flexor and extensor musculature (co-contraction) s/he will maintain a functional sitting posture with upright head and trunk, hips at 90 degrees and feet flat on the floor, without support from arms during a fine motor activity for 5 minutes, in 4 out of 5 opportunities across 3 consecutive weeks, (c) to demonstrate improved arm strength and stability, which are needed as a foundation for controlled movement, Student will wheelbarrow walk for a distance of 10 feet without stopping and with support provided at her/his feet, in 4 out of 5 consecutive trials over a 3-week period, and (d) using a multisensory approach and adaptations as needed, s/he will improve her/his foundational fine motor skills as seen by holding fine motor tools with a functional grasp and open webbed space for 80% of the activity in 3 out of 3 trials, over 3 consecutive weeks.⁷⁵

The IEP team prescribed five hours per week of specialized instruction inside general education, two hours per month of speech and language services equally divided inside and outside general education, two hours per month of occupational therapy inside general education, and fifteen minutes per week of consultation BSS. The Classroom Aids and Services were: visuals (i.e. pictures, models) paired with verbal directions, and repetition of instruction when needed to attend to and complete multi-step activities and/or elaborate on her/his thoughts and maintain conversation with others, visual schedules and/or verbal cues/prompts, presenting work demands into short, rapid cycles of work/break/work/break to build stamina for sustained joint attention and task completion, flexible seating with clearly defined external structures to move within a given area, while continuing to stay in close proximity to the group learning/social activity, preferential seating near staff to promote verbal/nonverbal communication, and facing the focal point of instruction and away from extraneous visual/auditory distractions to promote attention to task, transition objects/tools (i.e., individualized visual schedule linked to areas of interest, timer, item to hold, picture cue, etc.) to support independence in transitioning between activities, structured roles during unstructured times in the school day (errands, staff appointed leadership, specific jobs during arrival or morning meeting) to continue building social skills with adults and peers, encourage play and social interaction, provide structured and unstructured activities to work on initiate, maintain and introduce new topics, immediate reinforcement (e.g., stickers, verbal praise, access to preferred item/activity) when Student demonstrates desired behavior, and utilizing Student's sensory diet as created by her/his treating occupational therapist throughout her/his school day.⁷⁶

17. Witness G forwarded Petitioners a copy of the January 13, 2023 IEP on January 19, 2023.⁷⁷

18. On February 8, 2023, School C set a deadline of March 8, 2023 for Petitioners to enroll Student to be assured of an opening.⁷⁸ Petitioner/mother responded later that day, requesting

⁷⁵ *Id.* at 16-18 (128-30).

⁷⁶ *Id.* at 20 (132).

⁷⁷ P24:1 (209).

⁷⁸ P26:3 (245).

an observation of the proposed program.⁷⁹ School A denied the request for an observation on March 1, 2023: “Currently, we do not hold school day observations of classrooms, but I believe there will be some open houses coming up this spring. In addition, I am including a link of a virtual tour of the school...”⁸⁰ On March 11, 2023, School A notified Petitioners of previously scheduled tours of the school: “You missed our winter tours during our Open Houses, but we have more in the spring. We have an enrollment event on April 29 in the morning and there will be scheduled tours as well as for our Early Childhood Night on May 11. Both events are geared toward new enrolling families.”⁸¹ On May 30, 2023, School A’s principal contacted Petitioner/mother and offered an observation on June 14 or 15, 2023.⁸² Within an hour, Petitioner/mother accepted June 14th.⁸³

19. On August 3, 2023, Petitioners’ attorney, Attorney A, notified DCPS that Petitioners would re-enroll Student at School B for the 2023-24 school year, and that, due to DCPS’ failure to develop an appropriate IEP or placement, Petitioners held DCPS responsible for funding the placement at School B.⁸⁴ On August 11, 2023, DCPS replied, declining to fund the placement at School B and noting that School B does not hold a Certificate of Approval (“COA”) from the Office of the State Superintendent of Education (“OSSE”).⁸⁵

20. Witness B is the Director of Clinical Studies at School B and was Assistant Head of School from 2012-20. She testified that School B is predominantly mainstream; 10 – 15% of the 248 students are deaf, while all others have normal hearing. It serves students from 18 months old through grade D. A speech language pathologist is assigned to each classroom. The maximum class size is 14. The current grade H class has eleven students. School B does not have an OSSE COA. Only the students with hearing losses have individualized learning plans. Witness B testified that School B is providing Student all of the services recommended by Examiner C in her evaluation described at P14:9 (145). She also asserted that School B provides Student all nine of the services recommended by Examiner D on page 12 above. Witness B testified that Student was initially anxious when s/he arrived at School B, but has “settled in very nicely.” Student has social skill delays; s/he assumes everyone has the same interests in things that interest her/him. His/her affect can be socially isolating, Witness B testified that at the January 20, 2022 IEP meeting, she opined that Student required more services than were offered on the IEP. She opined that Student needs a small class environment to access the general education environment and that s/he currently benefits from having a full-time speech therapist in the classroom. On cross-examination, Witness B conceded that School B does not provide OT or BSS. She was unaware how many of the hearing students at School B have a disability, but was aware that none had autism. She was unaware how many School B teachers held special education certification, and was unaware of Student’s teacher’s certification. The speech therapist in Student’s class has no teaching certification. Witness B testified that she did not know if School B required its teachers to have special education certification. Student has no individualized learning plan, and School B is not implementing DCPS’ IEP.⁸⁶

⁷⁹ *Id.* at 3.

⁸⁰ *Id.* at 2.

⁸¹ *Id.* at 1.

⁸² P30:2 (268).

⁸³ *Id.*

⁸⁴ P32:1 (275).

⁸⁵ *Id.* at 2 (276).

⁸⁶ Testimony of Witness B.

21. Petitioner/mother testified that she provided a “very light push-back” to suggestions at the initial eligibility meeting in January 2022 that Student evinced symptoms of ASD because “[s/he] did not have problems speaking or laughing.” In response, the IEP team from Facility A said the IEP could be based on Developmental Delay with attentional problems. Petitioner/mother testified that she wanted the IEP implemented at Student’s School C, but the IEP team said related services for Individual Service Plans (“ISP”) in non-DCPS facilities were waitlisted. Once Petitioners received Examiner D’s evaluation, they reached out to DCPS to see what it had to offer. Based on Examiner D’s recommendation of small classes, Petitioner/mother thought the class size at School A would be too large. She testified that Petitioners twice requested an observation at School A to weigh options, but it was denied. The only other option they had was School B, which was recommended by their pediatrician. They were not allowed an observation until June 14, 2023.

On cross-examination, Petitioner/mother denied the suggestion that she opposed an ASD classification for Student at the eligibility meeting in January 2022, preferring to say that she “pressure tested” the IEP team on the issue of Student’s ASD symptoms. However, she conceded that neither she nor Student’s pediatrician had any concerns about Student having ASD. She also conceded that at the eligibility meeting, she said that Student’s rigidity was improving, her/his protesting had stopped, and his/her social skills were a strength. Petitioner testified that she did not agree or disagree with either classification. Petitioner/mother conceded that she did not give written consent for services under the January 2022 IEP because she wanted the services provided at School C. She also conceded that she never approved an ISP for push-in services at School C.

Petitioner/mother did not disagree with any of the PLOPs, goals, services, classroom aids and services, or classroom accommodations at the January 13, 2023 IEP meeting. Petitioner/mother testified that Student’s team at the January 2023 IEP did not agree or disagree with anything because the draft IEP at the meeting was different from the draft provided in advance of the meeting. Petitioner’s team reserved the right to review the finalized copy of IEP after the revisions at the meeting. Petitioner mother testified that she did not recall if they ever replied to the January 19, 2023 email enclosing the finalized IEP, but conceded that they never requested additional changes after receiving the finalized copy. In response to my question as to what she was looking to get in the January IEP, Petitioner/mother said: small class size, movement supports, OT supports, and special education training.⁸⁷

22. Witness C, a school psychologist at Facility A, conducted the Psychological Evaluation on January 5, 2022. She recalled that at the IEP meeting on January 20, 2022, when the staff raised the option of an ASD classification, Petitioner/mother said she had no concerns about ASD because Student had made a lot of progress and was very social. Based on Petitioners’ position, the team agreed to a Developmental Delay classification. Witness C testified that she drafted the Consideration of Special Factors and the PLOPs and goals in the Cognitive and Behavior sections of the IEP. Petitioners agreed with all of the sections she drafted. Witness C testified that the recommendations from her Evaluation were included in the IEP. She agreed at the meeting that the service hours were appropriate because with Student’s baselines, the amount prescribed was sufficient; there were no externalizing behavior concerns. Petitioners did not object

⁸⁷ Testimony of Petitioner/mother.

to the service hours at the meeting.⁸⁸

23. Witness D, a speech and language pathologist at Facility A, participated in the January 2022 IEP meeting.⁸⁹ She recalled that Petitioner/mother was not “on board” with an ASD classification, so the IEP team agreed to Developmental Delay. Petitioner mother wanted the IEP services provided at School C, but under an ISP, Student would be able to receive two hours of related services per month, less than the team prescribed. Petitioners agreed with the Communication PLOP. The speech services were divided equally between inside and outside general education to provide both one-on-one training and then support in the general education class to apply what was learned in the private sessions. Witness D agreed with the speech services levels in the IEP at the meeting because Student was displaying mild difficulties at School C, had no expressive problems, and Student’s teacher and parents expressed no concerns. Petitioners agreed with the level of speech services and classroom aids and services.

Regarding the January 2023 IEP, Witness B, School B’s Director of Clinical Services, confirmed to Witness D that Student was not receiving direct speech services at School B. Neither the parents nor Witness B disagreed with the Communications PLOP at the meeting. Witness B agreed with the four Communication goals, but also wanted a goal to address attention, but that was more appropriate in the Adaptive or Behavior section. Witness B agreed with the level of services on the IEP because Student’s communication skills were good, and Examiner D’s diagnosis reflected mild ASD.⁹⁰

24. Witness E, an occupational therapist at Facility A, conducted the December 31, 2021 Occupational Therapy Evaluation. She testified that at the January 20, 2022 eligibility meeting, there was no disagreement with her report. Witness E drafted the Motor Skills section of the January 2022 IEP. There was no disagreement with the PLOP or the goals. She opined that the IEP met the needs identified in her evaluation. Student was not receiving OT services, so the amount prescribed would be beneficial. Witness E opined that based on her observation of Student, her evaluation, and interviews, a general education classroom is Student’s least restrictive environment.⁹¹

25. Witness F, an occupational therapist at Facility A, participated in the January 13, 2023 IEP meeting. She opined that the independent evaluation conducted by Examiner E is consistent with the findings of Witness E’s evaluation for Facility A. Petitioners and their attorney did not disagree with the OT section of the IEP. There was no disagreement with any of the four goals. Witness E opined that based on the evaluations, the level of proposed services was appropriate, and that a program that did not include OT services for Student would not be appropriate. After the meeting, Petitioners made no request for changes to the IEP.⁹²

26. Witness G is the Evaluation Coordinator for Facility A who conducted the January

⁸⁸ Testimony of Witness C. Witness C was not admitted as an expert witness, but was permitted to recount her participation at the IEP meeting and explain why she made the decisions she made at the meeting.

⁸⁹ Witness D was not admitted as an expert witness, but was permitted to recount her participation at the IEP meeting and explain why she made the decisions she made at the meeting.

⁹⁰ Testimony of Witness D.

⁹¹ Testimony of Witness E.

⁹² Testimony of Witness F.

7, 2022 Educational Evaluation Report. She opined that Student's High Average on the ECAD indicates that s/he should have little trouble meeting the achievement demands of grade Q. Student's comprehension was intact; when asked a question, she would respond appropriately. At the January 2022 IEP meeting, the team conducted an ASD worksheet and a Developmental Delay Worksheet. Witness G recalled that Petitioner/mother was resistant to an ASD classification for Student. Since the classification was not determinative of the services Student would receive, they moved on. Everyone agreed with the Areas of Concern; the parents agreed with the Consideration of Special Factors, all the goals in all of the Areas of Concern, and the Classroom Aids and Services. Given Student's strengths, the team determined that Student was able to be successful in general education. Petitioners gave oral consent for services but were reluctant to pull her/him out of School C, which was not a DCPS facility. They did not give written consent for IEP services or ISP services for the 2021-22 school year. They finally gave written consent for IEP services until October 2022. Petitioners never provided comments on the January 13, 2023 IEP after the final draft was sent to them. Witness G testified that she first learned that Petitioners disagreed with the level of services when they filed the *Complaint*.

CONCLUSIONS OF LAW

Based upon the above Findings of Fact, the arguments of counsel, and this Hearing Officer's own legal research, the Conclusions of Law of this Hearing Officer are as follows: The burden of proof in District of Columbia special education cases was changed by the local legislature through the District of Columbia Special Education Student Rights Act of 2014. That burden is expressed in statute as the following:

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.⁹³

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

Whether DCPS denied Student a FAPE by failing to provide an appropriate IEP for the 2022-23 school year on January 20, 2022. Specifically, Petitioners believe that an insufficient amount of service hours were proposed and that Student requires a "highly structured, small, specialized environment throughout the school day."

⁹³ D.C. Code Sect. 38-2571.03(6)(A)(i).

The Supreme Court’s first opportunity to interpret the predecessor to IDEA, The Education of the Handicapped Act (“EHA”), came in *Board of Education of the Hendrick Hudson Central School District v. Rowley*.⁹⁴ The Court noted that the EHA did not require that states “maximize the potential of handicapped children ‘commensurate with the opportunity provided to other children.’”⁹⁵ Rather, the Court ruled that “Implicit in the congressional purpose of providing access to a ‘free appropriate public education’ is the requirement that the education to which access is provided be sufficient to confer some educational benefit upon the handicapped child...”⁹⁶ Insofar as a State is required to provide a handicapped child with a ‘free appropriate public education,’ we hold that it satisfies this requirement by providing personalized instruction with sufficient support services to permit the child to benefit educationally from that instruction... In addition, the IEP, and therefore the personalized instruction should be formulated in accordance with the requirements of the Act and, if the child is being educated in the regular classrooms of the public school system, should be reasonably calculated to enable the child to achieve passing marks and advance from grade to grade.”⁹⁷

More recently, the Court considered the case of an autistic child under IDEA who, unlike the student in *Rowley* was not in a general education setting.⁹⁸ The Tenth Circuit had denied relief, interpreting *Rowley* “to mean that a child’s IEP is adequate as long as it is calculated to confer an ‘educational benefit [that is] merely... more than *de minimis*.”⁹⁹ The Court rejected the Tenth Circuit’s interpretation of the state’s obligation under IDEA. Even if it is not reasonable to expect a child to achieve grade level performance,

... [h]is educational program must be appropriately ambitious in light of [his/her] circumstances, just as advancement from grade to grade is appropriately ambitious for most children in the regular classroom. The goals may differ, but every child should have the chance to meet challenging objectives... It cannot be the case that the Act typically aims for grade-level advancement for children with disabilities who can be educated in the regular classroom, but is satisfied with barely more than *de minimis* progress for those who cannot.¹⁰⁰

In *Endrew*, the Supreme Court held that an IEP must be designed to produce more than minimal progress in a student’s performance from year to year:

When all is said and done, a student offered an educational program providing ‘merely more than *de minimis*’ progress from year to year can hardly be said to have been offered an education at all. For children with disabilities, receiving instruction that aims so low would be tantamount to ‘sitting idly... awaiting the time when they were old enough to drop out...’ The IDEA demands more. The IDEA demands more. It requires an educational program reasonably calculated to enable a child to make progress appropriate in light of the child’s circumstances.”¹⁰¹

⁹⁴ 458 U.S. 176, 187 (1982).

⁹⁵ *Id.* at 189-90, 200

⁹⁶ *Id.* at 200.

⁹⁷ *Id.* at 203-04.

⁹⁸ *Endrew F. ex rel. Joseph F. v. Douglas County School District RE-1*, 137 S.Ct. 988 (2017).

⁹⁹ *Id.* at 997.

¹⁰⁰ *Id.* at 1000-01 (citations omitted).

¹⁰¹ 137 S.Ct. at 1000-01.

Petitioners requested initial evaluations to determine Student' eligibility for special education services out of their concern for auditory processing deficits: remembering and following single and multi-step directions.¹⁰² When Student was evaluated by Witness C, his/her teacher reported that Teacher A stated that Student had age-appropriate understanding of academic concepts and participated in social interactions with adults and peers, but had difficulty remembering and processing multi-step directions, and sustaining attention to staff-led activities. Student's average cognitive scores led Witness C to conclude that Student's cognitive development was not delayed relative to same-aged peers, s/he might benefit from staff support in the form of proximity to the teacher, repetition of directions, modelling, flexible seating, movement breaks, encouragement, and redirection to maintain participation and communicate his/her knowledge. On the BASC-3, Witness C parent and teacher rating scales revealed no significant social-emotional or adaptive delays. On the ASRS, which measures symptoms of Autism, Student's teacher's responses were in the very elevated range. Witness D deferred to the MDT as to a potential eligibility classification, but indicated that Student presented with many characteristics suggestive of ASD and offered several recommendations in the event Student were found eligible.

The results of Student's performance on the ECAD, with academic achievement scores in the High Average and Average range led Witness G to conclude that Student should have little trouble meeting the early achievement demands of grade Q. On a Speech and Language Evaluation, Teacher A's responses indicated inadequate communication skills at school, while Petitioner/mother's suggested adequate communication abilities at home. Examiner B concluded that Student "may have difficulties initiating and maintaining play and communication with classmates and teachers, taking turns, introducing new topics, using, and understanding nonverbal signals." On a Comprehensive Occupational Therapy Evaluation, Student scored in the "Just Like the Majority of Others" in Auditory processing, Visual processing and Movement processing. However, Examiner B found that Student presented with difficulties with maintaining body positions due to lower muscle tone within [her/his] core, fidgeting might cause him/her to lose attention on a task or miss information during an activity. Examiner B also offered a number of recommendations in the event Student were found eligible for services.

At the eligibility meeting on January 20, 2022, the Facility A staff suggested that testing revealed the possibility of ASD. Petitioner/mother conceded that she "very lightly" pushed back at this suggestion, because Student did not have problems speaking or laughing. Petitioner/mother characterized her comments as "pressure testing" rather than opposition to a classification of ASD. However, Witness C, Witness D, and Witness G all testified that Petitioner/mother was resistant to classifying Student with ASD. However, because IEP the team believed that Student required support in several areas identified in the evaluations, they classified Student as Developmentally Delayed. Team members testified that the classification would not preclude them from addressing needs found in their evaluations. The IEP team then prescribed five hours per week of specialized instruction inside general education, two hours per month of speech and language services (one hour each inside and outside general education), two hours per week of behavioral support services ("BSS"), and 15 minutes per week of behavioral consultation services, as well as numerous Classroom Aids and Services. Petitioners elected not to accept the IEP offered by DCPS. They

¹⁰² P5:1 (51).

inquired about having the services implemented at Student's private School C, but ultimately, they never provided written consent for an ISP.

Witness C testified that the recommendations from her Psychological Evaluation were included in the IEP. She agreed at the meeting that the service hours were appropriate because with Student's baselines, the amount prescribed was sufficient; there were no externalizing behavior concerns. Witness E, an occupational therapist at Facility A, conducted the December 31, 2021 Occupational Therapy Evaluation. She testified that there was no disagreement with the PLOP or the goals. She opined that the IEP met the needs identified in her evaluation. Student was not receiving OT services, so the amount prescribed would be beneficial. Witness E opined that based on her observation of Student, her evaluation, and interviews, a general education classroom was Student's least restrictive environment. Witness G is the Evaluation Coordinator for Facility A who conducted the January 7, 2022 Educational Evaluation Report. She opined that Student's High Average on the ECAD indicated that s/he should have little trouble meeting the achievement demands of grade Q. Everyone agreed with the Areas of Concern; the parents agreed with the Consideration of Special Factors, all the goals in all of the Areas of Concern, and the Classroom Aids and Services. Given Student's strengths, the team determined that Student was able to be successful in general education.

I conclude that Petitioners failed to make a *prima facie* case that the January 20, 2022 IEP was inappropriate. The authors of the initial evaluations testified that the IEP was consistent with their findings and that Petitioners expressed no disagreement with any of the substantive terms of the IEP.

Whether DCPS denied Student a FAPE by failing to provide a location of services for the 2022-23 school year.

The record is clear that Petitioners expressed their intention to have Student remain at School C. They inquired about having aspects of the IEP implemented at School C, but ultimately never signed the approval form for an ISP. Nor did they ever give written consent for IEP services. They were advised at the IEP meeting that a location of services would be determined once they gave written consent for services. Petitioners did not provide written consent for services until Petitioner/mother contacted Witness G on October 3, 2022, over a month after the beginning of the 2022-23 school year to explore "what kind of options would exist for [her/him] if we wanted to enroll [her/him] at DCPS?" Therefore, I conclude that Petitioners have failed to make a *prima facie case* that DCPS failed to provide a location of services, because they never met the condition precedent to receive a location of services.

Whether DCPS denied Student a FAPE by proposing an inappropriate location of services on October 24, 2022. Specifically, Petitioners assert that the class size of 20 is too large for Student, the building size is too large, and the mix of preK3 a and preK4 students is inappropriate.

DCPS offered a location of services in October 2022 based on the IEP that was developed in January 2022 at the only IEP meeting that had been conducted to that point. As previously discussed, Petitioners did not object to any aspect of the IEP when it was developed in January. Although School A was assigned as an initial location of services, Witness G committed to convening a review of Student's IEP thirty-days after Student's enrollment, to give the school staff

an opportunity to work with him/her and determine whether the IEP was meeting his/her needs. In the following section, I will discuss new information that would call the appropriateness of Student's IEP into question. However, Petitioners did not provide DCPS that information until the location of services had been offered. I conclude that Petitioners have failed to make a *prima facie* showing that DCPS failed to propose an appropriate location of service once Petitioners renewed their interest in having DCPS provide services to Student.

Whether DCPS denied Student a FAPE by failing to provide an appropriate IEP and placement on January 13, 2023. Specifically, Petitioners believe that an insufficient amount of service hours were proposed and that Student requires a “highly structured, small, specialized environment throughout the school day.”

After declining the IEP developed by DCPS in January 2022, Petitioners solicited an independent Neuropsychological Assessment Report from Examiner D. Examiner D issued her Report on September 8, 2022 in which she diagnosed Student with ASD, Level 1 Social Communication, Level 1 Restricted, Repetitive Patterns of Behavior, Without Accompanying Intellectual Impairment, Without Accompanying Language Impairment. Examiner D opined that Student's challenges warranted “intensive special education and therapeutic interventions to address [her/his] areas of need.”

The regulations require that in developing an IEP, the IEP team must consider the results of the most recent evaluation of the child.¹⁰³ Petitioners provided DCPS with Examiner D's evaluation on October 24, 2022, well in advance of the January 13, 2023 IEP meeting. Examiner D's findings, conclusions, and recommendations differ significantly from those of Witness C. Witness C declined to offer a diagnosis of ASD and Examiner D's programmatic recommendations would require a significantly more restrictive environment than is currently prescribed in Student's IEP. It is apparent from a reading of the IEP, the IEP meeting notes,¹⁰⁴ and the testimony of the witnesses, that Examiner D's evaluation was not seriously discussed at the meeting. Therefore, I conclude that DCPS has failed to meet its burden of proving that it developed an appropriate IEP on January 13, 2023.

Whether DCPS denied Student a FAPE by failing to permit the parents to observe the proposed placement at School A from the request on February 8, 2023 until June 14, 2023.

District of Columbia law authorizes parents to observe their children's current or proposed classroom settings:

Upon request, an LEA shall provide timely access, either together or separately, to the following for observing a child's current or proposed special educational 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

¹⁰³ 34 C.F.R. §300.324 (a)(1)(iii).

¹⁰⁴ R15:1 (108).

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 free and appropriate public education for that child nor has a financial interest in the outcome of such litigation.¹⁰⁵

Petitioner/mother requested an observation of the proposed program at School A on February 8, 2023. School A denied the request for an observation on March 1, 2023: “Currently, we do not hold school day observations of classrooms, but I believe there will be some open houses coming up this spring. In addition, I am including a link of a virtual tour of the school...” On May 30, 2023, School A’s principal contacted Petitioner/mother and offered an observation on June 14 or 15, 2023/ Petitioner/mother immediately accepted the offer for a June 14, 2023 observation.

School A violated the observation provision of the Code in two respect: the denial was not timely and the reason for the denial did not meet the only exceptions authorized in the statute, which apply only to parent designees. However, the failure to afford a parent an observation is a procedural violation. A Hearing Officer’s determination of whether a child was denied a FAPE must be based on substantive grounds. In matters alleging a procedural violation, a Hearing Officer may find that a child did not receive a FAPE only if the procedural inadequacies (i) impeded the child’s right to a FAPE; (ii) significantly impeded the parent’s opportunity to participate in the decision-making process regarding the provision of a FAPE to the parent’s child; or (iii) caused a deprivation of educational benefit.¹⁰⁶ In other words, an IDEA claim is viable only if those procedural violations affected the child’s substantive rights.¹⁰⁷ Here, Petitioners did not request an observation of School A until February 8, 2023, three months after giving notice that Student would be unilaterally placed at School B, and nearly a month after expressing disinterest in the IEP offered by DCPS. Student was not deprived of a FAPE due to the denial of an observation of a location of services in which Petitioners had no genuine interest.\

Whether School B is an appropriate placement for Student.

IDEA authorizes retroactive reimbursement to parents for private-school expenses under certain circumstances:

School districts must “reimburse parents for their private-school expenses if (1) school officials failed to offer the child a [FAPE] in a public or private school; (2) the private-school placement chosen by the parents was otherwise ‘proper under the [IDEA]’; and (3) the equities weigh in favor of reimbursement.”¹⁰⁸

¹⁰⁵ D.C. Code §38-2571.03(5)(A) (2015).

¹⁰⁶ 34 C.F.R. 300.513(a).

¹⁰⁷ *Leggett v. District of Columbia*, 793 F.3d 59, 67 (D.C. Cir. 2015); *Brown v. District of Columbia*, 179 F. Supp. 3d 15, 25-26 (D.D.C. 2016), quoting *N.S. ex rel. Stein v. Dist. of Columbia*, 709 F. Supp. 2d 57, 67 (D.D.C. 2010).

¹⁰⁸ *R.B. v. District of Columbia*, Civil Action No. cv18-662, 2019 WL 4750410 at 7 (D.D.C. Sept. 30, 2019), citing *Leggett*, supra, 793 F.3d at 66-67 and *Florence County School District Four v. Carter*, 510 U.S. 7, 15-16 (1993). See also, *School Committee of Town of Burlington v. Department of Education of Massachusetts*, 471 U.S. 359, 369 (1985).

Here, the equities do not weigh in favor of reimbursement. At the IEP meeting on January 20, 2022, Petitioner/mother resisted having Student classified ASD despite Witness C's evaluation findings that s/he "presents with many characteristics associated with Autism Spectrum Disorder." Petitioners declined DCPS' IEP and maintained Student at School C. Seven months later, Examiner D diagnosed Student with Autism and recommended an intensive program including, *inter alia*, "Special Education Teachers and Applied Behavioral Analysts with advanced training in remediating behaviors more associated with autism. 2. Small group setting with high teacher to student ratio 3. Daily speech language therapy with pull-out and push-in service delivery modalities 4. Systematic instruction with Differential Reinforcement of Low Rates Behaviors and Alternative Behaviors 5. Social skills and play skills instruction 6. Regular curriculum-based assessment and data collection to track [her/his] progress 7. Multisensory instruction with visual prompts, schedules, and pictographs 8. Predictable structure and routine 9. Access to sensory regulation tools (e.g., deep pressure, fidgets, sensory breaks)." Once Petitioners provided DCPS written consent for services, they objected to the proposed location of services at School A and forwarded a copy of Examiner D's evaluation. Shortly thereafter, they gave notice of their unilateral placement of Student at School B.

School B offers virtually none of the services recommended by Examiner D in her evaluation. It is not a special education school. Only 15% of the students are hearing impaired, and the remaining students are general education students. Witness B, who recently served as Assistant Head of School, was unaware if the school required special education certification of any of its teachers, which strongly suggests that it does not. If it does not have special education teachers, the first requirement on Examiner D's list, it certainly does not employ Applied Behavioral specialists, the second requirement on her list.

If Petitioners prefer a private school education for Student, that is their right. But if they use Examiner D's evaluation as leverage for DCPS to fund that education, at the very least they should have chosen a school that has the staff necessary to provide the services recommended for Student by Examiner D. For these reasons, I conclude that Petitioners are not entitled to reimbursement for expenses paid to School B for Student's unilateral placement.

RELIEF

For relief, Petitioners request (1) reimbursement for tuition and related services paid to School B for the 2022-23 school year, and (2) placement of Student at School B for the 2023-24 school year.

ORDER

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

ORDERED, that with fifteen school days of the issuance of this HOD, DCPS shall arrange an IEP meeting through Petitioners counsel to update Student's IEP and determine an appropriate location of services.

APPEAL RIGHTS

This decision is final except that either party aggrieved by the decision of the Impartial Hearing Officer shall have ninety (90) days from the date this decision is issued to file a civil action, with respect to the issues presented in the due process hearing, in a district court of the United States or the Superior Court of the District of Columbia as provided in 34 C.F.R. §303.448 (b).

Terry Michael Banks
Terry Michael Banks
Hearing Officer

Date: December 11, 2023

Copies to: Attorney A, Esquire
Attorney B, Esquire
Attorney C, Esquire
OSSE Office of Dispute Resolution
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