

**District of Columbia**  
**Office of the State Superintendent of Education**  
**Office of Dispute Resolution**  
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OSSE  
Office of Dispute Resolution  
February 10, 2020

**Confidential**

Parent on behalf of Student1	)	Case No. 2019-0279
	)	
Petitioner,	)	Hearing Dates: January 9-10, 2020
	)	Room 423
v.	)	Date Issued: February 10, 2020
	)	
District of Columbia Public Schools.	)	
	)	Terry Michael Banks,
Respondent.	)	Hearing Officer

**HEARING OFFICER DETERMINATION**

**INTRODUCTION**

Petitioner is an X-year-old student attending School A. On November 8, 2019, Petitioner filed a Due Process Complaint Notice alleging that the District of Columbia Public Schools ("DCPS") had denied the student a free appropriate public education ("FAPE") by failing to provide appropriate levels of support within the general education classroom. On November 15, DCPS filed a *Response to Due Process Complaint* asserting that Petitioner requires placement in a self-contained classroom at School B.

**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

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

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

### PROCEDURAL HISTORY

On November 8, 2019, Petitioner filed a *Due Process Complaint Notice* (“*Complaint*”) alleging that the District of Columbia Public Schools (“DCPS”) had denied Student a free appropriate public education (“FAPE”) by failing to provide appropriate levels of support within the general education classroom. Student attends School A. Petitioner was not represented when she filed the *Complaint*, but retained Attorney A’s law firm on or about November 12, 2019. On November 15, DCPS filed a *Response to Due Process Complaint* asserting that Petitioner requires placement in a self-contained classroom at School B. That day, DCPS also filed a *Motion for Expedited Hearing* to effectuate the placement at School B. Petitioner filed *Parent’s Opposition to DCPS Motion to Expedite Hearing* on November 20, 2019. After an informal conference call between the parties’ counsel and the Hearing Officer on November 21, 2019, DCPS agreed to a voluntary withdrawal of the *Motion for Expedited Hearing* and filed its *Withdrawal of its Request for an Expedited Due Process Hearing* on November 22, 2019.

On November 19, 2019, Petitioner filed *Parent’s Motion to Permit Observation of Parent Designee*. This motion requested the opportunity for an educational consultant to observe Student in Student’s classroom at School A. On November 21, 2019, Petitioner filed an identically styled motion requesting the opportunity to observe the classroom at School B that DCPS proposes for Student. On November 26, 2019, DCPS consented to both observations by email form Respondent’s counsel.

A prehearing conference was conducted on December 9, 2019, and the Prehearing Order was issued that day. On December 17, 2019, Petitioner’s counsel requested a modification of the Prehearing Order. I denied the request by email later that day.

On December 12, 2019, Petitioner filed a *Motion for Continuance*. The request was made (1) to facilitate the observation at School A, (2) because the hearing request did not currently cover all the relief the parent seeks, and (3) for the consideration of a neuropsychological evaluation that was not yet completed. DCPS filed its *Opposition to Petitioner’s Motion to Continue* on December 16, 2019. I denied Petitioner’s *Motion for Continuance* in an Order on December 16, 2019.

On December 23, 2019, Petitioner filed a *Motion to Amend the Hearing Request* to include new allegations concerning the inadequacy of DCPS’ proposed placement, to include the educational advocate’s report on her observations, to add information concerning Student’s new diagnosis of sleep apnea, and to request a dedicated aide. DCPS filed its *Opposition to Petitioner’s Motion to Amend* on December 26, 2019. I denied Petitioner’s *Motion to Amend* in an Order on December 30, 2016.

The due process hearing was conducted on January 9-10, 2020. The hearing was closed to the public. Petitioner moved into evidence Exhibits 1-44 (“P:”) DCPS timely objected to Exhibits 32, 33, 38, 39, and 40 on the grounds of relevance. I deferred ruling on the objections, but allowed Petitioner’s counsel to refer to the contested exhibits during the

hearing. Respondent moved into evidence Exhibits 1-18 (“R:”). There were no objections and Respondent’s Exhibits 1-18 were admitted.<sup>2</sup> I hereby admit Petitioner’s Exhibits 1-32, 34-37, 39, and 41-44 and exclude from evidence Exhibits 33, 38, and 40. Exhibit P:33 is an exchange of emails between counsel and the Hearing Officer concerning the scheduling of a conference call and includes advocacy that is unauthorized under the Office of Dispute Resolution’s Standard Operating Procedures Manual (“SOP”). Exhibit P:38 contains an exchange of two emails that contain no information relevant to the issues in dispute. Exhibit P:40 appears to be instructions from Student’s doctor subsequent to an office visit. The medical conditions addressed in the exhibit were not alleged in the Complaint, were not discussed in the Prehearing Order, and were not mentioned during testimony as having any meaningful effect on Student’s academic experience.

Petitioner presented as witnesses in chronological order: Petitioner, Witness A, and Witness B. Respondent presented as witnesses in chronological order: Witness C, Witness D, Witness E, Witness F, Witness G, and Witness H. Neither party objected to the qualifications of any of the proposed experts. Counsel for the parties submitted written closing arguments on January 24, 2020.

## ISSUES

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

1. Whether DCPS failed to provide Student with an appropriate IEP because it failed to consider adequately an evaluation performed by Facility C in June 2019 that determined that Student could “could attend [REDACTED] neighborhood school,” in a general education setting.
2. Whether DCPS adequately implemented Student’s IEP, particularly by failing to provide appropriate levels of related services: occupational therapy, physical therapy, and speech therapy.
3. Whether DCPS reassigned Student to a different school without the proper assessments being conducted.
4. Whether the IEP team increased Student’s hours of specialized instruction without cause.

DCPS asserted that it developed an appropriate IEP on September 13, 2019 that called for 20 hours outside of general education in a self-contained classroom, due to the behaviors exhibited by the student in the general education setting. The proposed placement would be in the Early Learner Support (“ELS”) classroom, a self-contained classroom at School B. DCPS also asserted that it is providing appropriate levels of occupational therapy, physical therapy, and speech therapy outside of general education.

<sup>2</sup> The *Prehearing Order* required any objections to witnesses or proposed exhibits to be filed two days before the hearing.

## FINDINGS OF FACT

1. The Student is an X-year-old, attending School A.<sup>3</sup>

2. On August 2, 2017, Facility A completed an Augmentative Alternative Communication (AAC) Evaluation for a Speech Generating Device (SGD). Student presented with a medical diagnosis of Down Syndrome and a speech diagnosis of Receptive/Expressive Language Disorder.<sup>4</sup> ■■■ speech intelligibility was not sufficient for listeners to comprehend.<sup>5</sup> The examiner was unable to conduct formal speech and language tests due to Student's inability to use speech to respond intelligibly.<sup>6</sup> Student was unable to use spoken communication to meet any pragmatic language needs.<sup>7</sup> Because Student's functional communication needs could not be met with speech, the examiner concluded that Student required an SGD to achieve functional communication in activities of daily living.<sup>8</sup> Student was presented with four SGDs. The examiner concluded that the most appropriate system for Student was the Accent 1000.<sup>9</sup> Student used this device to communicate with the greatest independence and for the greatest number of vocabulary items.<sup>10</sup> The examiner opined that "With Accent 1000 with LAMP Words for Life, [Student] can communicate quickly and effectively and participate more fully and safely in [Student's] community."<sup>11</sup>

3. On December 1, 2017, Facility B completed an Evaluation Report to assist in the determination of eligibility for special education services.<sup>12</sup> This was a re-evaluation; based on a June 23, 2016 evaluation, Student qualified for Early Intervention for Trisomy 21, Down Syndrome.<sup>13</sup> At the time of the reevaluation, Student was provided physical, occupational, and speech therapy once a month through Facility B.<sup>14</sup> The findings were as follows: Student presented with borderline delay in cognitive development compared to same-aged peers.<sup>15</sup> Student's receptive communication abilities were borderline in comparison to same-aged peers; expressive communication abilities were low average compared to same-aged peers.<sup>16</sup> Student's adult interaction skills and peer interaction skills were average, self-concept and social role skills were low average, and overall social-emotional skills were average compared to same-age peers.<sup>17</sup> Student's gross motor development and overall physical development were average, and Student's abilities within the adaptive domain were low average.<sup>18</sup>

<sup>3</sup> Petitioner's Exhibit ("P") 1.

<sup>4</sup> P2:1, 16.

<sup>5</sup> P2:3.

<sup>6</sup> *Id.*

<sup>7</sup> *Id.* at 4.

<sup>8</sup> *Id.* at 8.

<sup>9</sup> *Id.* at 11.

<sup>10</sup> *Id.* at 12.

<sup>11</sup> *Id.* at 13.

<sup>12</sup> P4.

<sup>13</sup> *Id.* at 3.

<sup>14</sup> *Id.*

<sup>15</sup> *Id.* at 6.

<sup>16</sup> *Id.*

<sup>17</sup> *Id.* at 7.

<sup>18</sup> *Id.*

4. On February 8, 2018, a Prior Written Notice was issued to initiate an evaluation to determine eligibility for special education services.<sup>19</sup> An Analysis of Existing Data was also conducted by DCPS through Facility C. As of that date, the parents had not pursued the use of an SGD, preferring to continue to focus on Student's use of verbal language.<sup>20</sup> Student was attending daycare at School E. The class had 20 children with five teachers. Student had made progress with adaptive skills; Student was able to use a spoon independently 50% of the time during meals. Student needed significant adult support in order to follow directions; directions often had to be repeated three times, and Student typically required a teacher to go to Student to show Student what to do or where to go. Student was generally unsuccessful at toileting. Student's teacher indicated that generally, Student was "doing well."<sup>21</sup> Student's abilities within the adaptive domain were low average compared to same-age peers.<sup>22</sup> In terms of cognitive development, Student did not follow 1-2 step instructions and presented with borderline delay.<sup>23</sup> Student demonstrated significant communication needs that will negatively impact ■■■ ability to access the general education curriculum.<sup>24</sup> Student had difficulty identifying body parts, did not respond to inhibitory language, and did not demonstrate the ability to follow one and two-step directions related to play.<sup>25</sup> Student's gross motor development was average.<sup>26</sup>

5. On March 15, 2018, DCPS convened a meeting to review Student's present levels of performance and discuss whether Student had any delays that would warrant special education services.<sup>27</sup> In education – cognitive, adaptive, and social-emotional – the team determined that Student would need the support of a special education teacher in order to access and make progress in the general education curriculum.<sup>28</sup> In speech and language, the team determined that Student would need the support of speech therapy once in school to work on expanding ■■■ vocabulary, following a variety of one and two step directions, to use language for a variety of purposes, to expand Student's expressive language in order to make requests, or refuse without the support of gestures, and to increase oral motor skills.<sup>29</sup> In the areas of occupational and physical therapy, the team determined that Student would need the support of therapy to access and make progress in the general education curriculum.<sup>30</sup> The team determined that Student was eligible for special education services under the classification of Other Health Impaired due to the diagnosis of Trisomy 21 and delays in adaptive, cognitive, communication, and fine and gross motor development.<sup>31</sup>

6. DCPS convened a meeting on June 7, 2019 to develop Student's initial IEP. In the area of communication, the team stated that Student was demonstrating significant communication needs which would negatively affect Student's ability to access the general

<sup>19</sup> P6:1.

<sup>20</sup> *Id.* at 4. Petitioner testified that Student started using the device in December 2017.

<sup>21</sup> *Id.* at 5.

<sup>22</sup> *Id.* at 6.

<sup>23</sup> *Id.* at 7.

<sup>24</sup> *Id.* at 9.

<sup>25</sup> *Id.* at 10.

<sup>26</sup> *Id.* at 12.

<sup>27</sup> P7:1-2.

<sup>28</sup> *Id.* at 2.

<sup>29</sup> *Id.* at 3.

<sup>30</sup> *Id.* at 3-4.

<sup>31</sup> *Id.* at 4.

education curriculum, noting that Student currently interacted with such peers in Student's daycare environment. In the area of assistive technology, the Petitioner reported that Student had been using the Accent 1000 SGD since January 2019 at home and at school.<sup>32</sup> The team indicated that Student "will continue to need support with the assistive technology device to effectively participate with the classroom setting and fully access the curriculum."<sup>33</sup> In the area of adaptive/daily living skills, Petitioner reported that Student was fully toilet trained and able to drink from an open cup and/or straw. Student's daycare teacher confirmed Student's ability to use an open cup and ability to use a spoon to eat 50% of the time. Student was able to follow the group during transitions, holding on to a line rope in the hallway. The teacher reported that she and the other four teachers often have to repeat directions three times and typically requires a teacher to walk over to show student what to do or where to go. Student typically needs redirection to stay on task, but can stay on a table top task up to five minutes at times. The teacher reported that Student had been successful toileting only twice. The team developed one annual goal for Adaptive/Daily Living Skills, two Cognitive goals, five Communications/Speech and Language goals, four Health/Physical goals, and three Motor Skills/Physical Development goals.<sup>34</sup> The team prescribed 10 hours per week of specialized instruction in general education, four hours per month of speech-language services outside general education, 120 minutes per month of occupational therapy outside general education, and 120 minutes per month of physical therapy outside general education.<sup>35</sup> In the area of Least Restrictive Environment, the team noted that Student was currently in a regular Early Childhood Program at least 10 hours per week.<sup>36</sup> "As part of the team discussion, it was determined that the Least Restrictive Environment ("LRE") would be a Gen. Ed classroom for [Student] with some special education support on a weekly basis."<sup>37</sup>

7. Petitioner secured placement for Student at School A through a lottery system for Student's pre-K 2019-20 school year.<sup>38</sup> On June 7, 2019, DCPS confirmed the placement at School A in general education.<sup>39</sup>

8. During the first week of the 2019-20 school year, Petitioner requested that DCPS conduct an Assistive Technology Evaluation. Witness H replied, indicating that the request had been forwarded to the school official responsible for assistive technology, and that "stakeholders have requested training on the Accent 1000."<sup>40</sup>

9. DCPS developed an undated Functional Behavior Assessment ("FBA"). Problem Behaviors included "leaving assigned spot," "disrupting others' learning," "leaving the classroom," and "assignment completion."<sup>41</sup> These behaviors were more specifically described as rolling on floor, walking around classroom, running away from group or teachers, moving from one spot to another spot, invading peers' personal space, picking up

<sup>32</sup> Petitioner testified that the Student began using the device in December 2017.

<sup>33</sup> P9: 2.

<sup>34</sup> *Id.* at 5-16.

<sup>35</sup> *Id.* at 17.

<sup>36</sup> *Id.* at 18.

<sup>37</sup> *Id.* at 22.

<sup>38</sup> Petitioner's testimony/

<sup>39</sup> P.8.

<sup>40</sup> P11-1.

<sup>41</sup> P13:1

items without permission throughout classroom, touching peers, off task responds to another task through negotiation or compromise, not starting assignment independently or with teachers, not finishing an assignment to completion, does not ask signal or communicate permission before leaving the room, does not adhere expectations for leaving classroom, goes places in the building/room other than those authorized, verbalizing during instruction, and making noises with mouth.<sup>42</sup> The FBA did not disclose the frequency of the behaviors or the triggers for those behaviors.<sup>43</sup>

10. On September 6, 2019, Petitioner was notified that on September 4, 2019, Student entered a closet adjacent to the classroom that locks from within. There is no indication that Student locked the closet door.<sup>44</sup> Petitioner replied immediately, complaining that Student was receiving inadequate support.<sup>45</sup>

11. On September 6, 2019, DCPS developed an Individual Student Safety Plan to address “[Student] will leave designated or assigned areas without permission.”<sup>46</sup> The FBA and Safety Plan were presented to Petitioner on September 17, 2019, several days after the IEP team meeting discussed below.<sup>47</sup> The Safety Plan requires the staff to (1) provide consistent positive reinforcement for on task behaviors, (2) remain in close proximity to student in the classroom, hopefully to discourage elopement, and (3) remind student of predetermined options, i.e., allow student to have structured break or opportunity to walk down the hallway and back (with a staff member).<sup>48</sup>

12. On September 9, 2019, by email at 5:03 a.m., Petitioner requested that DCPS assign a designated aide to Student. Petitioner also complained of the school’s failure to provide Student’s general education teacher with Student’s IEP and the lack of a behavior intervention plan. She also complained of missed support hours during the first two weeks of the school year.<sup>49</sup> Later that day, Petitioner visited Student’s classroom and at 9:07 a.m., sent an email complaining that “there has been no plan put in place to address the ongoing safety concerns in the classroom.”<sup>50</sup>

13. On September 9, 2019 at 10:39 pm., Witness H, Student’s special education teacher, replied by email to Petitioner and stated that during that school day, Student “did not participate in the task and activities in the classroom with fidelity. Therefore, [redacted] was in my classroom to receive [redacted] instruction during parts of the day. [redacted] cried and refused by saying no, crossing [redacted] arms, falling to floor even with redirection while in the Gen. Ed. classroom...”<sup>51</sup> Witness H indicated that she was requesting “(1) An immediate review of [Student’s] IEP with an update to include a dedicated aid (in process – submitted Friday, 9/6/19 awaiting Central Support), (2) A plan of interim support for [Student] until the

<sup>42</sup> *Id.* at 2-3.

<sup>43</sup> Witness B.

<sup>44</sup> P17:8-9.

<sup>45</sup> P11:1.

<sup>46</sup> P14:1

<sup>47</sup> P14, P17:1.

<sup>48</sup> P14:3.

<sup>49</sup> *Id.*

<sup>50</sup> *Id.* at 8.

<sup>51</sup> *Id.* at 5-6.

dedicated aid is assigned and integrated into the classroom to ensure [REDACTED] safety effective Monday, September 9<sup>th</sup> (Administrator A allocated resources within school Monday 9/9/19).” The email indicated that Petitioner had already agreed to attend such meeting on September 13, 2019.<sup>52</sup>

14. On September 11, 2019, Petitioner visited Student’s classroom and reported that “I was able to observe [Student] in the general education setting for nearly 90 minutes yesterday. I did not witness any of the behaviors you described specifically refusing to engage in the activity, crying, and tantrums. I did observe [Student] fully engaged in each activity and needing additional prompts with walking in the line with [REDACTED] classmates to go to the music special and with the afternoon snack...”<sup>53</sup> Witness H replied at 9:49 that night, notifying Petitioner that DCPS would recommend prescribing 20 hours outside of general education at the meeting on September 13, 2019.<sup>54</sup>

15. On September 11, 2019, DCPS’ Manager, Paraprofessional Support and Medical Education Support, responded to Petitioner by email and explained the procedure DCPS would follow to determine the efficacy of assigning a designated aide. First, the school must develop an FBA and implement behavior intervention plans, safety plans, and IEP goals. Then data and documentation of the behaviors leading to the request for an aide must be collected for 30 days. Thereafter, a Dedicated Aide Referral packet would be submitted to the Division of Specialized Instruction (“DSI”). DSI would then schedule an observation of the student and provide a written report and recommendation.<sup>55</sup>

16. On September 13, 2019, DCPS convened an IEP team and revised Student’s IEP. None of the present levels of academic achievement and functional performance or goals were changed.<sup>56</sup> However, the team changed Student’s Special Education Services to 20 hours outside general education.<sup>57</sup> In the LRE section, under “Specialized Instruction,” the team stated that “[Student’s] delays across developmental areas require a small student to teacher ratio with adapted and modified curriculum.”<sup>58</sup> Under Consideration of Special Factors, the IEP team stated that “[Student] requires redirection to task and constant assistance. [REDACTED] currently receives support within the Responsive Classroom model. The IEP reviewed the Safety Plan and discussed the Functional Behavior Analysis.”<sup>59</sup> The rest of LRE section remained unchanged from the initial IEP, including reflecting Student being in a *general* education environment.<sup>60</sup>

17. The team contemporaneously issued a Prior Written Notice (“PWN”) reflecting the change in services.<sup>61</sup> The PWN revealed that Petitioner objected to the change from general education to outside general education. Petitioner asked about the status of her

<sup>52</sup> *Id.*

<sup>53</sup> *Id.* at 3.

<sup>54</sup> *Id.* at 2.

<sup>55</sup> P15:1-2.

<sup>56</sup> P16:5-18.

<sup>57</sup> *Id.* at 19.

<sup>58</sup> *Id.* at 20.

<sup>59</sup> P16:3

<sup>60</sup> *Id.* at 20, emphasis added.

<sup>61</sup> P16:23.



request for a dedicated aide. The PWN indicated that while the request was “in process,” “A dedicated aide should be the very last resort for a student after all other strategies and interventions have been exhausted as well as support from existing school staff. It is a very restrictive support to place with any student and should be based on data and documentation of student progress... Parents disagreed with decision [sic] as they cited that a dedicated aide is reasonable and inappropriate supports have been acknowledged by Shepherd.”<sup>62</sup>

18. DCPS developed an undated Behavior Intervention Plan. In response to Student leaving a designated area without permission, Student would be incentivized to not do so with tangible treats and activities of choice. In response to noncompliance with assigned tasks, Student would receive positive verbal praise and encouragement, tangible treats, and activities of choice.<sup>63</sup> The email that documented delivery of the Safety Plan to Petitioner on September 17, 2019 made no reference to the behavior plan.<sup>64</sup>

19. On September 30, 2019, Witness G, Student’s general education teacher, informed Petitioner that on September 27, 2019, Student eloped from the classroom just before dismissal. Witness G reported that she located Student within 90 seconds.<sup>65</sup>

20. On or about September 30, 2019, Witness H notified Petitioner that DCPS proposed to place Student at School C.<sup>66</sup> Petitioner objected to the change in location of services, noting that School C was on the list of underperforming schools.<sup>67</sup> On October 3, 2019, the Senior Deputy Chief of DCPS’ Division of Specialized Instruction (“DSI”) provided Petitioner written notification of the placement at School C.<sup>68</sup>

21. On October 10, 2019, the DCPS Manager of Inclusion reassured Petitioner that the process for assigning a dedicated aide had been started.<sup>69</sup>

22. On October 18, 2019, Petitioner notified DSI that she was willing to view a self-contained environment that was not at an underperforming school,<sup>70</sup> but on October 22, 2019 she reiterated that her preference was for Student to remain at School A with a dedicated aide.<sup>71</sup>

23. On October 23, 2019, Witness H developed an Assistive Technology Consideration Worksheet. In light of Student’s communication delays, School A “recommend[s] a device that can follow [Student] to express needs, wants and can aid in discussions and feedback.”<sup>72</sup>

<sup>62</sup> *Id.* at 24.

<sup>63</sup> R5.

<sup>64</sup> P17:1.

<sup>65</sup> P18:1-2.

<sup>66</sup> P19:2.

<sup>67</sup> *Id.*

<sup>68</sup> P20:1.

<sup>69</sup> P221

<sup>70</sup> P27:3.

<sup>71</sup> *Id.* at 1.

<sup>72</sup> P28:1.

24. On October 30, 2019, the Senior Deputy Chief of DSI provided Petitioner written notification that Student's revised location of services would be School B.<sup>73</sup> The classroom is an Early Learner Support ("ELS") class with a special education teacher, two aides, and 10 other students.<sup>74</sup>

25. On November 6, 2019, Petitioner, Student's father, and Witness H visited School B.<sup>75</sup> Petitioner observed that the level of instruction and the student performance was below that at School A. Specifically, some of the students were not able to write, and there was no writing instruction on the day of the visit.<sup>76</sup>

26. On November 8, 2019, Petitioner notified relevant DCPS personnel including staff at School A and School B, that she had filed a due process complaint for purposes of stay-put, and that Student would continue to attend School A.<sup>77</sup>

27. On November 13, 2019, in response to Attorney A's request for DCPS to confirm that DCPS would observe stay-put in light of the due process complaint,<sup>78</sup> Attorney B indicated that DCPS was aware of the legal requirement. However, Attorney B requested that Petitioner agree to the change of placement at School B, because "DCPS believes that there is a substantial likelihood that [Student] will injure [REDACTED] or others in [REDACTED] current placement. Specifically, the behavior that presents the greatest risk of harm/injury to [Student] is 'elopement.' [Student] has left and attempted to leave the classroom."<sup>79</sup>

28. On November 18, 2019, DCPS issued Student's IEP Progress Report for the first reporting period. [REDACTED] was noted to be progressing on all but one of the goals (coloring with boundaries).<sup>80</sup>

29. Petitioner visited School A and observed Student on approximately 15 occasions: once in August 2019, three or four times in September, five times in October including on two field trips, three or four times in November including the Thanksgiving program, and three times in December. She never witnessed Student have a behavioral tantrum such as rolling on the floor. She had not been informed of any behavioral issues regarding Student in the 30 days prior to the hearing.<sup>81</sup>

30. Witness A provides Student independent occupational therapy services, once a week for 50-55 minutes, then debriefs with Petitioner. He works with Student on handwriting, attention engagement, moving with coordination, and transferring from sitting to standing. Student's on-task behavior has improved over time. Student can be redirected, sometimes with several attempts. Student's refusals to respond to direction are short-lived, perhaps one or two per session, lasting no more than a minute. Student might walk away from

<sup>73</sup> P30:1.

<sup>74</sup> Testimony of Witness F.

<sup>75</sup> P32:5.

<sup>76</sup> Petitioner's testimony.

<sup>77</sup> P32:3 (Second of two page threes).

<sup>78</sup> P32:3 (First of two page threes).

<sup>79</sup> P32:2 (First of two page twos.)

<sup>80</sup> P34.

<sup>81</sup> Petitioner's testimony.

Witness A briefly, but in a playful fashion and not intending to leave the room. Student exhibits a social personality and enjoys seeing others happy and engaged.<sup>82</sup>

31. Witness B, Petitioner's educational advocate, observed Student in the classroom on December 19, 2019. Student would not follow directions, would not lie down when directed, would not listen to teachers, went to the bathroom without permission, and would lie down on peers' mats instead of Student's mat.<sup>83</sup>

32. Witness B observed the classroom at School B that DCPS proposed in the October 30, 2019 letter. The classroom has one special education teacher, two assistants, and ten students with disabilities.<sup>84</sup>

33. Witness D provides Student speech and language services at School A, four hours per month, both in and outside general education. Student's expressive speech is not understood by an unfamiliar listener. Student has the Accent 1000 SGD described above, but it is not useful as a communication device as Student triggers the icons on the device randomly without apparent understanding of their purpose. Student is more attentive in one-on-one sessions in the therapy room than in the classroom, where ■■■ tends to walk away and requires redirection. Student is more distracted with the stimulations in the classroom. Student follows one-step directions well, and can follow two-step directions such as "get your coat and line up at the door" 30% of the time.<sup>85</sup>

34. Witness E provides Student occupational therapy services at School A outside general education. Witness E is working with Student on prewriting skills, coloring within boundaries, and on maintaining attention. Student has difficulty closing circles and coloring within boundaries. Student requires prompting to maintain attention. Student is not making progress on the coloring goal in the IEP.<sup>86</sup>

35. Witness F, a DCPS Program Specialist, observed the ELS class with Witness B, and observed Student in Student's class at School A during the week prior to the hearing. During the observation at School A, Student did not follow directions; Student wandered around the room rather than focusing on tasks as directed.<sup>87</sup>

36. Witness G is Student's general education teacher. The class includes 20 students and one teacher assistant. Witness G finds Student unable or unwilling to participate without individual support of Witness G, the aide, or Petitioner if Petitioner is visiting. Student tends to avoid participating in activities involving the entire class. In small groups of five, Student does not work independently; Student will leave the group to be alone. If the teacher or aide is present in the small group, Student will sit and try to participate. Student is more attentive if the group activity involves music, activity, or is on the playground. Student attempted unsuccessfully to leave the group on several occasions: three times during all-

<sup>82</sup> Testimony of Witness A.

<sup>83</sup> Testimony of Witness B.

<sup>84</sup> *Id.*

<sup>85</sup> Testimony of Witness D.

<sup>86</sup> Testimony of Witness E.

<sup>87</sup> Testimony of Witness F.

school morning meetings, twice at recess, once hid under a table at lunch, and three times during Spanish. ■ absconded into the classroom closet once and to the bathroom once. Student requires redirection throughout the school day, particularly in whole class activities. Early in the school year, ■ would intentionally fall to the floor and roll around four to five times per day, but by November, the frequency was down to once a day. Witness G never implemented any features of the undated behavior intervention plan.<sup>88</sup>

37. Witness H is Student's special education teacher. On "day one" Witness H was convinced that Student's placement in general education at School A was inappropriate. Prior to the changes to the IEP on September 13, 2019, Witness H was providing 5 of the 10 hours of specialized instruction out of general education, contrary to the IEP. The IEP was changed due to Student's behavior and inattentiveness. Once the IEP was changed to 20 hours of specialized instruction outside of general education, Witness H began routinely pulling Student out of the classroom due to Student's desire for individual attention. However, due to commitments to other students in the school, Witness H has not had the time to provide Student more than 10 hour per week of specialized instruction since the IEP was changed. Witness H conceded that by October 4<sup>th</sup>, Witness H had failed to provide a total of 19 hours prescribed in the September 13, 2019 IEP.<sup>89</sup> These hours were not made up.<sup>90</sup> After the due process complaint was filed, specialized instruction was reverted to inside general education.<sup>91</sup>

### 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.<sup>92</sup>

The first, third, and fourth issues involve the appropriateness of the Student's IEP and placement. Therefore, as to these issues, the burden of persuasion is on Respondent, provided that Petitioner meets the burden to present a *prima facie* case. The second issue does not

<sup>88</sup> Testimony of Witness G.

<sup>89</sup> Testimony of Witness H.

<sup>90</sup> P:21.

<sup>91</sup> Testimony of Witness H.

<sup>92</sup> D.C. Code Sect. 38-2571.03(6)(A)(i).

directly involve the appropriateness of the Student's IEP or placement. Accordingly, the burden of persuasion must be on Petitioner for this issue.<sup>93</sup>

**Whether DCPS failed to provide Student with an appropriate IEP because it failed to consider adequately an evaluation performed by Facility C in June 2019 that determined that [REDACTED] could “could attend [REDACTED] neighborhood school,” in a general education setting.**

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*.<sup>94</sup> 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.’”<sup>95</sup> 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...<sup>96</sup> 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.”<sup>97</sup>

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.<sup>98</sup> 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*.”<sup>99</sup> 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 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.

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

<sup>93</sup> *Schaffer v. Weast*, 546 U.S. 49 (2005).

<sup>94</sup> 458 U.S. 176, 187 (1982).

<sup>95</sup> *Id.* at 189-90, 200

<sup>96</sup> *Id.* at 200.

<sup>97</sup> *Id.* at 203-04.

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

<sup>99</sup> *Id.* at 997.

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. It requires an educational program reasonably calculated to enable a child to make progress appropriate in light of the child’s circumstances.”<sup>100</sup>

The regulations require the following in the development of an IEP:

(a) Development of IEP—

(1) General. In developing each child's IEP, the IEP Team must consider—

- (i) The strengths of the child;
- (ii) The concerns of the parents for enhancing the education of their child;
- (iii) The results of the initial or most recent evaluation of the child; and
- (iv) The academic, developmental, and functional needs of the child.

(2) Consideration of special factors. The IEP Team must—

- (i) In the case of a child whose behavior impedes the child's learning or that of others, consider the use of positive behavioral interventions and supports, and other strategies, to address that behavior;
- (ii) In the case of a child with limited English proficiency, consider the language needs of the child as those needs relate to the child's IEP...
- (iv) Consider the communication needs of the child, and in the case of a child who is deaf or hard of hearing, consider the child's language and communication needs, opportunities for direct communications with peers and professional personnel in the child's language and communication mode, academic level, and full range of needs, including opportunities for direct instruction in the child's language and communication mode; and
- (v) Consider whether the child needs assistive technology devices and services.<sup>101</sup>

As discussed above, DCPS last evaluated Student on December 1, 2017. The findings were as follows: Student presented with borderline delay in cognitive development compared to same-aged peers.<sup>102</sup> Student’s receptive communication abilities were borderline in comparison to same-aged peers; expressive communication abilities were low average compared to same-aged peers.<sup>103</sup> Student’s adult interaction skills and peer interaction skills were average, self-concept and social role skills were low average, and overall social-emotional skills were average compared to same-age peers.<sup>104</sup> Student’s gross motor development and overall physical development were average, and Student’s abilities within the adaptive domain were low average.<sup>105</sup>

<sup>100</sup> *Id.* at 1000-01 (citations omitted).

<sup>101</sup> 34 C.F.R. §300.324.

<sup>102</sup> P4:6.

<sup>103</sup> *Id.*

<sup>104</sup> *Id.* at 7.

<sup>105</sup> *Id.*

Based on this reevaluation, DCPS developed an IEP on June 7, 2019 that prescribed 10 hours per week of specialized instruction in general education, four hours per month of speech-language services outside general education, 120 minutes per month of occupational therapy outside general education, and 120 minutes per month of physical therapy outside general education.<sup>106</sup> In the area of Least Restrictive Environment, the team noted that Student was currently in a regular Early Childhood Program at least 10 hours per week.<sup>107</sup> “As part of the team discussion, it was determined that the Least Restrictive Environment (“LRE”) would be a Gen. Ed classroom for [Student] with some special education support on a weekly basis.”<sup>108</sup> In her written closing argument, Respondent’s counsel argued that DCPS developed a *draft* IEP that *would have* placed Student in a self-contained program at School D.<sup>109</sup> However, the operative word is “draft,” and DCPS did not issue a Prior Written Notice.

Petitioner does not contest the overall appropriateness of the June 7<sup>th</sup> IEP, although the record includes emails from her to related service providers complaining of services being provided outside of general education,<sup>110</sup> as prescribed in the IEP.<sup>111</sup> And although Petitioner’s counsel argued at the hearing and in her written closing argument that the IEP requires the use of Student’s Accent 1000 SGD, the IEP states only that Student had been using the device at home and at School E for six months and “will continue to need support with the assistive technology device to effectively participate with the classroom setting and fully access the curriculum.”<sup>112</sup> However, the device is not addressed in the IEP goals.

In fact, Petitioner’s consistent position is that the evaluation conducted by Facility C (DCPS) supports Student’s placement in a general education environment. However, that evaluation makes no recommendation as to whether Student’s services should be provided in or out of general education. Nevertheless, Petitioner’s conviction is supported by DCPS’ decision to adopt the June 7, 2019 IEP that prescribed specialized instruction within general education. At that time, the team was aware of Student’s borderline delay in cognitive development, Student’s receptive and expressive communication delays, Student’s need for an EGD, inconsistent ability to use the toilet, and low average adaptive skills. The team was also aware that Student had enjoyed a relatively successful experience at the School E daycare facility, which was a general education environment. Therefore, the team prescribed a general education environment for Student at School A.

When Petitioner was informed of Student’s behavioral issues, her position was that Student was not receiving adequate support.<sup>113</sup> On September 6<sup>th</sup>, when she was first informed that Student was having behavioral issues, Petitioner responded by complaining of a lack of classroom support for Student. On September 9, 2019, by email at 5:03 a.m., Petitioner requested that DCPS assign a designated aide to Student. Petitioner also complained of the school’s failure to provide Student’s general education teacher Student’s

<sup>106</sup> P9:17.

<sup>107</sup> *Id.* at 18.

<sup>108</sup> *Id.* at 22.

<sup>109</sup> R9.

<sup>110</sup> P25-27.

<sup>111</sup> P9:17.

<sup>112</sup> P9:2.

<sup>113</sup> P.11:1

IEP and the lack of a behavior intervention plan. Petitioner also complained of missed support hours during the first two weeks of the school year.<sup>114</sup> Later that day, Petitioner visited Student's classroom and at 9:07 a.m. and sent an email complaining that "there has been no plan put in place to address the ongoing safety concerns in the classroom."<sup>115</sup>

"The Act welcomes parental input, but specifically charges the evaluation of the student and the framing of an adequate IEP to the school. To be sure, that evaluation does not always require a school to conduct additional testing. When "existing... evaluations and information provided by the parents" and "observations by teachers" and other professionals provide the IEP Team with a reasonable picture of the student's skills and needs, the school may finalize an IEP without any further testing unless requested by the child's parents.<sup>116</sup>

Petitioner did not request reevaluation related to the change in placement prior to filing the due process complaint and, thereafter, retaining counsel. Petitioner's argument is that the IEP developed on September 13, 2019 changed Student's special education services from 10 hours of specialized services inside general education to 20 hours outside general education without the benefit of reevaluation. In the LRE section of the revised IEP, under "Specialized Instruction," the team stated that "[Student's] delays across developmental areas require a small student to teacher ratio with adapted and modified curriculum."<sup>117</sup> Under Consideration of Special Factors, the IEP team stated that "[Student] requires redirection to task and constant assistance. [Student] currently receives support within the Responsive Classroom model. The IEP team reviewed the Safety Plan and discussed the Functional Behavior Analysis."<sup>118</sup> The rest of LRE section remained unchanged from the initial IEP including reflecting Student being in a general education environment.<sup>119</sup> None of present levels of performance were changed.

During the first week of school, Petitioner requested an Assistive Technology Evaluation, but this was prior to any indication or documentation in the record that Student was having any serious problems in the classroom. Moreover, that Student required some form of assistive technology was not in dispute. Facility A's 2017 evaluation established the need, and Student's IEP provided that Student "will continue to need support with the assistive technology device to effectively participate with the classroom setting and fully access the curriculum." The only issue was the determining the appropriate device.

The IDEA requires local education agencies to reevaluate students at least once every three years unless the parent and the local education agency deem such reevaluation unnecessary.<sup>120</sup> The purpose of a reevaluation is to determine whether a child continues to have a qualifying disability and the nature and extent of the special education and related services that the child needs.<sup>121</sup> Student's assistive technology evaluation and the

<sup>114</sup> P14:3.

<sup>115</sup> *Id.* at 8.

<sup>116</sup> *Z.B. v. District of Columbia*, 888 F.3d 515, 523, 435 U.S.App.D.C. 194, 202 (2018), citing 20 U.S.C. § 1414(c)(1)(A)-(B), (c)(4).

<sup>117</sup> P16:20.

<sup>118</sup> P16:3

<sup>119</sup> *Id.* at 20.

<sup>120</sup> 20 U.S.C. § 1414(a)(2)(B)(ii); 34 C.F.R. § 300.303(b)(2).

<sup>121</sup> *See* 34 CFR § 300.15.



reevaluation conducted by Facility C were both conducted well within three years of the September 2019 IEP meeting.

I conclude that DCPS did not deny Student a FAPE by failing adequately to consider the Facility C reevaluation; that evaluation made no recommendation as to placement. I further conclude that DCPS did not deny Student a FAPE by failing to reevaluate Student prior to revising Student's IEP. Triennial evaluations were not due, and the record does not reflect that there was any change in Student's cognitive, physical, or adaptive disabilities in the three months between the IEP that Petitioner accepted in June 2019 and the IEP she rejected in September 2019. The IEP team members from School A who developed the September IEP, did not participate in the development of the June IEP. Based on the same evaluations, other background information, and brief experience with Student in the classroom, the School A IEP team concluded that it was incapable of meeting Student's needs in a general education environment.

**Whether DCPS adequately implemented the student's IEP, particularly by failing to provide appropriate levels of related services: occupational therapy, physical therapy, and speech therapy.**

There is no documentation in the record that DCPS failed to provide Student any related services prescribed in either the June 7, 2019 or the September 13, 2019 IEP. However, Witness H conceded that Witness H failed to provide 19 hours of specialized instruction prescribed in the September 13, 2019 IEP. Thus, I conclude that DCPS denied Petitioner a FAPE by failing to provide 19 hours of specialized instruction.

**Whether DCPS reassigned the student to a different school without the proper assessments being conducted.**

I concluded in the discussion of the first issue that DCPS did not deny student a FAPE by changing Student's IEP without conducting additional testing. However, DCPS' proposal to move Student from a general education environment at School A to the ELS classroom at School B would place Student in a more restrictive environment, as that class is composed entirely of disabled students. IDEA requires that "To the maximum extent appropriate, children with disabilities, including children in public or private institutions or other care facilities, are educated with children who are not disabled, and special classes, separate schooling, or other removal of children with disabilities from the regular educational environment occurs only when the nature or severity of the disability of a child is such that education in regular classes with the use of supplementary aids and services cannot be achieved satisfactorily."<sup>122</sup> Supplementary aids and services means aids, services, and other supports that are provided in regular education classes, other education-related settings, and in extracurricular and nonacademic settings, to enable children with disabilities to be educated with nondisabled children to the maximum extent appropriate.<sup>123</sup>

<sup>122</sup> 20 U.S.C §1412(a)(5)(A). *See also*, 34 C.F.R. §300.114(a)(2); *Endrew*, 137 S.Ct. at 999 (the IDEA requires that children with disabilities receive education in the regular classroom "whenever possible."); *Z.B.*, 888 F.3d at 528, 435 U.S.App.D.C. at 207.

<sup>123</sup> 34 C.F.R. §300.42.

DCPS' witnesses were unanimous in support of moving Student into a more restrictive environment. Witness G, Student's general education teacher, testified that Student is unable or unwilling to participate without individual support of Witness G, Witness H, the classroom aide, or Petitioner if Petitioner is visiting. Student tends to avoid participating in activities involving the entire class. In small groups of five, Student does not work independently; Student will leave the group to be alone. If the teacher or aide is present in the small group, Student will sit and try to participate. Student is more attentive if the group activity involves music, activity, or is on the playground. Student attempted unsuccessfully to leave the group on several occasions: three times during all-school morning meetings, twice at recess, once hid under a table at lunch, and three times during Spanish. ■ absconded into the classroom closet once and to the bathroom once. Student requires redirection throughout the school day, particularly in whole class activities. Early in the school year, ■ would intentionally fall to the floor and roll around four to five times per day, but by November the frequency was down to once a day.

Witness D, who provides Student's speech services at School A, testified that Student is distracted by the stimulation that is inherent in a large class environment. Witness D supported the change to School B because in the smaller class, Student would be in closer proximity to the teacher and, therefore, easier to be redirected. Similarly, Witness E, Student's occupational therapy provider, testified that it was more difficult for Student to maintain attention with other children around. Witness E also said that there would be more adult support in the ELS environment. Witness F, a DCPS Program Specialist, observed Student at School A. Student was inattentive, would not stay on the carpet when directed to do so, wandered around the room, struggled with transitioning to cleaning up, and was unable to comply with directions to interact with classmates. Witness F supported the more restrictive placement because Student would have a greater level of support. Finally, Witness H, Student's special education teacher, voiced similar reasons in support of the ELS placement. Because of Student's distractibility, Witness H often pulled Student out of class contrary to the IEP. Student responds better to adults than peers, and better with one-on-one attention. Witness H believes that the smaller class would facilitate Student maintaining attention, participation in assignments, and communication.

Respondent places great reliance on the recent decision in *Clasen ex. Rel. M.S. v. Unified School District No. 266*.<sup>124</sup> Like Student, M.S. carried a diagnosis of Down Syndrome. M.S. was diagnosed at age three and during the 2013-14 school year, ■ was in kindergarten and out of general education for most of ■ core academic courses. ■ parents requested that ■ repeat kindergarten in 2014-15, but requested that ■ be mainstreamed, to which school officials agreed. M.S. made progress and advanced to the first grade where ■ was pulled out only for language arts, between 45-75 minutes per day. Beginning in January 2016, there was a documented increase in M.S.'s behavioral disruptions. That month ■ was suspended for hitting, kicking, and spitting on peers and adults. ■ was suspended again in March for throwing items at teachers and peers, and again three days later when ■ bit a teacher, threw objects, and attacked and injures six classmates. M.S. remained in the general education class through the second grade, but at the end of the year, the IEP team recommended that ■ receive services out of general education. M.S. parents filed a due process complaint primarily on the grounds of denial of services in the least restrictive

<sup>124</sup> 75 IDELR 5, 2019 WL 4034476 (D. Kan. 2019)

environment (“LRE”). The hearing officer ruled in favor of the school district, and that ruling was affirmed by the Kansas State Department of Education.

The District Court upheld the state level decision. Tenth Circuit follows the *Daniel R.R.* test. This test has two parts. In the first part, courts determine whether education in a regular classroom, with the use of supplemental aids, can be achieved satisfactorily.<sup>35</sup> If not, courts move to the second part and determine if the school district has mainstreamed the child to the maximum extent appropriate.<sup>36</sup> In the first part of the *Daniel R.R.* analysis, courts weigh the following four factors: (1) steps the school district has taken to accommodate the child in the regular classroom, including the consideration of a continuum of placement and support services; (2) comparison of the academic benefits the child will receive in the regular classroom with those ■■■ will receive in the special education classroom; (3) the child’s overall educational experience in regular education, including non-academic benefits; and (4) the effect on the regular classroom of the disabled child’s presence.

In the first factor, multiple staff members testified that they had considered modifying the regular education curriculum, training staff to accommodate M.S.’s special needs, creating alternative classroom accommodations such as visual cues, and placing paraprofessionals in the classroom to support M.S. They implemented behavior strategies to the greatest possible extent without implementing a behavior plan, which required the consent of M.S.’s parents. In the second factor, as in Student’s hearing, multiple witnesses testified that M.S. would derive substantially more educational benefit in a special education classroom than in the general education environment. ■■■ would benefit from smaller class sizes, one-on-one attention, and instruction tailored to ■■■ skill level and special needs. Multiple witnesses also testified that M.S. did not have the necessary skill to handle the faster pace of the larger, general education classroom. In the third factor, multiple witnesses testified that M.S. frequently exhibited negative behavior while in the general education classroom, even with the attempted modifications, accommodations, and supplementary aids. In the fourth factor, the court found that M.S.’s presence in the general education classroom often had negative consequences on the rest of the class. ■■■ was disobedient, defiant, and violent. Finally, moving to the second part of the *Daniel R.R.* test, the court found that the district had mainstreamed M.S. to the maximum extent possible.

Petitioner placed primary reliance on the Sixth Circuit’s decision in *L.H. v. Hamilton County Department of Education*.<sup>125</sup> L.H. was also a Down Syndrome student who was mainstreamed through the second grade, including having repeated the first grade. ■■■ services included pull-out and push-in specialized instruction. ■■■ second grade IEP goals followed district’s second grade curricular goals which was a significant increase in difficulty from ■■■ previous year’s goals. L.H. struggled to meet the goals and ■■■ behavior deteriorated; ■■■ invaded peers’ persona space, disobeyed teachers’ directions, and often refused to work. To counteract this change in performance, ■■■ special education teacher modified ■■■ lessons to the kindergarten level except for reading, at which ■■■ performed at the first grade level. The teacher also moved ■■■ seat to the back of the room, away from student traffic and distracting work materials. ■■■ teacher reported that these changes led to improved behavior and stemmed the reduction in ■■■ academic effort. However, when it was apparent that L.H. would not meet ■■■ second grade goals, the principal suggested a special education classroom

<sup>125</sup> 900 F.3d 779 (6th Cir. 2018).

setting for L.H. Over the parent's objections, L.H.'s third grade IEP placed ■ in another school in a special education classroom with two teachers and nine students. The parents rejected the placement and enrolled L.H. in a private Montessori school. ■ was the only disabled student in a class of 17 students, had an individualized lesson plan, and ■ had a dedicated aide paid for by ■ parents. The parents filed a due process complaint to challenge the district's third grade IEP. Despite testimony from the Montessori school that L.H. had made steady progress, the administrative law judge upheld the school district's IEP. On appeal the district court found that the district's proposed placement was more restrictive than necessary, but that the Montessori school did not satisfy IDEA. Consequently, the parents were not awarded reimbursement.

The district court rejected the school district's position that L.H. had to demonstrate "mastery" of the general education grade level curriculum to avoid a segregated special education placement. The Sixth Circuit upheld the district court's interpretation of the LRE requirements under IDEA:

[T]he district court rejected that standard, holding: "What the IDEA implies, the case law makes explicit: a child need not master the general-education curriculum for mainstreaming to be a viable option. Rather, the appropriate yardstick is whether the child, with appropriate supplemental aids and services, can make progress toward the IEP's goals in the regular education setting..." With the proviso that *Endrew F.* modifies this only slightly if at all, *See Endrew F.*, 137 S.Ct. at 1000-01 (measuring for "appropriate progress" based "on the unique circumstances of the child for whom it was created"), the district court's holding is correct."<sup>126</sup>

However, the appellate court overruled the district court's ruling that the parent's choice of the Montessori school was inappropriate under IDEA, precluding entitlement for reimbursement. The Sixth Circuit found that the Montessori school "satisfies the requirement that the private school must 'provide some element of special education services in which the public school placement was deficient.'"<sup>127</sup> In this regard, the court specifically referenced favorably L.H.'s "qualified teacher and an individual aide."<sup>128</sup>

The district court's ruling in *Clasen* is distinguishable on a number of points. Using the *Daniel R.R.* factors of *Clasen* as a template:

***(1) Steps the school district has taken to accommodate the child in the regular classroom, including the consideration of a continuum of placement and support services.***

In *Clasen*, the school trained staff to accommodate M.S.'s special needs, created alternative classroom accommodations such as visual cues, placed paraprofessionals in the classroom to support M.S., and implemented behavior strategies. The record in this case does not reveal that DCPS made any such concessions. There was testimony that there was a paraprofessional assigned to the classroom, and two others were brought in on undocumented

<sup>126</sup> *Id.* at 793, some citations omitted.

<sup>127</sup> *Id.* at 797.

<sup>128</sup> *Id.*s.

occasions of Student's misbehavior. However, when Petitioner was first informed of Student's behavioral problems on September 6, 2019, on September 9<sup>th</sup>, Petitioner requested that a dedicated aide be assigned to Student. On September 11, 2019 DCPS replied, providing Petitioner the procedures DCPS would follow in processing her request. Nothing in the record documents the implementation of the stated procedures. On October 10, 2019, the DCPS Manager of Inclusion reassured Petitioner that the process for assigning a dedicated aide had been started. As of the hearing, DCPS had not notified Petitioner of a decision as to whether a dedicated aide would be assigned to Petitioner. Witness G, Student's general education teacher, testified that she was aware of the request, but was "not involved" in the decision-making process. As for behavior strategies, there was no testimony as to how the Safety Plan was implemented. The behavior intervention plan was undated and there is no indication that it was ever shared with Petitioner. Witness G testified that she never implemented features of the behavior plan.

***(2) Comparison of the academic benefits the child will receive in the regular classroom with those [REDACTED] will receive in the special education classroom.***

In this factor, the facts in *Clasen* are identical to those herein. Witnesses D, E, F, G, and H all testified that Student would be better served in a small class outside of general education where there would be fewer distractions and more one-on-one instruction.

***(3) The child's overall educational experience in regular education, including non-academic benefits.***

The distinction between the treatments of M.S. and Student is stark. M.S. was in general education for *four years* before the school district determined that [REDACTED] was not deriving benefit: two years in kindergarten, first grade and second grade. However, DCPS scheduled an IEP team meeting to move Student to a special education classroom within *three weeks* of Student enrollment at School A. Witness H testified that on "day one," she knew the placement at School A would not work.

As in *Clasen*, multiple witnesses testified that Student was distractible, had difficulty following directions, would wander from group activities, and would elope. However, although DCPS placed significant emphasis on Petitioner's behavior constituting a threat to [REDACTED] and others, the testimony and documentation revealed that these concerns were greatly exaggerated. While Student attempted to wander off on numerous occasions, [REDACTED] was virtually never successful and never in any danger. Two of the three "elopements" were to a closet adjacent to the classroom that was not locked at the time and to the adjacent bathroom without permission. The third was into the hallway shortly before dismissal one afternoon; Witness G, [REDACTED] teacher, retrieved [REDACTED] within 90 seconds. There was no history of self-harm and but one report of a minor altercation with a classmate. [REDACTED] has never been suspended for any reason. Witness G testified that Student's practice of falling and rolling on the floor diminished significantly by November 2019. On November 18, 2019, DCPS issued Student's IEP Progress Report for the first reporting period indicating that Student was progressing on all of [REDACTED] IEP goals except coloring within the lines.



*(4) The effect on the regular classroom of the disabled child's presence.*

In *Clasen*, M.S. was suspended in January 2016 for hitting, kicking, and spitting on peers and adults. ■■■ was suspended again in March for throwing items at teachers and peers, and again three days later when ■■■ bit a teacher, threw objects, and attacked and injures six classmates. Nevertheless, the school district allowed ■■■ to remain in general education for the next school year, ■■■ third in general education. Student has engaged in no such violent behavior, and has never been suspended. As described above, while ■■■ requires significant attention, ■■■ behavior has not represented a genuine safety concern.

With respect to the second prong of the *Daniel R.R.* test, whether the school district has mainstreamed the child to the maximum extent appropriate, DCPS clearly fails this test. While M.S. was in general education three years before the Kansas school district moved ■■■ to a special education class, DCPS made the change in Student's IEP within three weeks of Student's enrollment, arguably the minimum extent possible.

IDEA provides that separate schooling, or other removal of children with disabilities from the regular educational environment occurs only when the nature or severity of the disability of a child is such that education in regular classes with the use of supplementary aids and services cannot be achieved satisfactorily.<sup>129</sup> DCPS has never implemented the supplementary aid that would address Student's need for more individualized attention, a dedicated aide. While it has given Petitioner written assurance on at least two occasions that ■■■ September 9, 2019 request for a dedicated aide was in process, DCPS has yet to make a decision. The Down Syndrome student in *L.H. v. Hamilton County* resumed deriving educational benefit when ■■■ was provided a dedicated aide and an IEP that was tailored for ■■■ unique circumstances. Here, Student's special education teacher determined on "day one" that the placement at School A was a mistake, and within three weeks of Student's enrollment, the School A staff convened an IEP team meeting to engineer ■■■ departure. There is no assurance that a dedicated aide will solve all of the behavioral problems alleged by DCPS. Nevertheless, IDEA compels a genuine effort by the school to provide the necessary support to facilitate Student's placement in the least restrictive environment. I conclude that DCPS denied Student a FAPE by failing to do so.

**Whether the IEP team increased the student's hours of specialized instruction without cause.**

I concluded in the discussion of the first issue that DCPS did not deny Student a FAPE by changing Student's IEP without conducting additional testing. I also concluded in the discussion of the third issue that DCPS denied Student a FAPE by failing to maintain services in the least restrictive environment. Explicit in my first finding was the determination that when DCPS reconvened an IEP team on September 13, 2019, the record did not support the need for reevaluation; triennial evaluations were not due, and there had been no apparent change in Student's condition since the meeting three months earlier to warrant reevaluation.

As discussed in the previous section, the staff at School A determined virtually on "day one" that it was either ill-equipped or unwilling to address Student's challenging needs.

<sup>129</sup> 20 U.S.C §1412(a)(5)(A).

DCPS was well aware of Petitioner's cognitive, physical, and adaptive deficits when it developed Student's IEP in June 2019. It was also aware that, at least as was represented by Student's teacher at School E, Student was relatively successful in interacting with non-disabled peers over an extended period of time.

The record reveals that on September 6, 2019, Petitioner was notified that on September 4, 2019, Student entered a closet adjacent to the classroom that locks from within. There is no indication that Student locked the closet door. This is the lone documented behavior that prompted DCPS to develop an FBA, a Safety Plan, and to schedule an IEP team meeting one week later to change Student's placement to a self-contained special education classroom. This could only be effectuated by redrafting the IEP to eliminate general education services. DCPS failed to give serious consideration to Petitioner's request for a dedicated aide, and five months later, it still has not made a determination on that request.

It follows from my finding that DCPS did not provide the supplementary aids to maintain Student's least restrictive environment, that DCPS' decision to increase Petitioner's specialized instruction outside of general education was not supported by the record, for the reasons discussed in the previous section. Thus, I find that DCPS denied Student a FAPE by amending Student's specialized instruction in a manner that would preclude a placement in the least restrictive environment.

### **RELIEF**

Petitioner seeks (1) a finding that placement in School B is not appropriate, (2) an order directing DCPS to reconvene an IEP team meeting to consider an independent neuropsychological evaluation, and assistive technology evaluation and to update the IEP accordingly, (3) an order to direct DCPS to assign a dedicated aide to Student, and (4) an order for DCPS to implement Student's behavior plan.

### **ORDER**

As a result of the foregoing:

1. If it has not already done so since the initiation of this proceeding, Respondent shall conduct an Assistive Technology Evaluation of Student within thirty days of the issuance of this order.
2. Within thirty days of the issuance of this order, Respondent shall assign a dedicated aide to Student.
3. Within thirty days of the issuance of this order, the Respondent shall reconvene an IEP team to review all current evaluations of Student, develop a behavior intervention plan, and develop an updated annual IEP that maintains Student's specialized instruction in the general education environment.
4. Petitioner's other requests for relief are denied.

**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: February 10, 2020

Copies to:

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