

District of Columbia
Office of the State Superintendent of Education
Office of Dispute Resolution
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Parents, on behalf of Student,¹)	
Petitioners,)	
)	Hearing Dates: 12/14/20, 12/15/20
)	1/11/21, 1/12/21, 1/15/21, 1/21/21
)	Case No. 2020-0186
District of Columbia Public Schools,)	
Respondent.)	

HEARING OFFICER DETERMINATION

I. Introduction

This is a case involving an X-year-old student who is currently eligible for services as a student with Intellectual Disability (the “Student”). A due process complaint (“Complaint”) was received by District of Columbia Public Schools (“DCPS” or “Respondent”) pursuant to the Individuals with Disabilities Education Act (“IDEA”) on October 26, 2020. The Complaint was filed by the Student’s parents (“Petitioners”). On November 5, 2020, Respondent filed a response. The resolution period expired on November 25, 2020.

II. Subject Matter Jurisdiction

This due process hearing was held, and a decision in this matter is being rendered, pursuant to the IDEA, 20 U.S.C. 1400 et seq., its implementing regulations, 34 C.F.R. Sect. 300 et seq., Title 38 of the D.C. Code, Subtitle VII, Chapter 25, and the District of Columbia Municipal Regulations, Title 5-E, Chapter 30.

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

III. Procedural History

Petitioners filed a motion for an expedited hearing and stay-put relief on October 26, 2020. The motions were denied by order dated November 11, 2020. A prehearing conference was held on November 20, 2020. Attorney A, Esq., counsel for Petitioners, appeared. Attorney B, Esq., counsel for Respondent, appeared. A prehearing conference order summarizing the rules to be applied in the hearing and identifying the issues in the case was issued on November 25, 2020, and revised on December 1, 2020, and December 16, 2020.

Hearing dates were scheduled for December 14, 2020, and December 15, 2020. On December 11, 2020, Respondent moved to dismiss because Petitioners did not file their disclosures in full compliance with the prehearing order and 34 C.F.R. Sect. 300.512(a)(3). Petitioners filed opposition to the motion on December 14, 2020. This Hearing Officer denied the motion at the hearing date on December 14, 2020, but moved the start of testimony to December 15, 2020, to allow Petitioners to submit disclosures in accord with the regulation.

The Hearing Officer Determination (“HOD”) due date was originally January 9, 2021. On January 9, 2021, DCPS moved to extend the HOD due date to January 27, 2021. On January 9, 2021, this Hearing Officer granted the motion without opposition. It subsequently became that more hearing dates would be needed. On January 26, 2021, Respondent moved for an additional six-day continuance, extending the HOD due date to February 2, 2020. On January 27, 2020, this motion was granted.

The matter proceeded to hearing on December 15, 2020, January 11, 2021, January 12, 2021, January 15, 2021, and January 21, 2021. The hearing was conducted

through the Microsoft Teams videoconferencing platform, without objection. Petitioner was again represented by Attorney A, Esq. Respondent was again represented by Attorney B, Esq. This was a closed proceeding. A certified Spanish-English interpreter was present for Petitioners during the entirety of the proceeding. After presentation of Petitioners' case, Respondent moved for directed verdict. The motion was denied on the record. Oral closing arguments were presented on January 21, 2021. Both parties submitted lists of relevant citations on January 25, 2021.

During the proceeding, Petitioners moved into evidence exhibits P-1 through P-64 and P-70 through P-75. Objections were sustained with respect to exhibits P-55, P-60a, P-60b, and P-62 through P-65. Exhibits P-1 through P-54, P-56 through P-59, P-61, and P-70 through P-75 were admitted. Respondent moved into evidence exhibits R-1 through R-26 (except for R-5-1 through R-5-9). Objections were overruled. Exhibits R-1 through R-26 were admitted.

Petitioners presented as witnesses, in the following order: the Student; the Student's father ("Father"); Witness A, a family friend; Witness B, a bilingual educational support specialist (expert in educational support for families with limited English proficiency); Witness C, a law student; and the Student's mother ("Mother"). Respondent presented as witnesses: Witness D, an instructional coach at DCPS (expert in special education programming and placement); Witness E, a school psychologist (expert in psychology and evaluation of students with disabilities); Witness F, a teacher (expert in general education and science); Witness G, a special education teacher (expert in special education instruction, programing, placement, and English as a Second Language ("ESL") instruction and assessment); Witness H, a manager of specialized instruction;

Witness I, a social worker (expert in social and behavioral services, assessment, and Individualized Education Program (“IEP”) programming and placement); Witness J, a special education teacher (expert in special education programming, placement, and instruction); Witness K, principal of School A (expert in special education administration in public schools); and Witness L, a resolution specialist.

IV. Issues

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

- 1. Did Respondent change the Student’s placement when it transferred the Student from School A to School B without notice or an IEP meeting during the 2020-2021 school year? If so, did Respondent violate 34 C.F.R. Sect. 300.501 and related authority? If so, did Respondent deny the Student a Free Appropriate Public Education (“FAPE”)?**
- 2. Did Respondent fail to conduct the Student’s IEP meetings during the 2019-2020 and 2020-2021 school year in such a manner that allowed Petitioners to understand the meeting, including provide Petitioners with an interpreter? If so, did Respondent violate 34 U.S.C. Sect. 300.322, 34 C.F.R. Sect. 300.501, and related authority? If so, did Respondent deny the Student a FAPE?**
- 3. Did Respondent fail to provide Petitioners with the Student’s educational records in a timely manner in their native language in response to their records request(s)? If so, did Respondent violate 34 U.S.C. Sect. 300.322 (e)-(f), 34 C.F.R. Sect. 300.501, 34 C.F.R. Sect. 300.503(c), 34 C.F.R. Sect. 300.613, and related authority? If so, did Respondent deny the Student a FAPE?**
- 4. At the April, 2020, and May, 2020, IEP meetings, did Respondent provide the Student with a program in the Student’s least restrictive environment when increasing service hours on the Student’s 2020 IEP? If not, did Respondent violate 34 C.F.R. Sect. 300.101, 34 C.F.R. Sect. 300.114, and related authority? If so, did Respondent deny the Student a FAPE?**

Petitioners contended that the IEP improperly reduced the Student’s access to typically developing peers by providing for twenty hours of specialized instruction

without any inclusion or “push-in” classes. For this claim, the burden of persuasion is on Respondent, provided Petitioners present a prima facie case.

5. Did Respondent fail to provide the Student access to a laptop or other appropriate device, materials, and supplies for distance learning? If so, did Respondent deny the Student a FAPE?

This claim was withdrawn on the record by Petitioners on December 15, 2020.

6. Did Respondent fail to provide the Student with functional access to instruction for more than ten school days to enable the Student to participate in the general education curriculum and make progress towards meeting the IEP goals? If so, did Respondent deny the Student a FAPE?

As relief, Petitioners seek an independent educational evaluation, compensatory education as determined by an evaluation, placement of the Student at School A, copies of the Student’s educational records in Spanish, and related relief. Petitioners acknowledged that claims brought pursuant to 29 U.S.C. Sect. 794 (“Section 504 claims”) and the Americans with Disabilities Act must be dismissed because this Hearing Officer lacks jurisdiction to hear such claims.

V. Findings of Fact

1. The Student is an X-year-old who is currently eligible for services as a student with Intellectual Disability. The Student’s parents speak their native Spanish and do not speak English. The Student speaks in both languages, though the Student has expressive and receptive language delays. R-3-8. The Student is as strong in English as s/he is in Spanish, and possibly stronger, and sometimes prefers to speak English. R-5-10; P-44 at 849; Testimony of Witness I.

2. The Student was tested on an English proficiency test, the WIDA measure, on November 22, 2019. The Student’s score implied that s/he was in the “expanding

phase” of English language acquisition, where s/he could complete such tasks as identifying facts and explicit messages from illustrated text, finding changes to root words in context, and identifying elements of story grammar. R-3-3.

3. The Student is significantly delayed in all academic areas. The Student can write multi-sentence paragraphs consisting of simple sentences but struggles with organizing thoughts, especially when attempting to construct more complex sentences. The Student has better decoding and encoding skills, but often cannot comprehend the material s/he reads. Testimony of Witness E. The Student scored “below basic” on a Reading Inventory assessment during the 2019-2020 school year, at the 2nd percentile. P-1 at 18. I-ready testing revealed that the Student is three levels below grade in mathematics. R-3. The Student has difficulties following along in a big class but performs better in a small, self-contained setting. S/he needs small-group instruction with a lot of repetition and reinforcement to retain information from one week to the next. Testimony of Witness J.

4. After being evaluated at an early age, the Student was sent to School A, where s/he has remained for much of his/her academic career. School A is a bilingual school, providing half of instruction in English and half in Spanish. The school provides students with mathematics, science, English humanities, Spanish humanities instruction, and “specials” classes. Testimony of Witness D. School staff send emails in both English and Spanish, makes announcements in both languages, and gives pre-kindergarten and kindergarten instruction in Spanish. Testimony of Witness D; Testimony of Witness I. The school encourages thirty percent of teaching materials (such as word walls and glossaries) to be bilingual. Testimony of Witness J.

5. During the 2019-2020 school year, the Student attended School A. The Student's academic classes were taught in English, except for Spanish Humanities and mathematics. All of the Student's language arts classes were provided in a self-contained classroom. Science was taught by a general education teacher, with a special education teacher "pushing in" part time. The Student had a difficult time in science, where the classroom was large and the Student presented a serious safety issue. The Student failed even to begin many science assignments and needed pre-teaching to break down complex concepts. The Student's special education instruction was provided by Witness J and Teacher A, both English speakers. Testimony of Witness F; Testimony of Witness J.

6. Especially during the 2019-2020 school year, the Student's teachers noticed that the Student was not making adequate progress, despite interventions. As a result, DCPS decided to conduct a psychoeducational assessment, occupational therapy assessment, and speech and language assessment of the Student. R-7-2. Prior Written Notice and Consent for Initial Evaluation/Reevaluation forms were then sent to Petitioners in English. P-11 at 65-67.

7. On November 6, 2019, Speech and Language Pathologist A issued a speech and language evaluation report for the Student. The report discussed several measures, including the Receptive One-Word Picture Vocabulary Test-4 ("ROWPVT-4") (English with Spanish Interpreter), Expressive One-Word Picture Vocabulary Test-4 ("EOWPVT-4") (English with Spanish Interpreter), Clinical Evaluation of Language Fundamentals-5 ("CELF-5") (English with Spanish Interpreter), and the Goldman Fristoe Test of Articulation-3 ("GFTA-3"). The ROWPVT-4 and EOWPVT-4 tests revealed a mild delay in the Student's receptive vocabulary and a moderate delay in expressive

vocabulary skills. The evaluator compared the Student's performance in 2019 to his/her performance in 2016 and found no change in ability across all domains, except in articulation (slight growth) and receptive vocabulary (slight decline). P-46 at 939.

8. On December 2, 2020, Occupational Therapist A conducted an occupational therapy evaluation of the Student. The evaluator conducted interviews and testing, including the Beery-Buktenica Developmental Test of Visual-Motor Integration, 6th Edition (Beery VMI-6th Edition). The Student's performance on the Beery VMI-6th Edition revealed visual-motor integration skills in the low range and visual perception and motor coordination skills in the average range. The evaluator recommended the removal of the Student's occupational therapy services, noting that the Student had the necessary visual motor integration skills to produce handwriting assignments in the classroom, as validated by work samples, teachers' interviews, and observations. R-6.

9. On December 5, 2019, Witness M, a DCPS psychologist, issued a Confidential Triennial Evaluation for the Student. Witness M noticed that the Student had issues with instructions in class, and engaged in inappropriate activities such as raising his/her hand while not knowing the answer. On standardized testing, the Student scored in the 1st percentile rank on the General Intelligence Assessment ("GIA"), a cognitive measure. On academic testing, on the Woodcock-Johnson Tests of Achievement IV ("WJ-IV"), the Student's overall broad academic performance was low average. The Student did receive higher scores in mathematics and writing on untimed achievement tests, but on complex tasks, the Student's scores were very low. The Student also scored low on adaptive testing pursuant to the Adaptive Behavior Assessment System-Third Edition ("ABAS-III"). Witness M found that Petitioners

should be encouraged to consider the benefits of a smaller, more structured environment, and that the Student should read and reread passages orally in English or Spanish, with the Student's teachers or parents providing guidance and feedback. R-3.

10. After reviewing the Student's evaluation reports, School A staff were concerned. On or about December 10, 2019, Witness E and Witness D met with the Mother and reviewed the recent assessments in Spanish. Testimony of Witness D. On December 16, 2019, an eligibility meeting was held for the Student. DCPS staff gave the Mother a copy of the evaluations, then explained them into Spanish. It was determined that the Student no longer needed occupational therapy and that the Student should be determined to be eligible as a student with an Intellectual Disability. Testimony of Witness D; Testimony of Witness E. The Mother indicated that a potential change in program would make it difficult for the Student. R-8-5.

11. Following the eligibility meeting, also on December 16, 2019, an IEP meeting was conducted for the Student. The invitation for this meeting was sent to the Student's parents in English. P-12b at 69. Attending the IEP meeting were the Mother, Witness J, Teacher A, Witness D, a general education teacher, Witness I, Speech and Language Pathologist A, and Occupational Therapist A. Witness D and Witness I spoke the most. Spanish was the dominant language of the meeting. Witness J, Speech and Language Pathologist A, and Teacher A spoke in English. The English-speaking team members communicated to the Mother through a bilingual member of the team. When an English-speaking team member said something, a bilingual team member would try their best to explain what was said, often word for word. A bilingual team member would also communicate the Mother's comments to the English-speaking members of the team.

There was a draft IEP at the meeting, written in English. The team tried to explain to the Mother what a pull-out classroom was. The team did not use a certified interpreter and the DCPS “language line” was not used. The Mother was “overwhelmed” at the meeting. Testimony of Witness D; Testimony of Witness J; Testimony of Mother; R-10-1.

12. The December 16, 2019, IEP contained “Areas of Concern” sections in reading, mathematics, written expression, communication/speech and language, and emotional, social and behavioral issues. The IEP noted that the Student had severe expressive language delays which impacted his/her ability to clearly express him/herself in both social and academic settings. The IEP also indicated that the Student had a positive attitude about school, struggled to develop friendships with other students, had issues with structure and rules, was unable to stay on task and work independently, and engaged in conflicts with peers that affected his/her access to the general education curriculum. Additionally, the IEP indicated that the Student needed to work on safety, boundaries, and danger in the community, and that the Student would benefit from working individually and in a small group. The Student’s behavioral support services were increased to 240 minutes per month, and the IEP also recommended eleven hours of specialized instruction per week outside general education (including five hours in mathematics), with four hours of specialized instruction per week inside general education. The IEP also recommended 240 minutes per month of speech-language pathology (180 minutes outside general education, sixty minutes inside general education), and 30 minutes per month of behavioral support services on a consultative basis. The IEP also recommended “Other Classroom Aids and Services” including “Sentence Stems,” repetition of directions, frequent breaks, extended time, use of

manipulatives and multi-modal supports to learn and practice content, small-group reading interventions, explicit vocabulary instruction, and increased “wait” times after questions. A location with minimal distractions was also recommended. R-10.

13. Petitioners and DCPS agreed to amend the Student’s IEP, without a meeting, to add modifications such as speech-to-text assistive technology and a human scribe. On February 5, 2020, Petitioners were sent notice of the amendment, in English. R-12-1.

14. For the first three reporting periods of the 2019-2020 school year, the Student’s progress reports on goals indicated, in English, that the Student was “progressing” on a goal, that the goal was “just introduced,” or that the goal was “not introduced.” By the third reporting period, the Student was progressing in all goal areas except one. P-58 at 1427-1441.

15. On May 17, 2020, a draft IEP was sent to Petitioners, in English. Testimony of Petitioner; P-19 at 136. An IEP meeting was held on May 18, 2020. Attending were the Mother, Teacher A, a local educational agency (“LEA”) representative, Witness F, Witness J, Witness I, and Speech Language Pathologist A. At the meeting, teachers discussed the Student’s struggles in school, and how the Student needed individual attention. Witness I shared concerns about the Student’s ability to differentiate between friends and foes, indicating that the Student would do better in a program where safekeeping skills were taught all the time. R-15. The team informed the Mother that the Student’s specialized instruction hours needed to be increased, and that, with the increase in hours, the Student would not be able to attend School A. P-3 at 17. When English-speaking participants spoke at the meeting, Witness G interpreted their

comments into Spanish. Witness G also interpreted the Mother's statements into English for the English-speaking members of the team. The bilingual nature of School A was not discussed at the meeting, nor was anything discussed about the Student having to transition out of bilingual education. Testimony of Witness G; Testimony of Witness J. The May 18, 2020, IEP recommended that the Student receive twenty hours per week of specialized instruction outside general education, with the same basic related services, "Other Classroom Aids and Services," and accommodations as the prior IEP. R-14. On May 19, 2020, Petitioners were sent an IEP amendment form, in English, asking for a signature. P-21 at 140. After the IEP meeting, Respondent provided the Mother with an IEP, in English. Testimony of Petitioner. A Prior Written Notice was then sent to Petitioners, in English. P-21 at 146.

16. On June 17, 2020, the Mother sent an email to School A indicating that she did not agree with the IEP meeting and that she should not have had to sign a document without the Father present. The email was written in English by the Mother's friend, Witness A. The Mother does not know how to use computers well and did not check this email address thereafter. P-2; Testimony of Witness A; Testimony of Mother; R-17-2-3.

17. After DCPS received the email from the Mother, a meeting was held between the Mother, Witness J, and other DCPS staff to again discuss issues relating to the Student's IEP and placement. Witness I and another DCPS staff member were at the meeting as well. Testimony of Witness J.

18. On July 7, 2020, LEA Representative A sent a response to the Mother's June 17, 2020, email and attached a Prior Written Notice, in English. LEA representative

A also attached meeting notes, in English, explained that the Student's needs were extensively discussed, and that the Student's new school would be School B. R-17-1; R-18. A School B representative reached out to Petitioners on or about July 15, 2020, to introduce the school. They discussed the school's class structure, shared a virtual schedule, and had a translator on the line. However, the Mother refused to enroll the Student at School B. Testimony of Witness K. The Mother indicated that she wanted the Student to go to School A. Testimony of Witness H.

19. On or about August 2, 2020, School A sent the Mother a schedule and indicated that the Student would in fact be attending School A. The notice stated "(w)elcome to the 2020-2021 school year! We can't wait to (virtually) see all of our [School A students] on the first day of school, Monday, August 31, 2020." The email also stated that "(t)he administration and faculty have been working very hard to prepare for the start of our first virtual start of school ever" and provided a detailed schedule of the Student's classes." P-1-1; Testimony of Mother; Testimony of Witness K.

20. The Student attended virtual instruction at School A for approximately five days at the start of the 2020-2021 school year. Shortly thereafter, the Student was no longer able to access his/her virtual classes at School A and the school asked for its computer back. Testimony of Mother. DCPS then "manually" enrolled the Student at School B so the Student could access virtual classes. Testimony of Witness H. On September 24, 2020, School B sent a welcome email to Petitioners. R-18.

21. On or about September 28, 2020, Petitioners emailed DCPS seeking a copy of all educational records and a working laptop, and requesting that the Student's

access to School A be restored. P-4; Testimony of Witness C. On September 29, 2020, School B offered Petitioners a computer for the Student. P-7 at 48.

22. The Student started attending School B in approximately early October, 2020. When the Student was first enrolled at School B, s/he did not have access to a computer. DCPS staff gave the Student a computer approximately one month to a month-and-a-half after the start of the school year. The computer had issues, and the Mother requested a new computer. Testimony of Mother; Testimony of Student.

23. At School B, unlike School A, there are no classes in Spanish and no library class for the Student. Additionally, the Mother cannot help the Student with homework because all of the work at School B is in English. Testimony of Student; Testimony of Mother; Testimony of Father.

24. On November 24, 2020, Petitioners received a “zip” file from Respondent containing the Student’s school records going back to 2012. Testimony of Witness C; Testimony of Witness L.

25. At School B, the Student was placed in the “SLS” program. SLS classes have a maximum of fifteen students and provides twenty hours of academic instruction in self-contained special education settings. There are seven “blocks” of instruction per day (including lunch), each fifty-five minutes long. Aides go with the students to “specials.” Teachers have reported that the Student is doing well at School B and is making progress and developing friendships. Testimony of Witness H.

26. The Student’s IEP was sent to Petitioners, in Spanish, on November 1, 2020. P-50 at 1025.

VI. Conclusions of Law

The burden of persuasion in District of Columbia special education cases was changed in 2014. The District of Columbia Code now states that “(w)here there is a dispute about the appropriateness of the child’s individual educational program or placement, 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 establishes a prima facie case. D.C. Code Sect. 38-2571.03(6)(A)(i). The burden of persuasion for Issue #1, Issue #2, Issue #3, and Issue #6 is therefore on Petitioners as those claims do not directly relate to the appropriateness of the Student’s program or placement. Schaffer v. Weast, 546 U.S. 49 (2005). The burden of persuasion for Issue #4 is on Respondent, provided that Petitioner presents a prima facie case.

1. Did Respondent change the Student’s placement when it transferred the Student from School A to School B without notice or an IEP meeting during the 2020-2021 school year? If so, did Respondent violate 34 C.F.R. Sect. 300.501 and related authority? If so, did Respondent deny the Student a FAPE?

The procedural safeguards of the IDEA provide that a school district must offer meaningful parental participation and prior written notice whenever it initiates or proposes to change a child’s educational placement. 20 U.S.C. Sect. 1414; 34 C.F.R. Sects. 300.116(a), 300.327, 300.501(b), 300.503(a); Middleton v. District of Columbia, 312 F. Supp. 3d 113, 130 (D.D.C. 2018). The IDEA does not define “educational placement,” but courts have interpreted educational placement to go beyond the specific location of the school at which the student is enrolled. D.K. ex rel. Klein v. District of Columbia, 962 F. Supp. 2d 227, 233 (D.D.C. 2013) (school is not an educational placement). Accordingly, a change in the location of a student’s school will not

constitute a change in educational placement unless it is accompanied by a fundamental change in, or elimination from, the student's education program.

Changes in a given student's general education program are not ordinarily considered a "change of placement" for special education purposes. Letter to Fisher, 21 IDELR 992 (OSEP 1994). According to OSEP, the determination as to whether a change in placement has occurred must be made on a case-by-case basis, and the following factors are relevant in this analysis: 1) Whether the educational program set out in the child's IEP has been revised; 2) Whether the child will be able to be educated with nondisabled children to the same extent; 3) Whether the child will have the same opportunities to participate in nonacademic and extracurricular services; and 4) whether the new placement option is the same option on the continuum of alternative placements.

Here, DCPS changed the Student's school from School A to School B by providing the Student with written notice. As a result, as in the earlier motion for stay-put relief, Petitioners contend that DCPS improperly changed the Student's placement without allowing them to participate in the decision-making process. The stay-put issue was decided in favor of the school district.

However, as in Z.B. by & through Sanchez v. D.C., 382 F. Supp. 3d 32, 42–46 (D.D.C. 2019), aff'd sub nom. Sanchez v. D.C., 815 F. App'x 559 (D.C. Cir. 2020), cert. denied sub nom. Z. B. By & Through Sanchez v. D.C., 141 S. Ct. 375, 208 L. Ed. 2d 97 (2020), the change of placement inquiry in a final determination is distinguishable from the change of placement inquiry during stay-put. As in Z.B., a second determination is necessary on the "change of placement" issue in the HOD because the change of placement inquiry is different in a final determination, which occurs after testimony and

evidence are completed. Here, that inquiry must focus on whether the Student's move to School B, a monolingual (English) school, from School A, a bilingual school, was a "fundamental change" in placement because of the schools' language differences.

There is a difference between the instruction in School A and School B. School A, as a bilingual school, has several special characteristics. The school provides half of its instruction in English and half in Spanish. During the 2019-2020 school year, School A provided the Student with two academic classes in Spanish: mathematics and Spanish humanities. Additionally, School A staff sends emails and makes announcements in both English and Spanish, and encourages thirty percent of teaching materials used at the school to be bilingual.

However, these differences in instruction are a function of changes to the Student's general education services, not the Student's special education services. The four criteria in Letter to Fisher all point to changes in a student's special education services, i.e., whether the IEP has been revised, whether the Student will be educated with nondisabled children to the same extent, whether the nonacademic and extracurricular services have changed, and whether the new placement option is the same option on the continuum of alternative placements. The Student's change of school from a bilingual school to a monolingual school does directly not involve any of those changes in special education services.

Indeed, even when a change of school does result in changes to special education services, courts may be reluctant to find a change of placement if the school settings are mostly similar. In Z.B., the parents contended that the change of private schools was a change of placement, pointing to a 7.7 percent reduction in specialized instruction at the

new school. The court found that the new school's shorter schedule was not significant enough to constitute a fundamental change to Z.B.'s education program, especially when the parents "presented no evidence that Kennedy Krieger's shorter schedule will deprive Z.B. of any educational benefit or will prevent him from meeting the goals set in his IEP." Z.B., 382 F. Supp. 3d at 44. The court also pointed out that the new school was able to implement Z.B.'s IEP as well as, if not better than, the former school. Id.

Here, School B can implement the Student's IEP better than School A, which is not designed to provide children like the Student with sufficient self-contained instruction. In fact, according to the reasonable testimony of Witness G (an expert in special education instruction, programing, placement, and ESL instruction and assessment), the Student might do better at School B simply because s/he would be able to focus on one language. Petitioners did not present any testimony or evidence to the contrary. The record also suggests that Petitioners' main objections to School B are non-academic. Rather than citing to issues with instruction, the Mother cited to cultural factors, including her preference to keep all of her children at the same school and to have the Student keep his/her friends from School A. While these issues are understandably significant for these concerned parents, they do not create the basis for Petitioners' claim that DCPS improperly changed the Student's placement when the Student was assigned to School B. This claim must therefore be dismissed.

2. Did Respondent fail to conduct the Student's IEP meetings during the 2019-2020 and 2020-2021 school years in such a manner that allowed Petitioners to understand the meeting, including provide Petitioners with an interpreter? If so, did Respondent violate 34 U.S.C. Sect. 300.322, 34 C.F.R. Sect. 300.501, and related authority? If so, did Respondent deny the Student a FAPE?

Congress sought to protect individual children by providing for parental involvement in the formulation of a child's IEP. Hendrick Hudson Dist. Bd. of Educ. v. Rowley, 458 U.S. 176, 208 (1982). Accordingly, applicable law and regulation requires that parents of a child with a disability be afforded an opportunity to participate in meetings with respect to the educational placement of the child. 34 C.F.R. Sect. 300.501(b)(1); 34 C.F.R. Sect. 513(a); 20 U.S.C. Sect. 1414(e). To this end, school districts have a duty to ensure that parents meaningfully participate in an IEP review. Paolella ex rel. Paolella v. Dist. of Columbia, 210 F. App'x 1, 3 (D.C. Cir. 2006); A.M. v. Dist. of Columbia, 2013 WL 1248999 (D.D.C. Mar. 28, 2013); T.T. v. Dist. of Columbia, 2007 WL 2111032 (D.D.C. July 23, 2007).

As a result, a school district must provide certain notices to parents and ensure that such notice "is in the native language of the parents, unless it clearly is not feasible to do so." 20 U.S.C. Sect. 1415(b)(4), (d)(2); 34 C.F.R. Sect. 300.503(c). And, for IEP meetings, a school district "must take whatever action is necessary to ensure that the parent understands the proceedings of the IEP Team meeting, including arranging for an interpreter for parents with deafness or whose native language is other than English." 34 C.F.R. § 300.322(e).

The record indicates that DCPS provided the Student and Petitioners with IEP meetings that were largely held in Spanish with the Mother, a native Spanish speaker who does not speak English. At the meetings, a bilingual DCPS staff member (who was fluent in both English and Spanish) translated what was said by English-only speakers at the meetings into Spanish. The staff member also interpreted what was said by Spanish-only speakers at the meetings for the English speakers in the room.

However, the bilingual staff members who interpreted for the Mother at these meetings was not a certified interpreter. Hearing officers have held that this issue alone can be significant enough to constitute a violation of 34 C.F.R. Sect. 300.322(e) requirements. Oberlin City Schs., 119 LRP 24350 (SEA OH 05/17/19). Moreover, all of the documents used at the meetings (including all of the IEPs, the evaluations they were based on, and the Student's progress reports) and all of the meeting notices (including Prior Written Notices) were written for Petitioners in English. DCPS suggested that Petitioners knew what was in the IEPs, and noted that it provided them with a summary of the results of the Student's evaluations in Spanish. DCPS also argued that it has no duty to provide Spanish-only parents with evaluations in Spanish, pointing to Letter of Boswell, 49 IDELR 196 (OSEP 2007), which finds that "translations of *all* IEP documents *may* not be a requirement under the IDEA" (emphasis added).

But DCPS witnesses also said that these evaluations, especially the psychological evaluation by Witness E and the speech and language evaluation by Speech-Language Pathologist A, drove their May, 18, 2020 decision to change the Student's IEP hours and send him/her to a new school. Though Witness J and other DCPS witnesses testified that the Mother fully understood what was happening, and changed her mind after agreeing to the new IEP at the May 18, 2020, meeting, Witness B convincingly testified that the Mother never fully understood why the school district wanted to move the Student to a new school. It was important for Petitioners to be able to read these evaluations for themselves, so that they could understand why the Student needed to be moved from the school, where s/he had been comfortable for years, to a different school with a different character.

DCPS insisted that it went beyond its legal obligation to help Petitioners understand the change of schools and that it held additional meetings with Petitioners to clarify its position. It is true that additional meetings were held with Petitioners in December, 2019, and June, 2019, to explain the changes in the IEP and the school. But then DCPS sent Petitioners a five-page, single-spaced Prior Written Notice in English, not Spanish. Confusing matters more for Petitioners, School A then appeared to change its mind by sending them a schedule for School A, much as Petitioners wanted. School A then cut off the Student's access to virtual instruction, leading Petitioners and the Student to be even more confused and upset about the process.

As Petitioners pointed out, courts and hearing officers have found that school districts can be liable for the failure to provide non-English speakers with documents in their own language. Y.A. ex rel. S.G. v. New York City Department of Education, 69 IDELR 76 (S.D.N.Y. 2016) (failure to provide due process notices in a parent's native language plausibly deprives a parent of her procedural rights under IDEA); M.G. v. New York City Dep't of Educ., 15 F. Supp. 3d 296, 307 (S.D.N.Y. 2014) (same); Oakland Unified School District, 115 LRP 30632 (SEA CAL 2015) (district failed to provide a parent with translated copies of assessments and IEPs); Philadelphia City Sch. Dist., 115 LRP 36509 (SEA PA 05/26/15) (district should have also provide the parent translated documents in her native language to promote constructive dialogue during the IEP meeting). Moreover, in Letter to Boswell, OSEP found that translations could provide significant benefits and that "providing the parents with written translations of the IEP documents may be one way for a school district to demonstrate that the parent has been fully informed of their child's educational program."

It is noted that DCPS did not provide a clear reason why the IEPs, evaluations, and notices were all provided to Petitioners in English, or why School A sent Petitioners an email indicating that the Student could attend School A for the 2020-2021 school year. Accordingly, this Hearing Officer finds that DCPS significantly impeded Petitioners' opportunity to participate in the creation of the December 16, 2019 and May 18, 2020 IEPs, thereby denying the Student a FAPE. 34 C.F.R. Sect. 300.513(a)(2).

3. Did Respondent fail to provide Petitioners with the Student's educational records in a timely manner in their native language in response to their records request(s)? If so, did Respondent violate 34 U.S.C. Sect. 300.322 (e)-(f), 34 C.F.R. Sect. 300.501, 34 C.F.R. Sect. 300.503(c), 34 C.F.R. Sect. 300.613, and related authority? If so, did Respondent deny the Student a FAPE?

Petitioners contended that they did not receive timely access to the Student's educational records. An educational agency or institution must grant parents access to the educational records of their children no more than forty-five days after the request. 20 U.S.C. Sect. 1232g(a)(1)(A). The IDEA regulations provide in pertinent part: "(t)he parent of a child with a disability must be afforded, in accordance with the procedures of Sects. 300.613 through 300.621, an opportunity to inspect and review all education records with respect to -- the identification, evaluation, and educational placement of the child and the provision of FAPE to the child." 34 C.F.R. Sect. 300.501(a). "Record" means any information recorded in any way, including, but not limited to, handwriting, print, computer media, video or audio tape, film, microfilm, and microfiche. 34 C.F.R. Sect. 99.3.

Petitioners requested copies of the Student's educational records by email on or about September 28, 2020, and received a large zip file containing the Student's educational records on November 24, 2020. Respondent's response was notably

comprehensive and included records going back to 2012. Witness C testified that, nevertheless, some of the Student's records were missing, such as the Spanish translation of the Student's Prior Written Notices. However, it is not clear that such documents even exist. Petitioners also contended that these documents were not sent to them in a timely fashion, but there is nothing in the record to clearly indicate that DCPS's brief delay affected Petitioners or the Student in any way. Similarly, in Simms v. District of Columbia, No. 17-CV-970 (JDB/GMH), 2018 WL 4761625 (D.D.C. July 26, 2018), report and recommendation adopted, No. CV 17-970 (JDB)(GMH), 2018 WL 5044245 (D.D.C. Sept. 28, 2018), the court found that the parent did not clearly and specifically link her requests for educational records to the student's education and dismissed the parent's claim that DCPS denied the student a FAPE because educational records were not produced. The court opined that, "Plaintiff has not explained how, precisely, the other missing evidence—progress reports, additional report cards, counseling tracking forms, and the like—were necessary to her preparation for the due process hearing. Rather, she paints in the broadest of strokes, asserting that the evidence 'would have provided the basis for services' and that they 'related to the identification, evaluation, and educational placement.'" 2018 WL 4761625, at *7. The court explained that the plaintiff's allegations established a procedural violation of the IDEA, but that there is no basis to believe that procedural inadequacies compromised the pupil's right to an appropriate education, seriously hampered the parents' opportunity to participate in the formulation process, or caused a deprivation of education benefits. Id. This claim must therefore be dismissed.

4. At the April, 2020, and May, 2020, IEP meetings, did Respondent provide the Student with a program in the Student’s least restrictive environment when increasing service hours on the Student’s 2020 IEP? If not, did Respondent violate 34 C.F.R. Sect. 300.101, 34 C.F.R. Sect. 300.114, and related authority? If so, did Respondent deny the Student a FAPE?

Petitioners contended that the IEP improperly reduced the Student’s access to typically developing peers by providing for twenty hours of specialized instruction, without any inclusion or “push-in” classes.

An IEP developed through the IDEA’s procedures must be reasonably calculated to enable the child to receive additional benefits. Rowley, 458 U.S. at 208. The IEP should be both comprehensive and specific and targeted to the Student’s “unique needs.” McKenzie v. Smith, 771 F.2d 1527, 1533 (D.C. Cir. 1985); N.S. ex rel. Stein v. District of Columbia, 709 F. Supp. 2d 57, 60 (D.D.C. 2010); 34 CFR Sect. 300.320(a)(2)(B) (the IEP must contain goals that meet each of the child’s educational needs that result from the child’s disability); 34 CFR Sect. 300.324(a)(1)(iv) (the IEP must address the academic, developmental, and functional needs of the child). In 2017, the Supreme Court addressed a split amongst the circuit courts regarding what the IDEA means when it requires school districts to provide an “appropriate” level of education to children with disabilities. Endrew F. ex rel. Joseph F. v. Douglas County School Dist. RE-I, 137 S. Ct. 988 (2017). In Endrew F., the Court held that an IEP must be “reasonably calculated to enable a child to make progress appropriate in light of the child’s circumstances.” Id. at 1001. The Court made clear that the standard is “markedly more demanding than the ‘merely more than de minimis’ test” applied by many courts.” Id. at 1000.

The IEP must also provide students with instruction in their least restrictive environment. Sch. Comm. of Town of Burlington v. Dep’t of Educ. of Mass., 471 U.S.

359, 373 (1985). Accordingly, in formulating an appropriate IEP, an IEP team must “be mindful of IDEA’s strong preference for ‘mainstreaming,’ or educating children with disabilities ‘[t]o the maximum extent appropriate’ alongside their non-disabled peers.” Gagliardo v. Arlington Cent. Sch. Dist., 489 F.3d 105, 108 (2d Cir. 2007) (quoting 20 U.S.C. Sect. 1412(a)(5)); Lachman v. Ill. State Board of Educ., 852 F.2d at 295 (“[IDEA’s] requirement that mainstreaming be provided to the maximum extent appropriate indicates a very strong congressional preference”).

Petitioners did not emphasize this claim in their closing argument and did not present caselaw in support of the contention that the Student’s IEP provided the Student with inappropriate specialized instruction hours or failed to adequately consider the Student’s right to his/her least restrictive environment. Nor did Petitioners present any credible or persuasive testimony or evidence to support their position that the Student did not need the recommended twenty hours of specialized instruction, or that the specialized instruction should have, or could have, been provided inside general education. Respondent, on the other hand, presented eight different expert witnesses, all of whom are educational professionals, and all of whom testified that School A tried its best to keep the Student in a general education setting but that it was not working despite intense interventions. Teacher F, who came across credibly, taught the Student in general education classes and testified that the Student was unable to succeed despite “a huge amount of supports.” Teacher J agreed, testifying that the Student struggled even when in a small group of four to five children, and needed three students in the room (with one teacher) in order to succeed.

Petitioners failed to respond to these witnesses, whether during the presentation of their case in chief or during their presentation on rebuttal. Petitioners have accordingly failed to present a prima facie case on this claim, which must therefore be dismissed.

6. Did Respondent fail to provide the Student with functional access to instruction for more than ten school days to enable the Student to participate in the general education curriculum and make progress towards meeting the IEP goals? If so, did Respondent deny the Student a FAPE?

As was made clear by Petitioners' motion to expedite, this claim is based on 34 C.F.R. Sect. 300.530(b), which states that school personnel may remove a child with a disability who violates a code of student conduct (that is not a manifestation of his or her disability) from his or her current placement for more than ten days, if the student continues to receive educational services to enable the child to continue to participate in the general education curriculum. Such a child is also entitled to receive, as appropriate, a functional behavioral assessment and behavioral intervention services designed to address the behavior violation so that it does not recur.

Petitioners do not claim that school personnel removed the Student from school because of his or her violation of a code of conduct. Petitioners instead suggested that the Student was excluded from School A when s/he was denied access to his/her online instruction at School A, thereby missing school time until DCPS manually enrolled the Student at School B and Petitioners allowed the Student to attend School B. However, Petitioners present no authority to suggest that 34 C.F.R. Sect. 300.530(b) applies to a fact pattern that does not involve exclusion from school because of a violation of a code of conduct. This claim must be dismissed.

RELIEF

As relief, Petitioners seek an evaluation to determine an appropriate compensatory education award, an independent educational evaluation, copies of the Student's educational records in Spanish, and an order returning the Student to School A.

When school districts deny students a FAPE, courts have wide discretion to ensure that students receive a FAPE going forward. As the Supreme Court stated, the statute directs a hearing officer to “grant such relief as [it] determines is appropriate.” Burlington, 471 U.S. at 371; B.D. v. District of Columbia, 817 F.3d 792, 797–98 (D.C. Cir. 2016).

Under the theory of compensatory education, courts and hearing officers may award “educational services to be provided prospectively to compensate for a past deficient program.” Reid v. District of Columbia, 401 F.3d 516, 521-23 (D.C. Cir. 2005). An award of compensatory education aims to put a student in the position s/he would have been in absent the FAPE denial and “must be reasonably calculated to provide the educational benefits that likely would have accrued from special education services the school district should have supplied in the first place.” B.D., 817 F.3d at 797-798 (quoting Reid, 401 F.3d at 524). The B.D. court emphasized that, in determining the “complicated work” of fashioning such a remedy, the hearing officer should play close attention to the assessments of the student. Id.

Petitioners did not submit a written or oral compensatory education plan and did not suggest a possible compensatory education award for this Student. Instead, Petitioners requested an evaluation to determine the appropriate award for the Student. Under the circumstances, this Hearing Officer will order an evaluation so that an independent evaluator can determine the appropriate compensatory education award for

the Student. This approach was explicitly adopted by the District of Columbia Circuit Court of Appeals in B.D., where the court stated that if further assessments are needed, “the district court or hearing officer should not hesitate to order them.” Id. Such evaluation shall be conducted by an expert in special education assessments who has at least ten years of professional experience in the field of special education. The parties shall work together, cooperatively, to select such expert. Such expert must not have an actual or perceived bias that might favor one party. Such expert shall then, within ninety days of the date of this HOD, recommend an appropriate compensatory education award for the FAPE denial corresponding to Issue #2.

Petitioners’ request to provide Petitioners with the Student’s educational records in Spanish was not clarified or discussed during closing argument. The record suggests that the Student’s recent evaluations and current IEP have by now been translated into Spanish for Petitioners, who did not explain what other documents they are seeking. Similarly, Petitioners’ request for an independent educational evaluation was not clarified or discussed during closing argument. These requests for relief must be denied. Finally, since Issue #1 was resolved in favor of Respondent, there is no basis to order that the Student attend School A for the 2020-2021 school year.

VII. Order

As a result of the foregoing, the following is hereby ordered:

1. Respondent shall fund a compensatory education evaluation for the Student. The evaluation report shall be completed within ninety days of this HOD. The evaluator selected for this evaluation shall have at least ten years of professional experience. The parties shall work together to select such expert, who must not have an

actual or perceived bias that might favor one party or the other. Such expert shall then recommend an appropriate compensatory education award for the Student corresponding to the FAPE deprivation found herein;

2. All other requests for relief are denied.

Dated: February 2, 2021

Michael Lazan
Impartial Hearing Officer

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

VIII. Notice of Appeal Rights

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

Dated: February 2, 2021

Michael Lazan
Impartial Hearing Officer