

District of Columbia
Office of the State Superintendent of Education
Office of Dispute Resolution
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OSSE
Office of Dispute Resolution
February 12, 2021

Parents, on behalf of Student,¹)	
Petitioners,)	
)	Hearing Dates: 12/9/20; 12/17/20; 1/22/21
v.)	Hearing Officer: Michael S. Lazan
)	Case No. 2020-0178
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 Multiple Disabilities (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 8, 2020. The Complaint was filed by the Student’s parents (“Petitioners”). On October 22, 2020, Respondent filed a response. The resolution period expired on November 7, 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

A prehearing conference was held on November 12, 2020. Attorney A, Esq., counsel for Petitioners, appeared. Attorney B, Esq., counsel for Respondent, appeared. A prehearing conference order was issued on November 17, 2020, summarizing the rules to be applied in the hearing and identifying the issues in the case. The prehearing conference order was revised on November 18, 2020. The parties agreed to the hearing dates of December 9, 2020, and December 17, 2020.

The hearing was conducted through the Microsoft Teams videoconferencing platform, without objection. Petitioners were again represented by Attorney A, Esq. Respondent was again represented by Attorney B, Esq. This was a closed proceeding. The matter proceeded to trial on December 9, 2020, and December 17, 2020, but the parties were not able to finish their presentations because of extensive testimony and issues. On December 21, 2020, Petitioners moved to extend the Hearing Officer Determination (“HOD”) due date from December 22, 2020, to February 12, 2021. Per prior agreement between the parties, DCPS consented to this motion, and an order was issued on December 22, 2020, extending the timelines for the HOD to February 12, 2021. The matter resumed and ended with oral closing arguments on January 22, 2021.

During the proceeding, Petitioners moved into evidence exhibits P-1 through P-24. Respondent’s objections were overruled, and Exhibits P-1 through P-24 were admitted. Respondent moved into evidence exhibits R-1 through R-18, including R-8a, R-8b, R-9a, R-12a, R-13a, and R-13b. Objections were overruled except for exhibit R-18. Exhibits R-1 through R-17, including R-8a, R-8b, R-9a, R-12a, R-13a, and R-13b, were admitted.

Petitioners presented as witnesses, in the following order: Witness A, principal at School C (expert in special education programming and placement); the Student's mother; Witness B, a special education teacher at School C; and Witness C, a consultant (expert in special education programs and placements for students with autism and Attention Deficit Hyperactivity Disorder ("ADHD")). Respondent presented as witnesses, in the following order: Witness D, a school psychologist (expert in school psychology, evaluation, and eligibility for students with disabilities); Witness E, a speech-language pathologist (expert in speech-language pathology); Witness F, a clinical social worker (expert in social and emotional behavior, assessment, and Individualized Education Program ("IEP") programming and placement); Witness G, an education support specialist (expert in special education programming and placement, particularly for students with autism); Witness H, a speech-language pathologist (expert in speech and language pathology); Witness I, a board-certified behavior analyst ("BCBA") (expert in special education programming and placement with an emphasis on students with autism and applied behavioral analysis ("ABA") principles); and Witness J, a special education specialist for Respondent's Centralized IEP Support Unit ("CIEP") (expert in special education programming and placement).

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 fail to provide the Student with an appropriate IEP on or about April 20, 2020, and October 6, 2020? If so, did Respondent act in contravention of 34 C.F.R. 300.320, Endrew F. v. Douglas County School District, 137 U.S. 988 (2017), and Hendrick Hudson Bd. of Educ. v. Rowley, 458 U.S. 176

(1982)? If so, did Respondent deny the Student a Free Appropriate Public Education (“FAPE”)?

Petitioners contended that the Student needed more specialized instruction hours than the IEP recommended and required a “full-time” setting. Petitioners also contended that the IEP did not require the Student to attend classes with an appropriate student-to-teacher ratio, a structured, small setting in all classes and periods, sufficient assistance during transitions, or appropriate peer groupings.

2. Did Respondent fail to allow Petitioners to meaningfully participate in the IEP meeting for the Student on or about April 20, 2020? If so, did Respondent violate 34 C.F.R. Sect. 300.501 and related provisions? If so, did Respondent deny the Student a FAPE?

Petitioners contended that, at the IEP meeting, Respondent did not describe which “specialized program” the Student was to attend (i.e., “SLS,” “CES,” or “BES”).

As relief, Petitioners seek an order directing Respondent to pay for the Student’s tuition at School C during the 2020-2021 school year, plus fees, costs, and related relief (or reimburse Petitioners for the money they pay to School C for such expenses).

V. Findings of Fact

1. The Student is an X-year-old who is eligible for services as a student with Multiple Disabilities (Autism Spectrum Disorder, Other Health Impairment). The Student is relatively quiet with scattered presentation and skills, is easily distracted during instruction, and can be off-task unless s/he is prompted. The Student also can get lost during transitions between classes. The Student’s level of engagement can be a function of how much interest s/he has in a subject. Testimony of Witness A. At times, the Student does not follow directions, rushes through his/her schoolwork so that s/he can have free time, and engages in preferred activities such as doodling or playing computer

games. The Student may also mutter under his/her breath or roll his/her eyes when s/he is prompted to shift back to non-preferred activities. Still, the Student is generally redirectable, and does not exhibit disruptive behaviors in the classroom. P-17-16-18.

2. Processing verbal information is the Student's most significant weakness. Testimony of Witness D. The Student is "internally distracted." The Student may appear to listen during class, but will be unable to answer questions about the content discussed. The larger the group, the greater this issue is for the Student. To keep the Student interested in the work, instruction needs to be broken down into concrete, individual steps, with visuals, frequent check-ins, and feedback. Testimony of Witness B.

3. During the 2018-2019 school year, the Student attended School A, a DCPS public school. The Student's January 11, 2019, IEP provided for 15.5 hours of specialized instruction per week outside general education, with sixty minutes of speech-language pathology per month outside general education, 120 minutes of behavioral support services per month outside general education, sixty minutes of speech-language pathology per month inside general education, and thirty minutes of consultation services per month for occupational therapy. R-3.

4. On May 10, 2019, an IEP meeting was held for the Student. In the corresponding IEP, the Student's specialized instruction hours were increased to twenty hours per week, with the same related services as in the January 11, 2019, IEP. R-4.

5. The Student attended School C for the 2019-2020 school year. At School C, the Student received instruction with an approximate student-to-teacher ratio of six to one, with smaller ratios in academic classes. The Student received core classes lasting fifty minutes each, with a daily "specials" block and thirty minutes total for lunch and

recess. There are seven “blocks” of classes per day, not including lunch. Testimony of Witness A.

6. At School C, academic teachers are certified in special education, and “specials” teachers are certified in their subject matter areas. The school integrates social workers into drama and physical education classes, and an occupational therapist into art classes. Students are provided with smaller group instructional pods and are generally instructed in groups of three or four, which helps prevent the Student from straying to off-topic websites or reading material. The school serves students with a wide range of disabilities, including learning disabilities, autism spectrum disorder, emotional disturbance, intellectual disabilities, and hearing impairments. Over half of the students at the school are students with autism spectrum disorder. Testimony of Witness A.

7. At School C, the Student shares his/her core classes with the same group of peers. Academically, the Student is higher-functioning than some of these peers. The school “embeds” three different social skills programs into instruction, designed for students who have issues with peers, pragmatic language, and executive functioning, among other areas. Instruction is provided at grade level, with support. Testimony of Witness A. In reading, with only one teacher assistant and nine children in the classroom, students need to be checked more often than in English language arts (“ELA”), which has two teaching assistants. Testimony of Witness B. The Student participates in group counseling sessions with a school social worker on a weekly basis. The Student has made some progress in counseling: s/he has developed greater social connections, has become more inclined to ask questions, and has become less focused on preferred topics. P-16-16. The Student needs support in all classes because s/he has

shown inconsistent interest or willingness to participate, and because the Student has responded to prompts. Testimony of Witness A; Testimony of Witness B.

8. Since the inception of the COVID-19 pandemic, all learning has been virtual at School C. Students have been receiving services every day from 9:00 A.M. to 3:00 P.M., including “core classes,” skills class, “specials,” an additional math class, and “asynchronous” assignments after 1:40 P.M. The student-to-teacher ratio in the classes is six to one, but actual class attendance is usually lower. Both a teacher and an assistant are in the virtual room with the students. Virtual classes are thirty minutes long.

Testimony of Witness A.

9. The Student’s mother has been called by School C staff because the Student was not logged onto the computer for instruction. Testimony of Mother. During virtual instruction, Witness B would check on the Student through the Google classroom application to see if the Student was actually working. If the Student was not doing any work, Witness B would send a message to the Student. The Student had to be checked on more often during virtual instruction. Testimony of Witness B.

10. The Student was subject to testing in the fall of 2019. On “NWEA MAP” mathematics testing, the Student scored 219, at the 41st percentile. On NWEA MAP reading testing, the Student scored 206, at the 29th percentile. On an “RIT” reading assessment, the Student scored 206, at the 29th percentile. P-1-4-5.

11. Witness F observed the Student in or about February, 2020, in art, science, and physical education classes. The Student was engaged for eighty-four percent of the time during these observations. During science class, the Student would surreptitiously slip off to a page that was not part of class activities. During physical education, the

Student played around but also followed instructions well. The observation of the Student in art class was about fifteen minutes long. Some of the Student's peer models were lower-functioning than him/her, while others seemed to be similar. Witness F also interviewed the Student's teachers, who indicated that the Student could generally do the work and, though s/he could be inattentive, was redirectable when off task. The social worker at School C was also interviewed. The social worker indicated that the Student did not have severe behavior issues or concerns and needed to expand his/her capacity to deal with social relationships. In every observation, there were nine or fewer children and at least two staff members in the room. Testimony of Witness F.

12. An evaluation of the Student was conducted at Center A on February 12, 2020. The evaluation consisted of a parent interview, a child interview, and a variety of testing, including the Revised Child Anxiety and Depression Scale ("RCADS"), the Wechsler Intelligence Scale for Children-Fifth Edition ("WISC-V"), select subtests of the Wide Range Assessment of Memory and Language-Second edition ("WRAML2"), the Behavior Rating Inventory of Executive Function-Second Edition ("BRIEF-2"), select subtests of the Delis Kaplan Executive Function System ("D-KEFS"), the Conners Continuous Performance Test-Third Edition ("CPT-3"), the Gilliam Autism Rating Scale-Third Edition ("GARS-3"), the Conners Comprehensive Behavior Rating Scale ("Conners CBRS"), the Children's Depression Inventory-Second Edition ("CDI-2"), the Multidimensional Anxiety Scale for Children-Second Edition ("MASC-2"), and the Vanderbilt Behavioral Rating Scales. The Student's counselor, special education teacher, and mathematics/homeroom teacher completed the ADHD Rating Scale-V. The Student's counselor and special education teacher endorsed four of nine symptoms of

inattention, including “does not seem to listen when spoken to directly,” “does not follow through on instructions and fails to finish work,” “has difficulty organizing tasks and activities,” and “is easily distracted.” On the GARS-3, the Student fell into the probable range for autism spectrum disorder. Intelligence testing on the WISC-V indicated that the Student’s general cognitive abilities fell into the average range, with verbal comprehension and working memory abilities appearing to be relative weaknesses. The Student’s performance suggested a high likelihood of disorder characterized by attention deficits, such as ADHD. The Student’s performance also suggested that his/her ability to understand mental functions (intention, deception, emotion, etc.) and the concept that others have their own thoughts and feelings fell well below age-based expectations. P-8.

13. A speech-language pathology report for the Student was written by Center A on or about February 15, 2020. The report notes indicated that the Student’s receptive skills were average but that the Student’s expressive language skills were in the “severely below average” range because the Student had difficulty with tasks such as formulating sentences and using appropriate grammatical structure. The evaluator expressed a “moderate level of concern” for autism spectrum-related symptoms, and found that the Student met criteria for a diagnosis of autism spectrum disorder with accompanying language impairment. P-9.

14. At the time of the Student’s April 20, 2020, IEP meeting, s/he wrote in “run-on” sentences, had issues with structure, produced the minimum work, and had difficulty coming up with ideas. The Student was below grade level in reading, approaching grade level in mathematics, and below level in writing. Testimony of Witness B; Testimony of Witness A. Attending the IEP meeting, which was conducted

through the Microsoft Teams platform, were Petitioners, Witness J, Witness H, a general education teacher, an occupational therapist, Witness A, Witness B, and Petitioners' lawyer. P-1-1. There was no mention of the Center A evaluations at the meeting. Petitioners were asked about their concerns and they expressed disagreement with the IEP team's recommendations because the Student was not recommended for a "full-time" program. Testimony of Witness J. At the meeting, Witness B said that the Student would be either internally distracted or distracted by something else, unless one directly engaged him/her. Witness B indicated that educators had to engage the Student frequently to keep him/her on topic or on task. Witness B also said that the Student liked to look at memes on a Chromebook, and that Witness B had to sit directly across from the Student to keep him/her engaged. Witness A said that the Student had made some progress in reading, but that the Student's work output was sporadic without a very low student-to-teacher ratio. Witness B also said that the Student was capable of performing at a higher level, and would fall through the cracks without frequent checks with engagement and understanding. P-2-5. The Student's mother said that, when the Student looked at a computer, "you think [s/he] is doing work" but that she had to block the Student from watching videos instead of working. Witness B said that the "good thing" about Zoom classes is that the school uses "Google classroom," meaning that Witness B can actually see the Student typing on his/her work assignment. Witness B has therefore monitored the Student closely online, sending him/her chat messages when s/he is off-task. P-2-6

15. The Student's IEP included "Area of Concern" sections and corresponding goals in mathematics, reading, written expression, communication/speech and language,

emotional, social and behavioral issues, and motor skills/physical development. The IEP recommended specialized instruction outside general education for twenty hours per week with related services, including 180 minutes of speech-language pathology per month outside general education, 120 minutes of behavioral support services per month outside general education, and consultation services in both occupational therapy and speech-language pathology for thirty minutes per month each. The “Other Classroom Aids and Services” section of the IEP provided for teacher/staff prompts and adult support in navigating social relationships, previewing activities and transitions, using a multi-modal approach when teaching new information, reinforcing eye contact when giving instructions, using visuals to help the Student maintain focus and attention, and using a graphic organizer and a word bank. The “Classroom Accommodations” section of the IEP recommended clarification, repetition of directions, work presented in repeated and simplified manner, preferential seating, a location with minimal distractions, extended time, breaks, and flexibility in scheduling. P-1.

16. The IEP indicated that the Student’s behavior impeded his/her learning or that of other children, and that the Student benefitted from the “PBIS” system, token economy, behavior trackers, and individualized preferred incentives to assist in engaging him/her in classroom instruction on a consistent basis. The IEP stated that the Student presented with a communication delay related to weaknesses in language comprehension and expressive language and semantics, and that his/her depressed language comprehension skills may have impacted his/her ability to comprehend classroom lectures and execute directions necessary to complete academic-related tasks. The IEP indicated that the Student sometimes missed explanations of multi-step processes in

solving math problems due to his/her high level of inattentiveness. The IEP indicated that the Student was able to write with correct pronunciations and grammar most of the time, and wrote with fairly good detail, but was in the below average range in testing. The IEP indicated that the Student needed to improve the use of vocabulary in his/her writing, revise sentences to make sense, compose more complex sentence structures, and use the planning process to elaborate and organize his/her ideas. The IEP noted that the Student read primarily in large phrases or word groups with no expressive interpretation or pausing guided by the author's meaning or punctuation. The IEP also noted that the Student had decoding issues and difficulty analyzing texts, and that the Student did not self-correct errors. P-1.

17. The sections of the IEP relating to the Student's levels of performance and goals were identical to those written by School C for the Student's then-current "Diagnostic Prescriptive Goals" ("DPG"). Testimony of Witness A.

18. On or about May 4, 2020, Petitioners were told that the DCPS "locations team" was considering placing the Student in a "High Functioning Autism" ("HFA") classroom, which is a type of "Communication and Education Support" ("CES") classroom. P-19; Testimony of Mother.

19. As a result of emails from Petitioners, a phone meeting was set up with the locations team. At the meeting were Witness I, Witness G, the Student's mother, Witness C, Attorney A, and another DCPS staff member. The Student's mother and her representatives asked questions, including about class size, but Witness I did not know these specifics about the classrooms. Testimony of Witness J. At the meeting, DCPS staff described the program generally. The Student's mother was allowed to ask

questions and expressed her disagreement with the recommendations because the Student was not placed in a “full-time” program. Testimony of Witness I.

20. On June 15, 2020, Petitioners sent Respondent a unilateral placement notice indicating that they were placing the Student at School C for the 2020-2021 school year. P-20.

21. The HFA classroom proposed by Respondent for the Student contains children who are the Student’s neurotypical peers. This classroom is geared toward students who want a diploma and who can receive grade-level instruction with modifications. The classroom has a majority of students with autism spectrum disorder, though there are also students who are eligible for services as a result of other designations. The classroom has one special education teacher and two assistants for no more than eight students. As of the date of testimony, the proposed HFA CES class had three students. The classroom provides structured instruction through the ABA methodology, which is embedded into the school day, and uses differential reinforcement techniques. A BCBA oversees the instruction and creates and implements treatment plans, providing feedback and ongoing monitoring on the success of the plans, which primarily use ABA techniques. Visual supports are used in the room, as are social skills instruction, academic modifications, and the breaking down of instruction and demands. There is also an emphasis on daily living activities. Staff use simple, concrete language, prompting, and small-group instruction. The HFA CES classroom incorporates academic classes, including ELA, mathematics, science, and social studies. There are ninety minutes per period for virtual instruction, and sixty to eighty minutes per period for in-person classes. The schedule also contains “specials,” including art, music, and physical

education, and lunch and electives. A teaching assistant accompanies students when they are outside the self-contained environment; the teaching assistant collects behavioral and academic data and provides prompts and supports. General education “specials” classrooms have eighteen to twenty-five students. The lunch room has fifty to sixty students. If a student has difficulty accessing “specials,” DCPS staff may provide alternate arrangements. Testimony of Witness I; Testimony of Witness G.

22. HFA CES classrooms have special characteristics that make them different than other CES classrooms, which are geared to lower-functioning children and provide more remedial instruction. All CES classrooms are different than the BES and SLS support classrooms at DCPS, with different interventions and different student-to-teacher ratios. The DCPS locations team would choose between the CES, BES, and SLS classrooms for the Student. Testimony of Witness G.

23. The Student’s September, 2020, DPG from School C reported on the Student’s progress during the 2019-2020 school year. The DPG indicated progress in most areas, including in demonstrating flexibility interacting with a variety of peers and adults, and the ability to have longer conversations. The Student was doing a better job of asking clarifying questions and making follow-up comments while having conversations with peers. The report indicated that the Student needed prompts to remain focused. The DPG indicated that the Student “continues to have good conversations with peers throughout the school day” but usually the conversations were about topics of high interest to the Student. The Student would try to get the topic back to something more preferred, or be quiet, or read an off-task book when in an unstructured setting. P-16.

24. An “Analysis of Existing Data” (“AED”) meeting was held on July 22, 2020, after Respondent learned that an evaluation of the Student had been conducted at Center A. At the AED meeting, Respondent’s staff did not see the need for additional testing. Testimony of Witness D. The team discussed the assessments from Center A, and discussed the Student’s current work at School C. Witness A stated that mathematics was a relative strength for the Student, and that when the Student was uncomfortable in his/her environment or did not feel accepted by or part of the group, s/he became more internal. R-9A; Testimony of Witness A.

25. On or about July 28, 2020, a “Review of Independent Evaluation” of the Student was written by Witness D. The document indicated that the Student progressed in math at School C. The document included an interview with a teacher who reported that the Student was able to be redirected “where it appears it is [the Student’s] choice. If not, [the Student] has been reported to challenge the attempts at redirection by questioning.” The teacher reported that the Student was more likely to be disengaged with larger groups but had not displayed physically aggressive behaviors. R-12.

26. On or about September 8, 2020, an observation of the Student was conducted by Witness E, who saw the Student put a blanket over his/her head on and off for about five minutes during part of the instruction, and also put his/her head down on the desk. The Student was then physically prompted to sit up, which caused him/her to participate. The class was presented with a visual schedule, and the Student volunteered to answer a question. The class included work on vocabulary words, a stretch break, and a game of “Virtual Jeopardy” in a breakout room. The Student was able to participate in the instruction and complete the assigned vocabulary work, but tended to give brief

responses to questions. There were nine students in the room, with two teachers. R-13-7-9; Testimony of Witness E.

27. Teacher interviews were also conducted by Witness E. One teacher, Witness B, indicated that the Student had difficulty attending on a one-to-one basis. The teachers indicated that the Student sometimes had difficulty attending in groups, during lengthy instruction, and understanding curriculum. Teacher A indicated that the Student needed additional wait time before answering and had issues with expressing ideas in an organized, coherent manner. Teacher A also indicated that the Student could follow routines and use guided notes, but rushed, looked at off-topic items, and was not attentive to detail. R-13-8-R-13-13; Testimony of Witness E.

28. Witness J conducted a virtual observation of the Student at School C during the 2020-2021 school year. To Witness J, the Student seemed to be bored and had his/her head down sometimes. However, when the Student was called upon to read, the Student responded to questions. Other children in the classroom had more difficulty with the work than the Student did. The Student's fluency level was higher than the level of the other children in the room. Testimony of Witness J.

29. On September 16, 2020, Respondent convened an eligibility meeting and determined that the Student was eligible for services without any change in eligibility category. R-13A. There was discussion about the Student's placement at the meeting. R-13A. An IEP meeting was then held on October 6, 2020. Attending were the Student's mother, Witness J, Witness E, a general education teacher, a social worker, an occupational therapist, a resolution specialist, Attorney B, Witness A, Witness B, and a social worker from School C. At the meeting, the Student's mother indicated that the

Student was “doing great” but had challenges with online instruction. Witness B stated that the Student’s reading level had increased. The School C social worker indicated that she saw the Student individually in the spring and was now seeing the Student in a group with one other student. The social worker indicated that the Student was making progress with asking follow-up questions, was starting to participate in conversations about nonpreferred topics, and was starting to make connections with peers. The parties continued to disagree on specialized instruction hours. An amended IEP was issued on October 13, 2020, with changes to the present levels of performance in “Emotional, Social and Behavioral Development” and “Reading,” the “PBIS” box, and to goals. The IEP was otherwise unchanged. P-5; P-7.

VI. Conclusions of Law

The burden of proof in District of Columbia special education cases was changed by the local legislature through the District of Columbia Special Education Student Rights Act of 2014. That burden is expressed in statute as the following: “Where there is a dispute about the appropriateness of the child’s individual educational program or placement, or of the program or placement proposed by the public agency, the public agency shall hold the burden of persuasion on the appropriateness of the existing or proposed program or placement” provided that “the party requesting the due process hearing shall retain the burden of production and shall establish a *prima facie* case before the burden of persuasion falls on the public agency.” D.C. Code Sect. 38-2571.03(6)(A)(i). Accordingly, on Issue #1, relating to the appropriateness of the Student’s IEP, the burden of persuasion is on Respondent if Petitioners present a *prima*

facie case. On Issue #2, relating to the appropriateness of the IEP meeting itself, the burden of persuasion is on Petitioners.

1. Did Respondent fail to provide the Student with an appropriate IEP on or about April 20, 2020, and October 6, 2020? If so, did Respondent act in contravention of 34 C.F.R. 300.320, Andrew F. v. Douglas County School District, 137 U.S. 988 (2017), and Hendrick Hudson Bd. of Educ. v. Rowley, 458 U.S. 176 (1982)? If so, did Respondent deny the Student a FAPE?

Petitioners contended that the Student needed more specialized instruction hours than the IEP recommended and required a “full-time” setting. Petitioners contended that the IEP did not require the Student to attend classes with an appropriate student-to-teacher ratio, a structured, small setting in all classes and periods, sufficient assistance during transitions, or appropriate peer groupings.

The IDEA was enacted to “ensure that all children with disabilities have available to them free appropriate public education that emphasizes special education and related services designed to meet their unique needs and prepare them for further education, employment, and independent living.” M.G. v. Dist. of Columbia, 246 F. Supp. 3d 1, 7 (D.D.C. 2017) (citing 20 U.S.C. Sect. 1400(d)(1)(A); 34 C.F.R. Sect. 300.300). School districts must develop a comprehensive plan, known as an IEP, for meeting the special educational needs of each disabled student. 20 U.S.C. Sect. 1414(d)(2)(A). In Hendrick Hudson Bd. of Educ. v. Rowley, 458 U.S. 176 (1982), the Court explained that an IEP must be formulated in accordance with the terms of the IDEA and “should be reasonably calculated to enable the child to achieve passing marks and advance from grade to grade.” Id. at 204. The IDEA also requires that children with disabilities be placed in the “least restrictive environment” so that they can be educated in an integrated setting with children who are not disabled to the maximum extent appropriate, that is, one that

provides a program that “most closely approximates” the education a disabled child would receive if s/he had no disability. Leggett v. Dist. of Columbia, 793 F.3d 59, 74 (D.C. Cir. 2015).

The Court’s decision in Endrew F. v. Douglas County School District, 137 S. Ct. 988 (2017), elaborated on the doctrines established in Rowley. The Court stated that parents can fairly expect school authorities to offer a “cogent and responsive explanation” for their decisions, and that the IEP should be “appropriately ambitious,” a standard “markedly more demanding than the ‘merely more than de minimis’ test applied by the Tenth Circuit.” Id. at 1000-1002. Finding that “instruction that aims so low” would be tantamount to “sitting idly...awaiting the time when they were old enough to drop out,” the Court held that IDEA “demands” a higher standard. Id. (citing to Rowley). Still, the Court cautioned that its ruling “should not be mistaken for an invitation to the courts to substitute their own notions of sound educational policy for those of school authorities, to whose expertise and professional judgment deference should be paid.” Id. at 1001.

Petitioners did not present any persuasive evidence in support of their contention that the Student’s IEP did not propose sufficient assistance for the Student during transitions. Additionally, as Respondent pointed out, transitions are only relevant for issues relating to in-person schooling. There is no contention that the Student has been having issues with transitions during virtual instruction.

Petitioners also contended that the IEP did not provide the Student with appropriate limitations on class size. Insofar as academic classes are concerned, this claim does not consider that the actual class size of Respondent’s proposed HFA CES placement is similar to the class size at School C. The proposed HFA CES classroom at

School B has one special education teacher and two assistants, and there are no more than eight students in the classroom. In fact, as of the date of testimony, the proposed HFA CES classroom had only three students. Petitioners' placement, School C, provides a similar ratio. At School C, the Student received instruction with a student-to-adult ratio of approximately six to one, with smaller ratios in academic classes. School C's ELA class contained nine students with two teaching assistants, and the reading class contained nine students with one teaching assistant. Even the ELA classroom, with two assistants, contained a less-favorable ratio of children to adults when compared to Respondent's proposed HFA CES academics classrooms.

Petitioner's main claim was that the Student needed more specialized instruction than the twenty hours per week provided by the Student's IEP. Petitioners contended that the Student needs a self-contained special education classroom in "specials" and during the rest of the school day because s/he has shown inconsistent interest or willingness to participate. Respondent contended that the Student would receive support in "specials" through the presence of a teaching assistant in the room, and that issues relating to lunch and recess are not material to the merits of the case.

But Petitioners presented testimony and evidence that convincingly established that the Student quickly loses interest in any subject that s/he is not intrinsically interested in, including "specials," and needs to be continuously monitored by a trained teacher in order to focus on work. The record establishes that, once the Student disengages, s/he will quickly go into his/her own thoughts and disregard work until s/he is prompted back. The record also establishes that the Student will be manipulative in order to avoid work.

Witness B testified that the Student needed a three-to-one or four-to-one teacher-to-student ratio, because when there are five or more children per adult in the classroom, it can “really slow down” the Student’s level of engagement. Witness B said that small groups are very important to keep the Student on track; otherwise s/he would not pay attention to instruction. Witness B also testified that he knows how well the Student pays attention during virtual instruction because the Google classroom shows the teacher when a student is or is not writing. Witness B testified that he had to send the Student computer-based messages during lessons because the Student would not do the work on his/her own.

This Hearing Officer found this testimony to be persuasive. Witness B came across credibly and there were no material inconsistencies between his testimony and the documents in the record. In fact, there is a reference in the record from Witness J stating that Witness B’s input was “very helpful” during the April 20, 2020, IEP meeting. None of the DCPS staff said anything to challenge Witness B’s credibility. Respondent presented testimony that a teaching assistant goes with the students when they are outside the self-contained environment to collect behavioral and academic data and provide and supports. But Witness I indicated that the size of the “specials” classes could be as large as twenty-five students. It is not clear from the record how a teaching assistant would be able to manage such a needy Student in a room with so many children in it, especially when the teaching assistant was responsible for recording data on the behavior of the special education students in the room.

Respondent did not argue or explain how or why “specials” classes are less important than academic classes, or that the Student would be more interested in

“specials” classes and therefore need less monitoring in those classes. Instead, Witness I testified that, if the Student could not access “specials,” there would be other options. However, there was no explanation of how this would work, and there was no reference in the IEP to any duty or obligation to provide alternatives to the general education “specials.” There was also nothing in any of the IEP meeting minutes about how the Student could benefit from alternate arrangements in “specials” classes.

Throughout its presentation, Respondent urged that the Student be placed in a setting where s/he has access to typically developing children. IDEA requires that children with disabilities be placed in the “least restrictive environment” (“LRE”) so that they can be educated in an integrated setting with children who are not disabled, to the maximum extent appropriate. 20 U.S.C. Sect. 1412(a)(5)(A). “Special classes, separate schooling, or other removal of children with disabilities from the regular educational environment” should occur only if “the nature or severity of the disability is such that education in regular classes with the use of supplementary aids and services cannot be achieved satisfactorily.” 34 C.F.R. Sect. 300.114(a)(2)(ii); see also Roark ex rel. Roark v. Dist. of Columbia, 460 F. Supp. 2d 32, 43 (D.D.C. 2006) (“mainstreaming” of children eligible for special education services under the IDEA is “not only a laudable goal but is also a requirement of the Act”); Rowley, 458 U.S. at 202 (“The [IDEA] requires participating States to educate handicapped children with nonhandicapped children whenever possible”).

But Respondent presented no specific, relevant evidence that this Student has benefitted from access to non-disabled peers. Moreover, IDEA’s LRE requirement is subordinate to the IDEA’s requirement that educational placements must be based on

individual student needs. This is why the statute says that school districts must only provide LRE “to the maximum extent appropriate.” Letter to Lott, 16 IDELR 84 (OSEP 1989); Letter to Vergason, 17 IDELR 471 (OSERS 1991); Letter to Goodling, 18 IDELR 213 (OSERS 1991). While the mandate to provide an education in the LRE is an important requirement, maintaining a less restrictive placement at the expense of educational benefit is not appropriate or required. Hartmann by Hartmann v. Loudoun County Bd. of Educ., 118 F.3d 996 (4th Cir. 1997); see also Clyde K. v. Puyallup Sch. Dist., 35 F.3d 1396 (9th Cir. 1994); MR v. Lincolnwood Bd. of Educ., 843 F. Supp. 1236 (N.D. Ill 1994).

Respondent argued broadly that tuition reimbursement cases are supported by expert witnesses who are compromised by bias, and that it presented seven unbiased expert witnesses who supported its position that the Student’s IEP and placement were appropriate. However, the DCPS witnesses were all employees of DCPS, and Respondent did not show that Petitioners’ witnesses were biased. In fact, Witness C, Petitioners’ witness, came across professionally and Respondent did not point to anything in particular to suggest that Witness C’s testimony was compromised. Additionally, this Hearing Officer found the witnesses from School C to be credible, particular Witness B, who clearly explained why the Student needed to be supervised very closely during every minute of the school day. The DCPS witnesses did not clearly explain how the Student would be able to pay attention during general education classes, except to reference a teaching assistant that was not mentioned in the April 20, 2020, IEP.

Caselaw supports Petitioners position. In N.W. v. District of Columbia, 253 F. Supp. 3d 15 (D.D.C. 2017), a nine-year-old autistic student was parentally placed at

School C. DCPS offered this student an IEP that provided for 24.5 hours of specialized instruction, more than was offered to the Student in this case. The parents in the former case argued that their child needed a full-time, self-contained placement and alleged that the child needed more support in “specials.” The hearing officer disagreed, but the court reversed the hearing officer, finding that the HOD should get no deference because the hearing officer was dismissive of the testimony of the parent’s expert, who claimed that, when “left to his own devices,” the student did not “choose to participate” and thus needed “full-time special education support from the minute he walked in the door to the minute he got on the bus.” Id. at 15.

Moreover, in N.W., the court found the FAPE denial to be compounded by the fact that DCPS failed to incorporate its oral representations into the IEP, just as DCPS did here when it failed to include any *specific* information in the Student’s IEPs of April 20, 2020, and October 6, 2020 about the teaching assistant’s role in the Student’s “specials.” Indeed, there was nothing in the Student’s IEPs that specifically and clearly addressed what should happen to assist the Student during his/her general education classes. The N.W. court explained that “parents may reasonably fear that the District’s oral promises will prove to be illusory.” Id. at *16. See also N.S. ex rel. Stein v. District of Columbia, 709 F. Supp. 2d 57, 72–73 (D.D.C. 2010).

Respondent pointed to Z.B. by & through Sanchez v. D.C., 292 F. Supp. 3d 300, 305 (D.D.C. 2018), aff’d Sanchez v. D.C., 815 F. App’x 559, 560 (D.C. Cir.), cert. denied sub nom. Z. B. By & Through Sanchez v. D.C., 141 S. Ct. 375, 208 L. Ed. 2d 97 (2020), a case involving a dispute about which private school Z.B., a child with autism, should have attended for seventh grade. Insofar as Issue #1 is concerned, however, Z.B.

is inapposite. There is no discussion in Z.B. about whether a student should receive a “full-time” program at a private school or a public school program with some general education classes. Instead, Z.B. involves a proposed change of placement between two different private special education schools, both of which apparently provided students with specials in self-contained special education classes.

In sum, the most persuasive evidence indicates that the Student requires small, self-contained special education classes in all subjects. Respondent denied the Student a FAPE when it recommended that the Student receive twenty hours of specialized instruction per week in the IEPs of April 20, 2020, and October 6, 2020.

2. Did Respondent fail to allow Petitioners to meaningfully participate in the IEP meeting for the Student on or about April 20, 2020? If so, did Respondent violate 34 C.F.R. Sect. 300.501 and related provisions? If so, did Respondent deny the Student a FAPE?

Petitioners contended that, at the IEP meeting, Respondent did not describe which “specialized program” the Student was to attend (i.e., “SLS,” “CES,” or “BES”). They pointed out that the Student’s IEP said nothing about any of the characteristics of the HFA CES classroom, and that they had no idea that the HFA CES classroom was even proposed. Petitioners contended that Respondent knew about the selection of the HFA CES classroom at the time of the IEP meeting and withheld that information.

The IDEA requires districts to provide for meaningful parental participation in IEP meetings. This participation should include considering parents’ suggestions and, to the extent appropriate, incorporating them into the IEP. Deal v. Hamilton Cty. Bd. of Educ., 392 F.3d 840, 854 (6th Cir. 2004). The duty to actually discuss a student’s proposed school at an IEP meeting is an issue where courts disagree. Some cases suggest

that the school should be selected at the IEP meeting, as in A.K. ex rel. J.K. v. Alexandria City Sch. Bd., 484 F.3d 682 (4th Cir. 2007). In other cases, courts find that a school does not have to be selected at the IEP meeting. See, e.g., T.Y. v. N.Y.C. Dep't of Educ., 584 F.3d 412, 419 (2d Cir. 2009); A.W. ex rel. Wilson v. Fairfax Cnty. Sch. Bd., 372 F.3d 674, 683 n.10 (4th Cir. 2004); White v. Ascension Parish School Board, 343 F.3d 373 (5th Cir. 2003). In Eley v. District of Columbia, 47 F. Supp. 3d 1 (D.D.C. 2014), the court, in a slip opinion, did rule that the school should have been selected at the IEP meeting. However in Eley, as in A.K., the court was influenced by the fact that the student did not have a school to attend at the beginning of the school year.

Respondent argued that all of these issues have been settled by Z.B., which holds that a change between private schools with different schedules and programs was not a change of placement. This Hearing Officer would agree that, if DCPS schedules a meeting with parents to describe a school it recommends (and the meeting was scheduled before the parents had decided on whether to seek funding for a parental placement), courts would tend to find that the failure to identify the school at the IEP meeting would be a procedural error at best. In J.T. v. District of Columbia, No. CV 19-989 (BAH), 2020 WL 5865243, at *8 (D.D.C. Oct. 1, 2020), similar issues were raised by the parents, who felt excluded from the decision-making process about school selection. In that case, DCPS pointed out that the parents were “provided information about both schools” and “invited to visit and did visit each school, and spent time in each classroom with the opportunity to ask questions” of school employees.” Id. at *25, *27. The court accordingly denied the claim, finding that any violation was procedural in nature because

the parents had a full opportunity to speak at the IEP meeting and “enjoyed significant participation” in the form of visits to the school. Id. at *9.

Here, there is no dispute that Petitioners had a full opportunity to discuss the Student’s issues at the IEP meetings. Petitioners were asked about their concerns, they asked questions, and they expressed their disagreement with the recommendations because the Student was not placed in a “full-time” program. The Student’s mother said that, when the Student looked at a computer, “you think [s/he] is doing work” but that she had to block the Student from watching videos instead of working. Additionally, School C representatives were allowed to speak at the IEP meetings. Witness B said that the Student was internally distracted (or distracted by something else) unless one directly engaged him/her, and that s/he would fall through the cracks without frequent checks for understanding.

Then, Petitioners had a reasonable and fair opportunity to learn about the HFA CES program. Witness J told Petitioners that the Student was going to be assigned to the HFA CES program at School B, and then scheduled a meeting so that Petitioners and their expert could discuss the school with its staff, including Witness I and Witness G. Witness J testified that Petitioners and their expert, Witness C, understood the nature of the HFA CES program and the school as a result of that meeting, wherein the parties discussed, among other things, the ABA at the school, the school’s social skills curriculum, how supports from a speech and occupational therapist could be fluid, and the nature of the push-in arrangements in the classroom. This meeting was supplemented by three subsequent meetings where the HFA CES program was discussed: the AED meeting on July 22, 2020, the eligibility meeting on September 16, 2020, and the

subsequent IEP meeting on October 6, 2020. Petitioners were represented by a lawyer at all of the meetings that occurred after the April 20, 2020, IEP meeting. Petitioners have therefore not shown that they were denied meaningful participation in the decision-making process that determined their child's placement. This claim must be dismissed.

RELIEF

Parents who unilaterally place their child at a private school without the consent of school officials do so at their own financial risk. Florence Cnty. Sch. Dist. 4 v. Carter, 510 U.S. 7, 15 (1993). Parents in such situations may be reimbursed only if “the court or hearing officer finds that the agency had not made FAPE available to the child in a timely manner prior to that enrollment and that the private placement is appropriate,” 34 C.F.R. Sect. 300.148(c) (2012); see also Florence Cnty., 510 U.S. at 15 (parent may only receive tuition reimbursement “if a federal court concludes both that the public placement violated IDEA and that the private school placement was proper under the Act”); Holland v. District of Columbia, 71 F.3d 417, 420 n. 3 (D.C.Cir.1995) (noting that the circuit has ordered reimbursement “where the public agency violated [the IDEA] and the parents made an appropriate placement”).²

Additionally, in Branham v. District of Columbia, 427 F.3d 7 (D.C. Cir. 2005), the circuit court laid forth rules for determining when it is appropriate for independent hearing officers to order funding of non-public placements. First, the court indicated that “(i)f no suitable public school is available, the [school system] must pay the costs of

²In the District of Columbia, the burden of persuasion is on the parents to establish that the parental placement is proper. D.C. Code Sect. 38-2571.03(6)(A)(ii).

sending the child to an appropriate private school.” Id. At 9 (citing Jenkins v. Squillacote, 935 F.2d 303, 305 (D.C.Cir.1991)). The circuit then explained that such relief “must be tailored” to meet a student’s “unique needs.” Id. At 11-12 (citing to Carter, 510 U.S. at 16. To inform this individualized assessment, courts must consider “all relevant factors” including the nature and severity of the student’s disability, the student’s specialized educational needs, the link between those needs and the services offered by the private school, the placement’s cost, and the extent to which the placement represents the least restrictive educational environment. Id. at 12.

At School C, the Student receives instruction with a student-to-adult ratio of approximately six to one, with smaller ratios in academic classes. In academics, the students are provided with smaller instructional pods, generally in groups of three or four. The record suggests that this ratio is necessary for the Student, who will make covert efforts to avoid work and has to be watched closely and continuously during lessons. Insofar as virtual instruction is concerned, this approach, through the Google classroom application, also helps staff know when the Student is off-task. School C’s curriculum is specially focused on students with autism, and over half of the students at the school are diagnosed with autism spectrum disorder. The school accordingly embeds three different social skills programs into instruction, designed for students who have issues with peers, pragmatic language, and executive functioning, among other areas. The school is approved by OSSE, core teachers are certified in special education, and “specials” teachers are certified in their subject matter areas. Instruction is provided at grade level with support. The Student participates in counseling with the school social worker in weekly group sessions.

The record also shows that the Student has progressed at School C. Respondent argued that the Student did not make progress in speech during his/her time at School C, but this issue was not raised by any of DCPS's witnesses at the IEP meetings. In fact, the Student's performance, as reported in the DPG from School C, reflects consistent progress in all academic subjects, as well as greater success socially. The DPG suggested that the Student was doing well in mathematics, which is consistent with language in Witness D's report to the effect that the Student's mathematics levels increased at School C. R-12-11. The DPG stated that the Student "seems to grasp math skills very quickly." P-16-2. In reading, the DPG specifically mentioned that the Student was continuing to benefit from direct instruction and was "making progress in using vocabulary in sentences using contrived writing formats as well as topic related vocabulary connected to tasks involving summarization." In counseling, the Student also made progress, including with respect to engaging in conversations.

Academically, the Student is higher functioning than some of the others in his/her class. Accordingly, Respondent presented several witnesses, including Witness F, Witness E, and Witness J, who said the parental placement was not appropriate, arguing in effect that the Student was not being challenged at School C. Respondent argued that the situation was akin to a fifth grader being placed in the same class as first graders. But Witness F also testified that there were some students in the classroom that did function similarly to the Student, which is also what Petitioners' witness, Witness A, stated. Moreover, no School C staff testified that the program was too easy for the Student. Respondent argued that there was no reason for any of its witnesses to prevaricate because they are not paid experts, but Witness B, who is with the Student every school

day, was not a paid expert either. Witness B had no reason to insist that the Student needed to be closely supervised in a small classroom during every class of the school day.

Finally, for the reasons stated previously, this Hearing Officer does not find that LRE considerations change the conclusion that the parental placement in this case was “proper under the Act.” Petitioners have met their burden to show that School C is proper under the Act.

The IDEA allows that tuition reimbursement may be reduced or denied when parents fail to raise the appropriateness of an IEP in a timely manner, fail to make their child available for evaluation by the district, or upon a finding of unreasonableness with respect to the actions taken by the parents. 20 U.S.C. Sect. 1412(a)(10)(C)(iii). With respect to parents’ obligation to raise the appropriateness of an IEP in a timely manner, the IDEA provides that tuition reimbursement may be denied or reduced if parents neither inform the IEP team of their disagreement with its proposed placement and their intent to place their child in a private school at public expense at the most recent IEP meeting prior to their removal of the child from public school, nor provide the school district with written notice stating their concerns and their intent to remove the child within ten business days before such removal. 34 CFR Sect. 300.148(d)(i), (ii). Under 20 U.S.C. Sect. 1412(a)(10)(C)(iii), a denial or reduction in reimbursement is discretionary.

The Supreme Court has suggested that the statutory factors are a non-exhaustive list. Forest Grove Sch. Dist. v. T.A., 557 U.S. 230, 241 (2009) (“(t)he clauses of Sect. 1412(a)(10)(C) are...best read as elucidative rather than exhaustive”). In addition, courts have broad discretion to consider the range of all relevant facts in determining whether

and to what extent awarding relief is equitable. See Florence County, 510 U.S. at 16.

Among the most important of these is “whether the parents have cooperated with the [district] throughout the process to ensure their child receives a FAPE.” Bettinger v. N.Y.C. Bd. of Educ., 2007 WL 4208560, at *6 (S.D.N.Y. Nov. 20, 2007).

Respondent’s main argument on equities was that, at the April 20, 2020, IEP meeting, Petitioners failed to alert it to the Student’s recent evaluations conducted at Center A. But it is apparent from the record that these new reports did not change DCPS’s positions on the Student’s program or placement. The October 6, 2020, IEP is virtually the same as the April 20, 2020, IEP. Moreover, there is nothing in the record to suggest that Petitioners, who were unrepresented at the April 20, 2020, IEP meeting, were hiding these evaluations from Respondent or had any intent to mislead DCPS when they failed to mention the evaluations at the IEP meeting. Certainly, Petitioners should have alerted Respondent earlier in the year to the reports issued by Center A. However, this error does not lead to a finding of “unreasonableness” that would require a reduction in the award, especially since there is no showing that Petitioners have been otherwise uncooperative with any of DCPS’s requests. This Hearing Officer therefore finds that there should be no reduction on equities, and that Petitioners should be awarded tuition reimbursement for School C for the 2020-2021 school year.³

³To the extent that Petitioners have not paid School C the Student’s full tuition for the 2020-2021 school year, Respondent suggested that such prospective payments should not be ordered because Branham establishes a higher standard for such relief than Burlington. Respondent did not submit authority that establishes that the standard set forth in Branham for direct funding of placements is any different than the standards set forth in Burlington, especially in a case where the parent unilaterally placed a child in a school. Additionally, Petitioners have shown that the Branham factors also should result in a finding in their favor. Branham focuses on the nature and severity of the student's specialized educational needs, the link between those needs and the services offered by the private school, the placement's cost, and the extent to which the placement represents the least restrictive educational environment. This Hearing Officer has

VII. Order

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

1. Petitioners shall be reimbursed for all tuition payments made to School C on behalf of the Student for the 2020-2021 school year;
2. DCPS shall pay School C for the unpaid balance of the Student's tuition corresponding to the Student's attendance at School C for the 2020-2021 school year;
3. Petitioners' other requests for relief are denied.

Dated: February 12, 2021

Michael Lazan
Impartial Hearing Officer

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

found that the Student's specialized needs are appropriately serviced by School C, that the school is the Student's least restrictive environment, and no issue has been raised about cost.

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 12, 2020

Michael Lazan
Impartial Hearing Officer