

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

Parent on behalf of Student¹)	Case No. 2023-0169
)	
Petitioner)	Hearing Dates: January 23, 24 and 26, 2024
)	
v.)	Conducted by Video Conference
)	Date Issued: February 12, 2024
District of Columbia Public Schools)	
)	Terry Michael Banks,
Respondent)	Hearing Officer

HEARING OFFICER DETERMINATION

INTRODUCTION

Petitioner is the mother of an X-year-old student (“Student”) attending School B. On August 29, 2023, Petitioner filed a Due Process Complaint alleging that the District of Columbia Public Schools (“DCPS”) denied Student a free appropriate public education (“FAPE”) by failing timely to provide an appropriate Individualized Education Program (“IEP”) and placement for the 2023-24 school year. On September 10, 2023, DCPS filed *District of Columbia Public Schools’ Response*, denying that it had denied Student a FAPE in any way.

SUBJECT MATTER JURISDICTION

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

PROCEDURAL HISTORY

Petitioner is the mother of an X-year-old student (“Student”) attending School B. On August 29, 2023, Petitioner filed a Due Process Complaint alleging that the District of Columbia

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

Public Schools (“DCPS”) denied Student a free appropriate public education (“FAPE”) by failing timely to provide an appropriate Individualized Education Program (“IEP”) on May 15, 2023 and placement for the 2023-24 school year. Petitioner asserts that the IEP did not provide a sufficient amount of specialized instruction outside general education and did not include occupational therapy (“OT”) services that had been prescribed in Student’s previous IEP. On September 5, 2023, Petitioner filed a *Motion for Stay Put Relief and Maintenance of Placement*.² Petitioner asserted that School B was Student’s then-current placement pursuant to a Hearing Officer Determination issued on November 24, 2022. On September 10, 2023, DCPS filed *District of Columbia Public Schools’ Response*, denying that it had denied Student a FAPE in any way. On October 2, 2023, I issued an order granting Petitioner’s unopposed *Motion for Stay Put*, requiring DCPS to maintain Student’s placement at School B.

The parties participated in a resolution meeting on September 28, 2023 that did not result in a settlement. A prehearing conference was conducted on October 6, 2023 and the *Prehearing Order* was issued that day.

The due process hearing was conducted on January 23, 24 and 26, 2023 by video conference. The hearing was closed to the public at Petitioner’s request. Petitioner timely filed Five-day Disclosures on January 16, 2024, containing a witness list of four witnesses and documents P1 through P-57. Respondent objected to the following proposed exhibits P1-P10, P18, P27-P34, P36-P41, P46, and P48-P54. Petitioners’ Exhibits P1-P5, P8-P26, P28, P30-P37, P41-P46, P52, and P54 were admitted into evidence.

Respondent filed timely disclosures on January 16, 2024 containing a witness list of eight witnesses and documents R1 through R34. Petitioner did not file objections to Respondent’s disclosure. Respondent’s Exhibits R1-R34 were admitted into evidence. At the beginning of her opening statement, Petitioner’s counsel withdrew that aspect of the claim as to an inappropriate IEP based on the failure to provide OT services. Respondent then moved to dismiss the *Complaint* on the grounds that due to having been awarded stay put relief, and having already having been reimbursed for tuition expenses at School B for the 2023-24 school year, the dispute was moot. Petitioner’s counsel argued that Petitioner had not been fully reimbursed, and since stay put relief would expire upon the issuance of the final order in this case, placement for the remainder of the school year was still at issue. I deferred ruling on this motion.

Petitioner presented as witnesses in chronological order: Witness A, Petitioner, and Witness B. Witness A and Witness B were admitted as experts in special education. At the conclusion of Petitioner’s direct case, Respondent moved for a directed verdict on the issue of Petitioner’s entitlement to reimbursement for extended year services (“ESY”) for the summer of 2023. DCPS argued that Petitioner offered no evidence of Student having received ESY to be entitled to reimbursement. DCPS argued that Petitioner provided insufficient evidence that Student received ESY, and School B’s summer program was not taught by certified special education teachers. I deferred ruling on this motion.

Respondent presented as witnesses in chronological order: Witness C, Witness D, Witness

² See 34 C.F.R. §300.518 (a). IDEA’s stay put provision mandates that during the pendency of administrative or judicial proceedings authorized under the Act, the student must be allowed to remain in his/her “current educational placement.”

E, Witness F, and Witness G. Witness C was admitted as an expert in occupational therapy, and Witness D, Witness E, Witness F, and Witness G were admitted as experts in special education. After the testimony of Witness C on the second day of hearings, January 24, 2024, it was determined that Witness B's cross and redirect examinations, the argument on DCPS' directed verdict motion, and Witness C's testimony were not recorded. It was ultimately decided that Witness B would return and have her cross and redirect examinations replicated, but Witness C would not. The parties agreed that a third day of hearings would be scheduled to facilitate this testimony and that they would submit written closing arguments. The testimony was concluded on January 16, 2024 with cross and redirect testimony of Witness B. The Hearing Officer authorized the parties to submit written closing arguments or before February 2, 2024. On February 2, 2024, Petitioners filed *Petitioners' Written Closing* and DCPS filed *District of Columbia Public Schools' Closing and Post Hearing Brief*.

ISSUES

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

1. Whether DCPS denied Student a FAPE by failing to provide an appropriate IEP, least restrictive environment, and placement on May 15, 2023. Specifically, Petitioner asserts that the IEP did not provide a sufficient amount of specialized instruction outside general.³
2. Whether School B is a proper placement for Student, thereby entitling Petitioner to reimbursement for all expenses related to Student's placement at School B during the summer of 2023 and the 2023-24 school year.

FINDINGS OF FACT

1. Student is X years old, in grade B, and is enrolled at School B for the 2023-24 school year.⁴
2. Petitioner enrolled Student at School B at the beginning of the 2019-20 school year.⁵
3. On February 1, 2021, Petitioner filed a due process complaint against DCPS alleging that DCPS failed to develop an appropriate IEP on June 12, 2019, failed to revise that IEP by February 26, 2020, failed to develop an appropriate IEP by February 20, 2020, and failed to implement Student's 2019-20 IEPs. As to the 2019 IEP, Petitioner alleged that the present levels of performance ("PLOPs") and goals were inadequate and the IEP lacked a recommendation for a

³ In her opening argument, Petitioner's counsel withdrew the claim in the *Complaint* that the IEP was inappropriate for not including OT services that had been prescribed in previous IEPs.

⁴ Petitioners' Exhibit ("P:") 52 at page 449. The exhibit number is followed by the electronic page number, *i.e.*, P52:449.

⁵ P2:12, 17; Petitioner's testimony.

specific, evidence-base reading program. Hearing Officer Michael Lazan ruled in DCPS' favor as to the appropriateness of the 2019 IEP and as to its failure or obligation to update the IEP before the annual renewal date. However, due to Student's lack of progress, even regression, during the 2019-20 school year, Hearing Officer Lazan was less concerned with exposing Student to his/her general education peers rather than the deterioration in his/her performance; he concluded that instead of reducing Student's specialized instruction outside general education, s/he needed "additional small group reading intervention."⁶

The IEP meeting should therefore have centered on how to provide the Student with additional, more intensive, small group reading intervention. The team should also have discussed how, or whether, the Student could genuinely benefit from large general education classes that required students to read grade-level material, particularly when those general education classes were led by only one adult. As a result, this Hearing Officer finds that DCPS's IEP was not "cogent and responsive" to the Student's acknowledged needs in reading and writing, and therefore denied the Student a FAPE.⁷

The 2020 IEP reduced Student's intensive specialized instruction from ten hours outside general education in the 2019 IEP⁸ to five hours outside general education and five hours inside general education.⁹ Finally, Hearing Officer Lazan found that DCPS' failure to provide only half of the prescribed specialized instruction outside general education was a material breach of its obligation to implement Student's IEP.

Testimony from Witness H makes clear that there is a substantial difference between specialized instruction inside general education and specialized instruction outside general education. At School A, the goal of services inside general education is to modify class lessons so that special education students can understand them. The instruction provided by Witness H in the general education setting was not designed to remediate the Student's issues with decoding and spelling. Witness H specifically testified that the Student needs pull-out instruction to be able to make meaningful gains in areas such as decoding and spelling.¹⁰

In light of Student's poor academic performance during the 2019-20 school year, Hearing Officer Lazan deemed it imperative that Student should have received "all ten hours of small-group pull-out instruction offered to him/her in the June 12, 2019 IEP."¹¹ He also found that the unilateral placement, motivated by Student's lack of progress, was reasonably calculated, and therefore proper under IDEA, entitling Petitioner to reimbursement for tuition expenses at School B.¹²

4. On September 1, 2022, Petitioner filed a due process complaint alleging that DCPS failed to provide an appropriate IEP and placement on January 25, 2022, which denial of FAPE entitled her to reimbursement for tuition for her unilateral placement of Student at School B for

⁶ P5:65.

⁷ *Id.* at 65-66.

⁸ *Id.* at 48.

⁹ *Id.* at 52.

¹⁰ *Id.* at 69.

¹¹ *Id.* at 70.

¹² *Id.* at 72.

the 2022-23 school year. The IEP at issue provided thirteen hours per week of specialized instruction including eight hours outside general education. In his November 24, 2022 Hearing Officer Determination (“HOD”), Hearing Officer Peter V. Baden noted that the IEP team agreed that Student’s disability made accessing the general education curriculum difficult without special education support, that s/he needs constant repetition and check-ins, small group instruction in math, reading and written expression, and co-teaching support in the classroom to access the general education curriculum. Hearing Officer Vaden concluded that DCPS failed to meet its burden of proving that the IEP was appropriate where Student would not have the support s/he needed for the majority of the school week:

I find that LEA Representative did not credibly explain how, with Student’s undisputed need for small group instruction in math, reading and written expression, as well as his/her deficits in reading generally, and in attention and executive functioning, [s/he] would be likely to make appropriate educational progress in the general education setting for the majority of the school week, without the in-class support of a special educator... In sum, I conclude that DCPS did not offer a “cogent and responsive explanation” for how the January 25, 2022 IEP team’s decision to place Student mostly in a general education setting, with 13 hours total per week of special education, was reasonably calculated to enable Student to make progress appropriate in light of his/her circumstances.¹³

As for Petitioner’s request for Student’s prospective placement at School B,¹⁴ Hearing Officer Vaden applied the five-part test set forth in *Branham v. The Government of the District of Columbia*:¹⁵ (1) the nature and severity of the student’s disability, (2) the student’s specialized educational needs, (3) the link between those needs and the services offered by the private school, (4) the cost of the placement, and (5) the extent to which the placement represents the least restrictive educational environment.¹⁶ Hearing Officer Vaden found that (1) Student’s disability was Other Health Impairment – Attention Deficit Hyperactivity Disorder (“ADHD”), and that an evaluation in 2019 resulted in diagnoses of ADHD - Combined Presentation, Language Disorder/Mixed Receptive-Expressive Language Disorder, and Specific Learning Disorder with Impairment in Reading; (2) Student’s unique needs, set forth in the 2019 evaluation, included “high levels of structure, predictability, and routine, opportunities for “hands-on”/experiential learning); specialized instruction in reading provided for 45-60 minutes on a daily basis, by an appropriately trained and experienced professional in a one-to-one or small group setting, and speech and language therapy to target oral expression and vocabulary” and that the “IEP team agreed that for math, reading and written expression, accessing the general education curriculum was difficult for Student without small group support;” (3) School B was appropriate because OSSE issued it a Certificate of Approval, authorizing placement at School B of disabled students funded by the District, and because it offered small class sizes for students with language-based learning disabilities; (4) the tuition was not “out of line” with other OSSE-approved day schools, and (5) while DCPS “credibly” contended that Student could be educated in an environment less than a full-time special education day school, DCPS failed to offer a placement that provided “the intensive level of special education support which Student needed for most classes.”¹⁷ Hearing

¹³ P2:18-19.

¹⁴ OSSE funded the placement through the pendency of the hearing under IDEA’s stay put provision.

¹⁵ 427 F.3d 7 (D.C. Cir. 2005).

¹⁶ *Id.* at 12.

¹⁷ P2:22.

Officer Vaden also stated that “the least restrictive setting factor in *Branham* is of less importance than the IDEA’s ‘primary goal of providing disabled students with an appropriate education.’”¹⁸ While Hearing Officer Vaden ordered Student’s placement at School B for the 2022-23 school year, he specifically declined to make a finding as to whether Student required a full-time special education placement.¹⁹

5. On May 15, 2023, when Student was in grade G at School B, DCPS convened an IEP Annual Review meeting.²⁰ The Consideration of Special Factors provided that Student’s behavior did not impede his/her behavior or that of others, that s/he did not have communications concerns, and that s/he had access to assistive technology: speech to text, text to speech, and a word processor.²¹ On the Math PLOP, Student’s teacher reported that Student was performing in the “A” range. The PLOP characterized Student’s performance level as within the Low Average range, but no data was cited providing a grade level rating. In the description of the effect of his/her disability on his/her progress, the IEP provided that

[S/he] displays receptive language and expressive language challenges that affect [his/her] ability to recall and reproduce specific math terms and apply them as required to [her/his] math learning. [Her/his] executive function deficits in planning, organization and management during class inhibit work completion. [S/he] also becomes easily distracted in the classroom setting which affects [her/her] ability to receive and process directions and instruction.²²

In Reading, the PLOP indicated that Student’s reading abilities were “variable.” While s/he evinced a strength in reading comprehension, s/he “likely” experiences difficulty with reading speed and accuracy. On an undated Oral Reading Fluency task, Student committed many mispronunciation and substitution errors. However, no data was reported from the 2022-23 school year, and no data was provided as to Student’s grade level performance. In the description of the effect of his/her disability on his/her progress, the IEP provided that

[Student’s] word retrieval, memory weaknesses, organization and executive functioning skills negatively impact [her/his] reading. [Student’s] attention issues have an impact on [her/his] access to the general education environment in Reading as [s/he] needs constant repetition and check-ins to insure [s/he] has an understanding of the subject matter.²³

The Written Expression PLOP provided no data from the 2022-23 school year, and the comment quoted immediately above regarding inattention was repeated in the Written Expression description of the effect of his/her disability on his/her progress.²⁴

¹⁸ P2:20-22, citing *Q.C.-C. v. District of Columbia*, 164 F. Supp. 3d 35, 55 (D.D.C. 2016) (quoting *Carter By & Through Carter v. Florence County School District Four*, 950 F.2d 156, 160 (4th Cir. 1991), *aff’d*, 510 U.S. 7 (1993).

¹⁹ P2:19, n.4.

²⁰ P20:161.

²¹ *Id.* at 162.

²² *Id.* at 165.

²³ *Id.* at 170.

²⁴ *Id.* at 173-77.

The IEP team prescribed fifteen hours of specialized instruction per week, of which eight hours would be provided outside general education.²⁵

6. School B holds a current Certificate of Approval from OSSE.²⁶

7. There are eight teachers listed on Student's schedule for the 2023-24 school year, Teacher A through Teacher H.²⁷ The last period of the day, Advisory, is not an academic course. In the remaining seven courses, only Teacher F and Teacher G are certified in the District as special education teachers.²⁸ Teacher F is Student's Reading teacher and has Student in five classes per week for a total of three hours and five minutes. Teacher G is Student's Investigating Variables teacher and also has Student in five classes per week for a total of three hours and five minutes.²⁹

8. Excluding Arrival, Social Transition, Lunch, SEL, Occupational Therapy, Belonging, and Advisory, there are 1445 minutes of instruction during Student's 2023-24 school week at School B, or 24.1 hours.³⁰

CONCLUSIONS OF LAW

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

Where there is a dispute about the appropriateness of the child's individual educational program or placement, or of the program or placement proposed by the public agency, the public agency shall hold the burden of persuasion on the appropriateness of the existing or proposed program or placement; provided, that the party requesting the due process hearing shall retain the burden of production and shall establish a prima facie case before the burden of persuasion falls on the public agency. The burden of persuasion shall be met by a preponderance of the evidence.³¹

²⁵ *Id.* at 178.

²⁶ P54:466.

²⁷ P47:426.

²⁸ Testimony of Witness B. Teacher A, Student's English teacher, is certified in the District in English, Teacher B, his/her Global Citizenship Teacher, is certified in Social Studies, Teacher C, his/her Science teacher is certified in Biology, Teacher D, his/her Advanced Theater teacher, is certified in Performing Arts, Teacher E, his/her Physical Education Teacher has no certification, Teacher F, his/her Reading teacher is certified in special education, Teacher G, his/her Investigating Variables teacher, is certified in special education, and Teacher H, his/her Advisory teacher, is certified in special education. Witness B testified that Student's Physical Education class is "co-taught" by Teacher J, who is certified in special education. However, neither Teacher J nor Teacher K, a Theater Arts teacher who holds a special education certificate and who was also referenced in Witness B's testimony, are listed on Student's schedule.

²⁹ P47:426.

³⁰ *Id.*

³¹ D.C. Code Sect. 38-2571.03(6)(A)(i).

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

Whether DCPS denied Student a FAPE by failing to provide an appropriate IEP, least restrictive environment, and placement on May 15, 2023. Specifically, Petitioner asserts that the IEP did not provide a sufficient amount of specialized instruction outside general education.

The Supreme Court’s first opportunity to interpret the predecessor to IDEA, The Education of the Handicapped Act (“EHA”), came in *Board of Education of the Hendrick Hudson Central School District v. Rowley*.³² The Court noted that the EHA did not require that states “maximize the potential of handicapped children ‘commensurate with the opportunity provided to other children.’”³³ Rather, the Court ruled that “Implicit in the congressional purpose of providing access to a ‘free appropriate public education’ is the requirement that the education to which access is provided be sufficient to confer some educational benefit upon the handicapped child...³⁴ Insofar as a State is required to provide a handicapped child with a ‘free appropriate public education,’ we hold that it satisfies this requirement by providing personalized instruction with sufficient support services to permit the child to benefit educationally from that instruction... In addition, the IEP, and therefore the personalized instruction should be formulated in accordance with the requirements of the Act and, if the child is being educated in the regular classrooms of the public school system, should be reasonably calculated to enable the child to achieve passing marks and advance from grade to grade.”³⁵

More recently, the Court considered the case of an autistic child under IDEA who, unlike the student in *Rowley* was not in a general education setting.³⁶ The Tenth Circuit had denied relief, interpreting *Rowley* “to mean that a child’s IEP is adequate as long as it is calculated to confer an ‘educational benefit [that is] merely... more than *de minimis*.”³⁷ The Court rejected the Tenth Circuit’s interpretation of the state’s obligation under IDEA. Even if it is not reasonable to expect a child to achieve grade level performance,

... [h]is educational program must be appropriately ambitious in light of [his/her] circumstances, just as advancement from grade to grade is appropriately ambitious for most children in the regular classroom. The goals may differ, but every child should have the chance to meet challenging objectives... It cannot be the case that the Act typically aims for grade-level advancement for children with disabilities who can be educated in the regular classroom, but is satisfied with barely more than *de minimis* progress for those who cannot.³⁸

³² 458 U.S. 176, 187 (1982).

³³ *Id.* at 189-90, 200

³⁴ *Id.* at 200.

³⁵ *Id.* at 203-04.

³⁶ *Andrew F. ex rel. Joseph F. v. Douglas County School District RE-1*, 137 S.Ct. 988 (2017).

³⁷ *Id.* at 997.

³⁸ *Id.* at 1000-01 (citations omitted).

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

When all is said and done, a student offered an educational program providing ‘merely more than *de minimis*’ progress from year to year can hardly be said to have been offered an education at all. For children with disabilities, receiving instruction that aims so low would be tantamount to ‘sitting idly... awaiting the time when they were old enough to drop out...’ The IDEA demands more. The IDEA demands more. It requires an educational program reasonably calculated to enable a child to make progress appropriate in light of the child’s circumstances.”³⁹

The IEP at issue was issued on May 15, 2023, six months after Hearing Officer Vaden’s HOD. That HOD found that Student required an intensive level of special education support in most classes. The IEP at issue in Hearing Officer Vaden’s case provided eight hours of “intensive special education support,” *i.e.*, eight hours of specialized instruction outside general education. The May 15, 2023 increased the specialized instruction inside general education from five to seven hours per week, but it did not increase the specialized instruction outside general education. None of the PLOPs in the IEP provided data indicating that Student had experienced objective improvement since the issuance of Hearing Officer Vaden’s HOD. Moreover, none of DCPS’ witnesses offered testimony or identified data in the record to demonstrate that Student made objective academic gains since the issuance of the HOD, thereby failing to provide a possible justification for the IEP team’s decision to ignore Hearing Officer Vaden’s finding that Student needed specialized instruction outside general education in most of his/her classes. For these reasons, I conclude that DCPS has failed to meet its burden of proving that it provided Student an appropriate IEP on May 15, 2023.

Whether School B is a proper placement for Student, thereby entitling Petitioner to reimbursement for all expenses related to Student’s placement at School B during the summer of 2023 and the 2023-24 school year.

As discussed earlier, Hearing Officer Vaden cited the D.C. Circuit’s opinion in *Branham* in which the court enunciated the standard for determining the appropriateness of a prospective private school placement for a student with a disability:

Specifically, courts have identified a set of considerations “relevant” to determining whether a particular placement is appropriate for a particular student, 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.⁴⁰

³⁹ 137 S.Ct. at 1000-01.

⁴⁰ Citing *Rowley*, 458 U.S. at 202 (noting that “sufficient educational benefit” will vary from child to child); *McKenzie v. Smith*, 771 F.2d 1527, 1531 (D.C. Cir. 1985 (affirming district court’s placement decision that took into consideration the student’s “individual needs”); *id.* at 1534-35 (affirming private placement based on match between a student’s needs and the services offered at a particular school); *Florence County School District Four v. Carter*, 510 U.S. 7, 16 (1993) (holding that tuition reimbursement may be reduced if the cost of the private education is “unreasonable”); *Holland v. District of Columbia*, 71 F.3d 417, 425 (D.C. Cir. 1995) (remanding for consideration,

The D.C. Code requires OSSE to develop and administer a Certificate of Approval process for nonpublic special education schools or programs that serve District of Columbia students with disabilities with funding from the District of Columbia government, and those schools must comply with Title 5 of the District of Columbia Municipal Regulations.⁴¹ That title requires OSSE to establish criteria for teaching credentials for all special education teachers.⁴² Title 5 requires that all teachers in DCPS must hold a teaching credential in his/her area of sub-specialization.⁴³ The regulations mandate that in order to receive teaching credentials, applicants must meet certain minimum requirements.⁴⁴

Evidence offered by both parties indicates that only a small fraction of Student's teachers at School B hold credentials to teach special education students. Only two of Student's teachers listed on her/his 2023-24 school schedule are certified in special education. Of the 24.1 hours per week of instruction, only 6.17 hours, or 25.7%, are provided by teachers certified to teach special education.

In the previous hearing, Hearing Officer Vaden excluded such evidence as irrelevant, because School B held a Certificate of Approval from OSSE. Hearing Officer Vaden concluded that the COA shielded School B from further analysis of its ability to provide services to special education students.⁴⁵ On this point alone, I respectfully disagree with my colleague. *Branham* requires an analysis of the link between the Student's needs and the services offered by the private school. Petitioner insists that Student requires more specialized instruction outside general education than DCPS is willing to prescribe. I do not dispute Hearing Officer Vaden's analysis that "DCPS has not offered a placement which provides the intensive level of special education support which Student needs for *most* classes."⁴⁶ However, School B is also incapable of providing such services, because it does not require its teachers to meet the certification requirements of the District. Not only is Student taught by teachers who meet the District's minimum qualifications in only 25.7% of her/his instruction time, Witness B did not indicate that those teachers who have not been certified in special education have pending applications for certification. Teacher E, the Physical Education teacher, has been teaching at the school since the mid-2000s, and has never held special education certification. Thus, School B does not require that its teachers meet the District's minimum qualifications to teach its disabled students.

Private schools are attractive to parents, in large part, because they offer small classes with high teacher-to-student ratios. Education advocates and special education expert witnesses routinely recommend that students require full-time placement in schools with small class sizes in order to make academic progress, which necessitates placement in private schools. Because there is a higher ratio of teachers to students in private schools, tuition is high. There is no federal law

among other things, whether the costs of a private placement were reasonable); *Walczak v. Florida Union Free School District*, 142 F.3d 119, 132 (2d Cir. 1998) (discussing IDEA's preference for less restrictive environments); and *Reid v. District of Columbia*, 401 F.3d 516, 524 (2005) (equity may sometimes require consideration of the parties' conduct, such as when the school system reasonably "require[s] some time to respond to a complex problem," or when parents' refusal to accept special education delays the child's receipt of appropriate services).

⁴¹ D.C. Code § 38-2561.07 (a).

⁴² 5-A DCMR § 1602(mm) and (nn).

⁴³ 5-A DCMR § 1601.1

⁴⁴ 5-A DCMR § 1601.5.

⁴⁵ P2:21

⁴⁶ *Id.* at 22.

that offers the potential for tuition reimbursement for general education students in private schools. IDEA provides this possibility for students with disabilities. However, IDEA requires each IEP to provide “a statement of the special education and related services” the child shall receive. If a child’s teacher does not meet a jurisdiction’s minimum qualifications to be a special education teacher, that individual cannot be deemed to be providing special education services. In this case, Student is instructed by individuals deemed unqualified by local standards in 75% of his/her classes. Such individuals may be providing instruction in small class environments, but it is not the “specialized” instruction contemplated in the IEP. School B does not even require its teachers to seek certification as a condition of employment. Thus, while School B serves students with disabilities, it provides specialized instruction in only a small fraction of its classes.

Under these circumstances, I conclude that Petitioner has failed to meet her burden of proving that School B meets the third *Branham* requirement, a link between “the intensive level of special education support which Student needs for most classes”⁴⁷ and the services offered by School B. Thus, I conclude that School B is not an appropriate placement for Student.

Petitioner has also failed to meet her burden of proving entitlement to reimbursement for expenses incurred for Student’s participation in School B’s 2023 summer program. Student’s IEP provides his/her entitlement to ESY, a DCPS summer program designed to limit regression or loss of critical skills during the summer. Petitioner offered no testimony as to the curriculum or purpose of School B’s 2023 summer program. Since there is no evidence that School B’s summer program mirrors DCPS’ ESY program, Petitioner has failed to meet her burden of proving entitlement to reimbursement for ESY.

RELIEF

For relief, Petitioner requests, *inter alia*, (1) an order requiring DCPS to place and fund Student’s placement at School B for the 2023-24 school year, and (2) an order requiring DCPS to reimburse them for the tuition and all other expenses incurred for Student’s placement at School B for the 2023-24 school year, (3) an order requiring DCPS to amend Student’s IEP to reflect placement in a separate day school setting and specialized instruction throughout the full instructional week, (4) an order requiring DCPS to comply with 34 C.F.R. § 300.508(c), and (5) attorney’s fees.

ORDER

Upon consideration of the *Complaint*, DCPS’ *Response*, the exhibits from the parties’ disclosures that were admitted into evidence, the testimony presented during the hearing, and the parties’ post-hearing written closing arguments, it is hereby

ORDERED, that within fifteen school days of the issuance of this HOD, DCPS shall convene an IEP meeting to revise Student’s IEP to include specialized instruction outside general education in all courses involving a substantial amount of reading, writing, and or mathematics, and to determine an appropriate placement.

⁴⁷ P2:22.

APPEAL RIGHTS

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

Terry Michael Banks
Terry Michael Banks
Hearing Officer

Date: February 12, 2024

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