

**District of Columbia**  
**Office of the State Superintendent of Education**  
**Office of Dispute Resolution**  
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OSSE  
Office of Dispute Resolution  
January 18, 2024

**Confidential**

Parents on behalf of Student <sup>1</sup>	)	Case No. 2023-0134
	)	
Petitioner	)	Hearing Dates: December 11-14, 2023
	)	
v.	)	Conducted by Video Conference
	)	Date Issued: January 16, 2024
District of Columbia Public Schools	)	
	)	Terry Michael Banks,
Respondent	)	Hearing Officer

**HEARING OFFICER DETERMINATION**

**INTRODUCTION**

Petitioners are the parents of an X-year-old student (“Student”) attending School B. On July 14, 2023, Petitioners filed a Due Process Complaint Notice (“*Complaint*”) alleging that the District of Columbia Public Schools (“DCPS”) denied Student a free appropriate public education (“FAPE”) by failing to provide Student appropriate Individualized Education Programs (“IEP”) and placements for the 2022-23 and 2023-24 school years, improperly classifying Student, and failing to provide Student speech and language (“S/L”) services. On July 27, 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.

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

## PROCEDURAL HISTORY

On July 14, 2023, Petitioner filed the *Complaint* alleging that DCPS denied Student a FAPE by (1) failing to provide an appropriate IEP on August 12, 2022 with an improper disability classification and insufficient services in an inappropriate academic setting, (2) failing to provide an appropriate IEP on May 16, 2023 with an improper disability classification and insufficient services in an inappropriate academic setting, and (3) failing to respond to Petitioner/mother's request for an observation of DCPS' proposed location of services ("LOS").

On July 27, 2023, DCPS filed its *Response*, in which it refuted allegations in the *Complaint* denying that it had denied Student a FAPE in any way. DCPS asserted that (1) DCPS invited Petitioners to an IEP meeting on June 10, 2022. Petitioners did not attend, (2) DCPS attempted to schedule a S/L evaluation during the summer of 2022, but Petitioners did not make Student available, (3) On August 12, 2022, the IEP team met and developed an IEP for Student that prescribed goals in math, reading, and written expression, two hours of specialized instruction outside general education, and four hours per week inside general education. Petitioner/mother and those representing her at the meeting participated fully in the development of the IEP and placement. A Prior Written Notice ("PWN") issued on August 21, 2022 noted Petitioner's counsel's disagreement with the IEP at the IEP meeting as to the proposed hours of instruction and the least restrictive environment ("LRE"), (4) On January 23, 2023, the IEP team met; DCPS proposed an amended IEP with goals in math, reading, written expression, and emotional, social and behavioral development with two hours per week of specialized instruction outside general education, four hours per week inside general education, and three hours per month of behavioral support services ("BSS"), (5) Petitioners notified DCPS that Student will attend School B for the 2023-24 school year. Any claim about FAPE for the 2023-24 school year is moot and/or not ripe, (6) The IEP team met on May 16, 2023. The team developed an IEP providing five hours of specialized instruction in math outside general education, ten hours per week of specialized instruction in reading and written expression inside general education, three hours per month of BSS, and ninety minutes per month of BSS consultation, (7) IDEA does not require that a student have or receive a specific disability classification; it requires only a decision on eligibility, (8) Student was determined not to have a disabling oral communication condition, which determination was never challenged, and (9) School B is not a proper or appropriate placement and is not Student's LRE.

The parties participated in a resolution meeting on July 28, 2023 that did not result in a settlement. A prehearing conference was conducted on August 11, 2023 and the *Prehearing Order* was issued that day.

The due process hearing was conducted on December 11-14, 2023 by video conference. The hearing was closed to the public at Petitioners' request. Petitioners timely filed Five-day Disclosures on December 4, 2023, containing a witness list of seven witnesses and documents P1 through P-51. Respondent filed objections to Petitioner's disclosures on December 6, 2023. DCPS objected to expert testimony from Witness L and Witness D on grounds of their qualifications. The rulings on these objections were deferred until Respondent could conduct *voir dire*. Witness L was not ultimately called as a witness. Respondent also objected to the following proposed exhibits: P2-P6, P13, P18-21, P23, P25-P28, P31, P34-P35, P38-P39, P45-P46, and P50-P51. Petitioners' Exhibits P1, P3, P5-P22, P24-P30, P31 (on the issue of reimbursement only), P33,

P36-P37, P38 (on the issue of reimbursement only), and P39-P47, and P49-P50 were admitted into evidence.

Respondent filed timely disclosures on December 4, 2023 containing a witness list of eight witnesses and documents R1 through R20. Petitioners filed objections to Respondent's disclosures on December 7, 2023. Petitioners objected to expert testimony from Witness M because her curriculum vitae was not disclosed. This objection was sustained. They also objected to expert testimony of Witness K on grounds of her qualifications. The ruling on this objection was deferred until Petitioners could conduct *voir dire* of the witness. Petitioners also objected to the following proposed exhibits: R4, and R6-R9 on grounds of relevance, as they do not pertain to the school years at issue. A student's longitudinal educational record is relevant when the appropriateness of IEPs are at issue, so these objections were overruled. Respondent's Exhibits R1-R20 were admitted into evidence.

Petitioners presented as witnesses in chronological order: Witness A, Witness B, Witness C, Witness D, and Petitioner/father. Witness A and Witness C were admitted as experts in Special Education, Witness B was admitted as an expert in Speech & Language Pathology, and Witness D was admitted as an expert in Neuropsychology. Respondent presented as witnesses in chronological order: Witness E, Witness F, Witness G, Witness H, Witness J, and Witness K. Witness E was admitted as an expert in School Psychology, Witness F was admitted as an expert in Speech and Language Pathology, Witness G was admitted as an expert in Special Education Programming and Placement, Witness H was admitted as an expert in School Social Work, and Witness J was admitted as an expert in Special Education. At the conclusion of testimony, the parties' counsel gave oral closing arguments. The Hearing Officer authorized the parties to submit authorities upon which they rely on or before December 22, 2023. On December 22, 2023, Petitioners filed *Petitioners' Closing Authorities* and DCPS filed *District of Columbia Public Schools' Case Citations*.

## ISSUES

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

1. Whether DCPS denied Student a FAPE by failing to provide an appropriate IEP, on August 12, 2022, for the 2022-23 school year. Specifically, Petitioners assert that Student should have been classified with a Specific Learning Disability ("SLD") in addition to Other Health Impairment ("OHI"), the IEP did not include speech and language ("S/L") services, counseling or behavioral support services, and Student required more hours of specialized instruction in a small, special education setting throughout the entire school day. Petitioners also assert that the IEP contained outdated Present Levels of Academic Performance ("PLOPs") and that DCPS did not include updated baseline information from School Bs.
2. Whether DCPS denied Student a FAPE by failing to provide an appropriate IEP on May 16, 2023. Specifically, Petitioners assert that Student should have been classified with an SLD in addition to OHI, the IEP did not include S/L

services, and Student required more hours of specialized instruction in a small, special education setting throughout the entire school day.

3. Whether DCPS denied Student a FAPE by failing to respond to Petitioner/mother's request on May 19, 2023 for an observation of DCPS' proposed location of services, School A.
4. Whether School B is a proper placement for Student.

## FINDINGS OF FACT

1. Student is X years old and attended School A from grade M through grade A. S/he was first enrolled at School B in grade D for the 2021-22 school year.<sup>2</sup>

2. On or about April 12, 2019, when Student was in grade C at School A, Examiner A completed an independent Psychological of Student. Petitioners solicited the evaluation "to gain a better understanding of her/his processing strengths and challenges to determine how they affect [his/her] learning." Petitioners reported that Student had been diagnosed with Attention Deficit Disorder, Predominantly Inattentive Type ("ADHD") by his/her pediatrician. Petitioners noted concerns with following multi-step directions, using filler words when expressing ideas, distraction, focus, working memory, language processing, and trouble articulating, organizing, and expressing his/her thoughts.<sup>3</sup> In September 2018, School A developed a Section 504 plan to address his/her ADHD.<sup>4</sup>

On the Wechsler Intelligence Scales for Children ("WISC-V"), Student scored in the High Average range on the Working Memory Index (117), and in the Average range in Full Scale IQ (104), on the Verbal Comprehension Index (108), on the Visual Spatial Index (97), on the Fluid Reasoning Index (97), and on the Processing Speed Index (92).<sup>5</sup> In Oral Language, Comprehension, and Expression, Student's knowledge of word meaning, as measured on the WISC-V Vocabulary subtest (63<sup>rd</sup> percentile),<sup>6</sup> was in the Average range, but on the Oral Vocabulary subtest, requiring him/her to give synonyms and antonyms and requiring more specific retrieval skills, Student scored in the 16<sup>th</sup> percentile. His/her abstract verbal reasoning skills were in the High Average range on the Similarities subtest (75<sup>th</sup> percentile), and Oral Comprehension (27<sup>th</sup> percentile) and Understanding Directions (36<sup>th</sup> percentile) on the Woodcock-Johnson were in the Average range.<sup>7</sup> In Phonemic Processing, "assessing [his/her] ability to recognize, recall, analyze and synthesize stimuli (including words, sentences, and narratives) and to attend to the phonemic structure of speech" was in the High Average range on the Comprehensive Test of

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<sup>2</sup> Petitioners' Exhibit ("P:") 9 at page 1 (81). The exhibit is followed by the exhibit page number and the electronic page number in the disclosure in parentheses, *i.e.*, P:1 (81); testimony of Petitioner father.

<sup>3</sup> Respondent's Exhibit ("R:") 5 at page 1 (141). The exhibit is followed by the exhibit page number and the electronic page number in the disclosure in parentheses, *i.e.*, R5:1 (141).

<sup>4</sup> *Id.* at 2(142). *See* Rehabilitation, Comprehensive Services, and Developmental Disabilities Act of 1978, 29 U.S.C. § 794.

<sup>5</sup> R5:3-4 (143-44).

<sup>6</sup> Examiner A noted that "Percentile rankings between the 25<sup>th</sup> and the 75<sup>th</sup> percentile fall within the average range." *Id.* at 3 (143), which Witness D confirmed during her testimony.

<sup>7</sup> *Id.* at 4 (144).

Phonological Processing (“CTOPP-2”) Elision (75<sup>th</sup> percentile) and Blending Words (84<sup>th</sup> percentile) subtests.<sup>8</sup> In Auditory Recall, Student’s performance deteriorated as the material increased in length. On the Children’s Memory Scale (“CMS”) Story Recall (9<sup>th</sup> percentile) and Delayed Recall (9<sup>th</sup> percentile) subtests, Student scored at the bottom of the Low Average range. However, s/he scored in the Average range on the WJ-IV Story Recall (31<sup>st</sup> percentile), Sentence Repetition (57<sup>th</sup> percentile), Memory for Words (52<sup>nd</sup> percentile), and Verbal Attention (66<sup>th</sup> percentile) subtests, and in the High Average range on the WISC-V Digit Span (75<sup>th</sup> percentile) subtest. Examiner A concluded that

[Student] struggles to recall and interpret auditory information as it gets longer and more complex. [His/her] rote auditory memory is intact. [S/he] can repeat short bits of auditory presented information accurately, but [s/he] finds it more challenging to recall and interpret what [s/he] has heard as the material becomes longer.<sup>9</sup>

In Visual Processing, Reasoning, Memory and Visual Motor Integration, scored in the High Average or Average range on all subtests.<sup>10</sup> Similarly, in Processing and Production Speed, “the ability to interpret visual or verbal information and then provide a response under pressure of time,” Student scored in the Average range in all of the several subtests in the WISC-V, WJ-IV, CMS, and the CTOPP-2.<sup>11</sup>

Student’s attention and executive functioning were measured through the Behavior Rating Inventory of Executive Function (“BRIEF-2”) and the Conners’ Rating Scale, with rating scales completed by Petitioners and a teacher. None of the scores was elevated on the Behavior Regulation Index or the Emotion Regulation Index. In the Cognitive Regulation, and the Initiate scale was elevated on the parent and teacher forms as was the Working Memory scale and the Task Monitor scale. The Plan/Organize scale was elevated on the teacher’s form due to Student’s poor planning ahead for assignments. On the Conners, the Inattention scale was significantly elevated on both forms, the Learning Problem scale was elevated only by the parents, and the Learning Problems/Executive Function scale was elevated only by the teacher. The high score on the parents’ Executive Function scale was due to Student’s difficulty getting started on tasks, forgetting to turn in completed work, and poor organization, and on the Peer Relations form due to Student’s concerns about his/her friendships.<sup>12</sup>

Student’s ability to learn and recall information was measured on CMS and WJ-IV tests. S/he scored in the High Average range in Delayed Recognition (84<sup>th</sup> percentile) and Word Lists (75<sup>th</sup> percentile) and in the Average range in Visual-Auditory Learning (31<sup>st</sup> percentile) and Word Lists Delayed Recall (50<sup>th</sup> percentile).

These results suggest that Student gains more complete understanding of auditory material when [s/he] has the opportunity for repeated exposure and when [s/he] has the opportunity for repeated exposure and when [s/he] focuses on learning smaller, more manageable amounts of information. These results suggest that if [Student] is presented with a large amount of auditory information [s/he] is unfamiliar with,

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

<sup>9</sup> *Id.* at 5 (145).

<sup>10</sup> *Id.* at 5-6 (145-46).

<sup>11</sup> *Id.* at 6-7 (146-47).

<sup>12</sup> *Id.* at 7-8 (147-48).

[s/he] will have difficulty absorbing it at an efficient rate unless it is broken down into smaller units and repeated, and tied to previously learned information. The results also show that [Student] benefits when there is repetition and a visual component to a learning task.

In Reading, Student was assessed on the WJ-IV and the Gray Oral Reading Tests (“GORT-5”). Student scored in the High Average range in Word Attack (74<sup>th</sup> percentile), in the Average range in Phonemic Decoding Efficiency (50<sup>th</sup> percentile), Letter-Word Identification (47<sup>th</sup> percentile), Rate (37<sup>th</sup> percentile), Oral Reading (37<sup>th</sup> percentile), Accuracy (37<sup>th</sup> percentile), Right-Left Reversal (32<sup>nd</sup> percentile), Passage Comprehension (44<sup>th</sup> percentile), and Reading Comprehension (37<sup>th</sup> percentile), and in the Low Average range in Sight Word Efficiency (19<sup>th</sup> percentile), and Sentence Reading Fluency (21<sup>st</sup> percentile), and in the Borderline range in Errors (12<sup>th</sup> percentile).

[Student’s] phonological processing and phonemic awareness were strong. [S/he] is making progress in the development of [her/his] basic reading skills with the intervention [s/he] is receiving. [Student] knows the sounds of letters and [s/he] can decode words with up to four letters. [S/he] has a developing sight word vocabulary, but [s/he] is slow to recognize what [s/he] sees. [Student] still reverses letters when reading. [His/her] sense of letter orientation is not yet solid, which makes letter and word recognition a slower process. [Student] can read short sentences but needs time to interpret what [s/he] has read.<sup>13</sup>

In Writing, Student scored in the Average range in Spelling (48<sup>th</sup> percentile), Writing Samples (41<sup>st</sup>), and Writing Fluency (71<sup>st</sup>). “[Student] understands what should be included in a sentence and [s/he] can produce an accurate but brief sentence...”<sup>14</sup> In Math, Student was assessed through the WJ-IV and the Feifer Assessment of Mathematics (“FAM”). S/he scored in the High Average in Numeric Capacity (81<sup>st</sup>) and Rapid Number Naming (90<sup>th</sup>), in the Average range in Calculation (55<sup>th</sup>), Math Facts Fluency (25<sup>th</sup>), Forward Number Count (63<sup>rd</sup>), Backward Number Count (39<sup>th</sup>), Addition Fluency (34<sup>th</sup>), Linguistic Math Concepts (66<sup>th</sup>), Number Comparison (27<sup>th</sup>), and Addition Knowledge (45<sup>th</sup>), in the Low Average range in Applied Problems (22<sup>nd</sup>), Object Counting (19<sup>th</sup>), Sequences (10<sup>th</sup>), Subtraction Fluency (21<sup>st</sup>), Spatial Memory (23<sup>rd</sup>), and Subtraction Knowledge (23<sup>rd</sup>).

[Student] can complete basic calculations, but only when [s/he] draws out the calculations using dots. [S/he] shows weaknesses in estimations, [her/his] ability to visualize math concepts and procedures, and [s/he] has trouble with comprehension of story problems. [His/her] sequencing skills are weak, and they are affecting [his/her] ability to complete multi-step problems. [S/he] lacks automaticity of basic math facts.<sup>15</sup>

For Behavioral and Emotional Functioning, Examiner employed the Child Behavior Checklist (“CBC”) and the Teacher Report Form (“TRF”) rating scales. Parent and teacher responses yielded elevated scores on the Attention Problems forms because they viewed Student

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<sup>13</sup> *Id.* at 9-10 (149-50).

<sup>14</sup> *Id.* at 10 (150).

<sup>15</sup> *Id.* at 10-11 (150-51).

as having “more trouble concentrating, completing work, following directions, and learning than other [boys/girls] [her/his] age.” Petitioners’ scores on Social Problems were elevated because s/he was viewed as accident prone and easily jealous, and on the Anxious/Depressed scale because they “see [him/her] as more fearful, self-conscious, and worried than other [boys/girls] [her/his] age.”

Socially, [Student] likes being with others. [Student] has friends and [s/he] enjoys being with [his/her] peers. [S/he] can become anxious about friendships and social interactions...[Student] is concerned about the performance and [s/he] wants to do well. [S/he] has high expectations of [his/her] performance and [s/he] knows [s/he] is struggling which has led to increased anxiety.<sup>16</sup>

Examiner A’s recommendations included, *inter alia*, that Student be maintained on the Section 504 plan, that s/he received daily intervention from a reading specialist, speech and language services, and short and simple instructions and written whenever possible.<sup>17</sup>

3. On February 14, 2020, DCPS issued a Final Eligibility Determination Report indicating that at an eligibility meeting that day, Student was determined to be eligible for services as a student with Other Health Impairment due to ADHD.<sup>18</sup>

4. On February 14, 2020, DCPS conducted an Initial IEP meeting for Student.<sup>19</sup> The Consideration of Special Factors indicated that his/her behavior did not impede his/her learning or that of classmates, s/he did not present with communication needs, and did not require assistive technology.<sup>20</sup> The IEP prescribed goals in Math, Reading, and Written Expression. The IEP team also prescribed three hours of specialized instruction outside general education in Math (2 hours) and Written Expression, and three hours inside general education in Math and Reading (2 hours). The Other Classroom Aids and Services were: extended time for assignments, chunked material, shortened assignments, visual checklists, graphic organizers, word banks, noise cancelling headphones, privacy boards, fidgets, access to calculator when arithmetic is not the objective, and modified assessments.<sup>21</sup>

5. On June 1, 2020, when Student was in grade F at School A, DCPS issued an IEP Progress Report for the fourth reporting period of the 2019-20 school year. Teacher A, Student’s special education teacher, reported that Student had mastered his/her Math goal involving solving two-step word problems, was progressing on a goal involving addition and subtraction within 1,000, a goal involving the addition and subtraction of time intervals had not been introduced, and a goal involving multiplication and division inside 100 had been just introduced. In Reading, Student was progressing on a goal involving identifying the main idea in informational texts and two facts to support the main idea, and a similar goal involving literary texts had not yet been introduced. In Written Expression, Student was progressing on a goal involving writing a response to an inferential written topic, and a goal involving editing teacher-corrected writing assignments

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<sup>16</sup> *Id.* at 12 (152).

<sup>17</sup> *Id.* at 14 (154).

<sup>18</sup> R6:1 (159).

<sup>19</sup> R7:1 (170).

<sup>20</sup> *Id.* at 2 (171).

<sup>21</sup> *Id.* at 8 (177).

had not yet been introduced.<sup>22</sup>

6. On February 4, 2021, when Student was in grade A at School A, DCPS issued Student's IEP Progress Report for the second reporting period. In Math, Student had Mastered one Math goal; the two others had not been introduced due to virtual instruction. In Reading and Written Expression, Student was Progressing on all six goals.<sup>23</sup>

7. On February 4, 2021, DCPS conducted an IEP Annual Review meeting.<sup>24</sup> The Math PLOP indicated that Student's September 2020 i-Ready overall score of 425 represented no growth from the middle of the year ("MOY") assessment in school year 2019-20. The PLOP also reported that based on Examiner A's evaluation, Student has calculation skills in the Average range, but lacked automaticity, and whose ability to solve word problems was in the Low Average range. The goals involved (a) solving problems involving areas and perimeters of rectangles, (b) drawing 2D figures of geometric figures given one shape attribute, (c) solving two-step word problems, and (d) solving multiplication and division expressions.<sup>25</sup> In Reading, the PLOP indicated that Student's September 2020 standardized test lexile score had increased 99 points since the MOY 2019-20 assessment, and was at grade level. The PLOP reported that Student was receiving services virtually and had been able to remain on task, but struggled at times with making predictions or inferences from a text. The PLOP also reported some of Student's scores from Witness A's evaluation including the Low Average scores in reading fluency, and overall comprehension.<sup>26</sup> The goals involved (a) given inferences with evidence from texts, and (b) identifying main ideas in texts and the key details in the text supporting the main ideas.<sup>27</sup> In Written Expression, the PLOP reported that Student is able to complete written work with supports such as graphic organizers, sentence stems and examples of writing expectations. S/he is able to fill graphic organizers with ideas that answer a topic prompt and provide details. The goals involved (a) writing responses to given inferential writing topics, and (b) given a grade level draft text with capitalization, punctuation, and spelling errors, Student will edit the draft and make the appropriate corrections.<sup>28</sup> Student's direct services and Classroom Aids and Services were unchanged from the previous IEP.<sup>29</sup>

8. Petitioners enrolled Student at School B for the 2021-22 school year.<sup>30</sup>

9. On or about February 11, 2022, Witness D completed a Neuropsychological Evaluation of Student. Petitioners solicited the evaluation to gain an understanding of Student's current cognitive, neuropsychological, academic, and social/emotional strengths and challenges. Petitioners reported that Student had been diagnosed "with a disorder of attention," had difficulty with sustained focus, executive functioning, and aspects of reading, written language, and math.<sup>31</sup>

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<sup>22</sup> R4:6-9 (116-19).

<sup>23</sup> R4:16-20 (126-30).

<sup>24</sup> R8:1 (181).

<sup>25</sup> *Id.* at 3-5 (183-85).

<sup>26</sup> While Student's Sentence Reading Fluency score was Low Average (21<sup>st</sup> percentile), his/her Passage Comprehension (44<sup>th</sup> percentile), and Reading Comprehension (37<sup>th</sup> percentile) were in the Average range.

<sup>27</sup> *Id.* at 5-6 (185-86).

<sup>28</sup> *Id.* at 6-7 (186-87).

<sup>29</sup> *Id.* at 8 (188).

<sup>30</sup> Testimony of Petitioner/father.

<sup>31</sup> P3:1 (29).



On the Wechsler Intelligence Scales for Children (“WISC-V”), Student scored in the High Average range in Verbal Comprehension (116), in the Average range in Full Scale IQ (101), on the Processing Speed Index (103), and on the Working Memory Index (94), in the Low Average range on the Fluid Reasoning Index (85) and the Visual Spatial Index (84).<sup>32</sup> On the Wechsler Individual Achievement Test (“WIAT-4”), Student scored in the Average range on the Reading Composite (90), although his/her scores on the six subtests ranged from 90 (Word Reading) to 111 (Pseudoword Decoding). S/he also scored in the Average range on the Writing Composite (100), with the four subtest scores ranging from 95-104. Student scored in the Low Average range on the Math Composite (84) with Average scores in Numerical Operations (91) and Math Fluency (97), and a Low Average score in Math Problem Solving (81).<sup>33</sup> “... [his/her] trouble on the WISC-V Figure Weights subtest clearly reflected confusion about the relationship between different amounts. Overall, [Student] meets the criteria for diagnosis with a specific learning disorder with impairment in mathematics; [s/he] will require individualized remediation, as well as relevant supports and accommodations in the classroom, for assignments, and on tests.”<sup>34</sup>

Witness D reported selected subtest scores from several assessments to measure Student’s processing of verbal information. On the eighteen selected subtests, Student’s scores ranged from the 8<sup>th</sup> percentile in Phonological Proficiency, to scores in the 90+ percentile including Rapid Symbolic Naming (75<sup>th</sup>), Verbal Fluency (91<sup>st</sup>), Immediate Recall (75<sup>th</sup>), and Delayed Recall (75<sup>th</sup>).<sup>35</sup> Witness D opined that Student’s “phonological awareness” score “raises the possibility of a specific learning disorder with impairment in reading (dyslexia). Moreover, [Student’s] incorrect answers also raise questions about the acuity of [his/her] auditory processing.”<sup>36</sup> Witness D explained the disparity in Student’s scores in Phonological Decoding (77<sup>th</sup> percentile) and Phonological Proficiency (8<sup>th</sup> percentile) as “[s/he] is more successful when looking at words on a page than when hearing them.”<sup>37</sup>

In terms of his/her verbal expression, Student scored in the 91<sup>st</sup> percentile on the Delis-Kaplan Executive Functioning System (“D-KEFS”) Verbal Fluency subtests, but in the 16<sup>th</sup> percentile on the Oral and Written Language Scales (“OWLS-II”) subtest on Oral Expression.<sup>38</sup> On the Wide Range Assessment of Memory and Learning (“WRAML-2”), Student scored in the 16<sup>th</sup> percentile in Initial Learning, and in the 25<sup>th</sup> percentile in Delayed Recall and Delayed Recognition. Witness D concluded that “On the whole, [Student’s] performance on measures of both receptive and expressive language are consistent with the diagnosis of a language disorder; s/he will require individualized remediation, as well as relevant supports and accommodations in the classroom, for assignments, and on tests and exams.”<sup>39</sup>

With respect to attentional controls, Witness D noted that while Student was able to maintain his/her focus (52<sup>nd</sup> percentile), s/he worked “rather slowly” (29<sup>th</sup> percentile), [his/her] response speed was quite variable (17<sup>th</sup> percentile, “suggesting that [his/her] focus was waxing and

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<sup>32</sup> *Id.* at 19 (47).

<sup>33</sup> *Id.* at 22 (50).

<sup>34</sup> *Id.* at 11 (39).

<sup>35</sup> *Id.* at 19-20 (47-48).

<sup>36</sup> *Id.* at 9-10 (37-38).

<sup>37</sup> *Id.* at 10 (38).

<sup>38</sup> *Id.* at 19 (47). Although scores from certain subtests of the assessments administered were reported in Witness D’s Appendix, the Appendix did not provide the scores on all subtests of the D-KEFS, OWLS-II, or WJ-IV.

<sup>39</sup> *Id.* at 9 (37).

waning... suggesting that it would be quite challenging for [him/her] to maintain [his/her] attention throughout a full day of classes and homework. Witness D concluded that Student “continues to meet the criteria for diagnosis with a mild disorder of attention (ADHD: Predominantly Inattentive Presentation). In the area of executive functioning Witness D opined that Student “chose a rather ineffective strategy on the D-KEFS 20 Questions subtest, yet scored in the 37<sup>th</sup> percentile. S/he scored in the 61<sup>st</sup> percentile on the Tower of London-2, where s/he was asked to rearrange colored balls on pegs while following complicated rules. However, Witness D noted that Student worked relatively slowly (24<sup>th</sup> percentile). Moreover, Student “struggled with the organizational demands of the Rey-Osterrieth Complex Figure. [Her/his] direct copy of this complicated design was well below average... [Student] had trouble keeping track of several aspects of a puzzle or problem at once. Individuals who exhibit such executive difficulties typically experience trouble in the related areas of organization, time management, and efficient work production, and are relatively dependent on externally provided structure and direction.”<sup>40</sup>

Student’s emotional functioning was measured through the Children’s Depression Inventory (“CDI-2”) and the Multidimensional Anxiety Scale for Children (“MASC”). On the CDI-2, Student reported fewer symptoms of depression than most boys/girls his/her age. But on the MASC, “which measures aspects of anxiety, [her/his] overall score was well above average, and [s/he] reported clinically elevated separation anxiety/phobias and symptoms of both obsessive-compulsive disorder and a generalized anxiety disorder.”<sup>41</sup> Witness D concluded that Student satisfied the criteria for Generalized Anxiety Disorder (“GAD”).<sup>42</sup> In addition to ADHD, GAD, and the Specific Learning Disorder (“SLD”) in Mathematics, Witness D diagnosed Student with a Language Disorder, and an SLD with Impairment in Reading (Dyslexia).<sup>43</sup> Witness D expressed support for Student’s placement at School B.

Because of the disparities between [Student’s] strong cognitive abilities and [her/his] difficulties in the areas of attention, executive functioning, and receptive/expressive language, [her/his] specific learning disorders in reading (dyslexia) and math, and [her/his] very significant anxiety, [s/he] will require an educational program which can meet the needs of a student performing at divergent levels in different areas, and I fully support [her/his] parents’ decision to place [her/him] at [School B]. Given [Student’s] intelligence and excellent reasoning abilities, there is no reason to believe that [s/he] cannot succeed in a challenging academic program. However, [s/he] also will require extensive remediation, as well as classroom supports and accommodations, to assist in [her/his] weaker areas... [S/he] will require small groupings in all academic subjects, as well as individualized instruction in reading and math. In addition, [Student] will need speech/language therapy as an ancillary service, and a range of supports and accommodations...<sup>44</sup>

Witness D provided a plethora (six pages) of recommendations as to instruction and classroom accommodations including, but not limited to, 50% extra time on standardized tests, being given tests in small chunks, tests in small group, non-distracting environments, access to a word bank on

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<sup>40</sup> *Id.* at 10 (38).

<sup>41</sup> *Id.* at 12 (40).

<sup>42</sup> *Id.*

<sup>43</sup> *Id.*

<sup>44</sup> *Id.* at 13 (41).

tests, repeated instructions, access to speech-to-text software, access to a computer, assignments in writing, dividing long-term projects and papers into smaller segments, minimization of distractions, and seating near teacher.<sup>45</sup>

10. On June 10, 2022, DCPS conducted an Analysis of Existing Data (“AED”) meeting with Petitioners’ counsel.<sup>46</sup> On June 15, 2022, Attorney A, Petitioner’s counsel, objected to DCPS’ proposal at the AED meeting to conduct occupational therapy and S/L evaluations.<sup>47</sup> On June 28, 2022, Attorney A notified DCPS that Petitioners now consented to DCPS request to conduct evaluations, but Student would be unavailable “for a good part of the summer.”<sup>48</sup> On June 30, 2022, DCPS issued an AED report.<sup>49</sup> The report indicated that Student was “making consistent progress in the area of math... is currently reading approximately one year above grade level... is making consistent progress in the area of writing.”<sup>50</sup> The report acknowledge receipt of Witness D’s evaluation,<sup>51</sup> but indicated DCPS’ intention to conduct further assessments.<sup>52</sup> On July 5, 2022, Petitioner’s provided signed consent for DCPS to conduct the evaluations.<sup>53</sup> On July 6, 2022, Witness F, DCPS’ speech and language therapist, initiated efforts to set up evaluation dates in late July-early August for Student, and to get rating scales completed by School B teachers.<sup>54</sup> On July 7, 2022, Petitioner/mother notified Witness F that Student would be unavailable until the end of August.<sup>55</sup> Similarly, Petitioner/mother provided the same response in response to an evaluation request from a DCPS school psychologist.<sup>56</sup> Subsequently, on July 19, 2022, the parties agreed to conduct virtual psychological testing on July 29, 2022.<sup>57</sup> On July 21, 2022, DCPS initiated efforts to schedule an IEP meeting. Attorney A replied immediately, indicating her availability on August 11-12, 2022.<sup>58</sup> On July 22, 2022, Administrator A notified the parties that School B staff would not be available on August 11-12, 2022.<sup>59</sup> On July 27, 2022, DCPS’ Administrator B replied, “In efforts to provide a FAPE offer prior to the start of the 22-23 SY utilizing available data, DCPS intends to proceed with an IEP meeting. Upon receipt of new information, DCPS is happy to amend the IEP.”<sup>60</sup> The parties ultimately agreed to conduct the IEP meeting on August 12, 2022.<sup>61</sup>

11. On July 18, 2022, Attorney A, Petitioners’ attorney, notified DCPS that Student would attend School B for the 2022-23 school year and requested that DCPS fund the placement at School B for failing to offer an appropriate IEP for the upcoming school year.<sup>62</sup> DCPS replied on July 18, 2022, and declined to fund Student’s private school placement.<sup>63</sup>

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<sup>45</sup> *Id.* at 13-18 (41-26).

<sup>46</sup> R2:73 (85), *Id.* at 82 (70).

<sup>47</sup> *Id.* at 68 (80).

<sup>48</sup> *Id.* at 67 (79).

<sup>49</sup> R10:1 (193).

<sup>50</sup> *Id.* at 2-3 (194-5).

<sup>51</sup> *Id.* at 4 (196).

<sup>52</sup> *Id.* at 5 (197).

<sup>53</sup> P7:1 (75).

<sup>54</sup> R2:65-66 (77-78).

<sup>55</sup> *Id.* at 65 (77).

<sup>56</sup> *Id.* at 63-64 (75-76).

<sup>57</sup> *Id.* at 61 (73).

<sup>58</sup> *Id.* at 59-60 (71-72).

<sup>59</sup> *Id.* at 58 (70).

<sup>60</sup> *Id.*

<sup>61</sup> *Id.* at 35 (47).

<sup>62</sup> P11:1 (119).

<sup>63</sup> *Id.* at 2 (120).

12. On July 29, 2022, Examiner B, a DCPS School Psychologist, conducted a virtual academic assessment of Student.<sup>64</sup> Examiner B conducted the Kaufman Test of Educational Achievement-Third Edition (“KTEA-3”) to measure Student’s academic achievement. The KTEA-3’s Academic Skills Battery (“ASB”) Composite score that comprise 6 subtests from the areas of reading, math, and written language and represents a general score of overall academic abilities. Student scored in the Low range on the ASB Composite (73). In Reading the composite score is comprised of the Letter and Word Recognition (“LWR”) subtest and the Reading Comprehension (“RC”) subtest. Her/his Reading Composite score of 100 was in the Average range, as well as on both subtests. “[Student’s] performance here is similar to [her/his] previous academic functioning.”<sup>65</sup> In Writing, Student was administered the Spelling subtest; his/her score of 103 was in the Average range.<sup>66</sup> In Math, Student was administered the Math Concepts and Application subtest. The Math Concepts and Application subtest requires students to respond orally to items that require application of mathematical principles to real-life situations. Student score of 88 was in the Low Average range.<sup>67</sup>

13. On August 12, 2022, when Student was rising to grade G at School B, DCPS conducted an IEP Annual Review meeting.<sup>68</sup> The Consideration of Special Factors remained unchanged from Student’s Initial IEP. The Math PLOP reported. That a Measures of Academic Performance (“MAP”) assessment in the spring of 2022 indicated that Student was performing at a grade A level, one grade below his/her grade level at that time. The PLOP also reported Student’s WIAT-4 scores from Witness A’s evaluation: Math Composite (84, 14<sup>th</sup> percentile). Numerical Operations (91, 27<sup>th</sup>), Math Problem Solving (81, 10<sup>th</sup>), and Math Fluency (97, 42<sup>nd</sup>). The goals were (a) solving problems involving areas and perimeters of rectangles, and (b) drawing 2D figures of geometric figures given one shape attribute, (c) solving two-step word problems.<sup>69</sup> The Reading PLOP reported that on a MAP English Language Arts (“ELA”) assessment in the spring of 2022, Student’s score of. 200 was at a grade A level, one grade below her/his grade level at the time. The PLOP reported results of a School B Leveled Reading Assessment on September 23, 2021 indicating Student’s ability to read at grade level with 96% accuracy and 100% comprehension. On January 27, 2022, s/he was able to read a text one grade above grade level with 100% accuracy and 75% comprehension. The PLOP also reported some of Student’s scores from Witness D’s evaluation. The two goals from the previous IEP were carried over, and a third goal was added to address decoding.<sup>70</sup> In Written Expression, the PLOP reported Student’s WIAT-4 scores from Witness D’s evaluation, all of which were in the Average range. The goals were (a) the previous goal involving writing a response to a given inferential writing topic, (b) drafting multi-paragraph essays, and (c) revising his/her work incorporating mechanical and spelling conventions.<sup>71</sup> Student’s specialized services remained at six hours per week, but only two hours would be outside general education, in Math. The following Classroom Aids and Services were added to those previously prescribed: time for breaks, frequent check-ins and checks for understanding, and repetition of directions.<sup>72</sup>

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<sup>64</sup> P10:12 (112)

<sup>65</sup> *Id.*

<sup>66</sup> *Id.* at 13 (113).

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

<sup>68</sup> R11:1 (198).

<sup>69</sup> *Id.* at 3-6 (200-203).

<sup>70</sup> *Id.* at 6-10 (203-207).

<sup>71</sup> *Id.* at 10-13 (207-210).

<sup>72</sup> *Id.* at 14 (211).

14. On August 19, 2022, Witness E completed a Review of Independent Educational Evaluation of Witness D's Neuropsychological Evaluation.<sup>73</sup> The Review included the results of Examiner B's assessments of Student on July 29, 2022. Witness E cited the criteria for eligibility for services with an SLD and concluded that Student's profile did not meet the criteria for eligibility.<sup>74</sup> However, applying the criteria for OHI, Witness E concluded that Student met those criteria:

In [his/her] most recent Analyzing Existing Data meeting, [his/her] academic team noted that [Student] is making progress in reading and spelling. [S/he] is reported to be performing in the high average range. [Student] is noted to be able to answer literal questions. [S/he] is reading on the instructional level Y. In class, [s/he] is reported to read the text on [his/her] own. [Student] is given additional time on assignments and tests. In writing, [Student] is reported to be performing appropriately. [His/Her] teachers report that [s/he] writes a lot and has good writing fluency; however, [his/her] writing is reported to not always make sense. [Her/his] teachers report [s/he] uses graphic organizers. Math and memory are noted to be [her/his] weakest areas. It is noted that [Student] has trouble recognizing the correct operation and number sense...

[Student's] evaluation notes that [s/he] displayed strong Verbal Comprehension skills that were in the High Average range (SS=116). [Her/his] performance on Working Memory (SS=94) and Processing Speed (SS=103) were in the Average range.

[Student's] academic performance assessed by [Witness D] utilizing the WIAT-IV indicates that [s/he] is performing in the Average range for all areas except Math Problem Solving. In contrast [s/he] displayed a vulnerability in phonological proficiency (SS=79).

[Examiner B] completed an updated virtual academic assessment for [Student]. [Student] performed in the Average range for reading writing and spelling. [S/he] performed slightly below average for math concepts and application.

[Student's] most recent evaluation notes that [s/he] evaluated using questionnaires assessing anxious and depressed symptoms (MASC-2, CDI-2). On the CDI-2, [s/he] is reported to have made a number of positive comments, saying that [s/he] likes him/herself, that [s/he] is important to [his/her] family, and that [s/he] is confident that things will work out for [him/her], and [s/he] reported fewer symptoms of depression than most [boys/girls] [his/her] age. On the MASC-2, [Student] is reported to have endorsed quite a few items which measures aspects of anxiety; [her/his] overall score was well above average, and [s/he] reported clinically elevated separation anxiety/phobias and symptoms of both obsessive-compulsive disorder and a generalized anxiety disorder. When asked about [his/her] responses, it is reported that [Student] said that [s/he] has frequent intrusive thoughts, including worrying when [s/he] hears [his/her] parents arguing and ruminating about [his/her] own mistakes, and that [s/he] controls these fears with a number of rituals, including counting the number of words which someone is saying when they speak to [him/her] (including the number of words [his/her] teacher uses during instruction) and a relatively rigid bedtime routine. Finally, [s/he] noted that if [s/he] is interrupted during a routine, [s/he] feels very uncomfortable and sometimes needs to start over. Overall, [Student] appears to be a bright young student who displays vulnerability in phonological proficiency and math problem solving. Additionally, [s/he] has a history of concerns with

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<sup>73</sup> P10:1 (101).

<sup>74</sup> *Id.* at 14-15 (114-15).

attention and focus that impact [her/his] academic performance. The test results support eligibility for special education services as a student with an Other Health Impairment (OHI).<sup>75</sup>

Witness E's recommendations, *inter alia*, included the following: use of visual supports along with verbal instruction; presenting new content material in multiple modalities; breaking up activities into small units; preferential seating in minimal distraction areas, redirection, prompting, breaks, extended time, repeated directions, extra explanations of directions, and small group testing.<sup>76</sup>

15. On October 3, 2022, Witness F, a DCPS speech and language therapist, completed a Comprehensive Speech and Language Evaluation of Student. Student underwent a S/L evaluation in 2016 in which his/her expressive language skills were below age expectancy, but language comprehension and expression, speech fluency, voice, articulation, and intelligibility were age appropriate.<sup>77</sup> Student received S/L services at School B during the 2022-23 school year, but Petitioners declined to assume the financial cost of those services during the 2023-24 school year.<sup>78</sup> Witness F reported that Student was not receiving S/L services at School B at the time of the evaluation.<sup>79</sup> In interviews with two of Student's teachers, it was reported that Student "*sometimes* has difficulty attending in groups, *sometimes* has difficulty asking questions to gain information, and *sometimes* has difficulty starting and maintaining topics in conversation." Teacher B, Student's literacy teacher, reported that Student has intelligibility issues, avoids speaking in class, has communication skills that that influence his/her personal adjustment, has difficulty following two to three step directions, expressing ideas in an organized and coherent manner, and has low speech volume. "Despite these concerns, [Teacher A] does not believe that they prevent [Student] from making reasonable academic progress given classroom modifications and accommodations." Teacher B reported that Student has difficulty attending during lengthy instruction and has difficulty understanding vocabulary and concepts, "*sometimes* has reduced intelligibility, *sometimes* avoids speaking in class, *sometimes* mispronounces words, *sometimes* has difficulties following classroom routines, *sometimes* has difficulty following two to three step directions, *sometimes* his difficulty expressing ideas in an organized and coherent manner, *sometimes* demonstrates stuttering behavior, and *sometimes* has a quiet volume of speech."<sup>80</sup>

On the Goldman-Fristoe Test of Articulation ("GFTA-3"), no deficits were noted on the two subtests that were administered. "[Student's] intelligibility in structured and unstructured conversation was judged to be good to an unfamiliar listener. [Her/his] intelligibility within the general education classroom should be adequate for oral communication with peers and adults with known and unknown contexts."<sup>81</sup> Witness F found no deficits with Student's voice during a classroom observation. Witness F attributed the lowered volumes to a lack of confidence in his/her answers and recommended consultation with behavioral specialists for strategies to increase his/her confidence. "Vocal patterns, pitch, and quality should be adequate for classroom oral

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<sup>75</sup> *Id.* at 17 (117).

<sup>76</sup> *Id.* at 18 (118).

<sup>77</sup> P14:1, 3 (133, 135).

<sup>78</sup> Testimony of Witness B.

<sup>79</sup> P14:3 (135).

<sup>80</sup> *Id.* at 5 (137), emphasis provided in the text.

<sup>81</sup> *Id.* at 9 (141).

communication.”<sup>82</sup> Student’s fluency was also assessed during the observation. There was no stuttering or cluttering, and his/her rate and precision were adequate.

Student’s receptive and expressive vocabulary skills were measured on the Peabody Picture Vocabulary Test (“PPVT-5”), and the Expressive Vocabulary (“EVT-3”). On the PPVT-3, which measures receptive vocabulary, Student’s score of 83 was below the expected range, “indicating borderline skills in this area when compared to [her/his] age matched peers.” On the EVT-3, which measures expressive vocabulary, Student’s score of 96 was within the expected range. Witness F found this disparity unusual: “... [p]resumably, a student would have to ‘have’ the vocabulary before he or [s/he] would be able to ‘use’ the vocabulary.” Witness F opined that the receptive deficiency may be due to distractions, noise levels, inattention, fatigue, low energy, poor attitude, or lack of motivation.<sup>83</sup> “[Student] should be able to understand and use curriculum vocabulary on par with [his/her] age matched peers. [S/he] should be able to use vocabulary and specific terminology during classroom discourse. [His/her] performance can be further enhanced with a variety of supports including scaffolding, word webs, and repetition.”<sup>84</sup>

Student’s spoken language was assessed through the Comprehensive Assessment of Spoken Language (“CASL-2”). Student’s score of 102 was within the Average range. All of the scores on subtests were in the Average range except Pragmatic Language (117), which was Above Average, including Receptive Vocabulary (99), Sentence Expression (108), Grammaticality Judgment (114), Nonliteral Language (114), and Double Meaning (94, 34<sup>th</sup> percentile), Meaning from Context (97, 42<sup>nd</sup> percentile), and Inference (99).<sup>85</sup> The TAPS-4: Language Processing: Listening Comprehension Index assesses a student’s ability to understand information that is read aloud. Student’s score of 85 was within the Average range, indicating average listening comprehension skills.<sup>86</sup> The Test of Narrative Language (“TNL-2”) measures the ability to understand and tell stories. His/her score on the Narrative Language Ability Index of 113 was Above Average.

In other parts of this evaluation (vocabulary, grammar, syntax, supralinguistic functioning) [Student] demonstrated that [s/he] possesses the building blocks for successful language integration and processing. [Her/his] performance on the Test of Narrative Language – 2 would suggest that [s/he] is very successful in using these building blocks to put [her/his] ideas into words and to combine interrelated sentences that could convey the plot structure of a story to a listener. [S/he] demonstrates a good ability to integrate semantic, syntactic, and pragmatic language. [S/he] should be adept at classroom activities that include conversing with others about personal experiences, answering comprehension questions about stories, and creating fictional stories.<sup>87</sup>

Witness F concluded that Student did not have a disabling communication deficit and did not meet the eligibility criteria for a student with a Speech Language Impairment.<sup>88</sup>

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<sup>82</sup> *Id.* at 10 (142).

<sup>83</sup> *Id.* at 12 (144).

<sup>84</sup> *Id.* at 13 (145).

<sup>85</sup> *Id.* at 15-16 (147-48).

<sup>86</sup> *Id.* at 20 (152).

<sup>87</sup> *Id.* at 21-22 (153-54).

<sup>88</sup> *Id.* at 25 (157).

Overall, [Student] demonstrates oral communication skills commensurate with that of [his/her] age matched peers. [Student] demonstrated strengths with average to above average knowledge and use of lexical information and a strength in linguistic flexibility, average knowledge and understanding of figurative speech, average knowledge and understanding of indirect requests and sarcasm, average ability to recognize and interpret inferred meanings of context dependent and independent inferred information, low average listening comprehension skills, and average social language skills when compared to [his/her] age matched peers. Lexical/semantic functioning, as well as, grammar/syntax systems are average areas commensurate with [his/her] age matched peers. When examining [his/her] current articulation and intelligibility performance, [Student] demonstrates average articulation functioning and intelligibility...

Given the gestalt of [Student's] oral communication performance during this evaluation, [his/her] language system appears to be intact and not a source of academic difficulty and, in fact, would appear to be a source of relative strength. [Student's] language profile is NOT consistent with a student with a disabling oral communication disorder that would prevent [his/her] from accessing or gaining benefit from the general education curriculum.<sup>89</sup>

16. On October 14, 2022, DCPS convened an Eligibility Team Meeting for Student. Petitioner/mother opened by expressing her gratitude to School B for the environment it is providing for Student. "Really all you want for your kids."<sup>90</sup> Witness E, DCPS' School Psychologist at the meeting, reported that she had completed a review of Witness D's February 11, 2022 Neuropsychological Evaluation.<sup>91</sup> She reported that the evaluation found Student to be performing in the Average range in Reading and Writing but with "some vulnerability" in Math. In the social/emotional area, the evaluation highlighted Student's challenges with anxiety and executive functioning, revealed clinically elevated scores for separation anxiety, that Student had symptoms of obsessive-compulsive behavior, and had a diagnosis of GAD. Attorney A noted that Witness D made a diagnosis of SLD in reading. While the reading scores were largely in the average range, Attorney A argued that the scores were nuanced as to the weakness in reading comprehension. Witness H expressed skepticism at the suggestion of nuance, and asked what specifically School B staff sees that would call the average scores into question. "We are looking for disabling condition." Witness H asserted that the team would continue to find Student eligible as a student with an Other Health Impairment. She conceded that to the extent anxiety affected his/her performance in math, it could be addressed in the IEP.

When Attorney A why DCPS resisted finding an SLD in math, Witness H replied that Student's inattention and executive dysfunction is what was causing his/her difficulty in math. Administrator A, School B's Head of Middle School, stated that Student's teachers said s/he needs cueing to speak up for advocacy; s/he is not volunteering in the classroom and not asking questions when s/he is confused. Witness H stated that she was hesitant to pull Student out of academic courses too much; in DCPS, they would devote 30 minutes per week to work on these skills. The

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<sup>89</sup> *Id.* at 23 (155).

<sup>90</sup> R14:1 (267).

<sup>91</sup> *See* R12:1 (215).



DCPS representatives were firm that in the absence of externalizing behaviors, Student was properly classified OHI. Attorney reiterated her objection to this determination.

The team discussed speech and language services. Petitioner/father noted that Student had just started receiving services at School B. There were no intelligibility issues on an evaluation conducted by Witness F. A teacher commented on low vocal volume, but this was deemed a behavioral issue. There was no stuttering or cluttering. Although his/her vocabulary was in the borderline range, this score was considered an outlier. Student's supralinguistic language scores were within the average range, indicating that s/he has the ability to understand figurative and complex language. Student was above average in pragmatic language. Student was in the average range in auditory comprehension and narrative language, and above average in overall language ability. The DCPS representatives concluded that Student did not present with a disabling communication disorder and did not require S/L services. Attorney A stated her disagreement with this determination. The team determined that Student remained a student whose primary disability is OHI and is eligible for BSS. The team agreed to reconvene to update Student's IEP.<sup>92</sup>

17. On January 23, 2023, DCPS convened an IEP Team Meeting to propose amendments to Student's IEP.<sup>93</sup> Witness H, DCPS School Social Worker, updated the positive behavior area of the IEP on page 2. Witness A, Petitioner's Educational Consultant, indicated that the student sees the school social worker at School B. At Witness A's request, Witness H agreed to add the student's generalized anxiety disorder diagnosis to the PLOP and the positive behavioral box for the Behavior Section. Attorney A wanted to review the entire IEP as Petitioner wanted the IEP updated and did not agree with the current level of specialized instruction hours. DCPS proposed to add check-ins for classroom aids and services. School B indicated that the Student comes in to the social worker's office three times per week. Witness H agreed to add small group instruction and trusted teacher check-in to classroom aids and services. School B agreed with DCPS' decision that a behavior plan was not warranted. The team agreed to amend the IEP to add 180 minutes per month of BSS outside general education and extended year services.<sup>94</sup> On February 1, 2023, DCPS issued a PWN indicating its intention to issue an amended IEP to include 180 minutes per month of BSS as was determined at a meeting on January 23, 2023.<sup>95</sup> The Amended IEP was issued on February 1, 2023.<sup>96</sup> Although the team determined that Student was eligible for ESY and transportation, the amended IEP did not include these services.<sup>97</sup>

18. On May 15, 2023, Witness A, Petitioners' educational advocate, submitted comments to DCPS on a draft IEP. Significant suggestions include the following: incorrect grade on cover; Consideration of Special Factors did not include a reference to Student's push-in services from a social worker and believes Student requires assistive technology; in the Math PLOP, there is no reference to Student's SLD or anxiety; the first two Math goals are repeated from the previous IEP; for all Math goals, the evaluation schedule is too infrequent – should be every 8 weeks instead of every semester; suggested math goal involving track of what s/he is doing regrouping and checking answers to ensure they are feasible; in the Reading PLOP, there is no reference to Student's SLD or anxiety; the first three Reading goals are repeated from the previous IEP; Student needs Reading goals to

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<sup>92</sup> R14:6 (272).

<sup>93</sup> R16:1 (283).

<sup>94</sup> *Id.* at 3 (285).

<sup>95</sup> R18:1 (308).

<sup>96</sup> R17:1 (286).

<sup>97</sup> *Id.* at 22 (307).

address his/her fluency and vocabulary weaknesses; graded writing samples were not included in the Written Expression (“Writing”) PLOP; there is no reference to Student’s SLD or anxiety in the Writing PLOP; the IEP Writing goals were all repeated from the previous IEP; the Behavior goals were repeated from the previous IEP; addition classroom aids and services: graph paper, special supports to support emotional regulation/anxiety, multisensory instruction, gain attention before giving instruction, provide instruction in concise and precise language, break long assignments into parts with interim due dates, assistive technology for written expression and executive functioning, and pre-identified support/trusted adults; in Least Restrictive Environment, she disagreed with wording that services can be provided both within and outside of the classroom environment.<sup>98</sup>

19. On May 16, 2023, when Student was in grade G at School B, DCPS convened an IEP Annual Review meeting.<sup>99</sup> The Consideration of Special Factors provided that Student’s behavior impedes her/his learning or that of classmates. Behaviors causing concern were difficulty using pro-social skills and deficits in executive functioning. The Assistive Technology section was changed to require access to a word processor.<sup>100</sup> The Math PLOP reported that Student scored in the 8<sup>th</sup> percentile on a 2023 MAP Assessment and repeated the scores from Witness D’s evaluation. The goals involved: (a) use of decimals in problems involving application of area and perimeter formulas, and (b) two-step word problems.<sup>101</sup> In Reading, the PLOP reported that on a spring 2023 MAP Reading assessment, Student scored in the 20<sup>th</sup> percentile. The PLOP also repeated Student’s scores on Witness D’s evaluation. The first two goals from the previous IEP were repeated, but the third was replaced with a goal that addressed vocabulary.<sup>102</sup> In Written Expression, the PLOP reported the scores from Witness D’s evaluation. The goals were unchanged from the previous IEP.<sup>103</sup> Emotional, Social, and Behavioral Development was added as an Area of Concern. The PLOP indicated that the behavior concerns were anxiety, difficulty effectively using pro-social skills, and deficits in executive functioning. The PLOP also reported Student’s relevant scores from Witness D’s evaluation. The goals involved: (a) when presented with assignment or activity, Student will demonstrate agency with respect to work habits: initiating work and working until completion, (b) demonstrating the ability to use a preferred self-calming technique when experiencing anxiety or frustration, and (c) demonstrating appropriate peer relations, cooperative learning, and assertiveness.<sup>104</sup> The IEP team prescribed five hours per week of specialized instruction outside general education in Mathematics, and ten hours per week inside general education in Written Expression and Reading, three hours per month of behavioral support services BSS outside general education, and 90 minutes per month of consultation BSS services. The team added the following to the existing Other Classroom Aids and Services: check-in’s with trusted adult/social worker when needed; trusted teacher check-in; Small groups; and 1 inch graph paper.<sup>105</sup>

20. At the IEP Meeting, the following, several interactions, *inter alia*, took place: “[Witness A] wants the specific learning disability and anxiety included in how the disability

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<sup>98</sup> P25:1-24 (261-84).

<sup>99</sup> R20:1 (313).

<sup>100</sup> *Id.* at 2 (314).

<sup>101</sup> *Id.* at 3-6 (316-19).

<sup>102</sup> *Id.* at 7-12 (319-24).

<sup>103</sup> *Id.* at 13-16 (325-28).

<sup>104</sup> *Id.* at 16-22 (328-34).

<sup>105</sup> *Id.* at 23 (335).

impacts performance. The student is only eligible for OHI at this time. [Witness J, DCPS Program Specialist] will add anxiety throughout. [Attorney A, Petitioners' attorney] wants the SLD reference noted as a point of disagreement for the family, the advocate, School B, and the family... Dad inquired if the Math goals cover the entirety of the student's struggle with Math. [Attorney A] explained the purpose of the IEP goals to dad and agreed with [Witness J] regarding the specific goals. Specialized Instruction: 5 hours per week Math outside of the general education setting No more than 12 students in the classroom... [Witness J] explained the hours to the family. The hours could cover science and social studies. The IEP is a fluid document and can be changed. [Attorney A] is worried about the general education setting and feels the student needs support in every general education setting. The student is making progress at [School B] and wants the student to remain at [School B]. The student is having a challenge in a class of 4 and [Witness A] has concerns regarding class size. The student is in an 80 min. block Math class. Mom inquired about how the IEP would work in a DCPS classroom. Dad doesn't feel the proposal is adequate. Parents want the student to remain at [School B]. [Witness A] wants the student to have a full time IEP and the team is open to any non public options at this time. [Witness H, DCPS School Social Worker,] added consult services to BSS. [Witness H] added 90 min per month of consultation services. Classroom Aids and Services: Graph paper added Supplemental aids and services: Alerting before transitions and change of schedule. Breaking assignments into parts before completions... [Attorney A] inquired about placement. Services can be provided at the student's local school."<sup>106</sup>

21. On May 19, 2023, Petitioner/mother sent an email to Witness K, School A's Assistant Principal, and requested permission for an observation of School A by Petitioners' educational consultant, Witness A. In light of DCPS' proposed placement of Student at School A, Petitioners wanted Witness A to visit School A so that "She could learn about the proposed program, tour the school, connect with someone who can answer questions about the program and school, and visit both the general education and special education classes that [Student] may have according to [his/her] IEP."<sup>107</sup>

22. On August 2, 2023, Attorney A, Petitioners' attorney, notified DCPS that Student would attend School B for the 2023-24 school year and requested that DCPS fund the placement at School B for failing to offer an appropriate IEP for the upcoming school year.<sup>108</sup> DCPS replied on August 11, 2023, and declined to fund Student's private school placement.<sup>109</sup>

23. Witness A opined that Student's August 2022 IEP was inappropriate because s/he needs a small setting throughout the day. Witness A opined that Student could not thrive in a general education environment because her/his academic levels are too low, and her/his anxiety, memory weaknesses, and language weaknesses are too significant. "Even in a small class [s/he] needed constant prompting."<sup>110</sup> Witness A, who observed Student in two classes at School B on October 13, 2022, testified that Student was not participating in class, did not interact with peers, and "that can't improve in a larger setting." Witness A testified that at the May 16, 2023 IEP meeting, she disagreed with the services prescribed because Student needed special education services throughout the day. She disagreed with the team's refusal to prescribe S/L service s

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<sup>106</sup> R19:1-3 (309-311).

<sup>107</sup> P29:3 (311).

<sup>108</sup> P33:1 (349).

<sup>109</sup> *Id.* at 2 (350).

<sup>110</sup> Witness A observed Student in two classes at School B on October 13, 2022, English and Physical Education.

because Student's vocabulary and memory deficits impact him/her in all classes.<sup>111</sup>

24. Witness B is the Director of Speech and Language Pathology at School B. She first became aware of Student and his/her need for services in 2022. Witness B opined that Student has a mixed receptive/expressive language disorder with moderate weaknesses in inferences, verbal fluency, and higher level syntax skills. She testified that she disagreed with DCPS' determination that Student did not need S/L services, citing School B teacher comments in Witness F's evaluation that Student avoided speaking in class, had difficulty with multi-step instructions, and difficulty expressing ideas in an organized manner. Witness B opined that the discrepancy in expressive and receptive vocabulary tests on Witness F's evaluation indicates retrieval difficulties. She also noted that Student was below average in remembering complex and specific details and verbally presenting information. Witness B opined that Student needs to be in a small classroom; s/he needs teacher check-in, fewer people around, less noise, and clarification of what is expected of him/her. On cross-examination, Witness B conceded that she has never provided Student direct services, and was not involved in the development of Student's Progress Summary.<sup>112</sup>

25. Witness C is the Director of Jurisdictional Services for School B. Her duties include monitoring students' progress, compliance, testifying in due process hearings, attending IEP meetings, and meeting with teachers to review assessments. School B is a private school for students with language-based learning disabilities. Student's class sizes during the 2022-23 school year varied in size from five to nine except Physical Education (17-20) and band (10). In the 2023-24 school year, they range from four to twelve except 26 in Physical Education. School B holds a Certificate of Approval from the District of Columbia Office of the State Superintendent. Witness C testified that at the May 16, 2023 IEP meeting, she stated that Student was making progress at School B with the level of support that is appropriate for him/her. An inclusion setting is less than Student is receiving now and would be inappropriate, because s/he does not independently ask for help or clarification. Witness C cited School B's Assessment Summaries<sup>113</sup> showing grade level proficiency, MAP scores,<sup>114</sup> and Illustrative Mathematics.<sup>115</sup> With respect to the January 2023 Amended IEP, Witness C opined that she agreed with the 180 minutes of BSS, but the remaining services were insufficient. On cross-examination, Witness C conceded that she has no knowledge of School A. During the 2022-23 school year, Witness C conceded that only two of Student's seven teachers were certified in the District in special education. During the 2023-24 school year, only four of Student's eight teachers are certified in special education: Teacher D (Authors & Illustrators), Teacher E (Math), Teacher F (Physical Education), and Teacher G (Digital Art).<sup>116</sup>

26. Witness D is the psychologist who conducted the February 11, 2022 Neuropsychological Evaluation of Student. She described Student as lovely and engaged, uneven in cognitive functioning, excelled in verbal-based cognition, had trouble keeping track of things, average in working memory, and uneven in processing. Witness D saw several indications of executive dysfunction: if Student has to keep track of several things at once, her/his performance drops; on the Tower of London subtest, Student had to break the rules a lot; and s/he had trouble

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<sup>111</sup> Testimony of Witness A.

<sup>112</sup> Testimony of Witness B.

<sup>113</sup> P5:1 (61),

<sup>114</sup> P37:1 (359).

<sup>115</sup> P27:1 (297).

<sup>116</sup> Testimony of Witness C.

copying a complex design. Witness D diagnosed a Language Disorder because if an instruction became complicated, it had to be repeated; Student's ability to remember multi-step directions was in the 13<sup>th</sup> percentile. "[S/he] couldn't retrieve information that [s/he] presumably had." Witness D diagnosed an SLD in Reading because of Student's 8<sup>th</sup> percentile score in Phonological Proficiency and "modest comprehension." Witness D testified that she supports Student's placement at School B. She diagnosed Student with GAD. Student's anxiety makes him/her less attentive, which makes his/he executive functioning worse. Witness D opined that Student needs a program that supports all of [her/his] challenges because [her/his] challenges are interdependent. Witness D opined that Student needs a small group in all academic subjects because of his/her multiple learning differences. "I didn't see [him/her] being successful in a larger classroom. In a larger classroom, teachers may not notice that [s/he] was at sea." When asked why she recommended S/L services, she stated that she "noticed the fundamental impact of [his/her] difficulties w/language. On cross-examination, Witness D conceded that she did not talk to any of Student's teachers, did not reach out to any of Student's DCPS teachers, did not review Student's records at School A, had no knowledge to Student when s/he was at School A, no specific knowledge of the size of Student's class sizes at School A, that her description of Student's executive dysfunction was derived from a clinical, not educational setting, and that she was not referencing IDEA's definition of disability. Witness D conceded that she knew Petitioners were happy with School B.<sup>117</sup>

27. Petitioner/father testified that Student got [her/his] first IEP in grade F at School A during the 2019-20 school year. The 2020-21 school year was virtual and "it was a tough year." There was no math teacher for eight weeks. In February, Student's administrator went on leave and Student received no services: no IEP implementation, no pull-out, only S/L. Petitioners hired a tutor for Student in reading and writing, twice a week for an hour. Later they added tutoring in math, three times a week for an hour, and added an additional hour of ELA tutoring. "The plan was right, but [s/he] was not getting the services." The first year at School B was difficult for Student because it was hard for her/him to leave her/his friends. The smaller class size was easier for her/him to navigate. Petitioner/father testified that they requested an IEP from DCPS after Student was enrolled at School B "to understand what DCPS could do if [s/he] mainstreamed back." The services in the August 2022 IEP were "grossly insufficient" based on her/his level of need; her/his scores were single-digit percentiles in math. Student received S/L services at School B, but Petitioner/father could not remember why s/he got the services. The service hours on the May 2023 IEP were "a step in the right direction" but inadequate. But "what would be different than before? The math teacher had been left open for months." Regarding the request for an observation, Petitioners never got a reply from School A until the day before the hearing, when they called and asked if Petitioners could come that afternoon. At School B, "[S/he's] a happy kid again, As a parent, that's important. On cross-examination, Petitioner/father said they would have pulled Student out of School B if DCPS had offered a smaller class for most of the day. He conceded that he did not object to PLOPs, baselines, or goals at the IEP meeting. He further conceded that Petitioners got progress reports at School A and never complained about Student's progress. They decided to move Student to School B when they got the progress report in April 2021 that said goals had not been introduced. Petitioner/father conceded that they did not ask for a specific number of hours on the May 2023 IEP, "I don't know the number of hours – I wish it did work."<sup>118</sup>

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<sup>117</sup> Testimony of Witness D.

<sup>118</sup> Testimony of Petitioner/father.

28. Witness E is a school psychologist on DCPS' Central IEP Team. She testified that Attorney A opposed DCPS' proposal at the AED meeting in June 2022 to conduct assessments, because Student's anxiety would be exacerbated and DCPS only wanted them because Petitioners filed a complaint. Witness E opined that Student's relative strength is in understanding language, and has challenges when under time pressure. Witness E noted that Student's Reading scores were high except for Phonological Proficiency, all of his/her Writing scores were Average, and her/his Math scores were Average except Problem Solving. She characterized Student's score on the Phonological Proficiency subtest to be an outlier, because it was inconsistent with Student's testing overall. "When you look at scores, you don't look at one score. When you look at the Reading Composite, [her/his] scores are all in the average range. [S/he] does have challenges in one subtest, but overall Pseudoword Decoding was high average."<sup>119</sup> She observed that the Math Concepts subtest administered by Examiner B is comparable to the Problem Solving subtest on the WIAT-4 administered by Witness D. Witness E further opined that Student's executive functioning affects him/her on cognitive and academic levels, and that it is difficult to "tease out" executive functioning deficits from inattention. With respect to the SLD classifications, Witness E testified that "we're looking to see if [s/he's] below age and grade expectations cognitively and not responding to intervention." Witness E opined that Student's performance was not significantly below [her/his] cognitive level in reading, writing, or math; thus, OHI was the appropriate classification. Witness E reported that she presented her report at the October 14, 2022 Eligibility Meeting, and Petitioners had no questions.<sup>120</sup> Witness E noted that Witness D's evaluated found challenges in executive functioning and attention throughout. The proposal was to address these challenges in the academic Areas of Concern, Math, Reading, and Written Expression, but not to "over-pathologize" with unsupported classifications. On cross-examination, Witness E noted that Student's low score on Examiner B's ASB Composite was due to the fact that some subtests could not be given in the virtual format, thereby resulting in an invalid score for the Composite. "It was an oversight and overlooked by both of us."<sup>121</sup>

29. Witness F is the DCPS speech and language pathologist who conducted the October 3, 2022 Speech and Language Evaluation. She testified that because Witness D found a language disability in her evaluation of Student, Witness D agreed to conduct an evaluation at the June 10, 2022 AED meeting. "Sometimes neuropsychologists will use tests that are language-adjacent. We look at language differently. Sometimes they will give a vocabulary test and then generalize about speech and language ability inappropriately." Neither the petitioners nor School B teachers responded to requests to complete rating scales. Witness F's testimony was consistent with her evaluation. She concluded that Student's profile is not consistent with a student with a disabling oral communication disorder. She further opined that there was no data in her evaluation that suggested that Student needed speech and language services. Witness F noted that Student's Average score of 96 on the EVT-3 belied any concerns about word retrieval, and his/her score of 108 in Sentence Expression belied concerns about services in this area.<sup>122</sup> Witness F further opined that Student would benefit from interaction with non-disabled peers, because language is "rapid-fire" and s/he would benefit from that exposure.<sup>123</sup>

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<sup>119</sup> Quotes from witnesses' testimony is derived from hearing notes, not a transcript.

<sup>120</sup> R14:2 (268).

<sup>121</sup> Testimony of Witness E.

<sup>122</sup> "This test measures a student's ability to accurately express accurate syntax, including appropriate use of grammatical morphemes, sentence structure, and word order." R13:23 (255).

<sup>123</sup> Testimony of Witness F.

30. Witness G is DCPS' Non-public Monitor. He is responsible for ensuring IDEA compliance for District students placed in private schools. He did not contradict Witness C's testimony that two of Student's seven teachers in the 2022-23 school year were certified in special education, and four of eight in 2023-24. However, he was surprised to learn that Teacher F, a certified classroom teacher, was assigned as a co-teacher in Physical Education with a teacher who has no certification.<sup>124</sup>

31. Witness H is a DCPS school social worker. She testified that School B teachers never completed the rating scales she sent to Witness C in June 2022. She testified that there was no disagreement at the IEP team meeting on January 23, 2023 to DCPS' proposal to add 180 minutes per month of BSS outside general education. The behavior goals in the May 2023 IEP were designed to address executive functioning, self-calming, and peer relations. She opined that the OHI classification was appropriate because Student's anxiety and executive functioning deficits affected his/her performance.<sup>125</sup>

32. Witness J is a Program Specialist on DCPS' Central IEP Team. The team was trying to comply with a settlement agreement that required DCPS to develop an IEP by the beginning of the 2022-23 school year. Witness J testified that Attorney A's objection to DCPS request to conduct evaluations at the June 10, 2022 AED meeting precluded DCPS from completing evaluations before the end of the school year. "Once consent came in July, we were not able to access the student for evaluations or observations." Witness J disagreed that Student should have been classified with SLDs on the August IEP, because Witness E's data supported a classification of OHI alone. She disagreed that Student should have received S/L services, because Student was currently ineligible for services and DCPS intended to evaluate him/her once s/he was made available. The same was true for BSS. In the Math PLOP, the team considered Witness D's data as it had the most current data available. Witness J testified that there was no disagreement with the Math goals on the IEP. For Reading, the team considered the most recent data from School B including a spelling test, a WIST, a Reading Assessment, an end of year progress report, and WIAT scores from Witness D's evaluation. Witness D's data was also reviewed in developing the Written Expression goals. Witness J testified that there were no objection to any of the proposed goals, and as to the Areas of Concern. But not as to the amount of service hours. She opined that the services were appropriate, because there was enough time to address the primary concern of executive functioning. Student's 2020 IEP was in the general education environment and s/he was advancing from grade to grade. The parents' primary concern was for Student to remain at School B, which is too restrictive for Student's needs. At the May 2023 IEP meeting, Witness A continued to request an SLD classification. The IEP team increased Student's specialized instruction in math, because s/he was moving to grade B and they wanted to provide "maximum" support. Petitioner/father stated at the meeting that he wanted Student to remain at School B. There was general agreement with the Math, Reading, Written Expression, and BSS goals. Witness J agreed with the team's determination that it had offered Student a FAPE. If we increased the IEP hours to 30, to match School B's schedule, it would also be imperative that all of Students teachers be certified. School B is not appropriate because the environment is too restrictive for Student's needs, and its teachers are not qualified in special education. On cross-examination, Witness J testified that DCPS received Witness D's February 11, 2022 evaluation in May 2022, and the settlement agreement

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<sup>124</sup> Testimony of Witness G.

<sup>125</sup> Testimony of Witness H.

was executed in June 2022.<sup>126</sup>

## CONCLUSIONS OF LAW

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

Where there is a dispute about the appropriateness of the child's individual educational program or placement, or of the program or placement proposed by the public agency, the public agency shall hold the burden of persuasion on the appropriateness of the existing or proposed program or placement; provided, that the party requesting the due process hearing shall retain the burden of production and shall establish a prima facie case before the burden of persuasion falls on the public agency. The burden of persuasion shall be met by a preponderance of the evidence.<sup>127</sup>

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

**Whether DCPS denied Student a FAPE by failing to provide an appropriate IEP, on August 12, 2022, for the 2022-23 school year. Specifically, Petitioners assert that Student should have been classified with a Specific Learning Disability ("SLD") in addition to Other Health Impairment ("OHI"), the IEP did not include speech and language ("S/L") services, counseling or behavioral support services, and Student required more hours of specialized instruction in a small, special education setting throughout the entire school day. Petitioners also assert that the IEP contained outdated Present Levels of Academic Performance ("PLOPs") and that DCPS did not include updated baseline information from School B.**

The Supreme Court's first opportunity to interpret the predecessor to IDEA, The Education of the Handicapped Act ("EHA"), came in *Board of Education of the Hendrick Hudson Central School District v. Rowley*.<sup>128</sup> The Court noted that the EHA did not require that states "maximize the potential of handicapped children 'commensurate with the opportunity provided to other children.'"<sup>129</sup> Rather, the Court ruled that "Implicit in the congressional purpose of providing

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<sup>126</sup> Testimony of Witness J.

<sup>127</sup> D.C. Code Sect. 38-2571.03(6)(A)(i).

<sup>128</sup> 458 U.S. 176, 187 (1982).

<sup>129</sup> *Id.* at 189-90, 200



access to a ‘free appropriate public education’ is the requirement that the education to which access is provided be sufficient to confer some educational benefit upon the handicapped child...<sup>130</sup> Insofar as a State is required to provide a handicapped child with a ‘free appropriate public education,’ we hold that it satisfies this requirement by providing personalized instruction with sufficient support services to permit the child to benefit educationally from that instruction... In addition, the IEP, and therefore the personalized instruction should be formulated in accordance with the requirements of the Act and, if the child is being educated in the regular classrooms of the public school system, should be reasonably calculated to enable the child to achieve passing marks and advance from grade to grade.”<sup>131</sup>

More recently, the Court considered the case of an autistic child under IDEA who, unlike the student in *Rowley* was not in a general education setting.<sup>132</sup> The Tenth Circuit had denied relief, interpreting *Rowley* “to mean that a child’s IEP is adequate as long as it is calculated to confer an ‘educational benefit [that is] merely... more than *de minimis*.”<sup>133</sup> The Court rejected the Tenth Circuit’s interpretation of the state’s obligation under IDEA. Even if it is not reasonable to expect a child to achieve grade level performance,

... [h]is educational program must be appropriately ambitious in light of [his/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.<sup>134</sup>

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

When all is said and done, a student offered an educational program providing ‘merely more than *de minimis*’ progress from year to year can hardly be said to have been offered an education at all. For children with disabilities, receiving instruction that aims so low would be tantamount to ‘sitting idly... awaiting the time when they were old enough to drop out...’ The IDEA demands more. The IDEA demands more. It requires an educational program reasonably calculated to enable a child to make progress appropriate in light of the child’s circumstances.”<sup>135</sup>

On this issue, Petitioners retain the burden of production and must establish a *prima facie* case before the burden of persuasion falls on DCPS. Petitioner/father testified that Petitioners moved Student from School A to School B for the 2021-22 school year. I note first that Petitioners’ Exhibits contain no documents prior to Witness D’s February 2022 evaluation. Thus, Petitioners offered no documentation of Student’s academic record prior to the transfer, and no documentation that Petitioners were in any way dissatisfied with Student’s educational program at School A.

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<sup>130</sup> *Id.* at 200.

<sup>131</sup> *Id.* at 203-04.

<sup>132</sup> *Endrew F. ex rel. Joseph F. v. Douglas County School District RE-1*, 137 S.Ct. 988 (2017).

<sup>133</sup> *Id.* at 997.

<sup>134</sup> *Id.* at 1000-01 (citations omitted).

<sup>135</sup> 137 S.Ct. at 1000-01.

From DCPS' Exhibits, Student was found eligible for services and received an Initial IEP on February 14, 2020. The IEP prescribed goals in Math, Reading, and Written Expression. The IEP team also prescribed three hours of specialized instruction outside general education in Math (2 hours) and Written Expression, and three hours inside general education in Math and Reading (2 hours). Student's year-end Progress Report on June 1, 2020 reported that s/he had mastered one Math goal, one Reading goal, and one Written Expression goal, and the remaining goals had not yet been introduced. On February 4, 2021, when Student was in grade A at School A, DCPS issued Student's IEP Progress Report for the second reporting period. In Math, Student had Mastered one Math goal; the two others had not been introduced due to virtual instruction. In Reading and Written Expression, Student was Progressing on all six goals. Thus, one year after the development of his/her initial IEP, Student had mastered two Math goals and was progressing on all goals in his/her two stronger Areas of Concern, Reading and Written Expression.

In February 2021, at the IEP Annual Review meeting a year later, the Math PLOP revealed that Student's September i-Ready assessment showed no growth from MOY 2020-21. The PLOP also reported that based on Examiner A's evaluation, Student has calculation skills in the Average range, but lacked automaticity, and whose ability to solve word problems was in the Low Average range. In Reading, the PLOP indicated that Student's September 2020 standardized test lexile score had increased 99 points since the MOY 2019-20 assessment, and s/he was at grade level. The PLOP reported that Student was receiving services virtually and had been able to remain on task. In Written Expression, the PLOP reported that Student is able to complete written work with supports.

At the end of the 2020-21 school year, Petitioners elected to remove Student from School A and enroll her/him at School B for the 2021-22 school year. The record includes no correspondence from Petitioners explaining their decision. However, Petitioner/father conceded in testimony that "The plan was right, but [s/he] was not getting the services." Thus, he had no dispute with School A's IEP, but testified that staffing vacancies precluded Student from receiving prescribed services. The issue of an alleged failure to implement the 2020-21 IEP was not before me and, therefore, not explored.

The record reveals that sometime during the 2021-22, Petitioners filed a due process complaint requiring DCPS, *inter alia*, to develop an IEP for Student for the 2022-23 school year. DCPS received Witness D's evaluation in May 2022 and scheduled an AED meeting for June 10, 2022. Having just received Witness D's evaluation, DCPS proposed to conduct additional evaluations of Student including educational and S/L evaluations. On June 15, 2022, Petitioners' attorney objected to the proposed evaluations. By the time Petitioners relented and gave consent for evaluations on July 5, 2022, Student had left town for the summer, precluding classroom observations or in-person testing before the beginning of the school year, no staff members of School B would be available for the IEP meeting on August 12, 2022, and DCPS had not received all of Student's records from School B for the 2021-22 school year. On July 27, 2022, Administrator B informed Attorney A that DCPS would proceed with the IEP meeting "utilizing available data," but would amend the IEP upon receipt of new information.

While the August 12, 2022 IEP included data from Witness D's evaluation, it did not adopt her recommendation to maintain Student's placement at School B. The IEP maintained Student's service levels at six hours per week, but only two hours would be outside general education, in Math. Classroom Aids and Services were added to those previously prescribed to address Student's

executive functioning deficits: time for breaks, frequent check-ins and checks for understanding, and repetition of directions. A week later, Witness E completed her Review of Witness D's evaluation, which included Examiner B's report from her July 29, 2022 academic assessments of Student.

Respondent's counsel's opening statement asserted that Petitioners are not entitled to reimbursement because Student was already at School B and they undertook measures to get DCPS to pay for that placement. The argument has merit for reasons already discussed. Student was making progress under [his/her] IEP at School A. S/he had mastered two goals in his/her weakest subject, math, and was progressing on all of his/her reading and writing goals at the first anniversary of his/her initial IEP. Petitioners provided no evidence that they had ever expressed dissatisfaction with Student's School A IEP or the program at School A before enrolling her/him at School B.

Petitioners made their prima facie case through the introduction of Witness D's evaluation. However, that evaluation was not provided to DCPS until May of 2022, and Petitioners' refusal to consent to further evaluation and lack of data from School B precluded DCPS from developing a complete history in time for the IEP meeting that was obligated before the beginning of the 2022-23 school year.

Witness D's evaluation recommends that Student be provided a small group environment throughout the school day, supported Student's continued placement at School B, and supported reclassification of Student with SLDs in math and reading. Witness D's analysis is grounded, in large part, on Student's poor performance on one WJ-IV subtest, Phonological Proficiency, in which s/he scored in the 8<sup>th</sup> percentile. Witness D opined that Student's "phonological awareness" score "raises the possibility of a specific learning disorder with impairment in reading (dyslexia). Moreover, [Student's] incorrect answers also raise questions about the acuity of [her/his] auditory processing." Witness D's recommendations are unpersuasive for several reasons. First, although she was admitted as an expert in special education, Witness D made no reference to IDEA's criteria for classifications. A clinical diagnosis of SLD does not necessarily mean that it qualifies as an IDEA disability. Witness D conceded that she knew nothing about Student's performance at School A in a general education environment and did not seek records from the school or interviews with Student's teachers. Thus, she was both unaware, and despite the length of her report, apparently indifferent as to Student's actual ability to perform in a general education classroom. Therefore, her proposed SLD classifications and recommendation as to a restrictive placement carry little persuasive weight. Second, I found the evaluations of Witness E and Witness F to be more balanced and credible. Witness D's overemphasis on one subtest in one assessment is not credible. As Witness E noted, although Student scored poorly in Phonological Proficiency, s/he scored in the High Average range in Pseudoword Decoding (111). Moreover, his/her Reading scores ranged from Average to High Average, [her/his] Writing scores were all in the Average range, and while s/he scored in the Low Average range on Witness D's Math Problem Solving subtest, s/he was two points from Average on Examiner B's comparable Math Concepts subtest (88).<sup>136</sup> Moreover, her/his Verbal Comprehension skills were in the High Average range (11) and her/his Working Memory (94), and Processing Speed (103) were also in the Average range.<sup>137</sup> Witness F's evaluation, conducted by licensed speech pathologist, thoroughly refuted Witness D's

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<sup>136</sup> R12:12-13 (226-27)

<sup>137</sup> *Id.* at 17 (231).

assertion that Student has a disabling communication disability.

For these reasons, I conclude that DCPS has met its burden of proving that it provided Student an appropriate IEP on August 12, 2022. The data available at the time was equivalent to that when Student was removed from School A without explanation. There, s/he had been able to make progress with the support of six hours of specialized instruction per week, the amount DCPS prescribed in the August 12, 2022 IEP. In addition, the testing conducted by Witness D and Examiner B reveals that Student was performing at or above grade level in Reading and Writing, and able to make progress with support in math at the level provided in the IEP.

**Whether DCPS denied Student a FAPE by failing to provide an appropriate IEP on May 16, 2023. Specifically, Petitioners assert that Student should have been classified with an SLD in addition to OHI, the IEP did not include S/L services, and Student required more hours of specialized instruction in a small, special education setting throughout the entire school day.**

In the previous section, I found that DCPS met its burden of proving that it provided an appropriate IEP on August 12, 2022. Student had a documented record of progress at School A under an IEP that provided six hours per week of specialized instruction. There had been no deterioration in Student's performance a year after s/he enrolled in School B. Evaluations by Witness D and Witness E revealed that s/he was performing commensurate with his/her cognitive ability: at or above average in reading, average in writing, and slightly below average in math. Therefore, I concluded that DCPS was justified in providing the same level of support as it prescribed in Student's last IEP at School A on February 4, 2021. I also concluded that Witness E's evaluation was persuasive in establishing OHI as Student's predominant classification, and Witness F's evaluation effectively refuted Petitioners' assertion that Student had a disabling communication disability.

At the IEP meeting on May 16, 2023, the Math PLOP documented that Student had scored in the 8<sup>th</sup> percentile on a recent MAP assessment, and the Reading PLOP reported that s/he had scored in the 20<sup>th</sup> percentile on a recent MAP assessment. The Written Expression PLOP reported scores from Witness D's evaluation. While Witness A, Petitioners' Educational Advocate testified as to the infirmities in the PLOPs, the PLOPs contained the data provided to the IEP team by School B. However, that data was useful in determining Student's present levels of performance. For example, in the Math PLOP, School B provided results of random quizzes, but there was no explanation as to whether the performance on the quizzes represented grade level work. Similarly in the Reading and Written Expression PLOPs, the information provided by School B did not reveal where Student's performance stood in relation to his/her current grade. Nevertheless, the IEP team increased Student's specialized instruction to five hours per week of specialized instruction outside general education in Mathematics, and ten hours per week inside general education in Written Expression and Reading. Witness J testified that the IEP team increased Student's specialized instruction in math, because s/he was moving to grade B and they wanted to provide "maximum" support. The increased support also reflects recognition of Student's lower MAP scores during the 2022-23 school year. Three hours per month of BSS were added at the IEP meeting in January 2023, as to which Petitioners agreed. Witness J testified that there were no objection to any of the proposed goals or as to the Areas of Concern during the IEP meeting.

This leaves the issue of Witness A's and Witness D's recommendations that Student requires a small class environment throughout the day. However, as previously discussed, Student has a history of being able to make progress with much less support in a general education classroom. The suggestion that Student cannot make progress in a general education classroom is not only factually and demonstrably false, it is also speculative. Witness D gave no reason for her recommendation. Because Witness A observed Student needing support in one small group class on one occasion does not prove Student's inability to achieve success in a larger classroom with inclusion support. Neither Witness A nor Witness D ever observed Student in a general education environment or talked to any of his/her teachers at School A. Therefore, their opinions as to how Student would fare in that environment are not only pure conjecture, they are belied by Student's academic record at School A. The witnesses' recommendation also conflicts with one of IDEA's fundamental principles. Mainstreaming was *the* primary motivation for IDEA's predecessor, the EHA; the statute *requires* mainstreaming in the absence of proof that the child cannot make satisfactory progress in the general education environment:

*To the maximum extent appropriate, children with disabilities, including children in public or private institutions or other care facilities, are educated with children who are not disabled, and special classes, separate schooling, or other removal of children with disabilities from the regular educational environment occurs only when the nature or severity of the disability of a child is such that education in regular classes with the use of supplementary aids and services cannot be achieved satisfactorily.*<sup>138</sup>

Here, Student has demonstrated the ability to thrive in a mainstream environment, thereby precluding the requested relief.

For these reasons, I conclude that DCPS has met its burden of proving that it provided Student an appropriate IEP on May 16, 2023.

**Whether DCPS denied Student a FAPE by failing to respond to Petitioner/mother's request on May 19, 2023 for an observation of DCPS' proposed location of services, School A.**

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

Upon request, an LEA shall provide timely access, either together or separately, to the following for observing a child's current or proposed special educational program: (i) The parent of a child with a disability; or (ii) A designee appointed by the parent of a child with a disability who has professional expertise in the area of special education being observed or is necessary to facilitate an observation for a parent with a disability or to provide language translation assistance to a parent; provided that the designee is neither representing the parent's child in litigation related to the provision of free and appropriate public education for that child nor has a financial interest in the outcome of such

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<sup>138</sup> 20 U.S.C. §1412(a)(5)(A), emphasis added.

litigation.<sup>139</sup>

On May 19, 2023, Petitioner/mother sent an email to Witness K, School A's Assistant Principal, and requested permission for an observation of School A by Petitioners' educational consultant, Witness A. In light of DCPS' proposed placement of Student at School A, Petitioners wanted Witness A to visit School A so that "She could learn about the proposed program, tour the school, connect with someone who can answer questions about the program and school, and visit both the general education and special education classes that [Student] may have according to [his/her] IEP.

School A clearly violated the observation provision of the Code. It not only did not promptly reply to the request, it ignored the request for the remainder of the 2022-23 school year. In a disingenuous effort to cure the violation, School A invited Petitioners to observe the school one school day before the hearing, December 8, 2023, later that very afternoon.

A Hearing Officer's determination of whether a child was denied a FAPE must be based on substantive grounds. In matters alleging a procedural violation, a Hearing Officer may find that a child did not receive a FAPE only if the procedural inadequacies (i) impeded the child's right to a FAPE; (ii) significantly impeded the parent's opportunity to participate in the decision-making process regarding the provision of a FAPE to the parent's child; or (iii) caused a deprivation of educational benefit.<sup>140</sup> In other words, an IDEA claim is viable only if those procedural violations affected the child's substantive rights.<sup>141</sup> Here, Petitioners did not request an observation of School A "to learn about the program and school." Student attended School B for five years, and had an IEP at School A for the last year and one-half of her/his enrollment there. Thus, Petitioners had an intimate knowledge of School A and its special education program. In fact, Petitioners requested the observation to gather intelligence for their ongoing legal disputes with DCPS. They have made it clear that their preference is to have Student educated at School B rather than School A. They transferred Student from School A to School B for the 2021-22 school year without documenting the reasons why. When DCPS convened an AED meeting in October 2022, Petitioner/mother opened the meeting by praising the School B for the environment it provides her child: "Really all you want for your kids."<sup>142</sup> At the May 16, 2023 IEP meeting, Witness J testified that the parents' primary concern at the meeting was for Student to remain at School B, and that Petitioner/father stated at the meeting that he wanted Student to remain at School B. Petitioners made the request for Witness A to observe School A three days later.

I conclude that School B's violation of its obligation to provide Witness A an observation did not rise to the level of a denial of FAPE.

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<sup>139</sup> D.C. Code §38-2571.03(5)(A) (2015).

<sup>140</sup> 34 C.F.R. 300.513(a).

<sup>141</sup> *Leggett v. District of Columbia*, 793 F.3d 59, 67 (D.C. Cir. 2015); *Brown v. District of Columbia*, 179 F. Supp. 3d 15, 25-26 (D.D.C. 2016), quoting *N.S. ex rel. Stein v. Dist. of Columbia*, 709 F. Supp. 2d 57, 67 (D.D.C. 2010).

<sup>142</sup> R14:1 (267).

### **Whether School B is a proper placement for Student.**

In light of my findings in the previous sections that DCPS offered Student appropriate IEPs on August 12, 2022 and May 16, 2023, I need not reach the issue of the propriety of School B as a placement.<sup>143</sup>

### **RELIEF**

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


### **ORDER**

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

**ORDERED**, that the *Complaint* is **DISMISSED** with prejudice.

### **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  
Hearing Officer

Date: January 16, 2024

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

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<sup>143</sup> 20 U.S.C. § 1412(c)(i).