

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

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OSSE  
Office of Dispute Resolution  
July 06, 2020

**Confidential**

<b>Parent on behalf of Student1</b>	)	<b>Case No. 2020-0075</b>
	)	
<b>Petitioner,</b>	)	<b>Hearing Dates: June 16-18, 2020</b>
	)	<b>Conducted by Video Conference</b>
<b>v.</b>	)	
	)	<b>Date Issued: July 6, 2020</b>
<b>District of Columbia Public Schools</b>	)	
	)	<b>Terry Michael Banks,</b>
<b>Respondent.</b>	)	<b>Hearing Officer</b>

**HEARING OFFICER DETERMINATION**

**INTRODUCTION**

Petitioners are the parents of an X-year-old student (“Student”) attending School A. On March 19, 2020, Petitioners filed a Due Process Complaint Notice (“*Complaint*”) alleging, *inter alia*, that the District of Columbia Public Schools (“DCPS”) denied Student a free appropriate public education (“FAPE”) by failing to develop an appropriate Individualized Education Program (“IEP”) and placement. On April 1, 2020, DCPS filed *District of Columbia Public Schools’ Response* (“*Response*”), denying each of the claims in the *Complaint*.

**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

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

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

## PROCEDURAL HISTORY

Petitioner filed the *Complaint* on March 19, 2020 alleging that DCPS denied Student a FAPE by failing to provide an appropriate IEP and placement for the 2019-20 school year. On April 1, 2020, DCPS filed its *Response* in which it asserted that Student's IEP of 10 hours of specialized instruction outside of general education and five hours in general education, along with four hours per month of speech and language services, four hours per month of behavioral support, and one hour per month of specialized instruction consultation, were appropriate and could be adequately implemented at School F. DCPS also asserted that extended year services ("ESY") were not warranted at the time the IEP was developed, but would be revisited in the spring of 2020.

The parties participated in a resolution meeting on April 2, 2020 that did not result in a settlement. The resolution period ended on April 18, 2020. A prehearing conference was conducted by telephone on May 1, 2020, and the Prehearing Order was issued that day.

The due process hearing was conducted on June 16-18, 2020 by video conference and was closed to the public. Petitioner's counsel disclosed Exhibits P1-P24. On June 15, 2020, Respondent filed *District of Columbia Public Schools' Objections to Petitioner's Disclosure* ("*Objections*"), objecting to P6, P9, P11-13, P18, and P19 on grounds of relevance, hearsay, and lack of authentication. On June 16, 2020, Petitioner filed *Petitioners' Response to District of Columbia's Objections to Petitioner's Disclosure*. I overruled the objections to P6, P9, P12, and P18, and deferred ruling on P11, P13, and P19. After the hearing, I sustained the objection to P11, and overruled the objections to P13 and P19. Thus, Petitioner's Exhibits P1-P10 and P12-24 were admitted into evidence. Petitioner's Disclosures also included a witness list of six individuals, including proposed experts Witness A, Witness B, Witness C, and Witness D. Respondent's *Objections* opposed expert testimony from each of these witnesses on the grounds that Petitioner failed to disclose financial interests that may create a conflict. Respondent's Disclosures contained a witness list of ten witnesses and documents R-1 through R-15. There were no objections and Respondent's Exhibits R1-R15 were admitted into evidence.

Petitioner presented as witnesses in chronological order: Witness A, Witness B, Witness C, Witness D, and Petitioner. Respondent presented Witness E, Witness F, Witness G, Witness H, and Witness I. Petitioner offered Witness A as an expert in special education, Witness B was offered as an expert in special education programming and placement, Witness C was offered as an expert in clinical social work, and Witness D was offered as an expert in special education. I overruled Respondent's objections to each of these witnesses testifying as an expert on grounds of conflict of interests. Respondent offered Witness E as an expert in clinical psychology, Witness F was offered as an expert in behavioral support and IEP programming, Witness G was offered as an expert in speech and language pathology, Witness H was offered as an expert in special education, and Witness I was offered as an expert in special education programming and placement. Petitioners' counsel did not object to any of the proffered expert testimony. Counsel for the parties provided oral closing arguments at the conclusion of the testimony. After the hearing, on June 24, 2020, Petitioners'

counsel filed *Petitioner's Legal Authority*, citations to cases upon which Petitioners rely, and Respondent's counsel filed *District of Columbia Public Schools' Case Citations*, citations to cases upon which Respondent relies.

## ISSUES

As identified in the *Complaint* and the *Prehearing Order*, the issues to be determined in this case are whether DCPS denied Student a FAPE by failing to provide an appropriate IEP and placement for the 2019-20 school year.

## FINDINGS OF FACT

1. Student is X years old and is in grade A at School A.<sup>2</sup>

2. On May 10, 2016, Examiner A completed a Psychological Assessment Addendum of Student.<sup>3</sup> At the time, Student was in grade D at School B, receiving special education services as a student with a Specific Learning Disability ("SLD").<sup>4</sup> On the Beery-Buktenica Developmental Test of Visual Motor Integration ("Beery VMI"), Student had adequate fine motor control and visual-perceptual abilities, but did not consistently apply a careful and precise approach to drawing and writing.<sup>5</sup> On the Wide Range Assessment of Memory and Learning ("WRAML2"), s/he had adequate memory for visual and verbal information in context, but had difficulty encoding information in the absence of context, such as rote facts or formulas.<sup>6</sup> On the Woodcock-Johnson Tests of Cognitive Abilities, Normative Update ("WJ-III NU"), Student's Processing Speed score fell within the Average range.<sup>7</sup> In Cognitive Fluency, his/her scores in retrieval fluency and cognitive processing met or exceeded age-level expectations.<sup>8</sup> On the Conners Continuous performance Test ("CPT-II"), Student's scores reflected a strong ability to sustain concentration and focus, but also indicated that for extended tasks, his/her speed and efficiency could be impacted by fatigue.<sup>9</sup> On the Behavior Rating Inventory of Executive Function ("BRIEF"), which assesses impulsivity, task initiation, memory, planning, organizational skills, and self-monitoring, neither parent nor teacher questionnaire responses resulted in significantly elevated scores.<sup>10</sup> Student's reading competence was measured on the Comprehensive Test of Phonological Processing ("CTOPP-2").<sup>11</sup> S/he scored in the Below Average range in Phonological Awareness, Average in Word Segmenting, and Below Average in Sound Blending and Phoneme Isolation. Student's word reading was measured to be in the Average range on the Total Word Reading Efficiency Index.<sup>12</sup> In mathematics, Student scored in the Below

<sup>2</sup> Petitioner's Exhibit ("P:") 1 at page 2 (2). The exhibit number and page are followed by the electronic page number in the disclosure in parentheses, i.e., P1:2 (6).

<sup>3</sup> P13.

<sup>4</sup> *Id.* at 6 (96).

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

<sup>6</sup> *Id.* at 12 (93).

<sup>7</sup> *Id.* at 4 (94).

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

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

<sup>10</sup> *Id.* at 5 (95).

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

<sup>12</sup> *Id.* at 6 (96).

Average range on the Comprehensive Mathematical Abilities Test (“CMAT”); his/her math calculation skills were variable, and [her/his] addition skills were weak.<sup>13</sup> Examiner A suggested seating close to the teacher, and longer assignments broken down into smaller steps among several classroom accommodations.<sup>14</sup>

3. On April 27, 2017, Witness B completed a Diagnostic Evaluation of Student when s/he as in grade E at School C.<sup>15</sup> Witness B observed Student during one class period and conducted testing. On the Peabody Picture Vocabulary Test (“PPVT-4”), Student scored in the Average range. On the Expressive Vocabulary Test (“EVT-2”), s/he scored in the Low Average range. Witness B recommended a comprehensive speech and language evaluation.<sup>16</sup> On the WJ-IV, Student scored in the High Average range in Sentence Reading Fluency and Sentence Writing Fluency, in the Average range in Letter-Word Identification, Passage Comprehension, Broad Reading, Word Attack, Basic Reading Skills, Math Fluency, Broad Written Language, Writing Samples, and Spelling, in the Low Average range in Calculation, and Broad Math, and in the Borderline range in Applied Problems.<sup>17</sup> On the BRIEF, Petitioners’ ratings “yielded extremely elevated Clinical scores in all 13 areas on their BRIEF-2...” that was matched by the teacher scores.<sup>18</sup> Witness B opined that:

[Student] is in need of intervention for [her/his] attention and executive deficits. This examiner believes that these areas of need are primarily responsible for [his/her] difficulties (and at home) and, until these are addressed, both medically and behaviorally, they will continue to interfere with [his/her] learning and [his/]her peer/social relationships. Every day [Student] is without help in these areas, [his/her] ineffective and non-adaptive patterns of behavior are reinforced and solidified... It is critical to provide [Student] with the supports [s/he] needs to manage [his/her] chemistry and learn behavioral and regulation strategies. It is important to remember that [s/he] gets almost nothing done in school...

In terms of school placement... This examiner can support [his/her] attending [grade F] at School C as long as [s/he] receives all the supports recommended in this report and is seen for a medication consultation. Otherwise, [s/he] is unlikely to experience success. Even with these, this lovely general education school may not be enough for [him/her]. To prepare for that possibility, it is recommended that [Petitioners] visit schools like [School D] and [School E] during Open House season in the fall. They are encouraged to consider beginning the process of obtaining special education and related services through their local public school system...<sup>19</sup>

4. On November 9, 2018, School C issued a Peace Ambassadors Progress

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

<sup>14</sup> *Id.* at 9 (99).

<sup>15</sup> P12.

<sup>16</sup> *Id.* at 6 (80).

<sup>17</sup> *Id.* at 16 (90).

<sup>18</sup> *Id.* at 14 (88).

<sup>19</sup> *Id.* at 14-15 (88-9).

Report.<sup>20</sup> The report provided grades in each course for Class Work Completion, Group Work, Final Project, Test, and Cycle Grade. The report indicated that “Student work in all subjects is on grade level, unless otherwise noted. **Modified** indicates extensive coaching, alternative assessment, or reduced requirements...” None of Student’s courses were Modified.<sup>21</sup> In Work Habits, Skills, and Communication, Student was noted to “Needs Support” in Uses transition times well, Open to teacher and peer feedback, Asks for help when needed, Acknowledges self and others, and Works well in groups. The teacher comments included the following:

[Student], you have worked very hard to make the transition into the Peace Ambassador Class. You are adjusting to the pace and quantity of work in the Peace Ambassadors. Additionally, you are adjusting to a new group of classmates without having your usual familiar faces around you. You are figuring out what it takes to keep up with your weekly work and have found a friend in our classroom. You have done well in keeping up with your Independent Study Project, which is a huge accomplishment. Congratulations!!!!...

[Student] is progressing in Spanish. [Her/his] listening and reading skills have increased slowly but surely. [S/he] is learning to follow the criteria directions and carry out assignments with accuracy. In the last weeks, [s/he] has demonstrated a level of independence and personal organization in [his/her] class work...

**PE:** In terms of accepting and following class expectations, [Student] has shown progress this year in PE. Although [s/he] still encounters difficulty following the general rules of personal respect, whether applied to peers or teachers, [s/he] is a fair participant in class games, enjoying competition and sport regardless of the outcome. In the coming months, we will be working with [Student] to recognize and follow through with the clear guidelines for respectful communication between students and teachers, and, with proper support and structure, believe that [s/he] will begin to make progress toward meeting these expectations in near future.<sup>22</sup>

On January 25, 2019, School C issued another Progress Report.<sup>23</sup> On this report, each course indicated that services were “Modified” in Language, Math, Social World and Natural World, but not in Personal World, Spanish A, Physical Education, or Art.<sup>24</sup> In Work Habits, Skills, and Communication, Student was noted to “Needs Support” in Maintains organized papers and locker, Open to teacher and peer feedback, and Works well in groups.<sup>25</sup> The teacher comments included the following:

<sup>20</sup> P25.

<sup>21</sup> *Id.* at 1-3.

<sup>22</sup> *Id.* at 3.

<sup>23</sup> *Id.* at 5.

<sup>24</sup> *Id.* at 5-6. Petitioner/mother testified that accommodations in courses denominated “Modified” included the quantity of work assigned to ■■■, templates provided, notes provided, additional time on tests, word banks, and one less choice on multiple choice tests than his/her peers.

<sup>25</sup> *Id.* at 7.

[Student] continued to work hard, and with the adjusted work load, and modified tests, [Student] has found some academic success in our classroom. We appreciate the effort that [Student] put into completing one assignment at a time and staying after school to complete assignments. [Student] is exploring the social climate in our classroom by reevaluating friendships and learning the value of clarifying who is a supportive friend and who is not. We continue to ask that [Student] to spend less time laughing at other students and recognize [his/her] responsibility in creating a sense of safety in the classroom. This type of behavior prevents other students from wanting to get to know [her/him] better, and it prevents them from getting to interact with [him/her] in a more positive way.

We would like to see [Student] continue to work more than [s/he] socializes during the school day. This would lighten the load of homework that [s/he] would have to complete in the evening. We look forward to helping [Student] have success in our classroom, and we will continue to work wither towards that effort.

Spanish: [Student] is approaching the class with enthusiasm and is demonstrating [her/his] personal organizational skills. [REDACTED] continues to learn to follow directions and produce quality work. I encourage [him/her] to maintain [his/her] attention to lessons and assignments by sitting in a seat away from friends that can be distracting.

PE: [Student's] behavior in class, with only a few instances aside, has remained relatively consistent throughout both Cycle 1 and 2, and as such, our goals for [her/his] progress will be similar going forward. [S/he] still excels at nearly every skill or game [s/he] decides is worth [his/her] time, and generally struggles with following through on the expectations of respectful engagement with classmates and teachers...

Art: What a great time [Student] has had this semester! [S/he] worked enthusiastically and brought much joy to each of [his/her] projects. [His/her] collage of a cat will be in the art show on June 7<sup>th</sup>. [S/he] spontaneously imagined fun ideas for [his/her] Claymation videos, and [s/he] constantly challenged [him/her]self to make more shots in order to make the most amusing movie [s/he] could create. Good Job. [Student]!!<sup>26</sup>

5. When Student attended School C, s/he was in a general education class of 17-18 children. S/he was easily overwhelmed by sounds. Student would elope from the classroom when s/he was overwhelmed. S/he tended to laugh at [his/her] classmates and make mean-spirited comments to them. Student had no sense of how others feel and was incapable of adjusting [his/her] behavior.<sup>27</sup> According to Teacher C:

<sup>26</sup> *Id.* at 7.

<sup>27</sup> Testimony of Witness A, who participated in four meetings totaling approximately four hours in Student's classroom with Petitioner/mother and Student's teachers at School C, but never conducted a formal observation

... [Student] has difficulty attending in one on one situations, in groups and during lengthy instruction, has difficulty understanding curriculum vocabulary and concepts, requires excessive wait time to comprehend or respond to information, has a speech rate that interferes with communication, and demonstrates inappropriate interactions with [his/her] peers... [Student] *sometimes* appears upset when communicating, has oral communication skills that influence peer adjustments, had difficulty following classroom routine and multi-step directions, has difficulty expressing [her/his] ideas in an organized manner, sometimes has difficulty asking questions to gain information, sometimes has an unusual sounding voice, and sometimes has difficulty staring and maintaining topics of conversation. [Teacher C] is most concerned with [Student's] listening comprehension skills and social language functioning. She believes that these weaknesses would prevent [Student] from making reasonable academic progress despite classroom modifications and accommodations... Currently, [Student] is not performing on grade level. [Teacher C] also notes that "[Student] is resistant to the extra help and support that [s/he] needs; the strategies that [s/he] has developed to avoid or get out of challenging situations are to walk away, ignore or be rude and occasionally verbally hostile."<sup>28</sup>

6. On January 6, 2019, Witness B completed an Educational Assessment of Student.<sup>29</sup> At that time, Student was in grade G, in his/her third year at School C. On the WJ-IV, s/he scored in the High Average range on Sentence Reading Fluency, and Average in Broad Reading, Letter-Word Identification, Passage Comprehension, Basic Reading Skills, Word Attack, Broad Written, Language, Spelling, and Writing Samples, Low Average in Math Facts Fluency, and Low in Broad Math, Calculation, Applied Problems, and Sentence Writing Fluency.<sup>30</sup> Witness B concluded that Student had weaknesses in mathematics that required classroom accommodations:

[Student] continues to meet criteria for a Specific Learning Disability in math. [S/he] requires manipulatives, a calculator, and step-by-step/specialized instruction in math. It would be helpful for [Student] to keep/have a math journal with procedures, examples, drawings, and problem-solving approaches outlined. [S/he] should be allowed various ways to demonstrate [his/her] skills and understanding in math... Observations during this testing showed that [Student] requires accommodations such as extended time and having directions broken down, repeated and rephrased.<sup>31</sup>

7. On February 8, 2019, Examiner B completed a Speech and Language Evaluation of Student.<sup>32</sup> Examiner B's testing revealed that Student had "a statistically

of Student in the classroom. Witness B observed Student 4-5 times totaling more than five hours, and confirmed Witness A's testimony about Student's elopements and mocking of peers.

<sup>28</sup> P8:2 (54)

<sup>29</sup> P6.

<sup>30</sup> *Id.* at 6 (41).

<sup>31</sup> *Id.* at 4-5 (39-40).

<sup>32</sup> P9.

significant Receptive and Expressive Language Disorder, characterized by challenges in actively holding onto incoming language long enough to act upon it, in understanding language that increases in length, grammatical complexity and degree of abstraction, in verbal expression and in memory storage strength and word retrieval.” Examiner B recommended, *inter alia*, that Student “resume language and literacy treatment no less than 120 minutes per week.”<sup>33</sup>

8. In mid-March 2019, School C informed Petitioners that Student was not welcome to return. Petitioners applied to School A in April 2019, and upon Student’s acceptance, Petitioner’s signed a contract in July for the 2019-20 school year. Petitioner/mother contacted Witness H to arrange a visit to DCPS School F to assess its appropriateness for Student. Petitioners cancelled the contract with School A before visiting School F. When Petitioner/mother and Student visited School F, according to Petitioner, Student was emotionally “very opposed” to School F due to the size of the school and the noise in the halls.<sup>34</sup>

9. On July 18, 2019, Witness G completed an Independent Educational Evaluation Review of Examiner B’s Speech and Language Evaluation.<sup>35</sup> Witness G noted that that evaluation “lacked discreet assessments of receptive and expressive vocabulary, which are essential elements in what is considered to be a comprehensive speech and language evaluation from DCPS.”<sup>36</sup> Witness G conducted a Fluency Assessment, a Peabody Picture Vocabulary Test (“PPVT-4”), and an Expressive Vocabulary Test (“EVT-2”).<sup>37</sup> Witness G’s testing revealed neither a statistically significant nor a clinically meaningful difference between [his/her] receptive and expressive vocabulary scores. Thus, Student “should be able to understand and use curriculum vocabulary on par with [his/her] age matched peers given some cues and supports.”<sup>38</sup> Witness G concluded that Student had speech deficits requiring direct services:

Overall, [Student] presents with communication scores that range from the below average range to the average range. Given information from the provided evaluation, [Student] presents with weaknesses in [his/her] oral language skills, specifically [his/her] language organization and figurative language knowledge and use...

Given [Student’s] oral language performance, [s/he] demonstrates a disabling oral communication disorder that would prevent [him/her] from accessing or gaining benefit from the general education curriculum despite classroom modifications and accommodations, therefore: [s/he] meets eligibility recommendations for a student with a Speech Language Impairment in the area of language.<sup>39</sup>

<sup>33</sup> *Id.* at 6-7 (68-9).

<sup>34</sup> Testimony of Petitioner/mother.

<sup>35</sup> P8.

<sup>36</sup> *Id.* at 2 (54).

<sup>37</sup> *Id.* at 1 (53).

<sup>38</sup> *Id.* at 6 (58).

<sup>39</sup> *Id.* at 6-7 (58-59).



10. At an Analysis of Education Data (“AED”) meeting on June 7, 2019, Petitioners expressed concerns about the neighborhood DCPS school, School F, because of the size of the school population and because Student “will not have access to a trusted adult as often as is needed. Additionally, [Student] has never needed to move between classrooms for all classes.”<sup>40</sup>

11. On July 25, 2019, Examiner C, DCPS School Psychologist, completed a Review of Independent Educational Evaluation of Witness B’s January 6, 2019 evaluation.<sup>41</sup> Examiner C also reviewed a Wechsler Intelligence Scale for Children (“WISC-V”) conducted by Examiner D on January 3, 2019, and Examiner C conducted a Behavior Assessment System for Children (“BASC-3”) and a BRIEF-2. On the BASC-3, Petitioner/mother’s responses in the behavioral categories were as follows: At Risk in Somatization, Attention Problems, Atypicality, Adaptability, Social Skills, Leadership, Functional Communication, and Activities of Daily Living, The Developmental Social Disorders, and Resiliency, and Clinically Significant in Hyperactivity, Aggression, Conduct Problems, Anxiety, Depression, Withdrawal, Anger Control, bullying, Executive Functioning, and Negative Emotionality.<sup>42</sup> On the BRIEF-2 Petitioner/mother’s responses were in the Clinically Significant range in all categories: Inhibitory control and impulsivity, Self-monitor, Shift, Emotional Control, Initiate, Working Memory, Plan/Organize, Task Monitor, Organization of Materials, the Behavior Regulation Index, The Emotion Regulation Index, the Cognitive Regulation Index, and the Global Executive Composite.<sup>43</sup> On the WISC-V, Student was Average to Above Average in all cognitive areas. After reporting Witness B’s findings, Examiner C recommended continued eligibility in the areas of Written Expression, Math Calculations, and Reading Comprehension. With respect to Student’s behavior:

The BASC-3 and BRIEF-2 that were completed by [Student’s] mother as a part of this IEE Review indicated that there are significant (and broad) concerns regarding [Student’s] executive function skills and [his/her] social, emotional, and behavioral functioning. Educationally, based on the information available for review as a part of this report, [Student] seems to be bright young [man/lady] with a likely deficit overall in the area of math. [S/he] appears to have difficulty with self-regulation across all areas and will likely require support in and out of the classroom in the school setting ...If school staff have the same concerns reflected in the current parent input, [Student] would benefit from formal instruction on self-regulation, coping strategies, and social skills... It is recommended that an FBA be completed to determine the need for a more formal behavior plan that includes specific identification of behavior functions and a plan for teaching replacement behaviors.”<sup>44</sup>

12. On July 31, 2019, DCPS convened an Eligibility Team Meeting.<sup>45</sup> Petitioner/mother stated that Student would try to escape when s/he does not want to complete

<sup>40</sup> P15:3 (106).

<sup>41</sup> P7.

<sup>42</sup> *Id.* at 6-8 (47-49).

<sup>43</sup> *Id.* at 8-9 (49-50).

<sup>44</sup> *Id.* at 10-11 (51-2).

<sup>45</sup> P26.

a nonpreferred activity. “[S/he] could also want to escape from a person or environment.”<sup>46</sup> Witness G recommended linguistic support.<sup>47</sup> Witness B opined that Student diagnosis of ADHD and testing warranted an additional classification of other health impaired but was “OK with the SLD classification.”<sup>48</sup> The team determined that Student was eligible as a student with SLD in the areas of Written Expression Math Calculations, and Reading Comprehension, and would require specialized education in all academic areas, and related services in Behavior Support (“BSS”) and Speech.<sup>49</sup>

13. On August 21, 2019, DCPS convened an IEP Annual Review Meeting.<sup>50</sup> The Consideration of Special Factors noted that Student “has ADHD and challenges regulating her/his emotions, especially when frustrated... [S/he] also has difficulty with social skills and communication. According to the results of the BASC-3, [Student] demonstrates difficulty with aggression, conduct problems, anxiety, depression, anger control and withdrawal... [Student] is able to communicate on an every day level with [his/her] peers and teachers. [Student] presents with weaknesses in [his/her] oral language skills, specifically [her/his] language organization and figurative language knowledge and use...”<sup>51</sup>

The Mathematics Present Levels of Academic Achievement and Functional Performance (“PLOPs”) reported his/her Low WJ-IV scores in Calculation, Applied Problems, and Math Facts Fluency. Student’s baseline was an inability to solve problems that had more than one step, skills “well below expectations for age and grade,” an inability to divide, solve for an exponent, find and equivalent fraction, or multiply integers, to read time on an analog clock, count mixed coins to get a total, add several dollar amounts, or solve problems that had more than one step. The goals were (1) be able to calculate the total cost of items by adding and/or multiplying decimals with 80% accuracy, (2) using a calculator, s/he will solve 2-step word problems with up to two operations with 80% accuracy, (3) when given a financial literacy word problem that requires addition, subtraction, multiplication, or division of two multi-digit decimals, Student will determine the correct operation needed and use the standard algorithm to calculate the result with 80% accuracy, and (4) when asked to add or subtract two fractions with unlike denominators, Student will find the least common multiple, create like denominators, and add or subtract to solve.<sup>52</sup>

The Reading PLOPs reported Student’s WJ-IV scores in Reading from Exhibit P6. The baselines were (1) Student was Average in Passage Comprehension, and (2) Student earned a 61% on the grade G Cycle 2 Progress Report in Language. “[Student] received accommodations and modified work in [grade G].” The goals were (1) given an unfamiliar list of 50 regular and irregular multi-syllabic words, Student will decode and count the number of syllables with 80% accuracy, (2) given an instructional level informational text and a claim about the text, Student will cite three pieces of evidence and explain in 2-3 sentences how it supports the claim with 80% accuracy, and (3) Student will determine the

<sup>46</sup> *Id.* at 2 (159).

<sup>47</sup> *Id.* at 3 (160).

<sup>48</sup> *Id.* at 4 (161).

<sup>49</sup> *Id.* at 5 (162).

<sup>50</sup> P2.

<sup>51</sup> *Id.* at 2 (13).

<sup>52</sup> *Id.* at 3-6 (14-17).

theme or central idea of a text with 7 out of 10 correct 80% of the time.<sup>53</sup> The Written Expression PLOPs reported Student's WJ-IV scores from Exhibit P6. The baseline was his/her Low Average score on the Sentence Writing Fluency subtest, slow speed and poor sentence construction, and that his/her performance was below expectations for age and grade. The goal was to write a five-sentence paragraph that included a topic sentence, 2-3 details, transition words, sensory details, and a concluding sentence.<sup>54</sup>

The Communication/Speech and Language PLOPs were that Student presents with weaknesses in [his/her] oral language skills, specifically her/his language organization and figurative language knowledge and use, and relative strengths in hearing and speaking, vocabulary, pragmatic language skills, vocal functioning, and speech fluency skills. The baselines were Student's score in Organizing, Semantics, and Spoken Language on the Test of Language Development ("TOLD-1:4") in Exhibit P9, and figurative and supralinguistic weaknesses. The goals were (1) to follow a variety of two-step to multi-step directions including inclusion/exclusion, sequencing, spatial, and temporal concepts, (2) demonstrate knowledge and use of increasingly complex antonyms, synonyms, homonyms, multiple word meanings, and analogies, with 80% accuracy, (3) using a multi-sensory approach, Student will include 5-6 language elements when describing objects with 80% accuracy over three consecutive sessions, and (4) demonstrate knowledge and use of absurdities, idiomatic language, and figurative language in oral language activities with 80% accuracy over three consecutive sessions.<sup>55</sup>

The Emotional, Social, and Behavioral Development PLOPs were the Clinically Elevated scores on the BRIEF-2 in Exhibit P7, revealing that Student has difficulty with resisting impulses, being aware of her/his functioning in social setting, adjusting well to changes in the environment, reacting to events appropriately, being tasks or activities, problem solving and organizing. That evaluation also noted that Student "can become rigid and demonstrates emotional dysregulation." The PLOPs also included Student's Clinically Significant and At-Risk scores on the BASC-3 in Exhibit P7. The baselines were (1) when frustrated or anxious, Student will become aggressive and withdraw from peer interaction, (2) Student often becomes distracted and requires redirection to return to task, (3) Student has difficulty regulating her/his emotions and reacting to situations in frustration, (4) Student would benefit from clarifying directions to work independently, and (5) Student is not aware of how her/his behavior affects others. The goals were (1) utilize positive self-talk and coping strategies to handle stressful situations or work demands, demonstrated by engaging in an activity or situation in a calm and positive manner, 80% of the time, (2) in counseling sessions, Student will identify the problem, identify an effective coping strategy, and apply coping/regulation strategies 80% of the time, (3) show self-control of his/her body and voice at expected levels in structured and unstructured environments with peers around her/him 80% of the time, (4) using self-regulation strategies and self-monitoring checklists, Student will independently begin a task upon receiving clarifying directions across environments 80% of the time, (5) Student will return to task after becoming distracted given fading nonverbal prompts 80% of the time, (6) complete assigned tasks, within a designated time frame, using strategies to monitor completion of tasks 80% of the time, and (7) during counseling, when

<sup>53</sup> *Id.* at 6-7 (17-18).

<sup>54</sup> *Id.* at 8 (19).

<sup>55</sup> *Id.* at 8-10 (19-21).

presented with a problem, Student will accurately determine the size of the problem, determine the effective emotional response, and reflect on the response 80% of the time.<sup>56</sup>

The IEP prescribed fifteen hours per week of specialized instruction, five in general education and ten outside general education, four hours per month of speech-language services outside general education, four hours per month of behavioral support services (“BSS”) outside general education, and one hour per month of speech and language consultation services.<sup>57</sup>

During the IEP meeting, Petitioner/mother agreed with virtually all aspects of the IEP; she expressed concerns about the size of the school, but did not specifically object to the level of specialized instruction.<sup>58</sup> At the end of the meeting, Petitioner’s counsel stated that “the family feels that [his/her] needs are multifaceted and require a more restrictive environment than [School F].<sup>59</sup> Petitioners were encouraged to visit School F.<sup>60</sup>

14. On August 23, 2019, Petitioner’s counsel notified DCPS that Student would be enrolled at School A for the 2019-20 school year at DCPS’ expense.<sup>61</sup>

15. On October 21, 2019, Witness B conducted an observation of Student at School A.<sup>62</sup> Witness B concluded as early as May 2019 that School F could not meet Student’s needs:

To explore what public options would be available for [Student], [Petitioner/mother] spoke with [Witness H], the Special Education Coordinator at [School F], in April 2019 and both [Student] and [his/her] mother visited [School F] in May 2019. During the conversation and visit, it became clear that [School F] could not meet [Student’s] needs. Further, [Student’s] significant anxiety about being in such a large school, enrolling about 1500 students and is a much larger physical plant than any previous school [Student] attended...

This consultant is very familiar with the program at [School F] and has observed there and collaborated with staff for many years, most recently during the 2018-19 and 2019-20 school years. While [School F] can meet the needs of some children very well, the overwhelmingly general education instruction it provides is inappropriate for [REDACTED] [S/he] has very significant and multiple needs.<sup>63</sup>

Witness B observed Student in Science and Reading:

<sup>56</sup> *Id.* at 11-12 (22-23).

<sup>57</sup> *Id.* at 13 (24).

<sup>58</sup> Testimony of Petitioner/mother; testimony of Witness I.

<sup>59</sup> P3:3 (30).

<sup>60</sup> *Id.* at 4 (31).

<sup>61</sup> P5:1 (35)

<sup>62</sup> P18.

<sup>63</sup> *Id.* at 3 (113).

In Science, [Student] was observed to be in much greater control in this small, specialized environment than this consultant had ever seen [her/him] before. [S/he] was permitted to use a rubber/stretchy fidget to help [her/him] attend. The fidget was inconsistently helpful on its own but coupled with the small group size and step-by-step instruction, [Student] was better able to attend and participate in this small group, specialized instruction than [s/he] was in a general education setting. Specifically, [Student] remained in [his/her] chair without leaving it, even though [s/he] was a little wiggly. [S/he] wrote on [his/her] quiz paper when [Teacher A] asked the questions, wrote down [his/her] homework... and did not talk or call out. [Student] did stare a few times indicating inconsistent attention. [S/he] was more engaged when the activity was hands-on, even during the quiz, than when [s/he] just had to listen (auditory processing is a known deficit area for ■■■, as is auditory attention.)<sup>64</sup>

During the Reading session:

During this part of the lesson, [Student] was observed to get up from [his/her] seat frequently which actually seemed to be a reaction to not understanding how words are constructed. This consultant knows from her own experiences with [Student], as well as from reported history by [his/her] parents, teachers, and therapist, that tolerating being wrong or confused is very difficult for [him/her]. At the same time, [s/he] was very controlled. While [his/her] attention was observed to be highly variable, [his/her] behavior was much better than ever previously observed...

[Student] was observed to have difficulty managing [his/her] materials in the space allotted to [him/her] at the table. To do this, [s/he] got up several times to move [his/her] laptop, headphones, and other items off the table. This aspect of materials management seemed to have two components, one being executive and one being visual spatial. [S/he] seemed to have no sense that [s/he] was spreading [him/her]self and [his/her] things into other people's space...

[Student] was observed to have difficulty retaining multiple directions and typically responded with the last step given. [Teacher B] worked patiently with [Student], repeating and reviewing directions ensuring that [s/he] did them all in the correct sequence. Even when [Student] showed frustration, [Teacher B] was consistent and kindly insistent that things would be done correctly. The very small group size and the modified pace, while still teaching grade-level skills and content, allowed for this.<sup>65</sup>

Witness B then opined that School A was an appropriate placement for Student:

This consultant knows [Student] very well. She conducted two formal evaluations and observed [him/her] many times. This consultant has read

<sup>64</sup> *Id.* at 4 (114).

<sup>65</sup> *Id.* at 4-5 (114-15).

through the evaluations conducted by other professionals including those in the community and those with DCPS. [Student's] significant ADHD and multiple learning disabilities, [his/her] previously poor response to a general education program (not just [School C] but other placements before that), and [his/her] positive response to the intervention and milieu at [School A] support [his/her] placement there...

[Student] needs specialized instruction provided to [him/her] in very small class groupings and related services provided to [him/her] one-to-one and in very small groups so [s/he] can learn the skills [s/he] needs to meet grade and age-level academic, social, linguistic, and behavioral expectations. As noted earlier in this report, it is this consultant's opinion that [School A] constitutes the least restrictive environment for [Student] for the 2019-20 school year.<sup>66</sup>

16. Through the third quarter of the 2019-20 school year, Student's grades at School A were an A in Music and Health, A-'s in Reading Tutorial, Math, Language Arts, and Social Studies, a B+ in Science, and passes in Social Skills and Advisory.<sup>67</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>68</sup>

The issues in this case involve the appropriateness of Student's IEP and placement. As to these issues, Respondent bears the burden of persuasion.<sup>69</sup>

### **Whether DCPS denied Student a FAPE by failing to provide an appropriate IEP and placement for the 2019-20 school year.**

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*

<sup>66</sup> *Id.* at 6 (116).

<sup>67</sup> P20:1 (143).

<sup>68</sup> D.C. Code Sect. 38-2571.03(6)(A)(i).

<sup>69</sup> *Schaffer v. Weast*, 546 U.S. 49 (2005).

*Hudson Central School District v. Rowley*.<sup>70</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>71</sup> Rather, the Court ruled that “Implicit in the congressional purpose of providing access to a ‘free appropriate public education’ is the requirement that the education to which access is provided be sufficient to confer some educational benefit upon the handicapped child...<sup>72</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>73</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>74</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>75</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>76</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. It requires an educational program reasonably calculated to enable a child to make progress appropriate in light of the child’s

<sup>70</sup> 458 U.S. 176, 187 (1982).

<sup>71</sup> *Id.* at 189-90, 200

<sup>72</sup> *Id.* at 200.

<sup>73</sup> *Id.* at 203-04.

<sup>74</sup> *Endrew F. ex rel. Joseph F. v. Douglas County School District RE-1*, 137 S.Ct. 988 (2017).

<sup>75</sup> *Id.* at 997.

<sup>76</sup> *Id.* at 1000-01 (citations omitted).



circumstances.”<sup>77</sup>

Petitioners place primary reliance on *Gellert v. District of Columbia*.<sup>78</sup> There, the District Court granted summary judgment to parents who argued that their child required a small-class environment and were entitled to reimbursement for private school tuition when DCPS failed to provide a placement meeting this requirement. Unlike in the instant case, DCPS found the student in *Gellert*, who was enrolled at School F, to be ineligible for special education services. The parents then elected to enroll their child in a private, special education school with small class sizes. When DCPS declined to fund that placement, the parents filed a due process complaint. The Hearing Officer ordered evaluations to be conducted. Thereafter, DCPS reconvened an eligibility meeting and found the student eligible for services, but did not agree that he required a small-class environment. A Hearing Officer ordered reimbursement for the initial year at the private school, but declined to order reimbursement for the following year. On appeal, the private school provided evidence “supporting Jesse’s need for a small class size. When asked specifically about the appropriate size for Jesse, Marlene Gustafson, director of Kingsbury, testified, ‘the smaller, the better for him.’” Once the student was placed in a small-class environment, his “performance improved significantly.”<sup>79</sup> The only witness for DCPS was an interim special education coordinator at DCPS’ proposed placement, School G, who had not participated in a prior IEP meeting for the student and who had not even seen the student’s IEP until the morning of his testimony. Thus, the court held that DCPS failed to meet its burden of proof and ordered reimbursement for the second school year.<sup>80</sup>

Here, parents also maintain that a small-class environment is required. However, the evidence for this is not persuasive. Student’s prior placement, School C, would not allow him/her to return for the 2019-20 school year. While there was no testimony or documentation from School C as to the reason for this decision, the testimony from Witness A, Witness B, and Petitioner/mother suggest that it was due to Student’s tendency to elope when overwhelmed, to mock his/her peers, and to be disrespectful at times towards the staff. School C provided a general education environment, and Student received no special education services, although s/he did receive accommodations during the 2018-19 school year, including the quantity of work assigned to [REDACTED] s/he was provided templates, s/he was provided notes, additional time on tests, word banks, and one less choice on multiple choice tests than his/her peers.

The November 9, 2018 School C Progress Report discussed in paragraph 4 above indicates that Student was performing at grade level and earned positive comments from his/her teachers for his/her effort and academic progress, but s/he needed support in using transition times well, being open to teacher and peer feedback, asking for help when needed, acknowledging self and others, and working well in groups. The January 25, 2019 Progress Report was decidedly more critical of his/her behavior. However, School C’s unexplained decision to disinvite Student for the following school year is puzzling, because the teacher comments about his/her academic progress, other than Teacher C, remained quite positive.

<sup>77</sup> 137 S.Ct. at 1000-01.

<sup>78</sup> 435 F.Supp.2d 18 (D.D.C. 2006)

<sup>79</sup> *Id.* at 23.

<sup>80</sup> *Id.* at 24.



Thus, Petitioner was able to make academic progress in a general education environment, in a class of 15-18 students,<sup>81</sup> with no specialized instruction and no behavioral supports.

In her April 27, 2017 Diagnostic Evaluation of Student Diagnostic Evaluation of Student, Witness B supported Student's placement in the general education environment as long as s/he received the supports recommended in the evaluation. In her January 6, 2019 Educational Assessment of Student, Witness B found Student to be High Average to Average in most of the measured academic categories but to have a Specific Learning Disability in math. Witness B concluded that Student had weaknesses that required the following classroom accommodations: extended time and having directions broken down, repeated and rephrased. Thus, prior to Petitioners' decision to enroll Student in School A in April 2019, Witness B had never recommended that Student required a small-class environment.

The record supports that Student has made academic progress in general education but is performing somewhat below average in math and written expression.<sup>82</sup> At the IEP meeting on August 21, 2019, Petitioner/mother conceded the appropriateness of virtually every aspect of the IEP except the level of specialized services out of general education. However, neither she nor Witness B argued for full-time specialized instruction out of general education during the meeting. At the conclusion of the meeting, Petitioner's counsel stated that the family desired a more restrictive environment than School F.

This desire is not supported by any evaluation that was available to the IEP team at the time the IEP was developed and placement was determined. Moreover, the basis for the request for a small, self-contained class is not supported by the testimony presented by Petitioner's witnesses. Mr. Rubenstein testified that a "sense of safety" was the primary concern, and that Student was a "pretty anxious kid" who is easily overwhelmed. It does not follow that a student who has these issues but is making academic progress requires a highly restrictive environment to continue to make progress. When Witness B was asked what academic supports Student needed, she repeated the need for additional specialized instruction at least three times, despite never having recommending it prior to and including the IEP meeting.

Petitioner's counsel conceded in his closing argument that Student's academic needs "were not as significant as some of [his/her] other needs," and would not require a non-public placement. He argued that Student's attentional needs, the behavioral scores on the BRIEF-2 and the BASC-3, and School C's January 25, 2019 Progress Report require a full-time placement out of general education. However, it is not apparent from this record that Student's attentional and behavioral issues are so severe as to warrant such restrictions. S/he received no behavioral support at School C yet received consistent praise from his/her teachers for his/her academic effort and progress. The BASC-3 and BRIEF-2 scores are concerning, but they largely reflect the responses of Student's mother. The IEP proposed by DCPS would provide fifteen hours per week of specialized instruction and one hour per week of BSS, neither of which [s/he] ever received at School C. Student made academic progress at School C despite his/her behavioral issues, and s/he would receive considerably more services in the IEP proposed by DCPS.

<sup>81</sup> Witness A testified that there were 17-18 students in the class, while Witness B testified that there were 15.

<sup>82</sup> P6:6 (41).

I am particularly sympathetic to the parents' concern that School F is a much larger school than Student has ever attended, and s/he had an emotional, negative reaction during the visit to School F in the spring of 2019. I do not doubt that the smaller facility footprint, enrollment, and class sizes at School A are more desirable to Petitioners than the circumstances at School F. However, IDEA does not require a local education agency to maximize the services to disabled students,<sup>83</sup> but to provide those services that are reasonably calculated to enable a child to make progress appropriate in light of the child's circumstances. The IEP developed by DCPS was acceptable to Petitioners in all aspects except for the level of specialized instruction outside of general education. Petitioner's central criticisms of School F are the sizes of the facility and its enrollment. However, the issue in determining a proper placement is not the size of the school, but the size of the class in which the student will receive services. DCPS' IEP would require Student to transition from a general education class of 15-18 students to one of about 25 students, while also receiving 15 hours per week of specialized instruction, one hour per week of BSS, and one hour per week of speech services, none of which s/he received in his/her prior school. The record does not support that Student's behavior is so disruptive, or so significantly impairs his/her ability to access the curriculum, that a highly restrictive environment is the appropriate solution.

Petitioners' proposed placement also violates the central tenet of IDEA that "To the maximum extent appropriate, children with disabilities, including children in public or private institutions or other care facilities, are educated with children who are not disabled, and special classes, separate schooling, or other removal of children with disabilities from the regular educational environment occurs only when the nature or severity of the disability of a child is such that education in regular classes with the use of supplementary aids and services cannot be achieved satisfactorily."<sup>84</sup> I conclude that DCPS has met its burden of proving that the IEP it developed, and the placement it proposed, are reasonably calculated to enable the child to achieve passing marks and advance from grade to grade.

### **RELIEF**

For relief, Petitioner requested (1) reimbursement for tuition and related services at [REDACTED], a full-time special education program, and (2) continued placement at [REDACTED] until DCPS "makes an appropriate placement available."

### **ORDER**

Upon consideration of the *Complaint*, DCPS' *Response*, the exhibits from the parties' disclosures that were admitted into evidence, and the testimony presented during the hearing, it is hereby

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

<sup>83</sup> *Rowley*, 458 U.S. at 188-89.

<sup>84</sup> 20 U.S.C §1412(a)(5)(A). *See also*, 34 C.F.R. §300.114(a)(2); *Endrew*, 137 S.Ct. at 999 (the IDEA requires that children with disabilities receive education in the regular classroom "whenever possible."); *Z.B.*, 888 F.3d at 528, 435 U.S.App.D.C. at 207.

**APPEAL RIGHTS**

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

*Terry Michael Banks*

Terry Michael Banks  
Hearing Officer

Date: July 6, 2020

Copies to: Attorney A, Esquire  
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