

District of Columbia
Office of the State Superintendent of Education
Office of Dispute Resolution
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OSSE
Office of Dispute Resolution
July 15, 2023

Confidential

Parents on behalf of Student¹)	Case No. 2022-0083
)	
Petitioners)	Hearing Dates: June 20-22, 2023
)	
v.)	Conducted by Video Conference
)	Date Issued: July 15, 2023
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 A. On May 2, 2023, Petitioners filed a Due Process Complaint Notice ("*Complaint*") alleging that the District of Columbia Public Schools ("DCPS") denied the student a free appropriate public education ("FAPE") by failing to find [REDACTED] eligible for special education services for the 2021-22 and 2022-23 school years, failing to provide her/him appropriate Individualized Education Programs ("IEP") and placement for those school years, and failing to keep Student safe from bullying during the 2021-22 school year. On May 12, 2023, DCPS filed *District of Columbia Public Schools' Response* ("*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.

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

PROCEDURAL HISTORY

Petitioners filed the *Complaint* on May 2, 2023, alleging that DCPS denied Student a FAPE by failing to comply with its child find obligations for the 2021-22 and 2022-23 school years, and by failing to keep Student safe from bullying during the 2021-22 school year. On May 12, 2023, DCPS filed its *Response*, denying that it had denied Student a FAPE in any way. Specifically, DCPS alleged that Student was performing at or above grade level when Petitioners removed him/her from DCPS without ever requesting special education services from DCPS.

The parties participated in a resolution meeting on May 16, 2023 that did not result in a settlement. The parties participated in a prehearing conference on May 24, 2023. In the *Prehearing Order* that was issued later that day, the parties were invited to brief the Hearing Officer's authority under IDEA to adjudicate claims of bullying. On June 5, 2023, I issued an Amended Prehearing Order to address a change in the hearing dates. On June 12, 2023, Petitioners filed *Petitioners' Memorandum of Points and Authorities on a Hearing Officer's Authority to Adjudicate Bullying Claims* ("Petitioner's Memorandum").

On June 12, 2023, DCPS filed *District of Columbia Public Schools' Motion for Summary Decision*. Later that day, I issued an order denying that motion. The factual assertions in the *Motion* were not supported by sworn affidavits, were not shown to be undisputed, and could not be considered as evidence upon which a Hearing Officer could support a decision. On June 14, 2023, DCPS filed *District of Columbia Public Schools' Motion to Dismiss*. Later that day, I issued an order denying the motion as it was filed after the deadline set forth in the *Amended Prehearing Order*.

The due process hearing was conducted on June 20-22, 2023 by video conference. The hearing was closed to the public at Petitioners' request. Petitioners filed Five-Day Disclosures on June 12, 2023 containing a witness list of five witnesses and documents P-1 through P-35. DCPS filed objections to Petitioner's Disclosure on June 15, 2023. DCPS objected to the admission of Witness A, Witness B, and Witness C as experts. Rulings on those objections were deferred until DCPS completed *voir dire* of the witnesses. DCPS also objected to Petitioners' Exhibits P3, P5, P8-10, and P13-30. The objection to Petitioners' Exhibit P3 was sustained prior to the beginning of testimony, but I reversed this decision during the hearing and allowed its admission once Petitioners' counsel redacted it to include only emails exchanged between the parties. A ruling on Petitioners' Exhibit P20, a writing assignment, was deferred until authenticated, but it was never offered into evidence. The objections to Petitioner's Exhibit P9, an independent evaluation that was not provided to DCPS prior to the exchange of disclosures, and would not be authenticated by the author, and P27, a consent form for an observation, were sustained. On June 26, 2023, Petitioners submitted a redacted Exhibit P3 (redacted). Thus, Petitioners' Exhibits P1-P2, P3 (redacted), P4-P8, P10-P19, P21-P26, and P28-P35 were admitted into evidence.

Respondent's Disclosures, were also filed on June 12, 2023, containing a witness list of nine witnesses and documents R1-R9. Petitioners filed objections to Respondent's disclosures on June 14, 2023. Petitioners objected to Special Educational Coordinator A, Witness D, and Social Worker A being admitted as expert witnesses because DCPS failed to include their resumes in its disclosures as required in the *Amended Prehearing Order*. This objection was sustained prior to the beginning of testimony. Petitioners also objected to DCPS' Exhibit R8 due to lack of authentication. During DCPS's direct case, this exhibit was authenticated and admitted into

evidence. On June 21, 2023, DCPS submitted a redacted Exhibit R5 (redacted). Thus, Respondent's Exhibits P1-P4, P5 (redacted), and P6-P9 were offered and admitted into evidence.

Petitioners presented as witnesses in chronological order: Petitioner/mother, Witness A, Witness B, and Witness C. Witness A was admitted as an expert in special education and Witness C was admitted as an expert in psychology. At the conclusion of Petitioners' direct case, Respondent moved for a directed verdict; that motion was denied. Respondent presented as witnesses in chronological order: Witness D, Witness E, Witness F, Witness G, Witness H, Witness J, and Witness K. Witness F was admitted as an expert in education, Witness H was admitted as an expert in bilingual education, and Witness J was admitted as an expert in education. At the conclusion of DCPS' direct case, Petitioner/mother provided rebuttal testimony. At the request of Petitioners' counsel, the parties were authorized to file written closing statements *in lieu* of oral closings; the Hearing Officer imposed a deadline of June 30, 2023 for the submission of the closing arguments. On June 30, 2023, Respondent filed *District of Columbia Public Schools' Closing and Post-Hearing Brief*, and Petitioners filed *Petitioners' Closing Memorandum*.

ISSUES

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

1. Whether DCPS denied Student a FAPE by failing to find [REDACTED] eligible for special education services for the 2021-22 school year.
2. Whether DCPS denied Student a FAPE by failing to find [REDACTED] eligible for special education services for the 2022-23 school year.
3. Whether DCPS denied Student a FAPE by failing to keep [REDACTED] safe from bullying during the 2021-22 school year.
4. Whether School A is a proper placement for Student.

FINDINGS OF FACT

1. Student is X years old and has attended School A since January of the 2021-22 school year, when s/he was in grade D.²
2. Student enrolled at School B for grade M for the 2014-15 school year.³
3. On June 13, 2017, DCPS issued Student's report card for grade H. S/he earned the following grades: Advanced in Reading, Writing & Language, Speaking and Listening, Math,

² Petitioners' Exhibit ("P:") 13 at page 1 (155). The exhibit number and exhibit page numbers are followed by the digital page number in the disclosure in parentheses, i.e., P13:1(155); testimony of Petitioner/mother.

³ Respondent's Exhibit ("R:") 2 at page 1 (12). The exhibit number and exhibit page numbers are followed by the digital page number in the disclosure in parentheses, i.e., R2:1 (12).

Social Studies, Music, Art, and Health & Physical Education, and Proficient in Science.⁴ School B provides a Dual Language Program “in which s/he is studying grade level content in both English and Spanish. All Dual Language students are expected to meet the DCPS Standards for all Subject areas and in addition, are expected to meet grade-level appropriate Spanish language arts ‘normas.’” Language Arts, Math, Science, and Social Studies were taught in Spanish.⁵ Student was graded as Secure (Developing and Beginning were the lower grades) in Spanish Reading Standards, Spanish Writing Standards, and Spanish Speaking and Listening Standards.⁶ Student had three excused and four unexcused absences during the 2016-17 school year.⁷

4. As early as August 2017, Student was diagnosed with Unspecified Anxiety Disorder, which was updated shortly thereafter to Separation Anxiety Disorder. On September 26, 2017, Examiner A prepared a “To Whom it May Concern” letter proposing the development of a Section 504 Plan for Student.

While [Student’s] primary source of anxiety is separation from caregivers, it is important to be mindful that [s/he] experiences other features associated with children with anxiety disorders even after [s/he] has separated from parents for the school day. Specifically, [Student] tends to attempt to exert control over situations in which [s/he] experiences distress, [s/he] is very sensitive to negative evaluation (or perceived negative evaluation) by others, and [s/he] tends to avoid or try to escape from situations that trigger increased distress.⁸

5. On July 13, 2018, DCPS issued Student’s report card for grade E. S/he earned the following grades: Advanced in Reading, Writing & Language, Speaking and Listening, Art, Health & Physical Education, and Spanish, and Proficient in Math, Social Studies, Science, and Music. In all twelve of the graded behavioral categories, Student was found to have behaved appropriately and Independently (rather than With Limited Prompting, Rarely, or With Frequent Prompting). Student was absent seven times throughout the year, once unexcused.⁹ In Reading, Student was deemed to be performing above grade-level expectations.¹⁰

6. On October 31, 2018, when Student was in grade C at School B, DCPS developed a Section 504 Plan for Student.¹¹ Student’s perceived disability was not identified in the Plan.¹² The Specific Challenge to be Addressed was communication. To address home-school communication, the Plan required ongoing communication with the parents and for them to be notified one week in advance of Student’s tests. For Student’s emotional regulation, teachers were directed to redirect him/her positively to an activity to distract him/her, when necessary, when separating him/her from the parent in the morning. If Student arrived late, a familiar adult trusted by Student was to assist him/her to the classroom. Staff was also directed to communicate with

⁴ R2:6 (17).

⁵ *Id.* at 9 (20).

⁶ *Id.* at 10 (21).

⁷ *Id.* at 11 (22).

⁸ P34:1 (267).

⁹ R:2 at 12 (23). On DCPS’ grading scale, Advanced means exceeding expectations for this grade level, Proficient means meeting grade level expectations, and Basic means approaching grade level expectations. *Id.*

¹⁰ *Id.* at 16 (26).

¹¹ R4:1 (58). *See* 29 U.S.C. §794, Section 504 of the Rehabilitation Act of 1973.

¹² *Id.* at 4 (61).

Student one-on-one if redirection is needed. The Plan indicated that Student did not require related services, transportation, assistive technology (“A/T”), or a behavior management system.¹³

7. On June 7, 2019, DCPS issued Student’s report card for grade C. S/he earned the following grades: Advanced in Reading, Writing & Language, Speaking and Listening, Math, Science, and Health & Physical Education, and Proficient in Social Studies, Music, Art, and Spanish. In all twelve of the graded behavioral categories, Student was found to have behaved appropriately and Independently.¹⁴ Student had two excused absences throughout the year.¹⁵ Student was found to be Proficient in reading and comprehending Spanish literature and informational texts, Secure in Spanish Writing Standards, and Developing in Spanish Speaking and Listening Standards and Spanish Language Standards.¹⁶

8. On October 22, 2019, when Student was in grade F at School B, DCPS developed a Section 504 Plan for Student.¹⁷ Student’s disability was identified to be Anxiety Disorder.¹⁸ Communication remained the Specific Challenge to be Addressed. For home-school communication, in addition to one-week advance notification of Student being tested, parents would be alerted when there were changes at school or in schedules. Staff was also directed to communicate with Student one-on-one if redirection is needed. The Plan indicated that Student required 240 minutes per month of behavioral support services (“BSS”). The Plan included three behavioral goals: (a) to identify and discuss situations that are anxiety-producing and to identify coping strategies, (b) to use identified self-regulation strategies when s/he becomes upset, frustrated, or angry, and (c) to demonstrate problem-solving skills by identifying the social conflict problem and generating two appropriate solutions.¹⁹ The team discussed Student’s apparent aversion to Spanish:

[Student] has been going to see [Witness D, School Counselor] a lot throughout the school day. Because of [Witness D’s] schedule she is not able to see [Student] as often as the student desires. It is believed that some of what [s/he] is doing is work avoidance, mostly doing SLA/math, both of which are taught in Spanish. [Student] comes whenever [s/he] is experiencing anxiety or frustration. [Witness D] express that it is difficult for her to devote the one on one time the student desires. Because of the level of social emotional support, [s/he] appears to be requiring, it was recommended that we add [Social Worker A] as the support person for [Student].²⁰

9. On January 9, 2020, “Parents were contacted to confirm the removal of behavior support services for [Student] from [his/her] 504 Plan. Student refused services and parents are in agreement with [hem/her] not receiving social emotional support from the school social worker. [S/he] will continue to receive check-ins as needed with [Witness D], school counselor.”²¹

¹³ *Id.* at 1-5 (58-62).

¹⁴ R2:17 (28).

¹⁵ *Id.* at 21 (32).

¹⁶ *Id.* at 23 (34).

¹⁷ R4:9 (66).

¹⁸ *Id.* at 11 (68).

¹⁹ *Id.* at 10, 12 (67, 69).

²⁰ R3:1 (53).

²¹ *Id.* at 2 (54).

10. On June 19, 2020, DCPS issued Student's report card for grade F. Pass/fail grades were given for the fourth term due to the implementation of virtual learning in March 2020 in response to the COVID-19 pandemic. Student passed all courses during the fourth term. For the third term, Student earned the following grades: Advanced in Reading, Writing & Language, Speaking and Listening, Math, and Music, and Proficient in Social Studies, Science, Art, and Health & Physical Education. In the twelve graded behavioral categories, Student behaved Independently in seven categories and With Limited Prompting in five. S/he had no recorded absences throughout the year.²² On the Dual Language Program Addendum, Student was found to be Proficient after the third term in Spanish Language Arts (Overall), but Developing in all Spanish Reading Standards, and Beginning in most Spanish Writing Standards and in most Spanish Speaking and Listening Standards.²³

11. On December 2, 2020,²⁴ when Student was in grade A at School B, DCPS developed a Section 504 Plan for Student.²⁵ Student's disability was identified to be Anxiety Disorder.²⁶ Communication remained the Specific Challenge to be Addressed. In the classroom, the teacher was directed to redirect him/her positively to an activity to distract him/her, when necessary, when separating him/her from the parent in the morning. In the afternoon, the teacher would assist Student building a trusting relationship and lowering his/her anxiety level. Student was allowed to leave the classroom to use the bathroom or talk to a trusted adult, using a classroom manipulative to signify her/his need to leave. In the event of a schedule change, the parents would be notified and they will determine whether or not to communicate the change to Student.²⁷

12. On July 6, 2021, DCPS issued Student's report card for grade A. S/he earned the following grades: Advanced in Reading, Writing & Language, Speaking and Listening, Social Studies, Music, and Health & Physical Education, Proficient in Science, and Basic in Math and Spanish. In ten of the twelve of the graded behavioral categories, Student was found to have behaved appropriately and Independently in ten categories; s/he received no grades in two categories. Student had no recorded absences during the year. On the year-end Reading Inventory, Student was performing above grade level, but on the iReady Math assessment, s/he was below grade level. S/he was also below grade level on the STAR assessment that measures Spanish reading skills.²⁸ Student was found to be Proficient in reading and comprehending Spanish literature and informational texts, Secure in Spanish Writing Standards, and Developing in Spanish Speaking and Listening Standards and Spanish Language Standards.²⁹

13. On July 22, 2021, after Student had completed grade A at School B, DCPS developed a Section 504 Plan for Student.³⁰ Communication remained the Specific Challenge to be Addressed. Staff members were directed to spend a few minutes with Student to build trust and to communicate with Student one-on-one if redirection is needed. The Administrators, counselor, and teacher were directed to maintain ongoing communication with the parents, to give them one-

²² R2:24 (35).

²³ *Id.* at 29 (40).

²⁴ The Plan is dated December 2, 2019, but that is inconsistent with Student being in grade A.

²⁵ *Id.* at 16 (73).

²⁶ *Id.* at 18 (75).

²⁷ *Id.* at 17 (74).

²⁸ R2:30 (41).

²⁹ *Id.* at 23 (34).

³⁰ R4:23 (80).

week advance notification of Student being tested, and to alert them when there were changes at school or in schedules.³¹ The team met on July 27, 2021 to review the Plan:

Team concurred that accommodations should remain the same. [S/he] does not need testing accommodations. Parents report that the student's anxiety is as high as ever. Constant talking is [her/his] way of hiding [her/his] anxiety. [S/he] was in therapy, but it was paused because of [Student's] constant efforts to control the conversations... [Student] has proven to be a leader...³²

Petitioner/mother testified that s/he wanted Student to have support during “unstructured times out of the classroom.”

14. Petitioner/mother testified that sometime around the development of the July 2021 Section 504 Plan, she inquired about the efficacy of an Individualized Education Program (“IEP”) for Student. An unidentified staff person replied that it was not applicable for Student’s situation. Petitioner/mother conceded that s/he made no inquiry about an IEP at the July 27, 2021 Section 504 Plan meeting.³³

15. On November 9, 2021, when Student was in grade D at School B, DCPS updated Student’s Section 504 Plan at Petitioners’ request.³⁴ Witness H, Student’s SLA/Math teacher for one-half of the school day, reported that she “hasn’t seen a lot of conflicts in class.” Petitioner/mother proposed establishing an “acceleration group” in which Student “would be partnered with some of the kids that [s/he] had a tough time working with, not necessarily the bullies.” Although it was not reflected in the updated Plan, Witness F set up an acceleration group in SLA. Petitioner objected because SLA was Student’s “worst subject.” The Specific Challenge to be Addressed was not provided in the Plan. The accommodations included the following: (a) all peer conflict and social issues will be addressed in the moment by an adult to minimize potential anxiety, (b) Student will have the option to present to the teacher privately if s/he does not want to share in front of the class, (c) teachers were warned to be mindful of relationships when making seating assignments, (d) Student was encouraged to check-in with trusted adults throughout the school day, (e) staff members were directed to spend a few minutes with Student to build trust and to communicate with Student one-on-one if redirection is needed, and (f) regular communication with the parents regarding Student’s behavior class and interaction with staff and peers was encouraged. Parents were to receive one-week advance notification of Student being tested, and notice when there were changes at school or in schedules.³⁵ Student continued to exhibit a negative attitude towards Spanish; s/he did not want to read out loud. The team discussed investigating allegations of bullying.³⁶ Petitioners indicated that they were planning to remove Student from DCPS for middle school.³⁷

16. Petitioners notified School B of Student’s allegations of mistreatment by other students during the 2021-22 school year by email:

³¹ *Id.* at 24 (81),

³² R3:3 (55)

³³ Testimony of Petitioner/mother.

³⁴ P4:1 (83). Testimony of Petitioner/mother.

³⁵ *Id.* at 2 (84),

³⁶ R3:4 (56).

³⁷ *Id.* at 5 (57).

September 8, 2021: A student “continued to call [Student] “Karen” throughout the day. Each time soliciting laughs from the other students in the classroom at [Student’s] expense.”³⁸

September 9, 2021: An unidentified student called Student “Karen” and was admonished by a staff member. An unidentified student called Student fat in afterschool. On September 13, 2021, School Counselor A responded, reporting that she had met with Student and the first unidentified student on September 10, 2021. The student reported that he had already met with Witness E, a school dean. The student promised not to refer to Student “by anything other than [her/his] first name moving forward. He was apologetic and even asked if [Student] would be willing to partner with him in the future for class (group) activities...”³⁹

September 30, 2021: After Student told a student to put on her mask, “all of the students... started making fun of [Student] saying ‘[Student] put your mask on...’” then “you’re eating baby food...” then “You spit on yourself.” According to Student, four staff members “did not do anything to help.”⁴⁰ Witness F, the Assistant Principal, responded by email the next day, promising to speak to the entire grade D about their language at lunch. “I’ll make it clear to students and staff alike that we will not tolerate teasing. Students who are overheard teasing will call their parents with me the same afternoon to tell their parent what they said.”⁴¹ On October 3, 2021, Petitioner/mother replied, acknowledging that Student reported that Witness F made the promised announcement to the entire grade.⁴²

October 4, 2021: Student complained to Petitioner/mother that several girls were laughing at [REDACTED] before Witness F came into the lunchroom because they could see his/her underwear through his/her clothes.⁴³

October 6, 2021: Student complained to Petitioner/mother that an unidentified student told Student that he had researched the term “Karen,” concluded that it was not offensive, and would continue to call [REDACTED] “Karen.” “As usual, [Student] has asked that we not let the school know about this...”⁴⁴

October 8, 2021: Student complained to Petitioner/mother that the same student continued to call [REDACTED] “Karen” and a second student had done the same.⁴⁵ Witness F replied on October 13, 2021 and suggested convening a meeting including Student “so we can understand when and how this is happening.” Petitioners agreed to meet, but declined to include Student in the meeting.⁴⁶

³⁸ P3 (redacted):1 (1). The September 8th email also referenced a dispute involving Student objecting to other students killing flies. That dispute, which occurred on September 3, 2021, is described in paragraph 17.

³⁹ *Id.* at 2 (2).

⁴⁰ *Id.* at 7 (7).

⁴¹ *Id.* at 8 (8).

⁴² *Id.* at 9 (9).

⁴³ *Id.* at 10 (10).

⁴⁴ *Id.* at 11 (11).

⁴⁵ *Id.* at 14 (14).

⁴⁶ *Id.* at 15 (15).

November 23, 2021 (8:11 a.m.): Student “came home yesterday/still talking about it this morning with stories of a lot of problems with other students at lunch.”⁴⁷

November 23, 2021 (10:39 p.m.): Student complained to Petitioner/mother that during Physical Education, s/he was called fat, ugly, and Karen “by multiple students.” Student conceded that s/he hit one student and kicked another. Student also reported that “the other day” in P.E., s/he accidentally threw and hit [REDACTED] partner with a basketball when the partner was not looking, eliciting “this is why no one likes you [Student]... [Student] has been asking us to pull [REDACTED] from School B and is saying [s/he] can’t stand it there. [S/he] says [s/he] has no friends. Today [s/he] told me doesn’t know how to get involved in a game when other kids are already playing. This is all very disturbing to us.”⁴⁸ Witness F responded on November 26, 2021 and promised to look into the P.E. matter. As for Student’s interaction on the playground, Witness F recounted an interaction she witnessed in which Student managed to organize a play group on the playground when s/he could not join a game that was already underway. “It’s a great example of the kind of conflict we hope students learn to resolve at recess, and [s/he] did!”⁴⁹

December 13, 2021: Witness F informed Petitioners that a student was removed from class for making a comment to Student regarding COVID (Student had been absent due to COVID restrictions). The student would have “an in-school consequence tomorrow and we are scheduling a meeting with the other parent as well.”⁵⁰ Petitioner/mother replied late that afternoon that Student “was met with unkindness and it lasted much of the day. When [s/he] got out of the car at drop-off [an unidentified student] say [him/her] and yelled ‘NOOOO’ and started running away from [Student]...” Later Student was called “Blueberry” and “Smurf” due to his/her newly dyed hair color. Student asked not to have to return to School B “because [s/he] cannot tolerate going there anymore. This is absolutely out of control – you have to be able to do better there.”⁵¹ Witness F responded the next day. The staff was unaware of the encounters on the previous day, but Witness F spoke to the unidentified student who apologized to Student. The student whose persistent comments were deemed “targeted bullying” had an “in-school consequence” that day and would be permanently removed from Student’s classroom. Witness F also stated that she would meet with Student’s class the next day “to explain the change and have the whole class consider how they can stand-up to bullying and support one another... I also want to reassure you that even tin this challenging time, [Student] is continuing to have positive interactions at school as well. As I chatted with [her/him] yesterday afternoon, 2 students welcomed [her/him] to DC Scores, letting [her/him] know of a seating change...”⁵²

December 15, 2021, Petitioner/mother thanked a School B staff member for admonishing students who called Student “Blueberry.”⁵³

⁴⁷ *Id.* at 22 (22).

⁴⁸ *Id.* at 23 (23).

⁴⁹ *Id.* at 24 (24).

⁵⁰ *Id.* at 25 (25).

⁵¹ *Id.* at 27 (27).

⁵² *Id.* at 28 (28).

⁵³ *Id.* at 31 (31).

December 15, 2021: Petitioner/mother reported that during DC Scores that day, a student called Student a “baby” and “Smurf.” Student responded by called the other student an idiot.⁵⁴

January 10, 2022: Petitioner/mother reported that during afterschool that day, students cheered when informed that Student was discontinuing participation in DC Scores.⁵⁵

January 12, 2022: Petitioner/mother reported that students made fun of Student in class “because [s/ne] has a big forehead.”⁵⁶ This was in response from an email sent nine minutes earlier from Witness H, reporting that this event was preceded by Student intentionally broke a Jenga game that the students were playing.⁵⁷

January 14, 2022: Petitioner/mother reported that Student said that students told him/her to “shut the eff up (using the actual f-word).”⁵⁸

17. Sometime after November 8, 2021, Petitioners filed an undated “grievance” in which they alleged that Student had been the target of bullying since the beginning of the 2021-22 school year:

[Student] has been the victim of bullying since the beginning of the 2021-22 school year – being made fun of and tormented because of [his/her] insistence that [s/he] and other students wear masks correctly, teased for [his/her] weight, for wearing glasses, for [his/her] self-expression in coloring [his/her] hair, and a consistent belittling from other students in [his/her] grade leading to nonstop name calling such as “Karen” or “this is why no one likes you.” The torment began the first week of school when the children were sitting outside for lunch and [Student] spoke out against students needlessly killing flies. In the second week of school, we reported that [Student] walked into the cafeteria and a student loudly said, “Hi, Karen,” intending to socially embarrass [Student], and this then solicited mocking from many other students.⁵⁹

Incidents of alleged bullying in the grievance included the following:

September 3, 2021: “... the kids at [her/his] table all antagonized [her/him] by mocking the fact that they were killing flies. This continued into the classroom when... one of the students said, while smiling at [Student] that he loved killing flies...”

September 8, 2021: Student reported being called “Karen” by several students and referenced the September 3, 2021 incident.

⁵⁴ *Id.* at 30 (30).

⁵⁵ *Id.* at 39 (39).

⁵⁶ *Id.* at 42 (42).

⁵⁷ *Id.* at 43 (43).

⁵⁸ *Id.* at 44 (44).

⁵⁹ P5:1 (91).

September 9, 2021: Student was called “fat” by unidentified students. For the September 8th and 9th incidents, School Counselor A initiated face-to-face meetings with the accused students “which immediately led to retaliation against [Student] in the form of student coming up to [him/her] calling [him/her] a tattletale...”

September 30, 2021: “During lunch nearly the entire [redacted] grade ganged up on [Student] mocking [him/her] because [s/he] did not have [his/her] mask on while eating... The situation devolved to the point that many tables of kids were pointing and laughing at [Student], and [s/he] began to cry... This was not reported to us by the school.”

October 1, 2021: During lunch several students were making fun of Student, telling her/him that they could see through her/his clothes and see his/her underwear. Witness E, the Assistant Principal, announced during lunch that teasing would not be tolerated.

October 6, 2021: A student told Student that the student had researched “Karen,” did not feel it was offensive, and would continue to call Student “Karen.”

October 13, 2021: Students continued to call Student “Karen” and “fat.” School B staff suggested a meeting including Student. Petitioners agreed to a meeting on November 9, 2021, but declined to include Student in the meeting.⁶⁰

18. Petitioner/mother testified that after they filed the grievance, School B staff said they would conduct an investigation.

19. On November 24, 2021, DCPS issued Student’s report card for the first term of grade D. S/he earned the following grades: Advanced in Reading, Proficient in Speaking and Listening, Social Studies, Science, Music, Art. and Health & Physical Education, and Basic in Writing & Language, Math, and Spanish. In beginning of the year assessments, Student was above grade level in English Reading, and below grade level in Math and Spanish. In seven of the twelve of the graded behavioral categories, Student was found to have behaved appropriately and Independently, With Limited Prompting in four categories, and With Frequent Prompting in participating in class discussions. S/he was absent three times, two of which were unexcused.⁶¹

20. Witness E, a School B dean, testified that he conducted the investigation of Petitioners’ allegations of bullying beginning in late November 2021. He determined that a single student had targeted Student for bullying. The student was removed from Student’s class in December 2021. On cross-examination, Witness E conceded that two to three students engaged in name-calling of Student in January 2022.⁶²

21. On December 29, 2021, DCPS forwarded a Bullying-Targeted Student Safety Plan to Petitioners.⁶³ The purpose of the Plan was to facilitate a safe and secure learning environment

⁶⁰ *Id.* at 2-4 (92-94).

⁶¹ R2:38 (49).

⁶² Testimony of Witness E.

⁶³ P3(redacted):37-38 (37-38).

for Student that is free of bullying.⁶⁴ The staff Point of Contact was Witness E, a school dean. The primary safe persons (trusted adults) were Witness F, the Assistant Principal, and Staff Member A. The secondary safe person was Witness H, her/his SLA/Math teacher. School Counselor A and two other staff members were designated as Student's recess monitors, to be visible and provide additional supervision. School staff was directed to check-in with Student daily by 2:00 to ensure her/his safety. The family and Student were directed to report any bullying behavior within 24 hours. Student was directed to avoid face-to-face contact or online contact (social media) with the aggressor, to report new bullying immediately, report any bullying that occurs off-campus "as a result of this plan before or after school or in another place where the students might be together." Petitioners were directed to report any new potential bullying incidents within 24 hours or by the close of business on the following day. The Plan would expire, be reviewed, or potentially continued on April 19, 2022.⁶⁵

22. On January 20, 2022, Petitioners notified School B that "we are withdrawing [Student] from [School B] effective Monday, January 24, 2022, to enroll [him/her] in [School A], a small, local private school. We appreciate the work the school has been doing to try to make it a safe space for [Student]; however, we feel that the [grade D] environment continues to be too emotionally damaging for [her/him] to stay at [School B] while working through any possible restorative process."⁶⁶ Petitioner/mother completed a Student Withdrawal form on January 20, 2022 as well, indicating that Student would be enrolled at School A.⁶⁷

23. School A has an enrollment of 65, 20 in middle school and 45 in high school. There are 10-11 full-time staff members, one reading specialist, and administrative team, and tutors. The school year is divided into five "sessions," each seven weeks long. Class sizes vary from 6 to 10 with one teacher. The classes have a mix of grades. None of the teachers at School A is certified in special education. Of the 65 students at School A, twelve have IEPs.⁶⁸

24. Student was cited on a Student Incident Report three times while enrolled at School B. On November 18, 2019, s/he pinched the arm of Witness D, a school counselor, when Witness D was talking to another student, because "I wasn't done talking yet." On February 3, 2020, s/he engaged in off-task behaviors that demonstrated disengagement from learning. On February 6, 2020, Student put a foreign substance on three classmates' potato chips.⁶⁹

25. Through Session 3 of the 2021-22 school year, School A issued Student's report card revealing the following grades: MS English – B, World Religions – A, Math [G] – Pass, and Animation – Pass.⁷⁰ For Session 4, his/her grades were: MS English – B+, Life Science – A, Math [G] – A-, and MTG – Pass.⁷¹ Student's grades for Session 5 and Overall were: MS English – B/B+, World Geography – A-/NA, and Math [B] – B/B+.⁷² Teacher comments throughout the three sessions were all positive as to Student's behavior and effort.

⁶⁴ P8:1 (105).

⁶⁵ *Id.* at 2-3 (106-7).

⁶⁶ R6:2 (88).

⁶⁷ P11:1 (151).

⁶⁸ Testimony of Witness B.

⁶⁹ R5:1 (86).

⁷⁰ P13:1 (155).

⁷¹ P14:1 (157).

⁷² P15:1 (159).

26. At the end of the Session 1 of the 2022-23 school year, when Student was in grade G, School A issued the following grade report: MS Math – B+, Scientific Discovery – B+, MS English – B+. Study Skills – Pass. In Scientific Discovery, his/her teacher reported that there were times throughout the session when s/he was disruptive. His/her English teacher wanted him/her to work on limiting socializing in class and to respond more quickly when redirection is attempted.⁷³

27. At the end of Session 2 of the 2022-23 school year, School A issued the following grade report: MS Math – B-, Early U.S. History – C, MS English – C+, and Dance and Choreography – Pass. In Math, her/his teacher reported that Student struggled to turn in assignments on time and to use class time productively. In History, his/her inability to complete assignments timely affected his/her grade. The teacher also noted that there were “many times” that his/her behavior was a problem. Student’s English teacher reported that his/her two major projects were missing on the due date, and s/he had significant trouble on quizzes. Students’ Dance and Choreography instructor reported that s/he participated well, but encouraged him/her to stay focused.⁷⁴

28. At the end of Session 3 of the 2022-23 school year, School A issued the following grade report: MS Math – B, Civil Rights – B, MS English – A, and Study Skills – Pass. S/he earned praise for increased effort in Math and effort in Civil Rights. In English, Student was faulted for not being careful on quizzes, and for not turning in a book report timely. His/her poem presentation was “professional” and his/her slides were thoughtful and well organized, earning a 99% on the project. In Study Skills, s/he did a good job completing work.⁷⁵

29. At the end of Session 4 of the 2022-23 school year, School A issued the following grade report: MS Math – B, Computer Science– B+, MS English – A-, and Fashion Design and Sewing – Pass. In Math, Student did “great work” but could have studied more for quizzes and tests. The teacher comments in Computer Science, English, and Fashion were uniformly positive as to effort.⁷⁶

30. On or about March 1, 2023,⁷⁷ Witness C completed a Psychological Evaluation Report on Student. Student was referred to Witness C by Attorney B, Petitioner’s counsel, “to provide diagnostic clarification and inform educational/treatment planning.”⁷⁸ On the Wechsler Intelligence Scale for Children (“WISC-V”), scored in the Above Average range on the Working Memory Index (122), in the High Average range on the Verbal Comprehension Index (113), and in the Average range on the Visual Spatial (97), Fluid Reasoning (103), and Processing Speed (95) indices, as well as on the Full Scale IQ (106).⁷⁹ The Test of Variables of Attention (“TOVA”) and the Delis-Kaplan Executive Function System (“D-KEFS”) were administered to assess Student’s attention and executive functioning skills. On the TOVA, Student exhibited difficulty identifying target items and regulating his/her speed of responding, indicating a weakness in sustained attention. On the D-KEFS, s/he consistently scored between High Average and Above Average on tasks assessing his/her ability to name patches of ink color rapidly, read color words, inhibit a

⁷³ P18:1 (167).

⁷⁴ P21:1 (189).

⁷⁵ P24:1 (219).

⁷⁶ P26:1 (223).

⁷⁷ Testimony of Witness C.

⁷⁸ P23:1 (193).

⁷⁹ *Id.* at 20-21 (212-13).

primed response, and engage in cognitive set-shifting. Student scored in the High Average range in visual fluency and in the Average range in impulse control and cognitive flexibility. Witness C concluded that Student had weaknesses in self-monitoring when executive demands increase.⁸⁰

Petitioners and a teacher completed rating scales for the Conners and BRIEF-2. The parents and the teacher reported significant difficulty paying attention to details, following through on instructions, and tuning out external distractions. Concerns were elevated for executive functioning, impulse control, self-monitoring, cognitive flexibility, emotion regulation, initiation, planning/organization, and task monitoring.⁸¹ Results of testing for Autism were negative.⁸²

On the Kaufman Test of Educational Achievement (“KTEA-3”), Student scored in the High Average range in Reading (116), in the Average range in Written Language (106), and in the Low Average range in Math.⁸³ Student’s social/emotional functional was measured on the Conners Behavior Rating Scale (“CBRS”). Parent and teacher rating scales revealed clinically-elevated concerns for emotional distress, perfectionistic/compulsive behaviors, and physical symptoms. At school, there were additional concerns for defiant/aggressive behaviors (often loses temper, has explosive outbursts, says mean things to others, tries to get even with others), and separation fears.⁸⁴

Witness C diagnosed Student with Oppositional Defiant Disorder (“ODD”), Attention-Deficit/Hyperactivity Disorder (“ADHD”), and an Unspecified Mood Disorder.⁸⁵ Witness C opined that Student qualified for special education services with a classification of Multiple Disabilities – Other Health Impairment and Emotional Disability. Witness C recommended that Student be placed in a small, highly structured classroom where s/he can receive specialized instruction that is effective for students with ADHD, challenging behaviors, and co-occurring mood symptoms, and that s/he can be safe from peer bullying.⁸⁶

31. Witness C testified that Student does not perform as well in Math and Written Expression due to his/her executive functioning deficits. Witness C opined that Student is doing “better” and is “happier” at School A than School B, and happier is better. On cross-examination, Witness C conceded that Student was not doing better in Math at School A. She also conceded that she did not consider Student’s academic grades at School B when she opined that Student was eligible for special education services; she never reviewed Student’s report cards or teacher comments from School B. Witness C conceded that she was unaware that Petitioners had terminated BSS for Student that was provided in a Section 504 Plan.

32. Witness A, Petitioners’ Educational Consultant, assumed this role on or about May 8-9, 2023. He was retained to give the parents an opinion as to whether Student had been denied a FAPE by DCPS due to its failure to evaluate Student and to evaluate Student’s current placement at School A. He agreed with Witness C’s opinion, expressed in her March 2023 evaluation, that Student qualifies for special education; although Student has average intelligence, s/he has anxiety

⁸⁰ *Id.* at 7-8 (199-200).

⁸¹ *Id.* at 8 (200).

⁸² *Id.* at 9-10 (201-2).

⁸³ *Id.* at 10-11 (202-3).

⁸⁴ *Id.* at 11 (203).

⁸⁵ *Id.* at 12-13 (204-5).

⁸⁶ *Id.* at 13 (205).

and requires intervention to access the curriculum. He opined that Student's Section 504 Plans were inadequate to meet his/her needs, because s/he needed special education services to regulate his/her emotions. Witness A opined that Student is benefitting from his/her placement at School A. S/he likes the hands-on learning techniques and trusts the teachers. Witness A further opined that Student requires full-time specialized instruction, in a small, self-contained classroom, completely separated from general education students, because s/he does not have the "skill set" to interact with general education students. Witness A was unaware how many students in Student's current class have IEPs. On cross-examination, Witness A conceded that Student was receiving passing grades at School B, that he had not talked to any of Student's teachers at School B, that a private general education class is not a self-contained class, that Student's challenges at School B were related to her/his apparent aversion to speaking Spanish, that Petitioners had declined behavioral supports at School B, and that IDEA's test for eligibility requires a documented disability that has a negative effect on the student academic performance.⁸⁷

33. Witness D, Student's School B counselor during the 2019-20 school year, testified that she never referred Student for an eligibility determination because Student had a Section 504 Plan that was sufficient for his/her needs; Student was doing well academically and socially.⁸⁸ Student's primary issue was avoiding classes taught in Spanish: Spanish Language Arts ("SLA") and Math. School B had a bilingual program in which classes were taught solely in Spanish for one-half of each day; parents had the right to elect enrollment at a nearby non-bilingual school. Because Student did not want to be in Spanish-speaking classes, s/he would often come to Witness D's office during some of those periods. "It was getting to the point where it was consuming too much of my day to be giving one on one attention to [Student] in the form that she desired." This led the Section 504 Plan team to prescribe BSS services for Student. These services were to be provided by Social Worker A. Witness D testified that Student did not want to engage with Social Worker A, which resulted in Petitioners requesting the removal of the BSS from Student's Section 504 Plan.⁸⁹ During the 2019-20 school year, Witness D observed no bullying of Student, nor significant teasing, only "normal peer conflict."⁹⁰

34. Witness F, School B's Assistant Principal, opined that Student was not the victim

⁸⁷ Testimony of Witness A.

⁸⁸ In his *Closing Memorandum*, Petitioner's counsel devoted two pages to admonishing the Hearing Officer for allowing opinion testimony from Witness D, Student's school counselor during the 2019-20 school year. Witness D was on the team that developed Student's October 2019 504 Plan. On direct examination, the witness, who had considerable contact with the Student that year, was asked whether she believed Student's two plans were serving [REDACTED] appropriately, to which counsel objected. First, I assured counsel that I did not consider her response to be expert testimony. Second, as counsel had the opportunity to impeach the witness' answer on cross-examination, Petitioners were in no way prejudiced. In fact, counsel's cross-examination began with questions about the 2021-22 school year and ignored the witness' testimony relating to the earlier 504 Plans. Third, Witness D was a member of the team that developed Student's 504 Plan, she was jointly responsible for implementing the Plan, and was someone with whom Student chose to spend a disproportionate amount time. It was instructive to have the witness explain why she believed the plan was providing adequate support for Student.

⁸⁹ When I asked Witness D why Student did not want to interact with Social Worker A, she opined that Student did not want to engage with staff members of color. Student would turn [REDACTED] back and not look at Social Worker A, a [REDACTED] woman. The same was true of School Counselor A. Witness F, the Assistant Principal, corroborated this testimony, stating that Student refused to work with Social Worker A and Witness E, a school dean. Witness J, the [REDACTED], female Principal of School B, testified that "we did not identify the reason" Student would not work with Social Worker A, but found the behavior "strange." Witness J also testified that she never heard Student make a racially disparaging comment. Petitioners offered no explanation for terminating the behavioral services.

⁹⁰ Testimony of Witness D.

of persistent bullying. She noted that Witness H, Student's SLS and Math teacher, did not observe Student involved in conflict in class. Witness F testified that Student had verbal conflicts with students during the day, would not report the interactions to staff, but would then report to Petitioners at home that s/he had been bullied. Petitioners did not want the school staff to discuss the incidents with Student because it would betray Student's trust in Petitioners. Witness F opined that Student did not require special education services because s/he was performing "quite well" academically, participated well in classes taught in English, and was capable of doing the written work. Witness F denied that Petitioners ever requested that Student be evaluated for special education eligibility. On cross-examination, Witness F was asked if she had an opinion why Student had problems interacting with schoolmates. She opined that (a) there was a spike in behaviors upon the resumption of in-person classes after the pandemic, (b) his/her resistance to speaking Spanish in a Spanish bilingual program may have been offensive to classmates whose first language was Spanish, (c) s/he "pushed back" when redirected, leading classmates to believe s/he was privileged, and (d) s/he only "hung out" with white friends from his/her neighborhood. Witness F conceded that Student would have benefitted from BSS, but Student refused it and Petitioners agreed to discontinue it. Witness F did not consider this "just giving up" because she believed Student was doing well academically. In redirect testimony, Witness F opined that Student engaged in verbal "conflicts" with classmates, which Witness F did not consider to be bullying, as the verbal exchanges were bi-directional with no imbalance of power between the participants. She conceded that one student was found to have bullied Student.⁹¹

35. Witness G was Student's grade F English reading and writing teacher. Witness G testified that that year, Student was "on [grade] level, moving towards above [grade] level." She opined that Student's behavior was comparable to his/her peers and normal for his/her age. Although she has referred about ten students for evaluations since 2017, at no time did Witness G believe Student warranted referral for special education eligibility. Student would often come into Witness G's class to avoid Spanish-speaking classes. When she asked Student why s/he did not want to go to Math class, Student replied that s/he did not like Spanish.⁹²

36. Witness H was Student's SLA and Math teacher. Witness H testified that Student had good Spanish pronunciation and comprehension, but was uncomfortable speaking Spanish and sometimes did not want to participate in class. When Student worked in pairs with classmates, s/he worked well and showed respect. However, Witness H believed that Student did not want to do her/his best in Spanish. On cross-examination, Witness H testified that she did not observe Student in conflict or being teased in class. Witness H opined that Student was afraid of being laughed at due to her/his pronunciation, but no one laughed at her/him. Student was the only [REDACTED] in Witness H's class. Student's Spanish skills during the 2021-22 school year were one to two grades below grade level.⁹³

37. Witness J has been the Principal at School B for six years. She testified that at the lower grades, Student was at or above grade level in English and Spanish; before the pandemic, Student was one of the "top" students in English and Spanish. Witness J noticed a decline in Student's performance with the implementation of virtual learning during the pandemic years, 2019-20 and 2020-21. Witness J opined that Student had the ability to do well in Spanish, but

⁹¹ Testimony of Witness F.

⁹² Testimony of Witness G.

⁹³ Testimony of Witness H.

regressed during virtual learning when there was less Spanish instruction. Witness J never believed Student warranted evaluation for special education; Student was able to access the curriculum, his/her anxiety was not affecting his/her academic performance, and s/he was on grade level. Witness J recalls Petitioner/mother once asking about the difference between a Section 504 Plan and an IEP, which Witness J explained to her, but Petitioner/mother never requested an IEP.

Witness J testified that an investigation determined that one student was verbally bullying Student. That student was removed from Student's classroom in mid-December 2021 after Witness E's investigation, and the student's parents were warned that a continuation could lead to expulsion. Student was routinely involved in verbal disputes with classmates that Witness J did not believe amounted to bullying. Typically, Student would not report verbal altercations to staff, but would wait and express his/her frustration to his/her parents at the end of the day. The Safety Plan was developed, in part, to get timely reports and expressions of concern from Student to school staff. Witness J denied that name-calling constituted bullying. She characterized Student's interactions as verbal conflict in which Student was an equal participant. Witness J defined bullying as targeted harassment where there is an imbalance of power between the participants. The student who was found to have bullied Student was deemed to have persistently targeted Student and had an imbalance of power; he was physically larger and intimidating.⁹⁴

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.⁹⁵

The issues in this case do not involve an alleged failure of DCPS to provide an appropriate IEP or placement. Thus, under District of Columbia law, Petitioners bear the burden as to all issues.⁹⁶

Whether DCPS denied Student a FAPE by failing to find ■ eligible for special education services for the 2021-22 school year.

Whether DCPS denied Student a FAPE by failing to keep ■ safe from

⁹⁴ Testimony of Witness J.

⁹⁵ D.C. Code Sect. 38-2571.03(6)(A)(i).

⁹⁶ *Schaffer v. Weast*, 546 U.S. 49 (2005).

bullying during the 2021-22 school year.

IDEA requires local education agencies to identify and evaluate all students suspected of having disabilities to determine their eligibility for special education services:

All children with disabilities residing in the State, including children with disabilities who are homeless children or are wards of the State and children with disabilities attending private schools, regardless of the severity of their disabilities, and who are in need of special education and related services, are identified, located, and evaluated and a practical method is developed and implemented to determine which children with disabilities are currently receiving needed special education and related services.⁹⁷

The regulations define a child with a disability as follows:

Child with a disability means a child evaluated in accordance with §§ 300.304 through 300.311 as having an intellectual disability, a hearing impairment (including deafness), a speech or language impairment, a visual impairment (including blindness), a serious emotional disturbance (referred to in this part as “emotional disturbance”), an orthopedic impairment, autism, traumatic brain injury, an other health impairment, a specific learning disability, deaf-blindness, or multiple disabilities, and who, by reason thereof, needs special education and related services.⁹⁸

In this case, during the 2021-22 school year, DCPS was aware that since 2017, Student carried a diagnosis of Separation Anxiety Disorder, which supported the development of Student’s 504 Plans. Of the categories available in the regulation, DCPS could have suspected that Student suffered from a serious emotional disturbance. That disability is defined as follows:

- 4)(i) Emotional disturbance means a condition exhibiting one or more of the following characteristics over a long period of time and to a marked degree that adversely affects a child's educational performance:
- (A) An inability to learn that cannot be explained by intellectual, sensory, or health factors.
 - (B) An inability to build or maintain satisfactory interpersonal relationships with peers and teachers.
 - (C) Inappropriate types of behavior or feelings under normal circumstances.
 - (D) A general pervasive mood of unhappiness or depression.
 - (E) A tendency to develop physical symptoms or fears associated with personal or school problems.⁹⁹

Thus, two of the issues to be determined are whether Student had a condition that met the definition of a disability under IDEA, and if so, whether that disability adversely affected Student’s educational performance. The record reveals that Student first enrolled in School B for the 2014-

⁹⁷ 20 U.S.C. §1412(a)(3)(A); 34 C.F.R. §300.111(a)(1)(i).

⁹⁸ 34 C.F.R. §300.8(a)(1).

⁹⁹ 34 C.F.R. §300.8(c)(4)(i).

15 school year. In 2017, Student was diagnosed with Separation Anxiety Disorder. Petitioners and DCPS developed a Section 504 Plan on October 31, 2018 to address Student's Separation Anxiety. By doing so, DCPS conceded that Student had a disabling condition, but did not believe that the condition met the criteria under IDEA to be deemed a disability requiring special education services. At the end of the 2018-19 school year, Student earned Advanced grades in six courses, including the core subjects of Math, Reading, and Writing & Language, and Proficient grades in Social Studies, Music, Art, and Spanish.

Student's 504 Plan was updated on October 22, 2019, and the team first noted his/her aversion to Spanish; SLA and Math are taught in Spanish in School B's bilingual program. The Section 504 Plan prescribed four hours per month of BSS to address Student's anxiety. However, in January 2020, School B honored Petitioners' request to terminate the BSS.

Instruction began to be provided virtually in March 2020 when COVID-19 restrictions were imposed. At the end of the third term, all of Student's grades were Advanced or Proficient. However, on the STAR assessment, Student was found to be Proficient after the third term in Spanish Language Arts (Overall), but Developing in all Spanish Reading Standards, and Beginning in most Spanish Writing Standards and in most Spanish Speaking and Listening Standards. S/he had no absences and did not present a behavior problem in class.

Student's 504 Plan was updated on December 2, 2020. At the end of the year, during which instruction was provided largely virtually, Student earned Advanced and Proficient grades in every subject except Spanish and Math, the two courses taught in Spanish, in which s/he was graded Basic. On the STAR assessment, Student was found to be Proficient in reading and comprehending Spanish literature and informational texts, Secure in Spanish Writing Standards, but Developing in Spanish Speaking and Listening Standards and Spanish Language Standards.

When the team met in July 2021 to update Student's 504 Plan, it does not appear that there was sentiment from any team member that Student required any additional support to address [REDACTED] aversion to Spanish. The meeting notes indicate that the team members agreed to retain the existing accommodations in the Plan, although Petitioner/mother testified that s/he requested additional support during *unstructured periods*. The team reconvened on November 9, 2021. Accommodations were added to address the increased peer conflict in which Student was involved and Student's reluctance to speak Spanish in class. At the end of the first term on November 24, 2021, Student earned Advanced and Proficient grades in every subject except Writing & Language, Spanish, and Math, in which s/he was graded Basic.

Petitioner/mother testified that after the first 504 Plan was developed in 2018 to address Student's Separation Anxiety, "nothing changed." Nevertheless, at the end of that year, Student earned only Advanced and Proficient grades. Significantly, Petitioner/mother's testimony did not address her reasons for terminating the BBS prescribed in Student's October 22, 2019 Section 504 Plan, *that was specifically designed to address Student's anxiety*. Petitioner/mother's testimony then skipped to the 504 Plan updated in July 2021. She testified that that 504 Plan was deficient because it did not include support for Student during unstructured time, such as recess and lunch. Thereafter, Petitioner/mother discussed the instances of what she believed to be bullying by Student's classmates from the beginning of the 2021-22 school year until the November 9, 2021 Section 504 Plan meeting, which was focused largely on the allegations of bullying. There, Petitioner/ mother proposed an "acceleration group" in which Student would be teamed with

classmates to promote collaboration. Witness F accommodated the request, but Petitioner/mother objected that it was set up in Spanish class, Student's worst subject.

Thereafter, School B conducted an investigation of the bullying charges. It found that one student was targeting and bullying Student. School B removed that student from Student's class in December 2021, warned his parents that a continuation of the behavior could result in expulsion, and developed a Safety Plan that was delivered to Petitioners on December 29, 2021. Petitioners withdrew Student from School B three weeks later.

DCPS' witnesses attributed Student's decline in grades in Spanish and Math on his/her July 2021 and first term 2021-22 report cards to his/her aversion to Spanish, and to the limited Spanish instruction that was provided during virtual learning. They noted that Student's Spanish comprehension and pronunciation remained high, but s/he was the only [REDACTED] of fifteen students in [REDACTED] SLA/Math classes,¹⁰⁰ and was resistant to speaking and reading aloud in Spanish. Although [REDACTED] Spanish teacher testified that Student had good pronunciation, DCPS' witnesses testified that Student was afraid that s/he would be laughed at if s/he read Spanish out loud, even though Witness H testified that classmates did not laugh at [REDACTED] when [REDACTED] spoke.

Petitioners rely on the evaluation by Witness C and the expert testimony of Witness A and Witness C in support of their contention that DCPS should have suspected Student of having an IDEA disability during the 2021-22 school year. Neither the evaluation nor the expert testimony was persuasive. Witness C was solicited for an evaluation of Student by Petitioners' counsel more than a year after Petitioners expressed their intention to remove Student from DCPS at the November 2021 Section 504 Plan meeting, and more than a year after the unilateral placement at School A. Therefore, unless material aspects of Witness C's evaluation are clearly applicable to Student's 2021-22 school year, the evaluation is not relevant to that school year.

In the Criteria for Eligibility section of his *Closing Memorandum*, Petitioner's counsel stated that Student's qualifying disability included his/her long-standing diagnosis of "anxiety," and noted Witness C's new diagnoses of ODD, ADHD, and Mood Disorder. First, Student's long-standing diagnosis was Separation Anxiety Disorder, not General Anxiety Disorder ("GAD"), as counsel seems to suggest, which would implicate a broader set of potential behavioral antecedents. In fact, Witness C testified that she did not even consider Anxiety or Separation Anxiety Disorder as potential diagnoses, because whatever anxiety Student had did not rise to the level of GAD. Witness C's evaluation did not explain why, during the 2020-21 school year, Student's theretofore unquestioned diagnosis of Separation Anxiety Disorder was inappropriate. Thus, her opinion as to Student's diagnosis is not relevant to the school year at issue.

Witness C also offered the legal opinion in her evaluation that Student qualified for special education services with a classification of Multiple Disabilities. However, the evaluation did not provide the legal standards for the multiple disabilities nor an explanation of how her findings support her opinion. During her testimony, Witness C testified that for a disability under IDEA to exist, there must be a "showing of an educational impact." During the 2021-22 school year, the only objective data available to DCPS revealing Student's academic progress was his/her School

¹⁰⁰ Testimony of Witness H.

A report cards.¹⁰¹ Witness C conceded that she never reviewed Student's academic records at School B. Therefore, I find that her opinion that Student qualified for special education is not persuasive.

Witness A's opinion on child find was equally unpersuasive for similar reasons. He was first retained as a consultant for Petitioners six weeks before the hearing. On direct examination, he testified that he agreed with Witness C's evaluation that Student qualifies for special education services. He testified that Student has average intelligence, but requires intervention in order for him/her to access the curriculum. However, Witness A conceded on cross-examination that he was aware that Student was receiving no behavioral supports. Like Witness C, Witness A offered no testimony demonstrating that Student's Separation Anxiety had an adverse effect on his/her educational performance during the 2021-22 school year. In fact, he conceded on cross-examination that Student's challenges at School B were related to her/his apparent aversion to speaking Spanish. Moreover, despite her/his Separation Anxiety, all of Student's grades were Advanced or Proficient from the 2017-18 school year until his/her July 2021 report card without special education supports; in July and November 2021, s/he earned Basic grades in courses taught in Spanish. If her/his decline in 2021 was due primarily to her/his aversion to Spanish, it does not follow that s/he requires full-time special education support to succeed. Perhaps transferring to the non-bilingual, general education program in the same neighborhood would be sufficient. Witness A conceded in his redirect testimony that Student told him that math would have been easier to her/him if it were not taught in Spanish. As soon as Student transferred to School A, s/he earned A's and B's in math, taught in English, at instructional levels above her/his grade level. If Student's decline was caused by the bullying alleged by Petitioners, it also does not follow that the solution is a more restrictive academic setting rather than a setting free from bullying.

Although Witness A was aware that Petitioners had declined the behavioral intervention offered by School B that he said Student needed, Witness A offered no explanation how Student consistently earned superior grades in a bilingual, general education environment, without intervention. Witness A's opinion that Student's academic success requires complete segregation from general education students is also unsupported by the record. He was unaware that the students at School A, where Student's academic performance is satisfactory to Petitioners, offers a general education environment; only 12 of the 65 students have IEPs. And although Witness A opined that student requires full-time specialized instruction and was benefitting from the program at School A, he was either indifferent to or unaware of the fact that none of the teachers at School A is certified in special education.

Petitioners' counsel cites *N.G. v. District of Columbia*¹⁰² for the proposition that DCPS is obligated to conduct initial eligibility evaluations of all students who are *potential* candidates for services.¹⁰³ If counsel suggest that "potential" means any student with an emotional diagnosis, he grossly mischaracterizes the court's ruling. N.G. is distinguishable on a number of counts.

¹⁰¹ Witness C testified that she reviewed the achievement scores in Petitioners' Exhibit P9, a Neuropsychological Evaluation completed on January 3, 2022. This document was not admitted into evidence because it was never provided to DCPS during the 2021-22 school year.

¹⁰² 556 F.Supp. 2d 11, 25 (D.D.C. 2008).

¹⁰³ *Closing Memorandum* at 26-27.

- N.G.’s emotional decline began with a suicide attempt followed by hospitalization and a diagnosis of clinical depression. The following year, her grades were “extremely low” and her attendance was erratic.
- N.G. was diagnosed with ADHD, Major Depression, Mood Disorder, and evidencing suicidal intent, was hospitalized for 11 days. DCPS ignored letters from N.G.’s doctors and parents proposing interim academic solutions. She failed four courses but was promoted to the eleventh grade.
- N.G.’s mother requested a meeting before the following school year to discuss support for N.G., but was told staff was too busy to meet until the third week of September.
- After the parents unilaterally placed Student in private schools, conditioned upon her repeating the tenth grade, the mother attempted to register N.G. with DCPS for special education services at Wilson High School. The Special Education Coordinator informed her that a parent cannot request special education services.
- DCPS agreed to conduct evaluations only after the parents retained counsel. At the eligibility meeting, the multidisciplinary team (“MDT”) did not review the evaluations conducted by N.G.’s doctor or her past academic record at Wilson. The MDT denied eligibility on the grounds that N.G.’s academic performance was commensurate with her cognitive ability.
- N.G.’s academic performance was clearly affected as a result of her emotional disturbance, and DCPS knew it.¹⁰⁴

The facts in *N.G.* bear no resemblance to those here. N.G. was hospitalized and failed four of her tenth grade classes due to attendance problems, ADHD, Major Depression, Mood Disorder and suicidal ideation. DCPS actively misled N.G.’s parents as to their rights under IDEA, and did not consider the effect of her disability on her academic performance in determining her eligibility for services. Here, neither Petitioners nor Student’s teachers registered any documented concerns about his/her academic progress prior to the 2021-22 school year. Although Student was diagnosed with Separation Anxiety in 2017, at the end of the 2017-18, 2018-19, and 2019-20 school years, all of Student’s grades were at the Advanced or Proficient levels. S/he has never had an attendance problem. Although his/her grades in courses taught in Spanish dropped in 2021, neither Petitioners nor Student’s teachers attribute the decline to Separation Anxiety. Petitioners blame bullying, while Student’s teachers blame Student’s aversion to Spanish, including not wanting to be laughed at for ■■■ pronunciation after more than a year with limited instruction in Spanish.

Petitioners also rely on *G.G. ex rel. Gersten v. District of Columbia*,¹⁰⁵ in which Attorney B was counsel of record for the plaintiffs. *G.G.* offers no support for Petitioner’s child find claim.

¹⁰⁴ 556 F.Supp. 2d at 26-27.

¹⁰⁵ 924 F.Supp. 2d at 273.

- In pre-K, G.G.’s parents expressed concerns when he developed social problems with anger and frustration. In first grade, he demonstrated serious anxiety, including clenching his fists and teeth, continually repeating nonsensical phrases, banging his head on his desk, with handwriting, and interacting with his classmates.
- In second grade, he became increasingly withdrawn, escaped to the restroom multiple times per week, banged his head, developed tics, and chewed on his shirt to the point that it was covered in holes and saliva.¹⁰⁶ Parents and DCPS agreed that evaluation was warranted, and a neuropsychological evaluation by Children’s National Medical Center yielded a diagnosis of Asperger Syndrome.
- At the end of the school year, the parents made a written request for the development of an IEP for G.G. on June 13, 2011. DCPS did not reply. In August, the parents notified DCPS of G.G.’s unilateral placement in Ivymount’s Model Asperger Program and that they expected DCPS to fund the placement. DCPS informed the parents that in order to proceed with the special education process, they would have to enroll G.G. at his neighborhood school. When they attempted, his enrollment was denied. When they reapplied at DCPS’ Private and Religious Office, they heard nothing from DCPS about evaluations or developing an IEP.
- The court agreed with the Hearing Officer that the referral date was June 13, 2011, the date that parents’ counsel sent DCPS a letter requesting an IEP meeting.¹⁰⁷ From that point, DCPS had 120 days to complete an evaluation under District law, and an additional 30 days to develop an IEP, if such was warranted. The court overruled the Hearing Officer’s ruling that the parents’ October 27, 2011 due process complaint was premature. By that date, DCPS had not evaluated G.G. within 120 days and, therefore, was also not in a position to meet the 30-day deadline to complete an IEP.¹⁰⁸

If counsel cited *G.G.* for the proposition that DCPS had an independent obligation to evaluate Student on the basis of its knowledge of his/her condition during the first term of the 2021-22 school year, that reliance is misplaced. While DCPS’ statutory obligation to identify students suspected of disability is undisputed, despite four years of concerns expressed by G.G.’s parents (pre-K through second grade), this was not the basis of the court’s ruling. Instead, “G.G.’s parents formally bringing these behavioral concerns to the school’s attention on June 13th functioned as G.G.’s referral to the District for an evaluation or assessment.”¹⁰⁹

Petitioners’ counsel alludes to “the parents’ persistent pleading for more supports (including an Individualized Education Program...).”¹¹⁰ This assertion is apparently advanced to establish DCPS’ prolonged recalcitrance throughout Student’s enrollment at School B. The record

¹⁰⁶ *Id.* at 275.

¹⁰⁷ *Id.* at 279.

¹⁰⁸ *Id.* at 280.

¹⁰⁹ *Id.* at 279.

¹¹⁰ *Id.* at 2.

reveals that Student first enrolled in School B for the 2014-15 school year. After Student was diagnosed with Separation Anxiety Disorder, Petitioners and DCPS developed a Section 504 Plan in 2018. That Plan was updated on October 22, 2019 the addition of four hours per month of BSS. However, on January 9, 2020, Petitioners requested the termination of the BSS prescribed in the Plan. Petitioners offered no explanation during the hearing for their termination of BSS. COVID-19 restrictions were imposed two months later, and full-time in-person classed did not resume until the 2021-22 school year, by which time there is no evidence of Petitioners expressing significant discontent with any of the 504 Plans developed since 2019. Exhibit P3 (redacted) includes 48 pages of email exchanges of Petitioners' complaints to School B, beginning with allegations of bullying on September 8, 2021, and ending with the withdrawal of Student from School B on January 20, 2022. In not one of these emails did Petitioners request behavioral supports or an IDEA evaluation. While the statute imposes an independent obligation on DCPS to identify those it suspects of having a disability, as such is defined in the Act, not only is there no support in the record for counsel's suggestion that DCPS ignored parents' *persistent* pleas for an evaluation, there is no credible evidence that they *ever* requested an IDEA initial evaluation.

Petitioner's counsel accuses DCPS of "repeatedly plac[ing] the onus on the parents to request an evaluation pursuant to the Section 504 Plan."¹¹¹ By page 6 of his memorandum, counsel apparently had forgotten that on page 2, he had accused DCPS of ignoring Petitioners' persistent pleas for an eligibility evaluation. At no time during the hearing did counsel for DCPS assert that DCPS was absolved of its obligation to evaluate Student because s/he had a 504 Plan, or that they were excused from their child find obligations because Petitioners had not requested evaluations. DCPS did assert that Petitioners were satisfied with the 504 Plans and had declined the behavioral support services DCPS offered in the 2019-20 504 Plan. Such services necessarily would have been prescribed in an IEP were Student evaluated and found eligible for services for an Emotional Disturbance. Thus, if Petitioners did not want School B to provide Student BSS, they would not be motivated to request an evaluation that might lead to that result.

DCPS also asserted that Petitioners never expressed dissatisfaction with the 2019 Plan or any of the subsequent 504 Plans, which assertion is supported by the record. On July 27, 2021, with the impending resumption of in-person classes for the first time since March 2020, DCPS convened the last Section 504 Plan meeting before the beginning of the 2021-22 school year. The Meeting Notes indicate that the "Team concurred that accommodations should remain the same."¹¹² Petitioner/mother testified that she asked for more support during unstructured time at this meeting, but this is not inconsistent with DCPS' perception that no additional classroom accommodations were required. The next Section 504 Plan meeting was held on November 9, 2021, by which time Petitioners had documented instances, in Exhibit P3 (redacted), of what they considered to be bullying since the beginning of the school year. In that meeting, Witness H, Student's SLA/Math teacher, shared that she had not seen "a lot of conflicts in class" and that Student was an active participant in class. Despite Student's understanding and strong pronunciation of Spanish, s/he had a negative attitude towards SLA and did not want to read out loud. Petitioner/mother requested an acceleration group at the meeting to promote partnering, which request was granted by Witness F. However, Petitioner/mother was dissatisfied that the course selected was Spanish, Student's least favorite course. It would seem that the course in which Student exhibited the most apprehension would be the most efficacious for this trial, but

¹¹¹ *Id.* at 6.

¹¹² R3:3 (55).

Petitioner/mother thought otherwise. The rest of the meeting was devoted to bullying and updating the 504 Plan. However, Petitioners did not even want Student to know that s/he had a 504 Plan, “because [s/he] doesn’t want to be perceived as different.”¹¹³ Petitioners’ expressed reasons for leaving School B two months later did not involve an alleged lack of services to meet Student’s emotional needs. Rather, Petitioners were dissatisfied with what they deemed to be DCPS’ inadequate response to what they considered to be the bullying of Student.¹¹⁴

Student’s aversion to Spanish was first noted on a 504 Plan in October 2019. S/he would go to Witness D’s counseling office to avoid going to classes taught in Spanish. School B prescribed BSS to address Student’s anxiety, but Petitioners terminated those services in January 2020. Student continued to decline in Spanish and Math during the pandemic. DCPS witnesses attributed the decline to several factors: due to the limitations of virtual learning, there was less Spanish instruction from March 2020 through the 2020-21 school year, which affected Student’s confidence in Spanish despite [REDACTED] comprehension and pronunciation skills. Student’s reluctance to speak Spanish in SLA and Math and some class avoidance despite good attendance otherwise, affected [REDACTED] grades in these classes. S/he would abscond to Witness G’s room when s/he should have been in SLA or Math, and confessed to Witness G that s/he was there because s/he did not like Spanish. Student consistently earned superior grades in her/his courses that were not taught in Spanish. In light of her/his uniformly high academic performance prior to the pandemic, the fact that s/he suffered a decline in Spanish-speaking courses suggests more of an aversion to Spanish than the effects of a disability.

Petitioner’s counsel cited testimony of Witness B, School A’s Dean of Students, that Student “was performing lower in Math.”¹¹⁵ Student’s School A report cards refute this testimony. Once Student relocated to School A and was no longer subjected to Spanish, s/he earned an A and a B in the last two sessions of the 2021-22 school year at School A despite receiving course work one and two grades above her/his grade level.¹¹⁶ [REDACTED] performance substantiates [REDACTED] statement to Witness A, Petitioners’ consultant, that math would be easier to her/him if it were not taught in Spanish. It is uncontroverted that Student has always been at or above grade level in Reading, and s/he was Advanced in Writing on every report card but one from the 2017-18 school year through the 2021-22 school year at School B. Thus, Petitioners have failed their burden of proving that Student’s Separation Anxiety adversely affected his/her educational performance during the 2021-22 school year.

Bullying

This allegation raises three issues for a decision: whether Student was bullied, whether s/he was denied a FAPE as a result of the bullying, and whether IDEA provides a remedy for bullying for a child not determined to have an IDEA disability.

The record, primarily emails to School B from Petitioner/mother¹¹⁷ and the grievance Petitioners filed on December 8, 2021, reveals a number of instances of verbal exchanges between Student and his/her classmates. The alleged exchanges on September 8, 9, 13, 29, October 6, 13,

¹¹³ R3:5 (57).

¹¹⁴ R6:2 (88).

¹¹⁵ *Closing Memorandum* at 14.

¹¹⁶ P14:1 (157); P15:1 (159).

¹¹⁷ P3 (redacted).

November 23, December 13, 15, 29, 2021 and January 12, 2022 involved name-calling. On September 30, 2021, Student was taunted after admonishing a classmate to wear a mask. On October 4th, classmates laughed at him/her because they could see his/her underwear through his/her clothes. On December 13th, when Student returned to school after a COVID illness, s/he reported being taunted by several students. On January 10, 2022 Student reported that some classmates cheered when it was reported that s/he was leaving the D.C. Scores program. On December 14th, Student reported that students cursed at him/her. None of the allegations involved physical threats of any kind.

DCPS's witnesses testified that although Student was involved in verbal disputes throughout the school year, s/he would not report those that were not witnessed by the staff. Instead, s/he would complain of mistreatment to Petitioners after school, who would, in turn, notify the school of the alleged incidents by email. Early in the year, on October 13, 2021, the Assistant Principal suggested convening a meeting including Student "so we can understand when and how this is happening." Petitioners agreed to meet, but declined to include Student in the meeting. Of the exchanges witnessed by staff members, Student was deemed a participant, not a victim. Witness J, the School Principal, testified that there was no imbalance of power in the verbal conflicts Student had with her/his classmates; s/he instigated some, classmates instigated others. Student's SLA/Math teacher for one-half of each day during the 2021-22 school year, reported at the November Section 504 Plan meeting and testified at the hearing that she did not observe Student involved in conflict or being teased.

Witness J, the School B Principal, testified that School B considers bullying to consist of persistent, targeted harassment accompanied by an imbalance of power. DCPS concedes that Student was bullied by one student; his name-calling was persistent and he was physically imposing, although there was no allegation of a physical threat of any kind on his part. After the November investigation, this student was removed from Student's class and warned of the consequences if his behavior continued. It cannot be determined from Petitioners' exhibits which of the interactions listed above are attributable to the confirmed bully.

In *Petitioner's Memorandum*, Petitioner's counsel cites guidance from the U.S. Department of Education for the proposition that bullying may trigger a local education agency's child find obligations for students who have not yet been identified.¹¹⁸ He also cites caselaw from other jurisdictions in which bullying has been found to be a denial of FAPE under IDEA. For example, in *T.K. v. New York City Department of Education*,¹¹⁹ parents were unsuccessful in convincing a Hearing Officer that bullying deprived T.K. of a FAPE. The District Court remanded the case and ordered the Hearing Officer to apply a four-part test: (1) was the student a victim of bullying; (2) did the school have notice of substantial bullying of the student; (3) was the school "deliberately indifferent" to the bullying, or did it fail to take reasonable steps to prevent the bullying; and (4) did the bullying "substantially restrict" the student's "educational opportunities?"¹²⁰ The Hearing Officer again ruled in favor of the Department, but the District Court reversed that decision on appeal. Upon the Department's appeal, the Second Circuit noted

¹¹⁸ *Dear Colleague Letter from the Assistant Secretary* at 4-5, U.S. Department of Education, Office for Civil Rights (October 21, 2014); *Dear Colleague Letter on Bullying of Students with Disabilities* at 2, U.S. Department of Education, Office of Special Education and Rehabilitation Services, August 20, 2013; *Dear Colleague Letter*, U.S. Department of Education, U.S. Department of Education (July 25, 2000).

¹¹⁹ 810 F.3d 869 (2nd Cir. 2016).

¹²⁰ 779 F.Supp.2d 289, 316, 318 (E.D.N.Y.2011)

that it had not previously addressed whether bullying of a student with a disability was an appropriate consideration in the development of an IEP, and it could result in the denial of a FAPE under IDEA. It concurred with the school system's concession that bullying could be an appropriate consideration when it "reaches a level where a student is substantially restricted in learning opportunities," but the court did not reach that determination.¹²¹ Rather, it found that the school system's refusal even to discuss bullying in any meeting with the parents significantly impeded the parents' ability to assess the adequacy of the child's Individualized Education Program ("IEP"), thereby denying the student a FAPE.¹²²

However, in *S.S. by and through Street v. District of Columbia*,¹²³ Judge Colleen Kollar-Kotelly noted that there was no caselaw in this jurisdiction on the issue of whether bullying may be a basis for finding a violation of IDEA and a denial of a FAPE.¹²⁴ There, she upheld the finding by the Hearing Officer that the petitioner had failed to meet her burden of proving that the student was denied a FAPE due to disability harassment or bullying.¹²⁵

Applying the Second Circuit's test:

(1) DCPS concedes that Student was bullied by one student.

(2) "Substantial" bullying. As discussed above, the Assistant Principal testified that School B considers that the verbal conflict between Student and [REDACTED] classmates did not constitute bullying as there was no physical component and no imbalance of power, although on November 23, 2022 Student admitted hitting a student, kicking another, and hitting a third with a basketball accidentally. Typically, Student did not report the exchanges as bullying to school staff, choosing instead to report the incidents to Petitioners after school. Student's SLA/Math teacher, with whom s/he spent one-half of each day, denied witnessing conflict or Student being teased in her classroom. I conclude that School B did not have notice of "substantial" bullying.

(3) "Deliberately indifferent." Student rarely if ever reported the exchanges to staff members, so there was seldom contemporaneous confirmation that bullying had occurred. For the September 9th exchange in Petitioner's Exhibit P3 (redacted), reported by Petitioners after the fact, the School Counselor met with the other student the next day. He had already been admonished by the dean, apologized, said he would never call Student a name again, and offered to partner with Student. On October 3rd, classmates responded by teasing Student when [REDACTED] told a classmate to wear a mask. When Petitioners reported the incident, the Assistant Principal met with the entire grade and warned them that teasing would not be tolerated. After Petitioners reported a verbal exchange on October 13th, the Assistant Principal suggested convening a meeting with Petitioners and Student "so we can understand when and how this is happening," but Petitioners declined to include Student in the meeting. School B implemented Petitioner/mother's request for an acceleration group, but Petitioner/mother was dissatisfied that it was in the class in which Student had the most anxiety, Spanish. Since Student was the only [REDACTED] in the class, it would appear that School B selected the class in which partnering would have the most impact on student's self-confidence. On December 13th, a student was removed from class for making a comment to Student

¹²¹ *Id.* at 876.

¹²² *Id.* at 876-77.

¹²³ 68 F.Supp.3d 1 (2014).

¹²⁴ *Id.* at 13.

¹²⁵ *Id.* at 15-17.

about COVID. Finally, School B conducted an investigation of Student's allegations and concluded that one student had, in fact, bullied Student. That student was permanently removed from Student's class, his parents were warned of further consequences if the behavior persistent, and School B developed a Safety Plan to address future bullying. Unsatisfied with the school's response, Petitioners withdrew Student from School B three weeks later. I conclude that School B was not "deliberately indifferent" to the allegations of bullying.

(4) Substantial restriction of educational opportunities. The only evidence of restriction of education opportunities are Petitioner/mother's assertions in her November 23rd and December 13th emails that Student asked to leave School B. However, in the December 13th email, Witness F informed Petitioners that she would meet with Student's class the next day to explain why the bully was being removed from the class and to reaffirm the need to support one another. Witness F also recounted a positive exchange the day before, when two students welcomed Student to DC Scores. Through November 24, 2021, Student had but two unexcused absences. At the November 9, 2021 Section 504 meeting and on cross-examination at the hearing, Witness H, with whom Student spent one-half of the day, stated that she did not observe Student in conflict or being teased in the classroom. In fact, Witness H testified that Student worked well with others in class and was respectful, but sometimes did not want to participate. In the opinion of the School Principal, Student developed an aversion to Spanish during the pandemic when there was less instruction in Spanish. Upon his/her return to in-person classes, Student did not want to participate as much in SLA or Math, and was particularly self-conscious about speaking Spanish out loud. To the extent Student missed instruction, it was largely due to ■■■ avoiding SLA and Math, absconding to Witness G's classroom. While ■■■ earned Basic grades for the first time in Spanish and Math in July 2021, s/he continued to earn Advanced and Proficient grades in courses not taught in Spanish. Therefore, I conclude that the verbal exchanges s/he had with ■■■ classmates throughout the fall of 2021 did not result in a substantial restriction of educational opportunities for Student.

Applying the Second Circuit's test set forth in *T.K.*, I conclude that while Student was bullied by one of his/her classmates, the bullying did not result in a denial of FAPE. I further conclude that, for all of the reasons discussed above, Petitioners have failed to meet their burden of proving that DCPS failed to comply with its child find obligations during the 2021-22 school year.

Whether DCPS denied Student a FAPE by failing to find ■■■ eligible for special education services for the 2022-23 school year.

For the same reasons that I found that Petitioners failed to meet their burden as to the 2021-22 school year, I find that they have failed to meet their burden of proving that DCPS failed to comply with its child find obligations during the 2022-23 school year. By the beginning of the 2022-23 school year, DCPS had no additional data that would warrant a suspicion that Student had a disability as such is defined in IDEA.

Whether School A is a proper placement for Student.

Having concluded that Petitioners failed to meet their burden of proving that DCPS violated its child find obligations to Student during the 2021-22 and 2022-23 school years, I need

not reach the issue of School A's propriety as a placement. An affirmative determination of a violation would be necessary to authorize Petitioners to be reimbursed for the expenses for their unilateral placement of Student at School A.¹²⁶

RELIEF

For relief, Petitioners request (1) an order requiring DCPS to place Student at School A for the 2022-23 school year, and (2) an order requiring DCPS to reimburse them for the tuition and related services fees paid to School A for the 2021-22 and 2022-23 school years.

ORDER

Upon consideration of the *Complaint*, DCPS' *Response*, *Petitioners' Memorandum of Points and Authorities on a Hearing Officer's Authority to Adjudicate Bullying Claims*, the exhibits from the parties' disclosures that were admitted into evidence, the testimony presented during the hearing, , *District of Columbia Public Schools' Closing and Post-Hearing Brief*, and *Petitioners' Closing Memorandum*, 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
Terry Michael Banks
Hearing Officer

Date: July 15, 2023

Copies to: Attorney A, Esquire
Attorney B, Esquire
Attorney C, Esquire
OSSE Office of Dispute Resolution
[REDACTED]/DCPS
[REDACTED]/DCPS

¹²⁶ *School Committee of the Town of Burlington, Massachusetts v. Department of Education of the Commonwealth of Massachusetts*, 471 U.S. 359, 370 (1985).