

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

Office of Dispute Resolution  
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<b>Parents, on behalf of Student,<sup>1</sup></b>	)	
<b>Petitioners,</b>	)	
	)	<b>Hearing Dates: 3/22/21; 3/23/21; 3/31/21;</b>
<b>v.</b>	)	<b>4/1/21; 4/21/21; 5/14/21</b>
	)	<b>Hearing Officer: Michael Lazan</b>
<b>District of Columbia Public Schools,</b>	)	<b>Case No. 2020-0151</b>
<b>Respondent.</b>	)	

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**HEARING OFFICER DETERMINATION**

**I. Introduction**

This is a case involving an X-year-old student who is currently eligible for services as a student with Multiple Disabilities (the “Student”). A due process complaint (“Complaint”) was received by District of Columbia Public Schools (“DCPS” or “Respondent”) pursuant to the Individuals with Disabilities Education Act (“IDEA”) on August 27, 2020. The Complaint was filed by the Student’s parents (“Petitioners”). On September 11, 2020, Respondent filed a response, which it supplemented on October 6, 2020. The resolution period expired on September 26, 2020.

**II. Subject Matter Jurisdiction**

This due process hearing was held, and a decision in this matter is being rendered, pursuant to the IDEA, 20 U.S.C. 1400 et seq., its implementing regulations, 34 C.F.R.

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

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.

### **III. Procedural History**

A prehearing conference was held on November 3, 2020. Attorney A, Esq., counsel for Petitioners, appeared. Attorney B, Esq., counsel for Respondent, appeared. A prehearing conference order was issued on November 6, 2020, summarizing the rules to be applied in the hearing and identifying the issues in the case.

The parties agreed to appear at hearing dates on December 7, 2020, and December 8, 2020, due to witness and counsel unavailability on earlier dates. On October 28, 2020, Petitioners moved on consent to extend the Hearing Officer Determination (“HOD”) due date from November 10, 2020, to December 22, 2020. On November 10, 2020, this motion was granted by written order.

On November 19, 2020, Respondent moved for partial dismissal. On November 23, 2020, Petitioners moved for stay-put relief. On November 24, 2020, Respondent submitted opposition to the motion for partial dismissal. On December 7, 2020, Petitioners submitted opposition to the motion for stay-put relief. On January 12, 2021, this Hearing Officer granted the motion for stay-put relief and denied the motion to dismiss by written order.

Due to scheduling difficulties, the hearing dates were cancelled. An attempt was made to schedule the case in December, 2020, but the parties had difficulty scheduling December dates due to the schedules of counsel for Petitioners and Respondent. Attempts to schedule alternative dates in January, 2021, and February, 2021, also did not meet with success due to the unavailability of counsel. The parties finally agreed on

hearing dates of March 22, 2021, and March 23, 2021. On December 22, 2020, Petitioners moved on consent to extend the HOD due date from December 22, 2020, to April 7, 2021. On December 22, 2020, this motion was granted by written order.

Because of the COVID-19 pandemic, all hearings were conducted through the Microsoft Teams videoconferencing platform, on consent. Petitioner was again represented by Attorney A, Esq. Respondent was again represented by Attorney B, Esq. This was a closed proceeding. Hearings proceeded on March 22, 2021, and March 23, 2021, but the presentations of testimony and evidence did not conclude. The hearing on March 23, 2021, was truncated because of an extended discussion relating to the applicability of the provision in P-25-2 (paragraph eight). Hearing dates were added for March 30, 2021, and April 1, 2021. The hearings proceeded but the presentations of testimony and evidence again did not conclude. Additional hearing dates were scheduled for April 21, 2021, and May 14, 2021. On April 7, 2021, Petitioners moved on consent for an extension of the HOD due date to May 31, 2021. On April 7, 2021, this motion was granted through written order.

On April 21, 2021, Petitioners moved for a directed verdict. Respondent objected to the motion, but Petitioners were granted leave to move, provided that Respondent would receive an opportunity to respond by May 21, 2021, after Respondent's presentation during the final hearing date. The parties agreed that the decision on the motion would be due from this Hearing Officer on June 4, 2021, and that the HOD due date would be moved to June 21, 2021. On April 29, 2021, Petitioners moved on consent to extend the HOD due date to June 21, 2021. The matter proceeded to the final hearing date of May 14, 2021, during which the parties presented oral closing arguments. On

May 28, 2021, the motion to extend the HOD due date was granted through written order.

On June 4, 2021, this Hearing Officer denied the motion for directed verdict through written order. On June 11, 2021, Petitioners moved to dismiss the case because of mootness. On June 18, 2021, Respondent submitted opposition to this motion, which is addressed in this HOD.

During the proceeding, Petitioner moved into evidence exhibits P-1 through P-49. Respondent objected to exhibits P-2 to P-7, P-9, P-10, P-14 to P-26, P-28, P-31, P-34, P-35, P-38, P-40 to P-43, P-46, and P-47. The objections were overruled. Exhibits P-1 through P-49 were admitted. Respondent moved into evidence exhibits R-1 through R-28 without objection. Petitioner presented as witnesses, in the following order: Witness A, an independent education consultant (expert in special education, in particular programming and instruction); Witness B, assistant head of School B's elementary school (expert in occupational therapy and special education administration); the Student's mother ("Mother"); Witness C, a social worker (expert in programming and placement as it relates to social-emotional issues and behavioral issues); Witness D, a school psychologist (expert in school psychology, evaluation, and eligibility); Witness E, an occupational therapist (expert in occupational therapy and special education as it relates to occupational therapy); Witness F, manager of the DCPS "CIEP team" (expert in special education programming and placement and reading); Witness G, manager of specialized instruction at School A (expert in special education programming and placement); Witness H, a compliance specialist for DCPS; Witness I, a social worker (expert in special education programming and placement as it relates to social-emotional issues and behavioral issues); Witness J, a teacher at School A (expert in special

education programming and placement and reading); and Witness K, a DCPS party representative (expert in special education programming and placement and general education inclusion).

#### IV. Issues

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

**1. Did Respondent fail to provide the Student with an appropriate Individualized Education Program (“IEP”) for the 2020-2021 school year? If so, did Respondent act in contravention of 34 C.F.R. 300.320, Andrew F. v. Douglas County School District, 137 U.S. 988 (2017), and Hendrick Hudson Bd. of Educ. v. Rowley, 458 U.S. 176 (1982)? If so, did Respondent deny the Student a Free Appropriate Public Education (“FAPE”)?**

Petitioners contended that the Student’s IEP did not recommend necessary specialized instruction, lacked goals in executive functioning, and failed to provide for a reading intervention and/or methodology.

**2. Did DCPS fail to provide the Student with an appropriate educational placement for the 2020-2021 school year? If so, did Respondent violate the principles articulated in cases such as Andrew F. and Gellert v. District of Columbia, 435 F. Supp. 2d 18 (D.D.C. 2006)? If so, did Respondent deny the Student a FAPE?**

**3. Did Respondent fail to provide Petitioners with specific, requested information as to the Student’s proposed educational placement? If so, did Respondent deny the Student a FAPE?**

As relief, Petitioner seeks tuition reimbursement/payment for School B for the 2020-2021 school year.

#### V. Findings of Fact

1. The Student is an X-year-old who is eligible for services as a student with Multiple Disabilities (Specific Learning Disability, Other Health Impairment). The Student is bright and inquisitive but has executive functioning challenges, requires

redirection for inattentiveness, and tends to misplace items. Testimony of Mother; Testimony of Witness B; Testimony of Witness A. The Student has difficulty initiating and sustaining work, as well as organizing materials, and needs consistent prompting, follow-up, and check-ins from teachers. Testimony of Witness D.

2. The Student had significant difficulty in reading during the 2017-2018 school year, even though the Student was attending classes with two teachers (and seventeen students). The Student was in a general education private school at the time, School C. Testimony of Witness D; Testimony of Mother. The Student “loved” to contribute to classroom conversations. The Student needed redirection and prompting but improved in regard to attentiveness when s/he began taking medication. R-6-4.

3. The Student was observed at School A for forty-five minutes during the 2017-2018 school year by Witness D. There were twenty-four children in the Student’s class. The Student was redirected because s/he was fidgeting and looking around. However, the Student participated in classroom activities and lessons, and required minimal verbal prompting and redirection. During independent work, the Student was helped by both teachers. Socially, the Student interacted appropriately with his/her peers. R-6-5-6.

4. A neuropsychological evaluation report on the Student was issued on January 8, 2018. The Student scored a full-scale IQ of 93 on the Wechsler Intelligence Scale for Children, Fifth Edition. On the Woodcock-Johnson Tests of Achievement, Fourth Edition, the Student scored 87 in basic reading skills, below grade level, but scored 95 in broad mathematics and written language, both on grade level. The evaluation indicated that the Student had weaknesses in attention, executive function,

spatial skills, motor coordination (affecting the left hand more than the right), and reading. The report found that the Student was generally of average intelligence, with a relative strength for language/verbal skills. The Student was diagnosed with Attention Deficit Hyperactivity Disorder (“ADHD”), Combined Presentation, Specific Learning Disability, with impairment in reading, and Developmental Motor Coordination Disorder. The evaluator also indicated that the Student was at risk for being overestimated by teachers and other adults, given his/her strong language and memory skills as well as his/her strong desire to please. The evaluator also reported that the Student would likely struggle with multi-step tasks or instructions, and that his/her tendency towards impulsivity placed him/her at risk for difficulties at school, due to a likelihood to rush through his/her work, get into trouble for blurting out answers or off-task behaviors, and/or become distracted by his/her need to move. The testing report suggested that the Student needed repeated exposures to material and had poor tolerance for repetition/boredom. The evaluator recommended an IEP, but also indicated that the Student would be best served by a private school with particular expertise in educating children with learning differences, such as School B. Finally, the evaluator recommended that the Student be provided with a research-based, multi-sensory reading intervention, delivered daily in a small-group and/or individual setting. P-2.

5. An occupational therapy evaluation of the Student was conducted on February 12, 2018. The evaluator found that the Student scored well in visual perception areas, manual dexterity, unilateral coordination, and two-footed balance, but scored below average in fine-motor precision, handwriting, single-legged balance, ball skills, and motor coordination. The Student’s writing was legible, but s/he showed inconsistent

letter formation and a lack of precision. The evaluator found that the Student had difficulty crossing the midline of his/her body which affected his/her fine motor skills. The evaluator recommended sixty minutes per week of occupational therapy services. P-3-11.

6. On or about June 14, 2018, Witness E reviewed the Student's occupational therapy assessment, interviewed two of the Student's teachers, observed the Student at School C, and wrote a report. The Student's teacher told Witness E that the Student was independent with school-based daily living activities, such as managing his/her book bag, materials, and all tasks related to meal times and toileting, and that the Student was very task-driven but needed to slow down. No sensory concerns were noted.

Accommodations in place at this time included a decreased workload to reduce the Student's anxiety, allowing him/her to sit in a chair for whole-group instruction (as opposed to having him/her sit on the carpet), and allowing him/her to straddle the chair and push into the back of the chair, making a slight rocking motion. R-5.

7. After being evaluated by DCPS, the Student was determined to be eligible for special education services on or about June 25, 2018. The Student's IEP dated July 10, 2018, contained "Area of Concern" sections in mathematics, reading, written expression, and motor skills/physical development. The IEP recommended that the Student receive 10.5 hours per week of specialized instruction, including 5.5 hours per week outside general education in reading, 2.5 hours per week inside general education in mathematics, and 2.5 hours per week inside general education in written expression, with 240 minutes per month of direct occupational therapy and thirty minutes per month of occupational therapy on a consultative basis. R-8.



8. An amendment to the July 27, 2018, IEP recommended ten hours per week of specialized instruction outside general education and five hours per week of specialized instruction inside general education, with occupational therapy for thirty minutes per month and many additional supports (such as explicit instruction and peer modeling) designated as “Other Classroom Aids and Services.” P-4-13. The IEP contained “Area of Concern” sections in mathematics, reading, written expression, and motor skills/physical development. The “Communication” section of the IEP indicated that the Student would benefit from the use of explicit instruction, such as clear modeling, and immediate corrective feedback. The IEP reported that the Student’s reading levels were mostly below level, with especially poor performance in reading fluency. The IEP also reported the Student to be at grade level in mathematics and written expression, though it also indicated that the Student needed support in both subjects to address attentional issues. P-4-4-12.

9. For the 2018-2019 school year, the Student began attending School B, a non-public school for students with disabilities. P-6. The elementary school at School B has approximately 69 students, is ungraded, and includes classes in reading, writing, mathematics, academic “club” (a type of social studies class with project-based learning), movement, and art. School staff includes certified special education teachers. The school also integrates occupational therapy into its instruction to assist students with writing and executive functioning issues. Other than “club,” which is an especially interactive class, the maximum class size at the school is nine students. Testimony of Witness B.

10. The Student was essentially not reading at all when s/he first came to School B. By March, 2019, however, the Student was reading a first-grade passage at 37 words per minute, though having difficulties with prosody. P-7-2.

11. On May 24, 2019, Hearing Officer Peter Vaden awarded Petitioners tuition reimbursement at School B in connection with a due process complaint alleging FAPE denial for the 2018-2019 school year. P-8.

12. Another IEP meeting was held for the Student on August 6, 2019. The resulting IEP again contained “Area of Concern” sections in mathematics, reading, written expression, and motor skills/physical development. The IEP reported that the Student needed to improve reading fluency, intonation, and punctuation to improve oral reading. The IEP also reported that mathematics was an area of strength for the Student, but that his/her written expression was impacted by weaknesses in organization, spelling, and sequencing of ideas. The IEP indicated that the Student benefitted from explicit instruction in how to create sentences systematically. The IEP recommended ten hours per week of specialized instruction and five hours per week of reading, both outside general education. Occupational therapy was recommended for 240 minutes per month, with thirty minutes of occupational therapy consultation services. The IEP recommended an intensive research-based reading program or reading methodology, together with similar “Other Classroom Aids and Services” as the previous IEP. P-11.

13. The Student continued at School B for the 2019-2020 school year. DCPS proposed a placement at School A for the 2019-2020 school year. General education classrooms at School A have approximately twenty-five students in each class. The school uses the Foundations phonics-based reading program, as well as other reading

programs for struggling readers. Pull-out instruction for the Student at School A would have involved, among other things, explicit phonics instruction and instruction in writing and mathematics. Testimony of Witness J. Petitioners and Witness A observed School A on or about September 27, 2019. They saw a classroom for a different grade than the grade the Student was assigned to. The classroom was cheerful and orderly. The Mother thought the teacher was not enunciating clearly and that some of the children were struggling with the instruction due to the class size. The observers were then taken to a pull-out special education room. Teachers were told not to answer questions from Petitioners or Witness A. Petitioners wanted to see an inclusion classroom but were not able to. Witness A concluded that the Student could not be serviced at School A because, among other things, the general education class size was too large, the “Foundations” reading program used at the school was not appropriate for the Student, the reading interventions were inadequate, there was no focus on individual children, and there was no special educator or paraprofessional present to provide accommodations. P-19; P-20; Testimony of Witness A; Testimony of Witness H; Testimony of Mother.

14. Witness A conducted an observation of the Student at School B on November 1, 2019. She observed that the Student actively performed classwork, but had some issues transitioning and sustaining eye gaze to text. It was also observed that the Student was quickly redirected and did well at decoding, rather than encoding. P-23.

15. During the 2019-2020 school year, the Student made significant gains in reading. By May, 2020, the Student’s decoding accuracy was “very high,” the Student’s vocabulary was “exceptional,” and the Student’s ability to read aloud increased. P-41-1. On February 21, 2020, the Student was observed at School B by Observer A during a

virtual lesson. The classroom contained twelve students and two adults. To the observers, the Student did not appear to be engaged in the instruction and did not raise his/her hand or do the work in writing. P-27.

16. The School B IEP for the Student dated March 3, 2020, recommended thirty-five hours of specialized instruction and related services weekly, with ninety minutes per month of individualized occupational therapy. Speech/language and occupational therapy services were to be provided on an integrated basis. This IEP indicated that the Student was reading “non-controlled” grade-level text at 140 words per minute with proficient comprehension, but needed to improve his/her ability to self-correct while reading and adjust his/her reading rate. The Student was considered to be a very capable writer with supports and was able to write a four-sentence paragraph with a topic sentence and a concluding sentence. This IEP also said that the Student needed to work on transition words and benefitted from a graphic organizer, checklist, prompts and reminders, and extended time. The Student was considered on grade level in mathematics, though work was needed on multi-step word problems and number reversals. Organization continued to be a challenge for the Student, who was also having difficulty with motor tasks. This IEP again contained “Area of Concern” sections with goals in reading, written language, math, academic behavior and executive functioning, and occupational therapy. P-28.

17. After the onset of the COVID-19 pandemic in March, 2020, School B switched its instructional approach to distance learning, which was a challenge for the Student, who often came late to online classes and sometimes did not bring all of the materials that s/he needed. P-41-7.

18. IEP meetings were held for the Student on April 7, 2020, and April 15, 2020. The April 7, 2020, meeting was attended by Petitioners, Witness A, Observer A, Witness E, Witness H, Witness C, Witness K, and counsel for both Petitioners and DCPS. Also participating were Witness B, a teacher at School B, an occupational therapy assistant at School B, and the head of schools at School B. The April 15, 2020, meeting was attended by Petitioners, Observer A, Witness E, Witness H, Witness C, Witness K, and counsel for both sides. The parties discussed the “Area of Concern” sections of the proposed IEP and corresponding goals. P-30; P-32; Testimony of Witness J. Petitioners sought a “full-time” special education IEP and an “Area of Concern” section relating to executive functioning, including goals. DCPS did not agree with these requests and indicated that the Student’s executive functioning issues would be addressed by the IEP’s occupational therapy goals, “other” goals, and “Other Classroom Aids and Services.” Testimony of Mother; Testimony of Witness A; Testimony of Witness E; P-32-1. Witness A said that the Student required Orton-Gillingham-based instruction and reading goals to make appropriate progress and slow down his/her reading. DCPS felt that methodology should not be included in an IEP, and was particularly concerned about exposing the Student to typically-developing peers. There was no disagreement with the recommendation for occupational therapy services or the “Area of Concern” sections of the IEP. There was no specific discussion of issues with respect to lunch, recess, or “specials.” Testimony of Witness A; Testimony of Witness C; Testimony of Witness H; Testimony of Witness E; Testimony of Mother; P-29; P-30; P-32; R-16-3; R-20-3; R-21-2.

19. The IEP from April, 2020, which was finalized on April 22, 2020, again contained “Area of Concern” sections in mathematics, reading, written expression, and motor skills/physical development. The IEP indicated that the Student had not progressed with respect to number reversals but was performing addition and subtraction accurately in most instances. In reading, the Student’s instructional level had advanced two levels from the start of the school year. The IEP also said that the Student had neat handwriting and was improving his/her encoding ability. The IEP recommended fifteen hours of specialized instruction per week outside general education, with 240 minutes of occupational therapy per month. With respect to “Other Classroom Aids and Services,” the Student was recommended for interventions to address executive functioning, including: explicit instruction (such as clear modeling of the solution specific to the problem, thinking aloud through specific steps during modeling, presenting multiple examples of the problem, applying the solution to the problem, and providing immediate corrective feedback); an environment with limited distractions; strategic seating; prompting; chunking; breaks; repetition; and frequent follow-ups or check-ins. The Student was also recommended for supports during transitions (including a visual timer, schedule, and checklist) and writing instruction (including a slant board, use of enlarged graph paper, and additional time). P-29.

20. On May 14, 2020, Petitioners sent a written correspondence to Respondent indicating that they would reject the April, 2020, IEP and place the Student at School B for the 2020-2021 school year. P-34.

21. For the 2020-2021 school year, the Student continued to attend School B. Classes were virtual for most of the school year. Testimony of Witness B. As of

September 25, 2020, the Student was reading ninety-eight words per minute on grade-level passages (corresponding to the Student's expected performance at the end of the 2020-2021 school year), with an accuracy rate of 92 percent. P-38-5. By November 20, 2020, the Student was reading ninety-nine words per minute on grade-level to above-grade-level passages, with an accuracy rate of 95 percent. P-42-1.

22. During the 2020-2021 school year at School B, the Student has continued to make progress in reading, but is overly concerned with reading for speed. Staff have been working to make the Student a more efficient reader. The Student has also continued to be distractible and impulsive at times. The Student's maximum class size outside of "club" is nine students, with a 4:1 student-to-teacher ratio in reading. When instruction was virtual, it was difficult for the Student to focus. Testimony of Witness B; P-41-1-2; P-42.

23. On September 25, 2020, Witness K observed a virtual reading lesson for the Student at School B. The Student did some of the assigned work but was seen as highly distractible, alert, inattentive, impulsive, and talkative in class. P-39; Testimony of Witness K. On February 9, 2021, Witness A observed a virtual reading lesson for the Student at School B. The Student required prompts but was quickly redirected and actively performed the work in class. The Student's silent reading was calculated at a rate of more than 280 words per minute, at the 90th percentile. P-46; Testimony of Witness A.

24. The Student's School B IEP dated February 25, 2021, recommended 34.25 hours of specialized instruction per week, with 180 minutes per month of occupational therapy in forty-five minute sessions, with integrated occupational therapy and speech-

language therapy services. This IEP indicated that the Student has made significant progress in reading fluency, and is currently reading above grade level at a rate of 128 words per minute. The School B IEP also indicated that the Student was unable to consistently answer questions about comprehension and had issues with spelling and executive functioning. This IEP indicated that the Student is currently learning on grade level, with the need for teacher support at times. The IEP also indicated that the Student continued to need prompts and sometimes moved around the room, spoke loudly in class, had issues with transition, and arrived without needed materials. P-47-1-6.

25. A virtual observation of the Student was conducted at School B by Witness I on March 17, 2021. The class had three students and one teacher. The Student was enthusiastic and engaged, though s/he rocked back and forth sometimes and needed a prompt. Testimony of Witness I; R-29.

## **VI. Conclusions of Law**

The burden of proof in District of Columbia special education cases was changed by the local legislature through the District of Columbia Special Education Student Rights Act of 2014. That burden is expressed in statute as the following: “Where there is a dispute about the appropriateness of the child’s individual educational program or placement, or of the program or placement proposed by the public agency, the public agency shall hold the burden of persuasion on the appropriateness of the existing or proposed program or placement” provided that “the party requesting the due process hearing shall retain the burden of production and shall establish a *prima facie* case before the burden of persuasion falls on the public agency.” D.C. Code Sect. 38-2571.03 (6)(A)(i). Accordingly, on Issue #1 and Issue #2, relating to the appropriateness of the



Student's IEP and placement, the burden of persuasion is on Respondent if Petitioners present a *prima facie* case. On Issue #3, the burden of persuasion is on Petitioners.

**1. Did Respondent fail to provide the Student with an appropriate IEP for the 2020-2021 school year? If so, did Respondent act in contravention of 34 C.F.R. 300.320, Andrew F. v. Douglas County School District, 137 U.S. 988 (2017), and Hendrick Hudson Bd. of Educ. v. Rowley, 458 U.S. 176 (1982)? If so, did Respondent deny the Student a FAPE?**

Petitioners contended that the Student's IEP did not recommend necessary specialized instruction, lacked goals in executive functioning, and failed to provide for reading intervention and/or methodology. In Hendrick Hudson Bd. of Educ. v. Rowley, 458 U.S. 176 (1982), the Court explained that an IEP must be reasonably calculated to enable the child to receive benefit. Id. at 204. The Court's decision in Andrew F. ex rel. Joseph F. v. Douglas County School District RE-1, 137 S.Ct. 988 (2017), elaborated on the doctrine established in Rowley. The Court reasoned that "a student offered an educational program providing merely more than *de minimis* progress from year to year can hardly be said to have been offered an education at all." Id. at 1001. The Court held that IDEA "demands" a higher standard—"an educational program reasonably calculated to enable a child to make progress appropriate in light of the child's circumstances." Id. The Court stated that its ruling "should not be mistaken for an invitation to the courts to substitute their own notions of sound educational policy for those of the school authorities." Id. Still, the Court stated that courts should fairly expect those authorities to offer a "cogent and responsive explanation" for their decisions. Id. at 1002. The District of Columbia Circuit Court of Appeals has accordingly found that Andrew F. raised the bar on what counts as an adequate education under the IDEA. Z. B. v. District of Columbia., 888 F.3d 515, 517 (D.C. Cir. 2018).

The IEP is judged at the time that it was created, though evidence that “post-dates” the creation of an IEP is relevant to the inquiry to whatever extent it sheds light on whether the IEP was objectively reasonable at the time it was promulgated. Id. at 522; S.S. ex rel. Shank v. Howard Road Academy, 585 F. Supp. 2d 56, 66-67 (D.D.C. 2008) (an IEP should be judged prospectively to avoid “Monday morning quarterbacking”; Thompson R2-J Sch. Dist. v. Luke P., 540 F.3d 1143, 1149 (10th Cir. 2008); Adams v. Oregon, 195 F.3d 1141, 1149 (9th Cir. 1999); Carlisle Area Sch. V. Scott P., 62 F.3d 520, 530 (3d Cir. 1995); Roland M. v. Concord Sch. Comm., 910 F.2d 983, 992 (1st Cir. 1990).

### **Mootness**

On April 21, 2021, Petitioners filed a Motion for a Directed Verdict, on mootness grounds. This motion was denied by written order dated June 4, 2021. On June 11, 2020, after the conclusion of testimony, Petitioners filed a Motion to Dismiss on mootness grounds. Petitioners contended that the April, 2020, IEP that is the subject of the Complaint has expired, and that, accordingly, there was no longer a case or controversy to be decided. Petitioners pointed to a recent decision written by the United States Court of Appeals for the District of Columbia, J. T. v. District of Columbia, 983 F.3d 516, 518 (D.C. Cir. 2020), where the Circuit affirmed a court’s dismissal of a tuition reimbursement case on mootness grounds.

As indicated in the June 4, 2021, order on Petitioners’ Motion for a Directed Verdict, it is appropriate for a hearing officer to consider the impact of future stay-put rights in the context of a motion to dismiss for mootness. In N.S. v. District of Columbia, 272 F. Supp. 3d 192 (D. D.C. 2016), the parents alleged FAPE violations on behalf of

their child and sought tuition reimbursement for a non-public school. The hearing officer dismissed the case through issuance of an HOD, and the parents appealed. DCPS moved to dismiss at the federal court level on the basis of mootness. A federal magistrate filed a report and recommendation that the matter was not moot because it was “capable of repetition but avoiding review.” Then the parties filed exceptions to the magistrate’s decision, and switched arguments. The parents sought to convince the federal judge that the case was moot and, similar to this case, requested voluntary dismissal. DCPS then argued that the case was not moot because the Student’s stay-put rights would be impacted by a forthcoming decision on the appeal of the HOD. The court looked to whether DCPS would suffer prejudice as a result of the dismissal of the case, applying Fed. R. 41(a)(2), which determines whether a voluntary dismissal should be appropriate. The court considered DCPS’s argument that it had spent a great deal of time on the case and asked, rhetorically, whether DCPS would have to continue to fund the student’s private-school tuition under the stay-put provision during any future litigation. The court concluded that “the answer to this question may well prove decisive in a legal prejudice inquiry” and that DCPS would have a “strong argument” if prejudice was shown. *Id.* at 198-200. However, the court ruled that there would not be any prejudice to DCPS because it determined that the underlying HOD (which supported DCPS) would control on the student’s stay-put rights. The court therefore dismissed the case on mootness grounds, “given plaintiffs’ concessions [on the student’s future stay-put rights] and the relevant case law.” *Id.* at 200-201; see also New York City Dep’t of Educ. v. V.S., No. 10-CV-05120 JG JO, 2011 WL 3273922, at \*12 (E.D.N.Y. July 29, 2011) (denying mootness motion premised on receipt of stay-put relief); cf. Laster v. District of

Columbia, 394 F. Supp. 2d 60, 67 (D.D.C. 2005) (even though DCPS declared that it signed an agreement to pay for stay-put placement, action to enforce stay-put rights was not deemed moot).

Petitioners contend that an appeal of an adverse decision would extend their stay-put rights, and that, therefore, an HOD in the school district's favor would have no impact on the future rights of the parties. However, the decision of a special education hearing officer is entitled to "due weight" during the review of an HOD by a federal court. S.S., 585 F. Supp. 2d at 64 (quoting Rowley, 458 U.S. at 206); Stanton ex rel. K.T. v. D.C., 680 F. Supp. 2d 201, 205 (D.D.C. 2010).

Petitioners also cite to J.T., but much of J.T. is devoted to the application of the mootness doctrine's exceptions relating to "voluntary cessation" and "capable of repetition but avoiding review." The court did not rule that an expired IEP cannot be challenged, or that an expired IEP is necessarily moot, or that future stay-put rights should not or cannot factor into a court's analysis of mootness. Issues relating to future stay-put rights were not raised in J.T., where the court underscored that the parents (unlike Petitioners in this case) were not raising "retrospective" claims.

It is noted that courts in this Circuit use broad language when describing the standards for dismissal on mootness grounds. The Circuit has stated that mootness analysis *should* consider the importance of a ruling on future events. American Bar Ass'n v. FTC, 636 F.3d 641, 645 (D.C. Cir., 2011) (the mootness doctrine requires a federal court to refrain from deciding it if events have so transpired that the decision will "neither presently affect the parties' rights nor have a more-than speculative chance of

affecting them in the future”). As decided previously, this Hearing Officer finds that Petitioners’ mootness assertions are without merit.

### **Executive Functioning Goals**

An IEP must include “a statement of measurable annual goals, including academic and functional goals.” 20 U.S.C. Sect. 1414(d)(1)(A). The goals are “designed to meet the child’s needs that result from the child’s disability to enable the child to be involved in and make progress in the general education curriculum” and to “meet each of the child’s other educational needs that result from the child’s disability.” Id. In reviewing the substantive adequacy of IEP goals, a court “must appreciate that the question is whether the IEP is reasonable, not whether the court regards it as ideal.” Andrew F., 137 S.Ct at 999.

Petitioners argued that the Student’s IEP was defective because it did not contain goals with respect to executive functioning. Petitioners contended that the Student’s IEP should have contained an “Area of Concern” section, complete with goals, in regard to executive functioning issues, pointing to the Student’s undisputed executive functioning issues. These issues included the Student’s difficulties in focusing on instruction and inability to manage his/her materials consistently.

The IEP required that the Student receive 240 minutes of occupational therapy direct service per month, and thirty minutes per month of occupational therapy on a consultative basis. Witness E testified that these services were designed to address the Student’s executive functioning needs, at least in part. Witness E did not indicate that a specific section pertaining to executive functioning goals was necessary in the IEP. Moreover, Witness E testified that the IEP did include executive functioning goals, as did

Witness J, who said that “Motor Skills/Physical Development Goal 3” related to the Student’s functional independence with school-based tasks, such as organizing materials. The “objectives” sections of this goal reference the use of checklists and cues, both of which are mentioned as accommodations for the Student in the “Other Classroom Aids and Services” section of the IEP. Witness J and Witness K also testified, without rebuttal, that “Writing Goal 1” related to executive functioning issues.

Additionally, the IEP contained accommodations in the “Other Classroom Aids and Services” section that addressed the Student’s executive functioning issues. Witness J said that accommodations in the IEP relating to chunking, visual timers, checklists, alternative seating options, paper adjustments, and the like were designed to address executive functioning issues. Witness K further testified that the Student would benefit from executive functioning strategies, alternate seating options, and engaging in hands-on learning activities.

Moreover, Petitioners did not point to any caselaw in support of their position that separate goals devoted exclusively to executive functioning must be contained in an IEP, even if a student has significant executive functioning issues. In Z.B., the District of Columbia Circuit Court of Appeals found that an IEP did not deny Z.B. an appropriate education for want of executive functioning goals, because DCPS addressed executive functioning skills within the IEP’s treatment of other areas of concern. DCPS staff testified that they typically treat executive functioning as a “cross-cutting” factor, rather than in a separate section of the IEP. The court accepted DCPS’s explanation, found that executive functioning challenges were present in connection with different areas that the IEP addressed, found that the IEP contained goals and accommodations that addressed

Z.B.'s executive functioning issues, and dismissed the claim. Z.B., 888 F.3d at 527.

Similarly, here, this Hearing Officer must dismiss Petitioners' claim that the IEP was defective because it lacked executive functioning goals.

### **Hours of Specialized Instruction/Reading Instruction and Methodology**

Petitioners contended that the Student required more than fifteen hours of specialized instruction per week. Petitioners suggested that the Student's executive functioning issues required the kind of oversight that only a small, self-contained special education class could provide. Petitioners argued that the Student could not manage classes as large as twenty-five students. Witness A also indicated that the Student needed a lot of 1:1 instruction during class, that the pace of a regular placement would be "too quick" for the Student, and that there were too many transitions in a general education setting.

However, the record does not reflect that the Student requires 1:1 instruction or received direct 1:1 instruction at School B, where most classes contained nine students. Nor does the record suggest that the pace of instruction in a general education placement would be too fast for the Student, or that transitions would be especially problematic for the Student. Indeed, Petitioners did not argue any of these points during closing.

Nor is there any clear and compelling evidence in the record that the Student could not manage some general education classes, with accommodations, at this point in his/her academic career. Witness D testified that the Student had mastered many of his/her reading goals, suggesting that s/he could now understand the reading materials in a general education classroom. The DCPS witnesses pointed out that the Student was on grade level in reading, writing, and mathematics at the time of the IEP meeting. They

also urged that the Student's executive functioning and attentional needs could be addressed in a general education setting with the accommodations mentioned in the IEP's "Other Classroom Aids and Services" section.

Petitioners objected to DCPS's IEP team and witnesses, contending that none of the DCPS staff really knew the Student, and that DCPS staff were wrong to assert that the Student could manage in a general education setting for part of the school day. Petitioners contended that DCPS could have conducted its own observations to get to know the Student prior to the April, 2020, IEP meetings. Petitioners therefore contended that Respondent could not, and did not, meet its burden of persuasion.

However, Observer A observed the Student at School B prior to the IEP meeting, and she attended the IEP meeting in question. Moreover, as Hearing Officer Vaden underscored, Witness D observed the Student when s/he was last in a large class general education setting, at School C during the 2017-2018 school year. Witness D reported that the Student participated in classroom activities and lessons, required minimal verbal prompting and redirection, and interacted appropriately with peers, even though the Student received no special education services at the program and was much younger (and likely less mature) at the time. Witness E also observed the Student during the 2017-2018 school year at School C. She participated in both of the April, 2020, IEP meetings and agreed with the recommendation for fifteen hours of specialized instruction outside general education in the IEP, which Witness J explained were enough specialized instructional hours to implement the IEP goals. None of Petitioners' school-based witnesses observed the Student in a general education setting, which is the focus of this dispute.



Petitioners also alleged that DCPS should have conducted its own evaluations of the Student. However, Petitioners did not allege that DCPS violated the IDEA by failing to evaluate the Student, or suggest that a particular assessment should have been conducted by DCPS prior to the April, 2020, IEP meetings. DCPS is entitled to rely on assessments arranged by parents in lieu of its own assessments if no additional assessments are needed. Z.B., 888 F.3d at 525.

Petitioners also contended the Student continues to need a full-time special education setting with reading instruction through use of the Orton-Gillingham approach. This issue was before Hearing Officer Vaden, who ruled that the IEP before him was inappropriate because it did not provide for a reading program or methodology. The Student ended up attending School B during the 2018-2019 and 2019-2020 school years, with small-group reading instruction taught by teachers using the Orton-Gillingham methodology.

There can be no question that this instruction has been successful. The Student was essentially not reading at all when s/he started at School B, but was reading on a first-grade level in March, 2019. By the dates of the IEP meetings, about thirteen months later, the Student was on grade level in decoding “non-controlled” text, was reading grade-level material at 140 words correct per minute, and was proficient in comprehending the material that s/he was reading.

Witness A indicated that the Student nevertheless continues to need special reading instruction, though she said the Student is “virtually remediated” in terms of decoding. Witness A testified that the Student’s needs have not disappeared but have changed, because the Student now rushes and reads too quickly. Petitioners accordingly

contended that the Student needs continued Orton-Gillingham-based instruction to address comprehension and fluency. However, Petitioners did not clearly rebut the contentions of Witness F and Witness D to the effect that Orton-Gillingham-based instruction focuses on decoding, that many reading programs could address the Student's issues with comprehension and fluency, and that a student's success in Orton-Gillingham-based instruction in decoding is not especially relevant in determining a program to address fluency and comprehension.

Witness A also contended that the Student has issues with written language, in particular with spelling and language organization, though she did not clearly explain how Orton-Gillingham-based instruction would address these issues. In any event, the School B IEP from March 3, 2020, was inconsistent with the assertion that the Student's written expression issues required a prescriptive approach. In the School B IEP, the Student was considered to be a very capable writer who was working on grade-level material with supports and was able to write a four-sentence paragraph with a topic sentence and a concluding sentence. The School B IEP also said that the Student benefitted from a graphic organizer, checklist, and modeling, among other things. These interventions were also mentioned in the April, 2020, IEP from DCPS.

Petitioners enthusiastically pointed to the Student's success at School B, which has impressively managed the Student's education, taking him/her from being a virtual non-reader to reading above grade level. Indeed, Petitioners should be commended for their efforts to manage and address their child's learning difficulties. However, the first question here is not whether School B was appropriate for the Student. The first question is whether the school district offered the Student a reasonably-calculated IEP in April,

2020. While the school district's program may not have been the "best" program for the Student, the school district reasonably proposed this program in light of the child's growth in reading over the past few years. There is nothing in the record to suggest that the Student's reading issues would prevent him/her from understanding instruction in general education classes at School A. Additionally, the record suggests that the Student's executive functioning issues could be appropriately managed in the general education setting, particularly with the assistance of occupational therapy and a wide variety of pertinent accommodations.

Similarly, in Z.B., the Student had executive functioning and other issues, including inattentiveness, anxiety, depression, oppositional behavior, and mood dysregulation. The parents alleged that the student's 2015 IEP (which provided for, among other things, nine hours of special education per week outside the general classroom setting) did not provide Z.B. enough small-group or individual education, especially in contrast to the full-time special education offered at the non-public school. The court found, citing to Andrew F.: "(a)ny review of an IEP must appreciate that the question is whether the IEP is *reasonable*, not whether the court regards it as ideal." The court remarked on language from Andrew F. to the effect that "(i)f there is a gap between the best education that money can buy at a private school for a student with disabilities and the free and appropriate education at a public school that the IDEA promises, one might justly hope to close that gap for all students. Meanwhile, what Congress has required is that public schools be "ambitious" for every child, giving each the opportunity to "meet challenging objectives." Z.B., 888 F.3d at 528 (citing Andrew F., 137 S.Ct. at 1000). The court concluded that:

(w)ithout more, that argument runs up against the IDEA’s imperative that, to “the maximum extent appropriate,” public schools provide students with disabilities an education in the “least restrictive environment” possible. 20 U.S.C. § 1412(a)(5)(A). Ordinarily, states must ensure “removal of children with disabilities from the regular educational environment occurs only when the nature or severity of the disability of a child is such that education in regular classes with the use of supplementary aids and services cannot be achieved satisfactorily.” *Id.* The Supreme Court recently affirmed that “the IDEA requires that children with disabilities receive education in the regular classroom ‘whenever possible.’” Andrew F., 137 S.Ct. at 999 (quoting Rowley, 458 U.S. at 202, 102 S.Ct. 3034).

888 F.3d at 528.

In sum, I find that Respondent’s expert witnesses established that DCPS reasonably calculated the Student’s IEP in April, 2020. Accordingly, Petitioners’ claims pertaining to the April, 2020, IEP must be dismissed.

**2. Did DCPS fail to provide the Student with an appropriate educational placement for the 2020-2021 school year? If so, did Respondent violate the principles articulated in cases such as Andrew F. and Gellert v. District of Columbia, 435 F. Supp. 2d 18 (D.D.C. 2006)? If so, did Respondent deny the Student a FAPE?**

Most due process cases involve claims relating to the IEP, the “centerpiece” of IDEA. Honig v. Doe, 484 U.S. 305, 311 (1988). Nevertheless, petitioners may bring claims based upon an inappropriate educational placement in certain situations. If, as here, the Student’s IEP was appropriate, the educational placement must therefore be deemed appropriate if it can properly implement the IEP. W.S. v. District of Columbia, No. 19-CV-1390 (KBJ), 2020 WL 6611048, at \*4 (D.D.C. Nov. 12, 2020) (aggressive behaviors referenced throughout IEP but not addressed at the school); Gellert v. District of Columbia, 435 F. Supp. 2d 18 (D.D.C. 2006) (placement located in a hectic, unstructured environment); Shore Regional High School Board of Education v. P.S., 381

F.3d 194 (3d Cir. 2004) (proposed placement would subject a student to bullying); M.L. v. Federal Way School District, 394 F.3d 634 (9th Cir. 2005) (teacher was deliberately indifferent to the teasing of child with a disability).

Witness I and Witness F, both from School A, testified that the school could implement the provisions of the Student's IEP. Petitioners did not argue that School A was unable to implement the IEP or explain how this placement-based claim could be upheld if the Student's IEP was deemed to offer the Student a FAPE, or even clearly reference this claim during closing argument. This claim must therefore be dismissed.

**3. Did Respondent fail to provide Petitioners with specific, requested information as to the Student's proposed educational placement? If so, did Respondent deny the Student a FAPE?**

Prior to 2014, in the District of Columbia, parents and their designees were not allowed unfettered access to observe students at their public schools. Letter to Mamas, 42 IDELR 10 (OSEP letter, May 26, 2004). Consistent with its right to provide parents of special-needs children with additional protections under local law, the District of Columbia Council passed a law in 2014 requiring Local Educational Agencies to permit parents or their expert designees to observe a student in school, with some exceptions. D.C. Code Sect. 38-2571.03(5)(A).

Petitioners' Complaint references their difficulties in getting information from DCPS about School A during the 2019-2020 school year, including during an observation. The Complaint alleges that DCPS failed to respond to Petitioners' email to DCPS in August, 2019, and that DCPS's staff refused to allow Witness A and the Mother to ask School A staff questions at the September, 2019, observation.

While DCPS certainly should have allowed the Mother to ask questions during the observation, this Hearing Officer is not aware of any authority that specifically requires DCPS to answer questions from a parent during an observation. Nor is this Hearing Officer aware of any authority that finds FAPE denial because a school district did not respond to an email or did not allow questions during an observation. Moreover, Petitioners did not argue this point during their closing argument. This claim must also be dismissed.

### **VII. Order**

As a result of the foregoing, the Complaint is dismissed with prejudice.

Dated: June 21, 2021

Michael Lazan  
Impartial Hearing Officer

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

### **VIII. Notice of Appeal Rights**

This is the final administrative decision in this matter. Any party aggrieved by this Hearing Officer Determination may bring a civil action in any state court of competent jurisdiction or in a District Court of the United States without regard to the amount in controversy within ninety days from the date of the Hearing Officer Determination in accordance with 20 USC §1415(i).

Dated: June 21, 2021

*Michael Lazan*  
Impartial Hearing Officer