

OSSE
Office of Dispute Resolution
March 16, 2023

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| <p>Parents on Behalf of Student, ¹</p> <p>Petitioners,</p> <p>v.</p> <p>District of Columbia Public Schools (Local Education Agency “LEA”)</p> <p>Respondent.</p> <p>Case # 2022-0147</p> <p>Date Issued: March 16, 2023</p> | <p>HEARING OFFICER’S DETERMINATION</p> <p>Hearing Dates:</p> <p>January 13, 2023 January 17, 2023 January 18, 2023 January 19, 2023 February 22, 2023</p> <p>Counsel for Each Party listed in Appendix A</p> <p><u>Hearing Officer:</u> Coles B. Ruff, Esq.</p> |
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¹ Personally identifiable information is in the attached Appendices A & B.

JURISDICTION:

The hearing was conducted, and this decision was written, pursuant to the Individuals with Disabilities Act ("IDEA"), P.L. 101-476, as amended by P.L. 105-17 and the Individuals with Disabilities Education Improvement Act of 2004, the District of Columbia Code, Title 38 Subtitle VII, and the District of Columbia Municipal Regulations, Title 5A Chapter E30.

BACKGROUND AND PROCEDURAL HISTORY:

The student who is the subject of this due process hearing ("Student") resides with Student's parents ("Petitioners") in the District of Columbia. The District of Columbia Public Schools ("DCPS" or "Respondent") is Student's local education agency ("LEA"). Student has been determined eligible for special education and related services pursuant to IDEA with a disability classification of specific learning disability ("SLD").

DCPS first determined Student eligible as a child with a disability during school year ("SY") 2016-2017, while student was attending Student's then neighborhood school ("School A"). Student has received special education services since March 2017. Student continued to attend School A until the end of SY 2019-2020, after which Petitioners unilaterally placed Student in a non-public special education day school ("School B"). Student has continued to attend School B ever since.

On January 4, 2021, Petitioners filed a due process complaint ("DPC") alleging DCPS failed to offer Student a free appropriate public education ("FAPE") for SY 2019-2020 and SY 2020-2021. In March 2021 DCPS and Petitioners entered into a settlement agreement resolving the January 4, 2021, DPC. Pursuant to the agreement DCPS reimbursed Petitioners for the cost of Student's attendance at School B for SY 2020-2021.

On June 11, 2021, DCPS convened a team meeting and developed and individualized education program ("IEP") for Student and proposed to implement the IEP at Student's current neighborhood DCPS school ("School C"). Petitioners disagreed with the level of services DCPS proposed in the IEP and advised DCPS that they believed Student requires placement in a "full-time" special education day school entirely removed from the general education setting. On August 2, 2021, Petitioners served notice on DCPS that Student would be attending School B for SY 2021-2022 and requested that DCPS support that placement.

Petitioners filed a DPC on January 5, 2022, seeking reimbursement for their costs incurred for Student's unilateral placement at School B for SY 2021-2022. Petitioners withdrew the complaint to return to the IEP team to consider what DCPS would propose for SY 2022-2023.

On May 9, 2022, DCPS convened an annual review of Student's IEP. Petitioners again disagreed with the IEP and placement DCPS proposed. On July 18, 2022, Petitioners served notice to DCPS of their intent to maintain Student's enrollment at School B for SY 2022-2023. On August 8, 2022, Petitioners received a location of services ("LOS") letter, again placing Student at School C for SY 2022-2023.

Petitioners filed the current DPC against DCPS on August 10, 2022, asserting that DCPS denied Student a FAPE by failing, inter alia, to propose an appropriate IEP or placement for SY 2021-2022 and SY 2022-2023, because the IEP(s) contained an inappropriate least restrictive environment ("LRE") with insufficient hours of specialized instruction outside general education. Petitioners also allege that DCPS denied Petitioners the right to have their educational consultant conduct an observation at School C.

Petitioners seek reimbursement from DCPS for the tuition and other costs they have paid School B for Student's attendance and School B for SY 2021-2022 and SY 2022-2023. They also seek a ruling by the undersigned independent hearing officer ("IHO" or "Hearing Officer") that School B is an appropriate educational placement for Student and an order directing DCPS to place and fund Student at School B for the remainder of SY 2022-2023.

LEA Response to the Complaint:

Respondent filed a response to the DPC on August 22, 2022. In its response, DCPS stated, inter alia, the following:

The IEP team met in June 2021 and reviewed evaluations, after which the team determined that Student continues to be eligible for special education in all academic areas, speech, occupational therapy ("OT"), and behavior support services ("BSS"). The IEP team met on June 11, 2021, and developed the IEP for Student that the team determined was appropriate and represented Student's LRE.

The IEP team meeting notes reflect that the team explained that in making the placement determination for Student, the "[t]eam considered all available information and reports to determine services on the IEP. The team agreed to 20 hours of specialized instruction outside the general education setting in the form of an SLS [Specific Learning Supports] Program. Math, reading, writing, social studies, and science will be in a resource setting with 12 or less students." Additionally, the team determined that Student would receive significant other classroom aides and supports.

DCPS also proposed extensive accommodations for the classroom and for testing situations. The team determined that the robust IEP and placement represents the LRE for Student. Following the IEP meeting, the parent received a LOS letter notifying them that the IEP and placement could be implemented at School C.

For SY 2022-2023, the IEP team met and developed the IEP for Student which the team determined was appropriate and represented Student's LRE. As in was the case for the SY 2021-2022 IEP, DCPS again provided extensive other classroom aides and services and accommodations to support Student in all parts of Student's day. And again, the team determined that the robust IEP and placement represents the LRE for Student. On August 8, 2022, Petitioners received a LOS for School C, which is available and capable of implementing the IEP and placement.

School B does not comply with all requirements for a non-public school, and is not proper, appropriate, or the LRE for Student. DCPS has offered Student a FAPE. School B received a letter of finding in an investigation by OSSE in spring 2022. Based upon the many violations found, OSSE placed School B on a corrective action plan. It is DCPS' position that School B is neither appropriate nor proper at this time, and this matter should be dismissed.

Resolution Meeting and Pre-Hearing Conference:

The parties participated in a resolution meeting on September 2, 2022, and did not resolve the DPC. The parties did not mutually agree to shorten the 30-day resolution period. The 45-day decision period began on September 9, 2022, and ended [and the Hearing Officer's Determination ("HOD") was initially due] on

October 24, 2022. The parties requested and were granted two continuances of the hearing dates and extensions of the HOD due date. The HOD is now due on Marh 17, 2023.²

The IHO conducted a pre-hearing conference and issued a pre-hearing order ("PHO") on September 8, 2022, and a revised PHO in January 13, 2023, outlining, inter alia, the issues to be adjudicated.

ISSUES: ³

1. Did DCPS deny Student a FAPE by failing to propose an appropriate IEP or placement for SY 2021-2022 because the IEP contained an inappropriate LRE with insufficient hours of specialized instruction outside general education?
2. Did DCPS deny Student a FAPE by failing to permit an observation at School C?
3. Did DCPS deny Student a FAPE by failing to propose an appropriate IEP or placement for SY 2022-2023 because the IEP contained an inappropriate LRE with insufficient hours of specialized instruction outside general education?
4. Is School B a proper placement for Student?

DUE PROCESS HEARING:

The Due Process Hearing was convened on January 13, 2023, January 17, 2023, January 18, 2023, and January 19, 2023. After the hearing began, the parties agreed to an additional day of hearing on February 22, 2023. The parties submitted written closing arguments on March 3, 2023. The hearing was conducted via video teleconference on the Microsoft Teams platform.

RELEVANT EVIDENCE CONSIDERED:

The IHO considered the testimony of the witnesses and the documents submitted in each party's disclosures (Petitioners' Exhibits 1 through 47 and Respondent's Exhibits 1 through 17) that were admitted into the record and are listed in Appendix 2.⁴ The witnesses testifying on behalf of each party are listed in Appendix B.⁵

² The IHO offered hearing dates well within the 45 day period. The parties were not available for those dates and requested and agreed upon a continuance and extension of the HOD due date. The IHO granted a second continuance motion setting the following hearing dates: January 13, 17, 18, 19, 2023, and extending the HOD due date to February 11, 2023. After the hearing began, the parties agreed to an additional day of hearing: February 22, 2023, and another continuance and extension of the HOD due date. The HOD is now due on Marh 17, 2023.

³The IHO restated the issues from the PHO at the outset of the due process hearing and the parties agreed that these were the sole issues to be adjudicated.

⁴ Any item disclosed and/or objected to by either party, admitted, not admitted or admitted for limited purposes was noted on the record and is noted in Appendix A.

⁵ Petitioner presented five witnesses: (1) Student's Mother and the following individuals who were designated as expert witnesses: (2) Petitioners' Educational Consultant, (3) a School B Speech-Language Pathologist, (4) a School B Occupational Therapist and (5) a School B Administrator. Respondent presented six witnesses, who were designated as expert witnesses: (1)) a DCPS Occupational Therapist (2) a DCPS Social Worker, (3) a DCPS Non-Public School Monitoring Specialist, (4) DCPS LEA representative for School C who is a Special Education Teacher, (5) a DCPS Speech Language Pathologist, and (6) DCPS's LEA Representative who is a Special Education Teacher

SUMMARY OF DECISION:

DCPS held the burden of persuasion on issues #1 & #3 after Petitioners presented a prima facie case on those issues. Petitioners held the burden of persuasion on issues #2 & #4. Based on the evidence adduced, the IHO concluded that DCPS sustained the burden of persuasion by a preponderance of the evidence on issues #1 & #3. Petitioners did not sustain the burden of persuasion on issues #2 & #4. The IHO dismissed Petitioners' claims with prejudice.

FINDINGS OF FACT:⁶

1. Student resides with Petitioners in the District of Columbia. DCPS is Student's LEA. Student has been determined eligible for special education and related services pursuant to IDEA with a disability classification of SLD. DCPS first determined Student eligible as a child with a disability during SY 2016-2017, and Student has received special education services since March 2017. (Respondent's Exhibits 4-2, 11)
2. DCPS conducted a triennial comprehensive psychological evaluation of Student in February 2020 while Student was attending School A, Student's then neighborhood DCPS school. The evaluator noted the previous evaluation that DCPS conducted in 2017, which measured Student's cognitive abilities using the Woodcock-Johnson, Fourth Edition, Tests of Cognitive Abilities. In 2017, Student demonstrated significant variability in the cognitive assessments. Student had a General Intellectual Ability in the low average range with a standard score ("SS") of 83. Student's Comprehension-Knowledge (Gc) ability was in the average range (SS=106); Student's Fluid Reasoning (Gf) ability in the low average range (SS=85); Student's Short-Term Working Memory (Gwm) ability was in the low range (SS=78); Student's Cognitive Processing Speed (Gs) ability was in the very low range (SS=65); Student's Auditory Processing (Ga) ability was in the low average range (SS=86); Student's Long-Term Storage & Retrieval (Glr) ability was in the average range (SS=98), and Student's Visual Processing (Gv) ability was in the high average range (SS=112). Student's Cognitive Efficiency was estimated to be very low (SS=65). Student's phonological awareness skills were assessed with the Comprehensive Test of Phonological Processing, Second Edition, resulting in estimated average phonological processing (SS=98). (Respondent's Exhibit 4-2)
3. The February 2020 psychological evaluation also noted that an independent evaluation had been completed in 2019, which indicated that Student had average cognitive ability (Wechsler Intelligence Scale for Children (WISC-C) SS=100). The 2019 evaluation also noted Student's diagnoses of a language-based disability in reading, a specific learning disability in written

and who participated in the development of Student's IEPs. The IHO found the witnesses credible unless otherwise noted in the conclusions of law. Any material inconsistencies in the testimony of witnesses that the Hearing Officer found are addressed in the conclusions of law.

⁶ The evidence (documentary and/or testimony) that is the source of the Findings of Fact ("FOF") is noted within parentheses following the finding. A document is noted by the exhibit number. If there is a second number following the exhibit number, that number denotes the page of the exhibit from which the fact was obtained. When citing an exhibit that has been submitted by more than one party separately, the Hearing Officer may only cite one party's exhibit.

expression, a specific learning disability in math, and Attention Deficit Hyperactivity Disorder ("ADHD"), Inattentive type. (Respondent's Exhibit 4-2)

4. The February 2020 psychological evaluation measured Student's academic achievement using the Woodcock-Johnson, Fourth Edition, Tests of Achievement (WJ-IV). Student's Basic Reading Skills were in the low average range (SS=83); Student's Reading Fluency skills were in the low range (SS=73). Student earned a score in the low average range on a measure of Oral Reading (SS=80) and earned a score in the low range on the Sentence Reading Fluency subtest (SS=72). Student's Phoneme-Grapheme Knowledge was estimated to be in the average range (SS=94); Student's Math Calculation Skills were estimated to be in the below average range (SS=79); Student's Written Language skills were estimated to be in the average range (SS=92). The evaluator noted that Student's cognitive processing deficits in processing speed and short-term working memory impacted Student across academic areas, especially in reading fluency. (Respondent's Exhibit 4-2)
5. In February 2020, DCPS conducted an occupational therapy ("OT") re-evaluation. The evaluator stated in her report the following: Student is interested in sensory experiences (Seeking) just like most others. Student notices sensory cues (Registration) more than others. Student reacts to sensory experiences (Avoiding) and detects sensory cues (Sensitivity) in the school much more than other students. Student's tolerance and availability within the learning environment need support much more than other peers. Student's motor skills are an area of strength that will enhance Student's academic performance. Student, however, demonstrates difficulties in motor coordination and sensory processing skills, which might impact Student's ability to access the general education curriculum without teacher support. The evaluator made recommendations to address Student's OT needs in the classroom. (Respondent's Exhibit 7-7)
6. Student continued to attend and receive special education services at School A until the end of SY 2019-2020, after which Petitioners unilaterally placed Student at School B, a non-public special education day school. Student has continued to attend School B ever since. Student is now age ____ and is currently in grade ____.⁷ (Mother's testimony, Petitioners' Exhibit 3)
7. Student's mother believes that while Student was attending School A, Student did not seem to fit in with other children, was not tracking academically with other students in Student's class, and was sometimes bullied. Student's mother noted that Student is socially awkward and has weaknesses in concentration and focus. Student tunes out, and Student's parents find that they must constantly remind Student to do things as Student is easily distracted. Student's mother believes that in the general education setting, Student would have a larger class size, teachers with far less exposure to students who learn differently, and teachers less versed in techniques and concepts for teaching a child with special education needs. (Mother's testimony).
8. At the end of SY 2019-2020, Petitioners began looking into alternative schools for Student to attend. Petitioners applied to a few schools that did not accept Student. Student was eventually accepted at School B, and Petitioners unilaterally placed Student in School B at the start of SY 2020-2021. (Mother's testimony, Petitioner's Exhibits 8, 21)

⁷ Student's current age and grade are listed in Appendix B.

9. School B is an independent school for students with language-based disabilities. There are no students in the school who do not have a disability. School B holds an OSSE certificate of approval (“COA”). School B has appropriately 380 students divided into three divisions: lower school, middle school, and high school. In most of Student's classes, there are 13 or fewer students with one teacher, except for physical education (P.E.), with 28 students and two coaches. In most classes, including P.E., students are broken into small groups. (Witness 4’s testimony)

10. Petitioners engaged the services of an educational consultant in summer of 2020. Beginning in August 2020, the consultant conducted Student assessments and completed a diagnostic educational evaluation report for Petitioners in December 2020. The consultant reviewed Student’s previous evaluations from both DCPS and School B and observed Student in class at School B. The consultant also administered an academic assessment to Student (WJ-IV). Student’s math and written language skills were below expectations based on Student’s age, grade, and cognitive ability. On the Math Calculation subtest, Student scored at the bottom of the Low range, at the 2nd percentile, SS of 70. On the Applied Math Problems subtest, Student scored at the bottom of the Low range on this test, at the 3rd percentile, SS of 71. On the Math Facts Fluency subtest, Student scored in the Very Low range, at the 1st percentile, SS of 63. In spelling, Student scored in the Very Low range, at the 0.3 percentile, SS of 59. Student’s sentence-length writing score fell in the Low Average range, at the 14th percentile, SS of 84. Student’s Sentence Writing Fluency score fell in the Very Low range, at the 1st percentile. SS of 66. Student’s reading skills were better but varied. Student scored in the Average range on Letter-Word Identification, SS of 96 at the 40th percentile; Passage Comprehension, SS of 95 at the 37th percentile; and Sentence Reading fluency subtests, SS of 109 at the 73rd percentile. Student’s performance on the Word Attack subtest, SS of 78 at the 7th percentile. The consultant concluded in her December 2020 report that the nature and severity of Student’s disabilities “warrant placement in a full-time, nonpublic school.” (Witness 1’s testimony, Petitioners’ Exhibit 6)

11. On October 28, 2020, School B developed an IEP for Student that was amended on February 24, 2021. Petitioners and their educational consultant participated in the IEP development. The School B IEP included goals and objections in reading, written expression math, and in the related services of OT and speech-language. The IEP prescribed the following services:

SPECIAL EDUCATION AND RELATED SERVICES SUMMARY

| Service | Provider | Setting | Time | Type |
|----------------------|---------------------------|---------|---------------|-------------------------|
| Special Education | Special Education Team | SpEd | 32.75 hrs/wk. | Specialized Instruction |
| Speech/Language | Speech/Language Therapist | | | Integrated Services |
| Occupational Therapy | Occupational Therapist | | | Integrated Services |
| Occupational Therapy | Occupational Therapist | SpEd | 90 min/wk. | Individual |
| Speech/Language | Speech/Language Therapist | SpEd | 45 min/wk. | Individual |

12. The School B IEP noted the following regarding Student’s academic behavior and executive functioning needs. “Target areas named compromise [Student’s] ability to engage in the learning process (maintain attention, organize materials and information, use effective independent learning skills, and develop relationships) in the general education curriculum. Classroom observation shows that [Student] is highly distracted by internal and external stimuli in the space around

[Student] and requires several reminders during lessons to stay focused on the activity. [Student] requires more instruction on being an active participant in [Student] own learning and advocating for movement breaks when [Student] is feeling distracted. [Student] requires several prompts to slow down during every academic subject, and this is especially noted in math and reading. [Student] requires more direct instruction on persevering through non-preferred academic tasks and assignments. When not engaged in the topic, [Student] exhibits non-verbal body language, like sitting on the floor, reading a book, or playing with a fidget. [Student] is working on identifying when [Student] is distracted and independently asking for tools that will help [Student] focus. [Student] demonstrates difficulty sustaining attention throughout all academic classes and across the school day. [Student] also requires several reminders from teachers throughout the completion of the task. [Student] has demonstrated difficulty following multi-step directions and benefits from the repetition and simplification of oral and written directions. [Student] benefits from teacher check-ins, redirecting language, positive praise, and frequent movement breaks. [Student's] executive functioning needs, outlined above, impact [Student's] skill development and performance in all classes and social situations across the school day, including core academic instruction, lunch, recess, specialized art and movement classes, and other school-based activities.” (Petitioners’ Exhibit 9-7)

13. The School B IEP notes the following regarding speech language “weaknesses impact [Student's] ability to access the general education curriculum in the following ways: difficulty following classroom instructions and directions, difficulty answering questions and participating in class discussions, difficulty independently completing grade-level reading and writing assignments and language-laden academic coursework, difficulty interacting with peers. These difficulties impact [Student] during core academic skill instruction/classes, specialized arts and movement classes, lunch, recess, and other school-based activities.” (Petitioners’ Exhibit 9-9)

14. The IEP included the following accommodations in the classroom and during formal, informal, and standard testing:

- 100% extended time for tests as allowed by the parameters of the test
- Calculator for mathematics testing and in-class use
- Extra time for processing information and formulating oral/written responses during testing, class discussion, and instruction
- Frequent movement and visual breaks during instruction
- Large print material for tests and instruction
- Location of testing with minimal distractions
- Multi-sensory presentation (classroom) and breakdown of assignments into manageable components
- Notes, outlines, graphic and semantic organizers (classroom)
- Paraphrasing/simplification/repetition of oral and written directions
- Preferential seating near the source of instruction
- Small group setting and instruction
- Specialized attentional, executive, and social supports across the school day, including during all academic classes, specialized art and movement classes, and opportunities such as recess, lunch, field trips, and other special activities.
- Tests administered at the best time of day for Zac, and may be administered over multiple days without exceeding total time and within the parameters of the test
- The student dictates response to examiner for verbatim transcription
- Use of Assistive Technology and electronic devices as allowed by the parameters of the test: speech-to-text software, word processing with spellcheck/grammar features, online calendar to update and check assignments/schedule
- Use of computer for all written work
- Word prediction software

(Petitioners’ Exhibit 9-26)

15. School B conducted a speech and language evaluation of Student on September 23, 2020, which Petitioners provided to DCPS in February 2021. Student demonstrated average to high average skills in Vocabulary, although the evaluator noted that Student demonstrated word-finding difficulties as evidenced by testing behaviors. Student performed similarly to Student's age-matched peers on measures of syntax and grammar. The evaluator noted that while the mechanics of grammar and syntax appeared to be intact, Student's language formulation skills for longer and/or more complex discourse appeared to be deficient. Student's comprehension and language organization skills ranged from the average to the below average range. Student demonstrated relative strengths in recalling details from short passages and understanding spoken messages. Student demonstrated weaknesses in finding the gestalt and applying reasoning skills (making inferences, comparing/ contrasting, drawing conclusions, etc.), problem-solving, and comprehending narratives. (Petitioner's Exhibit 7, Respondent's Exhibits 6, 9-16, 9-17)
16. Following the settlement in of Petitioner's January 4, 2021, DPC, DCPS issued a prior written notice dated April 22, 2021, in which DCPS proposed to review Student's independent educational assessment; the School B speech and language evaluation, to conduct additional measures as needed and to observe Student at School B. (Petitioners' Exhibit 12)
17. A DCPS speech-language pathologist ("SLP") reviewed the School B September 23, 2020, evaluation in a report dated May 21, 2021. The DCPS SLP also conducted a classroom observation of Student and interviewed Student's parent and School B teacher. In summary, the DCPS SLP noted that Student presents with speech sound difficulties, word-finding difficulties, and language organization and formulation difficulties. Student also demonstrated deficits in phonological awareness skills for reading. (Witness 9's testimony, Respondent's Exhibits 6, 9-16, 9-17)
18. DCPS completed an Evaluation Summary Report dated June 3, 2021. In the report, DCPS noted information from the independent evaluations and a review of both Student's previous DCPS IEP and the School B IEP. This report noted, inter alia, the following: the School B team reported that Student is easily distracted by both internal and external stimuli; responds to multiple prompts to maintain focus and return to task. Student rushes through non-preferred tasks, specifically with reading and math content. Student is working on identifying when distracted as well as identifying and utilizing tools/strategies to cope so Student is better able to remain focused. Student struggles with social skills and recognizing another's likely response to behaviors. Overall summary: Student is an intellectually curious and passionate learner. Student's overall challenge with information processing and dyslexia affects the rate of Student organizing/synthesizing information during instruction and Student's assignment output. Specifically, [Student's] dyslexia and processing speed weaknesses affect [Student's] ability to rapidly and accurately process information presented orally and visually. [Student's] deficits also affect [Student's] ability to complete tasks within expected time limits, the ability to transfer information, such as copying information from the board, and the ability to follow multi-step directions. Student has had a series of targeted interventions in the classroom. Overall, the results from Student's evaluations which encompassed skills in cognitive, academic, and functional motor areas, indicate that continued interventions will be needed to support Student's growth as a learner. (Respondent's Exhibit 8)

19. On June 11, 2021, DCPS convened an IEP meeting to develop an IEP for Student for SY 2021-2022. Petitioners, along with their educational consultant, participated in the IEP meeting. School B staff, along with DCPS personnel, also participated in the meeting. The team confirmed Student's eligibility for special education and developed an IEP. The IEP was collaboratively developed along Petitioners, their consultant, and the School B staff. The IEP team agreed that Student has difficulty sustaining attention for non-preferred activities, difficulties in planning and organization, and a learning disability in academic areas that were identified. The IEP included academic goals and objectives in math, reading, and written expression. The IEP also included goals and objectives in related services areas of speech-language, emotional, social, and behavioral development (BSS), and motor skills/physical development (OT). Petitioners and their consultant agreed with the goals, present levels, and accommodations in the IEP that DCPS developed. (Witness 1's testimony, Respondent's Exhibit 9).
20. The IEP meeting notes state the following regarding the program in which Student's IEP would be implemented: 20 hours of specialized instruction outside the general education setting in the form of an SLS Program. Math, reading, writing, social studies, and science will be in a resource setting with 12 or fewer students. (Respondent's Exhibit 10-4)
21. The June 11, 2021, IEP prescribed the following services:

Special Education Services

| Service | Setting | Begin Date | End Date | Time/Frequency |
|-------------------------|--------------------|------------|------------|----------------|
| Specialized Instruction | Outside General Ed | 06/11/2021 | 06/10/2022 | 20 hr. per wk. |

Related Services

| Service | Setting | Begin Date | End Date | Time/Frequency |
|-----------------------------|---------------------------|------------|------------|-------------------|
| Occupational Therapy | Outside General Education | 06/12/2021 | 06/10/2022 | 180 min. per mon. |
| Behavioral Support Services | Outside General Education | 06/12/2021 | 06/10/2022 | 180 min. per mon. |
| Speech-Language Pathology | Outside General Education | 06/12/2021 | 06/10/2022 | 240 min. per mon. |

Consultation Services

| Service | Begin Date | End Date | Time/Frequency |
|-----------------------------|------------|------------|-----------------|
| Specialized Instruction | 06/11/2021 | 06/10/2022 | 2 hr per mon. |
| Occupational Therapy | 06/12/2021 | 06/10/2022 | 30 min per mon. |
| Speech-Language Pathology | 06/12/2021 | 06/10/2022 | 30 min per mon. |
| Behavioral Support Services | 06/11/2021 | 06/10/2022 | 60 min per mon. |

(Respondent's Exhibit 9, 10)

22. The June 11, 2021, IEP included the following in a section describing Student's LRE:

LEAST RESTRICTIVE ENVIRONMENT (LRE)

This section describes student needs that require removal from general education to receive the following special education a related service. Note: The nature and/or severity of the disability must be such that the student can only make progress on IEP goals and objectives by being removed from the general education classroom to receive these services.

| Service | Time/Frequency | Reason services cannot be provided in general education setting |
|-----------------------------|-------------------|---|
| Specialized Instruction | 20 hr. per wk. | [Student's] basic skills deficits require [Student's] to received academic services outside the general education setting. |
| Occupational Therapy | 180 min. per mon. | [Student] will be best served in a setting where ■ can access quiet, 1-1 support to work towards ■ Occupational Therapy goals. |
| Behavioral Support Services | 180 min. per mon. | [Student] requires individual and small group modality outside of the general education setting. Please note services can be provided both within and outside of the class setting. |
| Speech-Language Pathology | 240 min. per mon. | [Student] requires small group instruction to remediate oral communication skills in an environment conducive to repetition, paced instruction, and drills. |

23. The June 11, 2021, IEP included the following language regarding “Positive Behavior Interventions and Supports:

"[Student] is described as sweet, kind-hearted, and creative. [Student] exhibits low frustration tolerance, inflexible thinking, is easily distracted, and requires frequent breaks and prompting to initiate and remain on task. The following strategies have been attempted to address [Student's] social-emotional concerns: supportive teacher counseling, direct social skill instruction and coaching, teacher prompting/cuing, self-monitoring checklists, individual monitoring charts, teach executive functioning strategies including organization, attention, self-monitoring, shifting, and task completion.”

24. The June 11, 2021, IEP included the following language regarding “Communication”:

[Student] can communicate [Student's] thoughts and ideas to classmates. [Student] can express needs and advocate for self more readily. With support such as prompting, redirection, small group, and individualized instruction, as well as direct therapy for articulation/intelligibility, language formulation, and language organization skills, [Student] can access [Student's] academic curriculum.

25. The June 11, 2021, IEP included the following language regarding “Assistive Technology”:

[Student] benefits from electronic devices as allowed by the test parameters: speech-to-text software, word processing with spellcheck/grammar features, online calendar to update and check assignments/schedules, word prediction software, and calculator.

26. The June 11, 2021, IEP included the following Other Classroom Aids and Services: ⁸

[Student] will have access to a laptop for mathematics and writing support as well as visual supports and graphic organizers for reading and writing. In mathematics, [Student] will have access to manipulatives. Other classroom supports should

⁸ This section of the IEP noted the following: “This section documents aids, services, and other supports that are only provided in regular education classes or other education-related settings to enable children with disabilities to access the curriculum and are not accommodations provided in the Statewide-Assessment.”

include but are not limited to, visual modeling, repetition of important concepts, extra think time, self-rehearsals, adult scribing as needed, graphic and semantic organizers, manipulatives, graph paper, editing checklist, models and examples, teacher-made materials, multi-sensory approach, and flexible seating. Cuing/prompting to maintain attention will occur throughout the day during periods of instruction and independent work. Noise-cancelling headphones to facilitate ■ auditory processing skills if needed.

27. The June 11, 2021, IEP prescribed the following Classroom and Testing Accommodations:

| Classroom Accommodations | Statewide or Alternate Assessment Accommodations |
|--|--|
| <i>Presentation</i> | <i>Presentation</i> |
| Paper-Based Materials [Student] struggles when using a computer. [Student] has difficulty typing and manipulating the screen due to fine motor problems. [Student] becomes easily frustrated when using a computer and will often shut down and then requires heavy teacher encouragement to complete [Student's] assignment. | |
| Clarification/ Repetition of Directions [Student] experiences significant difficulties with [Student's] cognitive processing speed, short-term working memory, and cognitive efficiency. Because of this, [Student] requires clarification/repetition of directions for [Student] to demonstrate what [Student] knows fully. | Clarification/ Repetition of Directions |
| Read Aloud for Non-ELA/Literacy Assessments [Student] experiences significant difficulties with ■ cognitive processing speed, short-term working memory, reading fluency, and cognitive efficiency. Because of this, [Student] requires Non-ELA/Literacy Assessments read aloud for [Student] to fully demonstrate what [Student] knows. | Read Aloud for Non-ELA/Literacy Assessments |
| | Redirect Student to Test |
| <i>Response</i> | <i>Response</i> |
| | Calculation Device on Non-Calculator Sections |
| Human Scribe, Speech-to-Text, Human Signer, or External Assistive Technology for Responses on Non-ELA/Literacy Assessments | |
| Human Scribe, Speech-to-Text, Human Signer, or External Assistive Technology for Constructed Responses on ELA/Literacy Assessments | Human Scribe, Speech-to-Text, Human Signer, or External Assistive Technology for Constructed Responses on ELA/Literacy Assessments |
| | Answers Recorded in Test Book (Paper-Based Edition) |
| Unique/ Non-Standard Accommodation - Test with a Familiar Person | Unique/ Non-Standard Accommodation - Test with a Familiar Person |
| Setting | Setting |
| Preferential seating | Preferential seating |
| Location with minimal distractions | Location with minimal distractions |
| Small group testing | Small group testing |
| Timing and Scheduling | Timing and Scheduling |
| Extended Time | Extended Time [Student] experiences significant difficulties with [Student's] cognitive processing speed, short-term working memory, and cognitive efficiency. Because of this, [Student] requires extended time for [Student] to fully demonstrate what [Student] knows. |
| Flexibility in Scheduling | |

| | |
|-----------------|--|
| Frequent Breaks | Frequent Breaks [Student] experiences significant difficulties with ■ cognitive processing speed, short-term working memory, and cognitive efficiency. Because of this, [Student] requires frequent breaks for [Student] to fully demonstrate what [Student] knows. |
|-----------------|--|

28. The IEP included the following description of how Student's disability affects Student's access to the general education curriculum regarding speech and language: "Given formal and informal data from multiple sources, [Student] demonstrates a disabling oral communication disorder that would prevent [Student] from accessing or gaining benefit from [Student's] educational environment. Given [Student's] varied performances, [Student] would have varying degrees of difficulty using higher level and integrated language skills independently within the classroom." It was also noted that "[Student] has made significant progress in speech articulation. [Student] is 100% accurate in isolated therapy activities for all sounds in all positions. [Student's] is 100% accurate in targeted word production. In spontaneous speech and or in less structured settings such as the classroom, [Student's] sometimes reverts to /f/ for /th/ but is easily redirected. Additionally, it is sometimes difficult to hear [Student's] production as we all continue to wear masks in the school setting. Overall, [Student] has accurate production in spontaneous speech in 95% of instances; therefore, direct therapy will be suspended, and [Student] will move to monitoring for articulation goals. (Respondent's Exhibit 9-18)
29. Regarding OT, the IEP noted, among other things, the following about Student: "Difficulties with visual perceptual and ocular motor skills as noted by messy handwriting, letter reversals, poor organization, skipping words when reading, rubbing eyes, and holding paper close to [Student's] eyes have been noted... [Student's] teacher also observes that Student has some familiarity with upper case letters but no familiarity with lower case, cursive, or keyboarding. Student's difficulties in motor coordination and sensory processing skills may impact [Student's] ability to access the general education curriculum without teacher support. Deficits may impact [Student's] ability to accurately convey knowledge through writing and the ability to focus and process environmental stimuli during classroom activities. (Respondent's Exhibit 9-25, 9-26, 9-27)
30. Regarding Student's social-emotional concerns, the IEP stated, inter alia, the following: [School B's] progress report indicates within the Academic Behavior/Executive Functioning Domain as of March 2021, [Student] "continues to make slow progress in this goal area and consistently requires significant teacher support to follow multiple-step tasks, shift between activities and use technology. [Student] struggles significantly to organize ... materials but has been benefiting from the use of colored folders and a strict routine. [Student] benefits from being given a choice of two options rather than brainstorming and is making progress in this goal area." (Respondent's Exhibit 9-18)
31. Regarding Student's social-emotional concerns, the IEP also stated the following: [Student] has been noted to interact with classmates during unstructured times like recess and lunch, even initiating play with unfamiliar students. [Student] is willing to discuss personal opinions but shows difficulty when someone disagrees with [Student's] opinion. [Student] is growing in [Student's] ability to see another perspective. [Student] is improving in [Student's] ability to interact and engage in conversations with peers and is growing in ability to engage in topics that are not of interest to [Student's]. [Student] does not often initiate conversations but has improved in

remaining on the topic of conversation in academic classes and during unstructured times like lunch and recess. [Student] still requires teacher support to generate alternative ways but can participate in the brainstorming process and is progressing nicely in this goal area. [Student] is making progress in this goal area and benefits from visual cues to limit the interruptions and blurting. [Student] is making slow progress in this goal area and benefits from visual cues, teacher prompts and scaffolding. [Student] still struggles to lower the tone of [Student's] voice, especially virtually, but is making progress in [her/his] ability to raise [Student's] hand to be called on." (Respondent's Exhibit 9-19, 9-20)

32. Student's mother felt that she fully participated in the IEP meeting and expressed her opinions, including those provided by her educational consultant on her behalf. Student's mother agreed with the rest of the IEP team that Student needed specialized instruction for ELA, math, science, and social studies, and Student would receive that under the DCPS IEPs. Student's mother understood that under the DCPS IEPs, Student would have elective classes, specials, lunch, and recess, but understood that the accommodations in the IEPs would be available to Student throughout the school day. (Mother's testimony, Petitioners' Exhibit 19)
33. Petitioners agreed with all aspects of the IEP except the number of hours of specialized instruction outside the general education setting and thus, the resulting LRE.⁹ Petitioners and their consultant advised DCPS that they believed Student required placement in a "full-time" special education day school entirely removed from the general education setting. Petitioners' educational consultant expressed her opinion that the services and setting that Student receives at School B are appropriate to meet Student's needs. In her opinion, simply providing Student accommodations in general education for 10 hours per week was insufficient to meet Student's needs. Although there was no specific discussion of the non-academic elective classes Student would have pursuant to the IEP, the consultant considered electives to be academic and that Student needed special education support in all classes throughout the school day, including during lunch. In her opinion, the objectives in the IEP goals would require specialized support throughout the school day. (Mother's testimony, Witness 1's testimony, Petitioners' Exhibit 19)
34. DCPS proposed implementing the IEP at School C, Student's neighborhood DCPS school. DCPS provided Petitioners a LOS letter dated June 30, 2021, placing Student in the SLS program at School C for SY 2021-2022 school year. (Witness 1's testimony, Respondent's Exhibit 9, Respondent's Exhibit 14)
35. On July 21, 2021, Petitioners' consultant emailed School C, stating: "The DCPS LOS is for [School C] for the 2021-22 school year. We'd like to set up a time to meet by video and learn about how [School C] plans to implement [Student's] IEP. (Witness 1's testimony, Petitioners' Exhibit 20-2)
36. On July 22, 2021, the School C staff member responded to the email stating the following:

"Thank you for reaching out about [School C]. We look forward to working with you to help with the transition. [School C] is the location of service for [Student],

⁹ The IEP meeting notes indicate that Petitioners initially disagreed with the OT services, but that disagreement was not maintained in the DPC.

and we can service the IEP at [School C]. Here is some information that will help you learn more about the programming at [School C]. [School C's Website: - Here you can find information about the [School C] community. DCPS Specialized Programs Website: is <https://dcps.dc.gov/page/academic-programs-and-inclusion> - Here you can find information about the SLS program and a parent resource guide. DCPS Enrollment Website: <https://enrolldcps.dc.gov> - Here you can complete the enrollment paperwork for the school year. Scheduling a School Visit: If you are interested in viewing the building, please let me know a time/date that you can come see the facility. You can visit any day of the work week (Monday through Friday) between 12-3 during the summer months. Please note that you will need to wear a mask in the building and check in with one of the Personal Team Care members for a check in. Once you check in at the building, you will be provided with a Visitor Pass and can walk through the building.” (Petitioners’ Exhibit 20-2)

37. On August 2, 2021, Petitioners served notice to DCPS that Student would be attending School B for SY 2021-2022 and requested that DCPS support that placement. (Mother's testimony, Petitioner's Exhibit 21)
38. On October 12, 2021, Petitioners' educational consultant contacted School C to request the class schedule that Student would follow at School C and requested to come to the School C to observe the program. In an email response dated October 14, 2021, a School C staff member stated School C does not make schedules for students who are not attending. There is no indication that the consultant made further contact with School C to observe during SY 2021-2022. (Witness 1's testimony, Petitioners' Exhibit 24)
39. During SY 2021-2022, Student's School B schedule consisted of nine periods from 8:30 a.m. to 3:30 p.m. The table below indicates Student's class schedule and the teachers or staff members responsible for those subjects or activities. Of the teachers listed in the class schedule, during SY 2021-2022, only Student's art teacher held a current OSSE certification as a special education teacher. (Witness 7's testimony, Petitioners' Exhibit 23)

| | Monday | Tuesday | Wednesday | Thursday | Friday |
|-------------------|--|--|--|--|--|
| 8:30AM - 8:49AM | Morning Meeting [REDACTED] Rm Res 251 | Morning Meeting [REDACTED] Rm Res 251 | Morning Meeting [REDACTED] Rm: Res 251 | Morning Meeting [REDACTED] Rn Res 251 | Morning Meeting [REDACTED] Rm: Res 251 |
| 8:50AM - 9:29AM | Workshop [REDACTED] Rm: Res. 116 | Workshop [REDACTED] Rm: Res 116 | Workshop [REDACTED] Rm: Res 116 | Workshop [REDACTED] Rm: Res. 116 | Workshop [REDACTED] Rm: Res 116 |
| 9:30AM - 10:09AM | Physical Education [REDACTED] Rm: Gym OJ | Physical Education [REDACTED] Rm: Gym OJ | Physical Education [REDACTED] Rm: Gym OJ | Physical Education [REDACTED] Rm: Gym OJ | Physical Education [REDACTED] Rm: Gym 01 |
| 10:50AM - 11:29AM | Reading/Math [REDACTED] Rm: Res 251 | Reading/Math [REDACTED] Rm: Res 251 | Reading/Math [REDACTED] Rm: Res 251 | Reading/Math [REDACTED] Rn: Res. 251 | Reading/Math [REDACTED] Rm: Res 251 |

| | | | | | |
|----------------------|---|--|---|--|---|
| 11:30AM - 12:07PM | Reading/Math ██████████ Rm: Res 251 | Reading/Math ██████████ Rm: Res 251 | Reading/Math ██████████ Rm: Res 251 | Reading/Math ██████████ Rn: Res 251 | Reading/Math ██████████ Rm: Res 251 |
| 12:10PM - 12:49PM | Reading ██████████ Rm: Res. 251 | Reading/Math ██████████ Rm: Res 251 | Reading/Math ██████████ Rm: Res 251 | Reading/Math ██████████ Rn: Res. 251 | Reading/Math ██████████ Rm: Res 251 |
| 12:50PM - 1:29PM | Lunch ██████████ | Lunch ██████████ | Lunch ██████████ | Lunch ██████████ | Lunch ██████████ |
| 2:10PM - 2:49PM | Futurists ██████████ Rm: Res 230 | Futurists ██████████ Rm: Res 230 | Futurists ██████████ Rm: Res 230 | Futurists ██████████ Rm: Res. 230 | Futurists ██████████ Rm: Res 230 |
| 2:50PM - 3:30PM | Art ██████████ Rm: Res 256 | Speech/Language ██████████ Rm: Res 441 | Art ██████████ Rm: Res 256 | Art ██████████ Rn: Res. 256 | Art ██████████ Rm: Res 256 |

40. Petitioners filed a DPC on January 5, 2022, seeking reimbursement for the costs incurred for Student's unilateral placement at School B. On April 25, 2022, Petitioners withdrew the DPC to return to the IEP table to consider what DCPS could propose for Student for SY 2022-2023. (ODR Case 2022-0003)
41. On May 9, 2022, DCPS developed an IEP for Student for SY 2022-2023. Petitioners, their educational consultant, and the School B staff participated along with DCPS personnel. Petitioners' consultant had provided DCPS written feedback on the draft IEP that DCPS provided prior to the meeting. Petitioners and their educational consultant participated collaboratively in updating present levels of performance ("PLOPs"), goals, and objectives that reflected the progress that Student made during SY 2021-2022 at School B. Some goals were updated, and many remained the same as the previous IEP. Petitioners and their educational consultant agreed with DCPS staff on all elements of the May 9, 2022, IEP except the number of hours of specialized instruction in the IEP. They contended that Student needed specialized instruction throughout the school day. (Witness 1's testimony, Petitioners' Exhibits 33, 35)
42. The services and aids and services and accommodations in the May 9, 2022, IEP were essentially unchanged from the June 11, 2021, IEP, except for the following minor changes: The Communication Section added the following language: [Student] would benefit from a language rich environment with good peer modeling and adult support. The AT section was changed slightly to read: [Student] benefits from the following assistive technology devices: speech-to-text software, word processing with spellcheck/grammar features, online calendar to update and check assignments/schedule, word prediction software, and calculator. Consultative specialized instruction was reduced from 2 hours to 1 per week. The following language was added to the Other Classroom Aids and Services section: [Student] experiences significant difficulties with [Student's] cognitive processing speed, short-term working memory, and cognitive efficiency. Because of this, [Student] requires clarification/repetition of directions for Student to fully demonstrate what [Student] knows. Read Aloud for Non-ELA/Literacy Assessments. (Respondent's Exhibit 11)

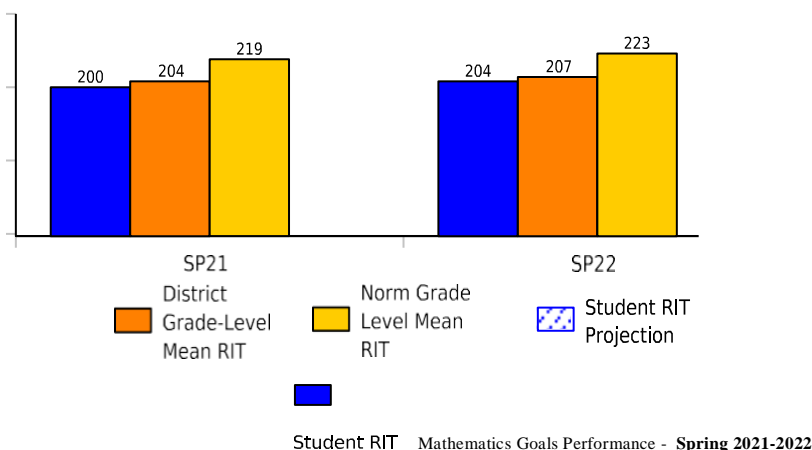
43. At the May 9, 2022, meeting, Petitioners asked where the IEP would be implemented. DCPS indicated that Petitioners would receive a LOS letter. Petitioners were invited to email DCPS their feedback or requests regarding the LOS after the meeting. On May 16, 2022, Petitioners, through counsel, shared their feedback on Student's LOS for SY 2022-2023. They stated that "Based on [Student's] progress and response to programming at [School B], we are seeking a program that can provide [redacted] with the same type of reading intervention [redacted] is currently receiving at [School B]. That request is for an Orton Gillingham reading intervention that can be provided for 60 minutes daily in a small group setting. This is what [Student] is currently receiving and what we believe [redacted] requires to continue to make progress." (Petitioners' Exhibit 36)
44. On July 18, 2022, Petitioners served notice of their intent to maintain [redacted] enrollment at School A for SY 2022-2023 due to DCPS's failure to propose an appropriate IEP. (Petitioners' Exhibit 40)
45. On August 8, 2022, DCPS provided Petitioners a LOS letter indicating that School C had been identified as the location for Student's May 9, 2022, IEP to be implemented. (Petitioners' Exhibit 41)
46. School C has approximately 1450 total students divided into three grades. For Students transitioning to School C from DCPS feeder schools, there are opportunities for both students and parents to tour the building, open houses on weekends, and a chance for students to come to the school to participate in class schedule run-throughs before school starts. Generally, all students in a grade have lunch and recess together, and some students have a slightly different lunch plans and/or locations. At School C, each Student in the grade Student would have attended during SY 2021-2022, took English and Literary Arts ("ELA"), math, science, art and physical education ("P.E."), and music. The SLS program at School C is a smaller setting than other classes in the school. The SLS program has a student/teacher ratio of 12 to 1. The group moves between two different teachers and aids. There are two SLS classroom groups, one for 6th grade and one combined 7th & 8th grade group. The groups switch between two teachers to cover all subjects, including science and ELA. (Witness 9's testimony)
47. Petitioners' educational consultant has been to School C often and is familiar with the building layout and some of the school staff. She did not, however, have an opportunity to visit School C and have discussions with school C staff about how Student's IEP would be implemented at School C and in what courses Student would have specialized instruction, and in what courses Student would not. Had She observed School C, she hoped to learn what classes Student would be taking and in which classes the IEP would be implemented. (Witness 1's testimony)
48. Petitioners maintained Student at School B for SY 2022-2023, where Student has continued to make academic and social-emotional progress. Since Student has been attending School B for the past three school years, Student is more willing to take risks. Student has a small group of friends at School B, which makes Student feel more comfortable and want to attend school. Student has become more engaged with learning, and Student's self-esteem has improved. (Mother's testimony)
49. There are currently 14 of the approximately 380 students at School B who are funded and monitored by DCPS. A DCPS monitoring specialist serves as the case manager for these students

and monitors their progress, participates in IEP meetings, and interacts with School B staff relative to the services being delivered to these students. (Witness 7's testimony)

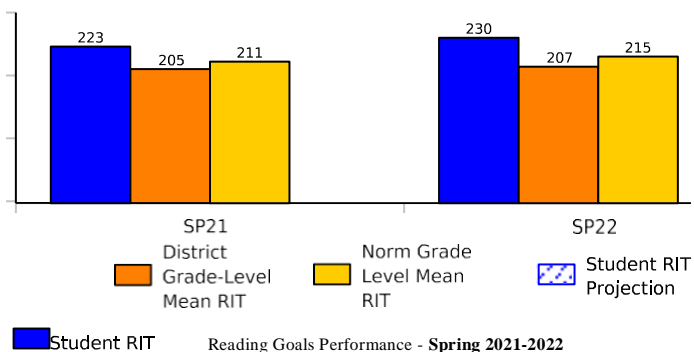
50. On March 3, 2022, OSSE cited School B for failing to meet requirements relating to adequate organizational structure and staffing, missing and/or expired teacher and related service provider credentials, inaccurate and incomplete staff roster information, and criminal background and child protective services registry checks . As a result, OSSE required School B to take corrective action to maintain its COA. School B's corrective action plan to address this is still in place. (Witness 7's testimony, Respondent's Exhibit 16)

51. Student's academic performance as measured by School B using MAP ¹⁰ reflects that Student is operating above grade level in reading and slightly below grade level in math. Student had the following scores in math and reading as compared to Student's same-grade peers in Washington D.C. and throughout the country:

Math: Math K-12



Language Arts: Reading



52. Student's School B first-semester report card for SY 2022-2023 reflects that Student had the following subjects/classes and teachers, two of whom hold OSSE special education teacher

¹⁰ MAP (Measures of Academic Progress) is a computerized adaptive assessment that measures your child's knowledge of reading and math.

certifications, three of whom hold OSSE general education certifications, and the remaining are uncertified:

| <u>Class:</u> | <u>Teacher:</u> | |
|--------------------------|-----------------|--|
| English 7 | | |
| Robotics and Engineering | | |
| Visualizing Math | | |
| Global Citizenship | | |
| Science 7 | | |
| Studio Art | | |
| Design Lab | | |
| Physical Education | | (Witness 7's testimony, Petitioners' Exhibit 47) |

53. By March of each year, School B wants parents to commit to having their child attend the following school year and sign an agreement and commit to a payment plan by June. Petitioners signed such an agreement with School B in March 2021 and March 2022. Petitioners paid \$64K for Student to attend School B during SY 2021-2022. This amount included the costs for OT and speech-language services. Although Student needs the related services and particularly OT for executive functioning skills, Petitioners paused OT and speech-language for SY 2022-2023 because Petitioners needed to reduce expenses and Student was fatigued. In lieu of those related services, Student is engaged in keyboarding instruction and has been on some sport teams. During the current school year, the Petitioners are obligated to pay School B \$56K, which they will pay over twelve months. At the time of the hearing, Petitioners had paid six months of that total for SY 2022-2023. (Mother's testimony.)

CONCLUSIONS OF LAW:

Pursuant to IDEA §1415 (f)(3)(E)(i), a decision made by a hearing officer shall be made on substantive grounds based on a determination of whether the child received a free appropriate public education ("FAPE").

Pursuant to IDEA §1415 (f)(3)(E)(ii), in matters alleging a procedural violation, a hearing officer may find that a child did not receive FAPE only if the procedural inadequacies impeded the child's right to FAPE, significantly impeded the parent's opportunity to participate in the decision-making process regarding the provision of FAPE, or caused the child a deprivation of educational benefits. An IDEA claim is viable only if [DCPS'] procedural violations affected the student's substantive rights." *Lesesne v. District of Columbia*, 447 F.3d 828, 834 (D.C. Cir. 2006)

34 C.F.R. § 300.17 provides:

A free appropriate public education or FAPE means special education and related services that--
(a) Are provided at public expense, under public supervision and direction, and without charge;
(b) Meet the standards of the SEA, including the requirements of this part; (c), Include an appropriate preschool, elementary school, or secondary school education in the State involved;
and (d) Are provided in conformity with an individualized education program (IEP) that meets the requirements of Sec. 300.320 through 300.324

Pursuant to 5E DCMR 3030.14, the burden of proof is the responsibility of the party seeking relief. *Schaffer v. Weast*, 546 U.S. 49, 126 S.Ct. 528 (2005). The burden of persuasion shall be met by a preponderance of the evidence. See, e.g., *N.G. V. District of Columbia* 556 f. Sup. 2d (D.D.C. 2008) see also 20 U.S.C. §1451 (i)(2)(C)(iii). Petitioners held the burden of production on all issues adjudicated. DCPS held the burden of persuasion on issues #1, & #3 after Petitioners presented a prima facie case on those issues. ¹¹ Petitioners held the burden of persuasion on issues #2 & #4.

ISSUE 1: Did DCPS deny Student a FAPE by failing to propose an appropriate IEP or placement for SY 2021-2022 because the IEP contained an inappropriate LRE with insufficient hours of specialized instruction outside general education?

Conclusion: Respondent sustained the burden of proof by a preponderance of the evidence that the IEP that DCPS developed for Student in SY 2021-2022 was reasonably calculated to enable Student to make progress appropriate in light of the child's circumstances.

The Individuals with Disabilities Education Act ("IDEA") was enacted to ensure that all disabled students receive a "free appropriate public education." 20 U.S.C. § 1400(d)(1)(A). "Commonly referred to by its acronym 'FAPE,' a free appropriate public education is defined as 'special education and related services that' are 'provided at public expense, under public supervision ...;' and that 'meet the standards of the State educational agency;' as well as 'conform[] with [each disabled student's] individualized education program.'" *Charles H. v. District of Columbia*, 2021 WL 2946127 (D.D.C. June 16, 2021) (quoting 20 U.S.C. § 1401(9)) (alterations in original). "Special education" is defined as "specially designed instruction, at no cost to parents, [that] meet[s] the unique needs of a child with a disability." 20 U.S.C. § 1401(29). "Related services," on the other hand, are defined as "such developmental, corrective, and other supportive services ... as may be required to assist a child with a disability to benefit from special education." Id. § 1401(26)(A).

¹¹ DC Code § 38-2571.03 (6) provides:

(A) In special education due process hearings occurring pursuant to IDEA (20 U.S.C. § 1415(f) and 20 U.S.C. § 1439(a)(1)), the party who filed for the due process hearing shall bear the burden of production and the burden of persuasion; except, that:

(i) 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.

(ii) Where a party seeks tuition reimbursement for unilateral placement, the party seeking reimbursement shall bear the burden of production and the burden of persuasion on the appropriateness of the unilateral placement; provided, that the hearing officer shall have the authority to bifurcate a hearing regarding a unilateral placement; provided further, that if the hearing officer determines that the program offered by the public agency is appropriate, it is not necessary to inquire into the appropriateness of the unilateral placement.

(B) This paragraph shall apply to special education due process hearings resulting from complaints filed after July 1, 2016.

"Under [the] IDEA and its implementing regulations, students with disabilities ... are entitled to receive [a] FAPE through an Individualized Education Program (or IEP)." *Charles H.*, 2021 WL 2946127 (quoting 20 U.S.C. § 1401(9)(D)). An IEP is a written document that lays out how the student will obtain measurable annual goals and that mandates specific special education and related services that the student must receive. 20 U.S.C. § 1414(d)(1)(A)(i). It is created for each student by a special "IEP Team," consisting of the child's parents, at least one regular-education teacher, at least one special-education teacher, and other specified educational experts. *Id.* § 1414(d)(1)(B). An IEP is the main tool for ensuring that a student is provided a FAPE. See *Charles H.*, 2021 WL 2946127 (quoting *Lofton v. District of Columbia*, 7 F. Supp. 3d 117, 123 (D.D.C. 2013)). " (*Robles v. District of Columbia* 81 IDELR 183 D.D.C. August 26, 2022)

In *Board of Education v. Rowley*, the United States Supreme Court set forth a two-part inquiry for determining whether a school district has satisfied the FAPE requirement. First, the state must have "complied with the procedures set forth in the Act." *Rowley*, 458 U.S. at 206. Second, the IEP that is developed must be "reasonably calculated to enable the child to receive educational benefits." *Rowley*, 458 U.S. at 206-07. To be appropriate under 34 C.F.R. § 300.324, the IEP must consider the (i) strengths of the child; (ii) concerns of the parents; (iii) results of the initial or most recent evaluation; and (iv) academic, developmental, and functional needs of the child.

The second substantive prong of the *Rowley* inquiry is whether the IEP developed was reasonably calculated to enable Student to make progress appropriate in light of Student's individual circumstances. In *Endrew F. ex rel. Joseph F. v. Douglas Cty. Sch. Dist.* RE-1, 137 S. Ct. 988 (2017), the U.S. Supreme Court elaborated on the "educational benefits" requirement pronounced in *Rowley*: To meet its substantive obligation under the IDEA, a school must offer an IEP reasonably calculated to enable a child to make progress appropriate in light of the child's circumstances. . . . Any review of an IEP must appreciate that the question is whether the IEP is reasonable, not whether the court regards it as ideal. . . . When a child is fully integrated in the regular classroom, as the Act prefers, what that typically means is providing a level of instruction reasonably calculated to permit advancement through the general curriculum. . . . If that is not a reasonable prospect for a child, his IEP need not aim for grade-level advancement. But his educational program must be appropriately ambitious in light of his circumstances, just as advancement from grade to grade is appropriately ambitious for most children in the regular classroom. The goals may differ, but every child should have the chance to meet challenging objectives. *Endrew F.*, supra, 137 S. Ct. at 999–1000 (citations omitted).

Pursuant to *Schaefer v. Weast*, 554 F.3d 470 (U.S. App. 2009), the Hearing Officer must "focus on the adequacy of the IEP at the time it was created, and ask if it was reasonably calculated at that time to enable the student to receive educational benefits."

The key inquiry regarding an IEP's substantive adequacy is whether, taking account of what the school knew or reasonably should have known of a student's needs at the time, the IEP offered was reasonably calculated to enable the specific student's progress.... "Any review of an IEP must appreciate that the question is whether the IEP is reasonable, not whether the court regards it as ideal." *Z.B. v. District of Columbia*, 888 F.3d 515 (D.C. Cir. 2018) citing *Endrew F.*, supra, 137 S. Ct. 988.

Removing a child with disabilities "from the regular education environment occurs only when the

nature or severity of the disability is such that education in regular classes cannot be achieved satisfactorily." 34 C.F.R. § 300.550; 34 C.F.R. §300.114 see also 20 U.S.C. § (a)(5)(A) (a disabled child is to participate in the same activities as non-disabled children to the "maximum extent appropriate"); *Roark ex rel. Roark v. District of Columbia*, 460 F.Supp.2d 32, 43 (D.D.C. 2006)

"The IDEA requires that children with disabilities receive education in the regular classroom whenever possible" *Z.B. v. District of Columbia*, 888 F.3d 515 (D.C. Cir. 2018) citing *Endrew F.*, supra, 137 S. Ct. at 999 (quoting *Rowley*, 458 U.S. at 202)

The evidence demonstrates that Student is eligible as child with a disability under IDEA with a disability classification of SLD. Student has been diagnosed with a language-based disability in reading, a specific learning disability in written expression, a specific learning disability in math, and ADHD, Inattentive type. Student has been assessed as having average cognitive functioning. When Student was administered formal academic achievement testing (WJ-IV) in 2020, Student's math and written language skills were below expectations based on Student's age, grade, and cognitive ability.¹² Student's reading skills were average.¹³

When DCPS developed Student's June 11, 2021, IEP, Student had been attending School B a full school year. School B is an educational placement that Petitioners and their witnesses all testified was providing Student a setting and services that met and continue to meet Student's needs. School B prescribed an IEP that stated that Student would be provided 32.75 hours per week of specialized instruction, 45 minutes of speech-language services per week, and 90 minutes of OT per week. Student's full day at School B was considered outside general education because School B has no non-disabled students. At School B, Student had and has classes with a student-to-teacher ratio generally of no more than 13 to 1, and in most instances 9 or 10 students.

Although at School B, Student was and is in classes that, in most instances, had and has a relatively low student-to-teacher ratio, it is questionable whether Student was and is being provided special education services during the entire school day. In many instances, Student was and is being taught by individuals not licensed and certified by the District of Columbia as either teachers or special education teachers. This was evidenced by the credible testimony of the DCPS non-public monitoring specialist and the OSSE letter citing School B with violations that included not having properly certified teachers.

Petitioners, nonetheless, maintain that Student needs specialized instruction throughout the school day and that the IEP DCPS developed for Student on June 11, 2021, was inappropriate because it

¹² On Math Calculation Student scored at the 2nd percentile, SS of 70. On Applied Math Problems Student scored at the 3rd percentile, SS of 71. On Math Facts Fluency Student scored at the 1st percentile, SS of 63. In spelling, Student scored at the 0.3 percentile, SS of 59. Student's sentence-length writing score was at the 14th percentile, SS of 84. Student's Sentence Writing Fluency was at the 1st percentile, SS of 66.

¹³ Student had the following scores: Letter-Word Identification at the 40th percentile, SS of 96; Passage Comprehension at the 37th percentile, SS of 95, Sentence Reading fluency at the 73rd percentile, SS of 109; and Word Attack at the 7th percentile, SS of 78.

contained insufficient hours of specialized instruction outside general education and thus an inappropriate LRE.

As documented in the June 11, 2021, IEP meeting notes and the testimony of Petitioners' and DCPS' witnesses, the IEP was collaboratively developed by DCPS, Petitioners, their educational consultant, and the School B staff. The IEP included academic goals and objectives in math, reading, and written expression. The IEP also included goals and objectives in the related services of speech-language, emotional, social, and behavioral development (BSS), and motor skills/physical development (OT).

Regarding Student's behavior, the IEP clearly notes that Student exhibits low frustration tolerance, inflexible thinking, and is easily distracted which requires that Student be provided frequent breaks and prompting to initiate and remain on task. The IEP included strategies to address these concerns, including teacher counseling, direct social skill instruction and coaching, teacher prompting/cuing, and self-monitoring checklists.

The IEP provided assistive technology and classroom aids and services to address Student's academic needs. These included access to a laptop computer for mathematics and writing support as well as visual supports and graphic organizers for reading and writing, repetition of important concepts, extra think time, cuing/prompting to maintain attention throughout the day during periods of instruction, and independent work.

The IEP noted that Student experiences significant difficulties with cognitive processing speed, short-term working memory, reading fluency, and cognitive efficiency. To address this, the IEP provided classroom and testing accommodations, including, but not limited to, read-aloud for non-ELA/literacy assessments to fully demonstrate what Student knows. The accommodations also included testing with a familiar person, preferential seating, a location with minimal distractions, frequent breaks, and extended time.

The IEP prescribed 20 hours per week of specialized instruction outside general education and approximately 2.5 hours per week of related services. In addition to speech-language services and OT that Student received at School B, DCPS provided Student 180 minutes per month of BSS to address Student's social/emotional behavior goals. The IEP included a statement on the LRE page that Student requires individual and small group modality outside of the general education setting and that services in the IEP can be provided both within and outside of the class setting.

The DCPS June 11, 2021, IEP also included the following consultative services: 2 hours per month of specialized instruction, 30 minutes per month of OT, 30 minutes per month of speech-language, and 60 minutes per month of BSS. Based on the testimony of DCPS witnesses, the consultative services were designed for a special educator and related service providers to consult with Student's teachers to ensure that Student's needs were being met under the IEP.

In total, the services in the IEP left roughly 10 hours per week or 2 hours per day in which Student would be inside general education. The testimony from DCPS' witnesses indicated that these two hours per day would be for lunch, recess, and elective classes such as art, music, and P.E.¹⁴

Petitioners agreed with all aspects of the IEP except the number of hours of specialized instruction outside the general education setting and, thus, the resulting LRE. Petitioners and their consultant advised DCPS that they believed Student required placement in a "full-time" special education day school entirely removed from the general education setting.

Petitioner's educational consultant testified that Student has difficulty sustaining attention for non-preferred activities, difficulties in planning and organization, and a learning disability in academic areas that the IEP team agreed upon. She testified that she considered all classes that Student might take, including art, music, and P.E., to be academic, requiring reading and writing and thus requiring specialized instruction. This witness's characterization of such electives or special classes as academic was not convincing. There is no evidence that at School B, where this witness testified that Student receives appropriate services, Student had or has all elective classes and instruction from a licensed teacher or licensed special educator, or that in non-academic settings, Student is receiving instruction.

What is clear, based upon the School B IEP as expressed in the IEP's statement regarding the accommodations Student receives, is that at School B, Student is receiving. "**specialized attentional, executive, and social supports** across the school day including during all academic classes, specialized art and movement classes and opportunities such as recess, lunch, field trips, and other special activities." (Emphasis added)

Petitioners' consultant also testified that she had observed Student at lunch. Her description of Student's behaviors during lunch did not require specialized instruction. Student's described behaviors in this setting principally required Student's redirection. The evidence demonstrates that the supports that Student needed were addressed by the type of accommodations that were listed in both the School B IEP and the IEP that DCPS developed.

Likewise, Petitioners' other witnesses who all interacted with and/or observed Student also testified principally about Student's severe distractibility. There was no evidence, however, from these witnesses that Student's academic deficits in reading, writing, and math were the primary problem that caused them to believe that Student would not be successful in a general education setting and needed all services provided outside general education. Rather, these witnesses emphasized Student's inattention and its impacts throughout the day, which causes Student to miss important information and need support to comply with classroom directions and assignments. It is noted that none of Petitioners witnesses other than Student's mother had any familiarity or observation of Student in a general education setting.

The data demonstrate that Student is performing academically above grade level of all students in the District of Columbia in reading. Nonetheless, Student remains below grade level in math and written expression. Despite Student's academic deficits, particularly in writing and in math, there

¹⁴ The IHO takes administrative notice of the fact that DCPS' school day and, thus school week, is shorter than School B's (32.5-hours per week vs. 35 for School B)

was insufficient evidence that Student's deficits in these areas would be as critical in elective classes as in more academic classes such as ELA, science, math, and social studies, the core academic classes that DCPS' witness testified Student would have had in a 20 hour per week SLS classroom that DCPS proposed for Student. Consequently, the IHO is not convinced that Student required or requires specialized instruction in all classes throughout the school day.

The IHO is convinced by the evidence that Student requires constant focus and attention from educators and related service providers to address Student being easily distracted, particularly in non-preferred activities, and for these individuals to provide Student with needed redirection throughout the school day. An IEP is not to be implemented solely by special educators and related service providers. Classroom and testing accommodations and other aids and services that are in Student's IEP are to be implemented throughout the school day. The IEP is to be provided to and implemented by all teachers that a student has contact with in all subjects. Any failure by an LEA to ensure that this is the case is a failure of IEP implementation but does not necessarily result in a finding of an flawed IEP.

Student's mother expressed that she fully participated in the IEP meeting and expressed her opinions, including those provided by her educational consultant on her behalf. Student's mother agreed with the rest of the team that Student needed specialized instruction for ELA, math, science, and social studies, and Student would receive that under the DCPS IEPs. Student's mother also understood that under the DCPS IEPs, Student would have elective classes, specials, lunch, and recess and that the accommodations in the IEP would be available to Student throughout the school day.

Student's mother shared that Student has weaknesses in concentration and focus, is easily distracted, and needs constant coaching and prompting. She also shared her belief that in the general education setting Student would have a larger class size, teachers with far less exposure to students who learn differently, and teachers less versed in techniques and concepts for teaching a child with special education needs. There was no evidence to support such a conclusion. It is clear from her testimony, as well as the data on Student's academic performance at School B, that Student's parents are pleased with Student's progress at School B and wish Student to remain there. However, IDEA does not prescribe that an LEA must provide a school placement that maximizes a student's potential or meets the individual preferences of parents.

Petitioners asserts that DCPS failed to provide a cogent or responsive explanation for the absence in the IEP of support for Student for lunch, music, P.E., art, recess, and other specials inside general education. However, the support for Student's unique needs throughout the school day exists in the full complement of services, direction for small group instruction, continual prompting, redirection, classroom and testing accommodations, assistive technology, and other classroom aids and services in the IEP as testified to by the DCPS witnesses and as supported by the document itself.

IDEA's mandate that students be educated in the least restrictive environment and have access to non-disabled peers seems to have compelled DCPS to develop an IEP that was both academically challenging for Student, and that provided Student the opportunity to be educated alongside Student's non-disabled peers. As result, based upon the academic goals, the amount of specialized

instruction, related services, the classroom and testing accommodations, and significant classroom aids and services, including, among other things, individualized and small group instruction in the IEP, the IHO concludes that the LRE and amount of specialized instruction prescribed by the IEP that DCPS developed for Student for SY 2021-2022 was reasonably calculated to enable Student to make progress appropriate in light of Student's circumstances.

Petitioners were less than satisfied with Student's educational program when Student last attended a DCPS school. The evidence demonstrates that since attending School B, Student has made academic and social-emotional progress and progress in the related service areas of speech-language and OT. It is understandable that Petitioners are satisfied with Student's progress at School B and want Student to continue to attend.

However, the LEA is not required to pay for a private placement when it has made a FAPE available, as the IHO has concluded here that the DCPS has. Student's continued exclusion from non-disabled peers is not supported by the totality of the evidence. As stated previously, the June 11, 2021, IEP that DCPS developed with the level of specialized instruction outside general education and the resulting LRE was reasonably calculated to enable Student to make progress appropriate in light of Student's circumstances.

ISSUE 2: Did DCPS deny Student a FAPE by failing to permit an observation at School B?

Conclusion: Petitioner did not sustain the burden of persuasion by a preponderance of the evidence on this issue.

The purpose of IDEA is to "ensure that all children with disabilities have available to them a free and appropriate public education that emphasizes special education and related services designed to meet their unique needs and prepare them for further education, employment, and independent living." *M.G. v. District of Columbia*, 246 F.Supp.3d 1,7 (D.D.C. 2017) (citing 20 U.S.C. § 1400(d)(1)(A)).

In determining the educational placement of a child with a disability, each public agency must ensure that the placement decision is made by a group of persons, including the parents and other persons knowledgeable about the child, the meaning of the evaluation data, and the placement options; and is made in conformity with the Least Restrictive Environment provisions of the IDEA; and the public agency must ensure that the child's placement is determined at least annually, is based on the child's IEP, and is as close as possible to the child's home. See 34 C.F.R. § 300.116.

Removing a child with disabilities "from the regular education environment occurs only when the nature or severity of the disability is such that education in regular classes cannot be achieved satisfactorily." 34 C.F.R. § 300.550; 34 C.F.R. §300.114 see also 20 U.S.C. § (a)(5)(A) (a disabled child is to participate in the same activities as non-disabled children to the "maximum extent appropriate"); *Roark ex rel. Roark v. District of Columbia*, 460 F.Supp.2d 32, 43 (D.D.C. 2006) ("The IDEA requires school districts to place disabled children in the least restrictive environment possible.")

"The IDEA requires that children with disabilities receive education in the regular classroom whenever possible" *Z.B. v. District of Columbia*, 888 F.3d 515 (D.C. Cir. 2018) citing *Endrew F.*,

supra, 137 S. Ct. at 999 (quoting Rowley, 458 U.S. at 202)

Pursuant to D.C. Code § 38-2561.02(c) Special education placements shall be made in the following order of priority; provided, that the placement is appropriate for the student and made in accordance with the IDEA and this chapter: (1) DCPS schools, or District of Columbia public charter schools pursuant to an agreement between DCPS and the public charter school; (2) Private or residential District of Columbia facilities; and (3) Facilities outside of the District of Columbia.

The legal standard under the IDEA is that DCPS “must place the student in a setting that is capable of fulfilling the student’s IEP.” *Johnson v. Dist. of Columbia*, 962 F. Supp. 2d 263, 267 (D.D.C. 2013). See also *O.O. ex rel. Pabo v. Dist. of Columbia*, 573 F. Supp. 2d 41, 53 (D.D.C. 2008) (placement must be in a school that can fulfill the student’s IEP requirements).

Parents must have an opportunity to participate in the IEP process, and "procedural inadequacies that "seriously infringe upon the parents' opportunity to participate in the IEP formulation process ... clearly result in the denial of a FAPE." *Cooper v. District of Columbia*, 77 F.Supp.3d 32, 37 (D.D.C. 2014) (quoting *A.I. 3ex rel. Iapalucci v. District of Columbia*, 402 F.Supp.2d 152, 164 (D.D.C. 2005)) (alteration in original). To ensure these requirements are followed, IDEA established procedural safeguards that allow parents to seek a review of IEP decisions they disagree with. See *Middleton v. District of Columbia*, 312 F.Supp.3d 113, 122 (D.D.C. 2018). Section 1415(f)(1)(A) provides "the parents or the local education agency involved in such a complaint shall have an opportunity for an impartial due process hearing ..."

The evidence demonstrates that Petitioner and her representatives had a full and unbridled opportunity to contribute to developing Student's IEPs at each meeting. Petitioners' educational consultant provided feedback on the draft IEP and testified that Student's needs were addressed in the IEP, except for the hours of specialized instruction, and thus the LRE. Although Petitioners and their representatives disagreed with the LRE or placement decision, they had a full opportunity to and did express their disagreement.

The case law generally supports the proposition that the actual school location where a student's IEP will be implemented is the purview of the school district. In *Sanchez v. District of Columbia*, 382 F. Supp. 3d 32, (April 25, 2019) the Court stated:

"First, the Court concludes that Z.B. was not denied a FAPE on this ground because the decision to refer Z.B. to Kennedy Krieger was a change in location of services not a change in educational placement, which would have necessitated parental involvement. The IDEA requires that a student's parents be part of the team that creates the student's IEP and determines the student's educational placement. See 20 U.S.C. § 1414(d)(1)(A)-(B). However, [**33] the IDEA does not "explicitly require parental participation in site selection." *James*, 949 F. Supp. 2d at 138 (quoting *White ex rel. White v. Ascension Parish School Bd.*, 343 F.3d 373, 379 (5th Cir. 2003)). Plaintiff has failed to cite any case, from this Circuit or another, requiring parental involvement in site selection. Instead, all of the cases cited by Plaintiff in support of her argument refer to parental participation in the development of the student's IEP and educational placement. See e.g., *Doug C. v. Hawaii Dep't of Educ.*, 720 F.3d 1038, 1044-45 (9th Cir. 2013) (requiring parental participation in the student's IEP development and educational placement); *Anchorage Sch. Dist. v. M.P.*, 689

F.3d 1047, 1055 (9th Cir. 2012) (same); *Deal v. Hamilton Cty. Bd. of Educ.*, 392 F.3d 840, 857-59 (6th Cir. 2004) (explaining that a predetermination of services can violate the parents' right to participate in the IEP process)."

IDEA allows states to create additional procedural and substantive protections if they are consistent with IDEA. *Middleton*, 312 F.Supp.3d at 122. If a state creates a higher standard, "an individual may bring an action under the federal statute seeking to enforce the state standard." *Id.* (quoting *Gill v. Columbia 93 Sch. Dist.*, 217 F.3d 1027, 1035).

In 2014, the District of Columbia passed the Student Rights Act. The Act "provides district parents with additional procedural safeguards to help make sure parents have the tools they need to stay informed, engaged, and empowered throughout the special education process." See D.C. Council Comm. Rep. on B 20-723 (D.C. 2014) at 1. Recognizing that "parents who do not have a specific background in the subject area ... often cannot adequately evaluate whether their child's instruction is sufficient [and that] parents are concerned that an LEA may limit such access to the point that the observation is unable to provide meaningful input into their child's educational progress," the Student Rights Act expanded on a parent's "right to observe" under the IDEA...¹⁵

The Act (D.C. Code § 38-2571.03) states in pertinent part the following:

5(A) Upon request, an LEA shall provide timely access, either together or separately, to the following for observing a child's current to proposed special education program:

(i) the parent of a child with a disability; or

(ii) a designee appointed by the parent of a child with a disability who has professional expertise in the area of special education being observed or is necessary to facilitate an observation for a parent with a disability or to provide language translation assistance to a parent; provided, that the designee is neither representing the parent's child in litigation related to the provision of a free and appropriate public education for that child nor has a financial interest in the outcome of such litigation.

(C) A parent, or the parent's designee, shall be allowed to view the child's instruction in the setting where it ordinarily occurs or the setting where the child's instruction will occur if the child attends the proposed program.

(D) the LEA *shall not impose any conditions or restrictions on such observations except those necessary to:*

(i) Ensure the safety of the children in the program;

¹⁵ *Woodson, et al., v. District of Columbia*, 119 LRP 28316

(ii) Protect other children in the program from disclosure by an observer of confidential and personally identifiable information in the event such information is obtained in the course of an observation by a parent or a designee, or

(iii) Avoid any potential disruption arising from multiple observations occurring in a classroom simultaneously.

(E) An observer shall not disclose nor use any information obtained during the course of an observation for the purpose of seeking or engaging clients in litigation against the District or the LEA.

Generally, a school district has the discretion to determine the actual school location where a Student's IEP is to be implemented, and parents are generally allowed to visit that location before a student's enrollment. The evidence demonstrates that after DCPS developed Student's June 11, 2021, IEP, DCPS informed Petitioners that the IEP could be implemented at School C, Student's neighborhood school. Petitioners' educational consultant sent an email to Student's neighborhood school, with which she was familiar, and requested an opportunity to visit the school. School C personnel promptly responded with an email that included information and website links that explained School C and its special education programs. In the email, the individual also provided information about when and how to visit school C. There is no evidence that Petitioners or the consultant responded to or followed up on that email until well after the start of SY 2021-2022. In October 2021, the consultant sent a second email requesting a class schedule that Student would have if Student attended School C. A different School C employee responded to this email and simply stated that School C does not create schedules for students who do not attend School C. There is no evidence that the consultant responded to that email or made any more attempts to visit and observe at School C before Petitioners filed the current DPC. The consultant testified that she was familiar with School C and did not need to see the school building.

Based on the evidence presented, the IHO concludes that DCPS's response to the consultant's initial email was an invitation for Petitioners and their consultant to visit School C and obtain information about School C. However, that invitation was never acted upon. Once the school year started, had they gone to School C, as the initial invitation indicated they could, perhaps they would have observed the SLS program, some elective general education classes, and the settings in which Student might have participated in lunch and recess. However, there was no such physical response to the invitation.

Based on the evidence adduced, the IHO concludes that adequate information was available to Petitioners regarding the DCPS school where the IEP could be implemented. DCPS's action in informing Petitioner regarding the location where Student's IEP would be implemented did not impede Student's right to FAPE or significantly impede Petitioners' opportunity to participate in the decision-making process regarding the provision of FAPE or cause Student a deprivation of educational benefits.

ISSUE 3: Did DCPS deny Student a FAPE by failing to propose an appropriate IEP or placement for SY 2022-2023 because the IEP contained an inappropriate LRE with insufficient hours of specialized instruction outside general education?

Conclusion: Respondent sustained the burden of proof by a preponderance of the evidence that the IEP that DCPS developed for Student in SY 2022-2023 was reasonably calculated to enable Student to make progress appropriate in light of the child's circumstances.

As previously stated, the purpose of IDEA is to "ensure that all children with disabilities have available to them a free and appropriate public education that emphasizes special education and related services designed to meet their unique needs and prepare them for further education, employment, and independent living." *M.G. v. District of Columbia*, 246 F.Supp.3d 1,7 (D.D.C. 2017) (citing 20 U.S.C. § 1400(d)(1)(A)).

Parents must have an opportunity to participate in the IEP process, and "procedural inadequacies that "seriously infringe upon the parents' opportunity to participate in the IEP formulation process ... clearly result in the denial of a FAPE." *Cooper v. District of Columbia*, 77 F.Supp.3d 32, 37 (D.D.C. 2014) (*quoting A.I. 3ex rel. Iapalucci v. District of Columbia*, 402 F.Supp.2d 152, 164 (D.D.C. 2005)) (alteration in original). To ensure these requirements are followed, IDEA established procedural safeguards that allow parents to seek a review of IEP decisions they disagree with. *See Middleton v. District of Columbia*, 312 F.Supp.3d 113, 122 (D.D.C. 2018). Section 1415(f)(1)(A) provides "the parents or the local education agency involved in such a complaint shall have an opportunity for an impartial due process hearing ..."

In determining the educational placement of a child with a disability, each public agency must ensure that the placement decision is made by a group of persons, including the parents and other persons knowledgeable about the child, the meaning of the evaluation data, and the placement options; and is made in conformity with the Least Restrictive Environment provisions of the IDEA; and the public agency must ensure that the child's placement is determined at least annually, is based on the child's IEP, and is as close as possible to the child's home. See 34 C.F.R. § 300.116.

Removing a child with disabilities "from the regular education environment occurs only when the nature or severity of the disability is such that education in regular classes cannot be achieved satisfactorily." 34 C.F.R. § 300.550; 34 C.F.R. §300.114 see also 20 U.S.C. § (a)(5)(A) (a disabled child is to participate in the same activities as non-disabled children to the "maximum extent appropriate"); *Roark ex rel. Roark v. District of Columbia*, 460 F.Supp.2d 32, 43 (D.D.C. 2006) ("The IDEA requires school districts to place disabled children in the least restrictive environment possible.")

"The IDEA requires that children with disabilities receive education in the regular classroom whenever possible" *Z.B. v. District of Columbia*, 888 F.3d 515 (D.C. Cir. 2018) citing *Endrew F.*, supra, 137 S. Ct. at 999 (quoting *Rowley*, 458 U.S. at 202)

On May 9, 2022, DCPS developed an IEP for Student for SY 2022-2023. Petitioners, their educational consultant, and the School B staff participated along with DCPS personnel. The evidence demonstrates that Petitioners and their educational consultant collaborated to update PLOPs, goals, and objectives that reflected the progress Student made during SY 2021-2022 at School B. The level of services in the IEP were the same as those proposed in the June 11, 2021, IEP. The aids and services and accommodations in the May 9, 2022, IEP had minor changes. Petitioners and their educational consultant agreed with DCPS staff on all elements of the May 9, 2022, IEP except the number of hours of specialized instruction in the IEP. They contended that

Student needed specialized instruction throughout the school day.

Although the evidence demonstrates that Student made progress at School B during SY 2021-2022, there was no evidence that Student's needs changed significantly and required any different programming than DCPS had prescribed for Student in the June 11, 2021, IEP. Student continued to require constant focus and attention by educators and related service providers to address Student being easily distracted particularly in non-preferred activities and for these individual to provide Student needed redirection throughout the school day.

Regarding the May 9, 2022, IEP, Petitioners assert that DCPS failed to provide a cogent or responsive explanation for the absence in the IEP of supports for Student for lunch, music, P.E., art, recess, and other specials inside general education. As the IHO discussed in the above analysis of the June 11, 2021, IEP, the support for Student's unique needs throughout the school day exists in the full complement of services, direction for small group instruction, continual prompting, redirection, and classroom and testing accommodations, assistive technology and other classroom aids and services in the IEP as testified to by the DCPS witnesses and as supported by the document itself.

IDEA's mandate that students be educated in the least restrictive environment and have access to non-disabled peers seems to have compelled DCPS to develop an IEP that was both academically challenging for Student and that provided Student the opportunity to be educated alongside Student's non-disabled peers. As result, based upon the academic goals, the amount of specialized instruction, related services, the classroom and testing accommodations, and significant classroom aids and services, including, among other things, individualized and small group instruction in the IEP, the IHO concludes that the LRE and amount of specialized instruction prescribed by the IEP that DCPS developed for Student for SY 2022-2023 was reasonably calculated to enable Student to make progress appropriate in light of Student's circumstances.

ISSUE 4: Is School B a proper placement for Student?

Conclusion: Petitioners did not sustain the burden of persuasion by a preponderance of the evidence on this issue.

A student's IEP determines whether an educational placement is appropriate; the placement does not dictate the IEP. *See Roark v. District of Columbia*, 460 F.Supp.2d 32, 44 (D.D.C. 2006); *Spielberg v. Henrico Cty. Public Sch.*, 853 F.2d 256, 258 (4th Cir. 1988) ("Educational placement is based on the IEP, which is revised annually."); 34 C.F.R. § 300.116(b)(2).

Under the IDEA, parents who unilaterally decide to place their disabled child in a private school, without obtaining the consent of local school officials, "do so at their own financial risk." *Florence County Sch. Dist. Four v. Carter*, 510 U.S. 7, 15, 114 S.Ct. 361, 126 L.Ed.2d 284 (1993) (quoting *Sch. Comm. of the Town of Burlington v. Dep't of Educ.*, 471 U.S. 359, 374, 105 S.Ct. 1996, 85 L.Ed.2d 385 (1985)). "As interpreted by the Supreme Court, IDEA requires school districts to reimburse parents for their private-school expenses if (1) school officials failed to offer the child a free appropriate public education in a public or private school; (2) the private-school placement chosen by the parents was otherwise "proper under the Act"; and (3) the equities weigh in favor

of reimbursement—that is, the parents did not otherwise act “unreasonabl[y].” *Leggett v. District of Columbia*, 793 F.3d 59, 66–67 (D.C. Cir. 2015) (citing *Carter*, supra, 510 U.S. at 15–16, 114 S.Ct. 361; 20 U.S.C. § 1412(10)(C)(iii)(III)).

At School B, Student is with no general education students. Although Petitioners assert that Student needs special education throughout the school day and must be totally removed from non-disabled peers, the data related to Student's educational and social-emotional functioning belies that assertion. There is no evidence that Student currently receives specialized instruction during lunch and recess at School B. There is no indication that Student cannot effectively interact with general education students during lunch and recess, which would presumably be a small portion of Student's school day in DCPS.

The evidence presented by Petitioners did not sufficiently demonstrate when countered by the evidence presented by Respondent, that Student requires specialized instruction throughout Student's school day and that Student should be educated in an environment in which Student is totally removed by non-disabled peers.

Albeit the evidence demonstrates that since Student has attended School B, Student has made progress and that Petitioners want Student to remain at School B, based upon the evidence adduced, the IHO does not conclude that Student's appropriate LRE was or is a separate special education day school, like School B, where Student is totally removed from non-disabled peers. The IHO, therefore, concludes that despite the progress Student has made at School B, School B is not a placement that DCPS is obligated to fund for SY 2022-2023.

ORDER:

All relief requested by Petitioners is denied, and Petitioners' DPC is dismissed with prejudice.

APPEAL PROCESS:

The decision issued by the Hearing Officer is final, except that any party aggrieved by the findings and decision of the Hearing Officer shall have ninety (90) days from the date of the decision of the Hearing Officer to file a civil action with respect to the issues presented at the due process hearing in a District Court of the United States or a District of Columbia court of competent jurisdiction, as provided in 20 U.S.C. §1415(i)(2).

/S/ *Coles B. Ruff*

Coles B. Ruff, Esq.
Hearing Officer
Date: March 16, 2023

Copies to: Counsel for Petitioners
Counsel for LEA
OSSE-SPED {due.process@dc.gov}
ODR due.process@dc.gov
{hearing.office@dc.gov}
[\[REDACTED\]@dc.gov](mailto:[REDACTED]@dc.gov) and [\[REDACTED\]@k12.dc.gov](mailto:[REDACTED]@k12.dc.gov)