

**District of Columbia**  
**Office of the State Superintendent of Education**  
**Office of Dispute Resolution**  
1050 - First Street, N.E.; Washington, D.C. 20002  
(202) 698-3819 www.osse.dc.gov

OSSE  
Office of Dispute Resolution  
March 11, 2024

**Confidential**

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| <b>Parent on behalf of Student<sup>1</sup></b> | ) | <b>Case No. 2023-0240</b>                  |
|  | ) |  |
| <b>Petitioner</b>                              | ) | <b>Hearing Dates: February 26-28, 2024</b> |
|  | ) |  |
| <b>v.</b>                                      | ) | <b>Conducted by Video Conference</b>       |
|  | ) | <b>Date Issued: March 11, 2024</b>         |
| <b>District of Columbia Public Schools</b>     | ) |  |
|  | ) | <b>Terry Michael Banks,</b>                |
| <b>Respondent</b>                              | ) | <b>Hearing Officer</b>                     |

**HEARING OFFICER DETERMINATION**

**INTRODUCTION**

Petitioner is the parent of an X-year-old student (“Student”) attending School A. On December 8, 2023, Petitioner filed a Due Process Complaint Notice (“*Complaint*”) alleging that the District of Columbia Public Schools (“DCPS”) denied Student a free appropriate public education (“FAPE”) by failing to evaluate Student in all areas of suspected disability, failed to provide appropriate Individualized Education Programs (“IEPs”), failed to provide a safe and hospitable environment, failed to develop and implement a safety plan, failed to provide a licensed behavior technician, and planned to evaluate Student with an inappropriate assessment. On December 18, 2023, DCPS filed *District of Columbia Public Schools’ Response* (“*Response*”), denying that it had denied Student a FAPE in any way.

**SUBJECT MATTER JURISDICTION**

This due process hearing was held, and a decision in this matter is being rendered, pursuant to the Individuals with Disabilities Education Improvement Act (“IDEIA”), 20 U.S.C. Section 1400 *et seq.*, its implementing regulations, 34 C.F.R. Sect. 300 *et seq.*, Title 38 of the D.C. Code, Subtitle VII, Chapter 25, and the District of Columbia Municipal Regulations, Title 5-E, Chapter 30.

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

## PROCEDURAL HISTORY

On December 8, 2023, Petitioner filed the *Complaint* alleging that DCPS denied Student a FAPE by failing to provide an appropriate IEP in November 2022 and November 2023. Specifically, Petitioner alleges that the IEP was not based on data from comprehensive assessments, Student had made little or no progress since 2019, the goals were inadequate, the Present Levels of Academic Performance (“PLOPs”), baselines, and objectives were not sufficiently updated, extended year services (“ESY”) was not prescribed, assistive technology (“A/T”) was not prescribed, and services for autism or psychological disabilities were not prescribed. Petitioner asserted further that DCPS denied Student a FAPE due to verbal abuse by his/her teacher on April 1, 2022, and that a Safety Plan was developed that was ineffective, not implemented and then discontinued. Petitioner also asserted that DCPS denied Student a FAPE by failing properly to implement Student’s 2022 IEP by failing to provide all of the Communication services prescribed in the IEP. Finally, Petitioner asserted that DCPS planned to evaluate Student with an inappropriate assessment, and failed to issue a Prior Written Notice (“PWN”) following a meeting on November 21, 2023.

On December 18, 2023, DCPS filed its *Response*, in which it refuted allegations in the *Complaint* denying that it had denied Student a FAPE in any way. DCPS asserted, inter alia, that (1) the Hearing Officer does not have jurisdiction under IDEA to adjudicate staffing claims or complaints against staff members; (2) the Hearing Officer does not have jurisdiction under IDEA to adjudicate claims of teacher abuse; (3) in response to an initial referral on September 21, 2020, DCPS convened an eligibility meeting at which Student was found eligible with an autism spectrum disorder (“ASD”). That day, DCPS developed Student’s original IEP; it prescribed placement in a self-contained Communication and Education Support “CES” Program classroom. On December 29, 2020, Petitioner declined to accept the IEP and placement offered by DCPS; (4) on or about November 15, 2022, an IEP team met at School A and proposed an IEP for Student including 22 hours per week in a self-contained classroom outside general education with speech-language (“S/L”) and occupational therapy (“OT”) services, but without a dedicated aide or ESY; (5) on February 28, 2023, the IEP amended Student’s IEP to modify the PLOPs and goals, and to add new specialized instruction services including services, setting, time/frequency; On June 9, 2023, DCPS issued a PWN in which Petitioner was notified that Student’s attendance issues were affecting his/her education. Petitioner replied indicating that “she has no intention of sending [her/him] back-to school this school year at [School A];” (6) on November 11, 2023, DCPS convened an Annual IEP meeting. The team deemed the IEP appropriate based upon the information available at the time of the meeting. The team requested consent to evaluate Student, which Petitioner provided on November 26, 2023. On November 18, 2023, DCPS emailed a PWN to Petitioner and requested consent to conduct OT and speech and language evaluations; and (6) DCPS denied all allegations of failures to implement Student’s IEP or his/her lack of progress.

The parties participated in a resolution meeting on December 19, 2023 that did not result in a settlement. The prehearing conference in this case was conducted on January 5, 2023 through video conference facilities. The *Prehearing Order* was issued that day.<sup>2</sup> I issued an *Amended Prehearing Order* on January 11, 2024 reflecting revisions requested by Petitioner.

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<sup>2</sup> During the prehearing conference, Petitioner’s counsel withdrew two allegations: (1) that DCPS planned to evaluate Student with an inappropriate assessment, and (2) DCPS failed to issue a PWN following a meeting on November 21, 2023.

The due process hearing was conducted on February 26-28, 2024 by video conference. The hearing was open to the public at Petitioner’s request. Petitioner filed Five-day Disclosures on February 20, 2024, containing a witness list of six witnesses and documents P1 through P-47. Respondent filed objections to Petitioner’s disclosures on February 22, 2024. Respondent objected to expert testimony from Witness A in the areas of “ABA”, “...to the program that [Student] receives at [Facility A], gains [s/he\ has made since attending [Facility A], needed classroom accommodations, [her/his] needs in terms of class size, program type, ABA and other services currently and in the future.” Respondent objected to expert testimony from Witness B in the areas of “...his work with [Student], his observations and testing, his compensatory education report, his opinions on all claims and all requests for relief herein including the urgent need for private placement.” Respondent also objected to any testimony from Witness E, School B’s IEP Coordinator and Admissions Coordinator, testifying about the program at School B, the type of students served, the therapeutic nature of the program and, specifically, the program available at School B for students with autism. The rulings on the objections to the proposed witnesses’ testimony was deferred until the conclusion of *voir dire* of each of the witnesses. Respondent also objected to Petitioner’s proposed exhibits P4, P5, P11, P26-30, P34, P35, P37-44, and P47. Petitioner’s Exhibits P1-P4, P6-P10, P12-P27, P28 (for relief only), P29, P31-P37, and P44-P47 were admitted into evidence.

Respondent also filed disclosures on February 20, 2024, including a witness list of twelve witnesses and documents R1 through R30, including R9A, R11A, R14A, and R 17A. Respondent filed a supplemental exhibit, R31, on February 21, 2024. Petitioner did not file an objection to Respondent’s disclosures. Therefore, Respondent’s Exhibits R1-R31, including R9A, R11A, R14A, and R 17A, were admitted into evidence.

Petitioner presented as witnesses in chronological order: Witness A, Witness B, Witness C, Witness B, Witness D, Witness E, Witness B, and Petitioner. Witness A was admitted as an expert in Applied Behavior Analysis, Witness B was admitted as an expert in Special Education and Compensatory Education, Witness C was admitted as an expert in Occupational Therapy, and Witness D was admitted as an expert in Speech and Language Therapy. At the conclusion of Petitioner’s direct case, Respondent moved for a directed verdict on all issues, and Petitioner moved to withdraw the fourth Issue Presented. Both motions were denied.<sup>3</sup> Respondent presented as witnesses in chronological order: Witness F, Witness G, Witness H, Witness J, and Witness K. Witness F was admitted as an expert in Speech and Language Therapy, and Witness H, Witness J, and Witness K were admitted as experts in Special Education.

At the conclusion of testimony, the parties’ counsel gave oral closing arguments. The Hearing Officer authorized the parties to submit authorities upon which they rely on or before March 5, 2024. On March 5, 2024, Petitioner filed *Additional Citations* addressing bullying.

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<sup>3</sup> Petitioners have a right to withdraw a complaint prior to the commencement of a hearing, but once the hearing has begun and testimony has begun, withdrawals are subject to the discretion of the Hearing Officer. Office of Dispute Resolution Standard Operating Procedures Manual, § 803. Respondent opposed the withdrawal of the fourth issue on the grounds that Petitioner failed to offer any evidence to meet her burden.

## ISSUES

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

1. Whether DCPS denied Student a FAPE by failing to provide an appropriate IEP in November 2022. Specifically, Petitioner alleges that the IEP was not based on data from comprehensive assessments of Student's developmental and functional skills, Student had made little or no progress since 2019, the goals were too elementary, not sufficiently measurable, repetitious of failed goals of the prior year, or did not address the Areas of Concern they purported to address, the Present Levels of Academic Performance ("PLOPs"), baselines, and objectives were not sufficiently updated to allow proper goals to be created, ESY was not prescribed, assistive technology ("A/T") was not prescribed, and services for autism or psychological disabilities were not prescribed. Petitioner also asserts that the Communication goals were too elementary, not sufficiently measurable, or repetitious of failed goals of the prior year and addressed socialization and compliance with classroom rules rather than Student's communications deficiencies. Petitioner further asserts that the occupational therapy ("OT") goals were too elementary, not sufficiently measurable, or repetitious of failed goals of the prior year, and that the PLOP, baselines, and objectives were inaccurate.
2. Whether DCPS denied Student a FAPE by failing to provide an appropriate IEP in November 2023. Specifically, Petitioner alleges that the IEP was not based on data from comprehensive assessments of Student's developmental and functional skills, Student had made little or no progress since 2019, the goals were too elementary, not sufficiently measurable, repetitious of failed goals of the prior year, or did not address the Areas of Concern they purported to address, the Present Levels of Academic Performance ("PLOPs"), baselines, and objectives were not sufficiently updated to allow proper goals to be created, ESY was not prescribed, assistive technology ("A/T") was not prescribed, and services for autism or psychological disabilities were not prescribed. Petitioner also asserts that the Communication goals were too elementary, not sufficiently measurable, or repetitious of failed goals of the prior year and addressed socialization and compliance with classroom rules rather than Student's communications deficiencies. Petitioner further asserts that the occupational therapy goals were too elementary, not sufficiently measurable, or repetitious of failed goals of the prior year, and that the PLOP, baselines, and objectives were inaccurate.
3. Whether DCPS denied Student a FAPE due to verbal abuse by his/her teachers, particularly on April 1, 2022 (documented by video) and during the spring of 2023. Petitioner asserts that a Safety Plan was developed that was ineffective, not implemented and then discontinued, Petitioner further asserts that the teachers' behavior indicates their lack of qualifications to implement Student's IEP.
4. Whether DCPS denied Student a FAPE by failing properly to implement Student's 2022 IEP. Specifically, Petitioner alleges that Student did not receive all of the Communication services prescribed in the IEP.

## FINDINGS OF FACT

1. Student is X years old and was enrolled in grade H at School C for the 2023-24 school year.<sup>4</sup>

2. Student was diagnosed with Autism Spectrum Disorder (“ASD”) at Facility B in October 2019. Facility C conducted a Battelle Developmental Inventory (“BDI-2”) on August 15, 2019 when Student was Y years old. Student’s standard score of 59 on the BDI-2 indicted a significant developmental delay. Her/his receptive and expressive language scores also reflected significant delays. Student qualified for an Individualized Family Service Plan (“IFSP”) due to having at least a 50% delay in communication.<sup>5</sup> According to her/his December 13, 2019 IFSP, Student was prescribed 60 minutes per week of S/L therapy, Applied Behavioral Analysis (“ABA”) therapy four times a week for 60 minutes, and occupational therapy (“OT”) twice per month for 60 minutes for each session.<sup>6</sup> The Assessment, Evaluation, Programming System (“AEPS-2”) is a criterion-based assessment tool that measures the development of fine motor, gross motor, cognitive, adaptive, social-communication, and social skills. Student’s March 2020 AEPS-2 Summary reported that

...[s/he] was not yet following basic one-step directions without gestural support or completing daily routines without physical prompting. [Student] was not following a pointing gesture, pointing to request, producing 50 single words, or regularly using two words utterances. Similar findings were observed during the [Facility D] observation in November of 2020. [Student] continued to present with significantly delayed receptive and expressive language. In keeping with [his/her] diagnosis of ASD, [his/her] pragmatic language was delayed and atypical. [Student] required maximum prompting, including physical cues, to complete simple directions. Often [her/his] spoken language, which consisted of mostly single-word utterances, was unrelated to [her/his] environment. [S/he] was not observed to use gestures.<sup>7</sup>

Student’s fine motor area score on the AEPS-2 was at the level of typically developing children.<sup>8</sup> On November 26, 2020, DCPS issued a Final Eligibility Determination Report finding Student eligible for services as a child with ASD.<sup>9</sup>

3. On November 23, 2020, when Student was in grade M, DCPS conducted Student’s Initial IEP meeting through Facility D. Student was classified with ASD.<sup>10</sup> The Consideration of Special Factors reported that Student’s behavior did not impede his/her learning or that of other children, but that s/he had language deficits. Student

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<sup>4</sup> Respondent’s Exhibit (“R:”) 26 at page 1 (319). The exhibit number is followed by the exhibit page number and the electronic page number in parentheses, e.g. R26:1 (319).

<sup>5</sup> R4:12 (41).

<sup>6</sup> *Id.* at 15 (46).

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

<sup>8</sup> *Id.* at 20 (51).

<sup>9</sup> *Id.* at 22 (53).

<sup>10</sup> R5:1 (76).

... [p]resents with significantly delayed receptive and expressive language as well as delayed and atypical social communication. [S/he] benefits from support to complete basic commands and daily routines. [Student] is beginning to use single nouns to label colors and pictures of early nouns. [S/he] uses mostly physical communication to request, gain attention, and express [his/her] dislikes. [Student] would benefit from a multimodality communication approach to attend to and use basic spoken and nonverbal communication.<sup>11</sup>

The team recommended the use of “light-tech” Augmentative Alternative Communication (“AAC”) devices such as sign-supported speech and picture boards.<sup>12</sup> The IEP team prescribed 22 hours per week of specialized instruction outside general education, four hours per month of S/L therapy outside general education, two hours per month of OT services outside general education, and one hour per month of OT consultation services.<sup>13</sup> Other Classroom Aids and Services included, but were not limited to, preferential seating, manipulatives and visuals during instruction (i.e. highlighted information, pictures), chunked tasks, extra time to complete tasks, repeated instructions/directions, small group instruction, individual instruction as needed, reduced/differentiated homework, use of counters, digital tools, anchor charts, and reading trackers, gentle physical prompting (e.g. laying a hand on his/her back), verbal prompts and/or visual cues (e.g. hand signals) to gain her/his attention prior to giving an instruction, pairing visual cues (e.g. a picture/object), sign support, and/or gestural cues with verbal instructions, keeping directions short until his/her auditory comprehension improves, repeated directions when needed, physical modeling of how to complete the direction if necessary, providing praise and reinforcement when s/he completes an instruction, participates in group activities, and/or attends to the speaker, sign-supported speech models, modeling how to gesture (e.g. pointing), and sensory diet activities as designed by her/his treating occupational therapist throughout his/her day in the school environment to support his/her attention, focus, and participate in school based tasks and activities.<sup>14</sup> The IEP team did not prescribe ESY.<sup>15</sup>

4. On November 18, 2021, when Student was in grade M at School A, DCPS conducted an IEP Annual Review meeting.<sup>16</sup> Student was in a Communication Education Support (“CES”) classroom, designed to provide services for children classified with ASD, to focus primarily on communication deficits. The Consideration of Special Factors was unchanged from the previous IEP. The Areas of Concern were Adaptive/Daily Living Skills (“Adaptive”), Cognitive, Communication/Speech and Language (“Communication”), and Motor Skills/Physical Development (“Motor Skills”). In Adaptive, the PLOP reported that the VB-MAPP assessment was administered to Student in October of 2021. S/he was using words to label at least 4 items in her/his environment without any adult prompts. S/he was able to attend to a speaker’s voice and could select the correct item when presented in a field of 2 for up to 2 items. Student could place 3 pegs into a peg board and match at least 10 identical objects. S/he showed variation in play by independently interacting with 3 different items during a 30-minute observation. S/he also independently engaged in cause-and-effect play for at least 2 minutes. Student was not able to

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<sup>11</sup> *Id.* at 2 (78).

<sup>12</sup> *Id.*

<sup>13</sup> *Id.* at 16 (91).

<sup>14</sup> *Id.* at 17 (92).

<sup>15</sup> *Id.* at 20 (95).

<sup>16</sup> R7:1 (97).

imitate vocalizations when prompted. S/he could identify at least 5 uppercase letters on command. S/he could independently trace within ¼ inch of the line for at least 5 geometrical shapes. Finally, Student could identify as a listener numbers 1-3 and label numbers 1-5. The four goals addressed (1) receptive and expressive skills, (2) following classroom routines during transitions, (3) toileting, and (4) counting to 100.<sup>17</sup>

In Cognitive, the PLOP also reported the results of the October 2021 VB-MAPP assessment. The three goals addressed (1) engaging in reciprocal play by taking turns with peers, (2) sorting objects with different sizes, shapes, and colors, and (3) and identify objects in a large array of objects.<sup>18</sup> In Communication, the PLOP reported that Student demonstrated interest in preferred activities such as letter matching, alphabet, counting, numbers. S/he demonstrated understanding of the classroom routines including circle time, centers, transitioning to centers, and recess given a visual schedule, verbal supports, and peer models. S/he had an AAC device from an outside provider but it did not have functionally in the classroom setting. Student had difficulty sharing/engaging appropriately with peers during play, naming actions/functional verbs, and using total communication to make requests, comments, and ideas known. The four goals addressed labeling nouns and verbs, (2) engaging in reciprocal play by taking turns and not expressing frustration while awaiting his/her turn, (3) making her/his needs known to the teacher, and (4) answering functional-based yes/no or wh- questions.<sup>19</sup> In Motor Skills, the PLOP reported that Student had an established functional grasp on writing/coloring tools, was able to stack blocks independently and knock them down, could stack cones on top of each other, and complete an inset 3D shape puzzle with minimal assistance. S/he enjoyed participating in activities with letters and could trace simple shapes with fading hand over hand support. Student had shown that s/he could write preferred items such as Blipi independently. S/he had difficulty with transitioning from preferred to non-preferred tasks without showing inappropriate behaviors (snatching, hitting, yelling). The three goals addressed (1) maintaining attention in preferred and non-preferred activities, (2) tracing independently with minimal deviation from the line, and (3) transitioning between table top tasks from preferred to non-preferred activities.<sup>20</sup> Student's direct services were unchanged, but the OT consultation services were terminated from the previous IEP. Other Classroom Aids and Services were largely carried over from the previous IEP, but the sensory diet designed by her/his treating occupational therapist was not.<sup>21</sup>

5. On April 1, 2022, a recording was captured on Student's AAC device in her/his backpack. The link to the recording provided in Petitioner's disclosures ran for three hours and twelve minutes, from 12:18 p.m. until dismissal at the end of the school day.<sup>22</sup> The recording captured the voices of Witness K, Student's special education teacher, a paraprofessional, other adults, and the students in the classroom. Petitioner listened to the recording at home that night and found Witness K's comments to, and about, Student to be abusive, demeaning, unprofessional, and particularly inappropriate for a child with Student's disability. Petitioner called the principal, Witness G, that night to express her displeasure. Witness G agreed to meet with Petitioner the next

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<sup>17</sup> *Id.* at 4-6 (100-102).

<sup>18</sup> *Id.* at 6-9 (102-105).

<sup>19</sup> *Id.* at 9-10 (105-106).

<sup>20</sup> *Id.* at 10-11 (106-107).

<sup>21</sup> *Id.* at 12 (108).

<sup>22</sup> Petitioner's Exhibit ("P:") 37 at page 1 (459). The exhibit number is followed by the exhibit page number and the electronic page number in parentheses, e.g. P37:1 (459). The exhibit provides the link to the recording: <https://1drv.ms/u/s!AmJed3wvjQ1OjTV-7meBzxnMpNY6>.

school day, April 4, 2022. At that meeting, Witness G listened to the recording. Witness G then convened a meeting including herself, Petitioner, Witness K, Student's special education teacher, BCBA, a behavioral specialist assigned to provide services in Witness K's classroom, and Petitioner's sister, at 4:00 later that day. Petitioner was dissatisfied that Witness G would not replace Witness K as Student's special education teacher and did not send Student back to School A indefinitely.<sup>23</sup>

6. On April 21, 2022, DCPS notified Petitioner that Student had ten unexcused absences for the school year.<sup>24</sup>

7. School A convened a meeting on May 18, 2022 to discuss the terms for Student returning to School. School A reported that a behavior technician would be added to Student's classroom to facilitate implementation of Student's IEP. A new paraprofessional, Paraprofessional A, would also be added to the classroom. Petitioner and her attorney, Attorney C, requested that Student be reassigned to another classroom. The staff denied this request on grounds that Student's Communication and Education Support ("CES") classroom was the only classroom in the school that could meet Student's needs.<sup>25</sup> School A developed a Safety Plan for Student that was discussed at the meeting. Student's Teacher, Witness K, Paraprofessionals A and B were identified as sharing responsibility "for the wellness of all children in the classroom." The Plan invited Petitioner to contact Witness K or Paraprofessional A directly. For arrival and transition to the classroom in the morning, the paraprofessionals were tasked with escorting Student from the school entrance to the classroom. Petitioner was invited to stay in the classroom for breakfast "until 8:45 a.m. during this transition period." One of the paraprofessionals would accompany Student to each of her/his "specials" classes (*i.e.*, Art, Music, Physical Education). Witness K or the paraprofessionals would monitor Student during lunch and recess. "Daily communication will be shared with [Petitioner] via written communication in a communication binder that contains [Student's] schedule, who was supporting [her/him], and any additional notes that are pertinent to the safety & support of [Student]."<sup>26</sup>

8. Student returned to School A on May 19, 2022.<sup>27</sup> Student remained in Witness K's classroom for the remainder of the school year.<sup>28</sup>

9. On June 24, 2022, the last day of the 2021-22 school year, Witness G, School A's principal, notified Petitioner that "the Safety Plan and details we outline for these final weeks of school will be discontinued beginning next school year. The current arrangements for coverage, visitation, etc., were intended to be temporary as they cannot be sustained long-term."<sup>29</sup>

10. On June 24, 2022, DCPS issued Student's IEP Progress Report for the 2021-22 school year. Witness K, Student's special education teacher, reported that Student was progressing on three of her/his four Adaptive goals, but no progress on her/his toileting goal:

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<sup>23</sup> Petitioner's testimony.

<sup>24</sup> R28:5 (363)

<sup>25</sup> R9:1-2 (113-114).

<sup>26</sup> R10:1-3 (119-121).

<sup>27</sup> Petitioner's testimony.

<sup>28</sup> Petitioner's testimony.

<sup>29</sup> R3:6 (26).



[S/he] is currently able to make 1 physical acknowledgement when called by [her/his] name in 3 out of 5 opportunities. [Her/his] physical acknowledgements have included eye-contact or following through with a verbal prompt... [S/he] is able to transition when directed with at least 1-3 prompts when given a verbal prompt. [S/he] requires additional prompting when transitioning from preferred activities or to put away preferred items. Although [s/he] does still display some noncompliant behaviors, [s/he] is still able to complete the transition. [S/he] is able to follow classroom routines and refrain from displaying noncompliant behavior in 40% of transition opportunities across 5 consecutive school days... [Student] is currently able to count up to 29 by 1's when given a verbal starting counter in 3 out of 5 opportunities. [S/he] requires moderate prompting to initiate counting. [S/he] also requires an adult prompt to continue on periodically throughout the counting cycle... [Student's] toileting skillset has remained the same since quarter 3. [S/he] is able to check into the bathroom when prompted to check [her/his] schedule. [S/he] enters the bathroom independently and will sit unassisted. [S/he] does still require some help with pulling pants up and down. [S/he] also is still active in the handwashing process although [s/he] does require some reminders for each step.<sup>30</sup>

In Cognitive, Student was progressing on one of her/his three goals:

[S/he] is currently able to engage in reciprocal play with a peer with at least 2 different peers and one activity. Although [s/he] does display maladaptive behaviors while waiting [his/her] turn, [s/he] does remain in the area. [S/he] requires maximum prompting to remain seated... [S/he] is currently able to select the correct item in an array of 2 for at least 4 items. The 4 items include a car, a cookie, a dog, and a fire truck.<sup>31</sup>

In Communication, Speech Therapist B reported that Student had made no progress on her/his goals “due to a significant number of absences.”<sup>32</sup> In Motor Skills, OT Therapist B reported that while Student was progressing on all three goals in the third reporting period, “Due to significant absences during this 4<sup>th</sup> quarter, there is not enough data to report on [Student's] progress.”<sup>33</sup>

11. Because School A terminated the Safety Plan, Petitioner held Student out of school at the beginning of the 2022-23 school year.<sup>34</sup> School A convened a meeting on September 7, 2022 “to review [Student's] IEP prior to the transition back to school.”<sup>35</sup> Petitioner expressed disappointment that no one from School A contacted her over the summer and that Student did not receive ESY. The staff responded that Student did not qualify for ESY, as s/he had not demonstrated regression that could not be recuperated. Petitioner objected to Student's placement in the same grade M CES classroom rather than the grades H-C CES classroom. “[Petitioner] shared [Student] is too advanced for a [grade M] setting and that [her/his] peers are not on a level of growth where she observes [her/him].” BCBA stated that this was not an option because of

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<sup>30</sup> R21:21-22 (230-231).

<sup>31</sup> *Id.* at 23-24 (232-233).

<sup>32</sup> *Id.* at 24-25 (233-234).

<sup>33</sup> *Id.* at 25-26 (234-235).

<sup>34</sup> Petitioner's testimony.

<sup>35</sup> R11:1 (122).

Student's participation in the Early Childhood Education Program ("ECE") and because School A's grades H-C CES classroom was full. Petitioner stated that she would decide whether to return Student to School A by the end of the day.<sup>36</sup> Petitioner elected to have Student return to School A.<sup>37</sup>

12. On November 16, 2022, DCPS issued Student's Progress Report for the first reporting period of the 2022-23 school year. Witness K, his/her special education teacher, reported that Student was making progress on all of his/her goals:

[Student] is currently able to physically acknowledge [her/his] name being called by a familiar caregiver in 2 out of 5 opportunities. [S/he] is not currently able to verbally acknowledge familiar caregivers when called by name... [Student] is currently able to follow classroom routines and refrain from displaying noncompliant behaviors as observed in 60% of transition opportunities. However, [Student] is still requiring at least 2 visual and verbal prompts... [Student] is currently aware of all 8 steps on the pre-taught visual toileting checklist. [S/he] is able to complete at least 4 steps with no more than 2 prompts. [S/he] is not yet independently doing any of the steps or requesting for the restroom... [Student] is able to rote count from 1 to 12 consistently when given a verbal starter. [S/he] is able to count up to 25 when given at least 3 adult prompts.<sup>38</sup>

Witness K reported that Student was also progressing on all of her/his Cognitive goals:

[Student] is currently able to engage in reciprocal play by taking [his/her] turn with a developmentally appropriate toy and not disengaging in at least 2 out of 5 back-to-back turns when playing with adults. [S/he] is not yet able to demonstrate this skill with peers, however; we will continue to work on extending this skill to peers... [Student] is currently able to sort at least 10 objects by shape and by color in 5 out of 5 opportunities with no more than 2 adult prompts. We will work on extending this skill to sort in larger categories such as size, uppercase and lowercase letters, animals, body parts, and different types of animals... [Student] is currently able to correctly identify 4 items in an array of 3.<sup>39</sup>

Witness F reported that Student was progressing on all of her/his Communication goals:

This quarter, [s/he] has been observed to orally label preferred objects in [his/her] classroom such as bubbles and train. [S/he] also orally labeled various foods including apple, carrots, potato, grapes, and broccoli... When engaged in shared tasks with the provider, [Student] has practiced orally producing, "My turn, to request a toy. [S/he] has required direct models presented 1-4 times, verbal cues, visual prompts, and extended wait time. When playing with a train, [s/he] took turns driving the train over a bridge in 4 instances when moderate verbal and visual cues... [S/he] requested bubbles using an oral language or AAC. When using an AAC device, [Student] requested bubbles by selecting the icon in a field of one in

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<sup>36</sup> *Id.* at 1-2 (122-123).

<sup>37</sup> Petitioner's testimony.

<sup>38</sup> R21:27-28 (236-237).

<sup>39</sup> *Id.* at 29-30 (238-239).

90% of opportunities when given direct models as well as verbal and visual prompting. When completing a craft activity, [Student] orally requested, “I want [color]” in 75% of opportunities when given direct verbal models presented 1-3 times and sentence starters... [S/he] is beginning to answer questions related to the calendar routine such as, “What is the month?” [Student] has benefited from repetition of questions and direct verbal models.<sup>40</sup>

OT Therapist A reported that Student was progressing on all of her/his Motor Skills goals:

[Student] demonstrates both rigid and fleeting attention. This means [s/he] can focus on preferred activities, but when provided with non-preferred activities, [Student] is easily distracted by stimuli in [his/her] environment... [Student] is able to write [his/her] name using mixed casing but does not write [her/his] name on the line... [Student] will attend to preferred activities but has much more difficulty transitioning to non-preferred tasks.<sup>41</sup>

13. On November 15, 2022, when Student was in grade M at School A, DCPS convened an IEP Annual Review meeting.<sup>42</sup> The Consideration of Special Factors was unchanged from the previous IEPs. In Adaptive, the PLOP reported that the VB-MAPP assessment was administered to Student in September of 2022. Student demonstrated strengths in visual perception/match-to-sample, play, and writing. S/he can match at least ten identical objects and sort items by color for at least five different colors. S/he was able to match any part of an arts and craft activity to another person’s sample spontaneously, could independently engage in cause-and-effect play for at least two minutes, and independently demonstrated the use of toys and objects according to their function for five items. Student was also able to assemble two objects with multiple parts and will search for missing or corresponding parts of a set for at least two sets. S/he could spontaneously emit five different speech sounds, averaging at least ten different speech sounds per hour. Student was able to select the correct letter presented in a field of five for at least five letters and could approximate the letters in his/her name when given a model. S/he could sit at a group snack or lunch table without negative behaviors for at least one minute and was able to follow an eight-step toileting checklist with some verbal and/or physical prompts from staff. Student demonstrated weaknesses in areas of requesting, labeling, listener responding, and motor and vocal imitations. S/he struggles with his/her attention, which impedes upon his/her ability to master some of these skills. The first three goals from the previous IEP were unchanged. The fourth goal was replaced with a goal address Student’s ability to imitate gross motor movements and object actions. A fifth goal was added addressing Student’s ability to use verbal, sign, or an AAC to request use of the bathroom.<sup>43</sup>

In Cognitive, the PLOP also reported the results of the September 2022 VB-MAPP assessment. The first two goals were unchanged from the previous IEP. The third goal, as in the previous IEP, addressed identification of objects in a large array of objects but the number to be identified was increased from 15 to 25, and the expectation was to be able to identify all 25 correctly instead of four. Two additional goals were added: (1) counting up to 20 objects in

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<sup>40</sup> *Id.* at 30-32 (239-241).

<sup>41</sup> *Id.* at 32-33 (241-242).

<sup>42</sup> P17:1 (218).

<sup>43</sup> *Id.* at 4-6 (221-223).

sequence, and (2) given a list of 15 words with up to three sounds, elkonin boxes, and letter tiles, Student will blend the sounds orally into words.<sup>44</sup>

In Communication, the PLOP reported that receptively, Student follows 1-step directions related to classroom functions and routines such as sit down, come here, give me, put on, take off, check schedule, and go to blue center, but requires verbal and visual cues and redirection. S/he participates in Morning Meeting activities by pointing to various posters and visuals with adult support. Expressively, Student uses a combination of gestures, oral language, and an A/T device to communicate his/her wants and needs. S/he continues to receive direct verbal modeling, expansions, and extensions to increase her/his vocabulary and oral language skills. S/he labels preferred toys such as bubbles and trains as well as foods such as apple, carrot, grapes, and broccoli, and is beginning to make requests using oral language or A/T. S/he has requested, “Bubbles,” using an A/T device with a field of one in 90% of opportunities when given direct verbal models and verbal and visual prompting. S/he also orally requested objects using, “Please,” “My turn,” and, “I want \_\_\_” when given direct verbal models, verbal and visual cues, and redirection. In a recent craft activity, Student requested different colored crayons using, “I want [color]” in 75% of opportunities following direct verbal models presented 1-3 times and sentence starters. S/he is beginning to answer factual and functional questions related to his/her calendar routine. For example, [s/he] answered, “What is the month,” when given repetition; however, her/his response is not consistent. Socially, Student typically engages in preferred and self-led play, but s/he does not frequently engage socially with her/his peers at this time. S/he is beginning to engage in structured turn-taking activities with the provider, and s/he has benefited from phrases such as, “My turn,” and “Your turn.” In highly structured activities, [Student] has participated in four rounds of turn-taking when given verbal and visual cues, redirection, and extended wait time. The four goals addressed (1) labeling specific vocabulary words, (2) engaging in reciprocal play by taking turns and not expressing frustration while awaiting his/her turn (unchanged from prior IEP), (3) making his/her needs known to the teacher using 1-3 word utterances, and (4) answering functional-based yes/no or wh- questions (modified from previous IEP).<sup>45</sup>

In Motor Skills, the PLOP reported that the previous IEP goals were introduced during the second quarter of the 2021-2022 school year, but limited data on his/her progress was collected due to significant absences throughout the school year. Student had an established functional grasp on writing/coloring tools with left hand dominance. S/he could write her/his name using mixed casing. His/her fine motor skills were adequate for playing with toys and using manipulating classroom objects. Student often displayed fleeting attention. This means that s/he was easily distracted by stimuli in his/her environment. S/he also displayed rigid attention; s/he focused on activities that were preferred but had difficulty attending to non-preferred tasks. Student’s sensory processing differences made it challenging for her/him to transition between activities without adult support. The three goals addressed (1) maintaining attention in preferred and non-preferred activities (unchanged from the previous IEP), (2) copying his/her name independently with minimal deviation from the line, and (3) transitioning between table top tasks from preferred to non-preferred activities (unchanged).<sup>46</sup> Student’s direct services were unchanged, and Other Classroom Aids and Services were carried over from the previous IEP.<sup>47</sup>

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<sup>44</sup> *Id.* at 7-10 (224-227).

<sup>45</sup> *Id.* at 11-12 (228-229).

<sup>46</sup> *Id.* at 12-14 (229-231).

<sup>47</sup> *Id.* at 15 (232).

14. During the IEP November 2022 IEP meeting, OT Therapist A reported that she was working on increasing Student's independence with checking her/his schedule and focusing on independent transitions in the classroom, using low-tech assistive technology. In response to Petitioner's question about Student's progress in turn-taking, Speech Therapist A reported that Student is beginning to show these skills in speech sessions with Witness F, Student's speech therapist, and the goal was for this to be replicated in other settings. To address Petitioner's concerns about Student's toileting, Witness K, Student's special education teacher, shared that the toileting goal could be updated to have Student communicate with the team when s/he needed to use the restroom. Witness K opined that this is a good goal to work on prior to transitioning to underwear at school. Witness K explained what a CVC word is, what it meant to break down a word, and described blending and phonemic awareness. Petitioner shared that Student is coming home sounding out words and that she can see the focus of this in the classroom carrying over at home. Petitioner opposed Witness K's proposal to add a second AAC device to supplement the one provided by Petitioner. Petitioner explained that she did not want to have more than one communication device for fear of overwhelming Student, and preferred that the staff continue use of the current device.<sup>48</sup>

15. On February 7, 2023, DCPS issued a PWN notifying Petitioner that School C would be Student's Location of Services ("LOS") for the 2023-24 school year.<sup>49</sup> Petitioner disapproved of the change in schools because (1) she wanted a more diverse location, (2) she heard that the CES class at School C was over-capacity, and (3) she heard that the paraprofessionals there were not adequately trained.<sup>50</sup>

16. At Petitioner's request, DCPS convened an IEP meeting on February 28, 2023 to delete a toileting goal that Student had mastered.<sup>51</sup> Witness K agreed that the toileting goal requiring Student to use a checklist when prompted to use the toilet could be deleted; Student would retain the goal of communicating when s/he needs to use the restroom.<sup>52</sup> Advocate A, Petitioner's advocate, stated that "everything that is on the IEP looks good," and there was no disagreement with any of the goals.<sup>53</sup>

17. On April 27, 2023, while picking up Student at dismissal, Petitioner saw Paraprofessional A who told Petitioner that she had been reassigned out of Witness K's classroom. Petitioner was displeased as she had not been notified of the change and considered Paraprofessional A her primary point of contact. Petitioner confronted the principal and expressed her displeasure with the change and the lack of notice about the change.<sup>54</sup> Witness G deemed Petitioner's language and actions following the exchange outside the school to be abusive and barred Petitioner from the interior of School A past the main lobby:

Following our exchange on the playground regarding a temporary staffing assignment in your child's classroom, you entered the building following me to pick up your [son/daughter] from [her/his] classroom. You shouted repeated

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<sup>48</sup> R13:2-4 (146-148).

<sup>49</sup> R14:1 (149)

<sup>50</sup> Petitioner's testimony.

<sup>51</sup> R14A:1 (151).

<sup>52</sup> R16:1 (175); R14A:7 (157).

<sup>53</sup> R16:3 (177); P22:3 (248).

<sup>54</sup> Petitioner's testimony.

profanity towards myself and members of our [School A] staff with aggression, such as “Fuck you, bitch” and pointing through the classroom window directing other derogatory statements. Your unprofessional decorum and communication escalated in the presence of children, staff, and families in our Early Childhood hallway and playground.

The behavior described above will not be tolerated on any DCPS campus. Your behavior violated our critical safety values and operations for our orderly school environment. Consequently, this letter serves as a formal notice of requirements for your presence on school grounds moving forward.

Specifically: You are no longer permitted to be in/at/or around the vicinity of the classroom and interact verbally with the staff. You may proceed only as far as the Main Lobby (arrival) and outdoor playground door (dismissal) of [School A]. A security officer or member of the school’s leadership team will escort your child to [her/his] classroom upon arrival and/or retrieve [him/her] from [her/his] classroom for pick-up.<sup>55</sup>

18. Petitioner elected not to send Student back to School A for the remainder of the school year.<sup>56</sup>

19. On May 31, 2023, DCPS notified Petitioner that Student had been absent from school for 20 consecutive days. “Because these absences are unexcused, [Student] may be withdrawn from the student roster.” The letter encouraged Petitioner to contact School A to discuss her plans for Student’s education.<sup>57</sup>

20. In August 2023, Petitioner enrolled Student in Facility A.<sup>58</sup>

21. On October 5, 2023, DCPS’ Home/Hospital Instruction Program (“HHIP”) declined Petitioner’s application for services to be provided in the home. “[Physician A, Student’s primary care provider] confirmed that there are no medical issues that confine [Student] to the home or hospital and there are no current plans to hospitalize [her/him] for [her/his] behaviors; thus, [Student] is not eligible for HHIP services. [Student] must transition to school.<sup>59</sup>

22. On November 21, 2023, when Student was enrolled in grade H at School C, DCPS convened an IEP Annual Review meeting.<sup>60</sup> In a newly designed IEP form, “Special Considerations” replaced “Consideration of Special Factors,” but the information was virtually unchanged from the February 2023 amended IEP other than to note that Student had not attended School C.<sup>61</sup> The Adaptive PLOP and goals were unchanged from the February 2023 amended

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<sup>55</sup> R22:1 (266).

<sup>56</sup> Petitioner’s testimony.

<sup>57</sup> R28:13 (371).

<sup>58</sup> *Id.*

<sup>59</sup> R19:1 184).

<sup>60</sup> R26:1 (319).

<sup>61</sup> *Id.* at 2 (320).

IEP.<sup>62</sup> The Cognitive PLOP and goals were unchanged from the February 2023 amended IEP.<sup>63</sup> The Communication PLOP and goals were unchanged from the February 2023 amended IEP.<sup>64</sup> The Motor Skills PLOP and goals were unchanged from the February 2023 amended IEP.<sup>65</sup> Similarly, Student's services and Other Classroom Aids and Services were unchanged from the previous IEP.<sup>66</sup>

23. Through December 15, 2023, Student had not attended School C during the 2023-24 school year.<sup>67</sup>

24. Witness A is a board certified behavior analyst ("BCBA") and is the Director of ABA at Facility A. Facility A provides a range of therapeutic services including OT, S/L therapy, physical therapy, and ABA therapy. Student had received speech therapy and ABA therapy at Facility A since September 2023, funded through Medicaid, every weekday from 9:00 to 4:00. On cross-examination, Witness A conceded that Facility A was not a school.<sup>68</sup>

25. Witness B is Petitioner's educational consultant. On November 1, 2023, Witness B administered the Adaptive Behavior Assessment System ("ABAS-3") to Student.<sup>69</sup> Student's General Adaptive Composite score, 59, was in the 0.3 percentile. Student's subtest scores in Conceptual (55), Social (60), and Practical (59) were all below the first percentile.<sup>70</sup> Witness B opined that Student needs help across all areas of daily functioning; s/he struggles in communicating and regulating behavior. Witness B opined that Student needs "constant 1:1 support;" s/he needs to be constantly redirected. Witness B observed Student at Facility A; Student was in constant motion, fidgeting, and behaved impulsively, but did not exhibit aggressive behaviors. Witness B observed that Student's interaction with others was limited; s/he uses few words functionally. Witness B opined that Student needs an ABA-trained teacher with her/him "for all the steps of life skills."

With respect to the November 2022 IEP, Witness B opined that DCPS should have prescribed Student an A/T device. He criticized the use of the VB-MAPP assessment of Student's adaptive needs, because "it doesn't fully capture [her/his] needs." Witness B preferred the Vineland and the ABAS-3 as assessment tools for Student. He criticized the first two Adaptive goals as "too basic," the third for not being "tied to do with anything to do with school," and the toileting goal as "not tailored to anything more than the bathroom." He criticized the Cognitive goal addressing reciprocal play as being a "social goal," did not understand the third goal and stated that it was not measurable, and criticized the goal of blending sounds as "too complex for [her/his] development... The focus should have been on getting [her/him] to settle down and listen to a teacher." Witness B opined that the IEP was inappropriate because it did not focus on Student's areas of critical need: (1) intensive support for social interaction, (2) developing functional social communication, and (3) developing behavioral regulation. He also faulted the IEP for failing to

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<sup>62</sup> *Id.* at 3-10 (321-328).

<sup>63</sup> *Id.* at 11-18 (329-336).

<sup>64</sup> *Id.* at 19-23 (337-341).

<sup>65</sup> *Id.* at 24-26 (342-344).

<sup>66</sup> *Id.* at 27 (345).

<sup>67</sup> R29:1 (382).

<sup>68</sup> Testimony of Witness A.

<sup>69</sup> P47:1 (573).

<sup>70</sup> *Id.* at 2 (574).

provide Student ESY; he opined that Student's disability was so severe that "without consistent support, s/he will lose what s/he has gained." Witness B also opined that the November 2023 was inappropriate because it was "simply a cut and paste" of the November 2022 IEP. On cross-examination, Witness B opined that Facility A was a school providing an educational curriculum. However, he was unaware if any of the staff members were certified as teachers. When asked if he knew what a CES classroom was, he responded, "From what I've read in DCPS' documents, it's not very good." He was unaware of the staffing or number of students in a CES classroom. When asked if he was aware that Petitioner removed Student from schooling in April 2022, he responded, "That depends on your definition of schooling." Witness B then opined that Student need not be in a school with an IEP, and that he advised Petitioner to keep Student out of DCPS. "Any parent would have concerns about safety on top of not receiving competent education anyway."<sup>71</sup>

26. Witness B developed a compensatory education plan for Student.<sup>72</sup> Witness B proposed 200 hours of tutoring interventions and 120 hours behavior support both based on Applied Behavior Analysis (ABA) methodology, (2) 160 hours of speech and language services, (3) 160 hours of occupational therapy, a psychological evaluation, a communication evaluation, and placement in a private school that uses evidence-based instruction with specialists such as a BCBA and appropriately trained 1:1 behavior technicians. When Witness B was informed that Student's 2021 IEP was not at issue, he amended his proposal to 100 hours of tutoring, 80 hours of speech therapy, 80 hours of OT, and added the need for a functional behavior assessment. Witness B conceded that he was unaware of the court's decision in *Reid v. District of Columbia*.<sup>73</sup>

27. Witness C is an occupational therapist at NTC. She conducted an evaluation of Student that was not provided to DCPS and was not admitted into evidence. Witness C opined that the November 2022 IEP was deficient for not including a sensory diet, but she had no disagreement with the OT goals in the IEP. On cross-examination, she conceded that the first and third goals were appropriate.<sup>74</sup>

28. Witness D is a speech-language therapist. She conducted a Communication Matrix assessment of Student in October,<sup>75</sup> but there is no evidence that the evaluation was provided to DCPS. As a result of her evaluation of Student, Witness D concluded that Student is functioning at a "very limited level." His/her communication deficits are "severe to profound." As for the November 2022 IEP, Witness D opined that the goals were "aiming high for a student with limited skill." With respect to the November 2023 IEP, Witness D opined that "I would let the student feel some level of success rather than push so rapidly for expressive skills."<sup>76</sup>

29. Witness E is the IEP Coordinator and Admissions Coordinator at School B. School B is a non-public school providing services to students with ASD and other disabilities. It employs the Positive Behavior Intervention Support ("PBIS") model, using strategies modeled after ABA. The school year is twelve months to avoid student regression. School B provides S/L, behavior

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<sup>71</sup> Testimony of Witness B.

<sup>72</sup> P27:1 (369)

<sup>73</sup> 401 F.3d 516 (D.C. Cir. 2005).

<sup>74</sup> Testimony of Witness C.

<sup>75</sup> P28:1 (372). The evaluation was admitted solely for consideration of relief.

<sup>76</sup> Testimony of Witness D.



support services (“BSS”), OT, and has a consulting psychiatrist. The total enrollment is 60, and there are ten lead teachers. The class size is capped at eight students. Each class has a lead teacher, a teacher’s assistant, and dedicated aides. School B employs three BCBA’s. School B holds a Certificate of Approval from the Office of the State Superintendent of Education (“OSSE”).<sup>77</sup>

30. Witness F is a speech-language therapist who provided services to Student at School A from August to November of 2022. She did not attend the November 2022 IEP meeting, but she drafted the Communication PLOP and goals and the progress report for the first reporting period of the school year. The goals were designed to address Student’s needs. The first goal addressed her/his weakness in expressive vocabulary. Student did not interact with her/his peers; the second goal addressed this deficiency, social reciprocity and taking turns. The third goal addressed is weakness in requesting desired objects, to make her/his requests known. The fourth goal also addressed social reciprocity: responding to questions. The goals were similar to the previous year because Student’s deficits were severe and s/he had not mastered the goals. The last paragraph of the Other Classroom Aids and Services also addresses Student’s communications needs.<sup>78</sup>

31. Witness G is School A’s principal. She was involved in the development of the Safety Plan developed to encourage Student’s return to school in May 2022. The plan was discontinued at the end of the school year because it “had served its purpose.” Because Petitioner had not reenrolled Student for the 2022-23 school year by August, School A inquired as to her intentions on August 11, 2022,<sup>79</sup> but Petitioner did not respond. Later, Petitioner requested a meeting before deciding whether Student would return. With respect to the decision in April 2023 to limit Petitioner’s access to School A, Witness G testified that Petitioner was frustrated that Witness G had reassigned Paraprofessional A from Witness K’s classroom. Petitioner approached Witness G outside the building during dismissal, became upset, used profanity, followed Witness G into the building “without authority,” uttered more profanity, and had to be escorted by security to her car. “It was incredibly disruptive and we felt unsafe.” On cross-examination, Witness G conceded that Witness K should not have used sarcasm or raised her voice during the classroom session that was recorded on April 1, 2022.

32. Witness J is the Special Education Coordinator and Teacher at School C. He became aware of Student in August 2023 when he received Student’s LOS placing him/her at School C. He contacted Petitioner who told him that she was making arrangements with OSSE to have Student attend another school. He later learned that Student was receiving services daily at Facility A and had applied for home services through HHIP. Witness J scheduled an IEP meeting because Student’s annual IEP was due to be renewed in November 2023. He submitted a draft IEP to Petitioner “based on the information we had at the time.” Petitioner and an advocate participated in the IEP meeting virtually. If Student were to attend School C, s/he would be in a CES class with 6-7 students, one teacher, and two paraprofessionals. An ABA-trained specialist is in the class one day each week. Witness J testified that a school psychologist evaluated Student in December, a S/L evaluation was scheduled for the following Monday, but for five weeks, an occupational therapist had reached out but had been unable to schedule an evaluation date.<sup>80</sup>

33. Witness K was Student’s special education teacher at School A. The CES class is

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<sup>77</sup> Testimony of Witness E.

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

<sup>79</sup> R3:5 (25).

<sup>80</sup> Testimony of Witness J.

designed to serve students with ASD. All CES teachers have a BCBA resource assigned to the class. Student was in her class for the 2021-22 and 2022-23 school years. During the 2021-22 school year, there were 7 students and two paraprofessionals in the class. Student was using an AAC device that Petitioner provided; it had pictures which Student could touch and it would announce the object. Student's adaptive training included toileting, following instructions, and transitioning. Witness K administered Student the VB-MAPP three times each school year to evaluate his/her adaptive functioning. It measures development in five domains: Manding (requesting), Tacting (labelling), Listening or Responding, Visual Perception (matching objects), and Motor Imitation (e.g. touch your nose). "It's a good assessment because it encompasses a lot of areas of development relevant to ASD students. It focuses on areas like imitation and language development that other assessments do not." Communication was the focus all day, every day.

With respect to the November 2022 IEP, there was no disagreement with the PLOPs. The first Adaptive goal addressed attentional skills, the second addressed transitioning, the third and fifth goals addressed toileting, and the fourth addressed motor imitation. The first Cognitive goal addresses communication and social skills as well as joint attention (two individuals focusing on the same thing at the same time). The second goal addresses early literacy and math skills, The third focuses on listener responding, a foundational skill measured by VB-MAPP. The fourth goal addresses math skills, replacing the former rote-counting goal, the next step for Student. The fifth goal addresses phonics/phonemic awareness; s/he knew his/her letters, so this was the next step. There was no disagreement about these goals as well as the S/L and OT goals at the IEP meeting. In February 2023 we amended the IEP to reflect that Student had mastered her/his toileting goal and the goal was updated. There was no disagreement.

Regarding the incident at dismissal in April 2023, Witness K testified that when Petitioner entered the building, she pounded on Witness G's classroom door. When Witness G threatened to call the police, Petitioner responded, "Do it, bitch." Witness K did call the police who suggested that she get a stalking order against Petitioner. Witness K said one was granted but later suspended. She did not want Petitioner arrested, so she did not pursue anything further.

On cross-examination, Witness K clarified that Student used two AAC devices in the classroom that were provided by Petitioner. Petitioner did not want Student to use a device suggested by School A because s/he did not want to confuse her/him.<sup>81</sup>

## CONCLUSIONS OF LAW

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

Where there is a dispute about the appropriateness of the child's individual educational program or placement, or of the program or placement proposed by the public agency, the public agency shall hold the burden of persuasion on the

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<sup>81</sup> Testimony of Witness K.

appropriateness of the existing or proposed program or placement; provided, that the party requesting the due process hearing shall retain the burden of production and shall establish a prima facie case before the burden of persuasion falls on the public agency. The burden of persuasion shall be met by a preponderance of the evidence.<sup>82</sup>

Two of the issues in this case involve the alleged failure of DCPS to provide appropriate IEPs. Under District of Columbia law, DCPS bears the burden of persuasion as to these issues presented. Petitioner bears the burden of persuasion as to all other issues presented. The burden of persuasion must be met by a preponderance of the evidence.

**Whether DCPS denied Student a FAPE by failing to provide an appropriate IEP in November 2022. Specifically, Petitioner alleges that the IEP was not based on data from comprehensive assessments of Student’s developmental and functional skills, Student had made little or no progress since 2019, the goals were too elementary, not sufficiently measurable, repetitious of failed goals of the prior year, or did not address the Areas of Concern they purported to address, the Present Levels of Academic Performance (“PLOPs”), baselines, and objectives were not sufficiently updated to allow proper goals to be created, ESY was not prescribed, assistive technology (“A/T”) was not prescribed, and services for autism or psychological disabilities were not prescribed. Petitioner also asserts that the Communication goals were too elementary, not sufficiently measurable, or repetitious of failed goals of the prior year and addressed socialization and compliance with classroom rules rather than Student’s communications deficiencies. Petitioner further asserts that the occupational therapy (“OT”) goals were too elementary, not sufficiently measurable, or repetitious of failed goals of the prior year, and that the PLOP, baselines, and objectives were inaccurate.**

The Supreme Court’s first opportunity to interpret the predecessor to IDEA, The Education of the Handicapped Act (“EHA”), came in *Board of Education of the Hendrick Hudson Central School District v. Rowley*.<sup>83</sup> The Court noted that the EHA did not require that states “maximize the potential of handicapped children ‘commensurate with the opportunity provided to other children.’”<sup>84</sup> Rather, the Court ruled that “Implicit in the congressional purpose of providing access to a ‘free appropriate public education’ is the requirement that the education to which access is provided be sufficient to confer some educational benefit upon the handicapped child...”<sup>85</sup> Insofar as a State is required to provide a handicapped child with a ‘free appropriate public education,’ we hold that it satisfies this requirement by providing personalized instruction with sufficient support services to permit the child to benefit educationally from that instruction... In addition, the IEP, and therefore the personalized instruction should be formulated in accordance with the requirements of the Act and, if the child is being educated in the regular classrooms of the public school system, should be reasonably calculated to enable the child to achieve passing marks and advance from grade to grade.”<sup>86</sup>

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<sup>82</sup> D.C. Code Sect. 38-2571.03(6)(A)(i).

<sup>83</sup> 458 U.S. 176, 187 (1982).

<sup>84</sup> *Id.* at 189-90, 200

<sup>85</sup> *Id.* at 200.

<sup>86</sup> *Id.* at 203-04.

More recently, the Court considered the case of an autistic child under IDEA who, unlike the student in *Rowley* was not in a general education setting.<sup>87</sup> The Tenth Circuit had denied relief, interpreting *Rowley* “to mean that a child’s IEP is adequate as long as it is calculated to confer an ‘educational benefit [that is] merely... more than *de minimis*.”<sup>88</sup> The Court rejected the Tenth Circuit’s interpretation of the state’s obligation under IDEA. Even if it is not reasonable to expect a child to achieve grade level performance,

... [h]is educational program must be appropriately ambitious in light of [his/her] circumstances, just as advancement from grade to grade is appropriately ambitious for most children in the regular classroom. The goals may differ, but every child should have the chance to meet challenging objectives... It cannot be the case that the Act typically aims for grade-level advancement for children with disabilities who can be educated in the regular classroom, but is satisfied with barely more than *de minimis* progress for those who cannot.<sup>89</sup>

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

When all is said and done, a student offered an educational program providing ‘merely more than *de minimis*’ progress from year to year can hardly be said to have been offered an education at all. For children with disabilities, receiving instruction that aims so low would be tantamount to ‘sitting idly... awaiting the time when they were old enough to drop out...’ The IDEA demands more. The IDEA demands more. It requires an educational program reasonably calculated to enable a child to make progress appropriate in light of the child’s circumstances.”<sup>90</sup>

To meet its burden on this issue, DCPS must show that it is more likely than not that the November 15, 2022 IEP would enable Student to make progress during the following year. The November 18, 2021 IEP had Areas of Concern in Adaptive, Cognitive, Communication, and Motor Skills. In addition to the goals in these four areas, the IEP team prescribed 22 hours of specialized instruction outside of general education, four hours per month of S/L therapy outside of general education, two hours per month of OT services outside of general education, and one hour per month of OT consultation services.

On June 24, 2022, DCPS issued Student’s Progress Report for the 2021-22 school year. As is set forth in paragraph 10 above, Student’s special education teacher, Witness K, described in detail the progress Student made on her/his Adaptive and Cognitive goals during the school year, despite being held out of school from April 4<sup>th</sup> until May 19<sup>th</sup>. Speech Therapist B Attributed Student’s lack of progress to “a significant number of absences. OT Therapist B reported that while s/he was making progress through the third reporting period, “significant absences” prevented the development of data to determine Student’s progress during the fourth quarter. Contemporaneously with the November 2022 IEP meeting, DCPS issued Student’s Progress Report for the first reporting period of the 2022-23 school year. As set forth in paragraph 12 above,

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<sup>87</sup> *Endrew F. ex rel. Joseph F. v. Douglas County School District RE-1*, 137 S.Ct. 988 (2017).

<sup>88</sup> *Id.* at 997.

<sup>89</sup> *Id.* at 1000-01 (citations omitted).

<sup>90</sup> 137 S.Ct. at 1000-01.

Witness K described in detail the progress Student made on all of his/her Adaptive and Cognitive goals despite having been held out of school for the first two weeks of the school year. Witness F reported the progress Student made on all of her/his Communication goals, and OT Therapist A described the progress s/he made on her/his Motor Skills goals.

On the November 15, 2022 IEP, the first three Adaptive goals from the previous IEP were unchanged; despite Student's progress, the goals had not been completely mastered. The fourth goal was replaced with a goal address Student's ability to imitate gross motor movements and object actions. A fifth goal was added addressing Student's ability to use verbal, sign, or an AAC to request use of the bathroom. Similarly, in Cognitive, the first two goals were unchanged as Student made progress but had not mastered them. The third goal, as in the previous IEP, addressed identification of objects in a large array of objects but the number to be identified was increased from 15 to 25, and the expectation was to be able to identify all 25 correctly instead of four. Two additional goals were added: (1) counting up to 20 objects in sequence, and (2) given a list of 15 words with up to three sounds, elkonin boxes, and letter tiles, Student will blend the sounds orally into words. In Communication, the four goals addressed (1) labeling specific vocabulary words, (2) engaging in reciprocal play by taking turns and not expressing frustration while awaiting his/her turn (unchanged from prior IEP), (3) making his/her needs known to the teacher using 1-3 word utterances, and (4) answering functional-based yes/no or wh- questions (modified from previous IEP). In Motor Skills, the three goals addressed (1) maintaining attention in preferred and non-preferred activities (unchanged from the previous IEP), (2) copying her/his name independently with minimal deviation from the line (instead of tracing in the previous IEP), and (3) transitioning between table top tasks from preferred to non-preferred activities (unchanged).

During the IEP meeting, in response to Petitioner's question about Student's progress in turn-taking, Speech Therapist A reported that Student is beginning to show these skills in speech sessions with Witness F, Student's speech therapist, and the goal is for this to be replicated in other settings. To address Petitioner's concerns about Student's toileting, Witness K, Student's special education teacher, shared that the toileting goal can be updated to have Student communicate with the team when s/he needs to use the restroom. After Witness K explained her work with Student blending sounds, Petitioner shared that Student is coming home sounding out words and that she can see the focus of this in the classroom carrying over at home.

The IEP meeting on February 28, 2023 was convened solely to address the fact that Student had mastered a toileting goal that was important to Petitioner, and that a new goal would address Student learning to communicate his/her need to use the bathroom. At that meeting, Petitioner's advocate noted that "everything on the IEP looks good," and that there was no disagreement with the goals. Since the only change was to the toileting goal, three months after the November IEP was developed, Petitioner and her advocate were completely satisfied with the IEP and the progress Student was making.

Petitioner relies primarily on the testimony of Witness B to make the case that the November 2022 IEP was inappropriate. Witness B argued first that the IEP should have prescribed an A/T device. The IEP provided that "The IEP team recommends that light-tech Augmentative Alternative Communication [device] such as sign-supported speech and picture boards, be explored..." In fact, Petitioner provided Student two A/T devices, including the one on which the April 2022 recording was captured. Witness K testified that the staff did not find the devices particularly useful and recommended replacing them with one provided by DCPS, but Petitioner

objected. Witness B opined that DCPS should have used a Vineland or ABAS-3 to assess Student's adaptive skills, However, as Witness K explained in paragraph 33 above, the VB-MAPP is "a good assessment because it encompasses a lot of areas of development relevant to ASD students. It focuses on areas like imitation and language development that other assessments do not," and can be given three times during the school year to measure Student's progress. Witness found fault with each Adaptive and Cognitive goal, they were alternatively "too basic" or "too complex." However, in paragraph 30 above, Witness F provided the basis for each of the Communication goals, and in paragraph 33 above, Witness K provided the basis for each of the Adaptive and Cognitive goals. As was previously discussed, Witness K described in detail the progress Student made on his/her previous Adaptive and Cognitive goals, Witness F described is progress on the Communication goals, and OT Therapist A described his/her progress on the Motor Skills goals. Witness B faulted the IEP team for failing to provide ESY. However, Petitioner withdrew Student from School A in April 2023 before a final determination as to Student's need for ESY would be made.

In addition, I found that important aspects of Witness B lacked credibility and objectivity. He insisted that Facility A was a school even though it is a therapeutic facility offering no educational component. On cross-examination, he conceded that he was unaware if any of the staff members were certified as teachers. When asked if he knew what a CES classroom was, he responded, "From what I've read in DCPS' documents, it's not very good." He was unaware of the staffing or number of students in a CES classroom. When asked if he was aware that Petitioner removed Student from schooling in April 2022, he responded, "That depends on your definition of schooling." Witness B then opined that Student need not be in a school with an IEP, and that he advised Petitioner to keep Student out of DCPS. Finally, Witness B recommended that Student receive one-on-one attention and support by a teacher throughout the school day. While this might be ideal for any student with profound disabilities, it is simply unrealistic. As the court stated in *K.S. v. District of Columbia*, the "While the [Magistrate's] Report acknowledged the services sought by K.S.'s parents may have more comprehensively served K.S., it correctly observed that the 'Cadillac of educational treatment' is not required by IDEA."<sup>91</sup> I note that the placement requested by Petitioner at School B does not offer one-to-one support. In fact, its 8:1 maximum student to teacher ratio is comparable to that in Witness K's classroom at School A, 7:1.

Witness C, an occupational therapist at NTC opined that the IEP was inappropriate because it did not prescribe a sensory diet. However, she had no disagreement with the OT goals in the IEP and specifically agreed that two of the goals were appropriate on cross-examination.

Student carries an ASD classification and has severe developmental delays. The record shows that under his/her November 2021 IEP, s/he made progress consistent with her/his circumstances in a number of developmental areas. S/he made progress on most of her/his goals during the 2021-22 school year, which was interrupted when s/he was removed from school from April 4, 2022 until May 19, 2022. The November 15, 2022 IEP repeated goals that had not been mastered, increased the expectations of several goals, and added new goals. In a February 28, 2023 IEP meeting convened to amend a toileting goal that Student had mastered, Petitioner's advocate endorsed every aspect of the IEP. For all of these reasons, I conclude that DCPS has met its burden of proving that it provided Student an appropriate IEP on November 15, 2022.

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<sup>91</sup> 962 F.Supp.2d 216, 225 (D.D.C. 2013)

**Whether DCPS denied Student a FAPE by failing to provide an appropriate IEP in November 2023. Specifically, Petitioner alleges that the IEP was not based on data from comprehensive assessments of Student’s developmental and functional skills, Student had made little or no progress since 2019, the goals were too elementary, not sufficiently measurable, repetitious of failed goals of the prior year, or did not address the Areas of Concern they purported to address, the Present Levels of Academic Performance (“PLOPs”), baselines, and objectives were not sufficiently updated to allow proper goals to be created, ESY was not prescribed, assistive technology (“A/T”) was not prescribed, and services for autism or psychological disabilities were not prescribed. Petitioner also asserts that the Communication goals were too elementary, not sufficiently measurable, or repetitious of failed goals of the prior year and addressed socialization and compliance with classroom rules rather than Student’s communications deficiencies. Petitioner further asserts that the occupational therapy goals were too elementary, not sufficiently measurable, or repetitious of failed goals of the prior year, and that the PLOP, baselines, and objectives were inaccurate.**

Petitioner withdrew Student from DCPS in late April 2023 and s/he has not attended School C or any other DCPS school since then. As Witness J testified, he was anxious to schedule an IEP meeting in November 2023, because Student was newly enrolled at School C and her/his IEP was due to be renewed that month. However, because Student had not been in a DCPS facility since April, Witness J had to develop an IEP for Petitioner “based on the information we had at the time.” Under these circumstances, where Student was removed from DCPS two months after his/his IEP was amended on February 28, 2023, where that IEP was completely satisfactory to Petitioner and her advocate, and Petitioner had provided no educational records developed thereafter, it was reasonable for School C to propose an IEP identical to Student’s amended IEP. Therefore, I conclude that DCPS has met its burden of proving that it provided Student an appropriate IEP on November 21, 2023.

**Whether DCPS denied Student a FAPE due to verbal abuse by his/her teachers, particularly on April 1, 2022 (documented by video) and during the spring of 2023. Petitioner asserts that a Safety Plan was developed that was ineffective, not implemented and then discontinued, Petitioner further asserts that the teachers’ behavior indicates their lack of qualifications to implement Student’s IEP.**

Petitioner bases this claim primarily on a recording that was captured on an AAC device, in Student’s backpack, on April 1, 2022. As set forth in paragraph 5 above, Petitioner found Witness K’s comments to, and about, Student during the recording to be abusive, demeaning, unprofessional, and particularly inappropriate for a child with Student’s disability.

In its *Response*, DCPS asserted that a Hearing Officer has no authority under IDEA to address alleged misconduct by a staff member. This issue was discussed at the prehearing conference, and the *Prehearing Order* and subsequent *Second Amended Prehearing Order* invited Petitioner to cite precedents for this claim:

The parties are invited to submit memoranda of points and authorities on any issue relevant to this proceeding on or before the due date for disclosures. Specifically, the Hearing Officer invites, but does not require, briefing on the issue of (1) a local education agency's obligation under IDEA to maintain a safe and hospitable environment, (2) a local education agency's obligation under IDEA to develop a safety plan, (3) a Hearing Officer's authority under IDEA to adjudicate claims of abuse by staff members, and (4) a Hearing Officer's authority under IDEA to adjudicate staffing claims or complaints against staff members.

Petitioner declined this invitation. Respondent's counsel raised the issue again at the beginning of Petitioner's direct testimony. I reminded Petitioner's counsel that I had signaled concern as to the lack of precedents for this claim and again requested that the parties submit authorities on or before March 5, 2024. However, I overruled DCPS' objection to the introduction of the recording into evidence and stated that I would listen to it before making a ruling.

Despite the admission of the recording into evidence, Petitioner's counsel did not request that the passages of the recording reflecting the alleged conduct be played on the record. Nor did he or Petitioner identify where, in the over three hours of the recording, the offensive language could be found.

Nevertheless, I did, in fact, listen to the entire three-hour recording. The recording opens with the class's "nap time" and what appears to be Witness K's inability to get several students, including Student, to be quiet. There were instances in which Witness K raised her voice and spoke disapprovingly to, and about, Petitioner.

I note that the principal, Witness G, took the allegations seriously and agreed to meet with Petitioner the next school day. At that meeting, Petitioner played the relevant portions of the recording for Witness G. Thereafter, Witness K held another meeting including Petitioner and Witness G. However, Witness G concluded that Witness K's conduct not only did not constitute misconduct, but that Student would remain in Witness K's classroom if Student remained at School A. Thus, in order to find that DCPS denied Student FAPE by maintaining Witness K as his/her teacher, I must conclude that Witness K's conduct not only was misconduct, but was so egregious that she was unqualified for her position.

Although Petitioner's claim could have been styled as a failure to implement Student's IEP for failure to provide the classroom decorum necessary for her/him to make progress, it was not. However, that is one of the claims Petitioner made in a State Complaint on July 28, 2022.<sup>92</sup> In its decision on September 26, 2022, the Office of the State Superintendent of Education denied the claim:

DCPS continued to make the student's IEP services available from Apr. 3-May 18, 2022, but the parent refused to send the student to school. The only evidence the parent cites for DCPS not implementing the student's supports and services is the Apr. 1, 2022 recording. DCPS staff members apologized and took steps to address the parent's concerns. DCPS reported that the classroom teacher and paraprofessionals assigned to the classroom were able to provide the supports and

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<sup>92</sup> OSSE State Complaint No. 022-003 at 8-10. The *State Complaint* is included in the record of this proceeding.



services required by the student's IEP. DCPS encouraged the parent to send the student back to school and convened an IEP team meeting to discuss what was needed for the student to return to school. OSSE finds that DCPS made services available as required by the student's IEP.<sup>93</sup>

Petitioner requests a finding that Witness K's continued mere presence in the classroom violated IDEA. I would be willing to do so if the record supported a finding that Witness K were unqualified. For example, in Case No. 2023-0169, I denied reimbursement for a unilateral placement to a private school where the overwhelming majority of the student's teachers held no certification to teach special education in the District. Since the teachers did not meet the qualifications of special education teachers in the District, their instruction could not be considered specialized instruction as required in the student's IEP. Here, however, neither DCPS nor OSSE have suggested that Witness K's conduct warranted disciplinary action of any kind, and certainly no suggestion that her qualifications should be questioned.

I conclude that Petitioner has failed to meet her burden of proving that Witness K's conduct on April 1, 2022 rendered her unqualified as a special education teacher, thereby denying Student a FAPE. On the contrary, as discussed in the first issue above, and as found by OSSE in the State proceeding, Student made documented progress while in Witness K's class, consistent with his/her circumstances.

**Whether DCPS denied Student a FAPE by failing properly to implement Student's 2022 IEP. Specifically, Petitioner alleges that Student did not receive all of the Communication services prescribed in the IEP.**

Petitioner offered no testimony or documentation that DCPS failed to receive all of the Communication services prescribed in the IEP. Therefore, I conclude that Petitioner has failed to meet her burden of proving that DCPS failed to implement Student's 2022 IEP.

## **RELIEF**

For relief, Petitioner requests (1) an order establishing Student's least restrictive environment to be a private school placement, (2) an order requiring DCPS to find an appropriate private placement for Student in collaboration with Petitioner, and to place Student in an appropriate private school no later than 15 days after the issuance of the HOD in this proceeding, (3) an order requiring that Student be evaluated for her/his need for A/T and requiring that A/T be added to Student's IEP, (4) an order requiring ESY to be added to Student's IEP, (5) an order requiring to fund independent evaluations: psychological (including testing for autism), OT, and S/L, (5) an order requiring DCPS to convene an IEP meeting to review all evaluations ordered herein and to revise the IEP accordingly, (6) an order requiring any IEP and placement to include Communication and OT services, (7) compensatory education services including tutoring from a provider of Petitioner's choice, (8) attorneys' fees, expenses, and costs.<sup>94</sup>

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<sup>93</sup> *Letter of Decision* at 4, State Complaint No. 022-003 (SEA Sep. 26. 2022). The Letter of Decision is included in the record of this proceeding.

<sup>94</sup> Hearing Officers have no role in the awarding of attorneys' fees, expenses, and costs.

## ORDER

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

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

## APPEAL RIGHTS

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

*Terry Michael Banks*  
Terry Michael Banks  
Hearing Officer

Date: March 11, 2024

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