

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

Office of Dispute Resolution  
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<b>Parent, on behalf of Student,<sup>1</sup></b>	)	
<b>Petitioner,</b>	)	
	)	<b>Hearing Dates: 4/6/21; 4/7/21; 4/8/21;</b>
<b>v.</b>	)	<b>5/3/21; 5/4/21</b>
	)	<b>Hearing Officer: Michael Lazan</b>
<b>District of Columbia Public Schools,</b>	)	<b>Case No. 2021-0008</b>
<b>Respondent.</b>	)	

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**HEARING OFFICER DETERMINATION**

**I. Introduction**

This is a case involving an X-year-old student who is currently eligible for services as a student with Other Health Impairment (the “Student”). A due process complaint (“Complaint”) was received by District of Columbia Public Schools (“DCPS” or “Respondent”) pursuant to the Individuals with Disabilities Education Act (“IDEA”) on January 19, 2021. The Complaint was filed by the Student’s parent (“Petitioner”). On February 1, 2021, Respondent filed a response. The resolution period expired on February 18, 2021.

**II. Subject Matter Jurisdiction**

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

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

Sect. 300 et seq., Title 38 of the D.C. Code, Subtitle VII, Chapter 25, and the District of Columbia Municipal Regulations, Title 5-E, Chapter 30.

### **III. Procedural History**

A prehearing conference was held on February 18, 2021. Attorney A, Esq., counsel for Petitioner, appeared. Attorney B, Esq., counsel for Respondent, appeared. A prehearing conference order was issued on February 24, 2021, summarizing the rules to be applied in the hearing and identifying the issues in the case. The prehearing conference order was amended on March 3, 2021, per the suggestions of Petitioner. The hearing was conducted through the Microsoft Teams videoconferencing platform, without objection. Petitioner was again represented by Attorney A, Esq. Respondent was again represented by Attorney B, Esq. This was a closed proceeding.

Petitioner moved to extend the Hearing Officer Determination (“HOD”) due date from April 4, 2021, to April 30, 2021, to accommodate the selected hearing dates. DCPS consented to this motion and an order was issued on April 5, 2021, extending the timelines for the HOD to April 30, 2021. The matter proceeded to trial on April 6, 2021, April 7, 2021, and April 8, 2021. The parties did not complete testimony on these dates. As a result, the parties added the dates of May 3, 2021, and May 4, 2021, and Petitioner again moved to extend the timelines to accommodate these hearing dates. On April 29, 2021, this Hearing Officer issued a second continuance order extending the timelines for the HOD to May 21, 2021.

During the proceeding, Petitioner moved into evidence exhibits P-1 through P-21 and P-24 through P-41 without objection. Respondent moved into evidence exhibits R-1 through R-14 without objection. Petitioner presented as witnesses, in the following

order: Witness A, an independent education consultant (expert in special education programming and placement); Witness B, Associate Head of the elementary school of School B; Witness C, Director of Speech, Language and Literacy services at School B (expert in speech and language pathology); Witness D, Director of Occupational Therapy at School B (expert in occupational therapy); and Petitioner. Respondent presented as witnesses, in the following order: Witness E, a speech-language pathologist (expert in speech-language pathology as it relates to evaluations and special education); Witness F, a speech-language pathologist (expert in speech-language pathology as it relates to evaluations and special education); Witness G, a teacher at School A (expert in special education and general education); Witness H, a special education teacher (expert in special education programming and placement); Witness I, a special education teacher (expert in special education and general education); Witness J, manager of the DCPS “CIEP” team (expert in special education and reading instruction); Witness K, an occupational therapist (expert in occupational therapy as it relates to special education); and Witness L, a local educational agency (“LEA”) representative (expert in special education and general education). After the conclusion of Respondent’s presentation, Petitioner presented rebuttal through the testimony of Witness A. Respondent then presented sur-rebuttal through the testimony of Witness L.

#### **IV. Issues**

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

**1. Did Respondent fail to provide the Student with an appropriate Individualized Education Program (“IEP”) on June 12, 2019? If so, did Respondent act in contravention of 34 C.F.R. 300.320, Andrew F. v. Douglas County School District, 137 U.S. 988 (2017), and Hendrick Hudson Bd. of Educ. v. Rowley, 458 U.S.**

**176 (1982)? If so, did Respondent deny the Student a Free Appropriate Public Education (“FAPE”)?**

Petitioner contended that the Student’s IEP did not contain: (1) appropriate language reflecting the Student’s present levels of performance; (2) appropriate goals; and/or (3) a recommendation for a specific evidence-based reading program.

**2. Did Respondent fail to revise the Student’s IEP prior to February 26, 2020? If so, did Respondent violate 34 C.F.R. Sect. 300.324(b)(1)(i) and (ii), and related provisions? If so, did Respondent deny the Student a FAPE?**

Petitioner contended that the IEP should have been revised to increase the Student’s recommended hours of specialized instruction and occupational therapy. Petitioner contended that there was a delay in finalizing the IEP after Respondent determined that the Student was eligible for occupational therapy services.

**3. Did Respondent fail to provide the Student with an appropriate IEP and placement on February 26, 2020? If so, did Respondent act in contravention of 34 C.F.R. 300.320, Andrew F. v. Douglas County School District, 137 U.S. 988 (2017), and Hendrick Hudson Bd. of Educ. v. Rowley, 458 U.S. 176 (1982)? If so, did Respondent deny the Student a FAPE?**

Petitioner contended that the IEP did not contain: (1) appropriate language reflecting the Student’s present levels of performance; (2) appropriate goals; (3) a recommendation for a sufficient amount of specialized instruction hours; (4) a recommendation for any amount of direct speech and language pathology services; and/or (5) a recommendation for a specific, evidence-based reading program. Petitioner contended that the recommended placement was therefore inappropriate for the Student.

**4. Did Respondent fail to implement the Student’s 2019-2020 IEP(s)? If so, did Respondent’s act or omission violate 34 C.F.R. Sect. 300.323(a) and principles established in cases such as Van Duyn v. Baker Sch. Dist. 5J, 502 F.3d 811, 822 (9th Cir. 2007)? If so, did Respondent deny the Student a FAPE?**

Petitioner contended that the Student was recommended for ten hours of specialized instruction per week outside general instruction, but in fact received less than ten hours per week. Petitioner also contended that approximately half of the Student's specialized instruction was provided inside general education.

As relief, Petitioner seeks tuition reimbursement and additional costs (including any separate payments for related services) corresponding to the Student's attendance at School B for the 2020-2021 school year. Petitioner also seeks compensatory education for the time period corresponding to the alleged FAPE denial.

#### **V. Findings of Fact**

1. The Student is a child who is eligible for services as a student with Other Health Impairment (Attention Deficit Disorder or Attention Deficit Hyperactivity Disorder). Cognitively, the Student is in the average range. The Student has a specific learning disability in reading and is accordingly well below grade level in reading ability. The Student has also been diagnosed with attention deficit hyperactivity disorder (“ADHD”) and has issues with executive functioning and following directions. The Student's disability impacts his/her reading fluency, comprehension, vocabulary, written expression, spelling, mechanics, and organization and clarity of written work, among other things. The Student's reading problems also affect his/her ability to solve problems in mathematics. The Student also has issues remaining in his/her seat, controlling impulses, managing materials, and maintaining awareness of others. In addition, the Student has weak handwriting and visual motor skills. Testimony of Witness A; Testimony of Witness B; Testimony of Witness C; Testimony of Witness D. The Student needs 1:1 instruction throughout the day. The Student has difficulty with large group

instruction, where s/he is often distracted and does not pay attention. Testimony of  
Witness B.

2. For the 2017-2018 school year, the Student attended School A. A reading and mathematics assessment conducted on July 7, 2017, found the Student's skills to be compatible with those of a beginning first-grade student. P-1-2. During this school year, the Student received small group "RTI" reading instruction, with approximately four other students in the group. The Student had difficulty remaining focused and generally required redirection at least twice per five-minute interval. P-1-5. On November 2, 2017, the Student was considered to be at level "C" in reading. P-3-2.

3. On December 5, 2017, and December 6, 2017, the Student was assessed in regard to speech-language issues. The evaluator reviewed the Student's records, interviewed the Student's teacher and parents, conducted an observation of the Student, and tested the Student on the Clinical Evaluation of Language Fundamentals-5th Edition ("CELF-5"), Expressive Vocabulary Test-2nd Edition ("EVT-2 – Form B"), and Peabody Picture Vocabulary Test-4th Edition ("PPVT-4 – Form B"). School staff reported to the evaluator that the Student sometimes struggled to answer questions and that the Student's expressive language during non-academic conversations was often "laborious." On the CELF-5, the Student's scored in the average range on five of eight subtests, with low scores in formulating and recalling sentences. The Student was in the borderline range in the Core Language Index, at the 14th percentile. On the PPVT-4, the Student's vocabulary was found to be in the average range. P-2.

4. A psychological assessment of the Student was conducted by Respondent's staff on November 14, 2017, as reported on December 22, 2017. The

evaluator conducted the Wechsler Intelligence Scale for Children-Fifth Edition (“WISC-V”) and Woodcock Johnson Tests of Achievement-Fourth Edition (“WJ-IV”), and also relied on classroom observations, teacher interviews, a parent interview, a Student interview, and a review of school records/documents/assessments. It was reported that the Student could read level “C” books with support and level “B” books independently. Teachers characterized the Student as happy, but with issues following directions and focusing. A functional behavior assessment (“FBA”) was conducted to explore the Student’s classroom behavior. Attention and possibly avoidance were identified as potential motivations. On the WISC-V, the Student’s full scale IQ score was 93, in the average range compared to children of the same age. On the WJ-IV, the Student scored in the average to low average range, consistent with his/her cognitive skills. The evaluator recommended a structured classroom environment to provide an opportunity for movement and collaboration, with a clearly defined incentive program to reinforce desired behaviors. P-1.

5. The Student continued to attend School A for the 2018-2019 school year. The Student had two teachers, one for reading and one for mathematics. The teachers told Petitioner that the Student was not making progress, even though the Student had been getting extra help. A “Section 504” plan was written for the Student during this time period. Testimony of Petitioner. The Student received general education instruction with approximately sixteen children in the classroom. The class used reading approaches such as “Foundations,” “Close Read,” and guided reading. The Student received some small group reading instruction during the year, with two to three students in the group. The Student did well in the small group reading lessons. The Student had significant

issues with decoding and some issues with reading comprehension during the year. The Student's teacher, Witness G, used sight-word cards and would "talk through" a book, go over difficult words, recommend strategies, and address comprehension issues.

Testimony of Witness G.

6. An independent neuropsychological evaluation of the Student was conducted on February 13, 2019, March 7, 2019, and March 12, 2019. Testing included the WISC-V; the Beery-Buktenica Developmental Test of Visual-Motor Integration ("VMI"); the Test of Word Reading Efficiency-2nd Edition ("TOWRE-2"); the Revised Children's Manifest Anxiety Scale-2nd Edition ("RCMAS-2"); and selected subtests of the WJ-IV, the Test of Language Competence-Expanded Edition ("TLC-E"), the Oral and Written Language Scales-2nd Edition ("OWLS-2"), the Comprehensive Test of Phonological Processing-2nd Edition ("CTOPP-2"), the Wide Range Assessment of Memory and Learning-Second Edition ("WRAML-2"), the Test of Everyday Attention for Children ("TEA-Ch"), and the Wechsler Individual Achievement Test-3rd Edition ("WIAT-3"). Teachers told the evaluator that the Student was happy and cheerful, and at grade level in science and social studies, but far below grade level in reading and writing. On the WISC-V, the Student performed in the average range. The Student also performed in the average range on the WRAML-2, which tests language comprehension and memory for spoken language. The Student scored in the low average range on the OWLS-2, which tests for listening comprehension. On the CTOPP-2, which tests phonological awareness, the Student scored at the 21st percentile. Testing on the BRIEF revealed significant concerns about the Student's attention and planning skills. On the WJ-IV, the Student scored at the 8th percentile in identifying sight words, 12th percentile

in decoding nonsense words, and 3rd percentile in reading fluency. In reading comprehension, on an untimed test, the Student scored at the 13th percentile, with spelling skills at the 7th percentile and writing fluency at the 14th percentile. In mathematics calculation, the Student scored at the 43rd percentile, indicating an early second-grade level. The Student was diagnosed with ADHD Combined Presentation, Language Order/Mixed Receptive Expressive, and Specific Language Disability in reading. The evaluator recommended that the Student's academic instruction should be provided in a small, separate classroom for students with language-based learning difficulties. P-5.

7. Middle-of-year ("MOY") testing during the 2018-2019 school year revealed that the Student was at level "D" in reading. End-of-year ("EOY") testing in May, 2019, showed that the Student was on level "F" in reading, indicating a mid-year first-grade level. "Confidence and cheerleading" played a role in the Student's gains during the year. Additional assessments by Witness I indicated that the Student's reading level was at a level "G" by May 30, 2019, with a reading fluency rate of nineteen second-grade words per minute. Testimony of Witness G; P-7-2; P-8-2. At the time, the Student could write some sentences and add punctuation, but was unable to write an organized paragraph. It was difficult to get the Student to write at all. P-7-2; P-8-2.

8. DCPS screened the Student for speech and language issues on or about May 31, 2019, using the Receptive One Word Picture Vocabulary Test-Revised ("ROWPVT-R"), the Expressive One Word Picture Vocabulary Test-Revised ("EOWPVT-R"), the Comprehensive Assessment of Spoken Language-Second Edition ("CASL-2"), and the Goldman-Fristoe Test of Articulation-Third Edition. The screening

showed that the Student presented with average communication skills in all areas, including vocabulary, expressive language, receptive language, and pragmatic language.

P-7-4; Testimony of Witness E.

9. An IEP meeting for the Student on June 12, 2019, was attended by Petitioner, Witness I (a special education teacher), an evaluator, a local educational agency (“LEA”) representative, a general education teacher, Witness E (a speech-language pathologist), another speech-language pathologist, an occupational therapist, and two other staff members. Petitioner asked for the IEP to require the use of evidence-based reading interventions. Witness I wrote the goals for the IEP. Petitioner expressed no concerns about the goals or present levels of performance in the IEP. P-10; Testimony of Witness G; Testimony of Petitioner.

10. The IEP dated June 12, 2019, stated that the Student’s behavior impeded his/her learning but was being controlled by prescription medication and classroom supports such as behavior charts. The IEP contained “Area of Concern” sections in mathematics, reading, and written expression, with corresponding goals. The IEP stated that the Student was at least one year behind in mathematics, reading, and written expression, struggled to focus, and had “limited access” to the general education curriculum in mathematics due to ADHD and his/her inability to focus. The IEP stated that, even if the Student managed to focus in reading, s/he continued to struggle in fluency and “some” reading comprehension. The IEP recommended ten hours per week of specialized instruction outside general education and continued use of “Other Classroom Aids and Services” such as small-group instruction, modified assignments, and extended time. The IEP also noted that the Student used a calculator to check his/her

work in the classroom, though “not on classroom tests.” The IEP provided for preferential seating, a location with minimal distractions, flexibility in scheduling, frequent breaks, extended time, and small group testing. P-10.

11. During the summer of 2019, the Student attended a program at School B, a non-public school for children with learning difficulties. The Student received occupational therapy services during this time. P-22; P-23.

12. The Student continued at School A for the 2019-2020 school year. The Student started the year at reading level “D.” P-18-3. During the school year, the Student received push-in services from a special education teacher, Witness H, for English language arts (five hours per week) and mathematics (three hours per week). During reading instruction inside general education, Witness H reviewed classroom discussions and differentiated general education work for the Student. Witness H would take four students in the classroom, “pull them to the side,” and work on current assignments with accommodations and cues. Testimony of Witness H. The Student was also scheduled to receive one hour per day (five hours per week) of pull-out instruction in reading from Witness I, with a focus on “foundational reading.” Testimony of Witness I. Witness F, a speech-language pathologist, pushed into Witness I’s pull-out reading classroom (containing the Student) for one hour per week for a different student. The pull-out reading classroom typically had four to five students. Testimony of Witness F. Witness I provided worksheets and used the Heggerty methodology to address letter sounds, rhyming, blending, segmenting, and adding and deleting phonemes. The Heggerty-based lesson lasted fifteen minutes. Flash cards were also used, along with wordplay, work on morphology, and a “Foundations” alphabet chart. The Student did not

like to go to the classroom and engaged in behavioral issues. Witness I discouraged the Student's one-hour pull-out reading period on the fifth day of the week, because on that day, the Student would have been by him/herself in the pull-out classroom. Testimony of Petitioner; Testimony of Witness I. The Student also received sixty minutes of occupational therapy per month to address his/her below average fine motor skills and sensory processing abilities. Testimony of Witness K.

13. The Student often had difficulty paying attention, following directions, and understanding new ideas during the 2019-2020 school year. The Student had difficulty using complete sentences and correct grammar and had a difficult time recalling details about what s/he read. Visuals were used to assist the Student, as well as sentence starters and transition words. P-13-2. The Student had issues with attention span, keeping his/her hands and body to him/herself, and worked better in small groups regardless of the subject. P-15-9. The Student did not receive a textbook, only worksheets, which s/he had difficulty reading. Testimony of Petitioner.

14. An independent occupational therapy assessment was administered to the Student on November 15, 2019. The assessment included teacher reports and testing through the VMI, Bruininks-Oseretsky Test of Motor Proficiency ("BOT2"), items from the Evaluation Tool of Children's Handwriting ("ETCH"), Test of Visual Perceptual Skills-4th Ed. ("TVPS-4"), and informal writing and drawing samples. Results of the BOT-2 revealed the Student presented with overall fine manual control in the "below average" range and manual coordination skills at the low end of the "average" range, indicating some concerns with fine motor precision and integration. Teachers reported concerns around poor or illegible handwriting, stamina, frustration tolerance, poor/tight

pencil grasp, inconsistent pencil coordination and pressure, fatigue, and general difficulty performing fine-motor tasks in the classroom (e.g., using tools). On the VMI, the Student's overall visual motor integration and visual perception fell in the "average" range, as did his/her visual perception skills on the TVPS-4. The Student presented with a profile consistent with mild deficits in processing auditory, visual, tactile, and vestibular-proprioceptive information. The Student was reported to be in constant motion, struggle with body space/position and directionality, and have trouble maintaining seated position and focus. Sixty minutes of direct occupational therapy per month was recommended for the Student. P-14.

15. A comprehensive speech-language evaluation of the Student was conducted by an evaluator in November, 2019. On the Peabody Picture Vocabulary Test-5 ("PPVT-5"), the Student scored at the 23rd percentile. On the Expressive Vocabulary Test-3 ("EVT-3"), the Student scored at the 7th percentile. On the CELF-5, the Student was in the average range in most subtests. On the Test of Auditory Processing Skills-4 ("TAPS-4"), the Student was below average on all subtests. The Student's score was "poor" or "very poor" on the subtests in the Word Identification and Spelling Test ("WIST") and the TOWRE-2. The Student's phonological awareness was at the 25th percentile on the TAPS-4. P-12.

16. An IEP meeting was held for the Student on January 13, 2020. At the approximate time of this meeting, the Student was performing at the 10th percentile in mathematics, well below grade level. P-19-3. In reading, the Student was considered to be functioning at level "D," and was reading from ten to fifteen words per minute. Testimony of Witness H; P-19-5; Testimony of Witness A. The Student's writing skills

were at a kindergarten to first-grade level at this time. P-18-3; P-19-8; R-5-21. At the meeting, DCPS wanted to reduce the Student's hours of specialized instruction, while Petitioner sought more hours of specialized instruction. The parties then "settled" on ten hours of specialized instruction per week, five hours inside general education and five hours outside general education. Testimony of Witness I. Petitioner sought a specific reading methodology for the Student. DCPS staff said that they would provide Petitioner with research on their approach to reading. After the meeting, the parties agreed on the goals and present levels of performance in the IEP. Testimony of Witness H.

17. The Student's IEP was finalized on March 29, 2020. The IEP determined that the Student's behavior did not impede his/her learning or the learning of other children, that the Student could benefit from assistive technology, and that the Student needed word retrieval strategies, graphic organizers, an opportunity for think time, and tactile and visual cues to supplement oral information. The IEP indicated that the Student was at the 1st percentile in reading and needed extended time to read a sentence. The IEP contained "Area of Concern" sections with corresponding goals in mathematics, reading, and written expression, and recommended five hours per week of specialized instruction outside general education, plus five hours per week of specialized instruction inside general education, with sixty minutes per month of occupational therapy outside general education. The IEP also recommended activity and movement breaks, flexible seating, permission to perform classwork in various body positions (such as sitting/standing/kneeling), access to fidgets and resistance bands, modified and shortened assignments, extended time during testing, sentence starters, a reward system and praise for on-task behavior, and visual aids to support him/her in the learning environment. The

IEP also provided for a checklist to guide the Student's thought process in reading and mathematics, as well as chunked text to increase the Student's understanding. Also recommended were modified organizational strategies, visual aids such as graphic organizers or sentence starters, tasks broken into shorter manageable parts, directions chunked into smaller steps and repeated, preferential seating, and a location with minimal distractions. P-19; R-9-1; Testimony of Witness A.

18. In March, 2020, the Student was accepted to School B. Petitioner signed a contract for the Student to attend the school and made a money deposit. Testimony of Petitioner.

19. After the onset of the COVID-19 pandemic, and after DCPS transitioned to virtual instruction, the Student worked with Witness H every day on reading and mathematics, in a group with five students. The Student also received daily virtual instruction from Witness I, as well as physical education, art, and Spanish instruction. Testimony of Witness I.

20. The Student's progress reports for the 2019-2020 school year indicated that the Student made some progress during the year. The Student was reported to have made progress on all math goals during the first and second reporting periods, and mastered a goal relating to addition and subtraction. In reading, the Student progressed on one of three goals in the first reporting period. In the second reporting period, progress was reported on all reading goals, and by February 1, 2020, the Student was reported to be at level "F" in reading. For the third reporting period, further progress was noted in reading, including the ability to identify a main idea, recognize two or three details that supported the main idea, and describe how those details supported the main

idea. R-5. The Student passed all of his/her classes for the 2019-2020 school year.

Testimony of Witness L.

21. For the 2020-2021 school year, the Student is attending School B. Students at the school are grouped according to academic skills. Due to the COVID-19 pandemic, instruction at School B has been provided through a virtual platform for much of the school year. The Student receives instruction in reading, writing, mathematics (with a co-teacher), academic “club” (a form of social studies), art, and a movement class. The Student’s reading, writing, and mathematics teachers are certified. The Student’s writing class sometimes includes an occupational therapist. After an initial period of time in a dyad for reading, the Student receives 1:1 daily Orton-Gillingham-based reading instruction from a certified special education teacher. Testimony of Witness B. Other classes consist of one or two adults and nine children. The Student received direct speech and language therapy and occupational therapy for part of the year, but Petitioner discontinued the services for financial reasons. Testimony of Witness Petitioner; Testimony of Witness A.

22. At School B, the Student’s ability to read, measured in words per minute, has increased. On September 21, 2020, the Student had an accuracy rate of seventy-seven percent in decoding a level “H” passage (fourteen correct words per minute). On January 21, 2021, the Student achieved eighty-nine percent accuracy on the same type of passage (thirty-three correct words per minute). P-28. The Student has showed strong growth in reading words with digraphs, words with two consonants separated by a vowel, words with two vowels separated by two consonants, and words with a silent “e” vowel pattern, as well as in reading fluency and generating a topic sentence. P-29-1-2. The

Student no longer feels singled out in a group where previously s/he had felt out of place. Testimony of Witness B; Testimony of Witness A. Additionally, the Student is learning on a third-grade level in mathematics, and a level “G” or “H” in reading. P-31-4-5.

23. In November, 2020, Witness A observed the Student during School B’s virtual instruction in mathematics and language arts. The Student had difficulty getting all his/her materials together and was initially not attending. The Student had to be redirected and did better in small-group instruction. Testimony of Witness A. The Student was observed on December 20, 2019, by Witness K. The Student was fidgeting and did not sit inside of his/her designated space. Testimony of Witness K.

24. School B wrote an IEP for the Student on February 8, 2021. The IEP provided for 31.25 hours per week of specialized instruction, 180 minutes per month of speech-language pathology, and 180 minutes per month of occupational therapy (four sessions of forty-five minutes per session). The IEP noted that the Student had made progress with word retrieval and developed narrative skills in speech but had weaknesses in pragmatic language. P-31.

## **VI. Conclusions of Law**

The burden of proof in District of Columbia special education cases was changed by the local legislature through the District of Columbia Special Education Student Rights Act of 2014. That burden is expressed in statute as the following: “Where there is a dispute about the appropriateness of the child’s individual educational program or placement, or of the program or placement proposed by the public agency, the public agency shall hold the burden of persuasion on the appropriateness of the existing or proposed program or placement” provided that “the party requesting the due process

hearing shall retain the burden of production and shall establish a *prima facie* case before the burden of persuasion falls on the public agency.” D.C. Code Sect. 38-

2571.03(6)(A)(i). Accordingly, on Issue #1 and Issue #3, relating to the appropriateness of the Student’s IEP and placement, the burden of persuasion is on Respondent if Petitioners present a *prima facie* case. On Issue #2 and Issue #4, the burden of persuasion is on Petitioners.

**1. Did Respondent fail to provide the Student with an appropriate IEP on June 12, 2019? If so, did Respondent act in contravention of 34 C.F.R. 300.320, Andrew F. v. Douglas County School District, 137 U.S. 988 (2017), and Hendrick Hudson Bd. of Educ. v. Rowley, 458 U.S. 176 (1982)? If so, did Respondent deny the Student a FAPE?**

Petitioner contended that the Student’s IEP did not contain: (1) appropriate language reflecting the Student's present levels of performance; (2) appropriate goals; and/or (3) a recommendation for a specific evidence-based reading program.

In Hendrick Hudson Bd. of Educ. v. Rowley, 458 U.S. 176 (1982), the Court explained that an IEP must be reasonably calculated to enable the child to receive benefit. Id. at 204. The Court’s decision in Andrew F. ex rel. Joseph F. v. Douglas County School District RE-1, 137 S.Ct. 988 (2017), elaborated on the doctrine established in Rowley. The Court reasoned that “a student offered an educational program providing merely more than *de minimis* progress from year to year can hardly be said to have been offered an education at all.” Id. At 1001. The Court held that IDEA “demands” a higher standard—“an educational program reasonably calculated to enable a child to make progress appropriate in light of the child’s circumstances.” Id. The Court stated that its ruling “should not be mistaken for an invitation to the courts to substitute their own notions of sound educational policy for those of the school authorities.” Id. Still, the

Court stated that courts should fairly expect those authorities to offer a “cogent and responsive explanation” for their decisions. Id. At 1002. The District of Columbia Circuit Court of Appeals has accordingly found that Andrew F. raised the bar on what counts as an adequate education under the IDEA. Z. B. v. District of Columbia., 888 F.3d 515, 517 (D.C. Cir. 2018).

An IEP is “a written statement for each child with a disability that is developed, reviewed, and revised in a meeting in accordance with 34 C.F.R. Sect. 300.320 through 34 C.F.R. Sect. 300.324.” 34 C.F.R. Sect. 300.22. Among other requirements, an IEP must include a statement of the child’s current educational performance, articulate measurable educational goals, and specify the nature of the special services that the district will provide. 34 C.F.R. Sect. 300.22; 34 C.F.R. Sect. 300.320(a).

Petitioner argued that the “present levels of performance” (“present levels”) sections in the Student’s June 12, 2019, IEP were not sufficiently detailed or meaningful. Petitioner argued that the present levels in math, reading, and writing simply stated that the Student was “at least a year behind” but did not mention at what grade level s/he was performing each skill. Petitioner argued that the present levels provided no specificity on the Student’s strengths and weaknesses, and no data discussing recent progress on each of the Student’s skills and/or skill deficiencies.

The present levels sections in this IEP were less than comprehensive, and DCPS did not argue otherwise. However, there is nothing in the record to suggest that the language in the present levels sections of the June, 2019, IEP would have affected, or in fact affected, the Student’s education at School A for the 2019-2020 school year. Staff at the school did not need an IEP to understand the needs of this Student, who had been at

the school for several years. Witness I, one of the Student's special education teachers for the 2019-2020 school year, had already taught the Student and should have already known the Student's strengths and weaknesses. Petitioner, who did not object to the present levels at the IEP meeting, was unable to provide any authority within the circuit for the proposition that FAPE denial should be found when present levels sections in a student's IEP are deemed to be less than comprehensive. To the contrary, courts in the circuit have rejected such claims as procedural violations. J.B. by & through Belt v. D.C., 325 F. Supp. 3d 1, 6 (D.D.C. 2018) (rejecting FAPE claims based on present levels as a procedural violation). There is nothing in the record to support the claim that the failure to provide comprehensive present levels in the June 12, 2019, IEP impeded the Student's right to a FAPE, impeded Petitioner's opportunity to participate in the decision-making process regarding the provision of FAPE to the Student, or caused a deprivation of educational benefit.<sup>2</sup> As a result, this Hearing Officer finds that this claim reflects a procedural violation at most, and that DCPS did not deny the Student a FAPE on this basis.

Petitioner also argued that the goals in the Student's June, 2019, IEP were inappropriate. According to 34 U.S.C. Sect. 300.320(a)(2), the statement of measurable annual goals, including academic and functional goals, must be designed to "(m)et the child's needs that result from the child's disability to enable the child to be involved in and make progress in the general education curriculum" and "(m)et each of the child's

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<sup>2</sup> In matters alleging a procedural violation, a hearing officer may find that a child did not receive a FAPE only if the procedural inadequacies: (i) impeded the child's right to a FAPE; (ii) significantly impeded the parent's opportunity to participate in the decision-making process regarding the provision of a FAPE to the parent's child; or (iii) caused a deprivation of educational benefit. 34 CFR Sect. 300.513(a).

other educational needs that result from the child's disability." Petitioner contended that the Student's mathematics goals were unrealistic since they focused on multiplication and two-step problems. Petitioner contended that the Student could not do multiplication or two-step problems since s/he was functioning at a first-grade level in mathematics. Petitioner also contended that the Student's reading goals were incomplete since the IEP did not address all known deficits. Petitioner noted that the IEP did not contain specific and measurable goals for sight-word reading or decoding and phonics, which were known areas of need. Petitioner also contended that the goals did not address the Student's ADHD or needs in executive functioning.

However, Petitioner did not object to any of the goals at the IEP meeting, and the record indicates that the Student did have some knowledge of multiplication (P-1-12) and some success with multiplication charts during the 2019-2020 school year. P-19-3. Similarly, the record indicates that the Student was able to make some progress on solving two-step word problems during the 2019-2020 school year. In fact, the School B IEP, though written in 2021, did contain a goal relating to two-step problems. P-31-14.

Additionally, Petitioner's contention that the IEP goals did not address decoding, phonics, sight-word reading, or spelling is not accurate. The IEP contained reading goals related to reading passages aloud, describing characters in detail, and describing the main idea of a text. As suggested by Witness G, these goals involved work across a wide spectrum of reading issues, including decoding, phonics, sight-word reading and spelling. Moreover, Petitioner did not point to authority where a court has found that a school district denied a student a FAPE because the student's reading goals did not specifically include a reference to decoding, phonics, sight-word reading, or spelling. Indeed, IEP

goals for reading, math, and other academic areas generally do not need to itemize the specific pieces of information that a student will acquire. J.K. v. Hudson City Sch. Bd. of Educ., No. 5:14CV1985, 2015 WL 5729903, at \*10 (N.D. Ohio Sept. 28, 2015).

Petitioner also suggested that the Student's IEP should have included goals relating to ADHD and executive functioning. However, this request was not made at the IEP meeting, and Petitioner did not explain what such goals should look like or how such goals would have helped the Student make progress during the school year. Nor did Petitioner point to any authority to suggest that IEPs must include goals corresponding to a student's clinical diagnosis, or any authority to indicate that executive functioning issues must be addressed through IEP goals.

Petitioner also argued that her request for specific, evidence-based reading interventions should have been incorporated into the Student's IEP. Issues relating to methodology in IEPs are ordinarily at the discretion of the school district. The United States Department of Education has stated that "there is nothing in the [IDEA] that requires an IEP to include specific instructional methodologies." 71 Fed. Reg. 46,665 (2006). As the Supreme Court has stated: "once a court determines that the requirements of the Act have been met, questions of methodology are for resolution by the States." Rowley, 458 U.S. at 208; see also Fairfax Cty. Sch. Bd. v. Knight, No. 1:05CV1472 (LMB), 2006 WL 6209927, at \*8 (E.D. Va. Aug. 23, 2006), aff'd, 261 F. App'x 606 (4th Cir. 2008) ("it is not the place of this Court to pass upon the relative merits of educational theories and methodologies"); S.M. v. Hawai'i Dep't of Educ., 808 F. Supp. 2d 1269, 1278 (D. Haw. 2011) (IEP did not specifically need to require the ABA methodology).

The commentary to the 1999 IDEA regulations does give hearing officers some leeway to require a methodology in an IEP where “there are circumstances in which the particular teaching methodology that will be used is an integral part of what is ‘individualized’ about a student’s education” and “will need to be discussed at the IEP meeting and incorporated into the student’s IEP.” Fed. Reg. Vol. 64, No. 48 (March 12, 1999) at 12552. The commentary explained that, “(f)or a child with a learning disability who has not learned to read using traditional instructional methods, an appropriate education may require some other instructional strategy.” Id.

At the time of the Student’s June 12, 2019, IEP, the Student was doing reasonably well in school. Though the Student was well below grade level in reading, the Student did progress from level “D” to level “G” during the 2018-2019 school year in general education classes. The June, 2019, IEP generously offered the Student ten hours of specialized instruction per week outside general education, together with aids and services to address the Student’s attentional issues. The ten added hours of pull-out instruction, on top of the Student’s apparent success during the 2018-2019 school year, leads this Hearing Officer to conclude that DCPS’s IEP provided the Student a FAPE without referencing an evidence-based reading methodology, especially since Petitioner did not clearly indicate what she meant by “evidence-based.” Damarcus S., 190 F. Supp. 3d at 51 (no need to include requirement for research-based instruction in the IEP when parent did not define the term).

In sum, this Hearing Officer finds that the June 12, 2019, IEP provided the Student a FAPE. This claim must be dismissed in its entirety.

**2. Did Respondent fail to revise the Student’s IEP prior to February 26, 2020? If so, did Respondent violate 34 C.F.R. Sect. 300.324(b)(1)(i) and (ii), and related provisions? If so, did Respondent deny the Student a FAPE?**

Petitioner contended that school staff met with her multiple times from November, 2019, to January, 2020, and that, at the first meeting, DCPS already knew that the Student was doing poorly. Petitioner pointed out, among other things, that: (1) the Student’s reading declined from level “G” to “BR” on the Reading Inventory test, and to “D” on the TRC test; (2) the Student was reading fewer words per minute than s/he was in the 2018-2019 school year; (3) the Student had not made progress during the 2019-2020 school year on a goal relating to describing characters; (4) the Student’s written expression had not improved during the 2019-2020 school year; (5) there was data in the record indicating that the Student needed more small-group instruction; (6) the gap between the Student and other students was increasing; and (7) the Student’s mathematics skills had remained stagnant. Petitioner contended that DCPS reacted too slowly when it failed to finalize the Student’s IEP until March 29, 2020, because it insisted on Petitioner’s signature. Petitioner contended that this delay also caused the Student to miss occupational therapy services, which were agreed to on January 13, 2020.

Petitioner did not mention that in November, 2019, she presented DCPS with an independent speech-language assessment that had to be reviewed. Once DCPS received this assessment, it needed time to review the document before it could schedule an IEP meeting. DCPS’s review of the assessment was completed promptly, by December 9, 2019, when Witness F completed her report on the assessment. The IEP meeting was then held shortly after the Christmas break, on January 13, 2020. After the IEP meeting, changes were made to the goals in the IEP per the suggestions of Petitioner’s counsel,

who expressed dissatisfaction with the IEP in an email dated February 12, 2020. P-21-8. The last draft of the IEP was sent to Petitioner on February 26, 2020, only about two weeks before the COVID-19 pandemic shut down DCPS's schools, including School A. Up to that point, all of DCPS's actions were reasonable and consistent with the IDEA.

Petitioner is correct that an IEP does not have to be signed by a parent in order to take effect. As a result, this Hearing Officer agrees that the Student's IEP should have been finalized on February 26, 2020, when the last draft was forwarded to Petitioner by Witness H. P-21-9. However, the United States Department of Education advised in early March that if learning is halted for general education students across a school district, then the school district is under no obligation to provide IEP services for special needs students. "Questions and Answers on Providing Services to Children with Disabilities during the Coronavirus Disease Outbreak March 2020" (USDOE, March 12, 2020, <https://sites.ed.gov/idea/files/qa-covid-19-03-12-2020.pdf>). Since DCPS closed its schools in March, 2020, the delay in finalizing the Student's IEP (caused by the district's insistence on including the parent's signature on the IEP) resulted in only one missed occupational therapy session in the first part of March, 2020. Moreover, while school districts must ensure that "as soon as possible following development of the IEP, special education and related services are made available to the child in accordance with the child's IEP" (34 C.F.R. set. 300.323 (c)(2)), the phrase "as soon as possible" does not mean immediately. The language of the IDEA permits some delay in the implementation of the IEP. Bd. of Educ. of Montgomery Cty. v. Brett Y, 155 F.3d 557 (4th Cir. 1998) (holding that 30 days to implement an agreed-upon IEP was consistent with IDEA regulations).

It is noted that there are very few reported cases of any kind where a school district has been found to have denied a student a FAPE because it did not revise an IEP prior to its expiration (absent a major change in the child's life). Dixon v. District of Columbia, 83 F. Supp. 3d 223, 233 (D.D.C. 2015) (LEA was only required to review IEPs once a year); Simms v. D.C., No. 17-CV-970 (JDB/GMH), 2018 WL 4761625, at \*19 (D.D.C. July 26, 2018), report and recommendation adopted, No. CV 17-970 (JDB) (GMH), 2018 WL 5044245 (D.D.C. Sept. 28, 2018) (no violation where IEP did not lapse). Accordingly, this claim must be dismissed.

**3. Did Respondent fail to provide the Student with an appropriate IEP and placement on February 26, 2020? If so, did Respondent act in contravention of 34 C.F.R. 300.320, Endrew F. v. Douglas County School District, 137 U.S. 988 (2017), and Hendrick Hudson Bd. of Educ. v. Rowley, 458 U.S. 176 (1982)? If so, did Respondent deny the Student a FAPE?**

Petitioner contended that the IEP did not contain: (1) appropriate language reflecting the Student's present levels of performance; (2) appropriate goals; (3) a recommendation for a sufficient amount of specialized instruction hours; (4) a recommendation for any amount of direct speech and language pathology services; and/or (5) a recommendation for a specific, evidence-based reading program. Petitioner contended that the recommended placement was therefore inappropriate for the Student.

By the January 13, 2020, IEP meeting, DCPS should have been concerned about the Student's lack of progress in its reading and writing programs, since the Student's reading levels did not improve during the 2019-2020 school year. In January, 2020, the Student was reading at level "D," even though the Student ended the 2018-2019 school year at Level "G." As pointed out by Witness A, this drop in reading level meant that genuine deliberation and reflection was needed by the IEP team about the efficacy of the

Student's reading and writing program. Witness A pointed out that it is not typical for a student with average cognitive abilities to decline in skills, and none of DCPS's witnesses disputed this assertion. Though the Student is average cognitively, his/her reading skills at the time of the IEP meeting were at the 1st percentile, lower than ninety-nine percent of his/her same-age peers. Clearly, the Student needed more reading intervention at DCPS to make sustained, meaningful progress in reading.

However, at the IEP meeting, DCPS was primarily concerned about the Student's exposure to typically developing peers. As a result, DCPS recommended that the Student receive *less* intensive specialized instruction than s/he was offered previously. At the hearing, Witness L stated that DCPS's position was that the Student would learn to read if s/he were exposed more to typically developing peers. However, DCPS's other witnesses did not express this sentiment, perhaps because the Student had been consistently exposed to his/her non-disabled peers during the 2017-2018, 2018-2019, and 2019-2020 school years, during which time the Student made little sustained progress in reading. There is nothing in the record to suggest that the Student would suddenly be able to learn to read merely by being near non-disabled peers in large general education classes.

Instead, the record makes clear that to make progress in reading, the Student needed additional small group reading intervention. The Student's general education teachers told Witness K that the Student does better in small groups, regardless of subject (P-15-9), which makes sense in view of the Student's undisputed difficulties with focus, attention, and executive functioning. The IEP meeting should therefore have centered on how to provide the Student with additional, more intensive, small group reading

intervention. The team should also have discussed how, or whether, the Student could genuinely benefit from large general education classes that required students to read grade-level material, particularly when those general education classes were led by only one adult. As a result, this Hearing Officer finds that DCPS's IEP was not "cogent and responsive" to the Student's acknowledged needs in reading and writing, and therefore denied the Student a FAPE.

Petitioner's other concerns about the February 26, 2020, IEP are less persuasive. Petitioner did not mention concerns about this IEP's present levels in her closing argument, and Petitioner's concerns about the IEP's goals were similar to those she expressed about the June 12, 2019, IEP. Namely, Petitioner argued that the IEP's reading goals were not "evidence-based," that the reading and writing goals were not specific as to subjects such as decoding, spelling, or geometry, that the mathematics goals were not sufficiently comprehensive, and that there were no goals to address the Student's ADHD and executive functioning issues. While the Student certainly needed a more intensive reading program, the record does not establish that the program had to be "specific" or "evidence-based" to be successful. As noted, *supra*, school districts are ordinarily given some leeway in selecting academic methodologies for a student, even if that student is struggling. Additionally, as previously discussed, the Student's reading and writing goals anticipated instruction in areas that concerned Petitioner, including encoding and spelling. Moreover, while the Student's mathematics goals may not have addressed every mathematics issue the Student may have had at the time, there is no requirement for IEP goals to be so comprehensive that they address every single academic issue a student may have. Similarly, there is no requirement for an IEP to include executive functioning

or ADHD goals, especially where the IEP is written with accommodations to address executive functioning, such as access to fidgets, use of a reward system, and modified assignments.

Petitioner also contended that the February 26, 2020 IEP should have included a recommendation for speech-language pathology services. Petitioner contended that the Student had weaknesses in word retrieval, expressive language, and auditory processing, and needed speech-language pathology to address these deficits. Petitioner pointed to the independent speech-language assessment of November, 2019, where the Student scored at the 7th percentile in expressive language, 9th percentile in formulated sentences, 9th percentile in recalling sentences, and 16th percentile in understanding spoken paragraphs. Petitioner also argued that the Student's auditory processing skills were below average, and that the Student had poor scores in multiple areas of phonological awareness.

DCPS called Witness E and Witness F in support of its position on this issue. Witness E testified that the Student scored in the average range when DCPS tested the Student's expressive and receptive speech in or about May, 2019. Witness F tested the Student in or about November, 2019, and also found that the Student was functioning in the average range, according to the Receptive and Expressive Language Indexes on the CELF-5. The Student also received a "slightly below average" score on the TAPS-4, which addresses listening comprehension skills.

DCPS was therefore presented with two differing sets of equally persuasive data on the seriousness of the Student's speech-language issues. Under the circumstances, it was reasonable for DCPS to credit the report of Witness F over the November, 2019, independent speech-language assessment. Witness F was more familiar with the Student

than the author of the November, 2019, assessment, who did not appear at the IEP meeting and was not called as a witness in this proceeding to allow for cross-examination. Witness F instructed the Student every week in Witness I's pull-out classroom. Given the testimony of Witness E, the report of Witness F, and the testimony of Witness F, this Hearing Officer finds that DCPS's position regarding the eligibility of the Student for speech-language pathology was fair and reasonably calculated, especially considering that Petitioner herself discontinued the Student's direct speech-language pathology services at School B.

In sum, Respondent denied the Student a FAPE through the February 26, 2020, IEP only because it failed to provide a sufficient amount of specialized instruction.

**4. Did Respondent fail to implement the Student's 2019-2020 IEP(s)? If so, did Respondent's act or omission violate 34 C.F.R. Sect. 300.323(a) and principles established in cases such as Van Duyn v. Baker Sch. Dist. 5J, 502 F.3d 811, 822 (9th Cir. 2007)? If so, did Respondent deny the Student a FAPE?**

The Student was recommended for ten hours of specialized instruction per week outside general instruction in the June 12, 2019, IEP. Petitioner contended that the Student received less than ten hours of specialized instruction per week, and that approximately half of that specialized instruction was provided inside general education.

"Failure to implement" claims may be brought if an LEA cannot "materially" implement an IEP. The parent "must show more than a *de minimis* failure to implement all elements of that IEP, and, instead, must demonstrate that the school board or other authorities failed to implement substantial or significant provisions of the IEP."

Beckwith v. District of Columbia, 208 F. Supp. 3d 34, 39 (D.D.C. 2016) (citing to Houston Indep. Sch. Dist. v. Bobby R., 200 F.3d 341, 349 (5th Cir. 2000); Savoy v. District of Columbia, 844 F. Supp. 2d 23 (D.D.C. 2012) (holding no failure to implement

where district's school setting provided ten minutes less of specialized instruction per day than was required by the IEP); see also Van Duyn ex rel. Van Duyn v. Baker School Dist. 5J, 502 F.3d 811 (9th Cir. 2007). Courts applying the materiality standard have focused on the proportion of services mandated to those actually provided, and the goal and import (as articulated in the IEP) of the specific service that was withheld. Garmany v. Dist. of Columbia, 935 F. Supp. 2d 177, 181 (D.D.C. 2013). A parent does not have to prove harm in order to prevail on a claim that a school district failed to implement an IEP. Turner v. District of Columbia, 952 F. Supp. 2d 31, 40 (D.D.C. 2013).

There is no dispute that the Student's IEP from June, 2019, required ten hours of specialized instruction per week outside general education, or that DCPS provided the Student with only five hours of specialized instruction per week outside general education during the 2019-2020 school year, until the onset of the COVID-19 pandemic in March, 2020. Petitioner contended that the difference in delivery of services is material, since the Student is easily distracted in the general education environment and needs reading instruction in a small group. The record supports Petitioner on this issue. Testimony from Witness H makes clear that there is a substantial difference between specialized instruction inside general education and specialized instruction outside general education. At School A, the goal of services inside general education is to modify class lessons so that special education students can understand them. The instruction provided by Witness H in the general education setting was not designed to remediate the Student's issues with decoding and spelling. Witness H specifically testified that the Student needs pull-out instruction to be able to make meaningful gains in areas such as decoding and spelling.

Given the Student's poor academic performance during the 2019-2020 school year, this Hearing Officer finds that it was imperative for the Student to receive all ten hours of small-group pull-out instruction offered to him/her in the June 12, 2019, IEP. As a result, this Hearing Officer agrees with Petitioner that Respondent denied the Student a FAPE when it did not provide the Student with ten hours of specialized instruction outside general education during the 2019-2020 school year, through to March 29, 2020.

### **RELIEF**

As relief, Petitioner seeks tuition reimbursement for the 2020-2021 school year at School B, together with compensatory education.

#### **School B.**

When school districts deny students a FAPE, courts have wide discretion to ensure that students receive a FAPE going forward. As the Supreme Court stated, the statute directs the Court to "grant such relief as [it] determines is appropriate." School Committee of the Town of Burlington v. Dep't of Education, Massachusetts, 471 U.S. 359, 371 (1985). The ordinary meaning of these words confers broad discretion on a hearing officer, since the type of relief is not further specified, except that it must be "appropriate." If petitioners meet their burden of persuasion (D.C. Code Sect. 38-2571.03(6)(A)(ii), the school district may be required to pay for educational services obtained for a student by the student's parent, if the services offered by the school district are inadequate or inappropriate, the services selected by the parent are appropriate, and equitable considerations support the parents' claim, even if the private school in which the parents have placed the child is unapproved. Florence County School District Four et

al. v. Carter by Carter, 510 U.S. 7 (1993). Courts must consider “all relevant factors” including the nature and severity of the student’s disability, the student’s specialized educational needs, the link between those needs and the services offered by the private school, the placement’s cost, and the extent to which the placement represents the least restrictive educational environment. Branham v. District of Columbia, 427 F.3d 7, 12 (D.C. Cir. 2005).

As discussed, the Student’s primary need for the 2020-2021 school year was to improve in reading and writing. Petitioner therefore placed the Student at School B, which specializes in providing remedial instruction in reading and writing to students with average cognitive ability. At first, the Student did not make significant gains, even though reading instruction was provided in a dyad, because the Student was not paying enough attention. The school then switched the Student’s reading instruction to daily 1:1 sessions with a certified reading teacher using the Orton-Gillingham methodology. This change resulted in the Student making progress in reading and writing during the 2020-2021 school year, especially in reading rate and fluency. On September 21, 2020, the Student had an accuracy rate of seventy-seven percent in decoding a level “H” passage (fourteen correct words per minute) but improved to an accuracy rate of eighty-nine percent on the same kind of passage (thirty-three correct words per minute) on January 21, 2021. By this time, the Student had showed growth in reading words with digraphs, words with two consonants separated by a vowel, words with two vowels separated by two consonants, and words with a silent “e” vowel pattern, as well as in reading fluency and generating a topic sentence.

Moreover, School B provided the Student with small class sizes in all classes, and reduced reading demands in classes that involved “reading to learn.” All of the Student’s classes contained less than ten students, and the Student’s social studies lessons were taught via a “club” class, which was not based on reading. DCPS insisted that the Student needs to be in general education classes all day, and Witness L went so far as to state that only intellectually disabled students and students who are “really, really” having difficulties should be in self-contained classes, because children learn from other children. But the Student was not making enough progress in the general education environment, where the Student would compare him/herself to the general education students. At School B, the Student was happier because s/he felt less stigmatized and fit in with the other students. This Hearing Officer therefore finds that Petitioner’s choice to send the Student to School B for the 2020-2021 school year was reasonably calculated, and therefore “proper” under the IDEA.

Tuition reimbursement may be reduced or denied when parents fail to raise the appropriateness of an IEP in a timely manner, fail to make their child available for evaluation by the district, or upon a finding of unreasonableness with respect to the actions taken by the parents. 20 U.S.C. Sect. 1412(a)(10)(C)(iii). With respect to parents’ obligation to raise the appropriateness of an IEP in a timely manner, the IDEA provides that tuition reimbursement may be denied or reduced if parents neither inform the IEP team of their disagreement with its proposed placement and their intent to place their child in a private school at public expense at the most recent IEP meeting prior to their removal of the child from public school, nor provide the school district with written notice stating their concerns and their intent to remove the child within ten business days

before such removal. 34 C.F.R. Sect. 300.148(d)(i), (ii). Under 20 U.S.C. Sect. 1412(a)(10)(C)(iii), a denial or reduction in reimbursement is discretionary.

To the extent that Respondent argued that an award of tuition reimbursement should be reduced or denied because of equities, this Hearing Officer finds that Petitioner cooperated with Respondent's staff throughout the IEP process, provided Respondent with notice of the unilateral placement, and allowed the Student to be evaluated and observed. Respondent suggested that tuition should be reduced because Petitioner signed a contract with School B in or about March, 2020, but Respondent failed to explain how Petitioner could possibly have secured a spot for her child at School B without providing the school with a down payment before the school year began. Petitioner therefore prevails and is awarded tuition reimbursement for all services provided by School B for the 2020-2021 school year, including all expenditures relating to related services.

**Compensatory Education.**

Petitioner also requested compensatory education for the Student. Under the theory of compensatory education, courts and hearing officers may award "educational services to be provided prospectively to compensate for a past deficient program." Reid v. District of Columbia, 401 F.3d 516, 521-23 (D.C. Cir. 2005). In every case, however, the inquiry must be fact-specific and, to accomplish IDEA's purposes, the ultimate award must be reasonably calculated to provide the educational benefits that likely would have accrued from special education services the school district should have supplied in the first place. Id., 401 F. 3d at 524; see also Friendship Edison Public Charter School v. Nesbitt, 532 F. Supp. 2d 121, 125 (D.D.C. 2008) (compensatory award must be based on a "qualitative, fact-intensive" inquiry used to craft an award "tailored to the unique needs

of the disabled student”). A Petitioner need not “have a perfect case” to be entitled to a compensatory education award. Stanton v. District of Columbia, 680 F. Supp. 201 (D.D.C. 2011).

Through the plan of Witness A (P-36), Petitioner seeks compensatory education for the Student corresponding to the time period from March 25, 2019, to June, 2020. Petitioner seeks 240 hours of reading instruction, 107 hours of mathematics instruction, 107 hours of writing instruction, 214 hours of work with an executive functioning coach or tutor, thirteen hours of occupational therapy, and 120 forty-five-minute sessions of speech-language pathology.

However, the time period corresponding to the compensatory education plan is not consistent with the findings in this HOD. The only claim eligible for a compensatory education award is the claim that Respondent failed to implement the June 12, 2019, IEP through to the onset of the COVID-19 pandemic. (There is no claim that the Student failed to receive the appropriate amount of specialized instruction during virtual instruction). During this time period, the Student missed approximately 130 hours of specialized instruction in a small group. It is fair to construe Petitioner’s request for compensatory education as a request for individual tutoring, since there is nothing in the record to suggest that Petitioner could arrange for the services to be provided in a small group session. To this Hearing Officer, the requested 454 hours of intensive individual tutoring more than make up for the loss of 130 hours of small-group instruction. Under the circumstances, this Hearing Officer will reduce the requested award by approximately one-half, to 228 hours of academic tutoring, consisting of 120 hours of reading tutoring, fifty-four hours of academic tutoring in mathematics, and fifty-four hours of academic

tutoring in writing. All other requests by Petitioner for compensatory education do not correspond with the findings in this HOD, which dismisses claims relating to the Student's need for speech-language pathology, occupational therapy, and executive functioning and ADHD goals. These other requests are all accordingly denied.

## VII. Order

As a result of the foregoing:

1. Respondent shall pay for the Student's attendance at School B for the 2020-2021 school year;
2. Respondent shall pay for 228 hours of academic tutoring for the Student, consisting of 120 hours of reading tutoring, fifty-four hours of academic tutoring in mathematics, and fifty-four hours of academic tutoring in writing, to be provided by a certified special education teacher at a reasonable and customary rate in the community;
3. All other requests for relief are hereby denied.

Dated: May 21, 2021

Michael Lazan  
Impartial Hearing Officer

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

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

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

Date: May 21, 2021

*Michael Lazan*  
Impartial Hearing Officer