

District of Columbia
Office of the State Superintendent of Education
Office of Dispute Resolution
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Confidential

District of Columbia Public Schools)	Case No. 2021-0200
)	
Petitioner,)	Hearing Dates: February 17-18, 2022
)	March 29-30, 2022
v.)	
)	
Parents on behalf of Student¹)	Conducted by Video Conference
)	
Respondents.)	Date Issued: May 9, 2022
)	
)	Terry Michael Banks,
)	Hearing Officer

HEARING OFFICER DETERMINATION

INTRODUCTION

Respondents are the parents of an X-year-old student (“Student”) attending the School A. On December 20, 2021, Petitioner, the District of Columbia Public Schools (“DCPS”), filed a Due Process Complaint (“*Complaint*”) asserting that the Individualized Education Programs (“IEP”) and placements it proposed on or about April 29, 2021 and May 10, 2021 for Student for the 2021-22 school year were appropriate, that it had offered Student a free appropriate public education (“FAPE”), and requested the Hearing Officer to find that “DCPS proposed an appropriate IEP and placement in the least restrictive environment (“LRE”), that the LEA made a FAPE available to the student, and that [School A] is not proper, appropriate, or the LRE for the student.”

On January 10, 2022, Respondents filed *Respondents’ Motion for Leave to file Response, Motion to Dismiss Petitioner’s Due Process Complaint and Response to Due Process Complaint*. In their *Response* to the *Complaint*, Respondents denied that DCPS had provided Student a FAPE for the 2021-22 school year.

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

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.

PROCEDURAL HISTORY

On June 21, 2021, Hearing Officer Lazan issued a Hearing Officer Decision (“HOD”) involving Student². The first issue in that proceeding was “Did Respondent fail to provide the Student with an appropriate IEP for the 2020- 21 school year.” The second issue was “Did DCPS fail to provide the Student with an appropriate educational placement for the 2020-21 school year?”³ In dismissing the Complaint in that matter, as to the IEP, Hearing Officer Lazan concluded that “DCPS reasonably calculated the Student’s IEP in April 2020. Accordingly, Petitioners’ claims pertaining to the April 2020 IEP must be dismissed.”⁴ As to DCPS’ proposed placement, Hearing Officer Lazan ruled as follows:

Witness I and Witness F, both from School A, testified that the school could implement the provisions of the Student’s IEP. Petitioners did not argue that School A was unable to implement the IEP or explain how this placement-based claim could be upheld if the Student’s IEP was deemed to offer the Student a FAPE [free appropriate public education], or even clearly reference this claim during closing argument. This claim must therefore be dismissed.⁵

On July 12, 2021, Respondent’s filed an appeal from Hearing Officer Lazan’s ruling in federal court.⁶

On December 20, 2021, the DCPS filed a Due Process Complaint asserting that the IEP and placement it proposed April 29, 2021 and May 10, 2021 for Student for the 2021-22 school year were appropriate, that it had offered Student a FAPE, and requested that the Hearing Officer find that “DCPS proposed an appropriate IEP and placement in the least restrictive environment (“LRE”), that the LEA made a FAPE available to the student, and that [School A] is not proper, appropriate, or the LRE for the student.”

On January 10, 2022, Respondents filed *Respondent’s Motion for Leave to File a Response, Motion to Dismiss Due Process Complaint and Response to Due Process Complaint*. In its *Response*, Respondents argued that DCPS has not provided Student a FAPE for the 2021-22 school year because Student requires a full-time specialized instruction program as is provided at School A. In its *Motion to Dismiss*, Respondents argued that the *Complaint* fails to state a claim on which

² ODR Case No. 2020-0151 (June 21, 2021); R15:1 (191).

³ R:15:5 (195).

⁴ *Id.* at 28 (218).

⁵ *Id.* at 29 (219).

⁶ Civil Action No. s1:21-cv-01856 (D.D.C. filed 7/12/21).

relief may be granted, and that the issues in dispute are currently within the sole jurisdiction of the U.S. District Court, citing the Supremacy Clause of the Constitution.

On January 11, 2022, DCPS filed *District of Columbia Public Schools' Opposition to Respondents' Motion to Dismiss* (“*Opposition*”). DCPS related that Petitioners have filed five Complaints since 2018, and two recent HODs involving Student were resolved in favor of DCPS; the latest was Hearing Officer Lazan’s on June 21, 2021. DCPS asserted that in a prior proceeding, Hearing Officer Vaden issued an order ruling that DCPS was authorized to file a similar Due Process Complaint pursuant to 34 C.F.R. Section 507(a).⁷ DCPS also disputed Respondents’ argument that the federal proceeding deprives this Hearing Officer of jurisdiction. DCPS cited Hearing Officer Seat’s ruling in a case not involving Student, that the claim could be maintained contemporaneously, because “there will be no difficulty in avoiding double recovery should it come to that.”⁸ DCPS argued that it is stuck in a cycle where its IEPs and placements are found to be appropriate by Hearing Officers, but due to the stay-put provisions of IDEA⁹ and the lack of prompt resolution of federal appeals of these decisions, “DCPS is entitled to a ruling which it may use to eliminate once and forever the financial payments for a placement which has been found to be not appropriate by IHO Lazan.”

On January 29, 2022, I issued an Order dismissing the *Motion*. The grounds for the ruling were (1) the *Complaint* adequately provided a description of the problem of the child, (2) the request for relief was for more than an “advisory opinion,” and (3) the pendency of a federal appeal of an HOD involving the child’s 2020-21 IEP did not preclude adjudication of claims involving the child’s 2021-22 IEP.

On March 22, 2022, Respondents filed a second Motion to Dismiss (“*Second Motion*”). Respondents asserted that as a result of the delay in completing the hearing, the expiration of the student’s IEP and the subsequent development of a new IEP for Student mooted the proceeding. Respondents argued that due to Student’s Stay Put rights, due both to the duration of this proceeding and their Stay Put motion in the federal case, Student’s placement and funding for the 2021-22 school year were no longer at issue. Respondents also reported that DCPS developed a new IEP for Student on March 17, 2022, thereby mooting the issue of the appropriateness of the May 10, 2021 IEP at issue in this proceeding. Finally, Respondents argued that the Supremacy Clause precluded this Hearing Officer’s authority to adjudicate matters that were currently before the federal court for decision.

On March 25, 2022, DCPS filed *District of Columbia Public Schools' Opposition to Respondent's Second Motion to Dismiss* (“*Second Opposition*”). DCPS argued (1) that the issue of dismissal was resolved with my Order on January 29, 2022, (2) the Supremacy Clause does not apply to this proceeding, and (3) the issue of reimbursement, which is inextricably linked to the appropriateness of the IEP, remains at issue.

⁷ ODR Case No. 2021-0108.

⁸ ODR Case No. 2019-0108.

⁹ IDEA’s Stay-Put provisions require that “during the pendency of any proceedings conducted pursuant to this section, unless the State or local educational agency and the parents otherwise agree, the child shall remain in the then-current educational placement of the child, or, if applying for initial admission to a public school, shall, with the consent of the parents, be placed in the public school program until all such proceedings have been completed.” 20 U.S.C. §1415(j).

On March 27, 2022, I issued an Order on Second Motion to Dismiss denying the *Second Motion*, ruling that the new IEP did not moot the issues in dispute in this proceeding.¹⁰

The prehearing conference in this case took place by video conference on January 12, 2022. The Prehearing Order was issued that day.

The due process hearing was conducted on February 17-18, 2022 by video conference. The hearing was closed to the public at Respondents' request. Petitioner filed disclosures on February 10, 2022 containing a witness list of seventeen witnesses and proposed Exhibits P1-P38. Respondents filed objections to Petitioner's exhibits on February 15, 2022. Respondents objected to proposed expert testimony from two witnesses who ultimately did not testify. Respondents also objected to the following exhibits: P1-P13, P15-P24, P27, and P 38 on the grounds of relevancy, and P25, P26, P29, P31, P32, and P36 on grounds of lack of authentication. Petitioner's Exhibits P2-P11 and P14-38 were admitted into evidence.

Respondents filed disclosures on February 10, 2022, containing a witness list of five witnesses and documents R1 through R-32. DCPS filed objections to Respondent's disclosures on February 15, 2022. DCPS objected to the designation of Witness L and Witness J as expert witnesses on the grounds of their qualifications. DCPS also objected to the following exhibits: R2, R3, R5, R7, R12, R14, R16-17, R19-32. When the hearing could not be completed in the two days that were scheduled, the parties agreed to conduct two additional days of hearings on March 29-30, 2022. On February 24, 2022, Respondents filed Respondents' *Motion to Supplement Disclosure* to add an expert witness and her *curriculum vitae*. Respondents filed a corrected set of disclosures on February 28, 2022 including Exhibits R1-R32 as well as the supplemental proposed Exhibit R33. On March 22, 2022, Respondents' filed *Respondents' Memorandum of Authorities in Support of the Admission of Evidence*. DCPS filed no response to the supplemental disclosure, and I granted the motion by an Order on March 27, 2022. Respondents' Exhibits R1-R19, R21-R29, and R31-R33 were admitted into evidence.

Petitioner presented as witnesses in chronological order: Witness A, Witness B, Witness C, Witness D, Witness E, Witness F, and Witness G. Witness A was admitted as expert in Psychology, Witness B was admitted as expert in Special Education, Witness C was admitted as an expert in Social Work, Witness D and Witness E were admitted as experts in Special Education, Witness F was admitted as an expert in Occupational Therapy, and Witness G was admitted as an expert in Special Education.

Respondents presented as witnesses in chronological order: Witness H, Witness J, Respondent/mother, Witness K, and Witness L. Witness H was accepted as an expert in Special Education, Witness J was admitted as an expert in Occupational Therapy, Witness K was admitted as an expert in Psychology, and Witness L was accepted as an expert in Special Education. At the conclusion of Respondents' direct case, Petitioner offered rebuttal testimony from Witness A and Witness E. Counsel for the parties provided oral closing arguments.

¹⁰ On May 5, 2022, I issued an Amended Order on Second Motion to Dismiss to correct references to the parents as "Petitioners" instead of "Respondents."

On March 29, 2022 DCPS filed a copy of *K.W v. District of Columbia*.¹¹ On April 8, 2022, Petitioner filed *District of Columbia Public Schools’ Case Citations*, and Respondents filed *Respondents’ Closing Authorities*.

ISSUES

As identified in the *Complaint* and the *Prehearing Order*, the issues to be determined in this case are as follows: whether DCPS provided Student an appropriate IEP (providing fifteen (15) hours of specialized instruction outside of general education) and placement on or about April 29, 2021 and May 10, 2021 for the 2021-22 school year.

FINDINGS OF FACT

1. Student is X years old and was in grade A at School A during the 2020-21 school year.¹²

2. On or about January 8, 2018, Examiner A of Facility A completed a Report of Neuropsychological Evaluation of Student at Respondents’ request.¹³ At the time, Student was in grade E at School B, a private pre-K-8 school, where s/he had repeated the previous grade due to concerns that s/he was socially, emotionally, behaviorally, and academically not ready for the increased structure and expectation of the next grade. Student was reported to require one-on-one support from his/her teacher to remain on task. Respondent/mother (“Mother”) was concerned that Student was behind her/his peers academically, particularly in reading.¹⁴ On the Wechsler Intelligence Scale for Children (“WISC-V”), Student scored in the High Average range in Verbal Comprehension (113), in the Average range in General Ability Index (98), Fluid Reasoning Index (94), Full Scale IQ (93), and Working Memory Index (91), slightly Below Average in Visual Spatial Index (89), and Below Average in Processing Speed (80).¹⁵ His/her overall social and emotional functioning were age-appropriate according to parent and teacher rating scale responses.¹⁶ Testing revealed weaknesses in attention and executive function:

In testing, selective attention was age-appropriate for accuracy, though this task was completed at a much slower pace reflecting attentional inefficiency. Similarly, [Student’s] performance on a sustained auditory attention task fell in the low range, with even greater difficulty simultaneously dividing [his/her] attention between auditory and visual stimuli. [Student] also demonstrated difficulties in areas of emerging executive function. Specifically, [Student] demonstrated impaired performance on tasks of impulse control/behavioral regulation, cognitive flexibility, and task initiation...¹⁷

¹¹ 385 F.Supp. 3d 29 (D.D.C. 2019).

¹² Respondents’ Exhibits (“R:”) 11 at page 1 (145). The exhibit number and exhibit page numbers are followed by the electronic page number in the disclosure in parentheses, i.e., R11:1 (145).

¹³ R2:1 (23).

¹⁴ *Id.* at 2 (24).

¹⁵ *Id.* at 11 (33).

¹⁶ *Id.* at 4 (26).

¹⁷ *Id.*

[Student's] attention challenges are notable, with significant difficulties evidenced in the context of this individualized testing session and significant reported challenges at school as well. [Student] presents with a pattern of inattention that includes difficulties with sustained and divided attention, distractibility, problems with planning and organization, problems with multi-step tasks/instructions, difficulty sustaining mental effort, as well as poor initiation and/or sluggishness/variability in response speed that is common to children with attention problems. Furthermore, [s/he] also presents with noted symptoms of hyperactivity and impulsivity (both verbal and behavioral) in the context of this evaluation as well as in [her/his] regular classroom.¹⁸

Student's phonological awareness, automatic naming performances, and phonological decoding were age-appropriate. Student's word reading and comprehension were below grade expectation, while his/her math and writing performances were at grade level.¹⁹

Examiner A diagnosed Student with Attention Deficit Hyperactivity Disorder ("ADHD"), a Specific Learning Disability ("SLD") with impairment in reading, and a Developmental Motor Coordination Disorder. Due largely to concerns that Student's inattention, impulsivity, and hyperactivity would have on her/his ability to learn, Examiner A opined that Student's

... [c]urrent private school placement may be unable to meet the level of individualized instruction and support that [s/he] requires. [Student] would be best served by a private school with a particular expertise in educating children with learning differences, such as [School A] or a similar program.

[Student] requires research-based reading intervention delivered in a small group and/or individual setting. [Student] should work regularly with *a reading specialist who will provide a multi-sensory research-based reading intervention*. This intervention should target both phonological awareness/decoding as well as more applied reading skills. The intervention should be delivered in a systematic and explicit manner, with consistent correction and reinforcement, 5 days per week in order to be effective. Programs meeting these requirements include: *Orton-Gillingham, Lindamood Bell, Seeing Stars, Phonographix, and the Wilson program*.²⁰

Examiner A also recommended 14 classroom accommodations including, but not limited to, providing small group environment free of distractions, high levels of classroom organization and structure, preferential seating, movement breaks, assistance starting tasks, breaking larger tasks into smaller, more manageable chunks, strategies to minimize inattentive errors, step-by-step verbal, visual, and written instructions, a written checklist with a visual schedule of steps required to complete a task, multimodal presentation of information, and prompts to turn in completed work.²¹

¹⁸ *Id.* at 5 (27).

¹⁹ *Id.*

²⁰ *Id.* at 6 (28), emphasis supplied in the text.

²¹ *Id.* at 7-8 (29-30).

3. On July 10, 2018, DCPS conducted an Initial IEP meeting. The IEP team classified Student with Multiple Disabilities (“MD”): SLD and Other Health Impairment (“OHI”).²² The IEP team determined the Areas of Concern to be in Mathematics, Reading, Written Expression, and Motor Skills/Physical Development. In Mathematics, the Present Levels of Performance (“PLOPs”) revealed that Student score in Broad Math (95), Math Calculation (99), Math Reasoning (92) and Math Fluency Skills (92) on a Woodcock-Johnson Test of Achievement (“WJ-IV”) were in the average range. The IEP team developed three Math goals.²³ In Reading, the PLOP indicated that Student scored in the Average range in Phonic Skills (96), in the Low Average range in Basic Reading (87) and Decoding (83), and in the Low Range in Reading Comprehension (78) on the WJ-IV. On the Gray Oral Reading Tests (“GORT-5”), Student’s score on the Oral Reading Test (76), which is comprised of fluency and comprehension, was in the Poor range. The IEP team developed four Reading goals.²⁴ In Written Expression, Student’s WJ-IV scores were in the Average range in Writing Skills (97) and Spelling (93). The IEP team developed three Written Expression goals.²⁵ The IEP team prescribed 5.5 hours per week of specialized instruction in Reading outside general education, 5 hours per week of specialized instruction of Math and Written Expression inside general education, one hour per week of Occupational Therapy (“OT”) outside general education, and 30 minutes per month of OT consultation services.²⁶

The IEP team also prescribed Other Classroom Aids and Services:

Given [Student’s] strong verbal reasoning skills, [s/he] would respond best with verbal instruction. [Student] would benefit from the use of explicit instruction, such as, clear modeling of the solution specific to the problem, thinking the specific steps aloud during modeling, presenting multiple examples of the problem and applying the solutions to the problems, and providing immediate corrective feedback to the [student on his/her accuracy] would be the best way to approach instruction with [her/him]. [Student] also benefits from an environment with limited distractions (visual and auditory), strategic seating, teacher proximity, positive peer modeling, increased environmental structure (building in routines for everyday activities), prompting, supportive signals or cue that remind [Student] to initiate an activity, chunking (breaking up activities into small units), redirection, prompting, breaks and frequent follow-ups or check-ins, alerting cues and accompanying oral directions with written or visual directions, repetition of instructions, and repetition of tasks for improvement memory/knowledge acquisition. [Student] should use a slant board whenever possible. [Student] should work in a well-lit area and use worksheets that are clear copies. [Student] should have the use of enlarged graph paper for math computations to aid in spacing and alignment. Computation signs should be highlighted. [Student] should write on wide format paper with lines. When working with printed materials, there should be space in between questions. [Student] should be able to write [her/his] answers in a test booklet, and should be

²² Petitioner’s Exhibits (“P:”) 8 at page 1 (46). The exhibit number and exhibit page numbers are followed by the electronic page number in the disclosure in parentheses, i.e., R11:1 (145).

²³ *Id.* at 5-6 (50-51).

²⁴ *Id.* at 6-9 (51-54).

²⁵ *Id.* at 9-10 (54-55).

²⁶ *Id.* at 14 (59).

given additional time to complete assignments and tests. Preferential seating.
Minimize chalkboard-to-desk copying.²⁷

4. On July 27, 2018, DCPS amended Student's IEP by increasing his/her specialized instruction outside general education to 10 hours per week. The 5 hours per week of specialized instruction inside general education, one hour per week of OT outside general education, and 30 minutes per month of OT consultation services remained unchanged. The IEP team also added the following to the Other Classroom Aids and Services that it adopted on July 10, 2018: "[Student] needs a visual time for tasks, particularly if they are 5-10 minutes in duration. [Student] sometimes sits in a chair that faces backwards, allowing pressure against [his/her] chest. [Student] also benefits from a visual schedule and visual checklist. Visual aids should have pictures as well."²⁸

5. On August 6, 2018, Respondents notified DCPS of their rejection of the July 27, 2018 IEP, that they were unilaterally placing Student at School A, and that they expected DCPS to fund that placement.²⁹ On January 28, 2019, Respondents filed a due process complaint alleging that the July 2018 IEP was inappropriate.³⁰ Three days later, DCPS notified Respondents that having offered Student a FAPE, it would not agree to fund the private placement.³¹ Hearing Officer Peter B. Vaden found that DCPS met its burden of proving that a special school, where Student would be segregated from nondisabled peers, is not Student's LRE.³² Hearing Officer Vaden found that the Other Classroom Aids and Services in the IEP adequately addressed Student's attentional and executive function deficits.³³ He rejected Examiner A's recommendation that Student would be "best served" in a private school as not being the IDEA standard for IEP appropriateness.³⁴ However, Hearing Officer Vaden found that Student's reading deficits were so severe that the IEP needed to specify a particular teaching methodology to address it.³⁵ Student's IEP did not identify any reading program or methodology to address Student's severe dyslexia, or specify how the 15 hours of specialized instruction would be tailored to address Student's reading deficits.³⁶ As DCPS failed to provide an appropriate IEP, Respondents were entitled to reimbursement for the expenses incurred for the unilateral placement in light of the Hearing Officer's finding that School A was reasonably calculated to enable Student to make progress appropriate in light of his/her circumstances.³⁷

²⁷ *Id.*

²⁸ P9:15 (80).

²⁹ Case No. 2019-0024 (May 24, 2019), R3:13 (49).

³⁰ R3:1 (37).

³¹ *Id.* at 13-14 (49-50).

³² *Id.* at 20 (56).

³³ *Id.* at 18-19 (54-55).

³⁴ *Id.* at 19 (55). Hearing Officer Vaden stated that "the Act does require that children with disabilities be included in school programs with nondisabled children, to the maximum extent appropriate," citing *Board of Education of the Hendrick Hudson Central School District v. Rowley*, 458 U.S. 176, 200 (1982) and *Moradnejad v. District of Columbia*, 177 F.Supp. 3d 260, 273 (D.D.C. 2016).

³⁵ R3:20-21 (56-57).

³⁶ *Id.* at 22 (58). Hearing Officer Vaden acknowledged that parents do not have a right to compel an LEA to provide a specific program or methodology, citing *David G. v. Council Rock School District*, 2011 WL 7678685 (E.D.Pa. Dec. 23, 2011), *report and recommendation adopted*, 2012 WL 1231812 (E.D.Pa. Apr. 12, 2012, and *Lachman v. Illinois Board of Education*, 852 F.2d 290, 297 (7th Cir. 1988). "I do not decide here what reading program is required for Student, only that given Student's acknowledged need for an intense reading intervention, an IEP which does not specify a methodology or provide for a reading program is not adequate." R3:22, n.2 (58).

³⁷ *Id.* at 25 (61), citing *Leggett v. District of Columbia*, 793 F.3d 59, 71 (D.C. Cir. 2015), which cited *Rowley*, 458 U.S. at 207.

6. On August 6, 2019, DCPS conducted an IEP Annual Review.³⁸ The Reading PLOP revealed that Student's instructional level was at the grade level that s/he just competed, but "[s/he] still needs to improve reading fluency, intonation, and using punctuation to improve [her/his] oral reading pace."³⁹ The IEP prescribed 15 hours of specialized instruction, all outside general education, with five of those hours specified for Reading. The other existing services were unchanged.⁴⁰

7. On August 9, 2019, Respondents' counsel notified DCPS that Student would attend School A for the 2019-20 school year and requested funding for the placement from DCPS.⁴¹

8. On April 7, 2020, when Student was in grade F at School A, DCPS conducted an IEP Annual Review.⁴² The Reading PLOP indicated that Student's instructional level was grade A, one grade above Student's grade at that time.⁴³ His/her instructional level for Math was "Not documented,"⁴⁴ but was at grade level for Written Expression.⁴⁵ In Motor Skills/Physical Development, the PLOP included the following regarding Student's executive functioning and attention:

[Student] reportedly continues to make progress in the area of functional independence. [S/he] is able to complete all steps and proper sequence for tying shoelaces, although often without adequate tension to keep the knot intact... [S/he] requires assistance to organize [her/his] belongings within [his/her] backpack, cubby, and workspace when working with multiple tools and materials. [Student] reportedly benefits from a timer and/or written schedule to help [her/him] stay focused on tasks, due to fleeting sustained attention.⁴⁶

The baselines were: (1) s/he is able to sustain sitting posture without movement, head propping, etc. during a writing task for 5 minutes; moderate verbal cues and demonstration assist with pacing, (2) needs assistance with cursive connections to form short words, cues to edit work for reversals and sizing errors, emerging typist, and (3) per therapist report, s/he benefits from cues to establish and follow school routines. The goals were: (1) s/he will demonstrate functional neuromotor and motor planning skills to participate in school-based tasks, (2) s/he will demonstrate functional visual perceptual motor skills as demonstrated by mastery objectives with adaptations, and (3) with adaptations/accommodations as needed, s/he will demonstrate functional independence with participating in school based tasks.⁴⁷

³⁸ P15:1 (147).

³⁹ *Id.* at 7 (153).

⁴⁰ *Id.* at 15 (161).

⁴¹ P17:1 (169).

⁴² P22:1 (181).

⁴³ *Id.* at 8 (188).

⁴⁴ *Id.* at 4 (184).

⁴⁵ *Id.* at 11 (191).

⁴⁶ *Id.* at 13 (193).

⁴⁷ *Id.* at 14-15 (194-95).

Student's proposed services were unchanged from the previous IEP.⁴⁸ The IEP team prescribed the following Other Classroom Aids and Services to support Student's executive functioning needs: (1) explicit instruction, *i.e.*, clear modeling of the solution specific to the problem, thinking the specific steps aloud during modeling, presenting multiple examples of the problem, immediate corrective feedback, (2) an environment of limited visual and auditory distractions, strategic seating near teacher, positive peer modeling, prompting, supportive signals or cues, chunking, redirection, breaks, frequent follow-ups or check-ins, alerting cues, oral directions with written or visual directions, repetition of instructions, and repetition of tasks for improvement in memory/knowledge acquisition, (3) visual timer for tasks, particularly if they are 5-10 minutes in duration, a visual schedule and checklist, visual aids with pictures, (4) interactive, hands-on, or laboratory learning activities, use of a slant board whenever possible, enlarged graph paper, and (5) wide format paper with lines, when working with printed materials, there should be space between questions, ability to write his/her answers in a test booklet, additional time to complete assignments and tests, minimize chalkboard-to-desk copying.⁴⁹

9. On May 14, 2020, Respondents notified DCPS that the April 7th IEP was inappropriate for Student and that Student would remain at School A for the 2020-21 school year.⁵⁰ On July 6, 2020, DCPS acknowledged Respondents' election of a unilateral private school placement for the 2020-21 school year, but did not agree to fund the placement.⁵¹

10. On August 27, 2020, Respondents filed a due process complaint alleging, *inter alia*, that DCPS failed to provide Student an appropriate IEP for the 2020-21 school year.⁵² Respondents argued that the IEP should have included an Area of Concern devoted to Student's executive functioning deficits. Hearing Officer Michael Lazan found no support in caselaw for a requirement for executive functioning goals, citing *Z.B. v. District of Columbia*.⁵³ Like the court, Hearing Officer Lazan accepted DCPS's testimony that Student's OT goals and Other Classroom Aids and Services adequately addressed Student's executive functioning needs.⁵⁴ Respondents also argued that Student required more than 15 hours of specialized instruction per week, and his/her executive functioning needs could be addressed successfully only in a small class environment where s/he could receive 1:1 instruction as needed. Hearing Officer Lazan disagreed:

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

Nor is there any clear and compelling evidence in the record that the Student could not manage some general education classes, with accommodations, at this point in his/her academic career. Witness D testified that the Student had mastered many of

⁴⁸ *Id.* at 16 (196).

⁴⁹ *Id.* at 17 (197).

⁵⁰ R15:1 at 14 (204).

⁵¹ P24:1 (203).

⁵² ODR Case No. 2020-0151 (June 21, 2021); R15:1 (191).

⁵³ 888 F.3d 515, 527 (D.C. Cir. 2018).

⁵⁴ R15:271 at 27 (217).

his/her reading goals, suggesting that s/he could now understand the reading materials in a general education classroom. The DCPS witnesses pointed out that the Student was on grade level in reading, writing, and mathematics at the time of the IEP meeting. They also urged that Student's executive functioning and attentional needs could be addressed in a general education setting with the accommodations mentioned in the IEP's "Other Classroom Aids and Services."⁵⁵

Respondents reiterated Student's need for a specific reading intervention methodology, the Orton-Gillingham Approach. Hearing Officer Lazan noted that School A had taken Student from "essentially not reading at all," to grade level proficiency, to having the issue of reading too fast. He accepted DCPS' witnesses' testimony that "Orton-Gillingham-based instruction in decoding is not especially relevant in determining a program to address fluency and comprehension."⁵⁶ In Written Expression, "the Student was considered to be a very capable writer who was working on grade-level material with supports and was able to write a four-sentence paragraph with a topic sentence and a concluding sentence."⁵⁷ Thus, Hearing Officer Lazan concluded that a general education classroom was Student's LRE:

Indeed, Petitioners should be commended for their efforts to manage and address their child's learning difficulties. However, the first question here is not whether [School A] was appropriate for the Student. The first question is whether the school district offered the Student a reasonably calculated IEP in April, 2020. While the school district's program may not have been the "best" program for the Student, the school district reasonably proposed this program in light of the child's growth in reading over the past few years. There is nothing in the record to suggest that the Student's reading issues would prevent him/her from understanding instruction in general education classes at [a DCPS school]. Additionally, the record suggests that the Student's executive functioning issues could be appropriately managed in the general education setting, particularly with the assistance of occupational therapy and a wide variety of pertinent accommodations.⁵⁸

11. On February 25, 2021, when Student was in grade A at School A, School A developed an IEP for Student.⁵⁹ In Reading, s/he was reported to be reading above grade level, but his/her proclivity to read too fast impairs his/her reading comprehension.

[Student] has made significant progress in the areas of reading fluency, text-level difficulty, decoding, and vocabulary development. [S/he] is currently reading on a beginning [grade D] reading level at a rate of 128 words correct per minute. This rate, although optimal when measuring speed, greatly affects [her/his] ability to comprehend what is written. [Student] will read so quickly, [s/he] will miss important information...

⁵⁵ *Id.* at 23-24.

⁵⁶ *Id.* at 25-26

⁵⁷ *Id.* at 26.

⁵⁸ *Id.* at 26-27, citing, *Z.B.*, 888 F.3d at 528 (states must ensure that removal of children with disabilities from the regular educational environment occurs only when the nature or severity of the disability of a child is such that education in regular classes with the use of supplementary aids and services cannot be achieved satisfactorily).

⁵⁹ R6:3 (77).

At this time, [Student] requires specialized small group instruction to address reading comprehension and encoding/spelling deficits. Impulsivity is [Student's] biggest weakness as [her/his] behavior limits [her/his] ability to complete tasks without errors and understand fully what [s/he] is reading. Currently, [Student] is unable to consistently and accurately answer various reading comprehension questions related to instructional levels texts. [Student] is able to spell words containing CVC and consonant digraph patterns, independently. However, [Student] is currently unable to independently spell words with spelling patterns containing vowel digraphs, diphthongs, and y as a vowel, consonant doubling and drop-e patterns.⁶⁰

Student was reported to be performing at grade level in Written Language. Her/his writing at grade level; s/he was proficient in cursive, but sometimes needed teacher support for capitalization and joining letters. S/he had difficulty with self-management during virtual learning, but when “in person, [s/he] has all [her/his] materials, finishes on time, and is organized in the small class setting and [s/he] uses the structure the classroom setting for modeling readiness behaviors... Occasional impulsivity is easily redirected by the teacher in this group setting.”⁶¹ Student was also reported to be on grade level in math.⁶²

12. On March 26, 2021, Witness A completed a Comprehensive Psychological Reevaluation.⁶³ On the Reynolds Intellectual Assessment Scales (“RIAS-2”), Student was High Average in Verbal Intelligence (111), and Average in Nonverbal Intelligence (100), Composite Intelligence (107), and Composite Memory (102).⁶⁴ On the WJ-IV in Reading, Student was Average in Broad Reading (104), Letter-Word Identification (100), Passage Comprehension (100), Sentence Reading Fluency, Word Attack (97), and Oral Reading (93). In Writing, s/he was Low Average in Broad Written Language (85), Spelling (83), and Writing Samples (84), and Average in Sentence Writing Fluency (97). In Math, Student scored in the Low Average range in Broad Math (88) and Calculation (88), and in the Average range in Math Facts Fluency (90), and Applied Problems (93). On the GORT-5, on the Oral Reading Index (94), “the most reliable score on the test,”⁶⁵ Student scored in the Average range. “[His/her] current performance is significantly improved from [his/her] last performance on the GPRT-5 in 2018, which fell within the Poor range (ORI=76).”⁶⁶ Student was Above Average in Reading Rate, Average in Fluency and Comprehension, and Below Average in Accuracy.⁶⁷

[Student's] reading speed was above [her/his] peers and compared to the last assessment [Student's] rate has increased significantly. [Student] no longer has to break down each syllable as [s/he] is reading as [s/he] had previously when [s/he] was evaluated. As [her/his] teachers also reported, [Student] tends to read too fast

⁶⁰ *Id.*

⁶¹ *Id.* at 4 (78).

⁶² *Id.* at 4-5 (78-79).

⁶³ P30:1 (286),

⁶⁴ *Id.* at 21 (306).

⁶⁵ *Id.* at 24 (309).

⁶⁶ *Id.*

⁶⁷ *Id.* at 25 (310).

in the classroom as well.⁶⁸

Witness A evaluated Student's attention on the Conners-3, with questionnaires completed by Student's mother and Teacher A and Teacher B. The teachers reported Very Elevated ratings on the Hyperactivity/Impulsivity subscale and Elevated ratings on the Inattention subscale. Student's mother reported Elevated ratings on the Hyperactivity/Impulsivity scale.⁶⁹ On the Behavior Rating Inventory of Executive Function ("BRIEF-2"), Teacher A's scores were Mildly Elevated on the Global Executive Composite, within normal limits on the Emotion Regulation Index, and potentially clinically elevated on the Cognitive Regulation Index. Student's mother's responses rated Student within normal limits on all three indices.⁷⁰

Witness A concluded that Student no longer had an SLD: "The test results indicate that [Student] is not performing significantly below [her/his] grade level and [his/her] academic abilities are currently commensurate with [his/her] cognitive abilities. Thus, [s/he] does not meet the criteria for a Specific Learning Disability.⁷¹ However, Witness A concluded that the elevated scores on the Conners-3 qualified her/him as OHI.⁷² Witness A provided 16 paragraphs of recommendations including, *inter alia*, that Student would benefit from breaking up activities into small units, extended time, breaks, small group or individual testing, clarification and repetition of directions, preferential seating in minimal distraction areas, redirection, and prompting. To discourage Student from rushing through work, Witness A suggested prescribing goals for accuracy.⁷³

13. On April 29, 2021, DCPS conducted an IEP Annual Review.⁷⁴ The Math PLOP reported that on an achievement test, s/he scored in the Average range in Applied Problems (93) and Math Facts Fluency (90), and slightly Below Average in Broad Math (88) and Calculation (87).⁷⁵ The Reading PLOP revealed that on a WJ-IV, s/he scored in the Average range in Broad Reading (104), Reading Identification (100), Passage Comprehension (100), Word Attack (97), and Sentence Reading Fluency (108).⁷⁶ In Written Language, the PLOP reported that on the WJ-IV, Student scored in the Average range in Sentence Writing Fluency (97), and in the Low Average range in Broad Written Language (85), Spelling (83), and Writing Samples (84).⁷⁷ The Motor Skills PLOP reported the following regarding Student's executive functioning and attention:

Some problems were identified in the areas of social participation and planning and ideation with functionally presents as challenges with organization of materials, in or around desk area, not performing tasks in proper sequence and/or failing to complete tasks with multiple steps... [S/he] was socially engaged and appropriate with [her/his] peer during break out room session and per parent report on the SPM

⁶⁸ *Id.* at 24 (309). Despite Witness A's finding that Student no longer qualified as a student with an SLD, the IEP team did change Student's classification.

⁶⁹ *Id.* at 26 (311).

⁷⁰ *Id.* at 28 (313).

⁷¹ *Id.* at 32 (317).

⁷² *Id.* at 33 (318).

⁷³ *Id.* at 34-36 (319-21).

⁷⁴ P34:1 (339).

⁷⁵ *Id.* at 3 (341).

⁷⁶ *Id.* at 6 (344).

⁷⁷ *Id.* at 10 (348).

there was no atypical presentation in the domain of social participation. Per teacher input, transitions are difficult in terms of gathering materials, attending to what [s/he] needs to gather in [her/his] locker and bringing appropriate materials to class. [S/he] will at times. Not realize the signs of transitions such as cleaning up and may need additional/direct verbal cues to complete an activity [s/he] is engaged in or stop reading and continue to next activity for example. [S/he] may benefit from consistent teacher prompt, timers, checklists to support transitions along with teacher check in that materials are gathered.⁷⁸

The baselines were: (1) s/he continues to need support for producing a legible cursive signature, (2) s/he has difficulty organizing and maintaining materials, organizing his/her work and often loses items, and continues to benefit from cues to complete routines, and (3) was observed to be moving a great deal during instruction, reportedly falling out of chairs, sometimes pacing in the classroom; retained primitive reflexes and decreased trunk strength for prone extension/supine flexion combined impact her/his ability to sustain a functional posture without increased movement. The goals were: (1) s/he will demonstrate functional fine and visual perceptual motor skills as demonstrated by mastery of objectives with adaptations, (2) with adaptations/accommodations as needed, s/he will demonstrate functional independence with participating in school-based tasks, and (3) s/he will demonstrate functional neuro/sensorimotor skills as demonstrated by mastery of objectives with adaptations as needed and no more than one prompt.⁷⁹

The services proposed for Student remained unchanged from the previous IEP.⁸⁰ An additional item was added to Other Classroom Aids and Services: s/he may benefit from alternative seating options to allow for subtle movement as well as isometric core strengthening.⁸¹

14. On May 10, 2021, DCPS reconvened the IEP team. DCPS proposed to provide all 15 hours of Student's specialized instruction outside of general education. Respondents found this unacceptable, stating that Student "still requires full-time academic programming."⁸²

15. On School A's Fall 2021 Assessment Summary, Student met grade-level expectations on all aspects of a Phonogram Assessment, a Real Words Assessment, a Nonsense Words Assessment, and a Red Word Reading Assessment, and s/he had mastered one of five categories on an Encoding Assessment *in the Fall of 2020*.⁸³ On a Leveled Reading Assessment, Student was able to read a grade-level passage independently with 100% comprehension as of September 20, 2021.⁸⁴ In Math, on a Comprehensive Mathematical Abilities Test ("CMAT"), Student scored in the Average range in Subtraction, Multiplication, Problem Solving, Charts/Tables/Graphs, and Rational Numbers, and in the Poor range in Addition and Division. On the CMAT Composite Quotients, Student was Average in Mathematical Reasoning (94) and Below Average in General Math (86) and Basic Calculations (83).⁸⁵

⁷⁸ *Id.* at 11 (349).

⁷⁹ *Id.* at 13 (351).

⁸⁰ *Id.* at 14 (352).

⁸¹ *Id.* at 15 (353).

⁸² P32:3 (327).

⁸³ R19:1-2 (231-32).

⁸⁴ *Id.* at 3 (233).

⁸⁵ *Id.* at 6 (236).

16. On or about November 19, 2021, when Student was in grade D, Witness K completed a Psychological Assessment Report on Student.⁸⁶ On the WISC-V, Student was Well Above Average in Verbal Comprehension (121), Average in Fluid Reasoning (109), Working Memory (103), Full Scale IQ (101),⁸⁷ and General Ability (108), Low Average in Processing Speed (86), and Below Average in Visual Spatial (84).⁸⁸ On the Test of Variables of Attention (“TOVA”), Student’s scores were “Consistent with an attentional control disorder.”⁸⁹ On the Delis Kaplan Executive Functioning System, Student’s scores were in the Average range in all subtests.⁹⁰ On the Rev Complex Figure Test, s/he scored in the Average range in Time to Copy, Low Average in Immediate Recall, and Extremely Low in Copy and Delayed Recall.⁹¹ On the Wide Range Assessment of Memory and Learning (“WRAMAL-2”), Student was High Average in Delayed Recognition, and Average in Immediate Recall and Delayed Recall.⁹² On the Feifer Assessment of Reading, s/he scored Extremely High in Silent Reading Fluency, Rate (150) and Above Average in Oral Reading Fluency (116) and Silent Reading Fluency, Comprehension (116). On the Test of Orthographic Competence, s/he was Low Average in Letter Choice and Below Average in Word Scramble.⁹³ On the Wechsler Individual Achievement (“WIAT-4”), Student scored in the Average range in Word Reading (113), Written Expression (86), Mathematics (89), Basic Reading (112), Decoding (112), Math Fluency (99), Phonological Processing (Pseudoword Decoding – 111) and Orthographic Processing (104), and Above Average in Dyslexia Index (119), and Below Average in Sentence Writing Fluency (83).⁹⁴ On the Conners Parent Edition, the parents scores reflected no elevated scales, while Teacher C’s and Teacher D’s scales, his/her Reading, Writing, and Math teacher and [her/his] History teacher, respectively, rated him/her Clinically Significant in Hyperactivity.⁹⁵

Witness K concluded that Student has a learning disability in spatial reasoning, which may impact her/his progress in geometry, chemistry, and physics, and in Written Expression.⁹⁶ Witness K also concluded that Student continues to present with ADHD: “[S/he] struggles to sustain close

⁸⁶ R29:1 (309). An IEP must be judged at the time it was developed. Evidence developed after the IEP may be relevant only if it sheds light on whether the IEP was objectively reasonable at the time it was created. *See, Roland M. v. Concord School Committee*, 910 F.2d 983, 992 (1st Cir. 1990) (“An IEP is a snapshot, not a retrospective. In striving for ‘appropriateness,’ an IEP must take into account what was, and was not, objectively reasonable when the snapshot was taken.” *See also, Z.B.*, 888 F.3d. at 523 (an IEP must be tailored to the student’s reasonably known needs at the time it is offered.); *S.S. ex rel. Shank v. Howard Road Academy* (585 F.Supp.2d 56, 66 (D.D.C. 2008) (“the measure and adequacy of an IEP can only be determined as of the time it is offered to the student... Neither the statute nor reason countenance ‘Monday Morning Quarterbacking’ in evaluating the appropriateness of a child’s placement”); *Thompson R2-J School District v. Luke P., ex rel. Jeff P.*, 520 R.3d 1143, 1149 (10th Cir. 2008) (Neither the statute nor reason countenance ‘Monday Morning Quarterbacking’ in evaluating the appropriateness of a child’s placement), citing, *O’Toole ex rel. O’Toole v. Olathe District Schools Unified School District No. 233*, 144 F.3d 692, 701-02 (10th Cir. 1998).

⁸⁷ “Not a valid, unified measure.” *Id.* at 24 (332).

⁸⁸ *Id.* at 23-24 (331-32).

⁸⁹ *Id.* at 24 (332).

⁹⁰ *Id.* at 25 (333).

⁹¹ *Id.*

⁹² *Id.*

⁹³ *Id.*

⁹⁴ *Id.* at 26 (334).

⁹⁵ *Id.* at 27-28 (335-36).

⁹⁶ Witness K opined that this disability, Dysgraphia, manifests in the following ways: (1) high rates of spelling errors, (2) below grade level composition skills that are severely discrepant from verbal reasoning ability, (3) difficulty encoding, (4) below average writing fluency, (5) difficulty planning and organizing text, (6) impaired copying ability, and (7) number reversals. *Id.* at 15 (29).

attention to non-preferred tasks such as writing or completing homework. [S/he] continues to demonstrate significant executive functioning difficulties... *[Student] will continue to require intensive phonics-based support targeting [his/her] identified areas of need: written expression and executive functioning:*"⁹⁷

[Student] has achieved critical reading goals and now excels at decoding, sight word recognition and comprehension. The focus of [his/her] supplementary aids and services can now shift towards intensive interventions for written expression and promoting executive functioning skills needed for middle and high school success. Goals addressing written expression should include targeting writing fluency and text organization.⁹⁸

17. Witness A, the DCPS School Psychologist, testified here that she testified in the proceeding before Hearing Officer Lazan that Student would benefit from a less restrictive environment, that nothing has changed that would cause her to change that opinion, and that the April 2021 IEP was appropriate. On cross-examination, Witness A testified that the 15 hours of specialized instruction provides ample support for student's deficits, and s/he would also benefit from a less restrictive environment.

18. Witness B, the Assistant Principal and Special Education Manager at School C, testified that School C, Student's neighborhood school, could implement Student's April 2021 IEP. It offers special education services as well as the OT services prescribed in the IEP. The 15 hours of specialized instruction outside of general education could be provided in a resource room, Student's case manager's classroom, or by another case manager, in 90 time blocks of Reading, Written Expression, or Math.

19. Witness C, a DCPS Social Worker, conducted an observation of Student at School A on March 17, 2021. She reported that in a 50-minute, virtual learning class with Teacher A, Student was appropriately on-task 97% of the time, 3% of the time s/he walked away from the screen. Student was engaged and participated throughout the period, and his/her behaviors were unremarkable.⁹⁹ Witness C testified that the April 2021 IEP more than meets Student's behavioral needs and that a more restrictive environment than the one prescribed in the IEP is not warranted.

20. Witness D, a DCPS Program Specialist, conducted an observation of Student at School A on September 5, 2020. In a 45-minute, virtual reading class with Teacher E and Teacher F, "Throughout the duration of the observation, the following were noted in respect to [Student's] behavior: Highly distractible, Alert, Inattentive, Impulsive, Talkative."¹⁰⁰ Witness D testified that in that classroom observation, Student was able to "get back on track" during the period. She also testified that she gave testimony before Hearing Officer Lazan that Student's April 7, 2020 IEP was appropriate; the 15 hours of specialized instruction, related services, and consultation services were adequate to meet Student's needs. Witness D also participated in the April 29, 2021 IEP meeting and agreed with the team that a less restrictive environment than Student has at School A would be more appropriate. On cross-examination, Witness D opined that Student's executive

⁹⁷ *Id.* at 14-16 (322-24), emphasis supplied in the text.

⁹⁸ *Id.* at 16 (324).

⁹⁹ P29:2 (285).

¹⁰⁰ P25:3 (206).

functioning deficits are adequately addressed in the Other Classroom Aids and Services section of the IEP, and that the parent agreed with the provisions in that section at the IEP meeting.

21. Witness E, another DCPS Program Specialist, also attended the April 29, 2021 IEP meeting. She concurred with Witness D that the Other Classroom Aids and Services adequately address Student's attentional and executive function deficits and were developed through collaboration with the parents and School A staff members. She also testified that Student has exhibited no behaviors indicating an inability to succeed in a general education classroom.

22. On June 14, 2018, Witness F, a DCPS occupational therapist, completed an Independent Occupational/Physical Therapy Assessment Review Report of an independent Occupational Therapy Evaluation conducted on February 12, 2018.¹⁰¹ At Student's Eligibility Meeting on June 25, 2018, Witness F opined that Student qualified for OT as a related service.¹⁰²

Witness F conducted a Comprehensive Occupational Therapy Evaluation on March 30, 2021. With respect to Student's deficits in attention and executive functioning, Witness F found that

[Her/his] sensory processing measures came back with a difference in performance between home and school, indicating there is slightly more of a challenge at school for [Student] to sustain a regulate state. In 2018, sensory processing in the school setting was found to be **Typical**, however, presently [s/he] reportedly has **Some Problems** at [School A]. Some problems were identified in the areas of social participation and planning and ideation which functionally presents as challenges with organization of materials, in, on, or around desk area, not performing tasks in proper sequence and/or failing to complete tasks with multiple steps... [S/he] was socially engaged and appropriate with [his/her] peer during break out room session and per parent report on the SPM there was no atypical presentation in the domain of social participation.¹⁰³

Witness F testified that she testified before Hearing Officer Lazan in support of the appropriateness of the April 2020 IEP. As for the April 29, 2021 IEP, Witness F testified that the Motor Skills section was developed in collaboration with the parents. The OT goals were designed to address Student's deficits in attention and executive functioning (organization, controlling his/her body in space). Witness F testified that there was no disagreement as to the adequacy of the OT goals or the classroom accommodations.

23. Witness G, DCPS' Manger of the Central IEP Team, testified that she also testified in support of the appropriateness of the 2020 IEP and participated in the April 29, 2021 IEP meeting. She testified here that the April 2021 IEP is appropriate because 15 hours of specialized instruction is adequate to address Student's needs in the three core areas of Math, Reading, and Written Expression, because s/he is already performing at grade level. The individualized attention s/he will get outside general education, along with the OT services and Other Classroom Aids and Services would also address his/her attentional and executive functioning deficits. Witness G

¹⁰¹ P5:1 (19).

¹⁰² P7:5 (43).

¹⁰³ R10:11 (143), emphasis supplied in the text.

testified that the second and third OT goals on Student's IEP address his/her weakness in executive functioning, and the Other Classroom Aids and Services designed for Student were unusually extensive.

24. Witness H, the Interim Head of the Intermediate Division at School A, testified that in Math, Student is in a class of 6-7 students and two teachers with breakout groups of three with one teacher, seven students and one teacher in Science, 13 students and two teachers in Written Language, 15 students and two teachers in Physical Education, and seven students and one teacher in Wood Shop. Witness H testified that Student often needs redirection, typically with non-preferred tasks, but s/he responds well to redirection and returns to his/her assigned tasks. Witness H testified that she would be concerned of Student being "lost" in class of 25 students – that s/he would be overlooked. Witness H testified that Student needs redirection, preferred seating, structured movement breaks, support for slowing down in reading, written language support, speech-to-text, spelling checks, use of graphic organizers, sentence structure strategies, and individualized instruction, more than one teacher in a class of 25 can be expected to provide. She opined that the setting at School A is Student's LRE because Student needs the small group support s/he gets at School A. On cross-examination, Witness H conceded that several of Student's teachers are not certified in special education or the subject matters they are assigned to teach; Teacher G, Student's Science teacher, is not certified in special education or science, Teacher H, her/his History teacher, is certified only in Art, and Teacher J, Student's Design Lab teacher, is not certified in special education.

25. Witness J is the Director of OT at School A. She supervises School A's nine other occupational therapists. She has never provided services to Student, but is aware of his/her needs through conversations with the therapists who provide services to Student. Witness J testified that Student's primary needs are motor planning and body awareness. The therapists work to help her/him pace her/himself when doing activities. Student's handwriting is legible, but s/he needs help with editing. In Math, s/he needs to take breaks because "[his/he] body needs to move." Witness J expressed concerns as to how Student would fare in a large class, because s/he "bumps into people" and "has papers all over the place." "[S/he's] able to implement strategies [s/he's] learning better in smaller classes."

26. Mother testified that Respondents solicited the evaluation from Witness K because of Student's reading difficulties in grade E. Respondents were unaware of School A until Witness K recommended it in her evaluation. When Student entered School A the following year in grade C, s/he could read some sight words, but could not read sentences or sound out unfamiliar words. Student's reading has improved to the point that s/he now wants to read all the time, and reads things over and over again. Mother disagreed with limiting Student to 15 hours of specialized instruction because Student is now an "enormous" reader, has made progress in executive functioning, and Mother does not believe Student can handle being in a general education classroom. She can foresee him/her in a general education class in the future, but "[s/he's] not ready to leave now... [S/he] would shrink and get lost... [S/he] would retreat or be a disturbance to [him/herself] and the class... [S/he] would require a 'whole lot' of transition planning" for a move to general education. Mother testified that Student has friends at School A and is happy at School A.

27. Witness K testified that Student requires instruction full-time in a highly supportive

environment with teachers who have advanced training in phonics and in supporting executive functioning. “I can’t see 15 hours in a typical DCPS environment being appropriate at this time.” When asked why Student needed such extensive support in light of the progress s/he’s made academically, Witness K said it was because s/he “has such complicated learning needs.” Witness K opined that Student required specialized instruction in a small class environment in any subject in which Student is expected to read, write, or do mathematical calculations. Witness K expressed concerns about the resource imbalance between School A and a typical DCPS class. When asked to clarify what she meant by this, she explained that the DCPS class would have a much higher student-to-teacher ratio and suggested that School A’s teachers are better trained in special education interventions.

28. Witness L is the founder and developer of a twelve-year-old company that provides educational consulting services. Witness L conducted a formal virtual observation of Student in a School A Reading class of Teacher A on February 9, 2021. Witness A concluded that Student exhibited the following strengths: application of spelling rule, reading and comprehension of text, use of classroom resources, responds positively to teachers and peers, quickly redirected to activities, and actively participates. His/her observed needs were: transitioning and shifting between activities/topics, general self-monitoring, and modulation of reading speed.¹⁰⁴ Witness L testified that Student requires specialized instruction throughout the school day in a small group environment to organize [REDACTED] and because of his/her attentional deficits. Student’s need to move around periodically would be concerning in a larger class environment. Because of Student’s “extreme executive dysfunction,” s/he needs a small group setting, even at lunch. Witness L testified that Student has made progress at School A, s/he’s happy at School A, s/he’s made friends at School A, and going from full-time to half-time special education support would be a “disaster.”

CONCLUSIONS OF LAW

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

Where there is a dispute about the appropriateness of the child’s individual educational program or placement, or of the program or placement proposed by the public agency, the public agency shall hold the burden of persuasion on the appropriateness of the existing or proposed program or placement; provided, that the party requesting the due process hearing shall retain the burden of production and shall establish a prima facie case before the burden of persuasion falls on the public agency. The burden of persuasion shall be met by a preponderance of the evidence.¹⁰⁵

¹⁰⁴ R5:3 (73).

¹⁰⁵ D.C. Code Sect. 38-2571.03(6)(A)(i).

The issues in this case are the appropriateness of Student’s IEP and placement. DCPS bears the burden of proving the appropriateness of the IEP and placement it offered, while Respondents bear the burden as to the propriety of School A as a placement.¹⁰⁶

Whether DCPS provided Student an appropriate IEP (providing fifteen (15) hours of specialized instruction outside of general education) and placement on or about April 29, 2021 and May 10, 2021 for the 2021-22 school year.

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*.¹⁰⁷ 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.’”¹⁰⁸ 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...¹⁰⁹ 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.”¹¹⁰

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.¹¹¹ 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*.”¹¹² 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.¹¹³

¹⁰⁶ *Schaffer v. Weast*, 546 U.S. 49 (2005).

¹⁰⁷ 458 U.S. 176, 187 (1982).

¹⁰⁸ *Id.* at 189-90, 200

¹⁰⁹ *Id.* at 200.

¹¹⁰ *Id.* at 203-04.

¹¹¹ *Endrew F. ex rel. Joseph F. v. Douglas County School District RE-1*, 137 S.Ct. 988 (2017).

¹¹² *Id.* at 997.

¹¹³ *Id.* at 1000-01 (citations omitted).

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. It requires an educational program reasonably calculated to enable a child to make progress appropriate in light of the child's circumstances."¹¹⁴

Respondents' counsel began his opening statement by stating that the issue in this case is *not* whether Student requires a full-time special education program, perhaps to reinforce on the Hearing Officer that it is DCPS' burden to prove the appropriateness of the less than full-time program that it proposed in the April 29, 2021 IEP and the May 10, 2021 proposed amendment. However, this argument is at odds with Respondents' assertion in its *Response to the Complaint* in which Respondents stated that DCPS did not provide an appropriate IEP for the 2021-22 school year because Student requires a full-time specialized instruction program as is provided at School A. Respondents' three most compelling witnesses objected to DCPS' proposed IEP in large part because it did not provide full-time specialized instruction. Mother objected to DCPS's proposal on May 10, 2021, in part, because it limited his/her specialized instruction to 15 hours per week. Witness K, an accomplished psychologist, evaluated Student and testified that 15 hours of support was inadequate and that Student requires instruction full-time in a highly supportive environment. Witness L testified that going from full-time to half-time special education support would be a "disaster."

Respondents' witnesses also testified that Student requires the small group environment offered by School A to succeed. Mother testified that Student has made progress at School A, has made friends at School A, and is happy at School A. Witness L echoed these uncontroverted facts. While it is not Respondents' burden to prove that Student requires full-time special education program, they are well aware that continued LEA funding for Student's placement at School A is dependent on DCPS' ability to establish that the less than full-time IEP it developed is appropriate.

Respondents originally sought Examiner A's assistance in 2017 due to concerns about Student's inattention and reading difficulties. Examiner A diagnosed Student with ADHD, an SLD in reading, and a Developmental Motor Coordination Disorder, and recommended that Student would be "best served" by a private school with expertise in learning disorders such as School A, specifically. Petitioners were unaware of School A before they retained Examiner A.

DCPS found Student eligible for services as a child with an SLD and OHI and developed an IEP on July 27, 2018 that provided 15 hours per week of specialized instruction, 10 hours outside general education and 5 hours inside general education. The IEP also included extensive accommodations to address Student's inattention and executive function deficits. Respondents rejected DCPS' proposed IEP, unilaterally placed Student at School A, and filed a due process complaint to secure funding for the placement from DCPS. Hearing Officer Vaden found that DCPS met its burden of proving that a special school, where Student would be segregated from

¹¹⁴ 137 S.Ct. at 1000-01.

nondisabled peers, was not Student's LRE. Hearing Officer Vaden was persuaded by DCPS witnesses who observed Student in his/her grade E general education environment at School D and found that s/he participated in classroom activities and lessons, required minimal verbal prompting and redirection, and interacted well with peers. He also found that the Other Classroom Aids and Services adequately addressed Student's inattention and executive function deficits. However, because Student's reading deficits were so severe, the Hearing Officer found the IEP deficient because it did not specify the teaching methodology or program that would be used to address the deficits.

Respondents rejected DCPS' August 6, 2019 IEP that prescribed 15 hours of specialized instruction outside general education and maintained his/her placement at School A, presumably through the application of Stay Put protections. Respondents also rejected DCPS' May 14, 2020 IEP that prescribed the same services as the 2019 IEP, along with extensive accommodations for Student's inattention and executive functioning deficits. When DCPS again declined to fund the placement, Respondent's filed the complaint that was adjudicated by Hearing Officer Lazan. He found no precedent for the parents' contention that the IEP required an Area of Concern devoted to executive functioning. Like Hearing Officer Vaden, he found the accommodations set forth in the IEP adequate to meet Student's executive functioning needs. By that time, Student was reported to be performing on grade level in Math, Reading, and Written Expression. Hearing Officer Lazan found that the evidence was not persuasive that Student "could not manage some general education classes, with accommodation, at this point in his/her academic career." Finally, Hearing Officer Lazan concluded that Student had progressed to the point in Reading that the teaching methodology required by Hearing Officer Vaden was no longer a necessity and was inappropriate for use to address Student's writing deficits. Respondents appealed the HOD, and Student remains at School A, funded through Stay Put.

This brings us to the IEPs at issue in this proceeding. By the time DCPS convened the IEP meeting on April 29, 2021, Student had made significant academic progress since enrolling at School A. It is uncontroverted that Student could not read when s/he arrived at School A in the fall of 2018. However, School A's Assessment Summary issued in the fall of 2021, revealed that by the fall of 2020, Student met grade-level expectations on all aspects of a Phonogram Assessment, a Real Words Assessment, a Nonsense Words Assessment, and a Red Word Reading Assessment, and s/he had mastered one of five categories on an Encoding Assessment *in the Fall of 2020*. On a Leveled Reading Assessment, Student was able to read a grade-level passage independently with 100% comprehension as of September 20, 2021, suggesting that s/he was at or near grade level when the IEP team met in April 2021.

On February 25, 2021, School A developed an IEP for Student. School A reported that Student "has made significant progress in the areas of reading fluency, text-level difficulty, decoding, and vocabulary development," and was reading one grade level above his/her current grade. The School A IEP also reported that Student was performing at grade level in Written Language and in Math.¹¹⁵ On the WJ-IV and the GORT-5 conducted by Witness A on March 26, 2021, Student was Average on all Reading Subtests. S/he was Low Average Broad Written Language, but Average in Sentence Writing Fluency. S/he was Low Average in Broad Math and Calculation, but Average in Math Facts Fluency and Applied Problems.

¹¹⁵ R6:3-5 (77-79).

Thus, by the date of the IEP meeting in April 2021, the objective data indicated that Student was performing at or above grade level in Reading, and at grade level in Math and Written Expression. However, Student still had academic challenges. S/he had gone from not being able to read in 2018 to reading so fast that it impaired his/her comprehension in 2021. However, on the WJ-IV in March 2021, Student was Average in Passage Comprehension. On the Conners-3, Student had elevated ratings from Mother and two teachers in Hyperactivity/Impulsivity and an elevated rating from a teacher in inattention. As for executive functioning, on the BRIEF-2, his/her scores ranged from Normal on the Emotion Regulation Index, to Mildly Elevated in the Global Executive Composite, to Potentially Clinically Elevated on the Cognitive Regulation Index.

These relatively benign findings on the Conners and the BRIEF-2 suggest that Student's attentional and executive functioning deficits do not have as significant effect on his/her classroom performance as was suggested by Respondents' witnesses. In fact, School A's February IEP indicates that Student is easily redirected:

[S/he] had difficulty with self-management during virtual learning, but when "in person, [s/he] has all [her/his] materials, finishes on time, and is organized in the small class setting and [s/he] uses the structure the classroom setting for modeling readiness behaviors... Occasional impulsivity is easily redirected by the teacher in this group setting.

Consistent with School A's IEP, the Interim Head of School A's Intermediate Division testified that Student often needs redirection, typically with non-preferred tasks, but s/he responds well to redirection and returns to his/her assigned tasks. The record also reveals that the parties collaborated on the development of OT goals and accommodations. The Other Classroom Aids and Services developed in DCPS' July 10, 2018 IEP were extensive and incorporated many of the significant accommodations suggested by Examiner A when Student's academic deficits were significantly worse, including providing small group environment free of distractions, preferential seating, movement breaks, assistance starting tasks, breaking larger tasks into smaller, more manageable chunks, step-by-step verbal, visual, and written instructions. The extensive nature of those accommodations led Hearing Officer Vaden to conclude that they adequately addressed Student's attentional and executive functioning deficits. The April 7, 2020 IEP included additional accommodations, and Hearing Officer Lazan reached the same conclusion.

Here, the objective record does not support the testimony of Respondents' witnesses that Student's attentional and executive functioning deficits are as extreme as they suggest. Moreover, the parties do not dispute the appropriateness of the OT goals and Other Classroom Aids and Services that were developed in the April 2021 IEP to address these deficits. While I am not bound by the findings of Hearing Officers Vaden and Lazan, the accommodations from their cases provide a continuum that has resulted in Student performing relatively on par with his/her same-aged peers, with little evidence that her/his performance is significantly affected by inattention or executive functioning deficits. The recent observations described above reveal that while Student is sometimes inattentive, s/he is easily redirected. It is significant that Mother's responses on the BRIEF-2 prior to the April 2021 IEP meeting placed Student within normal limits on all three indices.

Student's academic performance at the time of the April/May 2021 IEPs, at grade level in all three core subjects according to School A's February 2021 IEP, would not, by itself, warrant

15 hours per week of specialized instruction, if any at all. Thus, 15 or more hours of specialized instruction cannot be justified unless Respondents' witness are correct that Student requires a small class environment to have success. However, even though these opinions were offered by educational professionals, they do not hold up under scrutiny. First, Student has always attended private schools, and has never been in a large class environment. Thus, it is speculative to suggest that s/he would be "lost" in a larger class or that such a change in his/her environment would be a "disaster." What we do know is that when Student was observed in his/her general education classroom at School D, Student exhibited no troubling behaviors; s/he participated in classroom activities, required minimal prompting or redirection, and interacted appropriately with peers.¹¹⁶ In the observation by Witness D in September 2020, Student was distractible, but was able to get back on track. When Witness C observed Student in March 2021, Student was on-task. 97% of the time, was engaged, and participated throughout the class.

Examiner A originally recommended that Respondents consider a program such as School A that offers a small group environment. But this was at a time when Student could not read and was apparently more affected by attentional and executive functioning deficits than the record now suggests. Examiner A's recommendation was also geared to finding a placement that would "best serve" Student. As Hearing Officer Vaden ruled, IDEA does not require LEAs to maximize the level of service to disabled students.¹¹⁷ Rather the central tenet of IDEA is that "To the maximum extent appropriate, children with disabilities, including children in public or private institutions or other care facilities, are educated with children who are not disabled, and special classes, separate schooling, or other removal of children with disabilities from the regular educational environment occurs only when the nature or severity of the disability of a child is such that education in regular classes with the use of supplementary aids and services cannot be achieved satisfactorily."¹¹⁸

Witness H testified that School A is Student's LRE because Student needs the small group support s/he gets at School A. However, there is no evidence that Student needs a small group full time. This might be the case if there were evidence of severe dysfunction due to inattention or executive functioning deficits, but this record is devoid of any such evidence. DCPS' IEP would provide Student three hours per day of specialized instruction outside of general education for three subjects in which s/he is performing at grade level, and who Hearing Officer Lazan found to be performing at grade level when the April 7, 2020 IEP was developed. During those three hours, Student would be in a small group environment receiving individualized instruction. When s/he is not receiving specialized instruction, Student would still receive support through the extensive accommodations in the IEP.

Witness J testified that Student would not do well in a large class because s/he bumps into people and has papers all over the place. Again, it is speculative as to how Student would fare in a large class, but nothing in his/her current behavior presages the harms predicted by Respondents witnesses. Witness J has never observed Student in a large class environment and has no basis in fact for her opinion. Similarly, Mother's concern that Student would "shrink and get lost"

¹¹⁶ R3:20 (56).

¹¹⁷ See, *K.S. v. District of Columbia*, 962 F.Supp.2d 216, 225 (D.D.C. 2013) (the "Cadillac" of educational treatment is not required by IDEA).

¹¹⁸ 20 U.S.C §1412(a)(5)(A). See also, 34 C.F.R. §300.114(a)(2); *Andrew*, 137 S.Ct. at 999 (the IDEA requires that children with disabilities receive education in the regular classroom "whenever possible."); *Z.B.*, 888 F.3d at 528, 435 U.S.App.D.C. at 207.

in a larger class or would retreat or be a disturbance is purely speculative. Student exhibited no such behavior in his/her general education class at School D, albeit not a large class.

Witness K opined that Student needed a small class environment because s/he “has such complicated learning needs.” Student has performed on grade level for two years and his/her School A IEP and recent evaluations do not support the contention that s/he needs intensive intervention in an academic cocoon to succeed.

Finally, Witness L opined that Student requires a small class environment due to extreme executive dysfunction. There is not only no record of extreme executive dysfunction, there is no record that whatever executive dysfunction Student has, has a significant impact on his/her academic performance.

DCPS proposed School C, Student’s neighborhood school, as the location of services for Student. Witness B, the Assistant Principal and Special Education Manager at School C, testified that School C could implement Student’s May 10, 2021 IEP. It offers special education services as well as the OT services prescribed in the IEP. The 15 hours of specialized instruction outside of general education could be provided in a resource room, Student’s case manager’s classroom, or by another case manager, in 90 time blocks of Reading, Written Expression, or Math. Respondents offered no credible testimony to contradict School C’s ability to implement the May 10, 2021 IEP.

For all of these reasons, I conclude that DCPS has met its burden of proving that the IEP it offered Student for the 2021-22 school year on May 10, 2021, and the placement it proposed at School C, were reasonably calculated to enable Student to make progress appropriate in light of his/her circumstances

Whether School A is an appropriate placement for Student.

In light of my finding as to the appropriateness of the proposed IEP and placement, I need not reach the issue as to whether School A is an appropriate placement for Student. Clearly, School A performed remarkably, guiding Student from illiteracy to grade level functionality in less than two years. However, the record reveals that Student no longer requires the intensive support s/he needed in 2018 or 2019.

RELIEF

For relief, Petitioner requests an order that “DCPS proposed an appropriate IEP and placement in the least restrictive environment (“LRE”), that the LEA made a FAPE available to the student, and that [Lab] is not proper, appropriate, or the LRE for the student.”

ORDER

Upon consideration of the *Complaint*, Respondents' *Response*, the exhibits from the parties' disclosures that were admitted into evidence, the testimony presented during the hearing, the parties' closing arguments, *K.W v. District of Columbia, District of Columbia Public Schools' Case Citations*, and *Respondents' Closing Authorities*, it is hereby

FOUND, that DCPS proposed an IEP for Student on May 10, 2021 for the 2021-22 school year that were reasonably calculated to enable Student to make progress appropriate in light of his/her circumstances, that the placement at School C was appropriate in that it was capable of implementing the IEP, and that the program proposed in the IEP was Student's least restrictive environment.

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: May 9, 2022

Copies to: Attorney A, Esquire
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