

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

Confidential

Parents on behalf of Student¹)	Case No. 2023-0049
)	
Petitioner)	Hearing Dates: May 8-9, 2024
)	
v.)	Conducted by Video Conference
)	Date Issued: May 30, 2024
District of Columbia Public Schools)	
and)	
Office of the State Superintendent.)	
of Education)	
)	Terry Michael Banks,
Respondent)	Hearing Officer

HEARING OFFICER DETERMINATION

INTRODUCTION

Petitioners are the parents of an X-year-old student (“Student”) attending School A. On March 21, 2024, Petitioner filed a Due Process Complaint (“*Complaint*”) alleging that the District of Columbia Public Schools (“DCPS”) denied Student a free appropriate public education (“FAPE”) by failing to provide timely and appropriate Individualized Education Programs (“IEPs”). Petitioners also alleged that the Office of the State Superintendent of Education (“OSSE”) denied Student a FAPE by failing to finalize Student’s placement at School A for the 2023-24 school year until March 5, 2024. On March 29, 2024, OSSE filed *Office of the State Superintendent of Education’s Response to Administrative Due Process Complaint* (“*OSSE Response*”), denying that it had denied Student a FAPE in any way. On April 4, 2024, DCPS filed *District of Columbia Public Schools’ Response* (“*DCPS Response*”), denying that it had denied Student a FAPE in any way.

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 March 21, 2024, Petitioner filed the *Complaint* alleging that DCPS denied Student a FAPE by failing to provide appropriate IEPs and placements for the 2022-23 and 2023-24 school years. Petitioners assert that while Student required placement in a residential facility when they first referred her/him for evaluation in February 2022, Student was not found eligible until July 27, 2023, and DCPS did not develop an IEP providing placement in a residential facility until September 26, 2023.

On March 29, 2024, OSSE filed the *OSSE Response* in which it refuted allegations in the *Complaint* denying that it had denied Student a FAPE. OSSE asserted, *inter alia*, that it first received a change in placement (“CIP”) request from DCPS for Student on October 18, 2023. The CIP meeting was held on November 8, 2023. The parents had unilaterally placed the student at School A prior to any involvement from OSSE and expressed that they would prefer for the student to remain at School A. OSSE explained to the parents the process on how a service location is identified. The service location process, pursuant to local law and regulation, indicates that OSSE must issue service location to schools or programs that hold a full certificate of approval (“COA”) with OSSE, and ensure programs meet the following criteria: student’s age, grade, and disability classification. On November 14, 2023, OSSE obtained parental consent to move forward with admission’s packets. On November 16, 2023, OSSE sent out admissions packets to nine schools holding COAs. On January 19, 2024, OSSE reached out to the School A to schedule a time to meet and speak with the school to better understand the program and determine if they could meet OSSE’s basic requirements. On January 26, 2024, OSSE exhausted the approved lists of schools, as none were able to offer an acceptance. On February 1, 2024, OSSE sent an admissions packet to the School A and received an acceptance letter that same day. From February 6, 2024, through March 5, 2024, OSSE and School A met and emailed each other to finalize documents and agreements for OSSE to issue a Notice of Service Location and funding for Student. During this period, OSSE worked with the District’s staff to complete necessary processes. On March 5, 2024, following final acknowledgement from School A, OSSE issued a Notice of Service Location to School A for Student

On April 4, 2024, DCPS filed the *DCPS Response* in which it refuted allegations in the *Complaint* denying that it had denied Student a FAPE. DCPS asserted, *inter alia*, that on February 15, 2022, Petitioners submitted a DCPS Child Find Referral Form. The form identified speech/language, hearing, social/emotional, cognitive impairment, Developmental Delay, Attention problems, Academics, and Other (PTSD) as areas of concern. As Student was in school in Missouri at the time, DCPS was unable to conduct evaluations, and the local school district in Missouri declined DCPS’ request to evaluate Student. On April 29, 2022 DCPS proceeded with the initial AED meeting for the student. The team recommended a comprehensive bilingual psychological evaluation, a comprehensive bilingual speech and language (“S/L”) assessment, a

functional behavior assessment (“FBA II”), Language Access Testing, and a hearing evaluation. The student remained out of state and unavailable for evaluation. DCPS was unable to identify contractors in Missouri willing to conduct the evaluations. On July 5, 2022, Petitioners sent DCPS notice of Student’s unilateral placement at School A for the 2022-23 school year. During the fall of 2022, School A and an independent evaluator completed evaluations of Student. On January 26, 2023 DCPS received consent from the parent in an email for the following to be reviewed: a Psychological independent educational evaluation (“IEE”), a Speech IEE, and an Audiology IEE. DCPS issued a Prior Written Notice (“PWN”) to Proceed with Evaluation Process on January 27, 2023. DCPS completed the reports on the IEEs by a DCPS psychologist and a speech pathologist on February 15, 2023, and an Independent Audiological Evaluation Review was conducted by a DCPS audiologist on February 27, 2023. All reviews were completed timely within 30 days of receiving consent. The parties ultimately agreed to convene an eligibility meeting on July 27, 2023. Student was found eligible for special education under the classification of Emotional Disability (“ED”) with identified areas of need for academics, hearing, S/L, and behavior support services (“BSS”). On August 7, 2023, Petitioners sent DCPS a unilateral placement notice for Student at School A for the 2023-24 school year. On August 11, 2023, DCPS issued a PWN for notifying Petitioners of the determination of Student’s special education eligibility. To hold the IEP meeting before the start of the school year, on August 15, 2023, DCPS offered the parent an IEP Annual Meeting date of August 25th. The parties ultimately agreed to meet on September 26, 2023. DCPS proposed an IEP with 27 hours per week of specialized instruction outside general education, 240 minutes per month of BSS, 240 minutes per month of S/L services, 120 minutes per month of BSS consultation, 120 minutes per month of SLP consultation, and 30 minutes per month of audiology related consultation. The least restrictive environment (“LRE”) was determined to be a non-public school. In the District of Columbia, OSSE controls the budget and decision making for the location of service for any non-public placement. As is required by OSSE, DCPS referred the student to OSSE for residential program location of service (“LOS”). On November 8, 2023 the LOS meeting was held with OSSE, where OSSE sought consent from Petitioners to send out referrals to non-public schools. Once OSSE completed its processes and determined that it would place Student at School A, DCPS issued a PWN on April 2, 2024 indicating the LOS to be School A.

Petitioners and DCPS participated in a resolution meeting on April 8, 2024 that did not result in a settlement. The prehearing conference in this case was also conducted on April 8th through video conference facilities. The *Prehearing Order* was issued that day. I issued an *Amended Prehearing Order* on April 12, 2024 reflecting a change in the hearing dates.

The due process hearing was conducted on May 8-9, 2024 by video conference. The hearing was closed to the public at Petitioners’ request. Petitioners filed Five-day Disclosures on May 1, 2024, containing a witness list of three witnesses and documents P1 through P36, and a supplemental disclosure on May 3rd disclosing P37. DCPS filed objections to Petitioners’ disclosures on May 6, 2024. DCPS objected to expert testimony from Witness A and Witness B on grounds of their qualifications. These objections were deferred until DCPS completed *voir dire* of the witnesses. DCPS also objected to the following proposed Exhibits on grounds of hearsay, relevance, and lack of authentication: Petitioners’ Exhibits P2, P4, P9-P10, P12-P13, P20-P22, and P30-P33. Petitioner’s Exhibits P1-P3, P5-P11, P13-P21, P23-P31, and P33-P37 were admitted into evidence.

Respondent DCPS also filed disclosures dated May 1, 2024 containing a witness list of six witnesses and documents R1 through R16. Petitioners filed an objection to Respondent’s

disclosures on May 6, 2023. Petitioners objected to expert testimony from Witness G because her curriculum vitae was not disclosed by DCPS. This objection is sustained. They also objected to expert testimony from Witness F, but gave no reason for the objection as was required in the *Amended Prehearing Order*. As DCPS did disclose this witness' CV, this objection was overruled. Finally, Petitioners objected to DCPS Exhibit R-16 due to lack of authentication. A ruling on this objection was deferred until the document was offered into evidence. OSSE also filed objections to DCPS' disclosures on May 6, 2024. OSSE objected to expert testimony from Witness F and Witness G on grounds that the witnesses lack the qualifications to provide an opinion as to the LOS process. OSSE also seconded Petitioners' objection to DCPS' failure to disclose Witness G's CV, which objection had already been sustained. Respondent DCPS' Exhibits R1-R9 and R11-R16 were offered and admitted into evidence during Respondent's direct case.

Respondent OSSE also filed Disclosures filed on May 1, 2024 containing a witness list of two witnesses and documents OSSE R1 through OSSE R25. DCPS filed objections to OSSE's disclosures on May 6, 2024. DCPS objected to opinion testimony from Witness D and Witness E on grounds of their qualifications. At the hearing, OSSE's counsel noted that these witnesses were not proposed as expert witnesses. Respondent OSSE's Exhibits OSSE R1 – OSSE R25 were admitted into evidence prior to the beginning of testimony.

Petitioners presented as witnesses in chronological order: Witness A, Witness B, and Petitioner A. Witness A was admitted as an expert in Family Therapy and Witness B was admitted as an expert in Special Education. At the conclusion of Petitioners' direct case, DCPS moved for a directed verdict; that motion was denied. DCPS presented one witness, Witness C, who was admitted as an expert Special Education. OSSE presented as witnesses in chronological order: Witness D and Witness E.

At the conclusion of testimony, the parties' counsel gave oral closing arguments. The Hearing Officer authorized the parties to submit authorities upon which they rely on or before May 14, 2024. On May 14, 2024, Petitioners filed *Petitioners' Closing Citations*, OSSE filed *OSSE's Closing Authorities*, and DCPS filed *District of Columbia Public Schools Case Citations*.

ISSUES

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

1. Whether DCPS denied Student a FAPE by failing to provide a timely and appropriate IEP and placement for the 2022-23 school year. Specifically, Petitioners assert that while Student required placement in a residential facility when they first referred him/her for evaluation in February 2022, Student was not found eligible until July 27, 2023, and DCPS did not develop an IEP providing placement in a residential facility until September 26, 2023.
2. Whether DCPS denied Student a FAPE by failing to provide a timely and appropriate IEP and placement for the 2023-24 school year. Specifically, Petitioners assert that while Student required placement in a residential facility when they first referred her/him for evaluation in February 2022, Student was

not found eligible until July 27, 2023, and DCPS did not develop an IEP providing placement in a residential facility until September 26, 2023.

3. Whether OSSE denied Student a FAPE by failing to finalize the placement at School A for the 2023-24 school year until March 5, 2024.
4. Whether School A is an appropriate placement for Student.

FINDINGS OF FACT

1. Student is X years old and is enrolled in grade K at School A for the 2023-24 school year.²

2. On or about August 7, 2020, Examiner A, completed a Psychological Evaluation of Student. At that time, Student had just completed grade L at School B. Petitioners adopted her/him in 2019.³ Student's history included sexual abuse and lifelong neglect prior in his/her native Columbia prior to his/her arrival in the United States in 2018.⁴ Petitioners reported to Examiner A that Student's English was stronger than his/her Spanish; they did not believe that Student's academic struggles could be attributed entirely to the fact that English was his/her second language.⁵ Student was hospitalized for two weeks in January 2020 at Facility A after running away from home. S/he was hospitalized for another two weeks in March 2020 at Facility B when s/he ran away again, was found, then threatened his/her mother and brother with a knife. In July 2020, Student ran away from home when his/her parents found him/her with a cord wrapped around his/her neck, then ran away again once s/he was found. Student was receiving psychiatric treatment from Physician A at the time of Examiner A's evaluation.⁶

On the Wechsler Intelligence Scale for Children ("WISC-V"), Student scored in the Average range on the General Ability Index (94), the Visual Spatial Index (92), the Fluid Reasoning Index (103), and the Working Memory Index (91), and in the Low Average range on the Verbal Comprehension Index (89), and the Processing Speed Index (86).⁷ On the Beery-Buktenica Development Test of Visual-Motor Integration ("VMI-6"), Student earned a Visual Motor Integration standard score of 89, one point below the Average range.⁸ On the Comprehensive Test of Phonological Processing, 2nd Edition ("CTOPP-2"), Student's Phonological Awareness (awareness of and access to the sound structure of oral language) standard score of 86 was in the Low Average range

However, it is important to recognize that [his/her] scores on two of the three subtests, were in fact within the average range for [his/her] age, with [his/her] overall score artificially brought down by only one subtest... [Student's] lower

² Petitioners' Exhibit ("P") 26 at page 1 (233) and P30 at page 1 (271). The exhibit number is followed by the exhibit page number and the electronic page number in parentheses, e.g. P26:1 (233), P30:1 (271).

³ P2:1 (21).

⁴ *Id.* at 2 (22).

⁵ *Id.* at 4 (24).

⁶ *Id.* at 6-7 (26-27).

⁷ *Id.* at 8-10 (28-30).

⁸ *Id.* at 10 (30).

score on the Phoneme Isolation did not reflect an impairment in phonological awareness or processing. Moreover, [Student's] score on the Elision subtest, assessing [his/her] ability to isolate and manipulate phonemes within words by repeating a word and then saying what is left of the word after dropping the designated sound, fell solidly within the average range for [his/her] age, at the 37th percentile. Additionally, [Student's] performance on the Blending Words subtest, assessing [his/her] ability to combine sounds to form words, also fell within the average range for [his/her] age, at the 25th percentile. Thus, overall, [Student] demonstrated intact phonological awareness skills.⁹

The Clinical Evaluation of Language Fundamentals ("CELF-5") measured Student's expressive and receptive language skills. S/he scored in the Low Average range on the Expressive Language Index (83) and the Language Memory Index (85), and in the Below Average range in Core Language (79), the Receptive Language Index (75), and the Language Content Index (75).

Overall, then, [Student's] performance on measures of language processing was indicative of uneven development in English at this time. [Student] demonstrated age-appropriate phonological processing, both for distinguishing the individual sounds within words and for blending individual sounds together to form words. In addition, [s/he] demonstrated age-appropriate comprehension of single-sentence directions of increasing syntactic complexity as well as age-appropriate ability to formulate semantically and syntactically correct sentences of increasing length and complexity. Additionally, when [Student] understood more complex information accurately, [s/he] demonstrated the ability to make accurate inferences and predictions based on that information. However, [Student's] below average English vocabulary was found to interfere with [his/her] ability to recognize synonyms as well as to recognize synonym-antonym pair. [Student] further demonstrated difficulty analyzing and synthesizing critical words and concepts in sentences simultaneously, with particular difficulty interpreting sentences that used the passive voice and sentences that included time relationships, and with some milder difficulty understanding sentences that make comparisons and sentences that included serial order... [Student] demonstrated that [his/her] knowledge of English syntax remains limited relative to age-level expectations, interfering with [his/her] ability to vary [his/her] syntax when expressing ideas, particularly with regard to direct and indirect objects and subordinate clauses.¹⁰

On the Wide Range Assessment of Memory and Learning ("WRAML-2"), Student scored in the High Average range in General Recognition Memory (111), Verbal Recognition (118), and Visual Memory (118), in the Average range in General Memory (97), Verbal Memory (105), Visual Recognition (100), Working Memory (94), and in the Below Average range in Attention/Concentration (70).

[Student's] pattern of performance indicated that visualization of language-based information allows [him/her] to integrate specific details with the main idea, comprehend the information accurately, and retain and retrieve the information

⁹ *Id.* at 11 (31), emphasis provided in the text.

¹⁰ *Id.* at 14-15 (34-35).

successfully over time... [Student's] demonstrated strong rote memorization skills for language-based information presented orally and multiple times... [Student's] significantly stronger performance on the second working memory task indicated that [s/he] benefits from having visual frameworks to organize orally presented information... [Student's] scores on both [Attention/ Concentration] subtests fell below the average range for [his/her] age, indicating that [his/her] auditory and visual attention are impaired even for very short, discrete stimuli.¹¹

Student's capacity for attention and impulse control was measured on the Integrated Visual and Auditory Continuous Performance Test ("IVA-2"). S/he was Average on the Full Scale Response Control Quotient (91), Auditory Response Control Quotient (96), and Sustained Visual Attention Quotient (91), Mildly Impaired on the Full Scale Attention Quotient (85), Auditory Attention Quotient (89), Visual Attention Quotient (86), Visual Response Control Quotient (87), and Combined Sustained Attention Quotient (81), and Severely Impaired on the Sustained Auditory Attention Quotient (68).

[Student's] pattern of performance indicated that [her/his] general auditory and visual attentional functioning fell within the Average range overall, under both low-demand and high-demand conditions... The Full Scale Response Control Quotient measures the ability to regulate responses with the appropriate impulse control. [Student] earned an overall score in the Average range for [her/his] age... [Student's] performance indicated that [her/his] ability to inhibit responses to non-target auditory stimuli fell in the Superior range for [her/his] age overall, but that under low-demand conditions, when target stimuli are presented infrequently, [her/his] ability to inhibit responses to non-target stimuli deteriorated markedly, falling in the Extremely Impaired range for [her/his] age... Overall, while [Student's] pattern of performance may be rooted in [her/his] substantial trauma history, it nevertheless indicated that [her/his] capacity for the self-regulation of attention and behavior is functionally similar to that of individuals who meet criteria for a diagnosis of Attention Deficit/Hyperactivity Disorder, Combined Presentation, Moderate severity.¹²

Student's executive functioning was measured on the Wisconsin Card Sort Test (WCST) and the Behavior Rating Inventory of Executive Functioning ("BRIEF-2"). His/her scores were Above Average on all five subtests of the WCST.¹³ Petitioner A completed rating scales on the BRIEF-2. Her ratings yielded a Global Executive Composite (T=70) that indicated overall impairment in Student's executive functioning in the clinically elevated or clinically significant range, with a Behavior Regulation Index (T=67) in the Potentially Clinically Elevated range, an Emotion Regulation Index (T=63) in the Mildly Elevated range, and a Cognitive Regulation Index (T=73) in the clinically elevated range.¹⁴

On the Woodcock-Johnson Tests of Achievement (WJ-IV ACH), Student scored in the Low Average range in Broad Mathematics (83 – Average on the Calculation subtest (90)), in the

¹¹ *Id.* at 15-18 (35-38), emphasis provided in the text.

¹² *Id.* at 18-20 (38-40).

¹³ *Id.* at 21 (41)

¹⁴ *Id.* at 22 (42).

Low range in Broad Achievement (72), and in the Very Low range in Broad Reading (68) and Broad Written Language (67).¹⁵

Student's emotional functioning was measured through rating scales completed by Petitioner A on the Behavior Assessment System for Children ("BASC-3"). There were no scores in the Clinically Significant or At-risk range on the Adaptive Scales, and no Clinically Significant scores on the Clinical Scales. However, Petitioner A's ratings yielded At-risk scores in Aggression (T=61), Conduct Problems (T=69), Anxiety (T=67), Depression (T=63), Atypicality (T=65), and Withdrawal (T=66).¹⁶

Examiner A attributed much of Student's suboptimal performance on the WJ-IV ACH to his/her relatively limited education in the English language:

[Student's] pattern of errors indicated that [her/his] reading accuracy deficits result from insufficient formal instruction relative to same-age American peers but that [s/he] has successfully mastered the decoding skills [s/he] has been taught. Moreover, on the measure of reading comprehension, [Student] demonstrated an exceptionally strong ability to infer the gist of the passages presented to [her/him] even though [s/he] struggled with the decoding of those passages, but lacked a sufficiently specific English vocabulary to supply a single missing word for the passages even when [s/he] was able to explain what the passages meant more generally. Therefore, once again, [Student's] pattern of errors did not indicate a specific learning disorder but rather, reflected the impact of [her/his] weak English vocabulary and weak decoding skills relative to same-age American peers on [her/his] comprehension of printed text...¹⁷ As was the case for [her/his] reading accuracy skills, [Student's] s spelling accuracy, while below average relative to same-age American peers, indicated mastery of phonetic spelling rules as well as a tendency to combine conventions of Spanish spelling with conventions of English spelling in order to problem-solve how to spell unfamiliar words...¹⁸ [w]hile [Student's] writing skills are well below the level expected of same-age American peers, [her/his] struggles reflected insufficient formal instruction rather than an inability to learn and apply writing conventions. Nevertheless, based on [her/his] current skill level, [Student] will require targeted direct intervention to build spelling accuracy skills in English as well as skills for clear, well-organized written expression. Additionally, [Student] will not be able to produce grade-level written work without appropriate accommodations and supports in place...¹⁹ [Student] demonstrated age appropriate calculation skills and mathematical reasoning skills only slightly below the average range for [her/his] age, with some of [her/his] difficulty on the measure of mathematical reasoning resulting from [her/his] difficulty processing the *language* of the word problems rather than a difficulty with the underlying concepts and reasoning skills. However, on both the calculation and the reasoning subtest, [Student] worked extremely carefully, drawing or reasoning out each question, verbally mediating in Spanish to guide herself through,

¹⁵ *Id.* at 24-27 (44-47).

¹⁶ *Id.* at 29 (49).

¹⁷ *Id.* at 33 (53).

¹⁸ *Id.*

¹⁹ *Id.*

indicating that [her/his] computation skills were not automatic. Indeed, on the measure of fluency for single-digit addition, subtraction, and multiplication facts, [Student's] score fell below the average range for [her/his] age. Given that Student's math fluency skills were below the average range for [her/his] age despite age-appropriate calculation skills and that there was no language component to the task, [her/his] pattern of performance was consistent with the diagnosis of a Specific Learning Disorder with Impairment in Mathematics, with Impairment in the Memorization of Arithmetic Facts and Fluent Calculation.²⁰

Examiner A diagnosed Petitioner with Posttraumatic Stress Disorder ("PTSD"), Personal History of Physical and Sexual Abuse in Childhood, Personal History of Neglect in Childhood, Other Specified Attention Deficit/Hyperactivity Disorder, Developmental Coordination Disorder, Language Disorder, and Specific Learning Disorder with Impairment in Mathematics, with Impairment in the Memorization of Arithmetic Facts and Fluent Calculation.²¹ Examiner A made the following educational recommendations: (1) intensive speech and language therapy to target expressive and receptive language needs, (2) occupational therapy to target both visual/motor integration skills and non-motor visual processing skills, (3) placement in a school specifically focused on providing intensive academic remediation using multisensory and experiential learning methods and capitalizing on his/her strengths, (4) a low student-to-teacher ratio in order to receive the individualized support that s/he needs, (5) intensive remediation for her/his reading and spelling skills, and a long list of classroom aids and services.²²

3. For the 2020-21 school year, Petitioner's enrolled Student in School C, a private school in Maryland. In November 2020, after an incidence of suicidal ideation and treatment at Facility B, Petitioners placed Student in Facility C, a residential treatment facility in Missouri.²³

4. On February 14, 2022, Petitioner A filed a Private/Religious Schools Child Find Referral Form indicating concerns with S/L, hearing, social/emotional behavior, developmental delay, attention problems, PTSD, and academics. The form indicated that Student was enrolled at Facility C in grade L, and that her/his primary language was Spanish.²⁴ On February 15, 2022, Petitioner A sent DCPS proof of residency and a copy of Examiner A's evaluation.²⁵ DCPS acknowledged receipt of the referral on March 4, 2022.²⁶ DCPS proposed an initial data review meeting on March 29, 2022 or April 5, 2022;²⁷ Petitioner A accepted the March 29th date on March 8, 2022.²⁸

5. The Analysis of Existing Data ("AED") meeting was convened on March 29, 2022. According to the meeting notes, the purpose for the meeting was Student's triennial eligibility

²⁰ *Id.* at 33-34 (53-54).

²¹ *Id.* at 35 (55).

²² *Id.* at 36-42 (56-62).

²³ P37:13. Petitioners' Exhibit P37 was submitted as a supplemental exhibit and was not attached to the disclosure including the other 36 exhibits. Examiner A references a recommendation for residential treatment by Facility B and a Discharge Summary from Facility C; neither document was offered into evidence by Petitioners. P37:13, 14.

²⁴ P3:1 (65).

²⁵ P5:4 (76).

²⁶ P3:2 (66).

²⁷ P5:3 (75).

²⁸ *Id.*

determination. Petitioners were present and represented by Attorney A. Attorney A reported that Petitioners expected Student to be leaving Facility C in May or June 2022 and wanted to know the next steps. DCPS recommended that Student receive the following evaluations: comprehensive bilingual psychological evaluation, comprehensive bilingual S/L assessment, hearing evaluation, functional behavior assessment II (“FBA-II”), and language access testing. The meeting notes indicate that DCPS discussed the need for Petitioners to get independent evaluations for Student.²⁹

6. On May 19, 2022, DCPS authorized Petitioners to secure the following independent evaluations: comprehensive bilingual psychological evaluation, comprehensive S/L evaluation with translator, audiology evaluation, and an FBA. DCPS provided the authorization “after DCPS was informed by the Missouri... local school system that they are unable to administer the bilingual assessments for the student. DCPS also contacted multiple independent evaluators in the Missouri area who were also unable to conduct bilingual assessments.”³⁰ In response to an inquiry from Attorney A on May 19th, DCPS reaffirmed that “The local school system informed DCPS that they are unable to administer the assessments,” and provided a list of the independent evaluators that DCPS had previously contacted.³¹

7. On June 8, 2022, Attorney A reported that Petitioners had been unsuccessful in identifying any evaluator in Missouri to conduct a bilingual psychological evaluation or a bilingual S/L evaluation. She inquired as to whether DCPS would accept evaluations conducted with translators.³² On June 22, 2022, DCPS replied that a psychological evaluation conducted with a translator was acceptable to DCPS.³³

8. On July 5, 2022, Attorney A notified DCPS that Student would be leaving Facility C on July 14, 2022 and would be enrolled at School A in Connecticut, effective July 18, 2022. Attorney A requested that DCPS provide Student a FAPE by funding the placement at School A.³⁴

9. On August 12, 2022, Attorney A notified DCPS that Petitioners had been unable to locate an evaluator in Connecticut that was available to conduct a comprehensive bilingual psychological evaluation “in the coming months.” They proposed, instead, having Examiner A conduct the examination, and that they would arrange for Student to return to the District at Examiner A’s earliest availability, November 2022. A speech-language pathologist at School A was available to conduct the S/L evaluation. The charges for both evaluations would exceed the limits of DCPS’ authorization; Petitioner sought approval for the higher charges.³⁵ On August 23, 2022, DCPS issued a Re-Authorization Letter increasing the amounts it would pay the evaluators to the amounts requested by Petitioners.³⁶

10. On or about November 17, 2022, when Student was enrolled in grade J at School

²⁹ DCPS’ Exhibit (“R.”) 5 at pages 1-2 (81-2). The exhibit number is followed by the exhibit page number and the electronic page number in parentheses, e.g. R5:1-2 (81-2).

³⁰ R7:1 (84).

³¹ P6:6-7 (86-87).

³² *Id.* at 5-6 (85-86).

³³ *Id.* at 5 (85).

³⁴ R8:1 (86).

³⁵ R9:1 (88).

³⁶ P8:3 (95).

A, Examiner A completed a Psychological Evaluation of Student³⁷ that was provided to DCPS on December 8, 2022.³⁸ On the Weschler Adult Intelligence Scale (“WAIS-IV”), Student scored in the Low Average range on the General Ability Index (87), the Verbal Comprehension Index (89), the Perceptual Reasoning Index (88), and the Working Memory Index (80), and in the Extremely Low range on the Processing Speed Index (65). Because English was Student’s second language (although Student informed Examiner A that s/he was stronger in English (P37:17)), Examiner A administered the Test of Nonverbal Intelligence (“TONI-4”). Student’s score on Abstract Visual Reasoning of 94 was in the average range and “was consistent with [his/her] performance on the WAIS-IV, verifying the validity of the WAIS-IV as an assessment of Student’s cognitive functioning.”³⁹

Student’s visual-motor integration skills were assessed more closely using the Beery-Buktenica Developmental Test of Visual-Motor Integration (“VMI-6”). Her/his Visual-Motor Integration score of 72 was “well below the average range for her/his age, equivalent to the level of a child aged 8 years, 1 month.” Examiner A concluded that Student demonstrated “significant deficits in both orthographic processing, the aspect of non-motor visual processing necessary for reading accuracy, reading fluency, and spelling accuracy, and in the graphomotor coordination skills required for writing. Thus, [Student] continues to meet criteria for the diagnosis of a Developmental Coordination Disorder or Dysgraphia.”⁴⁰

Student’s attention was measured on the WRAML-3; her/his Attention/Concentration Index score of 66 was in the Extremely Low range, indicating that both her/his auditory attention and his/her visual attention were significantly impaired even when required to attend only briefly.⁴¹ On the IVA-2, Student was Mildly Impaired on the Auditory Response Control Quotient (89) and the Auditory Attention Quotient (81), Moderately Impaired on the Full Scale Attention Quotient (71), Full Scale Response Quotient (78), Visual Response Control Quotient (70), and the Sustained Auditory Attention Quotient (77), Severely Impaired on the Visual Attention Quotient (65), and Extremely Impaired on the Combined Sustained Attention Quotient (56) and the Sustained Visual Attention Quotient (37).⁴²

[Student’s] pattern of performance on the IVA-2, however, indicated that it is likely almost impossible to create an environment with a level of demand that is optimal for both auditory and visual attention. Moreover, even under optimal conditions for auditory or visual attention in isolation, [his/her] highest level of performance still placed [his/her] attention in the Mildly Impaired range for [his/her] age. Consequently, most environments are likely to be discouraging, frustrating, stressful, and even de-stabilizing for [him/her] to navigate. In addition, [Student’s] performance indicated that [his/her] auditory processing speed fell in the Mildly Impaired range for [his/her] age and [his/her] visual processing speed fell in the Severely Impaired range for [his/her] age.⁴³

³⁷ P37:1.

³⁸ P11:1 (117).

³⁹ P37:19-20.

⁴⁰ *Id.* at 20.

⁴¹ *Id.* at 21.

⁴² *Id.* at 22.

⁴³ *Id.* at 22-23.

Examiner A measured Student's verbal and visual recall memory on other subtests of the WRAML-3. S/he was in the Average range in General Delayed Memory (107), General Recognition Memory (108), Verbal Immediate Memory (106), Verbal Delayed Memory (106), Verbal Recognition Memory (106), Visual Immediate Memory (103), Visual Delayed Memory, and Visual Recognition Memory (108), and one point below Average in General Immediate Memory (89).⁴⁴ Student's executive functioning was assessed on the WCST. Her/his scores were Above Average on all five subtests.⁴⁵

Taken together, [Student's] pattern of performance on direct assessment indicated that both her/his auditory attention and her/his visual attention were significantly impaired even when [s/he] was required to attend only briefly. Furthermore, assessment of sustained attention indicated that [Student's] auditory attention fell in the Moderately Impaired range and [his/her] visual attention fell in the Extremely impaired range. Closer analysis of [his/her] performance indicated that [Student's] auditory attention is strongest, but still falls in the Mildly Impaired range for [her/his] age, under high-demand conditions and so, in highly engaging conditions, whereas [her/his] visual attention is strongest, but once again, still falling in the Mildly Impaired range for her/his age, under low-demand conditions that give [her/him] sufficient time for processing of information. In day-to-day life, however, auditory and visual information are typically presented simultaneously, at the same rate, and individuals are therefore expected to sustain auditory and visual attention at the same level. [Student's] pattern of performance, then, indicated that it is likely almost impossible to create an environment with a level of demand that allows [her/him] to sustain both auditory and visual attention... [Student's] profile remains consistent with the diagnosis of Other Specified Attention Deficit/Hyperactivity Disorder (ICD-10: F90.8). As noted previously, while [Student's] pattern of performance on direct assessment and [her/his] functioning in day-to-day life across settings may be rooted in [her/his] substantial trauma history and its impact on neural development, it nevertheless indicated that [her/his] capacity for the self-regulation of attention and behavior is functionally similar to that of individuals who meet criteria for the diagnosis of Attention Deficit/Hyperactivity Disorder, Combined Presentation, Moderate severity.⁴⁶

On the WJ-IV ACH, Student's scored in the Low range in all areas: Broad Achievement (72), Broad Reading (70 – 87 in Passage Comprehension, 66 in Fluency), Broad Written Language (73 – 95 in Writing Samples, 63 in Spelling), and Broad Mathematics (76 – 86 in Calculation, 87 in Applied Problems, 65 in Fluency).⁴⁷ Student's Social-Emotional Functioning was measured on the Rorschach and self-administered rating scales on the BASC-3. Student's self-report ratings yielded scores in the Clinically Significant range in Sense of Inadequacy (T=76) and in the At-risk range in Sensation Seeking (T=66), Anxiety (T=62), Depression (T=62), and Attention Problems (T=66).⁴⁸

⁴⁴ *Id.* at 23-24.

⁴⁵ *Id.* at 26.d

⁴⁶ *Id.* at 29-30.

⁴⁷ *Id.* at 30-31.

⁴⁸ *Id.* at 33.

Examiner A noted that in Reading, Student's accuracy and fluency were well below average, but his/her comprehension was consistent with his/her level of intellectual functioning. In Written Language, his/her spelling and fluency skills were well below average, but his/her ability to convey ideas in single-sentence responses to a variety of prompts was in the average range. In Mathematics, Examiner A concluded that Student remained eligible for a diagnosis of Specific Learning Disorder with Impairment in Mathematics, with Impairment in Fluent Calculation and Memorization of Math Facts. In terms of Student's social-emotional behavior, Examiner A found that his/her functioning were consistent with diagnoses of PTSD and Reactive Attachment Disorder. Other diagnoses were Personal History of Physical and Sexual Abuse in Childhood, Personal History of Neglect in Childhood, Other Specified Attention Deficit/Hyperactivity Disorder, Attention Deficit/Hyperactivity Disorder, Combined Presentation, Moderate severity, Developmental Coordination Disorder (Dysgraphia), and Language Disorder (By History).⁴⁹

Examiner A opined that Student requires a highly structured and very small school environment, with a teacher-to-student ratio of no more than 1 to 3 or 4. "[S/he] requires a therapeutic milieu that will, in and of itself, serve to reduce [her/his] anxiety enough to allow [her/him] to focus on educational instruction." Examiner A also recommended that Student be placed in a therapeutic boarding school:

Moreover, due to [Student's] level of dysregulation outside of a highly structured therapeutic milieu, [s/he] will require placement in a therapeutic boarding school to ensure the required level of structure, support, and therapeutic intervention 24/7. Without that intensity of support 24/7, [Student] will not remain regulated enough during school hours to access [her/his] education. Simultaneously, given [Student's] severe delays in academic skills in reading, mathematics, and written language expression, [Student's] school must have a specific focus on providing intensive academic remediation using multi-sensory and experiential learning methods and capitalizing on [Student's] strengths.⁵⁰

Examiner A also recommended 140 minutes of counseling services per week, one 50-minute group therapy session each week, psychiatric treatment to be integrated into her/his school program, 60 minutes per week of speech-language therapy intervention "to provide support for social communication and social cognition, as well as for her/his weaknesses in expressive and receptive languages and their impact on [her/his] reading and written expression skills," 60 minutes per week of occupational therapy to target both visual-motor integration skills and non-motor visual processing skills, and numerous classroom aids and services.⁵¹

11. On November 28, 2022, Examiner B of School A completed a Speech and Language Evaluation of Student.⁵² On the CELF-5, Student scored in the Average range in Sentence Assembly (8), in the Below Average range in Following Directions (7), and Formulated Sentences (7), in the Low range in Recalling Sentences (6), Understanding Spoken Paragraphs (6), Word Definitions (5), and Semantic Relationships, in the Very Low range in Word Classes (4),

⁴⁹ *Id.* at 34-37.

⁵⁰ *Id.* at 38.

⁵¹ *Id.* at 38-44.

⁵² P10:1 (101).

and in the Severely Low range in Pragmatic Profile (2). These scores represented an improvement from Student's scores on Examiner A's evaluation in 2020 in one category (Sentence Assembly – 6), the same in Recalling Sentences and Understanding Spoken Paragraphs, and below in all other categories except Word Definitions, which was not assessed in 2020.⁵³ In language skills, Student was Below Average on the Expressive Language Index (82) and the Language Memory Index (80), and in the Low range in Core Language (78), on the Receptive Language Index (75), and on the Language Content Index (75). The Language Memory Index score was five points below Student's score in 2020, while the other four scores were equal to or within a point of the earlier scores.⁵⁴ On the CELF-5 Pragmatic Profile, Student's advisor and a teacher provided ratings of Student's verbal and nonverbal contextual communication as observed in the academic, residential, and community settings. Both ratings placed Student in the Very Low range (0.4 and 2nd percentiles).⁵⁵ On the Social Language Development Test ("SLDT"), Student was in the Average range in Problem Solving, Below Average in Making Inferences, Interpreting Ironic Statements, on the Social Language Development Index, and Social Interaction, and Borderline Impaired or Delayed in Interpreting Social Language.⁵⁶ On the Test of Auditory Processing Skills ("TAPS-4"), Student was in the Average range on the Listening Comprehension Index (93), and in the Extremely Low range on the Phonological Processing Index (60) and the Auditory Memory Index (55).⁵⁷ On a hearing test in May 2022, Student was found to have a mild to moderate hearing loss in her/his left ear.⁵⁸

Examiner B diagnosed Student with Social Pragmatic Communication Disorder and recommended ninety minutes per week of direct S/L services.⁵⁹

12. On January 2, 2023, DCPS inquired of Attorney A as to the status of the independent FBA II, and indicated that the eligibility meeting would be scheduled upon receipt. On January 17, 2023, Attorney A notified DCPS that School A had informed her that Student "is not demonstrating significant behavioral issues in the classroom and that any off-task behavior is being addressed through a prompt from the teacher." Attorney A requested that DCPS proceed with the eligibility/IEP process with the independent evaluations already submitted to DCPS.⁶⁰

13. On January 26, 2023, DCPS submitted Consent to Evaluate forms to Petitioners. Minutes later, Attorney A replied, expressing confusion as Petitioners had submitted independent evaluations to DCPS. DCPS replied, indicating that it needed consent to review the independent assessments. Petitioner A provided consent by email two hours later.⁶¹ On January 27, 2023, DCPS issued a PWN indicating its intent to proceed with reviews of the independent audiology, psychological, and speech evaluations submitted by Petitioners.⁶²

⁵³ *Id.* at 3 (103).

⁵⁴ *Id.* at 6 (106).

⁵⁵ *Id.* at 7 (107).

⁵⁶ *Id.* at 8-9 (108-9).

⁵⁷ *Id.* at 11 (111).

⁵⁸ *Id.* at 13 (113).

⁵⁹ *Id.* at 15 (115).

⁶⁰ P14:1-2 (129-30).

⁶¹ P15:1-3 (133-35).

⁶² *Id.* at 5 (137).

14. On February 15, 2023, Examiner C, a DCPS school psychologist, completed a report on her review of Examiner A’s November 2022 evaluation.⁶³ After summarizing Examiner A’s evaluation,⁶⁴ Examiner C determined that Student met the criteria for eligibility for special education services as a child with an Emotional Disability (“ED”).⁶⁵ Examiner C recommended a number of classroom aids and services, but she offered no recommendation as to Student’s LRE.⁶⁶

15. On February 15, 2023, Examiner D, a DCPS speech and language therapist, completed a report on her review of Examiner B’s Speech and Language Evaluation.⁶⁷ Noting that Examiner B administered the CELF-5, Examiner D cited a 2005 study that found that “children learning English as a Second Language (ESL) may show similar characteristics to children with Specific Language Impairments (SLI) when assessed by language tests that are not valid, reliable, and free of bias. Thus, typically developing students learning English as a Second Language may be diagnosed as having a language disorder when, in reality, they are showing signs of typical second language acquisition.”⁶⁸ Examiner D opined that Student’s standard scores on the CELF-5 “should be interpreted with caution given her/his history of adverse childhood experiences (ACEs) and socio-emotional history.”⁶⁹ Examiner D also questioned the administration of the SLDT as test developers suggested excluding subjects who are not able to use English proficiently at school.⁷⁰ Similarly, Examiner D criticized the administration of the TAPS-4, because the test developers indicated that examinees should be proficient in the English language and not have hearing deficits that would impair the ability to respond reliably to the testing prompts.⁷¹ Nevertheless, Examiner D concluded that Student required S/L therapy in the school setting:

According to documentation from this evaluation and record review, [Student’s] challenges in the areas of receptive, expressive, and pragmatic language would impact [his/her] ability to successfully participate in class routines and activities. [Student’s] speech and language difficulties impact [his/her] ability to fully access the curriculum and to successfully communicate [his/her] wants, needs, and ideas with peers and adults throughout the school day. Integrated and individualized speech and language therapy in the school setting is necessary in order to address the above areas and ensure success in the classroom environment.⁷²

Examiner D offered a number of classroom strategies and recommended the adoption of the classroom accommodations and recommendations in the May 2022 audiological evaluation referenced in Examiner B’s evaluation.

16. On February 27, 2023, Examiner E, a DCPS audiologist, completed a review of an

⁶³ P16:1 (139).

⁶⁴ *Id.* at 1-8 (139-146).

⁶⁵ *Id.* at 9-10 (147-48).

⁶⁶ *Id.* at 12-13 (150-51).

⁶⁷ P17:1 (153).

⁶⁸ *Id.* at 9 (161).

⁶⁹ *Id.* at 10 (162).

⁷⁰ *Id.*

⁷¹ *Id.* at 11 (163).

⁷² *Id.* at 13 -17 (165-69).

independent audiological evaluation conducted on January 3, 2023.⁷³ The independent evaluation was not included in Petitioners' disclosures. Examiner E reported that the evaluation found Student to have a "mild sloping to moderately-severe mixed hearing loss in the left ear and normal hearing acuity in the right ear" that would impair his/her ability to access the curriculum orally:

Educationally, without proper amplification, [Student] will have some difficulty understanding distance or faint speech, speech in noisy and reverberant environments, localizing sounds, and detecting speech sounds on [his/her] poor side (left ear). It is anticipated that [s/he] will experience some problems accessing the general curriculum via audition alone due to [his/her] unilateral hearing loss. While [Student] can perform well in quiet one-on-one settings, [his/her] hearing loss may impact [his/her] ability to socialize with [his/her] teachers and peers in group settings. [S/he] may become fatigued in the classroom setting due to greater effort to listen, thus may become inattentive, distractible, or frustrated.⁷⁴

17. On March 29, 2023, DCPS' Centralized IEP Support Unit for Private Schools proposed dates for Student's eligibility meeting: June 15 or 16, 2023. Petitioner's counsel's paralegal objected to the delay in scheduling the meeting, but accepted the June 15th date. On April 25, 2023, Petitioner A requested a date in the following week. On May 12, 2023, a DCPS representative promised to "send out new dates." On June 2, 2023, DCPS Staff Member A replied, reiterating the offer of June 16th. Minutes later, Attorney A responded, noted that Petitioners had notified DCPS of their unavailability on June 16th "on multiple occasions" and renewed the request for a new date during the following week.⁷⁵

18. On July 27, 2023, DCPS conducted Student's eligibility meeting. Student was found to be eligible for services as a student with an ED.⁷⁶

19. On August 7, 2023, Attorney B notified DCPS that Petitioners would enroll Student at School A for the 2023-24 school year and requested that DCPS fund the placement.⁷⁷ On August 25, 2023, DCPS declined to fund the placement.⁷⁸

20. On September 26, 2023, DCPS conducted an IEP meeting.⁷⁹ The section on Special Considerations reported that Student's behavior impedes her/his learning or that of others, that s/he is an English learner, and that s/he is hearing impaired and needs a hearing aid.⁸⁰ The Areas of Concern in the IEP were Mathematics, Reading, Written Expression, Emotional/Social/Behavioral Development, Communication/Speech & Language, and Hearing.⁸¹ The IEP team prescribed 27 hours per week of specialized instruction outside general education, four hours per month each of BSS and S/L services outside general education, two hours per month each of behavior and S/L consultation services, 30 minutes

⁷³ P18:1 (171).

⁷⁴ *Id.* at 2 (172).

⁷⁵ P19:1-14 (175-88).

⁷⁶ P23-3 (213).

⁷⁷ P24:1 (223).

⁷⁸ *Id.* at 2 (224).

⁷⁹ P26:1 (233). Although the meeting was characterized as an Annual Review meeting, it was Student's Initial IEP meeting.

⁸⁰ *Id.* at 2-3 (234-35).

⁸¹ *Id.* at 4-18 (236-50).

per month of audiology consultation services, and a number of classroom aids and services.⁸² The IEP characterized Student's LRE as "a separate school."⁸³ There was a consensus that Student required a residential placement; DCPS committed to notify OSSE of the need for a non-public placement.⁸⁴ Administrator A, a Program Specialist on DCPS' Central IEP Support Unit for Private Schools, discussed the process OSSE must follow to solicit acceptances for Student from non-public schools holding an OSSE Certificate of Approval ("DOA").⁸⁵

21. On October 18, 2023, DCPS forwarded to Witness D, OSSE's Special Education Placement Manager, Student's Justification for Removal/Request for Change in Placement packet.⁸⁶

22. On November 8, 2023, OSSE conducted a Change in Placement Meeting with DCPS and Petitioners and determined that Student required a more restrictive educational environment.⁸⁷

23. On November 14, 2023, Petitioner A signed OSSE's *Location Assignment Process Consent Form & Confirmation of Receipt of OSSE's Policies and Procedures for Placement Review, Revised Parent Brochure*. Petitioner A confirmed that she participated in a meeting in which an OSSE representative explained the process by which OSSE applies to nonpublic schools and identifies a nonpublic location for Student, including applying to nonpublic schools on OSSE's COA list. The form authorized OSSE to proceed with the application process.⁸⁸

24. On November 16, 2023, Witness E, OSSE's Change in Placement Coordinator, notified Petitioners OSSE had sent applications nine schools on behalf of Student.⁸⁹ On November 22, 2023, Witness E notified Petitioners that of the nine schools to which it had sent applications for Student, five had declined admission; the other four had either not responded or not made a decision.⁹⁰

25. On January 9, 2024, Petitioner A inquired of Witness E, "Where are we in the process?" Witness E replied the next day, indicating that he was awaiting responses from four of the schools. On January 19, 2024, Petitioner A requested another update: "We have been in this process with DCPS for 2 years. Can we please get this resolved ASAP? This financial burden is so hard on our family." Twelve minutes later, Witness E replied, indicating that he would allow one more week to receive responses from the four schools.⁹¹ Later that day, Witness E contacted School A to schedule a meeting to "begin discussing the next steps" for Student.⁹²

⁸² *Id.* at 19-20 (251-52).

⁸³ *Id.* at 22 (254).

⁸⁴ P25:4 (230).

⁸⁵ *Id.* at 6 (232).

⁸⁶ R12:1 (120); OSSE's Exhibit ("OSSE R.") 3 at page 38. The exhibit number is followed by the electronic page, e.g. R3:38.

⁸⁷ OSSE R7:52-54.

⁸⁸ P27:1 (263).

⁸⁹ P28:2 (266); OSSE R9-R16:58-80. OSSE did not disclose the application to one of the nine schools. Witness E's November 22, 2023 email to Petitioners indicated that that school had no bed available.

⁹⁰ *Id.* at 1 (265).

⁹¹ OSSE R19:85-89.

⁹² OSSE R17:81.

26. On January 30, 2024, Witness E requested additional information from School A.⁹³ On February 1, 2024, OSSE forwarded an admissions packet to School A on behalf of Student. School A notified OSSE of Student's acceptance two hours later.⁹⁴ On February 9, 2024, School A notified OSSE that it could not provide the audiology services prescribed in Student's IEP.⁹⁵ On March 5, 2024, OSSE issued a Notice of Service Location for Student to School A.⁹⁶

27. Witness A is a family therapist at School A. She testified that School A is a therapeutic day/boarding school at which all students have disabilities. The class sizes range from five to ten students with a teacher-to-student ratio of 1:4. There is teacher or administrator support twenty-four hours per day. Witness A provides therapy to Student in two 45–60-minute sessions each week. Witness A opined that Student has progressed since arriving from Facility C: a decrease in PTSD symptoms, a decrease in anxiety, his/her mood is elevated, and his/her executive functioning has improved. Student's level of responsibility has improved to the point that on School A's level system related to degree of freedom on campus, Student has achieved the highest level, i.e., least amount of restrictions, Student is now allowed to leave the campus and seek employment in the outside community.⁹⁷

28. Witness B is the Residential Director at School A and became Student's academic case manager in October 2023. He testified that School A is a therapeutic boarding school for students in grades 7-12 who have been unsuccessful in other settings. All students are on a diploma track. Witness B opined that Student has made progress in the following areas: more self-advocacy, more self-confidence, more sociable, performance in sports, Drama, reading comprehension, writing, and advocacy with teachers. Student has also improved in making friends with his/her peers; s/he "burned bridges" before, but now has several close friends. Witness B was unaware of Student's instructional levels in English, Writing, and Mathematics, but testified that s/he instructed at grade level in Social Studies and Science.⁹⁸

29. Petitioner A testified that she adopted Student from her/his native Columbia when Student was Y-years old. Student had a traumatic childhood that included sexual trafficking. His/her mother was a prostitute. Student was at Facility C, a residential treatment facility in Missouri when Petitioners contacted DCPS; they contacted DCPS because Student needed academic instruction. Petitioners retained Attorney A's firm to provide legal counsel, but they did not contemplate litigation. DCPS was the first local education agency ("LEA") that Petitioners ever approached for services for Student in February 2022. At the AED meeting on March 29, 2022, DCPS committed to arranging for Student to be evaluated locally in Missouri. When DCPS was unable to get this done, they sent Petitioners authorization for independent evaluations in May 2022. DCPS ultimately approved the higher rates for the evaluations quoted by the independent evaluators. DCPS never suggested that Student be brought to the District for evaluations. Student was in the District for two weeks in August 2022. Petitioners did not inform DCPS that Student would be in the District for two weeks in August 2022. Petitioners agreed with the IEP developed in September 2023. Petitioners were advised and aware of the process OSSE would follow to place

⁹³ OSSE R18:82.

⁹⁴ OSSE R20:89-90.

⁹⁵ OSSE R22:93-95.

⁹⁶ P29:1 (269); OSSE R24:117-19.

⁹⁷ Testimony of Witness A.

⁹⁸ Testimony of Witness B.

Student in a nonpublic residential school.⁹⁹

30. Witness C is DCPS' LEA Representative. She testified that Petitioners' referral indicated that Student's primary language was Spanish. This would indicate the need for bilingual evaluations. The February 2022 referral was DCPS' first contact with Petitioners and first awareness of Student. DCPS's evaluators are licensed locally; they are not authorized to conduct evaluations in Missouri. DCPS received Examiner A's evaluation on March 8, 2023. DCPS contacted the local school district where Facility C is located to inquire as to its willingness to conduct the evaluations proposed at the AED meeting.¹⁰⁰ On April 14, 2022, the local school district declined to conduct the evaluations. Thereafter, DCPS attempted to locate independent evaluators in Missouri to conduct the evaluations. There are only two bilingual speech therapists in Missouri. One agreed to do it, then changed her mind; the other never responded to DCPS. Unable to identify independent evaluators willing to conduct the evaluations, DCPS sent Petitioners an authorization to secure independent evaluations on May 17, 2022. Petitioners did not inform DCPS that Student would be in the District for two weeks in August 2022. Their August 12, 2022 email indicated that Student would not be in the District until November 2022 when s/he would be evaluated by Examiner A. DCPS could have completed the required evaluations during the two week period in August 2022 had Petitioners made Student available. Witness C opined that although Attorney A asked DCPS to proceed to an eligibility meeting without awaiting the completion of an FBA II, Witness B's testimony as to Student's behavior at School A was consistent with the need for the assessment. Petitioners agreed completely with the IEP developed on September 26, 2023. School A representatives participated in the Change in Placement meeting on November 8, 2023. On cross-examination, Witness C testified that the eligibility meeting was not conducted until July 2023 due primarily to scheduling conflicts on DCPS' side of the team.¹⁰¹

31. Witness D is OSSE's Special Education Placement Manager. She testified that when OSSE solicits admissions from non-public schools, they normally send out three to four applications. However, because residential placements are more difficult to complete due to lack of bed availability, age (more difficult to place older students), behavioral concerns, and academic concerns, OSSE normally sends out more applications. Witness D testified that the month between School A's acceptance of Student and OSSE's issuance of the Notice of Service Location was a "quicker process than most... There are a number of requirements we have to go over with the schools before we can commit funds."¹⁰²

32. Witness E is OSSE's Change in Placement Coordinator. He testified that at the change in placement meeting on November 8, 2023, OSSE recommended a more restrictive environment for Student. At that meeting OSSE explained to Petitioners that it had to attempt to place Student in a school with a COA before it could seek admission to School A. OSSE did not predict how long that process would take as OSSE had no control on the schools' responsiveness to the applications. Witness E testified that the consent form that Petitioners signed after the meeting, to allow the applications to COA schools, also explained the application process. Witness E reiterated Witness D's testimony that OSSE solicited more admissions from residential schools than it would from day schools because residential admissions are more difficult to secure. Witness

⁹⁹ Testimony of Petitioner A.

¹⁰⁰ See R6:1 (83).

¹⁰¹ Testimony of Witness C.

¹⁰² Testimony of Witness D.

E testified that between February 1, 2024, when School A accepted Student, and March 5, 2024, when OSSE issued the Notice of Service Location, OSSE was communicating with School A officials to ensure that it had the capability to implement Student's IEP, that it had appropriate special education programs, and necessary related services.¹⁰³

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.¹⁰⁴

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

Whether DCPS denied Student a FAPE by failing to provide a timely and appropriate IEP and placement for the 2022-23 school year. Specifically, Petitioners assert that while Student required placement in a residential facility when they first referred him/her for evaluation in February 2022, Student was not found eligible until July 27, 2023, and DCPS did not develop an IEP providing placement in a residential facility until September 26, 2023.

Neither the appropriateness of Student's IEP or placement are disputed. Student's only IEP was developed on September 26, 2023. Both Petitioner A and Witness C, DCPS' LEA Representative, testified that the provisions of the IEP were acceptable to Petitioners. Moreover, it is uncontroverted that DCPS recommended a residential placement for Student, that OSSE concurred with that recommendation, and that OSSE ultimately placed Student at School A, Petitioners' placement of choice. Thus, the only issue as to school year 2023-22 is the timeliness of the IEP and placement for purposes of determining Petitioners' entitlement to reimbursement for expenses for their unilateral placement of Student at School A for that school year.

¹⁰³ Testimony of Witness E.

¹⁰⁴ D.C. Code Sect. 38-2571.03(6)(A)(i).

When a parent requests an evaluation for a child with a disability, District law requires the LEA to make reasonable efforts to obtain parental consent for the evaluation within 30 days, and it must evaluate the student within 60 days of receiving consent to evaluate.¹⁰⁵ The District's regulations require an LEA to evaluate and make an eligibility determination within 60 days from the date that the student's parent provides consent for the evaluation.¹⁰⁶ IDEA regulations require that the LEA convene a meeting to develop a child's initial IEP within 30 days of the determination that the child requires special education and related services.¹⁰⁷

Here, Petitioners referred Student for evaluation on February 14, 2022. DCPS did not acknowledge the referral until March 4, 2022 and then proposed an AED meeting on March 29, 2022. Although the meeting notes indicated that the purpose for the meeting was Student's triennial eligibility determination, nothing in the record corroborates a prior determination of eligibility. There is no prior eligibility determination form or IEP in the record, and the *Complaint* alleges that Petitioners first sought referral in February 2022.

No participant in the meeting from DCPS testified at the hearing, and the meeting notes reveal no discussion as to what entity would conduct the evaluations that the team determined were necessary: comprehensive bilingual psychological evaluation, comprehensive bilingual S/L assessment, hearing evaluation, FBA-II, and language access testing. However, at the hearing, Witness C, DCPS' LEA Representative, testified that DCPS' evaluators could not conduct the evaluations outside of the DMV region because they are only licensed in this region. Witness C further testified that DCPS contacted the school district where Facility C is located to inquire as to its willingness to conduct the evaluations, but they declined. DCPS also attempted to locate independent evaluators in Missouri to conduct the evaluations, but was unsuccessful. Therefore, on May 17, 2024, DCPS authorized Petitioners to obtain independent evaluations.

Student was not ultimately evaluated until Examiner A completed an independent Psychological Evaluation on or about November 17, 2022, and Examiner B conducted a Speech and Language Evaluation on November 28, 2022 at School A.¹⁰⁸ On January 2, 2023, when DCPS inquired of Petitioners' attorney as to the status of the independent FBA II, Attorney A replied that Student's behavior at School A was such that an FBA was unnecessary, and asked DCPS to proceed with the eligibility determination. DCPS acceded to this request and, on January 26, 2023, DCPS requested Petitioners' consent to review the independent evaluations, which consent was immediately provided. DCPS completed its review of the independent evaluations on February 27, 2023. DCPS did not suggest dates for the eligibility meeting until March 29, 2023, at which time it proposed dates in June 2023. Witness C conceded that the nearly three-month delay in convening the eligibility meeting was due to the difficulty in finding mutually convenient dates for DCPS' team members. After Attorney A first accepted DCPS's proposed date of June 15th, Petitioner A indicated her unavailability that week and requested a date the following week. The parties ultimately settled on July 27th, at which meeting Student was found to be eligible for services. Thereafter, the parties agreed to an IEP meeting date of September 26, 2023 at which they agreed as to the provisions of an IEP and that Student required a residential placement.

¹⁰⁵ D.C. Code § 38-2561.02(2)(A).

¹⁰⁶ 5-A DCMR § 3005.4(b).

¹⁰⁷ 34 C.F.R. § 300.323(c)(1).

¹⁰⁸ Examiner B referenced a May 2022 audiological evaluation and Examiner E, a DCPS audiologist who reviewed a January 2023 audiological evaluation. Neither audiological evaluation was disclosed or offered into evidence.

In her closing argument, Petitioners' counsel attributed the entirety of the delay in determining Student's placement to DCPS' lack of proactivity. This is not a case where the child was a DCPS student, performed poorly, and DCPS failed to provide adequate services to improve his/her chances of making academic progress. Rather, this is a child who was adopted from another country and placed in successive private schools upon his/her arrival in the District. Petitioners then placed Student in a residential treatment facility in Missouri that apparently did not include an academic program; Petitioners disclosed no academic records from Facility C and Student progressed only one grade level from the fall of 2020 to the fall of 2023. At the AED meeting in March 2022, Attorney A notified the team that Student would be leaving Facility C in two to three months and Petitioners needed to know the "next steps." Thus, Petitioners contacted DCPS only after retaining counsel to facilitate DCPS' funding of Students anticipated residential placement.

This is also not a case in which there was ample data already available for DCPS to make a determination as to eligibility or placement. Although Petitioners provided DCPS Examiner A's 2020 evaluation, that evaluation did not support or presage the need for a residential placement, and nothing in the record indicates that Petitioners provided DCPS Student's educational records from School B and School C, the two private schools s/he attended before being sent to Facility C. When asked at the hearing why Student was sent to Facility C, Petitioner A stated that it was at the recommendation of Facility B. However, no evaluation or report by Facility B was disclosed at the hearing, and Petitioners' February 25, 2022 email to DCPS enclosing Examiner A's 2020 evaluation did not include a report or evaluation from Facility B.¹⁰⁹ The mere fact that Student was in a residential treatment facility did not, by itself, support the academic necessity for a residential placement.¹¹⁰ The record does not include documentation that Petitioners provided DCPS any records relating to Student academic or behavioral performance at School B, School C, or Facility C.

Thus, DCPS was justified in attempting to get current evaluations of Student before making a determination as to eligibility. DCPS' position is that it could not conduct the evaluations of Student because s/he was in Missouri and their evaluators were not licensed to conduct evaluations in Missouri. DCPS also asserted that they made efforts to locate independent evaluators in Missouri to evaluate Student, but were unsuccessful. DCPS disclosed correspondence with the local school district in Missouri, and its May 19, 2022 email to Attorney A provided a list of the independent evaluators that it had contacted.

¹⁰⁹ Petitioners disclosed a Psychological Summary prepared by Examiner A on March 7, 2022 to which DCPS objected. Examiner A did not reevaluate Student before preparing the Summary. Having never before seen a summary of a two-year old evaluation, I asked why it was developed. The only significance of the document was that Examiner A recommended a residential placement in the Summary, which recommendation did not appear in her 2020 evaluation. The conclusion is inescapable that the Summary was developed in anticipation of the AED meeting three weeks later, at which Attorney A indicted that Student would shortly be needing a new placement. Examiner A's Summary was completed the day before Petitioners accepted DCPS' proposed date for the AED meeting. I excluded the Summary from evidence on grounds of hearsay; Examiner A was not available to testify as to the reason for the development of the Summary or the basis for her recommendation of a residential placement. On January 17, 2023, Attorney A notified DCPS that Student's behavior at School A did not warrant the development of an FBA II. Since general education classrooms throughout the city are replete with children with FBAs, it seems incongruous that a child who did not need one would require a residential placement.

¹¹⁰ In Case No. 2022-0009 (Nov. 14, 2022), in *dictum*, I concluded that a residential placement was unwarranted where the student's disruptive behavior was prevalent at home, but not in the school environment.

Petitioners argued that DCPS never asked them to make Student available for testing. These are not unsophisticated, helpless litigants. Petitioner A is an accomplished professional with a doctoral degree. From the inception of their interaction with DCPS, Petitioners have been represented by one of the city's most prominent firms specializing in special education law. Petitioner A testified that they retained Attorney A's firm to advise them, but did not anticipate litigation. Retaining a firm that specializes in litigation to secure private school placements, and bringing them to the first meeting with DCPS, belies that testimony. However, it does not undermine the legitimacy of Petitioners' claim in this matter, as IDEA guarantees a *free* appropriate public education. Petitioners' counsel were well aware that parents have a responsibility to make children available for testing during the eligibility process. In fact, DCPS raised the issue of the need for independent evaluations at that first meeting in March 2022.

During the hearing, I invited counsel for the parties to submit authorities post-hearing on the issue of an LEA's duty to conduct evaluations of an out-of-state student. Petitioners cited *District of Columbia v. Abramson*¹¹¹ for the proposition that DCPS denied the student a FAPE when it terminated the eligibility process upon the student's unilateral placement outside the jurisdiction. While Petitioners' counsel, who represented Abramson, correctly described the precedent, it is inapposite to the facts in the instant case. Here, DCPS did not decline to proceed with the eligibility determination. Rather, it argues that in Student's absence from the jurisdiction, it did everything it could to complete Student's evaluations on its own by encouraging the school district where Facility C was located to conduct the evaluations, and by attempting to locate independent evaluators in Missouri willing and able to conduct the necessary bilingual evaluations. Having failed in these efforts, DCPS provided Petitioners authorization to get independent evaluations where Student was located. Upon the completion of the independent evaluations, DCPS proceeded with the eligibility process. Thus, *Abramson* is clearly distinguishable from this case.

Petitioners cited no authority for the proposition that DCPS had the obligation to conduct evaluations in another jurisdiction. However, DCPS cited several cases holding that parents have an obligation to make their out-of-state children available for evaluation during the eligibility process. In *H.D. ex rel. Jeffrey D. v. Kennett Consolidated School District*,¹¹² the school district sought consent to evaluate the student on March 1, 2017. While the parents gave consent on March 21st, they had already arranged for the child to attend an out-of-state wilderness program beginning on March 9th, because they believed him to be severely deteriorating. The court held that the parents' decision to remove the student from the state absolved the school district of the obligation to evaluate him:

[G]reat Valley held that, in the absence of an IDEA violation by the school district, a school district cannot be required to assume the burden of evaluating a student who has been unilaterally removed to a private placement across the country.... Here, the District had not violated IDEA when H.D. was removed on March 9, 2017. The Parents could not then, by the act of unilaterally removing H.D.,

¹¹¹ 493 F.Supp.2d 80, 86 (D.D.C. 2007) (DCPS' refusal to continue the evaluation process for S.A., a resident of the District of Columbia, constituted a denial of FAPE.).

¹¹² 2019 WL 4935193 (E.D.Pa. 2019).

unilaterally burden the District with an out-of-state evaluation. Their removal of H.D. from the District therefore cut off the District's obligation to evaluate him.¹¹³

Another District Court in Pennsylvania cited *H.D.* and *Great Valley* approvingly in *N.H. ex rel. S.H. v. Phoenixville Area School District*.¹¹⁴ There, the parents consented to evaluations on April 29, 2019 and sought relief for the school district's failure to finalize the student's IEP by the beginning of the following school year in August. At the time of consent, the student was in a boarding school in Idaho, and by the time he graduated on August 1st, the parents had decided to enroll him in another boarding school in Rhode Island. They advised the school district that the student would be available in the district between August 20th and September 3rd. The student was in the district for two days in July, but the parents did not inform the school district of his availability at that time. The court upheld the hearing officer's ruling in favor of the school district because (1) the parents did not make the student available for evaluation within the district prior to the beginning of the school year, and (2) neither the student nor the parents suffered any harm, because the parents had already decided to send the student to the Rhode Island boarding school.

The court agrees that the District acted reasonably in evaluating N.H. considering the geographical constraints with which it was encumbered... [s]ave for a couple of weeks in August and September 2019, N.H. was in Idaho and Rhode Island during the evaluative period. The District cannot be blamed for the decision of N.H.'s parents to place him at schools faraway... The court also notes, as did the hearing officer, that N.H.'s parents contributed to this delay. Although N.H.'s parents requested an offer of a FAPE in April 2019, they did not respond to the District's request for N.H.'s availability until July 2019, and when they did, they provided the school with only a two-week window to complete the testing when N.H. was in Pennsylvania... Even if the District's evaluative process were unreasonable, the reevaluation report delay would be a procedural violation of the IDEA. The delay must cause substantive harm to warrant compensatory relief... As noted above, as early as August 1, 2019, N.H.'s parents were already set on sending him to the Rhode Island boarding school roughly a month before the start of the 2019-2020 school year. And in March 2020 there was still ample time ahead of the 2020-2021 school year for N.H.'s parents to decide to reenroll him in the District. The court agrees with the hearing officer that the District's delay in completing the reevaluation report did not result in any substantive harm.¹¹⁵

Petitioners not only failed to make Student available for evaluations, like the parents in *N.H. v. Phoenixville* they did not inform DCPS that Student would be in the District for two weeks in August 2022. During that very time frame, on August 12, 2022, Attorney A informed DCPS that Student would not be in the District until November 2022, at which time they would make him/her available to Examiner A, their preferred evaluator. Witness C testified that had DCPS

¹¹³ *Id.* at 24, citing *Great Valley School District v. Douglas M.*, 807 A.2d 315 (Comwlth. Ct. Pa, 2002). *See also*, *Schwartz v. the Learning Center Academy*, 2001 WL 311247 at 6 (W.D. Mich, 2001)(student was not eligible for services under the Rehabilitation Act of 1973 where the parents did not make him available for evaluation for eligibility.)

¹¹⁴ 2021 WL 5998445 (E.D. Pa. 2021).

¹¹⁵ *Id.* at 8, citing *P.P. ex rel. Michael P. v. West Chester Area School District*, 585 F.3d 727, 7 (3rd Cir. 2009) (while the delay in evaluating the child was unfortunate, the delay had no impact on the parents' decision to keep the child in private school).

known of Student's availability in August 2022, it could have completed all of the necessary evaluations at that time. Therefore, I find Petitioners to have been complicit in the parties' failure to complete the eligibility process within the time frame set forth in the statute. The evaluations were effectively completed when DCPS acceded to Attorney A's request on January 17, 2023 to proceed to the eligibility determination without developing an FBA II.

From that point forward, all of the delays in the eligibility process are attributable to DCPS. First, on January 26, 2023. DCPS requested consent to review the independent evaluations. This was a time-wasting exercise, but since it only cost nine days of the process, it was a relatively minor aspect of the violation of the deadlines. It seems unnecessarily redundant for DCPS to ask for consent to review evaluations that it authorized for the explicit purpose of using them to determine the child's eligibility. If explicit consent is needed for some reason, DCPS should secure the consent up-front as a condition of the authorization.

DCPS' evaluators took another month, until February 27, 2023, to complete their review of the independent evaluations. It took DCPS yet another month, until March 19, 2023, to *propose* dates for the eligibility meeting, and its proposed dates were not until mid-June. Due to Petitioners' unavailability on the only two days offered by DCPS in June, the meeting was not held until July 27, 2023. The District's regulations require an LEA to evaluate and make an eligibility determination within 60 days from the date that the student's parent provides consent for the evaluation. It is reasonable to hold DCPS to a similar timeline to complete the eligibility process within 60 days of receipt of independent evaluations. Thus, combined with IDEA regulations' requirement to develop an IEP within 30 days thereafter, DCPS should have developed Student's IEP by April 18, 2023. Therefore, I conclude that DCPS has failed to meet its burden of proving that it provided a timely IEP and placement for Student for the 2022-23 school year, on or before April 18, 2023.

Whether DCPS denied Student a FAPE by failing to provide a timely and appropriate IEP and placement for the 2023-24 school year. Specifically, Petitioners assert that while Student required placement in a residential facility when they first referred him/her for evaluation in February 2022, Student was not found eligible until July 27, 2023, and DCPS did not develop an IEP providing placement in a residential facility until September 26, 2023.

In the previous section, I concluded that DCPS failed to meet its burden of proving that it provided a timely IEP and placement for Student for the 2022-23 school year by failing to provide the IEP and placement by April 18, 2023. For the same reasons, I conclude that DCPS failed to meet its burden of proving that it provided a timely IEP and placement for Student for the 2023-24 school year.

Whether OSSE denied Student a FAPE by failing to finalize the placement at School A for the 2023-24 school year until March 5, 2024.

When a local LEA determines that it is unable to provide a student a FAPE, it must request OSSE to make a placement outside of the LEA. OSSE must review the request within 30 business

days.¹¹⁶ OSSE must then conduct a change in placement meeting with the parents and the LEA.¹¹⁷ If the meeting participants decide to proceed with a placement outside the LEA, OSSE shall issue a service location within 15 business days of that decision absent extenuating circumstances as determined by OSSE.¹¹⁸ OSSE is precluded from issuing a service location to a nonpublic special education school that is unable to implement the child's IEP or that does not hold a current certificate of approval unless the placement has been ordered by a federal court or a hearing officer pursuant to IDEA.¹¹⁹ A hearing officer may make a placement to a nonpublic school that lacks a COA only if there is no public school or program able to provide the student a FAPE and there is no nonpublic special education school or program available holding a COA.¹²⁰

DCPS forwarded a Justification for Removal/Request for Change in Placement ("CIP") packet to OSSE on October 18, 2023. OSSE conducted its review and convened the Change in Placement meeting within 30 days, on November 8, 2023. On November 14, 2023, OSSE provided, and Petitioner A signed, OSSE's *Location Assignment Process Consent Form & Confirmation of Receipt of OSSE's Policies and Procedures for Placement Review, Revised Parent Brochure*. That document explained OSSE's procedures for exhausting the list of nonpublic school holding COAs who could implement Student's IEP before it could issue a Notice of Service Location to School A. The regulations require this written notice if there are extenuating circumstances preventing OSSE from issuing the Notice of Service Location within 15 days of the CIP meeting.¹²¹ OSSE terminated its search for schools with COAs during the last week of January 2024, still not having received responses from four of the schools to which it had sent referrals. School A promptly accepted Student when OSSE submitted an admissions packet on February 1, 2024. Over the next month, OSSE corresponded with School A officials to ensure School A's ability to implement Student's IEP. OSSE issued a Notice of Service Location for Student to School A on March 5, 2024.

The regulations appear to preclude OSSE from unilaterally issuing a Notice of Service Location to a nonpublic school that does not hold a COA. However, the D.C. Code authorizes hearing officers to do so if no schools are available that hold a COA, and the regulations give OSSE the latitude to pursue referrals to COA schools beyond the 15-day deadline. Nevertheless, OSSE issued the Notice of Service Location on March 5, 2024.

I conclude that Petitioners have failed to meet their burden of proving that OSSE denied Student a FAPE by delaying the issuance of the notice. OSSE had an obligation to pursue referrals to schools with COAs, and it had no control as to the responsiveness of those schools. In light of the regulatory aversion to placements in non-COA schools, OSSE's two-month search beyond the 15-day deadline was not unreasonable. Nor was it unreasonable to take another month to ensure that School A was capable of implementing Student's IEP.

A hearing officer's determination of whether a child received a FAPE must be based on substantive grounds. In matters alleging a procedural violation, such as OSSE's failure to meet the deadline to issue the Notice of Service Location, a hearing officer may find that a child did not

¹¹⁶ 5-A DCMR § 3025.4.

¹¹⁷ 5-A DCMR § 3025.5; 5-A DCMR § 3022(b).

¹¹⁸ 5-A DCMR § 3025.6.

¹¹⁹ 5-A DCMR § 3025.8; D.C. Code § 38-2561.03(b)(1).

¹²⁰ D.C. Code § 38-2561.03(b)(2).

¹²¹ 5-A DCMR § 3025.7.

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 C.F.R. 300.513(a). In other words, an IDEA claim is viable only if those procedural violations affected the child’s substantive rights.¹²² Here, there was no denial of FAPE because (1) Student was already enrolled in School A when the matter was referred to OSSE, and (2) Petitioners are entitled to reimbursement for expenses incurred at School A from a date prior to the date the matter was referred to OSSE.

Whether School A is an appropriate placement for Student.

If an LEA fails to provide an appropriate placement to a child, and the parents elect to unilaterally place the child in a private school, the parents are entitled to reimbursement of their placement expenses if the placement is proper under IDEA.¹²³ A placement is proper under the Act if it is “reasonably calculated to enable the child to receive educational benefits.”¹²⁴

Respondents did not contest the appropriateness of School A as a placement for Student. Neither respondent cross-examined Witness A or Petitioner A as to their testimony that Student was making academic progress at School A. OSSE not only did not challenge the appropriateness of School A as a placement for Student at the hearing, it had conducted a search and concluded, as in the circumstances in *Leggett*, that School A was also a “necessary” placement: currently the only school available that was capable of meeting Student’s needs.¹²⁵ Therefore, I conclude that School A is a proper and appropriate placement for Student.

RELIEF

For relief, Petitioners request reimbursement for expenses incurred for Student’s placement at School A for the 2022-23 and 2023-24 school years, including transportation costs. Consistent with the conclusions above, I will order reimbursement of Petitioners’ expenses incurred for the placement of Student at School A retroactive to April 18, 2023.

ORDER

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

ORDERED, that OSSE shall reimburse Petitioners for their expenses incurred for the placement of Student at School A during the 2022-23 and 2023-24 school years, retroactive to

¹²² *Brown v. District of Columbia*, 179 F. Supp. 3d 15, 25-26 (D.D.C. 2016), quoting *N.S. ex rel. Stein v. District of Columbia*, 709 F. Supp. 2d 57, 67 (D.D.C. 2010).

¹²³ *Florence County School District Four v. Carter*, 510 U.S. 7, 15 (1993).


¹²⁴ *Leggett v. District of Columbia*, 793 F.3d 59, 71 (D.C. Cir. 2015).

¹²⁵ *Id.* at 72.

April 18, 2023, including tuition, related services charges, and Student's transportation between home and School A.¹²⁶

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
Hearing Officer

Date: May 30, 2024

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

¹²⁶ Although OSSE was not found to have denied Student a FAPE, D.C. Code § 38-2561.03(c) provides that “The SEA shall be responsible for paying the costs of education, including special education and related services, of a student with a disability when the student is placed at a nonpublic special education school or program pursuant to this section...” In the event there is authority to impose these charges on DCPS, the hearing officer invites a Motion for Reconsideration by OSSE.