

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

Parent on behalf of Student ¹)	Case No. 2022-0009
)	
Petitioner)	Hearing Dates: October 13, 14, 20, 2022
)	November 3, 2022
v.)	Conducted by Video Conference
)	Date Issued: November 14, 2022
District of Columbia Public Schools)	
)	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 January 13, 2022, Petitioners filed a Due Process Complaint Notice (“*Complaint*”) alleging that the District of Columbia Public Schools (“DCPS”) denied the student a free appropriate public education (“FAPE”) by failing to classify her/him properly or provide her/him an appropriate Individualized Education Program (“IEP”) and placement for the 2021-22 school year. On January 24, 2022, DCPS filed *District of Columbia Public Schools’ Response to Parent’s Administrative Due Process Complaint*, denying that it had denied Student a FAPE in any way.

SUBJECT MATTER JURISDICTION

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

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

PROCEDURAL HISTORY

On January 13, 2022, Petitioners filed the *Complaint* alleging that DCPS denied Student a FAPE by (1) failing to classify him/her with multiple disabilities (“MD”) including emotional disturbance (“ED”) and other health impaired (“OHI”), and (2) failing to provide an appropriate Individualized Education Program (“IEP”) and placement for the 2021-22 school year. On January 24, 2022, DCPS filed its *Response*, denying that it had denied Student a FAPE in any way. On May 13, 2022, Petitioners filed an unopposed *Motion to Amend the Hearing Request*, asserting that an amendment was necessary to add allegations relating to the 2022-23 school year. On May 17, 2022, I issued an order granting the motion.

Petitioners filed an *Amended Complaint* on June 9, 2022 alleging that DCPS denied Student a FAPE by (1) failing to classify him/her MD and (2) failing to provide an appropriate Individualized Education Program (“IEP”) and placement for the 2021-22 and 2022-23 school years. On June 21, 2022, DCPS filed *District of Columbia Public Schools’ Response to Parent’s [Amended] Administrative Due Process Complaint* (“*Response*”) on June 21, 2022, asserting that DCPS developed an IEP on or about June 21, 2021 that was appropriate because Student presented markedly differently in the home environment as compared to the school environment, (2) while Student has social/emotional medical diagnoses, the student’s programming, least restrictive environment (“LRE”), and placement are not determined by diagnoses or deficits, but how such conditions impact the student in the educational setting, and what specially designed instruction and related services are necessary to afford Student access to the general education curriculum, and (3) Petitioners are not entitled to reimbursement for the unilateral placement of Student at School A because School A is not an appropriate placement for Student.

The parties participated in resolution meetings on January 25, 2022 that did not result in a settlement. A prehearing conference was conducted by video conference on March 3, 2022, and the Prehearing Order was issued that day. An Amended Prehearing Order was issued on July 18, 2021 to address the *Amended Complaint*, the *Response*, and new hearing dates.

The due process hearing was conducted on October 13, 14, and 20, and November 3, 2022 by video conference. The hearing was closed to the public at Petitioners’ request. Petitioners filed disclosures on October 5, 2022 containing a witness list of six witnesses and documents P-1 through P-58. Respondent filed no objections to Petitioner’s exhibits, and Petitioners’ Exhibits P1-P58 were admitted into evidence. Respondent’s disclosures, also filed on October 5, 2022, contained a witness list of seven witnesses and documents R1 through R-45. Petitioners did not file objections to DCPS’ disclosures. During Respondent’s direct case, Respondent’s Exhibits R1-R3, R6-R7, R11, R13-R15, R17, R20, R22-R24, R26-R28, R31, and R34-R45 were offered and admitted into evidence.

Petitioners presented as witnesses in chronological order: Witness A, Witness B, Witness C, Witness D, and Petitioner/Mother (“Mother”). Witness A was admitted as an expert in Counseling and Psychology, Witness B was accepted as an expert in Special Education, Witness C was admitted as an expert in Psychology and Social Work, and Witness D was admitted as an expert in Clinical Psychology. Respondent presented as witnesses in chronological order: Witness E, Witness F, Witness G, and Witness H. Witness E was accepted as an expert in School Social Work, Witness F was accepted as an expert in Psychology, and Witness H was admitted as an expert in Special Education and Placement. At the conclusion of testimony, the parties’ counsel

gave oral closing arguments and were authorized to file cites to supporting authorities no later than November 7, 2022. On November 4, 2022, Petitioners filed *Petitioners' Memorandum of Authorities*. On November 7, 2022, DCPS filed a list of citations to authorities.

ISSUES

As identified in the *Amended 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 classify him/her MD including ED and OHI.
2. Whether DCPS denied Student a FAPE by failing to provide appropriate IEPs and placements for the 2021-22 and 2022-23 school years. Petitioners assert that Student requires therapeutic support for the entire school day in a small, structured setting outside of the general education setting.
3. Whether School A is an appropriate placement.

FINDINGS OF FACT

1. Student is X years old and attended School A during the 2021-22 school year.²
2. On May 2, 2017, when Student was Y years old, Facility A completed an Educational Evaluation Report as part of the process for determining Student's eligibility for special education services. Student was referred for evaluation by Teacher A due to concerns for her/his behavior, sensory input, aggression, and recognizing numbers/symbols.³ During the parental interview, Petitioner/Mother's ("Mother") concerns were Student's extreme high energy, limited attention span, and impulsivity. On the Battelle Developmental Inventory ("BDI-2"), Student scored in the Low Average range in the Cognitive Domain (88/21st %ile), including a first percentile score in Attention & Memory, 37th percentile in Perception and Concepts, and a 63rd percentile in Reasoning & Academics. Examiner A concluded that "[Student] presents as a child who is developing within typical range with academic skills and concepts. [Student] should have little trouble meeting the early achievement demands of [grade M] program, and should be able to respond appropriately to academic instruction and tasks."⁴
3. On June 1, 2017, Facility A completed a Confidential Psychological Evaluation of Student. Teacher A referred Student for evaluation due to concerns for her/his ability to function safely and access information in the school setting. "It is noted that [Student] displays a limited attention span, impulsive behaviors, and an extremely high energy level, which often results in

² Petitioners' Exhibits ("P:") 50 at page 1 (415). The exhibit number and exhibit page numbers are followed by the electronic page number in the disclosure in parentheses, i.e., P:50:1 (415).

³ P.3:1 (33).

⁴ *Id.* at 6 (38).

injury to others.⁵ Petitioners adopted Student from an orphanage in Ethiopia in 2015 and enrolled him/her in School B in 2016. In the parental interview, Petitioners reported that Student is very social and extroverted, is physically active, is very charming and can be manipulative. They were concerned that s/he puts teachers and classmates “at their wit’s end” due to his/her limited attention span, impulsive behaviors, and extremely high energy level. They reported that [REDACTED] disruptiveness in the classroom has caused her/him to spend time frequently outside the classroom with other school support personnel.⁶ Teacher A reported hitting, kicking, and biting others, and her/his inability to remain seated for more than a minute. S/he calls out impulsively, crawls around on the floor, and wanders around the classroom until s/he is redirected. S/he hits, yells, or takes toys from peers, “has an incredible amount of energy and virtually no impulse control.” S/he cannot access the full curriculum due to the amount of time spent on redirection. “It is also noted that [his/her] aggression leads to children and adults getting hurt on a daily basis.”⁷

Examiner B administered the Wechsler Preschool and Primary Scale of Intelligence (“WPPSI-IV”). Student’s difficulty maintaining attention precluded completion of a Full Scale Composite test. S/he scored in Average range in Verbal Comprehension (98), indicating age-appropriate ability to acquire, remember, and retrieve knowledge from his/her environment. S/he scored in the Low range in Object Assembly, indicating deficits in organizing visual information and engaging in trial-and-error learning tasks, portending difficulty with visual-spatial tasks such as construction activities and putting together puzzles.⁸ On the Behavior Assessment System for Children (“BASC-3”), Mother and Teacher A completed rating scales. In Externalizing Problems Composite, both Mother and Teacher A rated him/her with Clinically Significant behaviors in Hyperactivity and Aggression, but Mother’s composite T-score (102) was significantly higher than Teacher A’s (72). In Internalizing Problems – Anxiety, Depression, and Somatization – Mother’s composite score (65) rated Student At-risk, while Teacher A’s (43) was in the Average range. On the Behavioral Symptoms Index – Attention Problems, Typicality, and Withdrawal – Mother’s responses yielded a Clinically Significant composite (82), while Teacher A’s (66) was At-Risk.⁹ Mother reported that Student engaged in many disruptive, impulsive and uncontrolled behaviors, and was argumentative, defiant, and threatening to others. Like Mother’s externalizing score, Teacher A’s score “reflects more concerns than are typical for [Student’s] age.”

As noted in the school setting, [Student] engages in a high number of behaviors that are adversely affecting other children in the classroom. [S/he] is reported as often being restless and overactive, and [s/he] may have difficulty controlling [his/her] impulses. [His/her] school ratings also reflect a high number of aggressive behaviors, based on reports of being argumentative, defiant, and/or threatening to others. [Student’s] teacher reports that [s/he] engages in behaviors that are considered strange or odd, and that [s/he] seems at times disconnected from [his/her] surroundings. It is also noted that [Student] has difficulty maintaining necessary levels of attention at school.¹⁰

⁵ P4:1 (41).

⁶ *Id.* at 3 (43).

⁷ *Id.* at 4 (44).

⁸ *Id.* at 5-6 (45-46).

⁹ I note that Mother’s composite score of 82 was significantly higher than the scores in any of the three subtests – Attention (71), Atypicality (68), Withdrawal (53) – a variance that was not present in any of the other domains.

¹⁰ *Id.* at 8 (48).

Both Mother's and Teacher A's scores placed Student's adaptive skills in the Average range.

Examiner B concluded that Student's overall profile did not reflect a severe cognitive delay and "Results across home and school setting support average or typical development for [his/her] overall adaptive skills, and measures within this area also indicate average performance related to [her/his] adaptability, social skills, functional communication, and activities of daily living. Relative to the state criteria, [Student] does not demonstrate a severe delay in the area of adaptive development."¹¹ However, in the area of development across social emotional, and behavioral skills, her/his ratings reflect "elevated concerns for [his/her] age... [Student's] severe social/emotional delay supports the presence of a disability due to a Developmental Delay."¹²

4. On March 5, 2018, when Student was in grade M at School B, DCPS conducted an Individual Education Program ("IEP") Annual Review meeting. Student was classified with Developmental Delay ("DD").¹³ The Consideration of Special Factors indicated that Student's behavior impeded her/his learning or that of other children. S/he was described as inattentive in class, s/he struggled to stay focused without teacher prompts, and was unable to follow teachers' initial directives to him/her. The Areas of Concern were Cognitive, Emotional, Social, and Behavioral Development ("Behavior"), and Motor Skills/Physical Development. The Behavior Present Levels of Academic Achievement and Functional Performance ("PLOP") reported that Student engages with his/her peers in class but "struggles with maintaining positive peer interactions," has emotional outbursts and difficulty controlling his/her impulses on a consistent basis.¹⁴ The IEP team prescribed 1.5 hours per week of specialized instruction in general education, five hours per week outside general education, two hours each per month of behavioral support services ("BSS") and occupational therapy ("OT") outside general education, and 15 minutes per month of OT consultation services.¹⁵

5. On April 2, 2018, DCPS completed a Functional Behavior Assessment of Student. the Defining Behavior was: "[Student] does not know how to engage with peers, pushes peers, knocks over objects and toys, body is out of control, no self-regulation or boundaries. Takes more than 3 prompts to follow a simple one step direction." The Antecedent Behavior was during "centers," when there is a large group activity, recess, or unstructured time. S/he pouts, gets angry, can knock others' things over, and talks back to the teacher. The Purpose of the Behavior is either because s/he is tired or the get attention from adults and peers.¹⁶ On April 2, 2018, DCPS also developed a behavior intervention plan ("BIP"). The incentives were: allowing him/her to carry a special object, 1:1 time with the teacher, s/he can choose his/her favorite station, verbal praise, stickers, and five minutes extra play time. Consequences were: verbal redirection, break time, removing him/her from the situation, time out to discuss what s/he did wrong, and picking a new area to play.¹⁷

6. On June 13, 2018, DCPS issued Student's IEP Progress Report for the 2017-18

¹¹ *Id.* at 9 (49).

¹² *Id.* at 10 (50).

¹³ Respondent's Exhibits ("R:") 16 at 188. The exhibit number is followed by the overall disclosure page number, i.e., R16:188.

¹⁴ *Id.* at 190.

¹⁵ *Id.* at 193.

¹⁶ R2:2-3.

¹⁷ *Id.* at 5-6.

school year.¹⁸ In Behavior, Student was reported to have progressed on his/her emotional control goal/refraining from outbursts (including physically striking a peer or yelling at a teacher) in the third reporting period, but to have had no progress during the fourth quarter. Witness E, School B's social worker, commented that when Student is given supports and strategies, s/he is able to behave appropriately and refrain from emotional outbursts when s/he becomes upset. But without support, s/he "has continued to have difficulty refraining from emotional outbursts and controlling [his/her] body on a consistent basis without behavioral supports this school year."¹⁹ Student also had made no progress in either reporting period on the goal of making verbal requests to share items with peers.²⁰ Student's OT therapist also reported that Student progressed in the first and third reporting periods, but made no progress in the second and fourth periods, on his/her goal of remaining seated throughout one lesson of floor time or desk-time learning activities. "[Student] has not been able to make consistent progress with this goal due to a recent increase in defiant behaviors (refusing to follow directions, throwing/flicking materials, talking back, eloping from table to escape activities), especially towards the end of April and through most of May. The behaviors have decreased in her/his last 2 most recent sessions, but [s/he] still required constant cues to come back to the table or come back to the floor area..."²¹

7. On February 4, 2019, when Student was in grade H at School B, DCPS conducted IEP Annual Review meeting.²² The Consideration of Special Factors indicated that Student's behavior no longer impeded her/his learning or that of other children.²³ The Areas of Concern were unchanged from the previous IEP and the Behavior PLOP retained language from the prior IEP regarding emotional outbursts and controlling his/her emotions.²⁴ The IEP team prescribed 1.5 hours per week of specialized instruction in general education, two hours per week outside general education (down 3.0 hours), and two hours each per month of behavioral support services ("BSS") and occupational therapy ("OT") outside general education.²⁵

8. On November 25, 2019, when Student was in grade E at School B, DCPS conducted an IEP Annual Review meeting.²⁶ The Consideration of Special Factors indicated that Student's behavior did not impede her/his learning or that of other children.²⁷ The Behavior PLOP reported that although s/he continued to require prompting to remain on task, Student loved to play, had many friends, had many strengths, was social, friendly, and outgoing and s/he had a second consecutive year of perfect attendance.²⁸ The IEP team prescribed one hour per week of specialized instruction in general education (down 0.5), one hour per week outside general education (down 1.0), two hours per month of BSS outside general education, and 1.5 hours per month of OT (down 0.5) outside general education.²⁹

¹⁸ P5:1 (53).

¹⁹ *Id.* at 4 (56).

²⁰ *Id.* at 5 (57).

²¹ *Id.* at 6 (58).

²² R16:197; P6:1 (61).

²³ R16:198; P6:2 (62).

²⁴ R16:200; P6:5 (65).

²⁵ R16:203; P6:8 (68).

²⁶ P7:1 (73).

²⁷ *Id.* at 2 (74).

²⁸ *Id.* at 5 (77).

²⁹ *Id.* at 9(81).

9. On April 27, 2020, Examiner C, School Psychologist at School B, completed a Psychological Evaluation of Student. The referral for the evaluation was initiated due to Student's difficulty completing work independently, maintaining attention, impulsivity, and behavior.³⁰ Examiner C interviewed Mother, Student's teacher, Teacher B, and Student. Teacher B reported that there had been "a decrease in major tantrums during [her/his] time at [School B] and [s/he] is making an effort to participate in non-preferred academic tasks." Student's math skills and basic reading skills were age appropriate, but "[his/her] ability to generalize these skills is still inconsistent." Although his/her attention and impulsivity had improved, s/he continued to need redirection, prompting, and frequent praise. Mother reported having difficulty keeping Student engaged and motivated during distance learning. Mother stated that while Student was making progress at school "and had supports in place which seemed to be helping with [his/her] behavior and academics." At home, Student was "easily frustrated with the new routine. [S/he] is very impulsive and hyperactive... [S/he] tantrums when [s/he] gets tired and is hard to motivate especially when asked to complete reading assignments. [S/he] can become aggressive and throw and destroy things when [s/he] is agitated."³¹ On the mid-year DIBELS assessment, Student scored Below Grade Level in Reading and Writing. Examiner C reported that Student was currently performing below grade level in reading, s/he requires frequent prompting and redirection to stay on topic in writing, and needs redirection and modified work to complete math assignments.³² Examiner C also reported that she administered no assessments due to COVID-19 restrictions. Based on her review of records and the interviews, Examiner C opined that the IEP team "should think about continuing to support [Student] as a student with a Developmental Delay to address [REDACTED] academic and social skills, academic tolerance, sensory needs, and executive functioning:

„[i]t appears that [Student] is making progress on goals but [s/he] continues to perform inconsistently below [his/her] peers. [Student's] academic and social emotional skills can be affected by poor attention and executive functioning skills. [S/he] struggles to remain focused for longer periods of time and needs constant redirection, visual timers, and a visual schedule for tasks to help keep [her/him] on track. When working in small groups or one on one, [Student] is able to follow along with peers and answer questions but struggles with independent work and higher order thinking that require [him/her] to understand, infer, connect to other facts and concepts, categorize, manipulate, put together in new or novel ways, and apply information to solve new problems. Looking at the data provided, [Student] had made progress with supports and continues to need specialized instruction to access the curriculum.³³

10. On May 11, 2020, DCPS conducted a triennial reevaluation meeting. Teacher B reported that Student's strength was math, and was capable of explaining grade level math strategies and apply them to problems. S/he "has a strong set of foundation skills in both reading and math." However, [REDACTED] overall writing grade was Below Basic due to difficulty learning standard writing conventions, and is not a demonstrating grade level proficiency in math.³⁴ In Behavior, Witness E, School B's social worker, reported that Student was able to express his/her feelings

³⁰ P9:1 (87)

³¹ *Id.* at 6 (92).

³² *Id.* at 7-8 (93-94).

³³ *Id.* at 12 (98).

³⁴ P12:5 (113).

calmly, and continues to make progress controlling outbursts and keeping his/her body safe during recess. “[Student] continues to need support around improving [redacted] self-regulation skills and controlling [her/his] negative impulses toward [her/his] peers but is very responsive to redirection, prompting and modeling as well as positive reinforcement.”³⁵

11. On July 13, 2020, DCPS issued Student’s report card for the 2019-20 school year. No numerical grades were determined for the fourth term when distance learning was implemented due to the COVID-19 restrictions. Through the third term, Student’s grades were as follows: Advanced in Social Studies and World Languages (Chinese), Proficient in Speaking and Listening, Science, Music, Art, and Health & Physical Education, Basic in Reading and Math, and Below Basic in Writing & Language. In the twelve graded behavioral categories, Student performed appropriately and Independently in five categories, with Limited Prompting in five categories, and with Frequent Prompting in Follows Playground Rules and Respects the Rights/Property of Others.³⁶

12. On September 16, 2020, Mother signed an Individualized Distance Learning Plan (“IDLDP”) issued by DCPS “to communicate how the supports and services outlined in a student’s Individualized Education Program (IEP) will be delivered during remote learning. This plan is based on the current IEP and **does not** take the place of the annual IEP.”³⁷ The IDLP provided that Student would receive one hour per week of specialized instruction in reading, thirty minutes per week in math, thirty minutes per week of BSS teletherapy, and 90 minutes per month of OT teletherapy.³⁸

13. On October 1, 2020, Mother sent an email to Teacher C, Student’s general education teacher, and Teacher D, his/her special education teacher, expressing concerns about Student’s progress in reading and math, and concerns about the efficacy of distance learning:

At home, it is very difficult to get [him/her] to do independent work. [S/he] balks at reading practice and gives up easily when barely challenged, even with math and PE.

It has been our experience that [Student] needs the structure of the classroom to focus. [S/he] does much better under teacher oversight and peer pressure from other kids. Given that we both work, [s/he] can’t get that full support at home. But even if we had time to provide support, we don’t feel qualified as teacher stand-ins.

We are extremely concerned that [s/he] will continue to stagnate in [her/his] learning this year, unless the pandemic restrictions end and schools re-open...³⁹

14. On October 23, 2020, Psychiatrist A, Student’s psychiatrist, drafted a “To Whom It May Concern” letter describing Student’s treatment history. Psychiatrist A diagnosed Student with Attention Deficit Hyper Activity Disorder (“ADHD”) in August 2018. In July 2019, she

³⁵ *Id.* at 6 (114).

³⁶ P13:1 (117).

³⁷ P15:1 (125)

³⁸ *Id.* at 2-4 (126-28), emphasis provided in the text.

³⁹ P16:3 (133), emphasis provided in the text.

began medication treatment due to Student's "ongoing and increasing oppositional behavior, aggression, defiance, hyperactivity, impulsivity, and poor focus." By the time of the letter, the medications had been changed to clonidine for ADHD and aripiprazole, a mood stabilizer, for aggression.

Although these medications have helped, [s/he] continues to have significant impulsivity, defiance and aggression several times a week, and this is more likely when medications are given even an hour later than normal.

In November 2019 I also recommended in home family therapy via [Witness A], *given the challenging dynamics that sometimes arose in the home*. Both children struggle with anger issues and attachment issues, stemming from their histories of adoption, and often provoke each other's anger and difficult behaviors, and parents needed more help and, in the moment, advice managing this difficult dynamic.⁴⁰

15. On October 28, 2020, when Student was in grade C at School B, DCPS conducted an IEP Annual Review meeting.⁴¹ The Consideration of Special Factors indicated that Student's behavior did not impede her/his learning or that of other children.⁴² The Cognitive PLOP reported that Student was "well-below the benchmark" in phonics, reading accuracy, and fluency. No benchmark or grade level characterization was provided as to writing. In math, Student's composite score was 398; the grade level expectation at the end of the year would be 428-506.⁴³ The Behavior PLOP reported that Student "is an outgoing, friendly, thoughtful [child]. [S/he] is in a small group working on self-regulation skills, including accurately identifying feelings and then use appropriate coping mechanisms to handle them. In small group, [s/he] is sensitive to others' feelings and supportive of others. [S/he] benefits from redirection when [s/he] gets off topic or engages in off-task activities but once prompted and encouraged, [s/he] returns to the group."⁴⁴ The IEP team prescribed one hour per week of specialized instruction in general education (unchanged), ninety minutes per week outside general education (up 0.5 hours), two hours per month of BSS outside general education, and 1.5 hours per month of OT outside general education. (both unchanged.).⁴⁵

16. On December 18, 2020, Teacher C sent Petitioners a Term 2 Progress Report for Student. In math, [REDACTED] progress monitoring scores "are inconsistent each time." In math, his/her recent 4.5/9 assessment "is probably due to the fact that the questions were written in a tricky way. Based on classroom observations, [s/he] has a good sense of place value." Teacher C described Student as "a hard worker during class time. [S/he] is always very engaged and participates throughout the lesson."⁴⁶

17. Student was admitted to Facility B on December 14, 2020 for "Aggressive Behavior Towards Parents."⁴⁷ After a family outing to the zoo, Student tried to lock Mother and his/her

⁴⁰ P17:1 (136), emphasis added.

⁴¹ P18:1 (137).

⁴² *Id.* at 2 (138).

⁴³ *Id.* at 3 (139).

⁴⁴ *Id.* at 5 (141).

⁴⁵ *Id.* at 9 (145).

⁴⁶ P20:1 (151).

⁴⁷ P22:3 (160).

sister (“Sister”) out of the house, then went up to her/his room and began throwing objects, including a baseball, at Mother.⁴⁸

[Student] is presenting for voluntary admission after episodes of aggressive behavior at home (including destruction of property and throwing things at [her/his] mother and father) *that occur after boundary setting* resulting [in] the patient becoming angry and unable to “control” [his/her] “rage.”⁴⁹

The attending physician recommended a discontinuation of Student’s ADHD medications that can “cause or worsen hallucinations, abnormal mood (mood instability), and anxiety, that in turn can shortly thereafter lead to worsening of the same ADHD symptoms secondary to excitatory destabilization.”⁵⁰ A social worker at the facility “worked with patient and caregiver to develop coping skills *in relation to patient’s aggressive behaviors towards family, boundary concerns and family dynamics.*”⁵¹ Student was diagnosed with Disruptive Mood Dysregulation Disorder (“DMDD”), and ADHD⁵² and was discharged on December 22, 2020.⁵³

18. On December 20, 2020, Witness A completed a Treatment Summary & Safety Planning Recommendations regarding Student for Petitioners. Witness A was retained for advice due to Student’s

... [o]verall functioning *at home* at the time of referral was highly compromised and marked by significant conflict resulting from the client’s provocative and attention-seeking urges and impulses. The client’s birth and early years in an orphanage in [Country A] compromised [his/her] capacity to formulate healthy and appropriate attachments with *caregivers*. While [Student] receives special education services at [her/his] local elementary school, *it is compelling and noteworthy how well [s/he] historically performs in school; an environment that likely mirrors [redacted] experience in an orphanage.*”⁵⁴

In his report, Witness described the problem as largely one of sibling rivalry between two adoptees:

A key feature of [Student’s] presentation is an extreme need for attention which [s/he] often seeks to satisfy by creating chaos or negative attention. [s/he] is highly provocative, verbally and physically. [Student] struggles to maintain boundaries.

[Student’s] sister, [Sister], currently in grade K, was also adopted by her parents. [Sister] struggles with symptoms related to Generalized Anxiety Disorder and potentially a mild form of depression referred to as Dysthymia. [Sister] often vacillates between a more calm/reasonable/rational mindset and a highly emotional, reactive, and needy presentation. [Sister] is often the target of [Student’s] negative

⁴⁸ *Id.* at 8 (165).

⁴⁹ *Id.* at 18 (175), emphasis added.

⁵⁰ *Id.* at 10 (167).

⁵¹ *Id.* at 4 (161), emphasis added.

⁵² *Id.* at 18 (175).

⁵³ *Id.* at 6 (163).

⁵⁴ P21:1 (153), emphasis added.

attention-seeking urges and impulses, and [REDACTED] also frequently contributes to the chaos by reciprocating [REDACTED] actions...

The treatment provided by this clinician has been designed to provide [Student], [Sister], and their parents the skills and abilities to successfully manage and reduce conflict proactively and how to best respond when the situation requires crisis intervention.⁵⁵

Witness A reported that the close quarters compelled by pandemic restrictions heightened tensions in the home. The family applied successfully for a partial hospitalization program, but the program was shut down due to the pandemic. “Consequently, [Student] and [his/her] family could no longer benefit from the respite and additional care provided by [his/her] school.”⁵⁶ In October of 2020, a dispute between Mother and Student escalated to the point that Student had to be physically restrained, first by Mother, then by Father, using Therapeutic Crisis Intervention System techniques from training they received. In light of the unsafe nature of physical “holds” due to Student’s size and strength, the family adopted a new safety plan “that results in a reliance on the help of law enforcement, paramedics, emergency room staff, and potentially admittance to an inpatient psychiatric treatment program.” Thereafter, the new safety plan resulted in the week-long hospitalization at Facility B.⁵⁷

19. On January 12, 2021, School B notified Petitioners by email of the opportunity to elect to resume in-person classes as of February 1, 2021, with class sizes limited to twelve.⁵⁸ Mother accepted an in-person seat later that day.⁵⁹ The next morning, Teacher D indicated that she would be in-person at School B and “will be able to push-in to [Student’s] class and pull [her/him] out (most likely for one-on-one sessions). I will also continue small groups online.”⁶⁰ On January 13, 2021, Mother sent an email to Teacher D requesting that she pull-out Student extra instruction “when [s/he] isn’t in class.”⁶¹

20. On or about March 19, 2021, Witness D completed a Neuropsychological Evaluation of Student. The referral was initiated by Petitioners and Witness A “to develop understanding of [his/her] cognitive, neuropsychological, academic, and emotional strengths and weaknesses. While [s/he] is described as a bright and sociable [child], [Student] has severe difficulty with emotional functioning and self-regulation... Academically, [Student] generally has been more successful at controlling [his/her] behavior in the classroom (although even there it recently has been escalating), but [s/he] has been unexpectedly slow to master basic reading and writing skills, and has been receiving direct remediation in language arts.”⁶² Witness D interviewed Petitioners, Student, and “[her/his] family therapist,”⁶³ and reviewed the results of previous

⁵⁵ *Id.* at 2 (154).

⁵⁶ *Id.* at 3 (155).

⁵⁷ *Id.*

⁵⁸ P23:2-3 (180-81).

⁵⁹ *Id.* at 1-2 (179-80).

⁶⁰ *Id.* at 1.

⁶¹ *Id.*

⁶² P24:1 (183).

⁶³ It is unclear if Witness D was referring to Psychiatrist A or Witness A, but there was no further reference to the “family therapist” in the evaluation. Witness A was identified as the “Outside Family Therapist” in the June 21, 2021 IEP. P37:3 (299).

evaluations. Petitioners informed Witness D that in school, Student has trouble maintaining focus, requiring frequent redirection, and making transitions in the classroom. Petitioners reported that Student was on grade level in math, but has progressed slowly in reading and writing. During testing, Student “was easily engaged and did [her/his] best to work diligently on each measure given. [Student] clearly enjoyed the attention inherent in the one-to-one testing situation, and was visibly pleased when [s/he] knew that [s/he] had done well. However, [s/he] required very frequent redirection and reinforcement, and the assessment ultimately was broken into three separate sessions, as [s/he] was increasingly distractible and impulsive.”⁶⁴

On the Weschler Intelligence Scale for Children (“WISC-V”), Student scored 116 on the Verbal Comprehension Index (86th percentile), 111 on the Visual Spatial Index (77th), 97 on the Fluid Reasoning Index (42nd), 74 on the Working Memory Index (4th), 75 on the Processing Speed Index (75), and 112 on the General Ability Index (79th). Student’s performance was well below average on tests of phonological awareness, putting her/him at “significant risk for a learning disorder affecting reading and spelling.”⁶⁵ Witness D administered the Integrated Visual and Auditory Continuation Performance Test (“IVA-2”), a computerized test of sustained visual and auditory attention. Student consistently failed to follow instructions against double-clicking, and failed to earn valid scores for responses to visual stimuli, and struggled to maintain focus for the length of the test. Witness D concluded that this performance confirmed prior diagnoses of ADHD.⁶⁶

For academic achievement, Witness D administered the Weschler Individual Achievement Test (“WIAT-III”), the Woodcock-Johnson Tests of Achievement (“WJ-IV”), and the Test of Word Reading Efficiency (“TOWRE-2”). She characterized Student’s scores on the WIAT, in overall Reading (78 – 7th), Word Reading (71 – 3rd), Pseudoword Decoding (84 – 14th), on the WJ-IV in Reading Fluency (74 – 4th), and TOWRE-2 in Sight Words (81 – 10th), and Phonetic Decoding (84 – 14th), all in the Below Average range, as “lackluster.” However, Student’s Reading Comprehension (90) was in the Average range.⁶⁷ Student performed better in math: on the WIAT - III in overall Mathematics (104 – 61st), Numerical Operations (109 – 73rd), Math Problem Solving (98 – 45th), and on the WJ-IV in Math Fluency (90 – 26th), all in the Average range.⁶⁸ Student scored 96 in Writing Fluency, in the Average Range, 87 in Spelling, slightly Below Average, and 84 in Sentence Composition, also Below Average.⁶⁹ In emotional functioning, on the Children’s Depression Inventory (“CDI-2”), Student scored below average, but was in the average range on the Revised Children’s Manifest Anxiety Scales (“RCMAS-2”). Witness D concluded that Student’s profile was consistent with diagnoses of DMDD, Disinhibited Social Engagement Disorder, Specific Learning Disorders in Reading and Written Expression, and Developmental Coordination Disorder. However, as most of her/his outbursts and oppositional behavior occur primarily at home, s/he did not meet the criteria for Oppositional Defiant Disorder (“ODD”).⁷⁰

Witness D recommended that Student be placed in a therapeutic residential setting: “...[g]iven the severity of [Student’s] outbursts, as well as [her/his] pattern of very slow progress

⁶⁴ *Id.* at 5 (187).

⁶⁵ *Id.* at 9 (191).

⁶⁶ *Id.*

⁶⁷ *Id.* at 10 (192).

⁶⁸ *Id.* at 11 (193).

⁶⁹ *Id.* at 10 (192).

⁷⁰ *Id.* at 12, 15 (194,197).

interspersed with periods of escalating behavior, [s/he] is likely to need periodic inpatient hospitalization and/or placement in a therapeutic residential setting.⁷¹ She also recommended a teacher or staff member his/her “support person” to check in with Student regarding his/her progress and issues that arise, that s/he be permitted to leave class when s/he begins to feel frustrated, and a plan to be developed for regular communication between Student’s teachers, parents, and his/her treatment team. Witness D also recommended that test questions be read aloud, Student should have access to a human reader or to text-to speech software, that s/he be permitted to dictate responses to a scribe, that all assignments be in writing, long-term projects divided into smaller segments, that all written assignments be done by dictation on a computer, all homework assignments be submitted electronically, and that s/he have access to a scribe or a computer for classwork that requires written responses.⁷²

21. On April 30, 2021, DCPS completed an Analysis of Existing Data.⁷³ Teacher D reported that in math, Student is performing at grade level in algebraic thinking and geometry, and is approaching grade level expectations in measurement and data. “[Student] is able to follow the majority of the general education mathematics curriculum with limited scaffolding... [Student] has progressed at math this year and is able to access the general education curriculum. [his/her] growth has slowed due to health related absences.”⁷⁴ In reading, in all metrics of DIBELS, Student scored well below the grade-level expectations in each testing period. Teacher D attributed his/her poor performance to inconsistent attendance and lack of participation in class. S/he regressed in word reading, but improved in reading fluency and reading accuracy. His/her strength was reading comprehension and [REDACTED] main challenge was decoding. “[Student] has not demonstrated the growth expected for a student of [REDACTED] age with is intellectual abilities... [S/he] continues to struggle with applying visual decoding strategies.”⁷⁵ In written expression, Teacher D reported that Student exhibited resistance to writing and performed poorly on assignments. However, with prompting, s/he “... [i]s capable of producing on topic content... [S/he] is able to produce a page worth of content over the course of two days with assistance, such as sentence stems and help spelling... [Student] has been able to increase [his/her] production over the course of the year. The barrier right now is less motor related and more geared toward participation. The frustration that [Student] feels when writing has led to less growth than one might expect at this point in the year.”⁷⁶

In Behavior, Witness E, School B’s social worker, reported that Student has “been minimally engaged and a sometimes active participant in Behavior Support Services during quarter 3... While in group in the virtual setting, [Student] continues to need supports, prompts and modeling around controlling outbursts and keeping [his/her] body safe and calm in the presence of peers. When on task, [Student] is very insightful into [her/his] own emotions and effective coping skills to use when needed. However, implementing these coping skills on a consistent basis continues to be a challenge... [Student] has also started to exhibit some work avoidance in group, especially around writing... [Student] has had several excused absences this quarter for medical reasons. Through observations in virtual group BSS sessions and reports from teachers at school, [Student] continues to need support around improving [his/her] self-regulation skills and controlling [her/his] negative impulses toward [her/his] peers and adults. [Student] is less

⁷¹ *Id.* at 15 (197).

⁷² *Id.* at 18-20 (200-02).

⁷³ P26:1 (215).

⁷⁴ *Id.* at 2-3 (216-17).

⁷⁵ *Id.* at 3-4 (217-18).

⁷⁶ *Id.* at 4-5 (218-19).

responsive to redirection, prompting and modeling but continues to be responsive to positive reinforcement...[Student's] behavior is inconsistent. [S/he] has tendencies to be very disruptive in [his/her] classroom which impacts [redacted] learning, [redacted] peers and [redacted] teacher's instruction. [Student] can also be very negative which impacts [her/his] education."⁷⁷

22. On June 15, 2021, DCPS issued a Prior Written Notice ("PWN") indicating that a multidisciplinary team ("MDT") met on June 11, 2021 in light of the expiration of the validity of Student's DD classification. The MDT determined that Student remained eligible for services under the classification of Specific Learning Disability ("SLD"). Despite Student's diagnoses of ODD and Attachment Disorder, the MDT rejected the option of a classification of Emotional Disturbance ("ED"), because "[Student's] behaviors are not exhibited to a 'marked degree,' and do not impact [her/his] educational performance." Although Student exhibited ADHD symptoms, the MDT also rejected Other Health Impaired ("OHI") as part of a Multiple Disabilities ("MD") classification. The team determined that the "severity" and "interwovenness" of the ADHD symptoms with the SLD was insufficient to warrant an MD classification. Petitioners disagreed with the final determination.⁷⁸

23. On June 16, 2021, through an email from Attorney B, Petitioners noted their disagreement with the eligibility determination. They argued that Student's ADHD symptoms and aggressive behavior were exhibited to a marked degree and that an MD classification, including OHI and ED was warranted. Petitioners asserted that

Since December, [Student] has been hospitalized at [Facility B] for fifty-nine days, missing a total of thirty days of school. During the second half of the 2020-21 school year alone, there have been numerous unacceptable behavioral incidents at school, including kicking a wall in the hallway, yelling out during class, calling teachers and students inappropriate names and using hurtful words, stabbing another student with a pencil, running out of the classroom, and refusing to participate in school work and sessions with [his/her] IEP support team.⁷⁹

24. On June 17, 2021, Attorney B, Petitioners' co-counsel, notified DCPS that Petitioners would enroll Student at School A for the 2021-22 school year, and requested that DCPS fund the placement.⁸⁰ On August 17, 2021, DCPS replied, asserting that it had offered Student a FAPE, and denying the request for funding of the placement at School A.⁸¹

25. On June 21, 2021, DCPS convened an IEP Annual Review meeting.⁸² The Consideration of Special Factors was revised from prior IEPs to state that Student's behavior impedes his/her or his/her classmates learning. It also stated that met the criteria of OHI "as a secondary eligibility classification;" s/he can be inattentive in class and struggles to stay focused without prompts and support. Citing Witness D's recommendation in her evaluation, the team

⁷⁷ *Id.* at 6 (220).

⁷⁸ P34:1-2 (285-86).

⁷⁹ P35:3 (289).

⁸⁰ P36:1 (293).

⁸¹ *Id.* at 2 (294).

⁸² P37:3 (299). Petitioners were represented at the meeting by Attorney B and Witness A, and DCPS was represented by Attorney C.

prescribed Tier 1 assistive technology: speech to text and text to speech technology.⁸³ In Mathematics, the PLOP revealed that at year-end, Student scored at the early grade C level in overall math. "... [Student] has consistently demonstrated [his/her] ability to access grade-level content and excel in this content area, with appropriate scaffolding."⁸⁴ In Reading, the PLOP reported Student's achievement scores in Witness D's evaluation. On a year-end DIBELS assessment, Student scored at a mid-grade E level, the grade below his/her grade level, a gain of 98 DIBELS points since the beginning of the year. On the TRC assessment, s/he improved from Level B to Level E by the end of the year, a year of growth albeit at the early grade E level.⁸⁵ In Written Expression, the PLOP reported Witness D's achievement scores. It also reported that with support and extra time, Student can produce multi-sentence in small group and on assignments. His/her areas of need were reported to be application of phonetic language, organization, and letter spacing, with orthographic and phonological errors noted in her/his writing samples. A baseline revealed that s/he struggles to encode grade level words.⁸⁶

In Behavior, Student was described as "an outgoing, social, friendly, and thoughtful student." S/he gets off-topic and engages in off-task activities, "but once prompted and encouraged, [s/he] returns to the group. [Student] responds very well to verbal and nonverbal positive reinforcement from adults. According to [Student's] home room teacher, [Student] gets [her/his] reward break per [her/his] behavior chart in the morning approximately 95% of the time and in the afternoon approximately 80% of the time. [Student] has many strengths but [his/her] behavior and control over negative impulses is inconsistent." The PLOP also summarized Witness D's behavioral findings in her evaluation. It also reported that Student was an inpatient at Facility B on three occasions during the 2020-21 school year: December 14-22, 2020, January 9 – February 3, 2021, and April 12 – May 5, 2021, for a total of 59 days, including 23 school days.⁸⁷

The IEP team prescribed one hour per week of specialized instruction inside general education (unchanged), four hours of specialized instruction outside general education (up 2.5 hours), and added 30 minutes per month of OT consultation services to the previously prescribed 2 hours per month of BSS and 90 minutes per month of OT services. Other Classroom Aids and Services included, but were not limited to, positive reinforcement, positive feedback, fidgets, graphic organizers, repetition and scaffolding for attentional issues, assignment checklist, chunked assignments, regular check-ins with teachers, a dedicated computer, and modified/shortened homework assignments.⁸⁸

Witness D testified that the level of services provided in the June 2021 IEP was "a little thin," short of the residential therapeutic placement that she recommended in her evaluation. She was very concerned about the level of emotional and behavioral support offered in the IEP, opining that Student required access to a therapist on an as needed basis. She also opined that Student would not learn self-regulation in a general education setting and would be overwhelmed. Witness D opined that Student would require residential treatment "for the indefinite future." On cross-examination, Witness D conceded that she was unaware of Student's activities at school that would

⁸³ *Id.* at 6 (302).

⁸⁴ *Id.* at 7 (303).

⁸⁵ *Id.* at 9-10 (305-6).

⁸⁶ *Id.* at 12-14 (308-10).

⁸⁷ *Id.* at 15-16 (311-12).

⁸⁸ *Id.* at 20 (316).

suggest the need for residential treatment, but was aware that when s/he was asked to do something at home, s/he would attack his/her mother, throw things, and destroy property at home.

26. On June 24, 2021, DCPS issued a PWN indicating that an IEP team met on June 21, 2021 to conduct an IEP Annual Review. The IEP team stated that the reports of Witness A and Witness B both “note that [Student’s] presentation of behaviors differ between the home and school setting... The team rejected private placement, finding that [Student’s] ability to appropriately access and progress within the general education curriculum could be met, with appropriate supplemental aids and services, in [his/her] current placement.”⁸⁹

27. On June 24, 2021, DPCS issued Student’s IEP Progress Report for the 2020-21 school year. At year-end Student was reported to have made progress on a reading out loud goal in all but the third term, s/he mastered his/her math goal that was introduced in the first-term, was progressing on her/his reading sight words goal that was introduced in the first term, improving by 3 sight words per minute. In Behavior, Student progressed on both self-regulation goals in the first and fourth terms, but showed no progress during the second and third terms. Witness E, School B’s social worker, reported that “[Student] has not shown any physical aggression at school but at times can be disruptive and oppositional toward [his/her] homeroom teacher. [Student] is capable of reflecting on [her/his] feelings and action but [his/her] willingness to do this is inconsistent.”⁹⁰

28. On June 25, 2021, DCPS issued Student’s year-end report card for the 2020-21 school year. S/he had 25 absences, 22 of which were excused. {presumably 7 of the 22 can be attributed to the Facility B hospitalization. The rest?} S/he earned the following grades: Advanced in Art, Health & Physical Education and World Languages (Chinese), Proficient in Speaking and Listening, Math, Social Studies, and Science, Basic in Writing & Language, and Below Basic in Reading. In the twelve graded behavioral categories, Student appropriately and Independently in six categories, With Limited Prompting in five categories, and With Frequent Prompting in Follows Playground Rules/School Rules. Teacher C provided, in part, the following comments:

[Student] has made some progress in reading this year, but [her/his] progress has been limited by a few factors. [Student] has a very difficult time sitting and reading independently for more than 10 minutes... Sometimes [Student] enjoyed writing poetry, and at other times [s/he] was not interested in attempting it. [Student] has so many great ideas, but it can be difficult for [her/him] to get them down on paper. [S/he] did enjoy writing acrostic poems, though! Finally, [Student] has a good understanding of [grade C] math concepts. [His/her] biggest limitation has been understanding word problems... I’ve enjoyed getting to [know] [Student] and learning all about [her/his] love of Legos, Beyblades, and [her/his] dog. [Student] is a social, energetic, and bright student.⁹¹

29. During Student’s early days in grade F at School A, s/he was reported to be “self-starting and only asks for help when s/he really needs it... continues to work hard to follow directions and always completes [his/her] work and corrections without complaint. [S/he needs very few redirects most of which are for forgetting to rains ■ hand to talk... [S/he] prides

⁸⁹ P37:1-2 (297-98).

⁹⁰ P38:1-4 (231-24).

⁹¹ P30:1 (233).

[her/himself] on being a good role model in the classroom. [S/he] can sit at [her/his] desk without issue throughout the day only needing the same breaks as the whole class... [S/he] is always the first one ready when transitioning to a new activity.” In reading, at the beginning of the school year, a STAR assessment at a late grade C level. S/he was reported to be reading a grade level story independently. In math, s/he was reported to be “at or above benchmark.” In writing, Student was not writing answers in sentence format, by the author expressed a lack of concern at this stage of the school year.⁹² On the following exhibit, a School A teacher reported that Student regularly scores between 90 – 97% when answering questions about grade C (one grade below) and grade level texts. “[S/he] is eager and enthusiastic when reading and is always asking to read out loud. [S/he] can read 107 words per minute and scored a 96% on level G. [H]is/her writing is imaginative. [S/he] writes complete sentences, can spell many sight words, and relies on phonetic spelling for other words... [S/he] always completes [her/his] work/corrections in a timely manner and will ask for help/clarification when s/he needs to.”⁹³ As for Student’s behavior, s/he was reported to follow directions and redirects “nearly all the time... [S/he] asks for hugs throughout the day... [S/he] works hard to please adults.” Student was reported to be overly competitive with and sometimes rude to peers, but “[S/he] genuinely seems like [s/he] wasn’t to have friends and to be a good friend. [Her/his] rudeness seems based in fear of not being able to be as good as the rest and being ridiculed by [her/his] peers.”⁹⁴

30. On January 24, 2022, School A issued Student’s second quarter report card. S/he was reported to be at grade level in every subject: Reading, Math, English, Social Studies, Science, Spelling/Vocabulary, Penmanship, Physical Education/Health, and Music.⁹⁵

31. On March 25, 2022, School A issued Student’s third quarter report card. S/he was reported to be at grade level in every subject.⁹⁶

32. On April 22, 2022, DCPS convened an IEP Annual Review meeting.⁹⁷ The Consideration of Special Factors was largely unchanged from the previous IEP.⁹⁸ In Mathematics, the PLOP reported the results of Witness D’s math achievement tests, and reported that s/he was improving on solving word problems, addition, and subtraction, and noted that math calculations are a relative strength for Student, but gave no data related to grade level performance.⁹⁹ In Reading, the PLOP reported Student’s achievement scores in Witness D’s evaluation. It also reported that Student was consistently reading grade level books with 80% comprehension. Student is generally compliant, engages appropriately with adults and peers in class, but in less structured environments, such as physical education, s/he “can get caught up and too competitive.”¹⁰⁰ In Written Expression, Witness B, Student’s teacher, reported in the PLOP that

⁹² P40:1 (337). Petitioners offered undated and unattributed progress reports of Student at School A. Based on the otherwise chronological nature of Petitioner’s exhibits, I assume that these reports were developed prior to the issuance of the report cards that were issued on January 24, 2022 in Exhibit 42.

⁹³ P41:1-2 (340-41).

⁹⁴ *Id.* at 3 (341).

⁹⁵ P42:1-2 (343-44).

⁹⁶ P45:1-2 (365-66)

⁹⁷ R16:245.

⁹⁸ *Id.* at 246-47.

⁹⁹ *Id.* at 248-49.

¹⁰⁰ *Id.* at 251-52. The PLOP also repeated aspects of the report from the June 21, 2021 IEP regarding grade E level DIBELS scores without indicating that the data was a year old.

s/he regularly writes 5-6 sentence paragraphs, has completed a book report, writes more sentences when motivated, and his/ her spelling has improved.¹⁰¹ In Behavior, the PLOP repeated characterizations of Student's behavior from the previous IEP, and summarized behavioral findings in Witness D's evaluation, and results from a Strengths and Difficulties Questionnaire in April 2022, but included no reports from School A concerning Student's behavior in class.¹⁰²

The IEP team prescribed two hours per week of specialized instruction inside general education (up 1), three hours and forty minutes of specialized instruction outside general education (down twenty minutes), increased BSS from two hours per month to three hours, and maintained OT services and consultation services at 90 minutes per month and 30 minutes per month, respectively.¹⁰³ Other Classroom Aids and Services and Classroom Accommodations were unchanged from the prior IEP.¹⁰⁴

33. On July 18, 2022, Attorney B notified DCPS that Petitioners would maintain Student's enrollment at School A and requested that DCPS fund the placement.¹⁰⁵ DCPS responded on August 22, 2022, asserting that Petitioners had declined its appropriate offer of FAPE, and declining the funding request.¹⁰⁶

34. Witness A, who participated in the June 21, 2021 IEP meeting, testified that the services prescribed in that IEP "in no way came close" to meeting Student's needs. He opined that Student should remain in residential treatment for no more than two years due to attachment issues, and when s/he is discharged, s/he should be placed in an intensive therapeutic setting. Witness A was also critical of the April 22, 2022 IEP that prescribed five hours and forty minutes of specialized instruction per week. Witness A testified that he disagreed with DCPS' classification of Student with only an SLD. He supported Petitioners' January 16, 2021 statement of disagreement in which they urged that Student be classified with MD to include ED and OHI as additional classifications. On cross-examination, Witness A conceded that his December 20, 2020 Treatment Summary was not provided to the June 21, 2021 IEP team.

35. Witness B, Student's teacher at School A, testified that School A is a residential facility for students aged four to fourteen with emotional, developmental, or behavioral deficits. There are 20 students enrolled; the maximum enrollment is 32. Student is in a class of five students; the maximum class size is eight. Witness B has two support staff in class three days per week and one support staff member two days per week. Witness B testified that when Student first arrived, it was difficult for him/her to remain focused; s/he was hyperactive, competitive, and oblivious to others. Now s/he is more aware of others. Witness B opined that Student's April 22, 2022 IEP is not appropriate because s/he would be overwhelmed in a class of 25 and one teacher. Witness B testified that Student arrived reading at grade H level, but is now reading grade level novels, a four grade level improvement. Student now reads on her/his own and has overcome her/his initial resistance to reading aloud. His/her spelling has improved "immensely" and his/her writing is increasingly legible. On assessments on September 29, 2022, Witness B reported that Student was

¹⁰¹ *Id.* at 254-55.

¹⁰² *Id.* at 257-58.

¹⁰³ *Id.* at 263.

¹⁰⁴ *Id.* at 263 and 265.

¹⁰⁵ P51:1 (419).

¹⁰⁶ *Id.* at 2 (420).

at “District Benchmark” for grade A in reading¹⁰⁷ and math.¹⁰⁸

36. Witness C is Student’s Psychotherapist at School A. Witness C testified that she sees Student every day in class and in his/her living quarters. There are three cottages with six students in each cottage. Witness C provides individual therapy to Student one hour per week, and family therapy virtually, once each week. The program also involves home visits and Student is left alone with her/his parents for part of the day. Witness C testified that Student struggles to focus. S/he has required physical interventions for targeting peers or trying to harm adults. When s/he first arrived, Student would not sit and talk with staff members; Student is now cooperative with staff members. Witness C opined that based upon the needs Student has demonstrated at School A, the June 2021 IEP was not appropriate; s/he needs the high level of support provided by School A to make progress.

37. Mother testified that Petitioners received dozens of emails from School B regarding Student’s disruptions, and Student spent much time in the principal’s office for destruction of property. Mother testified that when virtual learning was initiated due to pandemic restrictions, it went “horribly” because Student had no self-direction. S/he threw things and had tantrums. When grade C began in the fall of 2020, School B’s virtual plans were better, but Student would not stay on the appropriate website. In Petitioners took Student to the emergency room when s/he became upset and threw a baseball bat at Mother. When a bed became available at Facility A, Student was admitted; s/he was admitted on two other occasions for a total of 59 days, and returned to School B in February. Petitioners decided to send Student to a residential facility based on recommendations from Witness A, Witness D, and Facility A. The June 2020 IEP was inadequate; there was too little support for what Student needed. Petitioners were able to secure insurance to cover the cost of Student’s placement at School A, except for one week, through June 2022. As part of the treatment, Student is expected to make home visits accompanied by a staff member. Petitioners are pleased with Student’s progress at School A; s/he now has self-confidence and there is no more work avoidance.

38. Witness E, School B’s social worker, testified that the April 2018 BIP was not intended to carry over into the next school year. Witness E testified that Student made behavioral progress in the 2018-19 school year; s/he responded well to redirection - and did not need them frequently – and to weekly 30-minute BSS interventions. Student was very friendly, outgoing, and well-liked by her/his peers. Student struggled to regulate his/her emotions, and had a low frustration tolerance, but there were no instances of violence or physical aggression. The older s/he became, s/he was more responsive to adults. Witness E worked with Student from the time of his/her enrollment until pandemic restrictions were imposed in March 2020. On cross-examination, Witness E conceded that Student was impulsive and had periodic outbursts, but denied that s/he acted out in a physically aggressive manner that was harmful to others.

39. Witness F was retained as an expert witness in Psychology for DCPS. Witness F opined that Student’s record did not support a residential placement. She found no evidence of physical aggression in the school setting. Witness F opined that Student’s June 21, 2021 IEP was appropriate because s/he was successfully accessing the general education curriculum and was responding appropriately to BSS interventions. Witness F also questioned findings in Witness D’s

¹⁰⁷ P57:1 (437

¹⁰⁸ *Id.* at 4 (440).

evaluation. Specifically, Witness F questioned the validity of the DMDD diagnosis because Student was not symptomatic in the school environment. She also opined that there was insufficient evidence of oppositional behavior in the school environment to support the ODD diagnosis (Witness D reached the same conclusion as to ODD).

40. Witness H has been the LEA Representative at School B since August 2020 and has attended all MDT involving Student since that time. Witness H testified that she is unaware of an incident involving Student ever stabbing a peer; she first heard of the allegation during the hearing. Witness H also was unaware of Student's physical aggression at home and Petitioners' need for physical restraints as was described in Witness A's Treatment Summary. Witness H testified that s/he was unaware of any physical aggression by Student that had the potential to hurt an adult or peer. Witness H was aware that Petitioners had difficulty managing Student during virtual learning, but once Student returned to school ■■■■■ behavior was improved. Witness H opined that the June 2021 IEP was appropriate because the goals were aligned with grade level standards and Student was capable of accessing the curriculum the general education environment. The team added three hours of reading support outside general education to address that deficit. On cross-examination, Witness H conceded that s/he was aware of Student yelling in class, calling teachers and peers inappropriate names, work avoidance, and running out of the classroom, but was unaware of him/her kicking a wall or stabbing a peer.

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.¹⁰⁹

The issues in this case involve the appropriateness of Student's IEP and placement. As to these issues, Respondent bears the burden of persuasion.¹¹⁰

¹⁰⁹ D.C. Code Sect. 38-2571.03(6)(A)(i).

¹¹⁰ *Schaffer v. Weast*, 546 U.S. 49 (2005).

Whether DCPS denied Student a FAPE by failing to provide an appropriate Individualized Education Program (“IEP”) and placement for the 2021-22 and 2022-23 school years. Petitioners assert that Student requires therapeutic support for the entire school day in a small, structured setting outside of the general education setting.

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*.¹¹¹ 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.’”¹¹² 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...”¹¹³ 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.”¹¹⁴

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.¹¹⁵ 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*.’”¹¹⁶ 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.¹¹⁷

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

¹¹¹ 458 U.S. 176, 187 (1982).

¹¹² *Id.* at 189-90, 200

¹¹³ *Id.* at 200.

¹¹⁴ *Id.* at 203-04.

¹¹⁵ *Endrew F. ex rel. Joseph F. v. Douglas County School District RE-1*, 137 S.Ct. 988 (2017).

¹¹⁶ *Id.* at 997.

¹¹⁷ *Id.* at 1000-01 (citations omitted).

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.”¹¹⁸

The June 21, 2021 IEP

The record reveals that Petitioners were relatively satisfied with Student’s progress as late as the beginning of the 2019-20 school year. Although the March 5 2018 IEP indicated that Student’s behavior impeded his/her learning or that of other children, the February 4, 2019 IEP indicated the Student’s behavior no longer impeded learning. This was carried over to the November 25, 2019 IEP where the IEP team prescribed one hour per week of specialized instruction in general education and one hour per week outside general education, reductions of 0.5 and 1.0 hours, respectively, from the February 4th IEP. BSS was maintained at two hours per month. As of November 2019, Student appeared to be continuing to make significant behavioral progress. The Behavior PLOP reported that although s/he continued to require prompting to remain on task, Student loved to play, had many friends, had many strengths, was social, friendly, and outgoing.

In Examiner C’s April 2020 evaluation, Teacher B reported that there had been a decrease in tantrums during Student’s time at School B, and s/he was making an effort to participate in nonpreferred academic tasks. However, Mother reported difficulty during distance learning, contrasting that with the progress Student had been making in school, where s/he “had supports in place which seemed to be helping with [redacted] behavior and academics.” Teacher B reported that Student’s reading and math skills were age-appropriate, but application of his/her skills was inconsistent.

As virtual learning persisted, Petitioners found it more and more difficult to manage Student at home, and they were anxious for in-person classes to resume. On October 1, 2020, Mother’s email to Teacher C spoke favorably of the structure of the classroom that Student needed to focus. “[S/he] does much better under teacher oversight and peer pressure from other kids.” At the IEP meeting on October 28, 2020, the Behavior PLOP reported continued improvement in Student’s ability to get along with others, but s/he was well below benchmark in reading. The IEP team increased specialized instruction outside general education by 30 minutes per week.

The sharp turning point came when Student attacked his/her mother in December 2020. Mother reported that s/he was in and out of Facility B as an inpatient for 59 days between December 14, 2020 and May 5, 2021. The difficulty controlling Student’s behavior at home led them to retain Witness D to conduct a neuropsychological evaluation of Student. Although Witness D conceded that “Student had been more successful at controlling [his/her] behavior in the classroom,” Witness D found Student’s performance on the WIAT to be “lackluster” and recommended that Student be placed in a therapeutic residential setting. Thereafter, on June 17, 2021, Petitioners notified DPCS that they would unilaterally place Student at School A for the 2021-22 school year. At the IEP meeting on June 21, 2021, DCPS reinserted the language in the Consideration of Special Factors that Student’s behavior impedes learning, but in the Behavior

¹¹⁸ 137 S.Ct. at 1000-01.

PLOP, Student was described as an outgoing, social, friendly, and thoughtful student.” ■■■ gets off-topic and engages in off-task activities, “but once prompted and encouraged, [s/he] returns to the group. [Student] responds very well to verbal and nonverbal positive reinforcement from adults. According to [Student’s] home room teacher, [Student] gets [her/his] reward break per [her/his] behavior chart in the morning approximately 95% of the time and in the afternoon approximately 80% of the time.” Although DCPS increased Student’s specialized instruction outside general education by 2.5 hours per week, Petitioners rejected the IEP and proceeded with their unilateral placement to School A.

The record reveals that based on Witness D’s testing, Student performed in the Average range in Math, in the Average range in Writing Fluency, slightly Below Average in writing overall, and Below Average overall in Reading, while scoring in the Average range in Reading Comprehension. School A’s initial assessments of Student confirmed that Student was performing at grade level in math and reading early in his/her first days at School A. The record also reveals that although Student’s behavior was characterized as an impediment to learning, the PLOP revealed that s/he was making steady progress in getting along with adults and peers. The testimony from School B’s social worker and LEA Representative was credible and emphatic that Student had not engaged in any physical aggression throughout the school year.

I conclude that DCPS has met its burden of proving that it offered an appropriate IEP to Student. It proposed an IEP that increased Student’s specialized instruction by 2.5 hours per week while s/he was showing grade level proficiency in math, near grade level proficiency in writing, average proficiency in reading comprehension, and his/her behavior was having a consistently decreasing effect on ■■■ ability to learn. The evidence is clear that Student is capable of making academic progress in a general education environment with minimal specialized instructive support and with weekly BSS services,

The April 22, 2022 IEP

On March 25, 2022, School A issued a third quarter report card in which Student was reported to be at grade level in every subject. The Math and Reading PLOPs reported the achievement scores from Witness D’s March 2021 neuropsychological evaluation. The Reading PLOP also indicated that Student was reading grade level books with 80% comprehension. In Written Expression, s/he regularly writes 5-6 sentence paragraphs, has completed a book report, writes more sentences when motivated, and his/ her spelling has improved. There was no indication in School A’s records that there was a behavioral problem with Student that impeded ■■■ ability to learn.

On April 22, 2022, DCPS proposed an IEP in which it offered five hours and forty minutes of specialized instruction per week, including three hours and forty minutes outside general education, and increased Student’s BSS services to three hours per week. The evidence is clear that Student is capable of making academic progress in a general education environment with minimal specialized instructive support and with weekly BSS services. Therefore, I conclude that DCPS has met its burden of proving that the April 22, 2022 IEP it developed for Student was reasonably calculated to enable Student to make progress appropriate in light of his/her Circumstances.

Whether DCPS denied Student a FAPE by failing to classify him/her with multiple disabilities (“MD”) including emotional disturbance (“ED”) and other health impaired (“OHI”).

On June 16, 2021, Petitioners objected to DCPS’ classification of Student with an SLD rather than MD due to OHI and ED. The stated basis for the objection was Student’s hospitalization for 59 day during the second half of the 2020-21 school year, and incidents including kicking a wall in the hallway, yelling out during class, calling teachers and students inappropriate names and using hurtful words, stabbing another student with a pencil, running out of the classroom, and refusing to participate in school work and sessions with [his/her] IEP support team. As for the hospitalization, the only documented hospitalization was from December 14 -22, 2020, which involved Student throwing a baseball at ■ mother. This incident did not occur at school and the background of what led up to the incident is incomplete. There is no information in the record as to the two additional hospitalizations that took place during the school year, but is not even alleged that it involved anything involving School B. Moreover, there is no documentation of Petitioners’ allegations regarding Student kicking a wall, or stabbing a student. The record does include references to the other disruptive actions, but none alleged to have occurred during the 2021-22 school year.

More to the point, Student’s IEPs at issue were designed to address the documented deficits that Student exhibited in the school environment. S/he was prescribed specialized instruction for ■ deficits in reading, math, and writing, and s/he was prescribed BSS to address ■ inattentiveness, lack of focus, and ■ periodic disruptive behavior. In the sections above, I concluded that DCPS developed appropriate IEPs to address Student’s known deficits during the 2020-21 and 2021-22 school years. Petitioners can point to no actual harm that Student has suffered as a result of DCPS’ failure to broaden the list of classifications. I reiterate that DCPS has met its burden of proving that the IEPs at issue were reasonably calculated to enable Student to make academic progress at School B, and the record supports the fact that s/he did.

Whether ■ is an appropriate placement.

IDEA provides that if parents “enroll the child in a private ... school without the consent of [the school district], a court or a hearing officer may require the [school district] to reimburse [them] for the cost of that enrollment...”¹¹⁹ The statute requires reimbursement, however, only where the school district has failed to “ma[k]e a free appropriate public education available to the child.”¹²⁰ Reimbursement, moreover, may be “reduced or denied” if the parents fail to notify school officials of their intent to withdraw the child, deny them a chance to evaluate the student, or otherwise act “unreasonabl[y],”¹²¹ The Supreme Court reiterated in *Florence County School District Four v. Carter*¹²² that IDEA empowers courts to order school officials to reimburse parents for their expenditures on private special education if the private placement was “proper under the Act.”¹²³ If the private school selected by the parent is reasonably calculated to allow the child to

¹¹⁹ 20 U.S.C. § 1412(10)(C)(ii).

¹²⁰ *Id.*

¹²¹ 20 U.S.C. § 1412(10)(C)(iii)(III).

¹²² 510 U.S. 7 (1993)

¹²³ *Id.* at 12, quoting, *School Committee of the Town of Burlington v. Department of Education of Massachusetts*, 471 U.S. 359, 369 (1985).

receive educational benefit, the parent should be entitled to reimbursement regardless of whether the school follows IEPs or is certified.¹²⁴

In light of my findings that the two IEPs at issue were appropriate, I need not reach the issue of the propriety of School A as a placement. However, Petitioners' assertion that Student requires therapeutic support for the entire school day in a small, structured setting outside of the general education setting was central to their case and deserves to be addressed.

Parents would not have been entitled to reimbursement for their expenses at School A even if I had concluded that DCPS denied Student a FAPE, because School A is not a proper placement for Student. As discussed above, Petitioners appeared to be completely satisfied with School B until pandemic restrictions compelled DCPS to institute distance learning. This meant that Student would be required to access ■ instruction at home from a virtual platform. Petitioners had considerable difficulty managing Student during the school day, which led to conflict in the home. Psychiatrist A reported that he recommended family therapy from Witness A "given the challenging dynamics that sometimes arose in the home."

Witness A opened his testimony by stating that Student was referred to him by Student's psychiatrist, Psychiatrist A, due to challenges at school and at home. In fact, the opening paragraph of Witness A's December 20, 2020 Treatment Summary not only specifies that it was Student's "overall functioning *at home*" that led to ■ being retained, it contrasted Student's behavior at home with "how well [s/he] historically performs in school..."

Mother sent an email to Student's teachers on October 1, 2020, longing for the resumption of in-person classes because "It has been our experience that [Student] needs the structure of the classroom to focus. [S/he] does much better under teacher oversight and peer pressure from other kids." Even Witness D, the primary proponent of a residential placement for Student, noted that "Academically, [Student] generally has been more successful at controlling [his/her] behavior in the classroom."

Witness D's Treatment Summary paints a clear picture of constant conflict within the family unit that on many occasions resulted in violence. Petitioners were trained in methods to restrain Student, and in October 2020, they were compelled to use those techniques. In December 2020, Student attacked ■ mother and was eventually hospitalized at Facility B eight days. The record reveals that Student was hospitalized twice more during the school year for event that were not documented, but had nothing to do with DCPS. The record also shows that once s/he entered School B, ■ aggressive behavior on school premises waned to the point that Witness E and Witness H both testified that there is no recent history of aggressive behavior by Student at School B. Moreover, neither party offered documentation of physical aggression by Student at school or evidence of disciplinary action against her/him by School B. Under these circumstances, there is no justification for a proposal for a residential placement due to Student's behavior in the school environment.

Petitioners cited nine cases in support of their position that a residential placement was necessary to provide Student special education and related services.¹²⁵ In *Leggett and K.E. v.*

¹²⁴ *Carter v. Florence County School District Four*, 950 F.2d 156, 163 (4th Cir. 1984).

¹²⁵ *Petitioners' Memorandum of Authorities* at 3.

District of Columbia,¹²⁶ the parent made repeated requests to schedule an IEP meeting to conclude the development of the child IEP before the upcoming school year that was not to completed in two meetings in June. Having received no response from the school, in early August, the parent notified DCPS of the unilateral placement in a residential facility three hours from the District, but she indicated a willingness to enroll in a DCPS school if DCPS offered an appropriate IEP. The court held that DCPS' failure to offer an educational program before the school year began was a substantive violation that entitled the parent to reimbursement for the unilateral placement. *Leggett* is distinguishable because (1) DCPS offered no IEP to the student, and (2) the court held that the residential placement was not precluded by the ruling in *McKenzie v. Smith*.¹²⁷ There, the court adopted the Third Circuit's approach of analyzing residential placements to determine "whether full-time placement may be considered necessary for educational purposes, or whether the residential placement is a response to medical, social or emotional problems that are segregable from the learning process."¹²⁸ Here, (1) Student had a current IEP at the time of the unilateral placement, (2) s/he had performed satisfactorily to Petitioners for several years in general education with IEPs that were minimally restrictive, and (3) for reasons discussed below, the unilateral residential placement was a response to social or emotional problems that are segregable from the learning process.

In *Mrs. B. v. Milford Board of Education*,¹²⁹ the Second Circuit employed a somewhat different test to determine the need for a residential placement: "... [w]hen the medical, social or emotional problems that require hospitalization create or are intertwined with the educational problem, the states remain responsible for the costs of the residential placement."¹³⁰ A clinical social worker recommended that the student's emotional problems could not be dealt with effectively outside a full-time residential treatment program due to the mother's inability to deal with the child manipulative and regressive behavior. Both Devereux-Glenholme School, where the student was unilaterally placed, and the hearing officer concluded that the placement was for non-educational reasons. However, citing the mother's inability to control the child, the hearing officer recommended that the child remain at Devereux for a second year. On appeal, the magistrate judge, citing the hearing officer's reluctance to transition the child back into the public school system, determined that the student's educational and noneducational problems were "sufficiently intertwined such that her educational problems cannot be separated" from the non-educational ones, which conclusion was adopted by the district court and the Second Circuit. However, there are key differences between the child in *Mrs. B.* and Student. The student in *Mrs. B.* (1) had a "lengthy history of difficulties in school, primarily rooted in social and emotional problems, (2) in the year prior to the unilateral placement, she received unsatisfactory or failing grades in virtually all of her subjects throughout the year, and (3) she had met only four of thirty-two objectives listed in her IEP. While Student was on an IEP for several years prior to the unilateral placement, she spent virtually all of her time in general education with no more than 2.5 hours of specialized instruction per week through the IEP developed in October 2020. Petitioners never expressed

¹²⁶ 793 F.3d 59 (D.C. Cir. 2015).

¹²⁷ 771 F.2d 1527 (D.C. Cir. 1985)

¹²⁸ *Id.* at 1534, citing, *Kruelle v. New Castle County School District*, 642 F.2d 687, 693 (3d Cir. 1981) and *Ashland School District v. Parents of Student R.J.*, 588 F.3d 1004, 1010 (9th Cir. 2009)(although teachers reported that student had difficulty turning in assignments on time, she earned good grade when she completed her work, was well regarded by teachers, was not disruptive, and it was student's "risky behaviors" outside of school that prompted her parents to enroll her in the facility).

¹²⁹ 103 F.3d 1114 (2d Cir. 1997).

¹³⁰ *Id.* at 1120, citation omitted.

dissatisfaction with Student's program until virtual learning was imposed due to the pandemic restrictions, and Student was difficult to manage and motivate at home. Until Petitioners elected to withdraw Student from School B, Student's IEPs consistently indicated that his/her behavior did not have a negative impact on his/her learning or that of his/her classmates. Student's grades prior to the initiation of virtual learning in the spring of the 2019-20 school year were Advanced or Proficient in every subject except Reading and Math, and her/his behavioral grades did not indicate that her/his behavior was a significant issue. The first written complaint about Student's program was in October 2020, and it was clearly focused on Petitioners' difficulty managing Student during virtual learning. In her October 1, 2020 email, Mother's primary concern was returning Student to the in-person environment in which s/he thrived prior to distance learning "under teacher oversight and peer pressure from other kids." When School B offered the option of a return to in-person classes on January 12, 2021, Mother accepted immediately. Finally, Student's Progress Report for the 2020-21 school year reveals that s/he made progress in the terms in which s/he was not hospitalized, and while evincing oppositional behavior "at times," s/he had never shown physically aggressive behavior.

Petitioners cite a number of other cases that are distinguishable because the students' behavior was so disruptive that it clearly precluded any opportunity for learning by the students and their classmates. Student's behavioral profile is simply not comparable to the student in *Township of Bloomfield Board of Education v. S.C. o/b/o T.M.*¹³¹ Unlike Student, T.M. was so disruptive that the IEP team recommended that he be placed on home instruction, a psychiatrist concluded that he had an affinity for sociopathic behavior, was a threat to other children, required 24-hour monitoring, was expelled from high school for threatening a teacher, and the school district asserted that he required medical stabilization before he could be educated.

Student's behavior is not comparable to the student in *Linda E. v. Bristol Warren Regional School District*.¹³² She would kick, spit, bite, and punch her mother, and once threatened to stab her mother with a butter knife. When the student was eight years old, she expressed a specific plan to kill herself to school staff members. They arranged for her to participate in a social skills group and have weekly meetings with a school psychologist or social worker. A 2002 report revealed that the student was punished several times for refusing to follow directions and did not have good friendships with other children. In the sixth grade, she was rude and disruptive in class and was guilty of one theft. She was also cutting herself at school. She was getting D's in language arts and science and failing math. The following year, she was "inappropriate during class and disrupting the learning environment," for which she received detention.¹³³

At age thirteen, the student in *Kruelle* had the social skills of a six-month-old, an IQ below 30, could not walk, dress himself, eat unaided, was not toilet trained, did not speak, and had a history of emotional problems leading to choking and self-induced vomiting when stressed, and had "frequent" temper tantrums in school.¹³⁴

In *Independent School District No. 284 v. A.C.*,¹³⁵ the student's classroom behavior included disruption, profanity, insubordination, and chronic truancy. Outside of school, she used

¹³¹ 2005 WL 2320029 (D.N.J. 2005).

¹³² 758 F.Supp.2d 75 (D.R.I. 2010).

¹³³ *Id.* at 78-80.

¹³⁴ 642 F.2d 687, 688-89 (3rd Cir. 1981).

¹³⁵ 258 F.3d 769 (8th Cir. 2001).

alcohol, illegal drugs, was sexually promiscuous, repeatedly ran away from home, was thought to have forged checks, and was hospitalized three times for attempted suicide.¹³⁶

And in *Seattle School District No. 1 v. B.S.*,¹³⁷ the student exhibited serious behavioral problems at school including physical and verbal aggression, oppositionality, tantrums, inattention, and inappropriate affection toward adults. In December 1992, she became so verbally and physically abusive that she was placed in restraints and hospitalized. Thereafter she was expelled from school. “In spite of A.S.’s age-appropriate scores on standardized tests, A.S. had long exhibited behaviors which adversely affected her educational performance.”¹³⁸

Respondent cited Office of Dispute Resolution (“ODR”) Case No. 2021-136 for support of its position that Student’s behavior in the classroom environment did not warrant a more restrictive setting. Respondent’s reliance is well placed. In Case No. 2021-136, Hearing Officer Michael Lazan was effectively asked to enforce an HOD I issued in Case No. 2021-0026 on August 23, 2021. In that case, like Student, the student was adopted. Unlike Student, the student in the prior case was aware that ■ was the only child of four siblings of his/her birth mother that was put up for adoption. An evaluator opined that s/he was traumatized by the loss of birth family and the related rejection that s/he felt.¹³⁹ More significantly, and unlike Student, the student’s behavior in Case No. 2021-0026 was consistently disruptive and aggressive in the school environment, and had a manifestly negative impact on the student’s ability to access the curriculum as well as that of his/her classmates:

- “In all academic areas, [Student] has shown difficulty in working independently and completing [her/his] assigned work without frequent prompting to stay on task. During independent work, [Student] is frequently observed choosing answers at random, and skipping over large sections of [his/her] work.”¹⁴⁰
- “Since [his/her] admittance, [Student] has needed to be separated from [his/her] peers on a number of occasions due to the level of disruption [her/his] behavior is causing in the classroom. Much of [his/her] behavior seems to be focused on receiving the attention of a particular peer...”¹⁴¹
- “Record review reveals a longstanding history of behavioral/emotional problems to include physical and verbal aggression, anxiety, elopement, and problems with self-regulation, attention, sensory processing, and appropriate social interaction with peers and adults. These problems continue with increased concern for anxiety, elopement, disruptive behaviors, and off-task behaviors. Moreover, by school report, [Student] is most times unavailable for learning though ■ is said to be more than capable of accessing the curriculum and completing assignments.”¹⁴²

¹³⁶ *Id.* at 771.

¹³⁷ 82 F.3d 1493 (9th Cir. 1996).

¹³⁸ *Id.* at 1497-98. *North v. District of Columbia Board of Education*, 471 F.Supp.136 (D.D.C. 1979), also cited by Petitioners, predates *McKenzie* and did not describe the student’s behavior in school.

¹³⁹ ODR Case No. 2021-0026 at 9.

¹⁴⁰ *Id.* at 5.

¹⁴¹ *Id.* at 6.

¹⁴² *Id.*

- An evaluator opined that “[Student] requires small group attention and an emotionally supportive environment for students with learning and attentional needs. In a regular public school setting, and even in a traditional “ED” or “LD” classroom, [Student] remains highly likely to become emotionally overwhelmed, and therefore, to fail to participate/attend and too fall below grade level despite [his/her] intellect.”¹⁴³
- DCPS determined that the student required a behavior intervention plan, due to “frequently eloping from class, often with no identifiable trigger. [Student] has needed to be separated from the class due to the level of disruption of unsafe behavior... [S/he] has had periods where [s/he] has required one on one support throughout much of the school day to stay on task, keep safe, and remain supervised while out of location, prompting the team to consider and approve a dedicated aide.”¹⁴⁴
- “[S/he] will often provoke [her/his] peers through name calling, inappropriate language, verbal aggression, and invasion of personal space. [Student] has also displayed some threats and physical aggression towards peers and staff...”¹⁴⁵
- The school worker noted that during distance learning, “[s/he] has also engaged in frequent inappropriate interactions including cursing, threatening, and instigating. [Student] may engage in these behaviors verbally or through the chat feature in Zoom.”¹⁴⁶ (p.17)
- “[Student] has also engaged in behaviors that are not socially expected including verbally aggressive language, cursing, and disruptive behavior (especially laughing at peers and interrupting). During [his/her] 11 person days, [Student] displayed 6 instances of verbal aggression and 9 instances of disruptive behavior.”¹⁴⁷

In Case No. 2021-0026, I ordered DCPS to develop an IEP providing Student a placement in a residential facility, preferably one with experience in handling children suffering trauma due to adoption or abandonment. Hearing Officer Lazan ruled in favor of the petitioners in Case No. 2021-0136, concluding that DCPS made no genuine effort to identify a residential facility with expertise in treatment of child trauma from adoption or abandonment.

Student’s behavioral issues pale in comparison to the student described above; the HOD in Case No. 2021-0026 included a seven-page, single-spaced list of aggressive acts by the student in the school environment over a two-year period. Certainly, that list far exceeded the threshold justifying a residential placement. In this case, however, there is no documentation instance of aggression against an adult or classmate or even of a single disruption in the classroom that warranted disciplinary action or a behavior intervention plan since the expiration of the BIP at the end of the 2017-18 school year. School B staff testified that they were unaware of the

¹⁴³ *Id.* at 10-11.

¹⁴⁴ *Id.* at 14.

¹⁴⁵ *Id.* at 14-15.

¹⁴⁶ *Id.* at 17.

¹⁴⁷ *Id.* at 20.

circumstances of Petitioners' assertions that Student stabbed a classmate with a pencil, the only alleged act of physical aggression against anyone in the school environment. In the June 21, 2021 IEP, Student was described as an outgoing, social, friendly, and thoughtful student who responded very well to positive reinforcement from adults. His/her behavior was rewarded 95% of the time in the mornings and 80% of the time in afternoons. School B staff believed that Student's inattentiveness was promptly and consistently controlled by redirection, and that s/he was accessing the general education curriculum.

For these reasons, I conclude that School A would not have been a proper placement for Student.

RELIEF

For relief, Petitioners request an order requiring DCPS to place Student at [REDACTED] for the 2022-23 school year and to reimburse Petitioners for the expenses incurred at [REDACTED] beginning with the summer of 2021, and for the 2021-22 school year including extended year services.

ORDER

Upon consideration of the *Amended Complaint*, DCPS' *Response*, the exhibits from the parties' disclosures that were admitted into evidence, the testimony presented during the hearing, the closing arguments of counsel for the parties, *Petitioners' Memorandum of Authorities*, and DCPS' list of authorities, it is hereby

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

APPEAL RIGHTS

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

Terry Michael Banks
Terry Michael Banks
Hearing Officer

Date: November 14, 2022

Copies to: Attorney A, Esquire
Attorney B, Esquire
Attorney C, Esquire
OSSE Office of Dispute Resolution
OSSE Division of Specialized Education
[REDACTED]/DCPS
[REDACTED]/DCPS