

OSSE
Office of Dispute Resolution
November 21, 2022

<p>Parents on Behalf of Student,¹</p> <p>Petitioners,</p> <p>v.</p> <p>District of Columbia Public Schools (Local Education Agency “LEA”)</p> <p>Respondent.</p> <p>Case # 2022-0132</p> <p>Date Issued: November 21, 2022</p>	<p>HEARING OFFICER’S DETERMINATION</p> <p>Hearing Dates:</p> <p>November 1, 2022 November 2, 2022 November 3, 2022 November 4, 2022 November 9, 2022</p> <p>Counsel for Each Party listed in Appendix A</p> <p><u>Hearing Officer:</u> <u>Coles B. Ruff, Esq.</u></p>
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¹ Personally identifiable information is in the attached Appendices A & B.

JURISDICTION:

The hearing was conducted, and this decision was written, pursuant to the Individuals with Disabilities Act (“IDEA”), P.L. 101-476, as amended by P.L. 105-17 and the Individuals with Disabilities Education Improvement Act of 2004, the District of Columbia Code, Title 38 Subtitle VII, and the District of Columbia Municipal Regulations, Title 5A Chapter E30.

BACKGROUND AND PROCEDURAL HISTORY:

The student who is the subject of this due process hearing ("Student") resides with Student's parents ("Petitioners") in the District of Columbia. The District of Columbia Public Schools ("DCPS" or “Respondent”) is Student's local education agency ("LEA"). Student has been determined eligible for special education and related services pursuant to IDEA with a disability classification of multiple disabilities ("MD"), including specific learning disability ("SLD") and other health impairment ("OHI").

Student was first determined eligible for special education by DCPS in June 2018. DCPS developed an initial individualized education program (“IEP”) for Student on June 15, 2018, and proposed to implement Student’s IEP at Student’s neighborhood DCPS school. Petitioner’s rejected DCPS’s proposal and unilaterally placed Student in a non-public school (“School A”) for school year (“SY”) 2018-2019. Student has continued attending School A since then.

DCPS conducted an annual review of Student’s initial IEP in October 2019. DCPS conducted subsequent annual reviews of Student’s IEP in July 2020, May 2021, and May 2022. In each instance, DCPS proposed to implement Student’s IEP at Student’s DCPS neighborhood school. Petitioners, in each instance, rejected the proposed IEP and placement in a DCPS school and maintained Student at School A.

Petitioners filed their current due process complaint (“DPC”) against DCPS on July 11, 2022, asserting that DCPS denied Student a free appropriate public education (“FAPE”) by failing, inter alia, to develop an appropriate IEP for the three most recent three school years: SY 2020-2021, SY 2021-2022 and SY 2022-2023. This includes the IEPs developed in July 2020, May 2021, and May 2022, and all subsequent amendments thereto. Petitioners allege that the IEPs prescribed insufficient hours of specialized instruction outside general education and did not prescribe speech language services. Petitioners also allege that DCPS failed to provide Petitioners any meaningful information about the education placements that DCPS proposed.

Petitioners seek reimbursement from DCPS for the tuition they have paid School A for Student’s attendance and School A in these three school years. They also seek a ruling by the undersigned independent hearing officer (“IHO”) that School A is an appropriate educational placement for Student and order DCPS to place and fund Student at School A for the remainder of SY 2022-2023.

LEA Response to the Complaint:

Respondent filed a response to the DPC on August 5, 2022. In its response, DCPS stated, inter alia, the following:

On October 30, 2019, DCPS conducted an observation of Student at School A. A DCPS speech language pathologist reviewed an independent evaluation of Student, and on December 18, 2019, an eligibility meeting was held. The team determined that Student did not have a speech language disorder.

On July 22, 2020, DCPS proposed an appropriate IEP for Student. DCPS did not deny Student a FAPE by not proposing speech language pathology services for SY 2020-2021. DCPS made a FAPE available to Petitioners with an appropriate IEP.

On May 21, 2021, DCPS proposed an appropriate IEP for Student. On December 10, 2021, the team made an IEP amendment to add occupational therapy (“OT”). The parent signed the IEP amendment form to make the changes to the IEP. DCPS made a FAPE available to Student.

On May 31, 2022, DCPS convened an IEP meeting. DCPS again proposed an appropriate IEP. DCPS deemed the May 31, 2022, IEP to be Student’s least restrictive environment (“LRE”), and that it made FAPE available. DCPS did not deny the student a FAPE by not proposing speech language pathology services for SY 2022-2023.

IDEA does not provide a parent a right to “meaningful information” about a school, nor does it provide parents and their advocate the right to question school personnel before filing litigation against the LEA. During SY2020-2021 DCPS schools were closed due to the pandemic. All information a parent needs related to DCPS schools can be obtained online.

DCPS does not agree that this student needs a self-contained segregated private school placement. DCPS has made a FAPE available, and the parents have declined the offers. School A is a private school location and not an appropriate educational placement for Student. If the IHO finds that the School A is proper, the relief should be denied pursuant to 34 C.F.R. 300.148 (d)(3) and 34 CFR § 300.146).

Resolution Meeting and Pre-Hearing Conference:

The parties participated in a resolution meeting on August 3, 2022, and did not resolve the DPC. The parties did not mutually agree to shorten the 30-day resolution period. The 45-day period began on August 11, 2022, and ended [and the Hearing Officer’s Determination (“HOD”) was initially due] on September 24, 2022. The parties agreed to hearing dates beyond the HOD due date and Petitioners submitted a motion to continue that was granted. The HOD is now due on November 21, 2022.

The IHO conducted a pre-hearing conference and on September 7, 2022, issued a pre-hearing order (“PHO”) on outlining, inter alia, the issues to be adjudicated.

ISSUES:²

The issues adjudicated are:

1. Did DCPS deny Student a FAPE by failing to propose an appropriate IEP or placement for SY 2020-2021 because the IEP: (a) contained an inappropriate LRE with insufficient hours of specialized instruction outside general education, and (2) did not include speech language services?
2. Did DCPS deny Student a FAPE by failing to provide any meaningful information as to the proposed placement or allow Student's family and their educational expert to speak with anyone from the proposed placement for SY 2020-2021?
3. Did DCPS deny Student a FAPE by failing to propose an appropriate IEP or placement for the SY 2021-2022 because the IEP: (a) contained an inappropriate LRE with insufficient hours of specialized instruction outside general education, and (2) did not include speech language services?
4. Did DCPS deny Student a FAPE by failing to provide any meaningful information as to the proposed placement or allow Student's family and their educational expert to speak with anyone or visit the proposed placement for SY 2021-2022?
5. Did DCPS deny Student a FAPE by failing to propose an appropriate IEP or placement for the SY 2022-2023 because the IEP: (a) contained an inappropriate LRE with insufficient hours of specialized instruction outside general education, and (2) did not include speech language services?
6. Did DCPS deny Student FAPE by failing to provide any meaningful information as to the proposed placement or allow Student's family and their educational expert to speak with anyone from the proposed placement for SY 2022-2023?
7. Is School A a proper placement for Student?

DUE PROCESS HEARING:

The Due Process Hearing was convened on November 1, 2022, November 2, 2022, November 3, 2022, and November 4, 2022. The parties made oral closing arguments on November 9, 2022. The hearing was conducted via video teleconference on the Microsoft Teams platform.

² The IHO restated the issues at the outset of the due process hearing, and the parties agreed that these were the issues to be adjudicated. In response to Respondent's objection to issue #3 in the PHO related to distance learning, Petitioner agreed it was addressed in at least one of the remaining issues. Thus, issue #3 from the PHO was eliminated by the IHO because of redundancy.

RELEVANT EVIDENCE CONSIDERED:

The IHO considered the testimony of the witnesses and the documents submitted in each party's disclosures (Petitioner's Exhibits 1 through 53 and Respondent's Exhibits 1 through 37) that were admitted into the record and are listed in Appendix 2.³ The witnesses testifying on behalf of each party are listed in Appendix B.⁴

SUMMARY OF DECISION:

DCPS held the burden of persuasion on issues #1, #3 & #5, after Petitioners presented a prima facie case on those issues.⁵ Petitioners held the burden of persuasion on issues #2, #4, #6, and #7. Based on the evidence adduced, the IHO concluded that Respondent sustained the burden of persuasion by a preponderance of the evidence on issues #1, #3 & #5. Petitioners did not sustain the burden of persuasion on issues #2, #4, and #6. The IHO dismissed Petitioners' claims with prejudice.

³ Any item disclosed and not admitted or admitted for limited purposes was noted on the record and is noted in Appendix A.

⁴ Petitioner presented five witnesses: (1) Student's Mother and the following individuals who were designated as expert witnesses: (2) Petitioners' Educational Consultant, (3) a School A Speech-Language Pathologist, (4) a School A Administrator, and (5) a former School A Administrator. Respondent presented eleven witnesses, who were designated as expert witnesses: (1) a DCPS Psychologist, (2) a DCPS Speech Language Pathologist, (3) a DCPS Social Worker (4) a DCPS Occupational Therapist, (5) a DCPS Non-Public School Monitor, (6) an LEA Representative for DCPS School B, (7) Special Education Teacher at School B (8) an LEA Representative for DCPS School C, and (9) three members of DCPS Central Office IEP team who participated in development of Student's IEPs. The Hearing Officer found the witnesses credible unless otherwise noted in the conclusions of law. Any material inconsistencies in the testimony of witnesses that the Hearing Officer found are addressed in the conclusions of law.

⁵ DC Code § 38-2571.03 (6) provides:

(A) In special education due process hearings occurring pursuant to IDEA (20 U.S.C. § 1415(f) and 20 U.S.C. § 1439(a)(1)), the party who filed for the due process hearing shall bear the burden of production and the burden of persuasion; except, that:

(i) 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.

(ii) Where a party seeks tuition reimbursement for unilateral placement, the party seeking reimbursement shall bear the burden of production and the burden of persuasion on the appropriateness of the unilateral placement; provided, that the hearing officer shall have the authority to bifurcate a hearing regarding a unilateral placement; provided further, that if the hearing officer determines that the program offered by the public agency is appropriate, it is not necessary to inquire into the appropriateness of the unilateral placement.

(B) This paragraph shall apply to special education due process hearings resulting from complaints filed after July 1, 2016.

FINDINGS OF FACT:⁶

1. Student resides with Petitioners in the District of Columbia. DCPS is Student's LEA. Student has been determined eligible for special education and related services pursuant to IDEA with a disability classification of MD including SLD and OHI due the attention deficit hyperactivity disorder ("ADHD"). (Respondent's Exhibit 29-1)
2. Student currently attends School A, non-public school where Petitioner's unilaterally placed Student for SY 2018-2019. Student has continued attending School A since then. Student attended a DCPS school prior to attending School A. (Mother's testimony)
3. In November 2017, while Student was attending a DCPS school, Petitioner engaged an independent clinical psychologist and an educational diagnostician who together conducted an independent cognitive and educational evaluation of Student. Student's cognitive functioning was measured using the Wechsler Intelligence Scale for Children-Fifth Edition (WISC-V). Student's cognitive functioning fell within the very superior range, at the 99th percentile relative to other children in the reference group. Student had the following assessment scores:

	Score	Percentile	Range
Verbal Comprehension Index	142	99.7	Very Superior
Visual-Spatial Index	138	99	Very Superior
Fluid Reasoning Index	115	84	High Average
Working Memory	100	50	Average
Processing Speed Index	97	42	Average
General Ability Index (GAI)	134	99	Very Superior

(Petitioners' Exhibit 2)

4. The evaluators concluded, based on the variance in Student's working memory and processing speed index scores relative to the other areas measured, along with data provided by educational and academic testing, that Student was both gifted and learning-disabled. Student's academic functioning was measured by the Woodcock-Johnson IV (WJ IV). Student had the following educational assessment scores:

GE= Grade Equivalent; SS = Standard Score; PA = Percentile by Age

	GE	SS	PA
<i>Broad Reading</i>	4.6	105	62
Letter-Word Identification	4.5	103	59

⁶ The evidence (documentary and/or testimony) that is the source of the Findings of Fact ("FOF") is noted within parenthesis following the finding. A document is noted by the exhibit number. If there is a second number following the exhibit number, that number denotes the page of the exhibit from which the fact was obtained. When citing an exhibit that has been submitted by more than one party separately, the Hearing Officer may only cite one party's exhibit.

Passage Comprehension	4.3	102	54
Sentence Reading Fluency	4.8	106	66
<i>Basic Reading Skills</i>	3.8	98	46
Letter-Word Identification	4.5	103	59
Word Attack	2.8	92	30
<i>Reading Fluency</i>	4.3	102	55
Oral Reading	3.3	95	37
Sentence Reading Fluency	4.8	106	66
<i>Reading Rate</i>	3.9	99	46
Sentence Reading Fluency	4.8	106	66
Word Reading Fluency	3.1	92	31
Broad Mathematics	5.8	114	83
Applied Problems	13.0	132	98
Calculations	5.0	108	71
Math Facts Fluency	4.4	103	58
Broad Written Language	3.3	94	35
Spelling	1.9	79	8
Writing Samples	4.5	102	56
Sentence Writing Fluency	5.6	110	75
<i>Academic Skills</i>	3.6	96	39
<i>Academic Fluency</i>	4.8	106	65
<i>Academic Applications</i>	6.5	116	86

5. The evaluators expected, given Student's cognitive ability, that Student would have achieved at least in the high average to superior range on the academic achievement assessments. However, despite Student's superior cognitive ability, Student's broad reading and writing skills were in the average range and significantly discrepant from Student's superior ability overall. (Petitioner's Exhibit 2)
6. Although Student's mathematical reasoning skills were in the very superior range, consistent with Student's cognitive ability and Student's overall performance in math placed Student in the high average range, at the 83rd percentile, Student's mastery of math calculations and fluency was average. (Petitioners' Exhibit 2)
7. The evaluators included in their evaluation the following statements regarding Student's social emotional and behavioral development: "On evaluation, [Student] emerges as an unhappy, depressed, youngster. The reports of [Student's] parents, grandparents, and teacher indicate that [Student] is often able to function well. Nevertheless, [Student] is sad and worried. [Student] feels ...unable to meet the challenges life places before [Student]. [Student] is excessively hard on [h]self, constantly belittling [h]self and ignoring [Student's] indisputable strengths. [Student] is also emotionally intense, managing a chronically uncomfortable level of affective press. When [Student] becomes emotional,

[Student's] thinking is dominated by internal factors (thoughts, feelings, and fantasies). At such moments, it is difficult for [Student] to use [Student's] exceptionally strong reasoning abilities to address whatever difficulty [Student] is contending with." (Petitioners' Exhibit 2)

8. The evaluators concluded that the discrepancies in Student's performance warranted a diagnosis of a learning disorder with impairment in reading and written expression. Based on direct testing of Student's attention and executive functioning and Student's history, the evaluators concluded that there was sufficient evidence to diagnose Student with ADHD with vulnerabilities in various aspects of executive functioning as well as regulation of attention. (Petitioners' Exhibit 2)
9. The evaluators recommended, among other things, consultation with a child psychiatrist to include discussion of the pros and cons of medication aimed at helping Student improve executive regulation and diminish Student's depression. The evaluators also made the following recommendation about Student's school enrollment given what they described as the severity of Student's learning disorder: "[Student's] parents may want to consider enrolling [Student] in a school that will facilitate the remediation of [Student's] weaknesses in reading, math, and written language. This option has been discussed with [Student's] parents. Alternatively, [Student] should receive intensive instruction in reading and writing, using a carefully sequenced, multisensory phonetic approach like Orton Gillingham, PhonoGraphix, or Wilson. This should be provided by a professional who is trained to work with children with learning disabilities." Petitioners' Exhibit 2)
10. The evaluators made the following additional recommendations: (Petitioners' Exhibit 2)
 - "[Student] will require substantial modification of requirements in [Student's] mainstreamed classes. Whenever possible, [Student] should be encouraged to share information orally or visually, so that [Student's] strengths and talents can be recognized. For example, reports and projects could be given verbally or in dramatic presentations, so that [Student] is not confined to a written project. Consideration should also be given to dictating homework assignments to [Student's] parents."
 - "[Student] should use a word processor for written assignments whenever possible. A program with a grammar and a spell checker will help to compensate for [Student's] difficulty with the mechanical aspects of writing and spelling. [Student's] parents should also monitor the amount of time [Student] spends on ... homework. If this is too excessive, they should communicate with the teacher to discuss accommodations."
 - "Given [Student's] difficulties with written language, it is recommended that [Student's] work be graded primarily for content. When necessary, two grades, one for mechanics and one for content, should be given. In addition, spelling lists should target phonetic word groupings. Copying requirements will be very

difficult for [Student]. Such requirements should be reduced by providing [Student] with a handout or materials to be copied.”

- “To facilitate [Student’s] written expression, various alternatives to handwriting should be considered. A computer should be made available for written work in the classroom. Dictation to a teacher, parent, or aid should also be considered.”
11. In May 2018, DCPS conducted a review of the independent evaluation that Petitioners provided and convened an eligibility meeting. DCPS determined Student eligible for special education and in June 2018 developed an initial IEP. (Respondent’s Exhibits 5, 6, 10)
 12. Petitioners did not reenroll Student in a DCPS school for SY 2018-2019. Student began attending School A at the start of SY 2018-2019. In December 2018 and early 2019 School A conducted a speech language evaluation to assess Student’s language profile to determine the need for speech-language therapy, and, if deemed necessary, to make recommendations for educational planning purposes. (Petitioners’ Exhibit 3)
 13. The School A evaluator noted that Student’s School A teacher described Student as reading at grade level but having low reading fluency. The teacher reported that “[Student] had phonological awareness and decoding difficulties, such as dropping the final stable syllable, discriminating between similar sounds or syllables (e.g., ing/ink), and confusing b and d. She has also observed that [Student] was inconsistent in using punctuation to guide phrasing and fluency when reading. As for writing, [Student] understood paragraph structure but did not always include an introduction and conclusion. Additionally, she noted weaknesses in written syntax and spelling. Reportedly, [Student] usually understood academic content, could state a main idea, and could make logical inferences, but sometimes had difficulty with remembering the sequencing for a story.” (Petitioners’ Exhibit 3, Witness 3’s testimony)
 14. Student’s social pragmatic skills were assessed informally throughout the evaluation and were age appropriate. The School A evaluator reported that Student was polite and cooperative and initiated and responded to social amenities appropriately. “Student’s understanding and use of most nonverbal language (e.g., physical space boundaries, body language, facial expressions) was also age appropriate. Student’s eye contact was usually appropriate as well, though occasionally Student did not make eye contact when Student seemed particularly anxious, which is consistent with [REDACTED] mother’s observations. Student initiated and engaged in lively conversations, made comments, and asked questions, and used an appropriate communication style given the situation and communication partner. Student took turns appropriately.” (Petitioners’ Exhibit 3 Witness 3’s testimony)
 15. Student’s receptive vocabulary skills were assessed using the Peabody Picture Vocabulary Test, Fifth Edition (PPVT-5), Form B. Student’s score was “Well Above Expected” indicating exceptional receptive single-word vocabulary, well above peers to understand words used in the classroom, in literature, in math, and in other content areas. Student’s

expressive vocabulary was assessed using the Expressive Vocabulary Test, Third Edition (EVT-3), Form A. Student's score was "Well Above Expected," reflecting a solid ability to use precise and sophisticated word choices. (Petitioners' Exhibit 3, Witness 3's testimony)

16. The School A evaluator noted that Student performed much better on the receptive vocabulary task than the expressive vocabulary task which was evident in the significant difference (at the 0.5 level) in standard scores on these two tests. During the expressive vocabulary test, Student sometimes stated a semantically related word and made comments such as, "I know what it is." It was noted that Student had had a greater fund of vocabulary word knowledge than Student was able to retrieve and use when speaking or writing, resulting in a relative difficulty formulating concise and succinct responses and finding the right word at the right time (e.g., "the word is on the tip of my tongue"), as well as reduced ability to use more precise and sophisticated word choices. (Petitioners' Exhibit 3, Witness 3's testimony)
17. The Clinical Evaluation of Language Fundamentals, Fifth Edition Metalinguistics (CELF-5 Metalinguistics) was administered to assess Student's ability to think about and use aspects of language that are crucial to classroom success in the upper grades. Student scores were average except for conversation skills and the meta pragmatic index where Student's scores were at the 16th and 14th percentile respectively and considered borderline. (Petitioners' Exhibit 3, Witness 3's testimony)
18. In sum, the School A evaluator stated that Student demonstrated mostly average to above average oral language skills, though often not quite as high as expected given Student's very superior cognitive profile. "Single-word receptive and expressive vocabulary are clear strengths, as are aspects of metalinguistic skills. [Student] processed and understood sentences with multiple meanings and abstract, idiomatic expressions. This reflects strong linguistic skills related to semantic flexibility and figurative language. On the other hand, Student's inferential reasoning skills are variable in that [Student] has a relatively stronger ability to identify logical inferences than to formulate [Student's] own inferences. In part, this reflects the influence of less stable oral expression skills, including just below average oral language formulation and organization as well as word retrieval weaknesses. Beyond the sentence level, Student demonstrated above average narrative comprehension and average narrative production. (Petitioners' Exhibit 3, Witness 3's testimony)
19. The School A evaluator concluded that Student's current linguistic profile is consistent with the diagnoses of: Speech Sound Disorder (ICD-10: F80.0) Specific Learning Disorder, with impairment in Reading: word reading accuracy, reading rate or fluency, reading comprehension (ICD-10: F81.0) Specific Learning Disorder, with impairment in Written Expression: spelling accuracy, grammar and punctuation accuracy, clarity or organization of written expression (ICD-10: (Petitioners' Exhibit 3, Witness 3's testimony)

20. On October 17, 2019, DCPS updated Student's IEP. On October 30, 2019, DCPS conducted an observation of Student at School A. Petitioners continued Student's placement at School A for SY 2019-2020. (Respondent's Exhibits 13, 14, 15)
21. In December 2019, a DCPS speech language pathologist ("SLP") reviewed the 2019 School A speech language evaluation and conducted a classroom observation of Student. The DCPS SLP concluded that given information from the evaluation, classroom observations, and additional data sources, Student presented with oral communication skills commensurate with or above Student's age matched peers. "Student presents with relative strengths in hearing and speaking vocabulary, metalinguistic skills, narrative language skills, organization of information, phonological awareness and processing skills, and pragmatic language skills." (Respondent's Exhibit 16, Witness 6's testimony)
22. The DCPS SLP stated in her report that "Student's reported relative weaknesses in language formulation and organization may be inconsistent given [Student's] average performance on the Sequencing subtest of the ELT-2 and [Student's] average production score on the TNL-2, as well as [Student's] performance on tests of oral language from [Student's] psychological evaluation. [Student's] reported articulation errors were noted to have minimal impact on [redacted] overall intelligibility. Reading and written expression deficits should be addressed by academic instructors." (Respondent's Exhibit 16, Witness 6's testimony)
23. The DCPS SLP went on to state: "When presented with data across time and raters, Student demonstrates oral language skills that are commensurate with [redacted] age matched peers. Given formal data, informal data, and classroom observations, Student does not present with a disabling oral communication disorder that would prevent Student from accessing or gaining benefit from [redacted] educational curriculum. Academic difficulty, if any, should be explored in the cognitive, academic, or behavioral domains." (Respondent's Exhibit 16, Witness 6's testimony)
24. Given Student's oral language performance, Student does not demonstrate a disabling oral communication disorder that would prevent Student from accessing or gaining benefit from Student's educational curriculum, therefore; Student does not meet eligibility recommendations for a student with a Speech Language Impairment. Final decisions regarding eligibility, frequency and duration of services will be determined by the multidisciplinary team, after all necessary and relevant data has been reviewed. While decisions regarding eligibility, frequency and duration of services are "team decisions", these decisions must be supported with empirical and qualitative data and grounded in best practices. (Respondent's Exhibit 16, Witness 6's testimony)
25. On December 18, 2019, DCPS convened an eligibility meeting to consider Student's eligibility for speech language services. Student's mother, her educational consultant and staff members from School A participated along with the DCPS staff, including the DCPS SLP who observed Student at School A and reviewed the IEE. The DCPS team members based on the review and conclusions presented by the DCPS SLP determined that Student did not have a speech language disorder. (Respondent's Exhibits 17)

26. On December 19, 2019, DCPS amended Student's IEP to include in the classroom aids services section of the IEP recommendations from the DCPS SLP from her review of the School A speech language evaluation and team discussion of the that evaluation. In addition to the recommendations from Student's 2018 independent evaluation that were already in this section of Student's IEP, the team added the following to Student's classroom aids and services:

"Amended on 12-19-19 to include the following recommendations from Ms. [REDACTED] IEE Review (12/10/10): The following special/general education classroom strategies are suggested to enhance general communication: (A) Make certain [REDACTED] is attending to the source of information (e.g., eye contact is being made, hands are free of materials, [REDACTED] is looking at the assignment, etc.). (B) Gain bi-sensory attention. Learning is maximized when the same information is received simultaneously through different modalities. Therefore, it is important to gain the student's visual as well as auditory attention before speaking with [Student]. F. Review and transition. Clearly closing an activity with a visual or auditory cue before transitioning to the next activity may decrease maladaptive transition behaviors." (Respondent's Exhibits 18)

27. DCPS conducted an annual review of Student's IEP on July 22, 2020. DCPS developed an IEP with 10 hours of specialized instruction per week outside of the general education environment split equally between reading and written expression, 5 hours of specialized instruction per week inside the general education environment in math, .75 hours per week of behavior support services ("BSS") outside general education, 1 hour per week of special education consultation, and 1 hour per month of BSS consultation. (Respondent's Exhibit 21-14)

28. The July 22, 2020, IEP included the following statement in the classroom aids and services section:

"Individualized and small group instruction, math fluency program, manipulative materials, calculator, extended time to formulate responses, experiential math tasks, concrete-representational-abstract constructivism theory, reading fluency program, listening skills instruction, cooperative learning, teach question generation when reading, teach visualization, comprehension monitoring, immediate feedback related to comprehension, teach to summarize, daily planner/agenda, homework reinforcement, provide organizational strategies, teacher prompting/cuing, homework recording device, repetition and review, interim deadlines for long term projects, teach self-monitoring, direct social skills instruction, supportive teacher counseling, behavior management program, structured linguistic experiences, auditory cuing, imagery for language, modeling for oral expression, rehearsal, miscue analysis, visual cuing, role playing, multisensory approach to writing sight words, teaching structured writing process, teaching editing process, keyboarding

instruction, personal editing checklist, models and examples for writing, color coding of writing.” (Respondent’s Exhibit 21-14)

29. The IEP meeting notes for the July 22, 2020, IEP indicate that DCPS found Student ineligible for speech language services and that Student had no communication issues. Student’s mother, her attorney and her educational consultant participated in the meeting and all expressed disagreement with that determination, noting that School A was working on speech with Student. The meeting notes state that DCPS would note the concern and add a word processor to Student’s accommodations. The School A representative who attended the meeting noted that in many areas academically Student was functioning at grade level with heavy teacher support, but that School A was concerned about Student’s writing and behavior support, and even the reduced homework demand on Student was not a totally successful intervention. In response to these concerns, DCPS increased the hours of specialized instruction in the IEP to provide 5 hours per week in writing outside general education and 5 hours per week for math inside general education and 1 per week hour of consultation. Petitioners’ attorney expressed appreciation for the increased support but noted that Student’s parents believed the increase was still not enough to meet Student’s needs. The meeting notes state: “Parents disagreed with the hours proposed and would like a full time separate day school.” The meeting notes indicate that Student’s parents wished to speak with neighborhood school where the IEP was to be implemented. The DCPS representative stated that she would help facilitate a conversation with the local school. (Respondent’s Exhibits 22 & 23)
30. DCPS proposed to implement Student’s July 22, 2020, IEP at Student’s DCPS neighborhood school (“School B”). Petitioners and their educational consultant were familiar with School B because Student’s older sibling had attended there, and the consultant had been to the school on prior occasions. However, they desired to visit the school again and gain more information about how Student’s IEP would be implemented. They were unable to do so. Ultimately, Petitioners rejected the proposed IEP and placement in a DCPS school and maintained Student at School A. (Mother’s testimony, Witness 1’s testimony, Petitioners’ Exhibits 7, 8)
31. In February 2021 School A conducted a functional behavior assessment (“FBA”) for Student to address Student school and work avoidance behaviors during hybrid instruction due to the pandemic. The FBA stated the following concerns: “[Student] has exhibited an extremely high level of school avoidance and refusal during [REDACTED] [th] grade school year. [Student] struggles to attend classes virtually and in person, and when [Student] does attend class, [Student] infrequently is able to engage fully with class material, the teacher, and [REDACTED] peers. [Student] turns in very little homework, though [Student] displays knowledge of the material verbally, mostly in one-on-one settings. [Student] is far behind ... classmates in terms of work completion and struggles to participate in group discussions or projects.”
32. On May 21, 2021, DCPS convened an annual review of Student’s IEP. Student’s mother and her attorney participated along with members of the School A staff. DCPS updated

Student's present levels of performance and goals to reflect Student's then current functioning in math, writing, reading, and social/emotional. DCPS also updated Student's supplemental aids and services and maintained the accommodations that were prescribed in the IEP. Student's mother and her representatives disagreed with hours of specialized instruction proposed and expressed their belief that Student needs a "full-time placement" with support throughout the entire school day. Petitioners rejected the proposed IEP and placement in a DCPS school and maintained Student at School A. DCPS developed an IEP that prescribed the following services:

Special Education Services

Service	Setting	Begin Date	End Date	Time/Frequency
Written Expression	Outside General Education	05/21/2021	05/20/2022	5 hr per wk
Reading	Outside General Education	05/21/2021	05/20/2022	3 hr per wk
Mathematics	General Education	05/21/2021	05/20/2022	5 hr per wk
Specialized Instruction	General Education	05/21/2021	05/20/2022	5 hr per wk

Related Services

Service	Setting	Begin Date	End Date	Time/Frequency
Behavioral Support Services	Outside General Education	05/21/2021	05/20/2022	180 min per mon

Consultation Services

Service	Begin Date	End Date	Time/Frequency
Specialized Instruction	05/21/2021	05/20/2022	1 hr per wk
Behavioral Support Services	05/21/2021	05/20/2022	60 min per mon

(Respondent's Exhibits 24, 26, Petitioner's Exhibit 17)

33. DCPS convened another IEP meeting on November 15, 2021, to review and revise Student's IEP to reflect the addition of OT services. Student's mother disagreed with amount of OT services that DCPS proposed. She believed that Student's should have been provided 180 minutes of direct services per month, rather than 60 minutes per month that DCPS proposed. Student's IEP was amended on December 10, 2021, to add 60 minutes per month of OT and 60 minutes per month of OT consultation. (Respondent's Exhibit 27, 28)
34. In March 2022, School A conducted an updated speech language evaluation of Student. The evaluation report noted that although Student began receiving speech-language intervention at School A when Student enrolled in September 2018 and the speech-language therapy was discontinued for social emotional reasons and during distance learning. The services resumed in September 2021 with one individual session per week. The report noted that Student's scores demonstrated hugely significant progress from School A's previous evaluation. In the 2022 assessment, Student demonstrated age-appropriate skills in making inferences, in response to both multiple choice and open-ended questions. In addition, Student performed above age expectations in formulating complex sentences that were appropriate to a situation, such as, "Would you rather eat at the café across the street before or after we watch the movie?" Overall, [Student] showed creativity and flexibility in [Student's] responses." (Petitioner's Exhibit 25)

35. In sum, the School A evaluator concluded that that Student's current testing showed significant progress in Student's oral and written expressive language at the sentence level, with scores at or above the expected range. She noted, however, that Student presents with vulnerable skills in oral expression at the discourse level. "The evaluator stated: "Although [Student's] vulnerable formulation and pragmatic skills do not warrant a diagnosis of an oral language disorder, the contrast between them and [Student's] very strong verbal reasoning is notable and can lead to frustration." (Petitioner's Exhibit 25)
36. On May 31, 2022, DCPS convened an annual IEP review meeting. Petitioners participated in the meeting along with their attorney and educational consultant. DCPS noted its receipt of an independent speech & language evaluation. DCPS proposed completing an IEE review and holding an eligibility meeting. The team reviewed and updated all sections of the IEP including the present levels of performance, goals, supplement aids/services, least restrictive environment, extended school year, accommodations, and graduation planning. Petitioners and their representatives noted their disagreement with the proposed specialized instruction hours and LRE. They noted that they feel Student needs a more restrictive environment and increased specialized instruction. DCPS did not propose an increase in specialized instruction or change in LRE. DCPS proposed to implement the IEP at Student's neighborhood school ("School C"). Ultimately, Petitioners rejected the proposed IEP and placement in a DCPS school and maintained Student at School A. DCPS developed an IEP that prescribed the following services: (Respondent's Exhibits 29, 30 31, Petitioner's Exhibit 44)

Special Education Services

Service	Setting	Begin Date	End Date	Time/Frequency
Specialized Instruction	Outside General Education	05/31/2022	05/30/2023	10 hr per wk
Specialized Instruction	General Education	05/31/2022	05/30/2023	5 hr per wk

Related Services

Service	Setting	Begin Date	End Date	Time/Frequency
Behavioral Support Services	Outside General Education	05/31/2022	05/30/2023	180 min per mon
Occupational Therapy	Outside General Education	05/31/2022	05/30/2023	180 min per mon

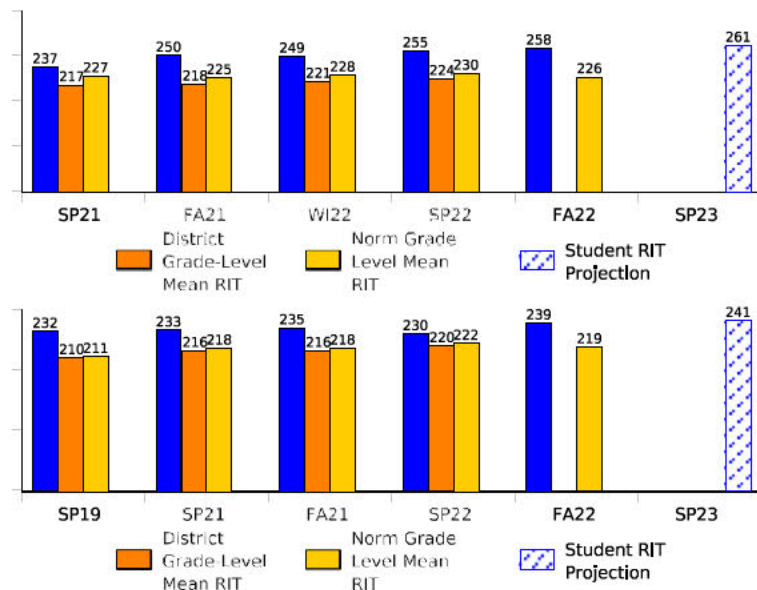
Consultation Services

Service	Begin Date	End Date	Time/Frequency
Occupational Therapy	05/31/2022	05/30/2023	30 min per mon

37. DCPS conducted a review of the School A speech language evaluation. Although the DCPS report was dated April 2022, the report referenced dates as late as August 2022 when the DCPS SLP spoke with Student's mother. Based upon her review of the data from the School A evaluation concluded that Student does not demonstrate oral language skills consistent with a disabling oral communication disorder. Student does not present with significant weaknesses that impact Student's ability to access or gain benefit from educational curriculum. (Respondent's Exhibits 28B, Witness 6's testimony)

38. On September 20, 2022, DCPS convened an eligibility meeting to consider DCPS’s review of School A’s 2022 speech-language evaluation. Petitioners participated in the meeting along with their attorney and School A’s SLP and an administrator. Based upon the evaluation results, DCPS concluded that Student did not meet the criteria for speech language services. (Respondents Exhibits 32, 33, Witness 6’s testimony)
39. Student has made academic progress while attending School A. During SY 2021-2022 Student earned an “A” grade in each of Student’s classes. Commensurate with Student’s above average abilities, Student continues to test above grade level and above same aged peers in the District of Columbia in Measures of Academic Progress (“MAP”) scores. Both School A and DCPS use MAP to measure a student’s progress in math and language arts. Student had the following MAP scores (noted in blue) between spring 2021 and fall 2022: (Petitioners’ Exhibits 42 & 48)

Math: Math K-12



Language Arts: Reading

40. Student is described by School A staff as a capable student with strong verbal abilities who needs scaffolding with writing assignments. Student gravitates toward theater activities at School A, and theatre seems to be a critical venue for Student to express Student’s talents. Due to Student high level of anxiety, School A staff believe Student needs small group of instruction and would need frequent need check-ins with teachers and related providers. Student was instrumental in forming a new club activity in the School A’s upper school. School A has not yet developed a plan to transition Student to a less restrictive LRE as is required by District of Columbia regulations. (Witness 2’s testimony)
41. School A has 390 students total at School A and 125 students in its upper school. The average class has 7 to 12 students. School A follows DCPS’s curriculum content and grants

DCPS diplomas to students who attend who are funded by DCPS. Some of the classes that Student is enrolled in at School A area taught by School A staff members who are not licensed teachers and some teachers who are content certified, but not certified in special education. During lunch and recess at period there are usually teachers or staff members who are present to supervise students, but there is no specialized instruction being provided during these times. (Witness 2's testimony, witness 11's testimony, Witness 12's testimony)

42. Petitioners' educational consultant assisted Petitioners over the past few years in IEP meetings with DCPS. The consultant provided feedback on the IEP that DCPS proposed and helped develop the present levels of performance ("PLOPS") and goals in Student's DCPS IEPs. The consultant has observed Student at School A and spoken to Student's teachers on several occasions and made recommendations regarding Student's IEP services, LRE and placement. He believes that due to Student's learning disabilities in reading, writing and math, ADHD and executive functioning challenges, Student needs specialized instruction throughout the school day. The consultant disagrees with the IEPs that DCPS developed because they lacked speech language services and what he believes is an inappropriate LRE, specifically the inclusion of any instruction inside general education. The consultant had no disagreement with any of the PLOPS, goals, or accommodations in the IEPs. (Witness 1's testimony, Petitioner's Exhibits 5, 13, 20, 26)
43. Although the consultant did not visit or observe the DCPS neighborhood schools where Student's IEP would have been implemented, the consultant has visited the two schools in the past and has had other clients who attended the schools. The consultant submitted a list of questions to DCPS regarding School B, the neighborhood school for SY 2020-2021 and SY 2021-2022, but never received a response from DCPS. He believed all three IEPs that are at issue and both the proposed DCPS schools were inappropriate. Based upon his experience with both School B and School C, he believed the specialized instruction that is delivered in general education would be in a co-taught classes and would with have too many students in them and as a result, Student would receive the level of specialized instruction Student needed. Student would not have a special educator to help. He believed that the out of general education classes are generally taught to students who are below grade level and who cannot handle the grade level content. He does not believe Student could make progress in a school less restrictive than School A and that Student needs supports in all the areas in every environment throughout the school day. (Witness 1's testimony)
44. Student's mother believes that none of the IEPs that DCPS developed and that are at issue provided Student with a sufficient in number of hours of special education. She believes that the combination of "pull-out and push-in" specialized instruction would make Student anxious because Student would likely feel ashamed of Student's learning challenges because of any special attention from a teacher that other student did not receive. She believes Student needs support in following directions and a "special approach" to access the curriculum throughout the school day and Student's writing challenges affect Student's performance in all classes. She believes that Student needs classes with small number of students. (Mother's testimony, Petitioners' Exhibit 44)

45. Petitioners' older child attended School B and Petitioners have friends whose children attend or have attended both School B and School C. Student's mother was not able to observe the program at School B during SY 2020-2021 due to the pandemic. Petitioners reached out to School B but did not get to see the program on site. Student's mother believes that both School B and School C have too many students and too much stimulation and would cause Student to "shut down" because of sensory overload. (Mother's testimony)
46. Petitioners have received financial aid from School A for Student to attend School A of approximately \$20,000. Petitioners have paid the remainder of the tuition and fees. In SY 2022-2023 Petitioners asked School A for an additional award from School A and were provided an additional \$10,000 from School A to assist in funding Student's attendance at School A. In each of the past three school years when the DCPS developed the IEPs for Student, Petitioners had already signed the contract with School A for Student to attend School A for the upcoming school year. (Mother's testimony)
47. Based upon review of Student's cognitive abilities and superior academic performance reflected both in report card grades and MAP scores, the DCPS special educators and related service providers reviewed Student's capabilities and performance at School A and who those participated in development of Student's DCPS IEPs expressed their professional opinions that Student is capable of accessing grade level curriculum with the level of specialized instruction and accommodations that DCPS prescribed in each of the IEPs at issue. Although Student has demonstrated social-emotional concerns such as anxiety and issues related to written expression, these concerns can be adequately addressed with the behavioral support and the other supports and accommodations that are prescribed the IEPs. (Testimony of Witnesses, 5, 6, 7, 8, 9, 11, 13)
48. School B and School C provide the specialized instruction and related services prescribed in the IEPs developed by DCPS for Student. Both schools offer small group instruction and academic challenging courses both inside and outside of general education. The specific schedule of classes that Student would have participated in at School B and will participate in at School C would have been generated if Student had enrolled in the respective school. School C has a performing arts program and academically and culturally stimulating clubs and after school activities that Student could participate in if and/or when Student chooses to attend. Information about the the services, course offerings and special clubs and activities offered at School B and School C can be obtained by reviewing the schools' web pages. (Testimony of Witnesses 9, 10, 14)

CONCLUSIONS OF LAW:

Pursuant to IDEA §1415 (f)(3)(E)(i), a decision made by a hearing officer shall be made on substantive grounds based on a determination of whether the child received a free appropriate public education ("FAPE").

Pursuant to IDEA §1415 (f)(3)(E)(ii), in matters alleging a procedural violation, a hearing officer may find that a child did not receive FAPE only if the procedural inadequacies impeded the child's right to FAPE, significantly impeded the parent's opportunity to participate in the decision-making process regarding the provision of FAPE, or caused the child a deprivation of educational benefits. An IDEA claim is viable only if [DCPS'] procedural violations affected the student's substantive rights." *Lesesne v. District of Columbia*, 447 F.3d 828, 834 (D.C. Cir. 2006)

34 C.F.R. § 300.17 provides:

A free appropriate public education or FAPE means special education and related services that--
(a) Are provided at public expense, under public supervision and direction, and without charge;
(b) Meet the standards of the SEA, including the requirements of this part; (c), Include an appropriate preschool, elementary school, or secondary school education in the State involved; and (d) Are provided in conformity with an individualized education program (IEP) that meets the requirements of Sec. 300.320 through 300.324

Pursuant to 5E DCMR 3030.14, the burden of proof is the responsibility of the party seeking relief. *Schaffer v. Weast*, 546 U.S. 49, 126 S.Ct. 528 (2005). Petitioners held the burden of persuasion on issues #3, #4 and #5. The burden of persuasion fell to Respondent on issues #1 and #2. once Petitioner has established a prima facie case on those issues. 7 The burden of persuasion shall be met by a preponderance of the evidence. The normal standard is a preponderance of the evidence. See, e.g., *N.G. V. District of Columbia* 556 f. Sup. 2d (D.D.C. 2008) see also 20 U.S.C. §1451 (i)(2)(C)(iii).

ISSUE 1: Did DCPS deny Student a FAPE by failing to propose an appropriate IEP or placement for SY 2020-2021 because the IEP: (a) contained an inappropriate LRE with insufficient hours of specialized instruction outside general education, and (2) did not include speech language services?

Conclusion: Respondent sustained the burden of proof by a preponderance of the evidence that the IEP that DCPS developed for Student in SY 2020-2021 was reasonably calculated to enable Student to make progress appropriate in light of the child's circumstances.

⁷ DC Code § 38-2571.03 (6) provides:

(A) In special education due process hearings occurring pursuant to IDEA (20 U.S.C. § 1415(f) and 20 U.S.C. § 1439(a)(1)), the party who filed for the due process hearing shall bear the burden of production and the burden of persuasion; except, that:

(i) 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.

(ii) Where a party seeks tuition reimbursement for unilateral placement, the party seeking reimbursement shall bear the burden of production and the burden of persuasion on the appropriateness of the unilateral placement; provided, that the hearing officer shall have the authority to bifurcate a hearing regarding a unilateral placement; provided further, that if the hearing officer determines that the program offered by the public agency is appropriate, it is not necessary to inquire into the appropriateness of the unilateral placement.

(B) This paragraph shall apply to special education due process hearings resulting from complaints filed after July 1, 2016.

The Individuals with Disabilities Education Act ("IDEA") was enacted to "ensure that all children with disabilities have available to them a free appropriate public education ["FAPE"] that emphasizes special education and related services designed to meet their unique needs and prepare them for further education, employment, and independent living." *M.G. v. Dist. of Columbia*, 246 F. Supp. 3d 1, 7 (D.D.C. 2017) (citing 20 U.S.C. § 1400(d)(1)(A)); *see also Boose v. Dist. of Columbia*, 786 F.3d 1054, 1056 (D.C. Cir. 2015)). Once a child is identified as disabled, the school district must develop an individualized education program ("IEP") for the student. See 20 U.S.C. § 1414 (d)(1)(A) & (d)(2)(A).

In *Board of Education v. Rowley*, the United States Supreme Court set forth a two-part inquiry for determining whether a school district has satisfied the FAPE requirement. First, the state must have "complied with the procedures set forth in the Act." *Rowley*, 458 U.S. at 206. Second, the IEP that is developed must be "reasonably calculated to enable the child to receive educational benefits." *Rowley*, 458 U.S. at 206-07. To be appropriate under 34 C.F.R. § 300.324, the IEP must consider the (i) strengths of the child; (ii) concerns of the parents; (iii) results of the initial or most recent evaluation; and (iv) academic, developmental, and functional needs of the child.

"The IEP is the "centerpiece" of the IDEA's system for delivering education to disabled children," *D.S. v. Bayonne Bd. of Educ.*, 54 IDELR 141 (2010) (quoting *Polk v. Cent. Susquehanna Intermediate Unit* 16, 853 F.2d 171, 173 (3d Cir. 1988), and the centerpiece for the implementation of FAPE is the IEP. *S.H. v. State-Operated Sch. Dist. of the City of Newark*, 336 F.3d 260, 264 (3d Cir. 2003).

The second, substantive, prong of the *Rowley* inquiry is whether the IEP DCPS developed was reasonably calculated to enable Student to make progress appropriate in light of Student's individual circumstances.

In *Endrew F. ex rel. Joseph F. v. Douglas Cty. Sch. Dist.* RE-1, 137 S. Ct. 988 (2017), the U.S. Supreme Court elaborated on the "educational benefits" requirement pronounced in *Rowley*: To meet its substantive obligation under the IDEA, a school must offer an IEP reasonably calculated to enable a child to make progress appropriate in light of the child's circumstances. . . . Any review of an IEP must appreciate that the question is whether the IEP is reasonable, not whether the court regards it as ideal. . . . When a child is fully integrated in the regular classroom, as the Act prefers, what that typically means is providing a level of instruction reasonably calculated to permit advancement through the general curriculum. . . . If that is not a reasonable prospect for a child, ■■■ IEP need not aim for grade-level advancement. But ■■■ educational program must be appropriately ambitious in light of ■■■ 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. *Endrew F.*, supra, 137 S. Ct. at 999–1000 (citations omitted).

Pursuant to *Schaefer v. Weast*, 554 F.3d 470 (U.S. App. 2009), the Hearing Officer must "focus on the adequacy of the IEP at the time it was created, and ask if it was reasonably calculated at that time to enable the student to receive educational benefits."

The key inquiry regarding an IEP's substantive adequacy is whether, taking account of what the school knew or reasonably should have known of a student's needs at the time, the IEP offered was reasonably calculated to enable the specific student's progress.... "Any review of an IEP must appreciate that the question is whether the IEP is reasonable, not whether the court regards it as ideal." *Z.B. v. District of Columbia*, 888 F.3d 515 (D.C. Cir. 2018) citing *Endrew F.*, supra, 137 S. Ct. 988.

Removing a child with disabilities "from the regular education environment occurs only when the nature or severity of the disability is such that education in regular classes cannot be achieved satisfactorily." 34 C.F.R. § 300.550; 34 C.F.R. §300.114 see also 20 U.S.C. § (a)(5)(A) (a disabled child is to participate in the same activities as non-disabled children to the "maximum extent appropriate"); *Roark ex rel. Roark v. District of Columbia*, 460 F.Supp.2d 32, 43 (D.D.C. 2006) ("The IDEA requires school districts to place disabled children in the least restrictive environment possible.")

"The IDEA requires that children with disabilities receive education in the regular classroom whenever possible" *Z.B. v. District of Columbia*, 888 F.3d 515 (D.C. Cir. 2018) citing *Endrew F.*, supra, 137 S. Ct. at 999 (quoting *Rowley*, 458 U.S. at 202)

The evidence demonstrates that Petitioners provided DCPS an independent evaluation conducted in 2017 of Student's cognitive and educational functioning. Student's cognitive functioning was determined to be above average, yet Student's academic performance of the educational achievement assessment was not commensurate with Student's cognitive abilities. Student was diagnosed as result with a learning disorder in reading and written expression. Based upon that evaluation and other available data DCPS determined Student eligible for special education in 2018 and developed an initial IEP for Student near the end of SY 2017-2018.

Petitioners chose not to reenroll Student in a DCPS school for the following school year. Instead, they enrolled Student in School A, a private school that principally services students with language-based learning disorders. Petitioners presumably believed that their child's educational and emotional needs could be best be met at School A. Student has continued to attend School A since SY 2018-2019 despite DCPS developing IEPs for Student and offering to implement the IEPs at Student's neighborhood DCPS schools annually.

The evidence also demonstrates that shortly after Student began attending School A, the school conducted a speech language evaluation. The evaluation revealed that Student's receptive, expressive, and pragmatic language skills were age appropriate. Student initiated lively conversations and used an appropriate communication style. Student had exceptional receptive single-word vocabulary, well above peers to understand words used in the classroom, in literature, in math, and in other content areas. The School A evaluator noted that Student greater vocabulary word knowledge than Student was able to retrieve and use when speaking or writing, resulting in a relative difficulty formulating concise and succinct responses. In sum, the School A evaluator stated that Student demonstrated mostly average to above average oral language skills, though often not quite as high as expected given Student's superior cognitive profile. Nonetheless, despite this data indicating that Student language abilities were age appropriate, the evaluator

diagnosed Student with a “speech sound disorder” along with specific learning disorder, with impairment in reading and written expression.

A DCPS SLP reviewed the evaluation and observed Student at School A concluded that Student did not have a disabling speech disorder that would qualify Student to be provided speech language services. The speech language services that were principally identified by the School A evaluator as needed to be addressed pertained to Student’s written expression skills, which in DCPS are generally addressed through specialized instruction that through the services of a SLP as done at School A.

The evaluation data clearly demonstrates that Student did not have a speech language disorder that would meet the criteria for Student to qualify for speech language services as a related service in Student’s IEP. The testimony of the DCPS SLP, coupled with the evaluation data that demonstrated student’s age appropriate receptive, expressive, and pragmatic language skills was both compelling and convincing and far more credible than the testimony of the School A SLP, even though she conducted the initial speech language evaluation of Student and is otherwise familiar with Student through Student’s attendance at School A.

The evidence also demonstrates that Student speech language abilities have continued to improve over time and that based upon a more recent School A speech language conducted in 2022, Student is no longer considered by School A to have any speech disorder even though the school continues to provide Student with speech language services.

Consequently, the IHO concludes that there is no evidence that Student’s needed speech language a related service when DCPS developed the IEP(s) for Student for SY 2020-2021. Rather, the evidence demonstrates that the IEP(s) was reasonably calculated in this regard to enable Student to make progress appropriate in light of Student’s circumstances.

Petitioners also assert that the IEP(s) that DCPS developed for Student for SY 2019-2020 were inappropriate because of an inappropriate LRE with insufficient hours of specialized instruction outside general education.

The evidence demonstrates that prior to the first DCPS IEP at issue for SY 2020-2021, Student had been attending School A for the two full school years. At the time the IEP was developed for SY 2020-2021 both School A and DCPS schools, as well as the rest of the United States, were in the Covid-19 pandemic and navigating distance learning and then a hybrid model of both distance and some in school learning. The evidence demonstrates that Student had a difficult time during this school year and engaged in school and classwork avoidance behaviors that School A addressed by developing an FBA.

DCPS offered Student for this school year an IEP with goals in math, reading, and written expression to be implemented with 10 hours of specialized instruction per week outside of the general education environment split equally between reading and written expression, 5 hours of specialized instruction per week inside the general education environment in math. The IEP also prescribed .75 hours per week of BSS outside general education, 1 hour per week of special education consultation, and 1 hour per month of BSS consultation. In

addition, the IEP prescribed classroom and testing accommodations and significant classroom aids and services including, among other things, individualized and small group instruction, math fluency program, manipulative materials, calculator, extended time to formulate responses, a reading fluency program, listening skills instruction, comprehension monitoring, immediate feedback related to comprehension, daily planner/agenda, homework reinforcement, organizational strategies, teacher prompting/cuing, a homework recording device.

Petitioners and their educational consultant participated fully in the meeting and the development of the IEP(s) for this school year. The evidence demonstrates that there was not dispute about any elements of the Student's IEP among any team members except the number of hours of specialized instruction outside general education and the resulting LRE. The evidence does not demonstrate that Petitioners or their representatives requested any specific number of hours of specialized instruction during the meeting. Rather, their position and request were for Student to be provided specialized instruction throughout the school day and presumably to remain in a more restrictive setting such as School A.

The IHO considered the testimony of Student's mother, her educational consultant that the staff members from School A who testified. Only one of these witnesses had ever evaluated Student and that witness was the School A SLP who, based upon the conclusions already made by the IHO, determined Student needed services that the empirical data did not demonstrate were warranted.

Petitioner's other witnesses had not taught Student in the classroom. The one administrator who is currently leads a class that Student is enrolled in at School A is not special education teacher and has no teaching credential. Consequently, the IHO did not give the testimony of any of these witnesses any greater weight than that of the DCPS witnesses who reviewed Student's evaluations and data and participated in development of the DCPS IEPs.

The data demonstrates that Student has above average intellectual abilities and has above average academic performance. It may be the case that Student has fared well because Student has been in an environment with low student to teacher ratio in a school that focuses principally on students with learning disabilities. But the evidence does not support a conclusion that Student would have preformed any less well given the level of services that DCPS prescribed in the IEPs it developed.

The IHO considered closely the concerns expressed by Student's mother that Student can at times shut down because of overstimulation from loud and crowded environments and she believes Student would have had and will have such an adverse reaction if Student attended either School B or School C. It is clear from her testimony, as well as the data of Students academic performance at School A, that she is pleased with Student's progress at School A and wishes Student to remain there. However, IDEA does not prescribe that an LEA must provide a school placement that maximizes a student's potential or meets the individual preferences of parents.

The data demonstrates that Student is preforming academically above grade level of all students in the District of Columbia. IDEA's mandate that students be educated in the least restrictive

environment and have access to non-disabled peers seems to have compelled DCPS to develop an IEP that was both academically challenging for Student and that provided Student the opportunity to be educated alongside Student's non-disabled peers. As result, based upon the academic goals, the classroom and testing accommodations and significant classroom aids and services including, among other things, individualized and small group instruction in the IEP(s), the IHO concludes that the LRE and amount of specialized instruction prescribed by the IEP(s) that DCPS developed for Student for SY 2020-2021 was reasonably calculated to enable Student to make progress appropriate in light of Student's circumstances.

ISSUE 2: Did DCPS deny Student a FAPE by failing to provide any meaningful information as to the proposed placement or allow the family and their educational expert to speak with anyone from the proposed placement for SY 2020-2021?

Conclusion: Petitioner did not sustain the burden of persuasion by a preponderance of the evidence on this issue.

In determining the educational placement of a child with a disability, each public agency must ensure that the placement decision is made by a group of persons, including the parents, and other persons knowledgeable about the child, the meaning of the evaluation data, and the placement options; and is made in conformity with the Least Restrictive Environment provisions of the IDEA; and the public agency must ensure that the child's placement is determined at least annually, is based on the child's IEP, and is as close as possible to the child's home. See 34 C.F.R. § 300.116.

Removing a child with disabilities "from the regular education environment occurs only when the nature or severity of the disability is such that education in regular classes cannot be achieved satisfactorily." 34 C.F.R. § 300.550; 34 C.F.R. §300.114 see also 20 U.S.C. § (a)(5)(A) (a disabled child is to participate in the same activities as non-disabled children to the "maximum extent appropriate"); *Roark ex rel. Roark v. District of Columbia*, 460 F.Supp.2d 32, 43 (D.D.C. 2006) ("The IDEA requires school districts to place disabled children in the least restrictive environment possible.")

"The IDEA requires that children with disabilities receive education in the regular classroom whenever possible" *Z.B. v. District of Columbia*, 888 F.3d 515 (D.C. Cir. 2018) citing *Endrew F.*, supra, 137 S. Ct. at 999 (quoting *Rowley*, 458 U.S. at 202)

Pursuant to D.C. Code § 38-2561.02(c) Special education placements shall be made in the following order of priority; provided, that the placement is appropriate for the student and made in accordance with the IDEA and this chapter: (1) DCPS schools, or District of Columbia public charter schools pursuant to an agreement between DCPS and the public charter school; (2) Private or residential District of Columbia facilities; and (3) Facilities outside of the District of Columbia.

The legal standard under the IDEA is that DCPS "must place the student in a setting that is capable of fulfilling the student's IEP." *Johnson v. Dist. of Columbia*, 962 F. Supp. 2d 263, 267 (D.D.C. 2013). See also *O.O. ex rel. Pabo v. Dist. of Columbia*, 573 F. Supp. 2d 41, 53 (D.D.C. 2008) (placement must be in a school that can fulfill the student's IEP requirements).

The purpose of IDEA is to "ensure that all children with disabilities have available to them a free and appropriate public education that emphasizes special education and related services designed to meet their unique needs and prepare them for further education, employment, and independent living." *M.G. v. District of Columbia*, 246 F.Supp.3d 1,7 (D.D.C. 2017) (citing 20 U.S.C. § 1400(d)(1)(A)).

Parents must have an opportunity to participate in the IEP process, and "procedural inadequacies that "seriously infringe upon the parents' opportunity to participate in the IEP formulation process ... clearly result in the denial of a FAPE." *Cooper v. District of Columbia*, 77 F.Supp.3d 32, 37 (D.D.C. 2014) (quoting *A.I. 3ex rel. Iapalucci v. District of Columbia*, 402 F.Supp.2d 152, 164 (D.D.C. 2005)) (alteration in original). To ensure these requirements are followed, IDEA established procedural safeguards that allow parents to seek a review of IEP decisions they disagree with. *See Middleton v. District of Columbia*, 312 F.Supp.3d 113, 122 (D.D.C. 2018). Section 1415(f)(1)(A) provides "the parents or the local education agency involved in such a complaint shall have an opportunity for an impartial due process hearing ..."

The evidence demonstrates that Petitioner and her representatives had a full and unbridled opportunity to contribute to development Student's IEPs at each meeting. Petitioners' educational consultant provided feedback on the draft IEP and testified that Student's needs were addressed in the IEP and save the hours of specialized instruction, and thus the LRE. Although Petitioners and their representatives disagreed with the LRE or placement decision, they had a full opportunity to and did express their disagreement.

The case law generally supports the proposition that the actual school location where a student's IEP will be implemented is the purview of the school district.

In *Sanchez v. District of Columbia*, No. 19-7048, 2020 U.S. App. LEXIS 15834 (D.C. Cir. May 15, 2020) the Court stated:

"First, the Court concludes that Z.B. was not denied a FAPE on this ground because the decision to refer Z.B. to Kennedy Krieger was a change in location of services not a change in educational placement, which would have necessitated parental involvement. The IDEA requires that a student's parents be part of the team that creates the student's IEP and determines the student's educational placement. *See* 20 U.S.C. § 1414(d)(1)(A)-(B). However, [**33] the IDEA does not "explicitly require parental participation in site selection." *James*, 949 F. Supp. 2d at 138 (quoting *White ex rel. White v. Ascension Parish School Bd.*, 343 F.3d 373, 379 (5th Cir. 2003)). Plaintiff has failed to cite any case, from this Circuit or another, requiring parental involvement in site selection. Instead, all of the cases cited by Plaintiff in support of her argument refer to parental participation in the development of the student's IEP and educational placement. *See e.g., Doug C. v. Hawaii Dep't of Educ.*, 720 F.3d 1038, 1044-45 (9th Cir. 2013) (requiring parental participation in the student's IEP development and educational placement); *Anchorage Sch. Dist. v. M.P.*, 689 F.3d 1047, 1055 (9th Cir. 2012) (same); *Deal v. Hamilton Cty. Bd. of Educ.*, 392 F.3d 840, 857-59 (6th Cir. 2004) (explaining that a predetermination of services can violate the parents' right to participate in the IEP process)."

IDEA allows states to create additional procedural and substantive protections if they are consistent with IDEA. *Middleton*, 312 F.Supp.3d at 122. If a state creates a higher standard, "an individual may bring an action under the federal statute seeking to enforce the state standard." *Id.* (quoting *Gill v. Columbia* 93 Sch. Dist., 217 F.3d 1027, 1035).

In 2014, the District of Columbia passed the Student Rights Act. The Act "provides district parents with additional procedural safeguards to help make sure parents have the tools they need to stay informed, engaged, and empowered throughout the special education process." See D.C. Council Comm. Rep. on B 20-723 (D.C. 2014) at 1. Recognizing that "parents who do not have a specific background in the subject area ... often cannot adequately evaluate whether their child's instruction is sufficient [and that] parents are concerned that an LEA may limit such access to the point that the observation is unable to provide meaningful input into their child's educational progress," the Student Rights Act expanded on a parent's "right to observe" under the IDEA...⁸

The Act (D.C. Code § 38-2571.03) states in pertinent part the following:

5(A) Upon request, an LEA shall provide timely access, either together or separately, to the following for observing a child's current to proposed special education program:

(i) the parent of a child with a disability; or

(ii) a designee appointed by the parent of a child with a disability who has professional expertise in the area of special education being observed or is necessary to facilitate an observation for a parent with a disability or to provide language translation assistance to a parent; provided, that the designee is neither representing the parent's child in litigation related to the provision of a free and appropriate public education for that child nor has a financial interest in the outcome of such litigation.

(C) A parent, or the parent's designee, shall be allowed to view the child's instruction in the setting where it ordinarily occurs or the setting where the child's instruction will occur if the child attends the proposed program.

(D) the LEA *shall not impose any conditions or restrictions on such observations except those necessary to:*

(i) Ensure the safety of the children in the program;

(ii) Protect other children in the program from disclosure by an observer of confidential and personally identifiable information in the event such information is obtained in the course of an observation by a parent or a designee, or

⁸ *Woodson, et al., v. District of Columbia*, 119 LRP 28316

(iii) Avoid any potential disruption arising from multiple observations occurring in a classroom simultaneously.

(E) An observer shall not disclose nor use any information obtained during the course of an observation for the purpose of seeking or engaging clients in litigation against the District or the LEA.

Generally, a school district has the discretion to determine the actual school location where a Student's IEP is to be implemented, and parents are generally allowed to visit that location before a student's enrollment. The evidence demonstrates that after DCPS developed Student's IEP, DCPS informed Petitioners that the IEP could be implemented at School B, Student's neighborhood school. Petitioners attempted to contact Student's neighborhood school but were unable to do so. During SY 2020-2021 DCPS schools, as most schools were, under covid restrictions. Although it appears that Petitioners and their consultant set questions to School B and they evidently never got a response, the evidence demonstrates that both were quite familiar with School B.

Based on the evidence adduced and consideration of the case law, the IHO concludes that adequate information was available to Petitioners regarding the DCPS school where the IEP could be implemented. DCPS's action in informing Petitioner regarding the location where Student's IEP would be implemented did not impede Student's right to FAPE or significantly impede Petitioners' opportunity to participate in the decision-making process regarding the provision of FAPE or cause Student a deprivation of educational benefits.

ISSUE 3: Did DCPS deny Student a FAPE by failing to propose an appropriate IEP or placement for the SY 2021-2022 because the IEP: (a) contained an inappropriate LRE with insufficient hours of specialized instruction outside general education, and (2) did not include speech language services?

Conclusion: Respondent sustained the burden of proof by a preponderance of the evidence that the IEP that DCPS developed for Student in SY 2021-2022 was reasonably calculated to enable Student to make progress appropriate in light of the child's circumstances.

As previously stated, the purpose of IDEA is to "ensure that all children with disabilities have available to them a free and appropriate public education that emphasizes special education and related services designed to meet their unique needs and prepare them for further education, employment, and independent living." *M.G. v. District of Columbia*, 246 F.Supp.3d 1,7 (D.D.C. 2017) (citing 20 U.S.C. § 1400(d)(1)(A)).

Parents must have an opportunity to participate in the IEP process, and "procedural inadequacies that "seriously infringe upon the parents' opportunity to participate in the IEP formulation process ... clearly result in the denial of a FAPE." *Cooper v. District of Columbia*, 77 F.Supp.3d 32, 37 (D.D.C. 2014) (quoting *A.I. 3ex rel. Iapalucci v. District of Columbia*, 402 F.Supp.2d 152, 164 (D.D.C. 2005)) (alteration in original). To ensure these requirements are followed, IDEA established procedural safeguards that allow parents to seek a review of IEP decisions they disagree with. See *Middleton v. District of Columbia*, 312 F.Supp.3d 113, 122 (D.D.C. 2018).

Section 1415(f)(1)(A) provides "the parents or the local education agency involved in such a complaint shall have an opportunity for an impartial due process hearing ..."

In determining the educational placement of a child with a disability, each public agency must ensure that the placement decision is made by a group of persons, including the parents, and other persons knowledgeable about the child, the meaning of the evaluation data, and the placement options; and is made in conformity with the Least Restrictive Environment provisions of the IDEA; and the public agency must ensure that the child's placement is determined at least annually, is based on the child's IEP, and is as close as possible to the child's home. See 34 C.F.R. § 300.116.

Removing a child with disabilities "from the regular education environment occurs only when the nature or severity of the disability is such that education in regular classes cannot be achieved satisfactorily." 34 C.F.R. § 300.550; 34 C.F.R. §300.114 see also 20 U.S.C. § (a)(5)(A) (a disabled child is to participate in the same activities as non-disabled children to the "maximum extent appropriate"); *Roark ex rel. Roark v. District of Columbia*, 460 F.Supp.2d 32, 43 (D.D.C. 2006) ("The IDEA requires school districts to place disabled children in the least restrictive environment possible.")

"The IDEA requires that children with disabilities receive education in the regular classroom whenever possible" *Z.B. v. District of Columbia*, 888 F.3d 515 (D.C. Cir. 2018) citing *Endrew F.*, supra, 137 S. Ct. at 999 (quoting *Rowley*, 458 U.S. at 202)

Pursuant to D.C. Code § 38-2561.02(c) Special education placements shall be made in the following order of priority; provided, that the placement is appropriate for the student and made in accordance with the IDEA and this chapter: (1) DCPS schools, or District of Columbia public charter schools pursuant to an agreement between DCPS and the public charter school; (2) Private or residential District of Columbia facilities; and (3) Facilities outside of the District of Columbia.

The legal standard under the IDEA is that DCPS "must place the student in a setting that is capable of fulfilling the student's IEP." *Johnson v. Dist. of Columbia*, 962 F. Supp. 2d 263, 267 (D.D.C. 2013). See also *O.O. ex rel. Pabo v. Dist. of Columbia*, 573 F. Supp. 2d 41, 53 (D.D.C. 2008) (placement must be in a school that can fulfill the student's IEP requirements).

As with the IEP(s) that DCPS developed for Student for SY 2020-2021, the evidence demonstrates that Student was not in need of speech language as a related service. There was no evidence that Student speech language skills had declined. Rather, the evidence demonstrates that Student language skills had improved. Student was not in need of speech language services during SY 2021-2022.

DCPS developed an IEP for Student for SY 2021-2022 that prescribed an increase in hours of specialized instruction and an increase in related services. The evidence demonstrates that Student's academic performance continued to improve and there was no credible evidence that that supported a finding that any factors had changed from the previous school year that would have required DCPS to prescribe specialized instruction for Student throughout the school day and an LRE totally removed from non-disabled peers as Petitioners assert was warranted for Student during SY 2022-2022. On the other hand, the evidence demonstrated that with the full resumption

of in person learning Student's behavior challenges from the previous school year had subsided. If anything, Student might have been in need of fewer services. Nonetheless, based on Petitioner's Petitioners' request DCPS prescribed more services for Student. Again, the IHO did not find Petitioners' witness any more credible than those of DCPS as to the level of specialized instruction and the LRE that Student needed. The empirical data of Student's report card grades and MAP scores demonstrated that Student was performing academically commensurate with Student's capabilities. This evidence does not demonstrate that Student was in need of specialized instruction through the school day and an LRE totally removed from non-disabled peers. The evidence demonstrates that the IEP(s) DCPS developed for Student for SY 2021-2022 was reasonably calculated to enable Student to make progress appropriate in light of Student's circumstances.

ISSUE 4: Did DCPS deny Student a FAPE by failing to provide any meaningful information as to the proposed placement or allow the family and their educational expert to speak with anyone or visit the proposed placement for SY 2021-2022?

Conclusion: Petitioner did not sustain the burden of persuasion by a preponderance of the evidence on this issue.

As previously stated, IDEA allows states to create additional procedural and substantive protections if they are consistent with IDEA. *Middleton*, 312 F.Supp.3d at 122. If a state creates a higher standard, "an individual may bring an action under the federal statute seeking to enforce the state standard." *Id.* (quoting *Gill v. Columbia* 93 Sch. Dist., 217 F.3d 1027, 1035).

In 2014, the District of Columbia passed the Student Rights Act. The Act "provides district parents with additional procedural safeguards to help make sure parents have the tools they need to stay informed, engaged, and empowered throughout the special education process." See D.C. Council Comm. Rep. on B 20-723 (D.C. 2014) at 1. Recognizing that "parents who do not have a specific background in the subject area ... often cannot adequately evaluate whether their child's instruction is sufficient [and that] parents are concerned that an LEA may limit such access to the point that the observation is unable to provide meaningful input into their child's educational progress," the Student Rights Act expanded on a parent's "right to observe" under the IDEA...⁹

The Act (D.C. Code § 38-2571.03) states in pertinent part the following:

5(A) Upon request, an LEA shall provide timely access, either together or separately, to the following for observing a child's current to proposed special education program:

(i) the parent of a child with a disability; or

⁹ *Woodson, et al., v. District of Columbia*, 119 LRP 28316

(ii) a designee appointed by the parent of a child with a disability who has professional expertise in the area of special education being observed or is necessary to facilitate an observation for a parent with a disability or to provide language translation assistance to a parent; provided, that the designee is neither representing the parent's child in litigation related to the provision of a free and appropriate public education for that child nor has a financial interest in the outcome of such litigation.

(C) A parent, or the parent's designee, shall be allowed to view the child's instruction in the setting where it ordinarily occurs or the setting where the child's instruction will occur if the child attends the proposed program.

(D) the LEA *shall not impose any conditions or restrictions on such observations except those necessary to:*

(i) Ensure the safety of the children in the program;

(ii) Protect other children in the program from disclosure by an observer of confidential and personally identifiable information in the event such information is obtained in the course of an observation by a parent or a designee, or

(iii) Avoid any potential disruption arising from multiple observations occurring in a classroom simultaneously.

(E) An observer shall not disclose nor use any information obtained during the course of an observation for the purpose of seeking or engaging clients in litigation against the District or the LEA.

Generally, a school district has the discretion to determine the actual school location where a Student's IEP is to be implemented, and parents are generally allowed to visit that location before a student's enrollment. The evidence demonstrates that after DCPS developed Student's IEP, DCPS informed Petitioners that the IEP could be implemented at School B, Student's neighborhood school. Petitioners attempted to contact Student's neighborhood school but were unable to do so. Nonetheless, Petitioners and their consultant were familiar with School B and the information about the school was available on the school's website. There was no evidence that DCPS in anyway caused Petitioners to not visit and observe at School B.

The evidence demonstrates that the specific schedule of classes that Student would have participated in at School B would have been generated if Student had enrolled at School B. School B had academically challenging curriculum. Information about the the services, course offerings and special clubs and activities offered at School B can be obtained by reviewing the school's web pages.

Based on the evidence adduced and consideration of the case law, the IHO concludes that adequate information was available to Petitioners regarding the DCPS school where the IEP could be implemented. DCPS's action in informing Petitioner regarding the location where Student's IEP would be implemented did not impede Student's right to FAPE or significantly impede Petitioners'

opportunity to participate in the decision-making process regarding the provision of FAPE or cause Student a deprivation of educational benefits.

ISSUE 5: Did DCPS deny Student a FAPE by failing to propose an appropriate IEP or placement for the SY 2022-2023 because the IEP: (a) contained an inappropriate LRE with insufficient hours of specialized instruction outside general education, and (2) did not include speech language services?

Conclusion: Respondent sustained the burden of proof by a preponderance of the evidence that the IEP that DCPS developed for Student in SY 2022-2023 was reasonably calculated to enable Student to make progress appropriate in light of the child's circumstances.

The evidence demonstrates that in for SY 2022-2023 Student was slated to move to another school level at School A, and would have moved to the same had Student attended a DCPS school. Consequently, and based upon the data available to the team that developed the IEP for student for SY 2022-2023, including Student report card grades and Student's MAP scores, Student continued to academically perform above grade level and above the same age/grade peers through the District of Columbia. There was not evidence, particularly with the 2022 School A speech language evaluation that Student had any need for speech language as a related service in Student's IEP. DCPS determined that rather than provide Student specialized instruction designated in particular areas of concern the instruction Student's actual class schedule and the classes in which the instruction would be provided would be left to the local DCPS school when Student enrolled. However, the areas of concern, PLOPs, goals, accommodations and aids and services that were were continued.

Again, the IHO did not find Petitioners' witness any more credible that those of DCPS as to the level of specialized instruction and the LRE that Student needed. The empirical data of Student's report card grades and MAP scores demonstrated that Student was performing academically commensurate with Student's capabilities. This evidence does not demonstrate that Student was in need of specialized instruction through the school day and an LRE totally removed from non-disabled peers. The evidence demonstrates that the IEP(s) DCPS developed for Student for SY 2022-2023 was reasonably calculated to enable Student to make progress appropriate in light of Student's circumstances.

ISSUE 6: Did DCPS deny Student FAPE by failing to provide any meaningful information as to the proposed placement or allow the family and their educational expert to speak with anyone from the proposed placement for SY 2022-2023?

Conclusion: : Petitioner did not sustain the burden of persuasion by a preponderance of the evidence on this issue.

As previously stated, generally, a school district has the discretion to determine the actual school location where a Student's IEP is to be implemented, and parents are generally allowed to visit that location before a student's enrollment. The evidence demonstrates that after DCPS developed Student's IEP, DCPS informed Petitioners that the IEP could be implemented at School C, Student's neighborhood school. Petitioners attempted to contact Student's neighborhood school

but were unable to do so. Nonetheless, Petitioners and their consultant were familiar with School C and the information about the school was available on the school's website. There was no evidence that DCPS in anyway caused Petitioners to not visit and observe at School C.

The specific schedule of classes that Student would have participated in at School C would have been generated if Student had enrolled. School C has a performing arts program and academically and culturally stimulating clubs and after school activities that Student could participate in if and/or when Student chooses to attend. Information about the the services, course offerings and special clubs and activities offered at School C can be obtained by reviewing the school's web pages.

Based on the evidence adduced and consideration of the case law, the IHO concludes that adequate information was available to Petitioners regarding the DCPS school where the IEP could be implemented. DCPS's action in informing Petitioner regarding the location where Student's IEP would be implemented did not impede Student's right to FAPE or significantly impede Petitioners' opportunity to participate in the decision-making process regarding the provision of FAPE or cause Student a deprivation of educational benefits.

ISSUE 7: Is School A a proper placement for Student?

Conclusion: Petitioners did not sustain the burden of persuasion by a preponderance of the evidence on this issue.

A student's IEP determines whether an educational placement is appropriate; the placement does not dictate the IEP. *See Roark v. District of Columbia*, 460 F.Supp.2d 32, 44 (D.D.C. 2006); *Spielberg v. Henrico Cty. Public Sch.*, 853 F.2d 256, 258 (4th Cir. 1988) ("Educational placement is based on the IEP, which is revised annually."); 34 C.F.R. § 300.116(b)(2).

Under the IDEA, parents who unilaterally decide to place their disabled child in a private school, without obtaining the consent of local school officials, "do so at their own financial risk." *Florence County Sch. Dist. Four v. Carter*, 510 U.S. 7, 15, 114 S.Ct. 361, 126 L.Ed.2d 284 (1993) (quoting *Sch. Comm. of the Town of Burlington v. Dep't of Educ.*, 471 U.S. 359, 374, 105 S.Ct. 1996, 85 L.Ed.2d 385 (1985)). "As interpreted by the Supreme Court, IDEA requires school districts to reimburse parents for their private-school expenses if (1) school officials failed to offer the child a free appropriate public education in a public or private school; (2) the private-school placement chosen by the parents was otherwise "proper under the Act"; and (3) the equities weigh in favor of reimbursement—that is, the parents did not otherwise act "unreasonabl[y]." *Leggett v. District of Columbia*, 793 F.3d 59, 66–67 (D.C. Cir. 2015) (citing *Carter*, supra, 510 U.S. at 15–16, 114 S.Ct. 361; 20 U.S.C. § 1412(10)(C)(iii)(III)).

At School A, Student is with no general education students. Although Petitioners assert that Student needs special education throughout the school day and must be totally removed from non-disabled peers, the data related to Student's educational and social-emotional functioning belies that assertion. There is no evidence that Student currently receives specialized instruction during lunch and recess at School A. There is no indication that Student cannot effectively interact with general education students during lunch and recess, which would presumably be a small portion of Student's school day in DCPS.

The evidence presented by Petitioners did not sufficiently demonstrate when countered by the evidence presented by Respondent, that Student requires specialized instruction throughout Student's school day and that Student should be educated in an environment in which Student is totally removed by non-disabled peers.

Albeit the evidence demonstrates that since Student has attended School A, Student has made progress and that Petitioners are pleased and want Student to remain at School A, based upon the evidence adduced, the IHO does not conclude that Student's appropriate LRE was or is a separate special education day school, like School A, where Student is totally removed from non-disabled peers. The IHO, therefore, concludes that despite the progress Student has made at School A, School A is not a placement that DCPS is obligated to fund for SY 2022-2023.

ORDER:

All other relief requested by Petitioners is denied and Petitioners DPC is dismissed with prejudice.

APPEAL PROCESS:

The decision issued by the Hearing Officer is final, except that any party aggrieved by the findings and decision of the Hearing Officer shall have ninety (90) days from the date of the decision of the Hearing Officer to file a civil action with respect to the issues presented at the due process hearing in a District Court of the United States or a District of Columbia court of competent jurisdiction, as provided in 20 U.S.C. §1415(i)(2).

/S/ *Coles B. Ruff*

Coles B. Ruff, Esq.

Hearing Officer

Date: November 21, 2022

Copies to: Counsel for Petitioners
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