

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

Parent on behalf of Student <sup>1</sup>	)	Case No. 2020-0138-B
	)	
Petitioner,	)	Hearing Dates: October 14 and 15, 2020
	)	Conducted by Video Conference
v.	)	
	)	Date Issued: October 26, 2020
Public Charter School	)	
	)	Terry Michael Banks,
Respondent.	)	Hearing Officer

**HEARING OFFICER DETERMINATION**

**INTRODUCTION**

Petitioner is the mother of an X-year-old student (“Student”) attending a District of Columbia Public School (“DCPS”). On July 30, 2020, Petitioner filed a Due Process Complaint Notice (“*Complaint*”) alleging, *inter alia*, that School A denied Student a free appropriate public education (“FAPE”) by failing to implement her/his Individualized Education Program (“IEP”), failing to provide appropriate IEPs, and expelling him/her on or about February 6, 2020. On August 10, 2020, School A filed a *Response to the Due Process Complaint* (“*Response*”), denying that Student’s expulsion constituted a denial of FAPE.

**SUBJECT MATTER JURISDICTION**

This due process hearing was held, and a decision in this matter is being rendered, pursuant to the Individuals with Disabilities Education Improvement Act (“IDEIA”), 20 U.S.C. Section 1400 *et seq.*, its implementing regulations, 34 C.F.R. Sect. 300 *et seq.*, Title

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

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

### PROCEDURAL HISTORY

On July 30, 2020, Petitioner filed the *Complaint* alleging, *inter alia*, that School A denied Student a free appropriate public education (“FAPE”) by (1) failing to implement her/his 2018-19 IEP, (2) failing to provide an appropriate IEP for the 2018-19 school year, (3) failing to provide an appropriate IEP for the 2019-20 IEP, (4) failing to implement her/his 2019-20 IEP, and (5) expelling him/her on or about February 6, 2020 despite her/his objectionable behavior being a manifestation of her/his disability. Petitioner also alleged violation of Section 504 of the Rehabilitation Act, the Elementary and Secondary Education Act, and Title VI of the Civil Rights Act of 1964. On August 10, 2020, Respondent filed its *Response*, denying that Student’s expulsion constituted a denial of FAPE.

The prehearing conference in this case took place by video conference on August 14, 2020. Respondent’s counsel objected to expedited adjudication on any issue other than those contemplated in 34 C.F.R. Section 300.532. I invited counsel to file a motion to dismiss or bifurcate on or before August 17, 2020. Petitioner’s reply would be due on August 20, 2020, and the prehearing conference was postponed until August 27, 2020 and was completed that day.

On August 17, 2020, Respondent filed School A’s *Motion to Dismiss or, in the Alternative, to Bifurcate* (“*Motion to Dismiss*”). On August 20, 2020, Petitioner filed *Petitioner’s Opposition to Respondent’s Motion to Dismiss Non-Expedited Matters or to Bifurcate Those Matter; Petitioner’s Response to other Issues Noted in Respondent’s Motion; and Notice of Respondent’s Failure to Give Notice Pursuant to S.O.P. 406(A)*. On August 25, 2020, I issued an Order on Motion to Dismiss bifurcating the issues relating to the manifestation determination from all other allegations in the *Complaint*.

The prehearing conference was reconvened on August 27, 2020, and a Prehearing Order was issued on August 28, 2020. In its original *Response* on August 10, 2020, Respondent addressed the allegations in the *Complaint* relating to Student’s manifestation determination and expulsion. In light of the bifurcation of the issues in the *Complaint*, I ordered Respondent to file a Response to the issues in the *Complaint* that are unrelated to the expulsion within 10 days of the issuance of the Prehearing Order.

On September 7, 2020, Respondent filed *School A’s Second Response to the Complaint* (“*Second Response*”). Respondent averred as follows: (1) Petitioner concurred with the December 4, 2017 IEP, (2) the December 4, 2017 IEP was appropriate, (3) allegations regarding the December 4, 2017 IEP are time-barred, (4) Petitioner concurred with the March 5, 2018 IEP, (5) the March 5, 2018 Amended IEP was appropriate, (6) allegations regarding the March 5, 2018 Amended IEP are time-barred, (7) it implemented the 2017-18 IEP appropriately, (8) claims involving implementation of the 2017-18 IEP are time-barred, (9) Petitioner concurred with the May 3, 2018 IEP, (10) the May 3, 2018 IEP was appropriate, (11) allegations regarding the May 3, 2018 IEP are time-barred, (12) Petitioner concurred with the April 25, 2019 IEP, and (13) the April 25, 2019 IEP was appropriate.

On September 7, 2020, Respondent also filed *School A's Partial Motion to Dismiss*. Respondent argued that all allegations concerning matters that occurred more than two years before the filing of the *Complaint* are barred by the statute of limitations. On September 9, 2020, Petitioner filed *Petitioner's Response to Respondent's Second Answer to Petitioner's Complaint; Request to Strike Respondent's Answer; and Request to Hold in Abeyance Respondent's Motion to Partially Dismiss Petitioner's Complaint* ("*Request to Strike*"). Petitioner argued that Respondent's *Second Response* does not meet the requirements of 34 C.F.R. Section 300.508(e) and should be stricken. On September 9, 2020, Petitioner also filed *Petitioner's Response to Respondent's Partial Motion to Dismiss* ("*Petitioner's Response*").

On September 14, 2020, Respondent filed *School A's Reply to Petitioner's Opposition to the Partial Motion to Dismiss* ("*Respondent's Reply*"). *Respondent's Reply* reiterated that all allegations relating to events prior to July 30, 2018 were time-barred, and added that Petitioner was provided Spanish language interpretation services upon request. On September 14, 2020, Respondent also filed *School A's Opposition to Petitioner's Request to Strike* ("*Respondent's Opposition*").

On September 16, 2020, Petitioner filed *Petitioner's Reply to School A's Opposition to Petitioner's Motion to Strike School A's Answer to the Complaint* ("*Petitioner's Reply*"). This pleading recounted the procedural history on these issues, and disputed Respondent's assertions in *Respondent's Opposition*. On September 16, 2020, Petitioner also filed *Petitioner's Motion to Hold in Abeyance School A's Motion for Partial Dismissal of Plaintiff's Complaint and Petitioner's Motion for Leave to File Surreply to School A's Motion for Partial Dismissal of Petitioner's Complaint*. The abeyance motion restated the arguments set forth in the *Request to Strike*.

On September 18, 2020, I issued an Order on Motion to Strike Respondent's Answer and to Hold in Abeyance Respondent's Motion to Partially Dismiss Petitioner's Complaint; Order on Respondent's Partial Motion to Dismiss. In that Order, I granted Petitioner's *Motion to Strike*, denied Respondent's *Partial Motion to Dismiss*, denied Petitioner's *Request to Hold in Abeyance Respondent's Motion to Partially Dismiss Petitioner's Complaint*, granted *Petitioner's Motion for Leave to File Surreply to School A's Motion for Partial Dismissal of Petitioner's Complaint*, and further ordered that on or before September 29, 2020, Respondent shall file an amended response to the *Complaint* that addresses the requirements of 34 C.F.R. Section 300.508(e)(1), including, but not limited to:

1. A description of each evaluation procedure, assessment, record, or report the agency used as the basis for the development of Student's December 2017, March 2017, May 2018, and April 2019 IEPs;
2. An explanation for the number of hours School A prescribed for specialized services and related services, both inside and outside general education, in Student's IEPs;
3. If the hours of specialized instruction outside general education and/or related services on Student's December 4, 2017 Amended IEP were reduced from the levels prescribed in the May 11, 2017 IEP developed at School B, the reasons justifying the reduction in services; and

4. An explanation for how Student's IEPs addressed Student's lack of English language proficiency.

On September 29, 2020, Respondent filed *School A's Third Response to the Complaint* ("*Third Response*"). Throughout the *Third Response*, Respondent reiterated its position that allegations relating to events more than two years before the *Complaint* was filed are time-barred. As to the Issues Presented, Respondent averred as follows:

Issue (1): The parent was involved in the process of amending the IEP and consented to the amendment; the parent was provided Spanish translation services at all times and failed to raise concerns in a timely manner; although Student entered School A with a "near self-contained IEP... it became apparent to School A that the student did not require that level of restrictiveness at School A...;" School A sought the parent's involvement in amending the student's IEP to a less restrictive environment; the IEP from Student's previous school did not note limited English proficiency, and such was not addressed in the December 4, 2017 amendment, but Student received English learner services as needed; at the subsequent annual IEP review meeting, the IEP was revised "to note the student's limited English proficiency;" School A considered retaining Student's more restrictive setting, but concluded that heavier restrictions were inappropriate and unnecessary to enable Student to make academic progress; School A considered faculty observations, available academic data and parental input in determining that a less restrictive setting would be more appropriate; the parent was unresponsive to School A's attempt to convene an IEP meeting at the beginning of the 2017-18 school year, but was eventually able to reach her, and the parent agreed with and consented to the amendment of the IEP; the parent was never denied Spanish language translation services; the March 5, 2018 IEP was not inappropriate; parent was involved in the development of the March 5, 2018 IEP and "was provided Spanish translation services as needed... and failed to raise such concerns in a timely manner;" the March 5, 2018 amended IEP resulted in an increase in services for the student and was reasonably calculated to enable the student to make appropriate progress in light of [her/his] circumstances; the March 5, 2018 IEP did not address Student's English proficiency as a special consideration, but [s/he] received English learner services as needed; SCHOOL A considered faculty observations, available academic data and parental input in determining that a less restrictive setting would be more appropriate on the March 5, 2018 IEP; the parent agreed with and consented to the March 5, 2018 amendment of the IEP; and the parent was never denied Spanish language translation services.

Issue (2): School A did not fail to implement Student's IEP during the 2017-18 IEP.

Issue (3): The May 3, 2018 IEP was reasonably calculated to enable Student to make progress; the parent agreed with the IEP and raised no objections; Student's needs related to limited English proficiency continued to be met

with the English learner supports provided by School A; the parent was never denied Spanish language translation services; and School A considered faculty observations, available academic data, and parental input in determining that continuing the services would be appropriate.

Issue (4): The April 25, 2019 IEP was reasonably calculated to enable Student to make progress; the parent was never denied Spanish language translation services and agreed with maintaining the Student's current services; Student's needs related to limited English proficiency continued to be met with the English learner supports provided by School A; and School A considered faculty observations, available academic data, and parental input in determining that continuing the services would be appropriate.

On October 2, 2020, Petitioner filed *Petitioner's Reply to School A's Third Answer to the Complaint; Motion for Sanctions and Motion for Independent Evaluations at School A's Expense*. Petitioner also filed *Petitioner's Motion for Emergency Stay of Five-Day Disclosure and Trial*. On October 7, 2020, Respondent filed *School A's Opposition to Petitioner's Request to Strike Third Response to Complaint*. On October 9, 2020, I issued an Amended Order on Motions to Strike Respondent's Third Answer, for Sanctions, for Independent Evaluations, and for Emergency Stay, in which I denied both motions. On October 9, 2020, Petitioner filed *Petitioner's Motion for Continuance of Hearing Date*. That day I issued an Order on Petitioner's Motion for Continuance denying this motion, as the Prehearing Order required that motions be filed by October 7, 2020.

The due process hearing was conducted on October 14 and 15, 2020 by video conference and was closed to the public. The hearing was interpreted in Spanish. Respondent's Disclosures, submitted October 7, 2020, contained a witness list of fourteen witnesses and documents R-1 through R-55, including a blank R9. On October 12, 2020, Petitioner filed objections to Respondent's disclosures. Petitioner objected to expert testimony from Staff Member A on the grounds of education and experience and Staff Member B on the grounds that her CV is unintelligible. As there were no objection to any proposed exhibits, Respondent's Exhibits R1 through R8 and R10 through R55 are admitted into evidence.

Petitioner's disclosure statement, submitted on October 7, 2020, included a witness list of five individuals and documents P-1 through P41. On October 12, 2020, Respondent filed an objection to expert testimony from Witness A in the area of Communications. Respondent also filed objections related to P14, P17-18, P26, P30-34, and P40. I sustained the objection to P14, P17-18, P26, P30, P32, and P40, overruled the objection to P31,<sup>2</sup> and deferred ruling on the objections to P33 and P34. After the conclusion of the testimony, upon a review of P33 and P34, I have determined that they have no probative value. Therefore, Petitioner's Exhibits P1-P13, P15-16, P19-P25, P27-P29, P31, P35-P39, and P41 are admitted into evidence.

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<sup>2</sup> Respondent argued that this evaluation was completed after School A completed Student's April 25, 2019 IEP and, therefore, had no probative value as to the appropriateness of that IEP. I admitted the document because School A was aware of this evaluation throughout the 2019-20 school year, when Student's May 5, 2019 remained in effect.

Petitioner presented as witnesses in chronological order: Witness A, and Petitioner. Petitioner offered Witness A as an expert in Communications. I overruled Respondent's objection to Witness A testifying as an expert in Communications, but limited his testimony to deficiencies in English proficiency, not speech and language deficits. Respondent presented as witnesses in chronological order: Witness B, Witness C, Witness D, Witness E, and Witness F. Respondent offered Witness B, Witness C, Witness D, Witness E, and Witness F as experts in Special Education without objection by Petitioner. At the conclusion of the testimony, the parties' representatives provided oral closing arguments.

## ISSUES

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

- (1) Whether School A failed to provide Student's an appropriate Individualized Education Program for the 2017-18 school year.
- (2) Whether School A failed to implement Student's 2017-18 IEP.
- (3) Whether School A failed to provide an appropriate IEP on May 3, 2018 for the 2018-19 school year.
- (4) Whether School A failed to provide an appropriate IEP on April 25, 2019 for the 2019-20 school year.<sup>3</sup>

## FINDINGS OF FACT

1. Student is X years old and was in grade I at School A during the 2019-2020 school year.<sup>4</sup>

2. On May 1, 2017, when Student was in grade F at School B, DCPS completed a Comprehensive Psychological Evaluation of him/her.<sup>5</sup> The evaluation reported that:

[Student] is reported to have experienced a number of serious head traumas when living with [her/his] maternal grandmother in Honduras. The first incident happened when [s/he] was 5. [S/he] fell from something high and required stitches. The second incident happened when [s/he] was 7. [S/he] was ejected from a car in which [s/he] was a passenger and needed 10 stitches. An additional head injury was reported to school personnel. That incident resulted when [Student] was riding a bicycle down a rocky hill. [S/he] hit [her/his]

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<sup>3</sup> Petitioner also alleged in the *Complaint* that School A violated Section 504 of the Rehabilitation Act, the Elementary and Secondary Education Act, and Title VI of the Civil Rights Act of 1964. However, during the prehearing conference on August 27, 2020, Petitioner's counsel conceded that the Hearing Officer does not have the authority to adjudicate these claims.

<sup>4</sup> Petitioner's Exhibit ("P:") 13 at page 1 electronic page number 180. The exhibit number and page are followed by the electronic page number in the disclosure in parentheses, i.e., P13:1 (180).

<sup>5</sup> P28:1 (427).

head and [her/his] scalp was exposed. However, [his/her] family attempted to treat the head injury at home rather than seek medical care...

[Student] is reported to have witnessed the murder of [his/her] grandfather when [s/he] was between the ages of 6-8. In addition, [Student] is reported by [his/her] mother to have experienced significant trauma, resulting in Post-Traumatic Stress Disorder, following in [her/his] journey from Honduras to the U.S. before being detained by Immigration and Customs Enforcement and reunited with [her/his] mother.<sup>6</sup>

On the Woodcock-Johnson Tests of Achievement, Student presented with levels of cognitive functioning that fell within the significantly below average range. His/her skills appear to be inadequately developed in reading, broad reading, mathematics, broad mathematics, mathematics calculations, written language and broad written language as compared to his/her grade level peers. The results of the adaptive behavior assessment were inconclusive as Petitioner and Student's teacher did not agree that Student's behavior was inconsistent with that of an average same-age student. Examiner A opined that Student met the criteria for Intellectual Disability.<sup>7</sup>

3. On May 11, 2017, School B found Student eligible for services as a student with Intellectual Disability.<sup>8</sup>

4. On May 11, 2017, when Student was in grade F at School B, DCPS developed Student's Initial IEP.<sup>9</sup> In Mathematics, the Present Levels of Academic Achievement ("PLOPs") indicated that her/his overall math abilities "appear to be inadequately developed given [her/his] age and grade... [d]espite intervention, [s/he] is documented to have difficulty adding and subtracting mixed numbers, solving word problems and problems with four operations." Her/his math scores indicated that s/he was performing two grades below grade level. The goals were: (1) given word problems involving the four mathematical operations with whole numbers leading to answers in the form of fractions or mixed numbers, Student will select the correct visual representation of the solution out of 3 possible answers, (2) given a multiplication problem with 2 multi-digit whole numbers up to 3 digits each, Student will use a multiplication chart and the standard algorithm to solve the problem in 3 minutes or less, and (3) given a math problem that requires division of 2 numbers up to a 5-digit dividend and 2-digit divisor, Student will use reference materials and the standard algorithm to calculate the quotient.<sup>10</sup> In Reading, Student was measured to read three grades below grade level. The goals were: (1) given an instructional-level passage that is separated into parts, Student will read aloud fluently with no more than 5 errors, (2) given a list of 20 regular and irregular multisyllabic words with visual phonetic models for the correct pronunciation of each syllable, Student will decode 16/20 words correctly, and (3) after reading an instructional level passage using a graphic organizer Student will write a summary of the text using at least one relevant quotation from the text to support explicit information or an

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<sup>6</sup> *Id.* at 2 (428).

<sup>7</sup> *Id.* at 11 (437).

<sup>8</sup> P27:2 (421).

<sup>9</sup> P1:1 (12).

<sup>10</sup> *Id.* at 3-5 (14-16).

inference.<sup>11</sup> In Written Expression, Student was also measured to perform three grades below grade level. The goals were: (1) when provided verbal or written feedback from a peer or teacher on a written response to a writing prompt, Student will watch the teacher model how to incorporate feedback into a draft and then use a writing checklist to make 2 of the suggested revisions, and (2) after reading a grade level passage that presents an argument with the author's original conclusion removed and overlaid with numerical headings for each of the author's claims, Student will write a substitute concluding paragraph that summarizes at least 3 of the author's claims and provides a statement of the author's concluding opinion.<sup>12</sup> The IEP team prescribed 19 hours of specialized instruction outside general education, including nine hours of mathematics.<sup>13</sup>

5. On or about September 27, 2017, when Student had enrolled in School A for grade G, School A issued an Individualized Education Program (IEP) Amendment Proposed Services Change Form.<sup>14</sup> School A proposed to change Student's "Current Total Special Education Service Hours/Week" from 19 hours per week to 60 hours per month. In the box entitled "Type of Proposed Amendment," there were four options that could be checked. The "Proposed Increase in Service Hours" was checked, the "Proposed Decrease in Service Hours" was checked, then the check mark was obliterated. Petitioner signed the form.<sup>15</sup>

6. On or about October 5, 2017, School A issued a Standard IEP Amendment Form proposing to "add inside hours of 37.5 hours per month (~9.5 hours per week) and increase outside hours from 19 hours per week to 22.5 hours per month (~5.5 hours per week). The LEA also proposes removing individual testing from IEP."<sup>16</sup> School A explained the changes as follows:

The LEA believes that this proposed amendment is appropriate because: [Student] will have daily inclusion support in all core academic classes: English, math, and science. This accounts for the addition of inside hours. [S/he] will receive daily reading and writing intervention via the second period of English and math interventions every other day via the math support class. The original justification for having individual testing is "[Student] will benefit from testing in a small group, which will support [her/his] attention plan." This justification supports small group testing (which is also on the IEP), not individual testing.

The proposed amendment is based on the following data:

The scheduled supports are based on multiple diagnostic assessments in reading, writing, and math indicating that [Student] is capable of achieving in an inclusion setting. The transition from elementary services to middle school services is the primary reason for the specific hours changes. The justification for individual testing is actually supportive of small group testing not

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<sup>11</sup> *Id.* at 5-7 (16-18).

<sup>12</sup> *Id.* at 8-9 (19-20).

<sup>13</sup> *Id.* at 10 (21).

<sup>14</sup> P2 (33).

<sup>15</sup> *Id.*

<sup>16</sup> P3 (35).

individual.<sup>17</sup>

Petitioner signed this form on November 27, 2017, agreeing to amend the IEP without convening an IEP Team meeting.<sup>18</sup>

7. On November 7, 2017, School A issued an IEP Progress Report – Annual Goals.<sup>19</sup> Student was reported to be progressing on two Math goals, but the division goal had not yet been introduced.<sup>20</sup> None of the three Reading goals had been introduced.<sup>21</sup> In Written Expression, Student was progressing on the revision goal, but the concluding paragraph goal had not yet been introduced.<sup>22</sup>

8. On December 4, 2017, School A issued an Amended IEP.<sup>23</sup> Student's Mathematics and Reading PLOPs were unchanged from the May 11, 2017 IEP, and none of Student's goals were changed from the May 11, 2017 IEP. The IEP team prescribed 22.5 hours per month of specialized instruction outside general education and 37.5 hours per month of specialized education inside general education.<sup>24</sup>

9. School A reduced Student's specialized instruction outside general education because s/he was "more advanced" than her/his classmates in the self-contained class, and the staff did not want to keep her/him on track for a certificate upon graduation rather than a diploma.<sup>25</sup> After the December 4, 2017 amendment, Student's only classes outside general education were Math Support for two periods per week in the second quarter and Math Support for four periods in the third quarter. Student's schedule for the fourth quarter did not include any classes outside general education.<sup>26</sup> Student began receiving English as Second Language classes after the December 2017 amendment.<sup>27</sup>

10. On February 8, 2018, School A issued an IEP Progress Report – Annual Goals.<sup>28</sup> Student was reported to be progressing on two Math goals, but the division goal had not yet been introduced.<sup>29</sup> S/he was progressing on the Reading fluency goal, but the two other goals had not been introduced.<sup>30</sup> Student was reported to be progressing on both Written Expression goals.<sup>31</sup>

11. On February 14, 2018, School A issued a Standard IEP Amendment Form,

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<sup>17</sup> *Id.*

<sup>18</sup> *Id.*

<sup>19</sup> Respondent's Exhibit ("R:") 24 at page 1 electronic page number 141. The exhibit number and page are followed by the electronic page number in the disclosure in parentheses, i.e., R24:1 (141).

<sup>20</sup> *Id.* at 2-3 (142-43).

<sup>21</sup> *Id.* at 3-4 (143-44).

<sup>22</sup> *Id.* at 5 (145).

<sup>23</sup> P4:1 (37).

<sup>24</sup> *Id.* at 12 (48).

<sup>25</sup> Testimony of Witness B and Witness C.

<sup>26</sup> R14:1 (65).

<sup>27</sup> Testimony of Witness B; R23:9 (124).

<sup>28</sup> R24:6 (146).

<sup>29</sup> *Id.* at 7-8 (147-48).

<sup>30</sup> *Id.* at 9-10 (149-50).

<sup>31</sup> *Id.* at 10-11 (150-51).

proposing to “Increase in special education service hours inside the general education classroom and outside of the general education classroom. The LEA believes that this proposed amendment is appropriate because: [Student’s] current progress shows that [s/he] would benefit from the English Language Learner intensive Math Support and Reading Support classes. The proposed amendment is based on the following data: Grades, assessments, observations, teacher input.” Petitioner signed this form on February 20, 2018, agreeing to amend the IEP without convening an IEP Team meeting.<sup>32</sup>

12. On February 20, 2018, School A issued an Individualized Education Program (IEP) Amendment Proposed Services Change Form.<sup>33</sup> The form proposed increasing Student’s specialized instruction from 37.6 hours per month inside general education and 22.5 hours per month outside general education, to 69.5 hours per week (sic).<sup>34</sup>

13. On February 27, 2018, School A issued a Standard IEP Amendment Form, proposing as follows: “[Student’s] hours have not changed, however, [his/her] schedule has. [S/he] is now taking Reading Support E on A days and Math Support on A&B days.”<sup>35</sup> More specifically, the LEA is proposing to: Increase in special education service hours inside the general education classroom and outside of the general education classroom. The LEA believes that this proposed amendment is appropriate because: [Student’s] current progress shows that [s/he] would benefit from the English Language Learner intensive Math Support and Reading Support classes. The proposed amendment is based on the following data: Grades, assessments, observations, teacher input.” Petitioner signed this form on February 27, 2018, agreeing to amend the IEP without convening an IEP Team meeting.<sup>36</sup>

14. On March 5, 2018, School A issued an Amended IEP.<sup>37</sup> “The following information was amended: Change to Specialized Instruction: [Student’s] hours have not changed, however, [her/his] schedule has. [S/he] is now taking Reading Support E on A days and Math Support E on A&B days.”<sup>38</sup> The IEP Team prescribed 22.5 hours per month of specialized instruction outside general education and 47 hours per month inside general education. The latter represented an increase of 9.5 hours over the amount prescribed for inside general education in the December 4, 2017 Amended IEP.<sup>39</sup>

15. On April 20, 2018, School A issued an IEP Progress Report – Annual Goals.<sup>40</sup> Student was reported to be progressing all three Math goals.<sup>41</sup> S/he was progressing on the Reading fluency goal, but the two other goals had not been introduced.<sup>42</sup> Student had

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<sup>32</sup> P5:1 (54).

<sup>33</sup> *Id.* at 2 (55).

<sup>34</sup> *Id.*

<sup>35</sup> P6:1 (57). “A” days are Monday and Wednesday, “B” days are Tuesday and Thursday. Testimony of Witness B.

<sup>36</sup> *Id.*

<sup>37</sup> R21:1 (94).

<sup>38</sup> *Id.*

<sup>39</sup> *Id.* at 12 (105).

<sup>40</sup> R24:12 (152).

<sup>41</sup> *Id.* at 13-14 (153-54).

<sup>42</sup> *Id.* at 15 (155).

regressed to be making no progress on both Written Expression goals.<sup>43</sup>

16. On May 3, 2018, School A conducted an IEP Annual Review Meeting.<sup>44</sup> Petitioner did not know the purpose of the meeting. She asked if Student would have the same IEP next year, asked how Student was doing in her/his classes, asked about her/his effort this term, and expressed concern about Student's ability to pay attention in class.<sup>45</sup>

The Consideration of Special Factors indicated that Student has limited English proficiency, did not have ACCESS scores, but was given the assessment in March 2018.<sup>46</sup> The Mathematics PLOPs revealed that Student took The Northwest Evaluation Association (NWEA)/Measure of Academic Progress (MAP) assessment in the Winter of 2018. Student scored 189, 32 points below the grade G average, and in the second percentile. S/he scored in the low range in the areas of Operations and Algebraic Thinking, Geometry, Statistics and Probability and The Real and Complex Number Systems. In the third term of the school year, Student did not meet expectations form math in two of four criteria. Her/his scores were 5 out of 8 in knowing and understanding (Criterion A), 3 out of 8 in the area of investigating patterns (Criterion B), 3 out of 8 in communicating (Criterion C), and 5 out of 8 in the area of applying mathematics to real-life contexts (Criterion D), where a score of 4 and above indicates meeting expectations and scores of 3 were approaching expectations. According to an I-Ready assessment in September 2017, Student was performing four years below grade G level. Her/his scores remained at that grade level on the assessment given in February 2018. The PLOP indicated that Student indicated that s/he had difficulty on the assessment because s/he did not understand it due to the language barrier: "As of now, iReady does not have a Spanish intensive version therefore [Student's] data may not be an accurate description of [her/his] true abilities when taught in [his/her] native language." Student also scored at the Grade C level in Numbers and Operations, Algebra and Algebraic Thinking, Measurement and Data, and Geometry. "[Student] struggles to stay on task and is often distracted by peers, [her/his] chromebook, or listening to music. However, when [Student] is engaged, [s/he] is able to add to classroom discussions with meaningful answers. [S/he] struggles to solve multiplication and division problems as [s/he] doesn't have high fluency in those areas. When provided with a calculator and scaffolding, [s/he] is able to demonstrate better mastery of more complex math problems."<sup>47</sup> The two goals were: given word problems or numerical problems involving the four mathematical operations with rational numbers, Student will apply and extend previous understandings of addition and subtraction to add and subtract rational numbers, and (2) given word problems or numerical problems involving the four mathematical operations with rational numbers, Student will apply and extend previous understandings of multiplication and division to multiply and divide rational numbers.<sup>48</sup>

In Reading, the PLOP indicated that Student's MAP score (194) in the winter of 2018 put her/his performance four grades below the grade level score (214), and at the 8<sup>th</sup> percentile. S/he achieved a zero in the area of Analyzing, struggled to initiate tasks on his/her

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<sup>43</sup> *Id.* at 16-17 (156-57).

<sup>44</sup> P8:1 (76).

<sup>45</sup> *Id.* at 24 (100).

<sup>46</sup> *Id.* at 6 (80).

<sup>47</sup> *Id.* 7-8 (81-82).

<sup>48</sup> *Id.* at 8-9 (82-83).

own, and misbehaved when confused about directions or a question. The goals were: (1) Student will read an instructional level text at a rate of 100 correct words per minute, making no more than 3 errors with proper speed, intonation, and expression, and (2) after reading or hearing a story, Student will use 4 sentence starters to provide a written summary to the central ideas and significant details of the story.<sup>49</sup>

In Written Expression, the PLOP indicated that Student “struggles to produce written work in English as it is not [his/her] native language. [Student] is able to formulate an answer verbally and have it scribed by an adult. [S/he] is then able to listen to what [s/he] has said verbally (when it is read back to [her/him]) and write it back down on [his/her] paper.” On his/her April 2018 report card, s/he received zero scores for Organizing (Criterion B), Producing Text (Criterion C), and 1 for Using Language and for Producing Text. “In the area of Producing Text, [Student’s] score of a 1 showed that [Student] uses a limited range of appropriate vocabulary and forms of expression, writes and speaks in an inappropriate register and style that do not serve the context and intention, uses grammar, syntax and punctuation with limited accuracy: errors often hinder communication, spells/writes and pronounces with limited accuracy... and makes limited and/or inappropriate use of non-verbal communication techniques.<sup>50</sup> The goals were: (1) given a familiar topic, a verbal or visual prompt, and a word list of topical vocabulary, Student will write up to 3 sentences containing 3-5 words each that correspond to the topic, (2) after reading an instructional level text on a preferred topic, Student will correctly spell 4 out of 5 words, provided with no more than 2 contextual cues.<sup>51</sup>

The IEP team prescribed 22.5 hours per month of specialized instruction outside general education, and 47 hours per month inside general education.<sup>52</sup> A Spanish translator was provided to Petitioner throughout the meeting.<sup>53</sup>

17. School A completed an IEP Progress Report – Annual Goals for the fourth reporting period of the 2017-18 school year (4/17/18 – 6/22/18).<sup>54</sup> Student was progressing on both Math goals,<sup>55</sup> both Reading goals,<sup>56</sup> and both Written Expression goals.<sup>57</sup>

18. Student had only three behavior “referrals” during the 2017-18 school year, and was not on School A’s “radar” for having behavior problems.<sup>58</sup>

19. Student’s schedule outside general education for the 2018-19 school year included Building Successful Students for two periods per week, English Support for four periods, and Individuals and Societies for two periods per week.<sup>59</sup>

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<sup>49</sup> *Id.* at 9-11 (83-85).

<sup>50</sup> *Id.* at 11 (85).

<sup>51</sup> *Id.* at 11-12 (85-86).

<sup>52</sup> *Id.* at 13 (87).

<sup>53</sup> Testimony of Witness B and Witness C.

<sup>54</sup> R24:18 (158).

<sup>55</sup> *Id.* at 18-19 (158-59).

<sup>56</sup> *Id.* at 19-20 (159-60).

<sup>57</sup> *Id.* at 21, 22 (161-62).

<sup>58</sup> Testimony of Witness B.

<sup>59</sup> R26:1 (172).

20. On September 13, 2018, School A issued a Standard IEP Amendment Form, proposing as follows: “Decrease inside general education hours from 47 hrs./month to 38.5 hrs./month. The LEA believes that this proposed amendment is appropriate because: In [grade G], English was double block plus an extra reading support. The proposed amendment is based on the following data: Specific class/support recommendation came from former staff/teachers.” Petitioner signed this form on September 18, 2018, agreeing to amend the IEP without convening an IEP Team meeting.<sup>60</sup> That day, School A issued an Amended IEP.<sup>61</sup> The only change from the May 3, 2018 IEP was to reduce the 47 hours per month of specialized instruction inside general education to 38.5 hours per month.<sup>62</sup>

21. On September 27, 2018, School A issued a Prior Written Notice (“PWN”) indicating that it would “Decrease inside general education hours from 47 hrs/month to 38.5 hrs/month.”<sup>63</sup>

22. On November 5, 2018, School A issued a Standard IEP Amendment Form. The LEA proposed to add new related services to the IEP:

More specifically, the LEA is proposing to: The LEA, [Student], and [her/his] mother have agreed to provide [Student] with counseling services at school during the school day.

The LEA believes that this proposed amendment is appropriate because: [Student] was supposed to be receiving counseling outside of school. However, [s/he] has only gone one time. Due to this... the LEA has concluded that school-based counseling is needed especially because [Student] has been displaying more negative behaviors as the school year has progressed.<sup>64</sup>

Petitioner signed the form on November 9, 2018, agreeing to amend the IEP without convening an IEP Team meeting.<sup>65</sup>

23. On November 8, 2018, School A issued an IEP Amendment Proposed Services Change Form. It proposed to increase Student’s “Total Special Education Service Hours” from 61 to 63 hours/month.<sup>66</sup>

24. On November 12, 2018, School A issued an IEP Progress Report – Annual Goals, for the first reporting period of the 2018-19 school year.<sup>67</sup> Student was reported to be progressing on both Math goals, progressing on the Reading goal of reading 100 correct words per minute, but the goal of writing a summary of a story was just introduced. Student

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<sup>60</sup> R27:1 (174).

<sup>61</sup> R28:1 (177).

<sup>62</sup> *Id.* at 9 (185).

<sup>63</sup> R29:1 (199).

<sup>64</sup> R31:1 (203).

<sup>65</sup> *Id.*

<sup>66</sup> R30:1 (201).

<sup>67</sup> R38:1 (296).

was reported to be progressing on both Written Expression goals.<sup>68</sup>

25. On November 19, 2018, School A issued an Amended IEP.<sup>69</sup> A new Area of Concern was added for Emotional, Social, and Behavioral Development (“Behavior”). The PLOP included the following: “... According to the Strengths and Difficulties questionnaire administered to [Student’s] teacher in October 2018, [Student] scored into the very high range for levels of overall stress and behavior difficulties and into the high range for challenges with concentration and the impact of these challenges on [Student’s] lived experience. Moving forward, [Student] should work toward increasing an awareness about how [s/he] is feeling and utilizing age appropriate coping strategies that help [her/him manage challenging emotions.”<sup>70</sup> The goals were: (1) Student will gain an increased awareness about how s/he is feeling, as evidenced by identification of her/his triggers and an ability to share how s/he is feeling, and (2) S/he will utilize age appropriate coping strategies and modes of self-expression, such as mindfulness skills or expressing her/his feelings, to handle emotions such as anger, sadness, and frustration.<sup>71</sup> The IEP Team prescribed 22.5 hours of specialized instruction outside general education, 38.5 hours/month inside general education, and 2 hours per month of BSS.<sup>72</sup>

26. On February 23, 2019, School A issued an IEP Progress Report – Annual Goals, for the second reporting period of the 2018-19 school year.<sup>73</sup> Student was reported to be progressing on both Math goals, progressing on the Reading goal of reading 100 correct words per minute, but making no progress on the goal of writing a summary of a story.<sup>74</sup> “[Student] has not made progress with this goal because [s/he] has been refusing to write in numerous classes.”<sup>75</sup> Student was reported to be progressing on both Written Expression goals.<sup>76</sup> In Behavior, two goals had just been introduced.<sup>77</sup>

27. School A completed a Functional Behavior Assessment on March 20, 2019.<sup>78</sup> The Background Information provided the following:

It is reported that [Student] experienced multiple, serious head traumas/injuries while [s/he] was living in Honduras with [her/his] maternal grandmother. In addition to head traumas, it is also reported that [Student] witnessed the murder of [her/his] grandfather between ages 6 and 8, which resulted in Post Traumatic Stress Disorder (PTSD) and was intensified in [her/his] immigration to the United States. During [her/his] journey to the

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<sup>68</sup> *Id.* at 1-4 (296-99).

<sup>69</sup> R32:1 (206).

<sup>70</sup> *Id.* at 9 (214).

<sup>71</sup> *Id.*

<sup>72</sup> *Id.* at 10 (215).

<sup>73</sup> R38:6 (301).

<sup>74</sup> *Id.* at 6-8 (301-3).

<sup>75</sup> *Id.* at 8 (303).

<sup>76</sup> *Id.* at 9-10 (304-5).

<sup>77</sup> *Id.* at 10 (305).

<sup>78</sup> P11:1 (150); R35:1 (262).

United States, [Student] was detained by Immigration and Customs Enforcement before [s/he] was ultimately reunited with [her/his] mother.<sup>79</sup>

The Behavioral Data included the list of 58 behavioral incidents during the 2018-19 school year: 12 off-task, 9 cellphone usage, 7 inappropriate language, 6 skipping, 5 eloping, 4 refusals to follow directions, 2 headphone usage, 2 roaming, 2 other, 1 vandalism, 1 running in hall, 2 harassments (1 sexual), 1 food/drink during class, 1 possession of lighter, 1 trespassing, and 1 play-fighting.<sup>80</sup> The Functional Assessment Screening Tool determined that Student's desire for access to preferred items and to escape from tasks or activities were the most likely reasons for Student's disruptive and off-task behaviors.<sup>81</sup>

The suggested Noncontingent Reinforcement with Extinction was that Student "will receive positive social reinforcement (praise, positive adult attention) on scheduled intervals, whether or not [s/he] has engaged in a target behavior during the period of time. Social reinforcement is given to [Student] even if off-task or disruptive tasks have occurred during the scheduled period of time (every 5 minutes)... However, reinforcement is withheld if [Student] is engaging in the target behavior at the time of the scheduled delivery. If the target behavior is happening at the time of the scheduled delivery, withhold social reinforcement until there has been an absence of the target behavior for 1 minute. All target behaviors should be ignored, unless they are unsafe. If a behavior is unsafe and cannot be ignored, follow the discipline protocol (formal warning, conference, referral) ...<sup>82</sup>

28. In the spring of 2019, Student took the Partnership for Assessment of readiness for College and Careers ("PARCC") in English Language Arts and Literacy ("ELA").<sup>83</sup> Her/his score was 650, Performance Level 1, "Did Not Yet Meet Expectations" for grade B.<sup>84</sup> In Mathematics, Student's score was 695, Level 1.<sup>85</sup>

29. School A developed a Behavior Intervention Plan ("BIP") for Student on April 25, 2019.<sup>86</sup> The BIP was developed to address off-task behavior, "e.g. looking around, looking at another website on computer, noncompliance, etc.," and disruptive behavior, "When the student is engaging in behaviors that cause interruption to classroom and/or peers (e.g. calling out, inappropriate language, talking to peers during instruction, etc.),"<sup>87</sup> The BIP required Student to receive positive social reinforcement (praise, positive adult attention) on scheduled intervals, whether or not s/he has engaged in a target behavior, except it is to be delayed so as not to provide reinforcement while actually engaged in a target behavior. "All target behaviors should be ignored, unless they are unsafe... If a behavior is unsafe and cannot be ignored, follow the [School A] discipline protocol. Unsafe behaviors are defined as behaviors that can potentially cause physical danger to [Student], school staff, or [her/his]

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<sup>79</sup> P11:1 (150).

<sup>80</sup> *Id.* at 1-2 (150-51).

<sup>81</sup> *Id.* at 6, 23 (155, 172).

<sup>82</sup> *Id.* at 24 (173).

<sup>83</sup> P29:1 (446).

<sup>84</sup> *Id.* Level 2, "Partially Met Expectations," required a score of 700, Level 3, "Approached Expectations," required a score of 725, and Level 4, "Met Expectations," required a score of 750.

<sup>85</sup> *Id.* at 3 (448).

<sup>86</sup> R36:1 (288).

<sup>87</sup> *Id.*

classmates, but also verbal threats or explicit language that make others feel unsafe.” The BIP also would reward Student with five-minute breaks for completed work assignments.<sup>88</sup>

30. On April 25, 2019, School A issued an IEP Progress Report – Annual Goals, for the third reporting period of the 2018-19 school year.<sup>89</sup> Student was reported to have regressed to making no progress on both Math goals.<sup>90</sup> S/he was also making no progress on the Reading and Written Expression goals.<sup>91</sup> In Behavior, Student was progressing on both goals.<sup>92</sup>

31. On April 25, 2019, School A also conducted an IEP Annual Review Meeting.<sup>93</sup> The Consideration of Special Factors noted her/his lack of English language proficiency on the ACCESS for ELL’s English Language Proficiency Test:

... [Student] received an overall Proficiency Level of 3.1 out of 6.0 total possible points, establishing [her/his] proficiency level as “emerging,” and approaching “developing.” The person with an “emerging” level of proficiency “knows and uses some social English and general academic language with visual and graphic support,” according to the assessment. The person with a “developing” level of English Language Proficiency knows and “uses social English and some specific academic language with visual and graphic support.” [Student’s] reading and oral comprehension are largely affected by gaps in vocabulary. [S/he] also has several gaps in decoding skills in English. These factors all negatively impact [Student’s] reading comprehension and writing to the extent that it significantly impacts [her/his] academic performance, especially [her/his] ability to do grade-level work independently.<sup>94</sup>

In Mathematics, the PLOP noted that s/he scored in the 2<sup>nd</sup> percentile on the MAP, and that his/her score fell from 215 in September 2018 to 190 in January 2019. His/her MAP scores reflect performance at the grade C level. Her/his grades for the first quarter were 2 in Knowing and Understanding, 4 in Investigating Patterns, 1 in Communicating, and 3 in Real World Application. In the second quarter, her/his grades were 2 in Knowing and Understanding, 2 in Investigating Patterns, 2 in Communicating, and 1 in Real World Application. I-Ready testing revealed that s/he was performing four grades below grade level in Number/Operations, Algebra/Algebraic Thinking, Measurement/Data, and Geometry. Student’s math goals were unchanged from the May 3, 2018 IEP.<sup>95</sup>

In Reading, the PLOP revealed that on the January 2019 MAP, Student was found to be reading five-six years below grade level, at the 1<sup>st</sup> percentile.<sup>96</sup> “[Student] has not made

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<sup>88</sup> *Id.* at 2 (289).

<sup>89</sup> R38:12 (307).

<sup>90</sup> *Id.* at 12-13 (307-8).

<sup>91</sup> *Id.* at 13-15 (308-10).

<sup>92</sup> *Id.* at 16 (311).

<sup>93</sup> P13:1 (180).

<sup>94</sup> *Id.* at 3 (182).

<sup>95</sup> *Id.* at 4-7 (183-86).

<sup>96</sup> *Id.* at 7 (186).

progress since the 1<sup>st</sup> quarter. [S/he] is [a] reluctant reader who has a difficult time focusing when reading. [S/he] also has difficulty with longer passages when reading. [Student] requires extensive one-on-one attention and constant reminders in order to remain focused long enough to complete any work. [S/he] also benefits from sitting close to a teacher, which is why [Student] has been given the option to sit or stand next to [his/her] Reading Support teacher while [s/he] does [her/his] work.” Student’s grades for the first two quarters were 1 and 2, respectively, in Analyzing. “[Student’s] current progress shows that [s/he] has the capability to meet expectations for grade level in English. [Student’s] English teacher reports that [Student] requires individualized, one-on-one assistance. She also reports that even when [s/he] receives this assistance, [s/he] often refuses to do [her/his] work and proceeds to distract [her/his] peers.” Student’s goals were unchanged from the May 3, 2018 IEP.<sup>97</sup>

In Written Expression, the PLOP indicated that during her/his first quarter at School A, Student received the following grades in English: 1 in Organizing, and zeros in Producing Text and Using Language. In the second quarter, s/he received three zeros.<sup>98</sup> The two goals from the May 3, 2018 IEP were repeated.<sup>99</sup>

In Behavior, the PLOP included the following: “In counseling at [School A], [Student] is inconsistent in [her/his] engagement with sessions. Initially, [Student] was focused and participated openly and fully in conversations and activities. Over time, [Student] has become more disengaged, and it has been challenging for the counselor to motivate and engage with [Student]. In response, [Student] has been doing play therapy and theraplay to build a stronger attachment to the counselor and counseling setting. According to the Strengths and Difficulties questionnaire administered to [Student’s] teacher in April 2018, [Student] scored into the very high range for levels of overall stress, challenges with focus and concentration, and behavior difficulties. [Student’s] team is currently working toward implementing a new BIP for [Student] to help [her/him] have better tools that assist [her/him] with focusing and self regulating in the classroom...”<sup>100</sup> The goals were unchanged from the November 2018 Amended IEP.<sup>101</sup>

The IEP prescribed 23 hours per month of specialized instruction outside general education (an increase of 30 minutes), 38.5 hours per month inside general education (unchanged), and 2 hours per month of BSS outside general education.<sup>102</sup> A Spanish translator was provided to Petitioner throughout the meeting.<sup>103</sup>

32. On June 18, 2019, School A issued an IEP Progress Report – Annual Goals. Student was reported to be progressing on both Math goals. In Reading, s/he was progressing on reading 100 words per minute but making no progress on writing a summary of central ideas in a story. In Written Expression and Behavior, s/he was progressing on both goals.<sup>104</sup>

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<sup>97</sup> *Id.* at 7-9 (186-188).

<sup>98</sup> *Id.* at 10 (189). The previous IEP referred to Student’s April 2018 report card. Thus, the reference here must be to the first two quarters of the 2018-19 school year rather than Student’s first quarters at School A in 2017.

<sup>99</sup> *Id.* at 11 (190).

<sup>100</sup> *Id.* at 12 (191).

<sup>101</sup> *Id.* at 13 (192).

<sup>102</sup> *Id.* at 14 (193).

<sup>103</sup> Testimony of Witness B and Witness C.

<sup>104</sup> P21:23-28 (314-19).

In Behavior, s/he was progression on both goals.<sup>105</sup>

33. On June 29, 2019, Examiner B completed a Bilingual Neuropsychological Evaluation of Student.<sup>106</sup> Student was referred for the evaluation due to a “request for more data given recent misbehaviors and concern that [her/his] initial psychological evaluation did not fully investigate prior head trauma.”<sup>107</sup> On the Wechsler Nonverbal Scale of Ability (“WNV”), Student’s full-scale score, “the most reliable estimate of [her/his] general cognitive ability,” was 60, within the Very Low range of cognitive functioning. Student scored in the 4<sup>th</sup> percentile on the Matrices subtest that measures perceptual reasoning, in the 1<sup>st</sup> percentile on the Spatial Span subtest that measures working memory with visual-spatial stimuli, in the 2<sup>nd</sup> percentile in Coding, which measures symbol association and processing speed, and in the 3<sup>rd</sup> percentile in Picture Arrangement, which measures perceptual organization.<sup>108</sup> The Woodcock-Munoz Pruebas de habilidades cognitivas (Bateria COG III) is a Spanish test that measures cognitive functioning for individuals aged 2 – 90+. Student scored 66 in General Intellectual Ability (“GIA”), indicating that her/his overall cognitive functioning was in the Very Low range. S/he scored in the Very Low to Low range (2<sup>nd</sup> percentile) in Verbal Ability, Low to Low Average (10<sup>th</sup> percentile) in Thinking Ability, Very Low to Low Average (5<sup>th</sup> percentile) in Cognitive Efficiency, Very Low to Low range (2<sup>nd</sup> percentile) in Working Memory, Very Low to Low (1<sup>st</sup> percentile) in Broad Attention, and in the Very Low range (1<sup>st</sup> percentile) in Executive Processes.<sup>109</sup> Student’s score on the Trail Making Test, Student’s score on Part B was depressed due to a deficit in the ability to recall the alphabet in a sequential manner, and his/her overall score indicated significant deficiencies in speed and efficiency.<sup>110</sup> On the Wisconsin Card Sorting Test – 64 Card Version (“WCST-64”), which measures neuropsychological and executive functioning, Student’s scores reflected Very Low to Low concentration, planning, organization, cognitive flexibility in shifting sets, working memory, and inhibition of impulsive responding.<sup>111</sup>

On the Behavior Assessment System, two of Student’s teachers described Student as a student “with Clinically Significant Externalizing Problems (hyperactivity, aggression, and conduct problems). Both teachers also endorsed symptoms of depression. Both teachers identified Clinically Significant School Problems associated with attention and learning problems. Teachers also endorsed At-Risk to Clinically Significant Adaptive Skills problems associated with deficits in adaptability, social skills, leadership, study skills, and functional communications.”<sup>112</sup> Examiner B concurred with the classification of Intellectual Disability:

Results from this evaluation support continued eligibility as a student with an Intellectual Disability. It also revealed Very Low language proficiency in both languages. Results also suggest low reasoning, working memory, and processing speed deficits that may lead to poor decision making especially when needing to make decisions fast, when the situation (stimulus) changes,

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<sup>105</sup> *Id.* at 28 (319).

<sup>106</sup> P31:1 (465).

<sup>107</sup> *Id.*

<sup>108</sup> *Id.* at 5 (469).

<sup>109</sup> *Id.* at 5-6 (469-70)

<sup>110</sup> *Id.* at 6 (470).

<sup>111</sup> *Id.* at 7 (471).

<sup>112</sup> *Id.* at 7 (471).

or when [s/he] needs to explain/communicate [his/her] thoughts. Results also suggest that these deficits are manifested as clinically significant externalizing problems (hyperactivity, conduct problems, aggression).<sup>113</sup>

The only reference to head trauma in the evaluation was as follows:

A 2017 psychological evaluation reported, and [Petitioner] confirmed, several head injuries. She was unable to confirm if they resulted in concussions or loss of consciousness because they occurred when she was in the United States.<sup>114</sup>

34. On July 8, 2019, upon a review of the Bilingual Neuropsychological Evaluation, School A issued a Final Eligibility Determination changing his/her disability classification to Traumatic Brain Injury (“TBI”).<sup>115</sup> In the Evaluation Summary Report, the Description of Concerns in mathematics was as follows: “[Student’s] math teacher reports that in class, [s/he] has improved in being able to advocate for [her/himself] by asking clarifying questions and taking notes in class. [His/her] teachers would like to see [Student] continue to ask questions when [s/he] is confused and engage in lessons. [Student] struggles to stay on task and is often distracted by peers, [her/his] chromebook, or listening to music.”<sup>116</sup> In Reading, the Description of Concerns was as follows:

[Student] is able to work more effectively with the use of chunked materials, visual organizers, and a quiet environment. [Student] is engaged in [her/his] readings when [s/he] is on task. [S/he] also enjoys being given responsibility. [His/her] decoding skills can increase over time and can be seen as a relative strength for [her/him], as well as [her/his] vocabulary. At times [Student] advocates for [him/herself] and will ask questions if [she] is unclear or uncertain about what [s/he] is supposed to do, but often [s/he] doesn’t ask for help unless approached by a teacher. His/her listening comprehension outstrips [her/his] reading comprehension, but is often not enough to help her/him with more complex analysis of characters or text structure on grade level. [S/he] is able to engage in analytical discussion of high-interest material on [her/his] independent level, but struggles to stay focused and comprehending during whole-group work of grade level texts.<sup>117</sup>

In Written Expression, the Description of Concerns was as follows:

It has been recommended that [s/he] attend lunch tutoring to receive attention on Tuesdays and Thursdays, but [Student] has not shown up. If [Student] is to successfully pass English for Q4, [s/he] will need to get to class on time, remain in class, ignore peer distractions during class, refrain from distracting [her/his] peers, and produce work. [Student’s] English teacher knows that

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<sup>113</sup> *Id.* at 8 (472).

<sup>114</sup> *Id.* at 2 (466).

<sup>115</sup> R42:7 (352).

<sup>116</sup> R42:9 (354).

<sup>117</sup> *Id.* at 11 (356).

[s/he] is capable of producing quality work, based on [her/his] class participation, which can be meaningful at times and the fact that [s/he] has done well in English in the past. However, [s/he] needs to produce written work and complete assigned assessment to receive a grade for English.<sup>118</sup>

In Emotional, Social and Behavioral Development, the Description of Concerns was as follows:

[Student] experiences large challenges with defiance toward adults and rules, impulse control, emotion regulation, and emotional awareness. With academic work, it appears as though [Student] has very little intrinsic motivation, and [s/he] requires great amounts of attention and prompting to do academic work. In [Student's] attempts to connect with others, [s/he] can be found socializing with individuals outside of school who are not healthy for [Student's] overall well being, and these friends encourage [Student] to engage in unsafe behavior. During the school day, this translates to [Student] exhibiting increased aggression, although not always physical, towards peers and a growing disinterest in engaging in academic work.<sup>119</sup>

Based on findings from a recent Occupational Therapy ("OT") evaluation, Student was found to be qualified for increased OT services to improve his/her visual perception, handwriting, typing, sensorial, and self-regulation skills, and would benefit from 180 minutes/month of OT services outside of general education.<sup>120</sup>

The IEP team concluded that Student does not meet all of the criteria for Intellectual Disability."<sup>121</sup> The team determined that Student was eligible for special education services under the classification of Traumatic Brain Injury ("TBI").<sup>122</sup>

35. On August 26, 2019, School A issued an Amended IEP changing Student's classification to TBI and prescribing three hours per month of OT services inside general education.<sup>123</sup> In the area of Emotional, Social, and Behavioral Development, the Present Levels of Academic Achievement and Functional Performance included the following:

Over the past year, [Student] has been working with different counselors through local clinics for therapeutic support and mentorship. Through these sessions, counselors note that [Student] is a kind and thoughtful student but has experienced challenges with managing [her/his] impulses, distress or frustration, and [Student] is working toward healthy ways to express [her/his] anger... When asked about any concerns she might have, [Student's] mother shared that she is concerned about [Student's] defiant and angry behavior at home, which she notes began after [Student's] cell phone was taken away... In counseling at [School A], [Student] is inconsistent in [his/her] engagement

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<sup>118</sup> *Id.* at 14 (359).

<sup>119</sup> *Id.* at 43 (360).

<sup>120</sup> *Id.* at 18 (363).

<sup>121</sup> R42:25 (370).

<sup>122</sup> *Id.* at 23(368).

<sup>123</sup> R44:1, 14 (372, 388).

with sessions. Initially, [Student] was focused and participated openly and fully in conversations and activities. Over time, [Student] has become more disengaged, and it has been challenging for the counselor to motivate and engage with [Student]. In response, [Student] has been doing play therapy and theraplay to build a stronger attachment to the counselor and counseling setting. According to the Strengths and Difficulties questionnaire administered to [Student's] teacher in April 2018, [Student] scored into the high range for levels of overall stress, challenges with focus and concentration, and behavior difficulties. [Student's] team is currently working toward implementing a new BIP for [Student] to help [her/him] have better tools that assist [him/her] with focusing and self-regulation in the classroom. Moving forward, [Student] should work toward increasing an awareness about how [s/he] is feeling and utilizing age appropriate coping strategies that help [her/him] manage challenging emotions.<sup>124</sup>

The Amended IEP included two behavioral goals:

- (1) [Student] will gain an increased awareness about how [s/he] is feeling, as evidenced by identification of [her/his] triggers and an ability to share how [s/he] is feeling...
- (2) [Student] will utilize age appropriate coping strategies and modes of self-expression, such as mindfulness skills or expressing [her/his] feelings, to handle emotions such as anger, sadness, and frustration...<sup>125</sup>

The Amended IEP prescribed 23 hours per month of specialized instruction outside general education, 38.5 hours per month of specialized instruction inside general education, 120 minutes per month of BSS, and 180 minutes per month of OT services.<sup>126</sup>

36. Student's schedule for the 2019-20 school year outside general education included Reading for two periods, Math Support for two periods, and Science for four periods.<sup>127</sup>

37. In the fall of 2019, Student scored 196 (4<sup>th</sup> percentile) on the MAP Mathematics Student Progress Report ("MAP"). In the spring of 2018, s/he scored 194 (3<sup>rd</sup> percentile). In Reading, s/he scored 202 in the spring of 2018 (17<sup>th</sup> percentile) and 196 (9<sup>th</sup> percentile) in the fall of 2019.<sup>128</sup>

38. On January 31, 2020, School A issued an IEP Progress Report – Annual Goals. Student was reported to be progressing on his/her first Math goal, but had regressed to making no progress on the multiplication/division goal. In Reading, s/he was not making progress on either goal. In Written Expression and Behavior, s/he was progressing on the goal of writing three sentences using topical vocabulary, but the spelling goal had not yet

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<sup>124</sup> Id. at 11 (385).

<sup>125</sup> Id. at 12 (386).

<sup>126</sup> Id. at 14 (388).

<sup>127</sup> R41:1 (344).

<sup>128</sup> P29:10 (455).

been introduced. In Behavior and Motor Skills, s/he was not making progress on either goal.<sup>129</sup>

39. On January 15, 2020, School A updated Student's BIP. The BIP was developed to address off-task behavior, "e.g. looking around, looking at another website on computer, noncompliance, etc.," and disruptive behavior, "When the student is engaging in behaviors that cause interruption to classroom and/or peers (e.g. calling out, inappropriate language, talking to peers during instruction, etc.)"<sup>130</sup> The BIP required Student to receive positive social reinforcement (praise, positive adult attention) on scheduled intervals, whether or not s/he has engaged in a target behavior, except it is to be delayed so as not to provide reinforcement while actually engaged in a target behavior. "All target behaviors should be ignored, unless they are unsafe. Do not verbally engage (ex. 'don't do that,' 'stop that'), do not follow/chase [REDACTED], do not block an exit). If a behavior is unsafe and cannot be ignored, follow the [School A] discipline protocol. Unsafe behaviors are defined as behaviors that can potentially cause physical danger to [Student], school staff, or [her/his] classmates, but also verbal threats or explicit language that make others feel unsafe." The BIP also would reward Student with five-minute breaks for completed work assignments. If Student leaves campus without permission, s/he would not be admitted back into the building that day. If s/he refuses to turn in his/her cellphone, his/her mother would be contacted to come to school to get the phone. If the phone still cannot be acquired, Student would receive an in-school suspension.<sup>131</sup>

## CONCLUSIONS OF LAW

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

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: 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.<sup>132</sup>

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<sup>129</sup> P21:32-38 (323-29).

<sup>130</sup> R37:1 (292).

<sup>131</sup> *Id.* at 2 (293).

<sup>132</sup> D.C. Code Sect. 38-2571.03(6)(A)(i).

The issues in this case involve the alleged failure to develop appropriate IEPs for Student and the alleged failure to implement one of Student's IEPs. Under District of Columbia law, the Respondent bears the burden of persuasion for the alleged failures to develop appropriate IEPs; Petitioner bears the burden as to the alleged failure to implement the 2017-18 IEP. The burden of persuasion shall be met by a preponderance of the evidence.<sup>133</sup>

**Whether School A failed to provide Student's an appropriate Individualized Education Program for the 2017-18 school year.**

The Supreme Court's first opportunity to interpret the predecessor to IDEA, The Education of the Handicapped Act ("EHA"), came in *Board of Education of the Hendrick Hudson Central School District v. Rowley*.<sup>134</sup> The Court noted that the EHA did not require that states "maximize the potential of handicapped children 'commensurate with the opportunity provided to other children.'"<sup>135</sup> Rather, the Court ruled that "Implicit in the congressional purpose of providing access to a 'free appropriate public education' is the requirement that the education to which access is provided be sufficient to confer some educational benefit upon the handicapped child..."<sup>136</sup> Insofar as a State is required to provide a handicapped child with a 'free appropriate public education,' we hold that it satisfies this requirement by providing personalized instruction with sufficient support services to permit the child to benefit educationally from that instruction... In addition, the IEP, and therefore the personalized instruction should be formulated in accordance with the requirements of the Act and, if the child is being educated in the regular classrooms of the public school system, should be reasonably calculated to enable the child to achieve passing marks and advance from grade to grade."<sup>137</sup>

More recently, the Court considered the case of an autistic child under IDEA who, unlike the student in *Rowley* was not in a general education setting.<sup>138</sup> The Tenth Circuit had denied relief, interpreting *Rowley* "to mean that a child's IEP is adequate as long as it is calculated to confer an 'educational benefit [that is] merely... more than *de minimis*.'"<sup>139</sup> The Court rejected the Tenth Circuit's interpretation of the state's obligation under IDEA. Even if it is not reasonable to expect a child to achieve grade level performance,

... [h]is educational program must be appropriately ambitious in light of [his/her] circumstances, just as advancement from grade to grade is appropriately ambitious for most children in the regular classroom. The goals may differ, but every child should have the chance to meet challenging objectives... It cannot be the case that the Act typically aims for grade-level advancement for children with disabilities who can be educated in the regular classroom, but is satisfied with barely more than *de minimis* progress for those

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<sup>133</sup> *Schaffer v. Weast*, 546 U.S. 49 (2005).

<sup>134</sup> 458 U.S. 176, 187 (1982).

<sup>135</sup> *Id.* at 189-90, 200

<sup>136</sup> *Id.* at 200.

<sup>137</sup> *Id.* at 203-04.

<sup>138</sup> *Andrew F. ex rel. Joseph F. v. Douglas County School District RE-1*, 137 S.Ct. 988 (2017).

<sup>139</sup> *Id.* at 997.

who cannot.<sup>140</sup>

In *Endrew F.*, the Supreme Court held that an IEP must be designed to produce more than minimal progress in a student's performance from year to year:

When all is said and done, a student offered an educational program providing 'merely more than *de minimis*' progress from year to year can hardly be said to have been offered an education at all. For children with disabilities, receiving instruction that aims so low would be tantamount to 'sitting idly... awaiting the time when they were old enough to drop out...' The IDEA demands more. It requires an educational program reasonably calculated to enable a child to make progress appropriate in light of the child's circumstances."<sup>141</sup>

### ***Statute of Limitations***

Respondent argued that all allegations relating to events occurring more than two years prior to the filing of the *Complaint* are barred by the statute of limitations.<sup>142</sup> I resolved this issue in Petitioner's favor in the Order on Motion to Strike Respondent's Answer and to Hold in Abeyance Respondent's Motion to Partially Dismiss Petitioner's Complaint; Order on Respondent's Partial Motion to Dismiss. The two-year limitation applies unless the LEA is guilty of the following intentional acts:

- (1) Specific misrepresentations by the LEA that it had resolved the problem forming the basis of the due process complaint; or
- (2) The LEA's withholding of information from the parent that was required under this part to be provided to the parent.<sup>143</sup>

Petitioner does not allege that Respondent is guilty of misrepresentation or withholding of information that would preclude application of the statute. Therefore, this issue turns on whether Petitioner knew or should have known about key elements of the IEPs developed prior to July 30, 2018.

As discussed in the prior Order, the regulations require that a Prior Written Notice ("PWN") must be provided "in the native language of the parent..."<sup>144</sup> School A's version of a PWN was signed by Petitioner on September 27, 2017, for the December 2017 IEP. As previously discussed, it violated Section 300.503(c) by not being provided in Petitioner's native language. More important, the document is confusing even to someone who is perfectly literate in English. In the section headed "Type of Service - Specialized Instruction," "Current Number of Service Hours/Week" has a handwritten modification changing "Week" to "Month," the word "Inside" is inserted, and a zero is entered on the line "hours/week." Thus, these entries presumably indicate that Student's IEP as of September 27, 2017 had no

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<sup>140</sup> *Id.* at 1000-01 (citations omitted).

<sup>141</sup> 137 S.Ct. at 1000-01.

<sup>142</sup> 20 U.S.C. §1415(f)(3)(C); 34 C.F.R. §300.511 (e).

<sup>143</sup> 34 C.F.R. §300.511(f).

<sup>144</sup> 34 C.F.R. §300.503(c).

specialized instruction inside general education. The next line of that section indicates that Student has 19 hours/week outside general education. The section to the right, headed “Type of Proposed Amendment, has four circles that can be checked. “Proposed Increase in Service Hours” is checked. “Proposed Decrease in Service Hours” is checked, but it appears that an effort was made to obliterate the check mark. Thus, this section suggests that Student’s service hours will be *increased* in the proposed new IEP. The next line, “C,” reiterates the “Current Total Special Education Service Hours/Week” to be 19 hours per week. Line D, “Proposed Total Special Education Service Hours/Week” was listed as 60 hours with “week” crossed off and “month” inserted. The narrative section entitled “Service Data Supporting the Proposed Change” includes no data, but states “[Student] will have daily inclusion support in all core academic classes: English, math, and science. [S/he] will receive daily reading and writing intervention via the second period of English and Math support class.” Thus, one section of the notice indicates that Student’s service hours will be increased. However, even assuming there are but 4 weeks in a month, 60 hours per month constitutes a 16 hour *decrease* in services. While the misrepresentation as to an increase in services may not have been intentional, that box was checked, and the check mark in the “Proposed Decrease” circle was obliterated.

On October 5, 2017, Petitioner signed School A’s “Standard IEP Amendment Form (LEA Initiated). This document specified that “The LEA proposes to add inside hours of 37.5 hours per month (~9.5 hours per week) and increase outside hours from 19 hours per week to 22.5 hours per month (~5.5 hours per month).” Once again, School A misstated that Student’s outside hours would be *increased*. Nineteen hours per week is at least 76 hours per month, so 22.5 hours per month constitutes a substantial decrease. Petitioner’s signature indicated her agreement to these changes “without convening an IEP Team meeting.” School A issued the Amended IEP on December 4, 2017. None of Student’s goals were changed from the May 11, 2017 IEP. The IEP team prescribed 22.5 hours per month of specialized instruction outside general education and 37.5 hours per month of specialized education inside general education. While Petitioner may well have believed that School A was increasing Student’s specialized instruction services, it actually represented a reduction of 53.5 hours per month of specialized instruction outside general education,.

The PWN in Petitioner’s Exhibit 5, dated February 20, 2018, indicates that Student currently received 37.5 hours per month of services inside general education and 22.5 hours per month of services outside general education, for a total of 60 hours per month. The PWN purports a “Proposed Increase in Service Hours,” as line D indicates that the Proposed Total Special Education Service Hours Per Week was to be increased to 69.5 hours per *week*. However, in the attached Amended IEP, dated March 5, 2018, the IEP Team prescribed 69.5 hours per *month*. So instead of the increase of 218 hours per month promised in the PWN, the IEP provided an increase of only 9.5 hours per month, all inside general education. While this may have been the result of an innocent error on the part of Witness C, who drafted the PWN, when considered in context with the misleading PWN issued in October 2017, Petitioner was again misled as to the changes to Student’s IEP. Based on this misinformation, Petitioner signed School A’s “Standard IEP Amendment Form (LEA Initiated)” on February 27, 2018, waiving an IEP meeting. Neither the February 20, 2018 PWN nor the February 27, 2018 document was provided in Spanish. Thus, when School A issued the Amended IEP on March 5, 2018, which also was not issued in Spanish, Petitioner was likely not clear as to the level of specialized services outside general education Student was receiving.

On May 3, 2018, School A conducted an IEP Annual Review Meeting. Witness B and Witness C both testified that a translator was present for the meeting. However, the Meeting Notes indicate that Petitioner did not know the purpose of the meeting. She asked if Student would have the same IEP next year, asked how Student was doing in her/his classes, asked about her/his effort this term, and expressed concern about Student's ability to pay attention in class. At the hearing, Petitioner testified that School A did not explain the purpose of the meeting or the changes to Student's IEP. The IEP Team made no changes to Student's service hours from the March 5, 2018 Amended IEP.

The documentation and testimony offered at the hearing only confirmed my conclusion that Petitioner did not know, and cannot be held responsible for knowing, the significance of the changes School A made to Student's IEP during the 2017-18 school year. School A failed to provide PWNs in Spanish as required by Section 330.503(c). 34 C.F.R. Section 300.322(e) also required the LEA to "take whatever action is necessary to ensure that the parent understands the proceedings of the IEP Team meeting." While it had not been enacted during the 2017-18, D.C. Code Section 2-1933 now requires public charter schools to "provide translations of essential information for students and parents or guardians into any non-English language, which would have required Student's IEP to be provided in Spanish. While School A provided a translator at the May 3, 2018 IEP Team meeting, by that time, Student's specialized instruction outside of general education had already been substantially reduced, and School A could honestly say at that meeting that his/her services were not being changed. Therefore, I reaffirm my conclusion in the September 18, 2020 Order that based on (1) misinformation in School A's PWNs that were not provided in Petitioners' native language, (2) Petitioner's waiver of the December 2017 and March 2018 IEP Team meetings based on the misinformation in the PWNs, and (3) the May 3, 2018 IEP that indicated that Student's services in the 2018-19 IEP would remain the same, Respondent has not met its burden of proving that Petitioner knew or should have known the amount, type, and significance of the special education services Student was receiving on his/her 2017-18 and 2018-19 IEPs.

### ***Appropriateness of the IEP***

Student arrived at School A in 2017 with an IEP that provided 19 hours per week of specialized services outside special education. When School A elected to amend her/his IEP, *Endrew F.* required it to develop an IEP that was reasonably calculated to enable Student to make progress appropriate in light of her/his circumstances. As was previously discussed, School A provided no information in its PWN on September 17, 2017, on Standard IEP Amendment Form issued on October 5, 2017, or on the Amended IEP issued on December 4, 2017 to explain the reasons for the reduction of 53.5 hours per month of specialized instruction outside general education. Student's Math and Reading PLOPs and goals were unchanged from the May 11, 2017 IEP. Thus, the reduction in intensive services outside general education was not based on an improvement in Student's performance. Rather, Witness B and Witness C testified that Student was academically "more advanced" than her/his classmates in the self-contained class to which s/he was assigned. Witness C testified that Student would have been bored had s/he remained in the self-contained class. The witnesses testified that Student was better served by providing her/him reading and math support classes available only in School A's general education classes, while continuing to

provide 30% of the specialized services outside general education prescribed in the previous IEP.

The Standard IEP Amendment Form, issued on October 25, 2017, stated that the proposed amendment was based on “multiple diagnostic assessments in reading, writing, and math indicating that [Student] is capable of achieving in an inclusion setting. The transition from elementary services to middle school services is the primary reason for the specific hours changes. The justification for individual testing is actually supportive of small group testing not individual.” However, School A has identified none of the assessments it suggests supported the reduction in specialized instruction outside general education. In fact, the unchanged PLOPs from May to December 2017 indicate that no such assessments were conducted, or the results were not considered in making the determination to reduce drastically Student’s service hours outside general education. Moreover, School A’s justification for removing Student from most of her/his self-contained classes is unpersuasive. While s/he may have been more “advanced” than her/his classmates, School A apparently rejected the option of developing individualized lesson plans for Student in the small class setting to meet Student’s unique needs.

School A had the burden of proving by a preponderance of the evidence that it provided an appropriate IEP. Despite reducing Student’s intensive services by over 70%, and having failed adequately to inform Petitioner of the nature and significance of the reductions, School A argued that Petitioner had not even made a *prima facie* case of a denial of FAPE. On the contrary, I conclude that Petitioner has made a *prima facie* case, and Respondent has failed to meet its burden of proving that its reduction in Student’s specialized instruction outside general education was based on any objective data in the record. Therefore, I conclude that the Amended IEP issued on December 4, 2017 was not an appropriate IEP for Student.

#### **Whether School A failed to implement Student’s 2017-18 IEP.**

Petitioner offered no evidence that School A failed to implement the May 11, 2017 IEP until it was amended in December 4, 2017. Respondent concedes that it implemented the Amended IEP thereafter. As I have found that IEP to have been inappropriate, I conclude that Respondent failed to implement an appropriate IEP from December 5, 2017 throughout the remainder of the 2017-18 school year.

#### **Whether School A failed to provide an appropriate IEP on May 3, 2018 for the 2018-19 school year.**

Student’s May 11, 2017 IEP provides that s/he was performing Math at a grade reading at a grade D level and reading at a grade C level, respectively two and three grades below her/his grade level at the time. On the IEP School A developed on May 3, 2018, Student’s level of specialized instruction outside general education was 23 hours per month, an increase of 30 minutes, but well below the 76 hours prescribed on his/her May 11, 2017 IEP. Student’s Math PLOP indicated that his/her MAP scores placed him/her at the 2<sup>nd</sup> percentile. His/her I-Ready assessment placed him/her at a grade C level, one grade lower than the PLOP reported on her/his May 2017 IEP, despite progressing on all three Math goals on the April 20, 2018, Progress Report. Student’s MAP scores in Reading in the winter of 2018 placed her/him at a grade C level, the same as the assessment in May 2017. S/he was

progressing on the Reading fluency goal, but the two other goals had not been introduced, and s/he had regressed to be making no progress on both Written Expression goals. Thus, School A has offered no objective data to indicate that Student made any academic progress during the 2017-18 school year, despite subjective assurances to the contrary from Respondent's witnesses during the hearing.

In my analysis of the first Issue Presented, I concluded that Respondent denied Student a FAPE when it developed an IEP that significantly reduced Student's specialized instruction outside general education without any objective data to support the reduction. After implementing the changes in December 2017, data reveals that Student had made no objective improvement in Math or Reading, and had made limited progress on his/her IEP goals when his/her May 3, 2018 IEP was developed. Therefore, I conclude that School A has failed to meet its burden of proving that Student's 2018-19 IEP, which reflects the reduced level of specialized instruction services prescribed by School A in December 2017, is reasonably calculated to enable Student to make progress appropriate in light of her/his circumstances.

**Whether School A failed to provide an appropriate IEP on April 25, 2019 for the 2019-20 school year.**

Student's May 11, 2017 IEP provides that s/he was performing Math at a grade reading at a grade D level and reading at a grade C level, respectively two and three grades below her/his grade level at the time. The Math PLOP on the April 25, 2019 IEP reveals that Student was performing at a grade C level on the January 2019 MAP, one grade lower than s/he was performing on his/her May 2017 PLOP. In Reading, his/her January 2019 MAP score was in the 1<sup>st</sup> percentile of peers nationwide, and her/his score had dropped from 195 in September 2018 to 171 in January 2019. S/he had "not made progress since the 1<sup>st</sup> quarter. [Student] requires extensive one-on-one attention..." His/her MAP Reading score reflected a grade A level, one grade below his/her assessment in May 2017. In the third reporting period Progress Report, issued the same day as the IEP, Student was reported to have regressed to making no progress on both Math goals, and was also making no progress on the Reading and Written Expression goals. Thus, by objective measures, Student had regressed in both Math and Reading since the development of his/her May 2017 IEP, and was not making progress on IEP goals. Despite this regression, and despite the Reading teacher's suggestion that Student requires extensive one-on-one attention, School A again prescribed only 23 hours per month of specialized instruction outside general education.

On July 18, 2019, School A reviewed Examiner B's June 29, 2019 Bilingual Neuropsychological Evaluation of Student. Student scored in the Very Low range in General Intellectual Ability and Verbal Ability, Low to Low Average in Thinking Ability, Very Low to Low Average in Cognitive Efficiency, Very Low to Low range in Working Memory, Very Low to Low in Broad Attention, and in the Very Low range in Executive Processes. Student was unable to recall the alphabet in a sequential manner. Upon its review of Examiner B's evaluation, School A amended the April 25, 2019 IEP. However, it made no change in Student's individualized instruction. Rather, it reclassified him/her with a traumatic brain injury despite Examiner B's finding that Student's head injury was not documented and Examiner B's recommendation that Intellectual Disability remained the appropriate classification.

In the spring of 2018, Student scored 196 (4<sup>th</sup> percentile) on the MAP Mathematics Student Progress Report (“MAP”). Her/his scores were lower, 194 (3<sup>rd</sup> percentile), in the fall of 2019. In Reading, s/he scored 202 in the spring of 2018 (17<sup>th</sup> percentile) and lower, 196 (9<sup>th</sup> percentile), in the fall of 2019.

The record reflects that Student had made no objective academic progress since her/his enrollment at School A when the IEP Team met to develop his/her April 25, 2019 IEP. The IEP Team again made no significant change to his/her level of specialized instruction since it reduced such services from 76 to 22.5 hours per month in December 2017. As with the previous IEPs developed by Respondent, Respondent presented no objective evidence that the April 25, 2019 was likely to produce results any different from those in 2017 and 2018 that failed to enable Student to make progress in light of his/her circumstances. Therefore, I conclude that Respondent denied Student a FAPE by failing to provide an appropriate IEP for the 2019-20 school year.<sup>145</sup>

### **RELIEF**

For relief, Petitioner requested (1) funding for independent comprehensive psychological, speech and language, auditory processing, and occupational therapy evaluations; (2) compensatory education, (3) and attorney’s fees.

Petitioner did not allege that Respondent had failed to evaluate Petitioner in all areas of suspected disability, nor that Respondent failed to conduct necessary triennial evaluations. Witness A opined that School A should not have reduced student’s intensive specialized instruction without conducting evaluations. However, my ruling was based on Respondent’s failure to provide any objective measure that Student was making progress after Respondent reduced his/her services. Therefore, there is no justification for the independent evaluations requested by Petitioner.

Petitioner offered no evidence of an appropriate type or amount of compensatory education services to which Student is entitled. Hearing Officers may not award compensatory education services based solely on the amount of services an LEA failed to provide.

[W]e part company with the Reids regarding how such awards are calculated. They urge us to adopt a presumption that each hour without FAPE entitles the student to one hour of compensatory instruction, a standard apparently embraced by several courts... In our view, this cookie-cutter approach runs counter to both the "broad discretion" afforded by IDEA's remedial provision and the substantive FAPE standard that provision is meant to enforce.

More specifically, as the Fourth Circuit has explained, “compensatory education involves discretionary, prospective, injunctive relief crafted by a court to remedy what might be termed an educational deficit created by an educational agency’s failure over a give period of time to provide a FAPE to a

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<sup>145</sup> D.C. Code §2-1933, which became effective on April 11, 2019, required Respondent to provide Petitioner Student’s IEP in Spanish, which it did not do.

student... Overlooking this equitable focus, the Reids' hour-for-hour formula in effect treats compensatory education as a form of damages – a charge on school districts equal to expenditures they should have made previously. Yet “the essence of equity jurisdiction” is “to do equity and to mold each decree to the necessities of the particular case. Flexibility rather than rigidity has distinguished it...” In keeping with that principle of case-specific flexibility, we agree with the Ninth Circuit that “there is no obligation to provide a day-for-day compensation for time missed. Appropriate relief is relief designed to ensure that the student is appropriately educated within the meaning of IDEA...”<sup>146</sup>

Thus, Petitioner has the burden of establishing the type and amount of compensatory services that will compensate the student for the services that were denied. Absent such a showing, any award by the Hearing Officer would be arbitrary.

Accordingly, just as IEPs focus on disabled students' individual needs, so must awards compensating past violations rely on individualized assessments... In every case, however, the inquiry must be fact-specific and, to accomplish IDEA's purposes, the ultimate award must be reasonably calculated to provide the educational benefits that likely would have accrued from special education services the school district should have supplied in the first place.<sup>147</sup>

Thus, the record lacks evidence of (1) how much academic growth could be reasonably be expected of Student with an appropriate IEP since December 4, 2017, and (2) what kind and amount of services would put Student in the academic position s/he would have been in if Respondent had provided 19 hours per week of specialized instruction outside general education since December 4, 2017. The D.C. Circuit has strongly suggested that Hearing Officer Determinations that find a denial of FAPE must address compensatory education services.<sup>148</sup> in *B.D. v. District of Columbia*, the Court suggested that assessments addressed at determining the nature and amount of service to address the appropriate compensation for a specific student could ameliorate the fact-specific requirement. “Nothing in the Hearing Officer's Decision required updating or supplementing the compensatory education award upon completion of the new assessments.”<sup>149</sup> To that end, I will order a limited amount of compensatory education services as well as an assessment funded by Respondent to determine the nature and amount of additional services necessary to compensate Student for the denial of FAPE found herein.

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<sup>146</sup> *Reid v. District of Columbia*, 401 F.3d 516, 523-24, (D.C. Cir. 2005), citations omitted.

<sup>147</sup> *Id.*, 401 F.3d at 524.

<sup>148</sup> *B.D. v. District of Columbia*, 817 F.3d 792, 799, 800 (D.C. Cir. 2016).

<sup>149</sup> *Id.* at 799.

## ORDER

Upon consideration of the *Complaint*, Respondent's *Response*, the exhibits from the parties' disclosures that were admitted into evidence, and the testimony presented during the hearing, it is hereby

### **ORDERED**, that

- (1) Respondent shall fund a total of 100 hours of independent tutoring services for Student in Reading, Mathematics, and Written Expression, with no restrictions as to the time of day or deadlines for the completion of such services.
- (2) Respondent shall fund an independent evaluation to determine (1) how much academic growth could be reasonably be expected of Student with an appropriate IEP (i.e., 19 hours/week of specialized instruction outside general education) since December 4, 2017, and (2) what kind and amount of services would put Student in the academic position s/he would have been in had Respondent provided him/her 19 hours/week of specialized instruction outside general education from December 5, 2017 until February 6, 2020.
- (3) Within thirty (30) days of receipt of the independent evaluation, Respondent shall convene an Multidisciplinary Team meeting to review the evaluation and to determine an appropriate amount of compensatory education services for the lack of an appropriate amount of specialized instruction outside of general education for Student for the period December 5, 2017 to February 6, 2020.
- (4) All other requests for relief are denied.

## APPEAL RIGHTS

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

Terry Michael Banks  
Terry Michael Banks  
Hearing Officer

Date: October 26, 2020

Copies to: Attorney A, Esquire  
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OSSE Division of Specialized Education  
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