

OSSE  
Office of Dispute Resolution  
October 09, 2023

Parent on Behalf of Student, <sup>1</sup>	HEARING OFFICER’S DETERMINATION
Petitioner,	Hearing Dates: September 12, 2023 September 13, 2023 September 14, 2023 September 26, 2023
v.	
District of Columbia Public Schools (Local Education Agency “LEA”)	Counsel for Each Party listed in Appendix A
Respondent.	<u>Hearing Officer:</u> <u>Coles B. Ruff, Esq.</u>
Case # 2023-0063	
Date Issued: October 9, 2023	

<sup>1</sup> Personally identifiable information is in the attached Appendices A & B.

## **JURISDICTION:**

The hearing was conducted, and this decision was written, pursuant to the Individuals with Disabilities Act (“IDEA”), P.L. 101-476, as amended by P.L. 105-17 and the Individuals with Disabilities Education Improvement Act of 2004, the District of Columbia Code, Title 38 Subtitle VII, and the District of Columbia Municipal Regulations, Title 5 Chapter 5-A30.

## **BACKGROUND AND PROCEDURAL HISTORY:**

The student who is the subject of this due process hearing (“Student”) resides with Student's parent (“Petitioner”) in the District of Columbia, and the District of Columbia Public Schools (“DCPS”) is Student's local education agency (“LEA”).

Student has been determined eligible for special education and related services pursuant to IDEA with a disability classification of Specific Learning Disability (“SLD”). Student was first found eligible for special education in February 2020 when Student attended a DCPS school (“School A”). DCPS developed an initial individualized educational program (“IEP”) for Student in March 2020. At the start of school year (“SY”) 2020-2021, Petitioner placed Student in a non-public special education day school (“School B”) and sought and eventually obtained DCPS funding for Student’s attendance at School B for SY 2020-2021 and SY 2021-2022.

On January 13, 2022, DCPS convened an annual IEP review meeting and updated Student’s IEP. DCPS notified Petitioner that the IEP could be implemented at Student’s neighborhood DCPS school (“School C”). Petitioner maintained Student at School B for SY 2022-2023.

DCPS convened an annual IEP review meeting on May 30, 2023, and updated Student’s IEP. Again, DCPS notified Petitioner that Student's IEP could be implemented at School C. Petitioner has continued to maintain Student at School B, and Student currently attends School B with parental funding.

Petitioner filed a due process complaint (“DPC”) on April 12, 2023, and an amended DPC on July 26, 2023, alleging that DCPS denied Student a free appropriate public education (“FAPE”) because, inter alia, the IEPs and placements that DCPS proposed for Student for SY 2022-2023 and SY 2023-2024 are inappropriate.

## **Relief Sought:**

Petitioner seeks as relief that DCPS be found to have denied Student a FAPE and that DCPS be ordered to reimburse Petitioner for tuition and related expenses she has already paid, including transportation costs, for SY 2022-2023 and SY 2023-2024, including the summers of 2022 and 2023. Petitioner also requests that School B be determined Student’s educational placement for SY 2023-2024.

**LEA Response to the Complaint:**

Respondent filed a response to the Petitioner DPC and filed a response to the amended DPC on August 9, 2023. In its response to the amended DPC, DCPS stated, inter alia, the following:

DCPS has not denied Student a FAPE and asserts that the DPC should be dismissed. Petitioner parentally placed Student in a private school and has filed four due process complaints against DCPS since August 2020. DCPS has proposed IEPs and placements for each school year that IEP teams determined represented Student's least restrictive environment ("LRE"). DCPS notified Petitioner that Student's local DCPS school could implement the IEPs.

In February 2023, a DCPS psychologist completed a psychological report on Student. In March 2023, DCPS completed an occupational therapy assessment, and on March 9, 2023, the multidisciplinary team ("MDT") met and determined Student's continued eligibility. DCPS provided Petitioner a prior written notice ("PWN") on April 18, 2023, which noted Student's eligibility for special education services as a student with an SLD in the areas of reading, writing, and math and noted Student eligibility for occupational therapy ("OT") and behavior support services ("BSS").

On May 30, 2023, a team met and proposed an IEP for Student. The MDT determined that the IEP and placement represent the Student's LRE. DCPS informed Petitioner that Student's local DCPS school can implement the IEP for SY 2023-2024. DCPS did so well in advance of the start of SY 2023-2024 and provided Petitioner a copy of the May 30, 2023, IEP and the PWN. In the District of Columbia, a FAPE offer is made by offering an IEP before the start of the school year. DCPS has fulfilled the requirements of making a FAPE available to Student. Nothing further is required.

Even if the IEP is found to be somehow lacking, all relief should be denied because School B is not proper or appropriate for Student, as it fails to follow all OSSE certificate of approval ("COA") requirements and does not offer the specialized instruction that Petitioner asserts School B is providing Student.

**Resolution Meeting and Pre-Hearing Conference:**

The parties participated in a resolution meeting on April 27, 2023. The parties did not mutually agree to shorten the 30-day resolution period. The 45-day period began on May 13, 2023, and ended [and the Hearing Officer's Determination ("HOD") was originally due] on June 26, 2023. Petitioner filed a motion to amend her due process complaint. The DPC amendment and granting of the motion to amend extended the timeline for the HOD. The HOD is now due October 9, 2023.

The undersigned Independent Hearing Officer ("IHO") conducted a pre-hearing conference and issued a pre-hearing order ("PHO") on the original DPC and, on September 5, 2023, issued a revised PHO on the amended DPC, outlining, inter alia, the issues to be adjudicated.

## **ISSUES: <sup>2</sup>**

The issues adjudicated are:

1. Did DCPS deny Student a FAPE by failing to provide Student an appropriate educational program and placement and/or location of services for SY 2022-2023 because the IEP did not provide sufficient self-contained special education services and/or the proposed placement and/or location of services at School C was too large a setting for Student? <sup>3</sup>
2. Did DCPS deny Student a FAPE by failing to timely complete Student's reevaluations and, re-confirm Student's eligibility for special education services, and develop an IEP? <sup>4</sup>
3. Did DCPS deny Student a FAPE by failing to provide Student an appropriate educational program and placement and/or location of services for SY 2023-2024 because Student's for SY 2023-2024, because the IEP did not provide sufficient self-contained special education services and/or the proposed placement and/or location of services at School C, was too large a setting for Student? <sup>5</sup>
4. Is School B a proper placement for Student?

## **DUE PROCESS HEARING:**

The Due Process Hearing was convened on September 12, 2023, September 13, 2023, September 14, 2023, and September 26, 2023. The hearing was conducted via video teleconference.

## **RELEVANT EVIDENCE CONSIDERED:**

This Hearing Officer considered the testimony of the witnesses and the documents submitted in each party's disclosures (Petitioner's Exhibits 1 through 45 and Respondent's Exhibits 1 through

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<sup>2</sup> The Hearing Officer restated the issues at the hearing, and the parties agreed that these were the issues to be adjudicated.

<sup>3</sup> Petitioner asserts that Student's IEP should have prescribed all services outside general education with an LRE in a separate special education school.

<sup>4</sup> Petitioner asserts that evaluations were completed and reviewed on March 9, 2023, and Student's IEP should have been completed within 30 days of the eligibility determination and, in this instance, by April 9, 2023. However, the IEP was not completed until May 30, 2023, and Petitioner asserts that she did not receive a copy of the IEP until July 28, 2023.

<sup>5</sup> Petitioner asserts that Student's IEP should have prescribed all services outside general education with an LRE in a separate school.

24) that were admitted into the record and are listed in Appendix 2.<sup>6</sup> The witnesses testifying on behalf of each party are listed in Appendix B.<sup>7</sup>

## **SUMMARY OF DECISION:**

Respondent held the burden of persuasion on issues #1 and #3 after Petitioner established a prima facie case on those issues. Petitioner held the burden of persuasion on issues # 2, and #4. Based on the evidence adduced, the Hearing Officer concluded that Respondent sustained the burden of persuasion by a preponderance of the evidence on issue #1, but did not sustain the burden of persuasion by a preponderance of the evidence on issue #3. Petitioner did not sustain the burden of persuasion on issues #2 and #4. The IHO directed DCPS to amend Student's current IEP, directed DCPS to convene an IEP meeting to update Student's and to determine an appropriate placement and location of services for Student for the remainder of SY 2023-2024, and awarded Petitioner reimbursement for Student's attendance at School B for SY 2023-2024 up to and including the date that DCPS determines an appropriate placement and location of services for Student for the remainder of SY 2023-2024.

## **FINDINGS OF FACT:** <sup>8</sup>

1. Student resides with Petitioner, Student's parent, in the District of Columbia, and the DCPS is Student's LEA. Student has been determined eligible for special education and related services pursuant to IDEA with a disability classification of SLD. Student currently attends School B, a non-public special education day school. Student began attending School B at the start of SY 2020-2021. Student's parent currently funds student's attendance at School B. (Petitioner's testimony, Respondent's Exhibit 21)
2. Student began attending Pre-K at School A, Student's local DCPS. Student performed spectacularly in school through Pre-K. When Student reached kindergarten, Student's teacher identified Student as having difficulty with pre-reading skills. During SY 2019-2020, Petitioner submitted a referral to DCPS for Student to be evaluated for special

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<sup>6</sup> Any item disclosed and not admitted or admitted for limited purposes was noted on the record and in Appendix A.

<sup>7</sup> Petitioner presented four witnesses: (1) Student's parent ("Petitioner") and the following individuals who were designated as expert witnesses: (2) an independent speech-language pathologist who provided Student services, (3) a School B Administrator, and (4) a second independent speech-language pathologist who provided Student services. Respondent presented seven witnesses designated as expert witnesses: (1) a DCPS Psychologist, (2) an employee of the DCPS Language Acquisition Division, (3) a DCPS social worker, (4) a DCPS speech-language pathologist, (5) a DCPS special education teacher/LEA representative for School C, (6) DCPS LEA non-public monitor, (7) DCPS special education teacher/LEA representative/DCPS Central IEP Team. The Hearing Officer found the witnesses credible unless otherwise noted in the conclusions of law. Any material inconsistencies in the testimony of witnesses that the Hearing Officer found are addressed in the conclusions of law.

<sup>8</sup> The evidence (documentary and/or testimony) that is the source of the Findings of Fact ("FOF") is noted within parentheses following the finding. A document is noted by the exhibit number. If there is a second number following the exhibit number, that number denotes the page of the exhibit from which the fact was obtained. When citing an exhibit submitted by more than one party separately, the Hearing Officer may only cite one party's exhibit.

education services. DCPS conducted an initial psychological evaluation in January 2020. The DCPS psychologist assessed Student's intellectual and academic functioning, interviewed Student, Petitioner, Student's teachers, reviewed Student's educational records, and observed Student in the classroom. Student's cognitive functioning was assessed using the Reynolds Intellectual Assessment Scales ("RIAS-2"). Student had strong verbal and nonverbal reasoning abilities, both ranked in the above-average range, suggesting solid verbal abilities, including well-developed verbal knowledge and good comprehension. Student also had Average working memory, with relative weakness in processing speed, which fell below Average. (Petitioner's testimony, Respondent's Exhibit 3)

3. Student's academic functioning was assessed using the Woodcock-Johnson (WJ-IV) achievement test, which indicated a pattern of strengths and weaknesses. Student scored Average on Broad Math and Broad Written Language. Student's Broad Reading fell below grade level. Student's oral reading and comprehension were in the Average range. Sentence Reading Fluency fell well below grade level, indicating a weakness in reading fluency. The psychologist noted that with reading intervention both in the classroom and outside of school, Student made consistent gains in reading. However, despite the academic gains and progress, the psychologist noted that Student continued to benefit from academic interventions to support academic fluency to catch up to grade-level performance. (Respondent's Exhibit 3)
4. The evaluation report noted that during Student's early years Student lived abroad due to Petitioner's diplomatic career. Student's first two years were spent living in Columbia, South America, where Student picked up the Spanish language. Student's family later returned to the District of Columbia and had a Spanish speaker living in the family household for a few years. As a result of Student's bilingual background (speaking both English and Spanish at home), DCPS assessed Student's eligibility for English as a Second Language ("ESL") support at School A. The ESL testing was the first sign that Student had reading and writing difficulties. As a result of the testing, Student qualified for and received ESL services while attending School A. (Petitioner's testimony Respondent's Exhibit 3)
5. School A found Student eligible for special education on February 14, 2020, and developed Student's initial IEP on March 13, 2020. DCPS developed Student's initial IEP near the time DCPS shut down for COVID-19. Petitioner observed the services being provided to Student virtually through the IEP and ESL services, and Student continued to struggle. As a result, Petitioner explored other schools that could address Student's learning differences and identified School B. Student started at School B in the fall of 2020 for SY 2020-2021. (Petitioner's testimony, Respondent's Exhibits 4, 5)
6. Petitioner continued to request offers of FAPE from DCPS while Student has attended School B. On March 9, 2021, DCPS convened an annual IEP review and developed an IEP for Student that prescribed 10 hours per week of specialized instruction inside general education and related services and 5 hours per week each of specialized instruction in reading and written expression outside general education. The IEP also prescribed 180 minutes per month of direct occupational therapy outside general education and 30 minutes per month of OT consultation services. (Respondent's Exhibit 5)

7. In May 2021, DCPS conducted a reevaluation of Student. The DCPS psychologist administered the WJ-IV and Behavior Assessment System for Children, Third Edition (“BASC-3”). On May 20, 2021, DCPS issued a final eligibility report based on Student’s reevaluation. The overall summary of the report was as follows: Although Student’s academic tests/assessments were almost all on benchmark, they were still indicative of weaknesses and Student’s need for more intervention. Student’s cognition speed processing/performance fell well below average. Student’s weakness with simple or rote, typically automatic tasks that require speed negatively impacted Student’s academic fluency. Student’s had poor performance in sentence reading fluency. Student lacked foundational skills which caused Student to struggle on complex reading and writing tasks. The report also noted that Student had difficulties with attention and self-regulation, negatively impacting Student’s learning, and overall academic performance. (Witness 4’s testimony, Petitioner’s Exhibit 2, Respondent’s Exhibit 7)
8. On May 21, 2021, DCPS amended Student’s IEP. Student’s disability classification was changed to other health impairment (“OHI”) for Attention Deficit Hyperactivity Disorder (“ADHD”). The IEP included a statement that Student presents with inattentive and hyperactive behaviors, which impedes Student’s ability to fully attend in the general education curriculum. The team added math and emotional, social, and behavioral development as new areas of concern. The amended IEP also increased Student’s hours of specialized instruction to 20 hours per week, with all instructional hours outside general education. The amended IEP also prescribed 180 minutes per month each of direct OT and BSS, both outside general education, and 30 minutes per month of OT consultation services, 30 minutes per month of BSS consultation services, and 1 hour per week of specialized instruction consultation services. The amended IEP also prescribed extended school year (“ESY”) services in reading for 5 hours per day from July 12, 2021, to July 20, 2021. The PWN stated that the parent and her attorney disagreed with the hours of specialized instruction that DCPS proposed. (Respondent’s Exhibits 9, 10)
9. DCPS identified Student’s neighborhood DCPS school, School C, as the location that could implement Student’s IEP for SY 2021-2022. Petitioner refused the educational placement offered by DCPS and continued Student’s enrollment at School B for SY 2020-2021. (Petitioner’s testimony, Respondent’s Exhibit 8)
10. On January 13, 2022, DCPS convened a meeting to update Student’s IEP with current data and determine Student’s educational program for SY 2022-2023. The IEP team agreed that Student’s behavior can impact Student’s learning. The team collaboratively reviewed the data received from School B and updated Student’s goals and objectives in each area of concern, including math, reading, writing, social/emotional, and motor skills/physical development. DCPS again proposed 20 hours per week of specialized instruction, with all instructional hours outside general education. The IEP also prescribed 180 minutes per month each of direct OT and BSS, both outside general education, and 30 minutes per month of OT consultation services, 30 minutes per month of BSS consultation services, and 1 hour per week of specialized instruction consultation services. The IEP included the following classroom aides and services: “graph paper, tactile materials, multi-sensory

approach, collaboration among team members, movement breaks to improve attention and focus, daily planner, various work seating options (not adaptive seating), organization strategies, graphic organizers, teacher prompting, minimize visual clutter, access to adapted paper, slant board, and timer, teacher check-in with planner for organization.” The IEP did not prescribe ESY services, although it was noted that the team would reconvene to consider ESY later in the year. (Respondent’s Exhibits 11, 12)

11. The DCPS IEP team members informed the parent that the IEP would be implemented in a specific learning support ("SLS") classroom in a DCPS school. DCPS informed Petitioner that School C had been identified as Student's LOS for SY 2022-2023. (Petitioner's testimony, Respondent's Exhibit 14)
12. Petitioner disagreed with the number of hours of specialized instruction in the IEP. She believed that should have all service hours outside general education. Petitioner notified DCPS of her intent to maintain Student’s enrollment at School B for SY 2022-2023 because she believed the IEP and placement were inappropriate and noted her right to seek public funding for the placement. (Petitioner's testimony, Petitioner's Exhibit 10)
13. DCPS has an assigned progress monitor who monitors the services provided to DCPS students attending School B, including ensuring that the instruction that DCPS students are provided by licensed content and special education teachers, and licensed related service providers. The monitor reviewed the certifications for School B staff who provided Student services during SY 2022-2023. For most of Student's school day during SY 2022-2023, Student’s instruction was not provided by a certified special education teacher. DCPS has lodged a complaint with OSSE due to School B not providing DCPS students instruction and related services by licensed individuals. (Witness 10's testimony, Respondent's Exhibit 24)
14. Petitioner engaged the services of a firm of independent speech-language pathologists ("SLP") to assist Student in literacy. After Student attended School B for second and third grade, Petitioner engaged the SLP firm for an updated opinion regarding Student's reading skills and progress. On September 16, 2022, one of the SLPs from the firm worked with Student for several weeks and evaluated Student's reading and spelling skills. The evaluator administered the Comprehensive Assessment of Phonological Processing (“CTOPP-2”) to assess Student’s phonological process skills. While Student earned average scores in Phonological Awareness and Phonological Memory, Student’s scores fell in the below-average range on Rapid Symbolic Memory and Alternative Phonological Awareness. The evaluator noted that Student’s strength in blending nonwords was masking Student’s weakness in segmenting nonwords. (Witness 3’s testimony, Petitioner’s Exhibit 11)
15. The evaluator also administered the Test of Word Reading Efficiency-Second Edition (“TOWRE-2”). Student scored in the poor range in the Sight Word Efficiency and Phonemic Decoding subtests, resulting in an overall Total Word Reading Efficiency Index score in the very poor range. On the Gray Oral Reading Test ("GORT-5"), Student’s scores across all areas of the test (rate, accuracy, fluency, and comprehension) fell in the poor



range. (Witness 3's testimony, Petitioner's Exhibit 11)

16. On the Test of Written Spelling, Student' could spell twelve words accurately and earned a standard score in the poor range. On the Test of Orthographic Competence, to assess aspects of the English writing system integral to proficient reading and writing, Student performed in the very poor range on the punctuation and abbreviations subtests and in the below-average range on the letter choice and word scramble subtests. The independent evaluator concluded that the evaluation results indicated that Student presented with a Specific Learning Disorder, with reading and written expression impairments. Petitioner submitted the completed evaluation report to DCPS for its review. (Witness 3's testimony, Petitioner's Exhibit 11)
17. In September 2022, DCPS confirmed an IEP meeting for Student for October 18, 2022. DCPS emailed the parents that "due to unforeseen circumstances," the meeting had to be postponed. A new combination of Analysis of Existing Data ("AED") and IEP meeting was held on December 12, 2022. During the meeting, DCPS stated that it needed more time to review the documents from School B, and the team agreed that DCPS would conduct a comprehensive psychological evaluation and an OT evaluation. (Petitioner's Exhibit 13)
18. DCPS issued a PWN that stated DCPS's intention to initiate Student's triennial eligibility evaluations. DCPS proposed to conduct a comprehensive psychological and an OT evaluation. Given the timing of the evaluations, Petitioner and her attorney agreed to extend the time to update Student's IEP until after the reevaluation had been completed and Student's continued eligibility for services had been determined. Petitioner provided DCPS written consent to the evaluations on December 20, 2022. DCPS and Petitioner agreed to reconvene the IEP meeting on February 21, 2023, to review the evaluations and develop the IEP. (Respondent's Exhibit 15, Petitioner's Exhibits 16)
19. DCPS psychologist completed the psychological evaluation in February 2023. The psychologist administered the following assessments: Wechsler Intelligence Scale for Children- Fifth Edition (WISC-V), Wechsler Individual Achievement Test-Fourth Edition (WIAT-IV) Behavior Assessment System for Children, 3rd Edition (BASC-3). She observed Student at School B in a reading class. She noted that during the observation, Student "needed consistent redirection to remain on tasks and stay focused." On the WISC-V, Student earned a verbal comprehension score in the high average range. Student's other scores all fell within the average range. On the WIAT-IV, Student's reading performance was in the low average range overall, with scores ranging from the very low to average range. In written language, Student earned an average score on sentence composition but scored in the very low range in spelling and orthographic fluency. (Witness 4's testimony, Petitioner's Exhibit 20)
20. In math, Student's scores ranged from very low to average, despite scoring in the average range overall. On behavior rating scales, Student's mother reported no concerns with attention and focus. At the same time, Student's teachers noted some challenges with hyperactivity, attention, and adaptability in the classroom, struggle with picking pertinent data for assignment completion, producing legible work, and sustaining participation on

tasks. It was also noted that Student might experience fatigue with extended handwritten assignments and difficulty with letter/number construction and placement accuracy. (Witness 4's testimony, Petitioner's Exhibit 20)

21. DCPS convened an eligibility meeting on March 9, 2023. The evaluators reviewed their assessments. The DCPS psychologist recommended that Student be found eligible as a student with SLD. The DCPS team members agreed to move forward with the SLD classification and determined Student's continued eligibility for special education. The team also agreed that Student was eligible for OT services. DCPS also confirmed during the eligibility meeting that they were working with School B to schedule testing to reconsider Student's status as a student with ESL needs. (Witness 4's testimony, Respondent's Exhibits 18, 19)
22. Although Student's IEP did not indicate that Student has limited English language abilities, DCPS had last conducted annual testing of Student's English language abilities in March 2020. Based on that evaluation, Student remained eligible to receive ESL services. Student has not had ESL services since Student began attending School B. DCPS attempted to re-administer the English Language testing in March 2023 at School B. School B did not have the technology to complete the assessment. Testing is the only way for a Student to exit the ESL services federal requirement. DCPS offered to test Student at a DCPS school as a result. Student did not complete the testing and, therefore, remains eligible for ESL services until Student's tests out of the services. (Witness 5's testimony)
23. On March 17, 2023, Petitioner's counsel followed up with DCPS, noting that no PWN had been received from Student's eligibility meeting and asking when dates for a proposed IEP meeting would be received. Petitioner followed up on March 28, 2023, asking if an IEP meeting had been scheduled. On April 18, 2023, DCPS issued a PWN and the eligibility report and contacted Petitioner to schedule an IEP meeting on May 30, 2023. (Petitioner's testimony, Petitioner's Exhibit 27, Respondent's Exhibits 18, 19)
24. DCPS convened the IEP meeting on May 30, 2023. The IEP team members used the 2023 psychological evaluation and the data from School B to develop the IEP academic goals and to make programming decisions. Based on the updated data from the evaluation and the information from School B, Student was making academic progress. The team members reviewed and agreed on academic and related service goals. There was no disagreement by Petitioner or School B about the IEP goals. (Witness 6's testimony, Witness 10's testimony, Respondent's Exhibit 22)
25. DCPS reduced Student's specialized instruction to 18 hours of special education, with 13 hours per week outside of general education, 5 hours per week inside of general education, 180 minutes per month of BSS, 180 minutes per month of OT, 30 minutes per month of OT consultation, 30 minutes per month of BSS consultation, and 1 hour per week of specialized instruction consultation. The IEP included accommodations and supplemental aides and services. (Witness 6's testimony, Respondent's Exhibit 22)

26. The DCPS members of the team concluded that Student would receive reading instruction outside general education. The team discussed Student being in a general education setting for math with special education support. The DCPS members of the team believed that 5 hours of specialized instruction in math could be delivered to Student in general education with a special education teacher and a certified math teacher for direct instruction. (Witness 6's testimony, Witness 10's testimony)
27. Generally, in developing an IEP, the IEP goals justify and determine the number of specialized instruction hours. The DCPS members of the team believed that the number of specialized instruction service hours in the May 30, 2023, IEP was appropriate to implement the IEP goals. Regarding the reduction of two hours of specialized instruction from the IEP, the DCPS team members believed that with two additional hours per week in general education, Student could go into a science or social studies class with general education peers. Petitioner and her representative asked for 30 hours of specialized instruction per week. However, there was no specific data to support the request for 30 hours per week of specialized instruction. (Witness 10's testimony, Respondent's Exhibits 22, 23)
28. Petitioner was allowed to participate fully in the IEP meeting, make suggestions, and ask questions. Petitioner did not object to any of the IEP goals and the level of related services that DCPS proposed. There was no specific proposal about how the IEP would be implemented and what classes/subjects the specialized instruction would be provided. Petitioner was surprised that DCPS proposed a reduction in services given that Student, in her opinion, had just begun to make progress in all services at School B. Petitioner and School B staff expressed disagreement with the proposed services, stressing Student's need for a small, self-contained setting across the entire school day. DCPS informed the parent that it was proposing to implement the IEP at School C. (Witness 2's testimony, Petitioner's testimony, Petitioner's Exhibit 36)
29. Petitioner and her attorney followed up with DCPS about the status of the finalized IEP and other meeting documentation from the May 30, 2023, meeting. When Petitioner filed her first DPC, she had yet to receive a copy of the finalized May 30, 2023, IEP or any PWN. (Petitioner's Exhibit 40)
30. On July 28, 2023, DCPS issued a PWN that stated that IEP was developed and discussed at the IEP meeting with the parents and the school. It noted that Petitioner and her attorney disagreed with the proposed hours and believe Student requires a 30-hour full-time IEP. (Respondent's Exhibit 23)
31. Petitioner contacted School C and visited. Petitioner saw the SLS classroom and talked with SLS teacher. The teacher did not have any information about Student, so they talked about how she ran the classroom, the profile of the students, and the teaching methodologies used in the classroom. Petitioner observed the school's library and the cafeteria during lunch. There were a lot of "rambunctious" kids having a lot of fun in both of those spaces. (Petitioner's testimony)

32. School C's SLS classroom provides special education intervention and modification of curriculum to address the needs of students with learning disabilities. Each SLS classroom has a teacher and teacher's aide and no more than 12 students. Instruction is provided one-on-one and in small groups. Students are with general education students for lunch and recess and may have special classes in music, art, P.E., and Spanish. School B and its SLS program can fully and effectively implement Student's DCPS IEPs. (Witness testimony)
33. In DCPS, a general education teacher routinely receives a copy of the Student's IEP, and the special educator collaborates with the general education content teacher to modify any content as needed to ensure that Student needs are being met in the general education setting and that appropriate accommodations and supplemental aides and services are being provided. (Witness 10's testimony)
34. School B is an independent school for students with mild to moderate language-based learning differences with average to above-average intelligence. School B has a current OSSE certificate of approval ("COA"). School B has a lower, intermediate, and upper school, including grades 9 through 12. There are 181 students in the middle school. Some of Student's teachers at School B are not licensed content or special education teachers. In some classes at School B, there are more students and a higher student-to-teacher ratio than in the SLS class at School C. (Witness 2's testimony)
35. At School B, Student's struggles to do grade-level work and struggles producing in written form what Student knows. Student needs structured breaks when something is challenging, or Student perceives it as challenging. Student needs reminders and prompts to remain on task. Verbal and physical impulsivity remain areas of targeted need for Student. Student has strong leadership skills and successfully navigates relationships with peers. In less structured environments, Student needs adult support. In comparing Student School B progress reports, Student made progress during the most recent school year. (Witness 2's testimony, Petitioner's Exhibits 5, 8, 9, 12, 21, 31, 37)
36. At School B, there were students with similar learning profiles as Student. Student loves the teachers and school peers and is deeply engaged in all subjects. Student is happy and is making progress. Petitioner describes Student as verbally capable, linguistically advanced, and socially engaging. Petitioner notes a profound difference in Student's behavior when Student is called upon to read and write. Petitioner believes that Student's Student's learning differences affect Student in all classes involving reading, including special classes such as music and Spanish. However, Petitioner has not conducted any classroom observations at School B during the time Student has attended School B. (Petitioner's testimony)

## **CONCLUSIONS OF LAW:**

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

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

34 C.F.R. § 300.17 provides: A free appropriate public education or FAPE means special education and related services that-- (a) Are provided at public expense, under public supervision and direction, and without charge; (b) Meet the standards of the SEA, including the requirements of this part; (c), Include an appropriate preschool, elementary school, or secondary school education in the State involved; and (d) Are provided in conformity with an individualized education program (IEP) that meets the requirements of Sec. 300.320 through 300.324

Pursuant to 5E DCMR 3030.14, the burden of proof is the responsibility of the party seeking relief. *Schaffer v. Weast*, 546 U.S. 49, 126 S.Ct. 528 (2005). Respondent held the burden of persuasion on issues #1 and #3 after Petitioner established a prima facie case on those issues. Petitioner held both the burden of production and persuasion on issues # 2, and #4.<sup>9</sup> The burden of persuasion shall be met by a preponderance of the evidence. The normal standard is a preponderance of the evidence. See, e.g., *N.G. V. District of Columbia* 556 f. Sup. 2d (D.D.C. 2008) see also 20 U.S.C. §1451 (i)(2)(C)(iii).

**ISSUE 1:** Did DCPS deny Student a FAPE by failing to provide an Student an appropriate educational program and placement and/or location of services for SY 2022-2023 because Student's IEP did not provide sufficient self-contained special education services and/or the proposed placement and/or location of services at School C was too large a setting for Student?

**Conclusion:** Respondent sustained the burden of persuasion by a preponderance of the evidence that the IEP that DCPS developed for Student on January 13, 2022, was reasonably calculated to enable a Student to make progress appropriate in light of Student's circumstances.

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<sup>9</sup> DC Code § 38-2571.03 (6) provides:

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

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

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

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

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

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

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

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

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

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

Removing a child with disabilities "from the regular education environment occurs only when the nature or severity of the disability is such that education in regular classes cannot be achieved

satisfactorily." 34 C.F.R. § 300.550; 34 C.F.R. §300.114 see also 20 U.S.C. § (a)(5)(A) (a disabled child is to participate in the same activities as non-disabled children to the "maximum extent appropriate"); *Roark ex rel. Roark v. District of Columbia*, 460 F.Supp.2d 32, 43 (D.D.C. 2006) ("The IDEA requires school districts to place disabled children in the least restrictive environment possible.")

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

In developing an IEP, the Supreme Court has explained that IDEA's mandate to place a disabled student in their least restrictive environment must be balanced with the requirement that an IEP be "reasonably calculated to enable a child to make progress appropriate in light of [their] circumstances." *Endrew F.*, 137 S. Ct. at 999, 1101.

Petitioner alleges that DCPS failed to provide Student appropriate educational program and placement and/or location of services for SY 2022-2023 because Student's IEP did not provide sufficient self-contained special education services and/or the proposed placement and/or location of services at School C was too large a setting for Student. Petitioner asserts that Student's IEP should have prescribed all services outside general education with an LRE in a separate school.

The evidence demonstrates that on March 9, 2021, DCPS developed an IEP for Student that prescribed 10 hours per week of specialized instruction inside general education and related services and 5 hours per week each of specialized instruction in reading and written expression outside general education, along with direct and consultative OT services. Petitioner did not reenroll Student in DCPS for SY 2021-2022 and unilaterally placed Student in School B.

In May 2021, DCPS conducted a reevaluation of Student. The reevaluation revealed that Student still lacked foundational skills and struggled with complex reading and writing tasks. The reevaluation also found that Student had difficulties with attention and self-regulation negatively impacting Student's learning and academic performance.

As a result, DCPS changed Student's disability classification to OHI due to ADHD and significantly increased Student's hours of specialized instruction to 20 hours per week, with all instructional hours outside general education. The IEP also prescribed 180 minutes per month each of direct OT and BSS, both outside general education, and 30 minutes per month of OT consultation services, 30 minutes per month of BSS consultation services, and 1 hour per week of specialized instruction consultation services. The IEP also included classroom aides and services, such as multi-sensory approach, movement breaks to improve attention and focus, daily planner, various work seating options, graphic organizers, teacher prompting, teacher check-in with planner for organization. Petitioner disagreed with the IEP and maintained Student at School B for SY 2021-2022.

On January 13, 2022, DCPS updated Student's IEP with current data and determined Student's educational program for SY 2022-2023. The evidence demonstrates that the IEP team, including Petitioner, collaboratively reviewed the data received from School B and updated Student's goals and objectives in math, reading, writing, social/emotional, and motor skills/physical development.

There was no disagreement by any of the team members, including Petitioner and her representatives or the School B staff members who participated, to the IEP goals and the number of amount that type of related services. Petitioner, however, maintained that Student needed all instruction outside general education throughout the school day, totally removed from non-disabled peers. Again, Petitioner disagreed with the IEP and maintained Student at School B for SY 2022-2023.

Petitioner passionately testified that she observed the instruction Student received at School A under Student's initial IEP with virtual learning during the COVID-19 pandemic. That virtual instruction, along with the virtual ESL services that Student received, convinced Petitioner that she needed to look for an alternative school for Student and chose School B. Petitioner testified that compared to the instruction Student received at School A and the instruction she believes Student would receive at School C based on her visit to School C, Student is better served at School B. However, Student never had the benefit at School A of in-person instruction and related services. Petitioner's comparison of services Student would receive under the DCPS IEPs, and that Student is currently receiving at School B is unconvincing.

The evidence demonstrates that when Student started at School B, Student's instruction was also virtual. It appears based upon the reevaluation data from Student's 2021 reevaluation, Student made little progress academically at School B during SY 2021-2022 as Student lacked foundational skills and continued to struggle with complex reading and writing tasks.

Petitioner testified that Student needs specialized instruction outside general education for special classes, including music, art, and P.E. However, there was no direct evidence that Student has taken music or art at School B or that Student's performance in such classes would be directly affected by Student's learning challenges. Likewise, although Petitioner testified that Student would also be challenged in a P.E. class as well, at School B, Student is with a relatively large number of students in P.E. class. There was no evidence that with the accommodations and classroom aids and services in Student's IEP, Student would not be successful in these special classes if they were provided in general education setting pursuant to Student's IEP.

The evidence demonstrates that although Student has a relatively low student-to-teacher ratio in most academic classes at School B, not all Student's instructors have been or are licensed teachers. In addition, although School B has been issued an OSSE COA, there is no evidence that at School B, that all its students have been identified as children with a disability pursuant to IDEA, such that Student is with non-disabled peers throughout the school day, although the students may have what School B characterizes as learning differences. In addition, Petitioner has never actually observed any of the instruction that Student has received since Student has attended School B.

Petitioner also presented as expert witnesses, two speech pathologists who had worked with Student in literacy, one of whom evaluated Student. These witnesses testified to Student's significant reading difficulties that were demonstrated by both the DCPS evaluations and their own. Both witnesses testified that Student needs specialized instruction outside of general education throughout the school day. However, their testimony was also unconvincing. Although they were familiar with Student's reading and literacy skills when they worked with Student, and attested to Student's distractibility, they worked with and evaluated Student nearly two years ago,



and neither had observed Student in the classroom nor spoken directly to any of Student's teachers or related service providers. Neither witness was personally familiar with the instruction that Student had or is receiving at School B.

Finally, Petitioner presented an administrator at School B who testified that Student struggles to do grade-level work and to produce in writing what Student knows. She also testified that Student needs structured breaks and, reminders and prompts to remain on task. She testified to Student's verbal and physical impulsivity. This witness also testified to the Student academic progress at School B as reflected in Student's School B progress reports.

This witness suggested that despite Student's progress and demonstrated social skills Student still needed and needs special education services throughout the school day in an environment totally removed from non-disabled peers. This witness testimony too, in this regard, was unconvincing. Although the witness testified that Student continues to struggle academically in both reading and writing, that witness also testified to Student's strong leadership skills and that Student successfully navigates relationships with peers. Although this witness had observed Student in the classroom at School B, this witness was not a teacher or services provider and had never provided Student's any services. This witness opined that student needed special education services during lunch and recess. However, there was no evidence that Student received any special education services at School B during lunch and recess.

On the other hand, the evidence demonstrates that because of Student's 2021 reevaluation, DCPS significantly increased the services in Student's January 13, 2022, IEP. The IEP prescribed 20 hours per week of specialized instruction, with all instructional hours outside general education. The IEP also prescribed 180 minutes per month each of direct OT and BSS, both outside general education, and 30 minutes per month of OT consultation services, 30 minutes per month of BSS consultation services, and 1 hour per week of specialized instruction consultation services and significant classroom aids and services to address both Student's learning challenges and Students distractibility.

DCPS presented witnesses who credibly testified that amount of specialized instruction outside of general education in the IEP developed on January 13, 2022, was based upon the IEP goals that were contained in the IEP. There was no disagreement by any team member, including Petitioner and School B to any of the IEP goals. Although DCPS witnesses, like all of Petitioner's witnesses, had never provided Student any services, some of the DCPS witnesses had evaluated Student, and had observed Student in the classroom.

The DCPS witnesses credibly testified that there was no data presented at the IEP team meeting by School B or Petitioner that supported Student's need for specialized instruction throughout the school day in non-academic classes and during lunch and recess. The DCPS witnesses credibly testified that each of Student's teachers, including those in general education setting would receive a copy of Student's IEP and provide Student the accommodations and classroom aids and services that are required under the IEP. The evidence demonstrates that under the IEP the special educator collaborates with the general education content teacher to modify any content as needed to ensure that Student needs are being met in the general education setting and that appropriate accommodations and supplemental aides and services are being provided.

Understandably, Petitioner wants what she considers to be the best education for her child., Petitioner believes that Student would be best served by attending School B. However, there is insufficient evidence that Student cannot effectively interact with general education students during lunch and recess or that with the supports, accommodations, and aids and services prescribed Student's IEP that Student cannot be in a general education setting with non-disabled peers for special classes such as art, music, and P.E. and for lunch and recess.

DCPS provided a cogent and responsive explanation of the proposed IEP. The evidence demonstrates that the IEP provided Student with sufficient self-contained special education services.

Alternatively, Petitioner alleged that the location of services that DCPS proposed at School C was too large a setting for Student. Petitioner testified that she visited School C and spoke with the SLS teacher classroom teacher and during her visit, she observed the school library and cafeteria. She observed what she characterized as a rambunctious group of kids who were having fun. There was no testimony that indicated that the number of students in the classes or in the total school was significantly larger than the number at School B. The evidence demonstrates that there are 181 students in School B's middle school. There was no testimony about the total number of students at School C. The DCPS witness credibly testified that Student, even in the general education classes, would be with no more students than Student is with in the P.E. class at School B. Consequently, the IHO did find that Petitioner's claim in this regard to be supported by the evidence.

The evidence adduced supports the finding that the level of specialized instruction outside general education than DCPS proposed for Student in the January 13, 2022, IEP was appropriate, and the IEP was reasonably calculated to enable Student to make progress appropriate in light of Student's circumstances. Consequently, the Hearing Officer concludes that Respondent sustained the burden of persuasion by a preponderance of the evidence on this issue.

**ISSUE 2:** Did DCPS deny Student a FAPE by failing to timely complete Student's reevaluations and re-confirm Student's eligibility for special education services, and develop an IEP?

**Conclusion:** Petitioner did not sustain the burden of persuasion by a preponderance of the evidence that DCPS denied Student a FAPE by failing to timely complete Student's reevaluations and re-confirm Student's eligibility for special education services, and develop an IEP.

Under the IDEA, states, as well as the District of Columbia, that receive federal educational assistance must establish policies and procedures to ensure that a FAPE is made available to disabled children. *Reid v. District of Columbia*, 401 F.3d 516, 519 (D.C. Cir. 2005).

34 C.F.R. § 300.303(a) makes it clear that "A local education agency ("LEA") shall ensure that a reevaluation of each child with a disability is conducted...if the child's parents or teacher requests a reevaluation." and that the reevaluation must be conducted at least once every three years.

Students are also entitled to a reevaluation of their disability upon a parental request, provided that no reevaluation occurs "more frequently than once a year," though a requested reevaluation must

occur "at least once every 3 years." 34 C.F.R. § 300.303(a)(2); see *Cartwright v. Dist. of Columbia*, 267 F. Supp. 2d 83, 87 (D.D.C. 2003).

Requests for evaluations/reevaluations are to be conducted in a timely manner. *Herbin v. Dist. of Columbia*, 362 F. Supp. 2d. 254, 259, 261 (D.C.C. 2005).

Pursuant to 34 C.F.R. § 300.323 at the beginning of each school year, each public agency must have an IEP effect for each child with a disability within its jurisdiction. The legal standard under the IDEA is that DCPS "must place the student in a setting that is capable of fulfilling the student's IEP." *Johnson v. Dist. of Columbia*, 962 F. Supp. 2d 263, 267 (D.D.C. 2013). See also *O.O. ex rel. Pabo v. Dist. of Columbia*, 573 F. Supp. 2d 41, 53 (D.D.C. 2008) (placement must be in a school that can fulfill the student's IEP requirements).

At the outset of the due process hearing, Petitioner's counsel asserted that Petitioner was not challenging DCPS failure to update Student's January 13, 2022, IEP prior to its expiration. However, it was unclear until the start of the due process hearing, that Petitioner was asserting that Petitioner was asserting that Student's IEP should have been developed within 30 days of Student's March 9, 2023, eligibility determination.

The evidence demonstrates that in September 2022, DCPS confirmed an IEP meeting for Student for October 18, 2022. DCPS delayed that meeting until December 12, 2022. The evidence demonstrated that DCPS had only recently been provided data from School B and the parties agreed that in light of the evaluations that would be conducted, that Student's annual IEP review meeting would be delayed until the evaluations were completed. The evidence demonstrates that the evaluations were conducted within a reasonable time and reviewed by a team on March 9, 2023.

On March 9, 2023, a team determined Student's continued eligibility for special education and set a targeted date for developing Student's IEP. On April 18, 2023, DCPS issued a PWN and the eligibility report and contacted Petitioner to schedule an IEP meeting on May 30, 2023. A DCPS witness testified that because of a DCPS team member's departure from DCPS the IEP meeting was delayed for nearly two months until May 30, 2023.

Petitioner was aware as of the May 30, 2023, IEP meeting what services, placement, and location of services DCPS was proposing. Petitioner rejected the offer of FAPE, continued Student's attendance at School B and ultimately filed and a DPC challenging the IEP. There is every indication that Petitioner had intended for Student to remain at School B and that development of the IEP within thirty days of Student's March 9, 2023, eligibility determination would have made any difference in Student's continued attendance at School B. DCPS provided Petitioner a copy of the IEP on July 28, 2023, which was at least a month prior to the start of SY 2023-2024.

As previously stated, pursuant to IDEA §1415 (f)(3)(E)(ii), in matters alleging a procedural violation, a hearing officer may find that a child did not receive FAPE only if the procedural inadequacies impeded the child's right to FAPE, significantly impeded the parent's opportunity to participate in the decision-making process regarding the provision of FAPE, or caused the child a deprivation of educational benefits. The evidence does not support a finding that DCPS's delay in developing Student's May 30, 2023, IEP or providing Petitioner a copy of that IEP and PWN

impeded the Student's right to FAPE, significantly impeded Petitioner's opportunity to participate in the decision-making process regarding the provision of FAPE, or caused Student a deprivation of educational benefits. Consequently, the IHO concludes that Petitioner did not sustain the burden of proof by a preponderance of the evidence on this issue.

**ISSUE 3:** Did DCPS deny Student a free appropriate public education ("FAPE") by failing to provide an Student an appropriate educational program and placement and/or location of services for SY 2023-2024 because Student's IEP did not provide sufficient self-contained special education services and/or the proposed placement and/or location of services at School C?

**Conclusion:** Respondent did not sustain the burden of persuasion by a preponderance of the evidence that the IEP that DCPS developed for Student on May 30, 2023, was reasonably calculated to enable a Student to make progress appropriate in light of Student's circumstances.

As previously stated, In developing an IEP, the Supreme Court has explained that IDEA's mandate to place a disabled student in their least restrictive environment must be balanced with the requirement that an IEP be "reasonably calculated to enable a child to make progress appropriate in light of [their] circumstances." *Endrew F.*, 137 S. Ct. at 999, 1101.

As discussed in issue # 1 above, the evidence in this case supports the finding that the level of specialized instruction that DCPS proposed for Student in the January 13, 2022, IEP was appropriate and reasonably calculated to enable Student to make progress appropriate in light of Student's circumstances.

The evidence demonstrates that DCPS convened an eligibility meeting on March 9, 2023, in which evaluators reviewed their assessments and the team determined Student's continued eligibility for special education with the SLD classification. The team also agreed that Student was eligible for OT services.

DCPS convened the IEP meeting on May 30, 2023. The IEP team members used the 2023 psychological evaluation and the data from School B to develop the IEP academic goals and to make programming decisions. DCPS reduced Student's specialized instruction to 18 hours of special education, with 13 hours per week outside of general education with 5 hours per week inside of general education. Otherwise, the IEP services remained the same.

The DCPS members of the team concluded that Student would receive reading instruction outside general education. The DCPS members believed that 5 hours of specialized instruction in math could be delivered to Student in general education with a special education teacher and a certified math teacher for direct instruction. In addition, the DCPS team member concluded that Student's weekly specialized instruction would be reduced by two hours. Petitioner not only disagreed with reduction of services, but disagreed that Student should have any hours of instruction inside general education.

DCPS' witness testified that the entire team, including Petitioner, agreed with the IEP goals and that the number of hours of specialized instruction was driven by the goals. However, the was

insufficient evidence presented by DCPS to support the reduction in specialized instruction. The DCPS witness testified that regarding the reduction of 2 hours of specialized instruction from the IEP, the DCPS team members believed that with two additional hours per week in general education, Student could go into a science or social studies class with general education peers. However, the witness was unsure in what subjects Student's additional 25 minutes per day of instruction in general education would be used or that it was specifically discussed during the IEP meeting.

A DCPS witness gave the following explanation of the two additional hours in general education: "Sometimes SLD students do very well with project-based learning and science projects, using their hands and being with the general education peers, so I would say that would be appropriate for the student to be included in general education class for that length of time."

This explanation of the reduction of the specialized instruction was not student specific and was not based on Student unique needs. Consequently, the IHO concludes that regarding the May 30, 2023, IEP, DCPS did not provide a cogent and responsive explanation of the proposed IEP. The evidence demonstrates that the IEP did not provide Student sufficient self-contained special education services and was not reasonably calculated to enable a Student to make progress appropriate in light of Student's circumstances.

#### **ISSUE 4:** Is School B a proper placement for Student?

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

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

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

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

Pursuant to D.C. Code § 38-2561.02(c) Special education placements shall be made in the following order of priority; provided, that the placement is appropriate for the student and made

in accordance with the IDEA and this chapter: (1) DCPS schools, or District of Columbia public charter schools pursuant to an agreement between DCPS and the public charter school; (2) Private or residential District of Columbia facilities; and (3) Facilities outside of the District of Columbia.

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

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

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

Albeit the evidence demonstrates that since Student has attended School B, Student has made progress and that Petitioner is pleased with and wants Student to remain at School B, based upon the evidence adduced, the Hearing Officer did not conclude that Student's appropriate LRE at the time the May 30 2023, IEP was developed was a separate special education day school, like School B, where Student is removed from non-disabled peers.

As already discussed in issues #1 above, there was sufficient evidence that the IEP DCPS proposed for Student on January 13, 2022, was reasonably calculated to enable Student to make progress appropriate in light of Student’s circumstances. There was insufficient evidence presented that Student’s LRE had changed from the time that IEP was developed.

The IHO, therefore, concludes that despite the progress Student has made at School B, School B is not a placement that DCPS is obligated to fund prospectively and therefore, does not grant Petitioner's requested relief for Student’s prospective placement at School B. However, there is sufficient evidence that School B meets the requirements for reimbursement for at least the duration that the IHO prescribes in the order below.<sup>10</sup>

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<sup>10</sup> *Branham v. District of Columbia*, 427 F.3d 7 (D.C. Cir. 2005) Courts must consider “all relevant factors” including the nature and severity of the student's disability, the student's specialized educational needs, the link between those needs and the services offered by the private school, the placement's cost, and the extent to which the placement represents the least restrictive educational environment. *Id.* at 12.

**ORDER:**

1. DCPS shall, within ten (10) business days of the issuance of this order, amend Student's current IEP to increase the specialized instruction outside of general education to twenty (20) hours per week.
2. DCPS shall, within 30 calendar days of its receipt from Petitioner of the documentation of Petitioner's actual out-of-pocket payment to School B, reimburse Petitioner tuition and costs for Student's attendance at School B for SY 2023-2024 up to including the date that DCPS complies with the directive below regarding Student's IEP and placement and location of services for the remainder of SY 2023-2024.
3. DCPS shall, within (30) calendar days of the issuance of this order, convene an IEP meeting to update Student's IEP with any current data and to determine an appropriate placement and location of services for Student for the remainder of SY 2023-2024.
4. All other relief requested by Petitioner is denied.

**APPEAL PROCESS:**

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

/S/ *Coles B. Ruff*

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**Coles B. Ruff, Esq.**

**Hearing Officer**

**Date: October 9, 2023**

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