

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

<b>Parent on behalf of Student<sup>1</sup></b>	)	<b>Case No. 2023-0092</b>
	)	
<b>Petitioner</b>	)	<b>Hearing Dates: October 2-5, 2023</b>
	)	
<b>v.</b>	)	<b>Conducted by Video Conference</b>
	)	<b>Date Issued: October 16, 2023</b>
<b>District of Columbia Public Schools</b>	)	
	)	<b>Terry Michael Banks,</b>
<b>Respondent</b>	)	<b>Hearing Officer</b>

**HEARING OFFICER DETERMINATION**

**INTRODUCTION**

Petitioners are the parents of an X-year-old student (“Student”) attending School B. On May 19, 2023, Petitioners filed a Due Process Complaint Notice (“*Complaint*”) alleging that the District of Columbia Public Schools (“DCPS”) denied the student a free appropriate public education (“FAPE”) by failing to provide him/her an appropriate Individualized Education Programs (“IEP”) and placements for the 2022-23 and 2023-24 school years. On June 1, 2023, DCPS filed *District of Columbia Public Schools’ Response*, denying that it had denied Student a FAPE in any way.

**SUBJECT MATTER JURISDICTION**

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

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

## PROCEDURAL HISTORY

On May 10, 2023, Petitioner filed the *Complaint* alleging that DCPS denied Student a FAPE by to provide an appropriate IEP and location of services for the 2022-2023 and 2023-24 school years. As for the 2022-23 school year, Petitioners assert that the IEP did not provide a sufficient amount of self-contained special education services and the proposed location of services (“LOS”), School A, was too large of a setting. Petitioners assert that Student’s IEP expired on February 6, 2023, depriving Student of an IEP at the beginning of the 2023-24 school year.

On June 1, 2023, DCPS filed its *Response*, in which it refuted allegations in the *Complaint* denying that it had denied Student a FAPE in any way. DCPS asserted that it offered Student a FAPE for the 2022-23 school year in an IEP developed on February 7, 2022, but Petitioners elected to enroll Student in a private school, School B, for that school year. DCPS asserted that Petitioners contributed to delays preventing the timely completion of Student’s 2023-24 IEP. Finally, DCPS asserted that [REDACTED] is not a proper or appropriate placement for Student because it is not her/his least restrictive environment.

A prehearing conference was conducted on June 2, 2023 by video conference, and the *Prehearing Order* was issued that day. The parties participated in a resolution meeting on June 6, 2023 that did not result in a settlement.

The due process hearing was conducted on October 2-5, 2023 by video conference. The hearing was closed to the public at Petitioners’ request. Petitioners filed Five-day Disclosures on September 25, 2023, containing a witness list of five witnesses and documents P1 through P-36. Respondent filed objections to Petitioners’ disclosures on September 28, 2023. Specifically, DCPS objected to expert testimony from Witness B and Witness C on the grounds of their qualifications in their areas of expertise. Rulings on these objections were deferred until Respondent completed *voir dire*. DCPS also objected to Petitioners’ proposed Exhibits P10, P12, P15, P17-18, P20-21, and P23-29. Petitioners’ Exhibits P1-14, P16-P23 (the Writing Assessment was admitted, the Math Assessment was excluded), and P-25-36 were admitted into evidence.

Respondent’s disclosures, also filed on September 25, 2023, contained a witness list of nine witnesses and documents R1 through R14. Respondent filed a Supplemental disclosure, R-15, on September 28, 2023, the curriculum vitae of Witness G. Petitioners filed objections to Respondent’s disclosures on September 28, 2023. Petitioners objected to expert testimony from Teacher A as his curriculum vitae was not included in Respondent’s disclosure, and as to Witness L on the grounds of qualifications. The objection to expert testimony from Teacher A was sustained. A ruling on Witness L was deferred until Petitioners completed *voir dire*. Petitioners also objected to Respondent’s proposed Exhibit R4 on grounds of relevancy and lack of authentication.

Petitioners did not object to Respondent’s proposed Exhibit R-10, an IEP developed on June 16, 2023. However, Petitioner’s counsel argued that both that document and *District of Columbia Public Schools’ Supplemental Response* were served on Petitioners for the first time on September 25, 2023, the due date for the parties’ disclosures. Petitioners’ counsel noted that the IEP meeting took place after the *Prehearing Order* was issued in this case, and argued that the *Supplemental Response* should be excluded from the record. Respondent’s counsel argued that Petitioners and Petitioners’ counsel attended the June 16<sup>th</sup> meeting, participated fully in the

development of the IEP, were well aware of the contents of the IEP, and had an obligation to amend the *Complaint* accordingly. Respondent's counsel argued further that in the event the *Supplemental Response* were excluded, he would request a continuance to file a complaint to establish the appropriateness of the June 16<sup>th</sup> IEP. In the interest of resolving all issues related to the 2023-24 school year expeditiously, I overruled Petitioners' objection to the inclusion of DCPS' *Supplemental Response* in the record. A consequence of this ruling was the consideration of Petitioners' assertion of Student's need for speech and language ("S/L") services. Petitioners provided DCPS a copy of an independent Speech and Language Evaluation during the 2022-23 school year, but alleged only the lack sufficient specialized instruction outside general education in the 2023-24 IEP in the *Complaint* and at the prehearing conference. I ruled that while I would consider the late served IEP and *Supplemental Response*, I would allow Petitioners to offer proof of Student's need for S/L. I then authorized Respondent to add a S/L expert witness that it had not planned on calling or disclosed. Thus, Respondent filed another supplemental disclosure, P-16, the *curriculum vitae* of Witness K, who subsequently provided expert S/L testimony for Respondent. Respondent's Exhibits R1-- R16 were admitted into evidence during Respondent's direct case.

Petitioner presented as witnesses in chronological order: Witness A, Witness B, Witness C, and Petitioner A. Witness A and Witness C were admitted as experts in Special Education and Witness B was admitted as an expert in Speech and Language Therapy. Respondent presented as witnesses in chronological order: Witness D, Witness E, Witness G, Witness H, Witness J, and Witness K. Witness D, Witness E, Witness G, Witness H, and Witness J were accepted as an experts in Special Education, Witness F was admitted as an expert in School Social Work, and Witness K was accepted as an expert in Speech and Language Therapy. At the conclusion of Respondent's direct case, Petitioner A provided rebuttal testimony. At the conclusion of the testimony, the parties' counsel gave oral closing arguments. The Hearing Officer authorized the parties to submit authorities upon which they rely. On October 5, 2023, Petitioners filed *Petitioners' Closing Authorities*, and Respondent filed *District of Columbia Public Schools' Case Citations*.

## ISSUES

As identified in the *Complaint* and the *Prehearing Order*, and as modified on the first day of hearings, the issues to be determined in this case are as follows:

1. Whether DCPS denied Student a FAPE by failing to provide an appropriate IEP and location of service for the 2022-2023 school year. Specifically, Petitioners assert that the IEP did not provide a sufficient amount of self-contained special education services and the proposed location of services ("LOS"), School A, was too large of a setting.
2. Whether DCPS denied Student a FAPE by failing to provide an appropriate IEP and location of services for the 2023-2024 school year. Specifically, Petitioners assert that Student's previously developed IEP expired on February 6, 2023, and the IEP developed on June 16, 2023 (a) was not provided to Petitioners until September 25, 2023, (b) did not provide a sufficient amount of self-contained special education services or a LOS, and (c) did not include S/L services.

3. Whether School B is a proper placement for Student.

### FINDINGS OF FACT

1. Student is X years old and was enrolled in grade B at School A in during the 2021-22 school year.<sup>2</sup>

2. On February 16, 2021, when Student was in grade G at School A, DCPS conducted an IEP Annual Review meeting. Student was classified with Multiple Disabilities (“MD”): Specific Learning Disability (“SLD”) and Other Health Impairment (“OHI”).<sup>3</sup> In Communication under Consideration of Special Factors, the IEP team reported that Student “requires verbal models, visual aids and supports to assist with [his/her] comprehension of information. Directions and instructions should be repeated and restated, simplified to include pertinent information, broken down into smaller increments, and modeled...”<sup>4</sup> In Mathematics, the Present Level of Performance and Annual Goals (“PLOG”) reported that on the beginning of the year (“BOY”) i-Ready assessment in September 2020, Student’s overall score was at the grade A level, two grades below his/her grade level. S/he had the most difficulty with multi-step word problems, while his/her strengths included solving equations with fractions and decimals. The goals involved solving word problems using algebraic equations with a single variable, and solving word problems with at least two operations by using key information to set up equations.<sup>5</sup> In Reading, the PLOG reported that Student scored 914 on a BOY Reading Inventory and 1018 on a middle of the year (“MOY”) Reading Inventory on January 25, 2021. The MOY score was within the year-end, grade level expectation band of 925-1070. The goal involved identifying evidence in texts to support a claim or inference.<sup>6</sup> In Written Expression, the PLOG reported that Student was introduced to narrative writing in the first advisory and expository writing in the second. S/he scored 87% in a Literary Analysis Writing Workshop and 100% on a Writing Summative. The goals involved using a graphic organizer to plan and write essays following the RACE paragraph structure, and when given a writing prompt, to compose a response that follows the English standard conventions.<sup>7</sup>

In Emotional, Social, and Behavioral Development (“Behavior”), the PLOG reported that Student “transitioned appropriately to the virtual learning platform.”<sup>8</sup> On an October 21, 2020 Strengths and Difficulties Questionnaire (“SDQ”), Student scored in the Very High range for Emotional Distress, in the High range in Overall Stress and Getting Along with Other Children, and Close to Average in Behavior Difficulties, Hyperactivity and Concentration Difficulties, Kind and Helpful Behavior, and in Impact of any Difficulties on the Child’s Life.

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<sup>2</sup> Petitioners’ Exhibit (“P:”) 6 at page 3 (95). The exhibit number and exhibit page numbers are followed by the electronic page number in the disclosure in parentheses, i.e., P6:3 (95).

<sup>3</sup> P2:4 (20).

<sup>4</sup> *Id.* at 5 (21).

<sup>5</sup> *Id.* at 6-7 (22-23).

<sup>6</sup> *Id.* at 7-9 (23-25).

<sup>7</sup> *Id.* at 9-10 (25-26).

<sup>8</sup> DCPS offered instruction on virtual platforms during the 2020-21 school year during the COVID-19 pandemic. Students were offered the option of returning to in-person classes for a portion of the school week during the second half of the school year. The testimony in this case did not reveal that Student attended in-person classes during the 2020-21 school year.

[S/he] reported how transitioning to [grade G] virtually was very stressful but [s/he] enjoys the virtual platform and has been able to show great progress academically and developmentally. [Student] has discussed [her/his] sadness around not socially having peers to interact with like normal but has seemed to adjust for the time being. [S/he] also has been able to talk about [her/his] anxiety and this writer works with [her/him] on ways to assist [her/him] with reducing [her/his] anxiety and increasing [her/his] coping skills. [S/he] has not exhibited any behavioral or emotional concerns with this writer at this time.<sup>9</sup>

The goals involved learning and practicing coping strategies to manage challenging emotions and accurately identifying situations that can be anxiety producing, using appropriate coping strategies or relaxation techniques when presented with real or imagined stressful situations, and recognizing his/her level of anxiety through the use of a visual self-rating system.<sup>10</sup>

The IEP team prescribed eight hours per week of specialized instruction inside general education and two hours per month of behavioral support services (“BSS”). The Other Classroom Aids and Services included, but were not limited to, small group instruction, adjustment of assignments, extended time, visual aids and supports, graphic organizers, frequent check-ins, scaffolded prompts and/or work, proximity to the teacher, use of a word bank, checklists for task completion, and chunked assignments.<sup>11</sup>

3. At the end of the 2020-21 school year, Student’s grandparents sent a letter to School A’s Assistant Principal thanking the school staff for “guiding all the [grade G] team throughout this unique year of education... Our personal interest is in the success of [Student], our [grandchild]!!! You all have provided [her/him] with an outstanding opportunity to grow emotionally, within the academics, as a middle schooler... We would like to give a special shout out to [Witness E, Student’s special education teacher]. She is brilliant in her approach to providing emotional support and [Student] has truly benefitted from her work.”<sup>12</sup>

4. On August 12, 2021, DCPS issued Student’s report card for the 2020-21 school year. His/her final grades and teacher comments were as follows: Language Arts – B+ (Pleasure to have in the class. Good participation.), Science – B+ (Pleasure to have in the class. Good participation.), Math – A- (Pleasure to have in the class.), Spanish Language & Culture - A- (Pleasure to have in the class. Good participation), World Geography & Cultures – A- (Pleasure to have in the class. Excellent behavior), Art – A-, Music – B+, Health & Physical Education – A- (Pleasure to have in the class. Good participation). Based on Student’s Reading Inventory Lexile score of 1018 on January 25, 2021, Student was reported to be reading at a level two grades higher than his/her grade level.<sup>13</sup>

5. On or about August 20, 2021, Examiner A and Examiner B completed a Psychological and Educational Evaluation.<sup>14</sup> The examiners had evaluated Student in 2018 when

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<sup>9</sup> *Id.* at 11 (27).

<sup>10</sup> *Id.* 11-12 (27-28).

<sup>11</sup> *Id.* at 13 (29).

<sup>12</sup> R8:1 (101).

<sup>13</sup> Respondent’s Exhibit (“R:”) 3 at pages 13-15 (35-37). The exhibit number and exhibit page numbers are followed by the electronic page number in the disclosure in parentheses, i.e., R3:13-14 (35-37).

<sup>14</sup> P4:1 (65).

her/his parents were concerned with her/his anxiety, irritability, difficulty engaging with peers, and functioning below age level in reading writing and mathematics. At that time, the examiners diagnosed Student with Attention Deficit Hyperactivity Disorder (“ADHD”).<sup>15</sup> By 2021, despite Student having what Petitioners described as “a ‘wonderful’ special education adviser at [redacted] [sic],” they were concerned with Student’s performance during virtual instruction; Student spoke little while in the virtual classroom and was “‘barely’ at grade level with reading and ‘still below grade level in mathematics.’”<sup>16</sup> On the Weschler Intelligence Scale for Children (“WISC-V”), Student scored in the Average range in Full Scale IQ (91), Verbal Comprehension (98), Working Memory (100), Processing Speed (98), and Visual Spatial (86), and Low Average in Visual Spatial (86) and Fluid Reasoning (88). These scores reflected improvement from the 2018 evaluation where Student was Below Average in Fluid Reasoning (79) and Low Average in Full Scale IQ (89) and Processing Speed (81).<sup>17</sup>

Student’s attention and executive functioning were measured through the Test of Variables of Attention (“TOVA-8”), the Conners (“Conners-3”), subtests from the Delis-Kaplan Executive Function System (“D-KEFS”), the Klove Grooved Pegboard Test, and the Cancellation subtest from the WISC-V. While on her/his ADHD medication, Student did not present with difficulties with the regulation of attention on the TOVA-8, compared to her/his score in 2018 when s/he was not taking medication. Student’s score on the Cancellation subtest was consistent with the TOVA-8 score.<sup>18</sup> Student performed better on the D-KEFS than s/he did in 2018, but the examiners did not characterize her/his D-KEFS scores relative to age-level norms.<sup>19</sup> The Conners ratings scales were completed by Petitioners and Student’s grandmother. The examiners found it noteworthy that the Petitioners’ ratings were significantly different. Petitioner B rated Student Average in 10 of the 11 scales, while Petitioner A rated him/her Significant in 7 of the 11, and 5 were Very Elevated. “This discrepancy likely carries clinical meaning and is worth exploring.”<sup>20</sup> The grandmother’s scale fell “mostly between those of [Student’s] two mothers.”<sup>21</sup> On Klove, which screens for differential hemispheric activation, Student’s scores were in the Average range with either hand. “Based upon the foregoing, we would continue the diagnosis to attention deficit hyperactivity disorder – combined presentation. “As noted, given that [Student] was seen while on Vyvanse, this evaluation cannot be used to make a differential determination regarding this diagnosis. What can be said is that on Vyvanse no problems are noted on tests of attention/executive functioning.”<sup>22</sup>

On the Woodcock-Johnson Tests of Cognitive Abilities (“WJ-IV”), Student scored in the Average range in Comprehension-Knowledge (97), Short-Term Working Memory, and Perceptual Speed, in the Below Average range in Fluid Reasoning (80), and Low in Long-Term Retrieval (76).<sup>23</sup> On the WJ-IV Tests of Achievement, Student scored in the High Average range in Basic Reading Skills (111), in the Average range in Broad Reading (99), Reading Fluency (97), Broad

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<sup>15</sup> *Id.* at 6 (70).

<sup>16</sup> *Id.* at 1 (65).

<sup>17</sup> *Id.* at 3 (67). The examiners opined that the difference between the IQ scores was “not meaningfully different.” *Id.* at 11 (75)

<sup>18</sup> *Id.* at 8 (70).

<sup>19</sup> *Id.* at 8-9 (70-71). Student’s scores on the Verbal Fluency subtests ranged from the 63<sup>rd</sup> to the 91<sup>st</sup> percentiles, on the Color-Word Interference Test, from the 16<sup>th</sup> to the 63<sup>rd</sup> percentile, and in the 50<sup>th</sup> percentile on the Tower Test. *Id.* at 7 (71).

<sup>20</sup> *Id.* at 8 (72).

<sup>21</sup> *Id.*

<sup>22</sup> *Id.* at 9 (73).

<sup>23</sup> *Id.* at 16 (80).

Written Language, Academic Skills (99), Academic Fluency (92), and Low Average in Academic Applications (87), Broad Math (81) and Math Calculation Skills (85).<sup>24</sup> The examiners did not provide data from the Gray Silent Reading Test, only the indication “Informal.”<sup>25</sup>

[Student] earned average scores on assessments of [his/her] basic reading and written language skills, but [s/he] continues to show significant difficulty with mathematics. In addition, [s/he] shows weaknesses with reading comprehension on both the Woodcock-Johnson IV Tests of Achievement and the Gray Silent Reading Test. [Student’s] difficulties warrant a diagnosis of a disorder of mathematics with impairment in math reasoning, calculations and fluency... and a disorder of reading with impairment in reading comprehension.<sup>26</sup>

The examiners recommend, *inter alia*, that Student “needs to engage in careful, systematic math tutoring... [Student] would also benefit from individual tutoring that focuses on improving her/his reading comprehension and written language skills... Given [Student’s] slow processing speed, [s/he] needs extra time (time and a half) to complete assignments and tests. They also recommended that s/he have access to a word processor with a spell-checker and a calculator.”<sup>27</sup>

6. On February 8, 2022, DCPS issued Student’s IEP Progress Report for the second reporting period of the 2021-22 school year. In Math, Student was reported to be Progressing on both goals. Teacher A reported that s/he had mastered one-step, one operation problems and was learning to solve problems with more than one operation. In Reading, Teacher A reported that Student was Progressing on his/her goal, having read *Call of the Wild* and completed a character map citing text evidence to connect characters within the story. “[Student] continues to need support to organize [his/her] thoughts. [S/he] asks questions when [s/he] is unsure and is demonstrating the desire to improve [his/her] skills.” In Written Expression, Teacher A reported that Student was Progressing on his/her two writing goals: “[S/he] is using a MPO format organizer to structure [his/her] essays and this has enabled [him/her] to begin to write well thought out paragraphs... [Student] responds to a writing prompt at the beginning of class. [Student] often needs clarification or redirecting in order to get started; however, [his/her] attention to punctuation, capitalization and spelling are consistently good.” In Behavior, Witness F reported that Student was Progressing on his/her three BSS goals. Student was learning to identify rational vs. irrational thoughts, but was struggling to implement was s/he was learning. Student was more comfortable in anxiety-producing situations and able to brainstorm coping strategies with Witness F.<sup>28</sup>

7. On February 7, 2022, DCPS conducted an IEP Annual Review meeting.<sup>29</sup> The Consideration of Special Factors was unchanged from the previous IEP. In Mathematics, the PLOP reported that Student scored 490 on her/his September 20, 2021 BOY i-Ready assessment, placing her/him at a grade G performance level, one grade below her/his grade level. The PLOP also

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<sup>24</sup> *Id.* at 17 (81).

<sup>25</sup> *Id.* at 16 (80). The examiners stated that Student showed weaknesses with reading comprehension on both the WJ-IV and the Gray Silent Reading Test. *Id.* at 10 (74).

<sup>26</sup> *Id.* at 10 (74). Student scored in the Low Average range on the Passage Comprehension subtest (87), Applied Problems (81), Calculations (82), and Math Facts Fluency (88). The examiners did not provide data from the Gray Silent Reading Test, only the indication “Informal.”

<sup>27</sup> *Id.* at 12-13 (76-77).

<sup>28</sup> P8:6-8 (128-30).

<sup>29</sup> P6:4 (96).

reported the results of Student’s August 2021 WJ-IV Math assessment and that Student “participates on a regular basis in math class.” The goals were unchanged from the 2021 IEP.<sup>30</sup> In Reading, the PLOP reported that Student scored 990 on the September 17, 2021 Reading Inventory. The year-end grade level expected range was 925-1070. The PLOP also reported Student’s WJ-IV scores. “[Student] participates and shares [his/her] ideas when [s/he] is in small group breakout sessions. In a whole group setting, [s/he] works to complete assignments in [his/her] class notebook... [Student] currently has an 80% average in [his/her] ELA class. [Student] participates in class on a regular basis. [Student] is willing to read aloud in class and demonstrates appropriate reading fluency. [Student] often asks for support or reassurance when answering questions based on what [s/he] reads.” The goal was unchanged from the 2021 IEP.<sup>31</sup> In Written Expression, the PLOP reported that Student scored in the Average range in Broad Written Language on the 2021 WJ-IV. The goals were virtually unchanged from the 2021 IEP.<sup>32</sup> In Behavior, the PLOP reported that Student was administered the Child Automatic Thoughts Scale (“CATS”) in October that measures internalizing and externalizing problems involving physical threat, social threat, personal failure, and hostility. S/he “did not score high on any of the subscales in this assessment.” On an October 2021 SDQ, Student was Close to Average in all measured categories. Although Student scored in the Low range for Anxiety on the CATS, s/he reported in group counseling that s/he struggles with unproductive thoughts that cause anxiety quite often. The IEP team added a goal to two goals from the previous IEP; the new goal required Student to demonstrate the appropriate emotional response in anxiety or frustration producing situations by using a strategy to regulate back to an expected emotional state and return to the assigned task within two minutes.<sup>33</sup>

The IEP team maintained Student’s services at eight hours per week of specialized instruction inside general education and two hours per month of BSS as well as the Other Classroom Aids and Services.<sup>34</sup>

8. On July 18, 2022, Examiner C of School B completed a Comprehensive Speech and Language Assessment of Student.<sup>35</sup> On the Peabody Picture Vocabulary, which measures receptive vocabulary skills, and the Expressive Vocabulary Test, Student scored in the Expected range.<sup>36</sup> On the Clinical Evaluation of Language Fundamentals, Student scored in the Average range in Multiple Meanings, Below Average in Making Inferences, and Borderline at-risk in Figurative Language and on the Total Metalinguistics Index. “Difficulty making inferences impacts [Student’s] ability to analyze information and make higher-level connections about what [s/he] hears and/or reads... Overall, weaknesses in any of [the] metalinguistic skills contribute to challenges in understanding and using language effectively in social and academic contexts, such as during conversational exchanges and classroom discussions, when reading literature and textbooks, and when writing stories and essays.<sup>37</sup> On portions of the Test of Auditory-Processing Skills (“TAPS-4”), Student was Below Average on the Listening Comprehension Index. “Weak listening comprehension skills put [Student] at a disadvantage in making connections in learning,

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<sup>30</sup> *Id.* at 5-7 (97-99).

<sup>31</sup> *Id.* at 7-9 (99-101).

<sup>32</sup> *Id.* at 9-10 (101-2).

<sup>33</sup> *Id.* at 11-12 (103-4).

<sup>34</sup> *Id.* at 13 (105).

<sup>35</sup> P10:1 (147).

<sup>36</sup> *Id.* at 3 (149).

<sup>37</sup> *Id.* at 4-5 (150-51).

in answering questions orally or in writing, and in participating effectively in the class discussions.”<sup>38</sup> On the Test of Word Reading Efficiency (“TOWRE-2”), Student was in the Very Superior range in Word Reading Efficiency. On the Gray Oral Reading Tests (“GORT-5”), s/he was in the Average range in Reading Rate, Reading Accuracy, and Reading Fluency, but Below Average in Reading Comprehension.<sup>39</sup> On the Oral and Written Language Scales (“OWLS-II”), Student scored in the Average range in Written Expression. “[Student’s] weaknesses in written language cause difficulty when sharing [his/her] ideas and thoughts in writing. Weaknesses in capitalization and punctuation are noted.”<sup>40</sup>

Examiner C diagnosed Student with Mixed Receptive/Expressive Language Disorder, a Specific Learning Disorder (“SLD”) with Impairment in Reading, and an SLD impairment in Written Expression. Examiner C recommended that Student receive forty-five minutes per week of speech and language therapy, and that her/his classroom environment should be one with a small student to teacher ratio to “ensure that [Student] receives the support [s/he] will need to acquire linguistic skills, as well as academic content.”<sup>41</sup>

9. On August 5, 2022, Attorney A, Petitioners’ attorney, notified DCPS that Student would attend School B during the 2022-23 school year for DCPS’ failure to provide a FAPE, requested that DCPS fund the placement, and reserved the right to seek funding from DCPS.<sup>42</sup> On August 11, 2022, DCPS replied, asserting that it had offered a FAPE to Student and denying the request for funding of Student’s placement at School B.<sup>43</sup>

10. School B is a private school that serves children who have language-based disabilities. The total enrollment at School B is 393 in three divisions, with 130 in the Upper School and 180 in the Middle School. School B has a Certificate of Approval (“COA”)<sup>44</sup> from the Office of the State Superintendent of Education (“OSSE”). Class sizes are generally limited to eight students. School B does not develop individualized educational plans for students who are placed there by parents rather than OSSE or a local education agency (“LEA”).<sup>45</sup>

11. On August 11, 2022, DCPS issued Students 2021-22 Report Card. His/her final grades were as follows: English – B, Science – B+, Math – B+, World History & Geography – B, Spanish – C, Health & Physical Education – A, Music – A.<sup>46</sup>

12. On September 8, 2022, Witness A, Petitioners’ educational consultant, completed an Academic Assessment of Student.<sup>47</sup> On the WJ-IV in Reading, Student scored the Average range in Basic Reading Skills (104), Reading (98), and Reading Fluency (90), but one point Below Average in Broad Reading (89). In Mathematics, s/he scored in the Average range in Math

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<sup>38</sup> *Id.* at 5-6 (151-52).

<sup>39</sup> P10:8 (154).

<sup>40</sup> *Id.* at 9 (155).

<sup>41</sup> *Id.* at 11 (157).

<sup>42</sup> P11:1 (167).

<sup>43</sup> *Id.* at 2 (168).

<sup>44</sup> Private schools with a COA are eligible to receive funding for special education placements from OSSE and local education agencies (“LEAs”) in the District.

<sup>45</sup> Testimony of Witness C.

<sup>46</sup> R3:17-18 (39-40).

<sup>47</sup> P12:1 (171).

Calculation Skills (91), Low Average in Broad Mathematics (81) and Low in Mathematics (77). In Written Expression, Student scored in the Average range in Written Language (102), Broad Written Language (99), Written Expression (94), and Sentence Writing Fluency (93).<sup>48</sup>

13. On December 12, 2022, Petitioners gave written consent for School B to release Student's educational records to DCPS and for DCPS to observe Student in the virtual classroom or in person at School B.<sup>49</sup>

14. On February 7, 2023, Petitioners' counsel's paralegal responded to DCPS' request to Petitioners to provide dates for their availability for an IEP meeting. The dates provided ranged from March 1, 2023 through March 10, 2023.<sup>50</sup>

15. On April 13, 2023, Student's mathematics skills were measured on the IXL Real Time Diagnostic. His/her Overall Math Level was 500, which Witness C testified corresponded to a grade D level, three grade levels below his/her current grade. Student was administered the Measures of Academic Progress in Math and Reading in the fall of 2022 and in the spring of 2023. In Math, s/he scored 210 in the fall (22<sup>nd</sup> percentile) and 213 in the spring (19<sup>th</sup> percentile). In Reading, s/he scored 218 in the fall (50<sup>th</sup> percentile) and 233 in the spring (75<sup>th</sup> percentile).<sup>51</sup>

16. In May 2023, Student completed an End of Year Writing Assessment.<sup>52</sup> On a scale of Exceptional, Skilled, Proficient, Developing, and Beginning, Student's essay was graded Skilled.<sup>53</sup> Student's Math Teacher at School B had year-end comments about performance: Understanding content, initially applies strategies, advocates for clarification, able to explain understanding, catch errors, grasps material quickly, participates, follows directions/routine, comes to class prepared, is focused and works independently, completes homework, made good gains this year, hard worker, motivated, works well with a "partner share" – identify errors and explain, shows good effort in class, can easily confuse rules, needs to review, has a positive attitude, and asks good questions in class.

17. Student's year-end grades and levels of teacher support in each class for the 2022-23 school year at School B were as follows:<sup>54</sup> English – B+ (Independent from support in three areas, Minimal support in two areas, Moderate support in Understanding key concepts and vocabulary and Engaging in discussion about content), Primary Source History – B (Independent in two areas, Minimal in three areas, Moderate in Understanding key concepts and vocabulary and Uses organizational supports and strategies), Investigating Variables (Math) – A- (Independent in four areas, Minimal in three areas), Democracy – A- (Independent in one area, Minimal in one

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<sup>48</sup> *Id.* at 2 (172).

<sup>49</sup> P16:3 (197).

<sup>50</sup> P19:2 (206).

<sup>51</sup> P21:1 (213). The score report did not provide precise grade level equivalence information, but graphs indicated that Student's Math scores were consistently below grade level while his/her Reading scores rose from grade level to above grade level.

<sup>52</sup><sup>53</sup> P23:1 (217).

<sup>53</sup> P23:8 (224); testimony of Witness C.

<sup>54</sup> P26:1-4 (251-54). The levels of teacher support were Independent, Minimal, Moderate, and Maximum. Moderate support involved "frequent independent check-ins, redirection, repetition, or clarification most days but not every day." Maximum support involved "individual assistance throughout class each day and may continue to struggle even with this level of support." *Id.* at 4 (254).

area, Moderate in three areas, and Maximum in Understanding key concepts and vocabulary and Engages in discussion about content), Science – B (Independent in four areas, Minimal in three areas), Ceramics – A (Independent in all areas), Authors and Illustrators – A (Independent in two areas, Minimal support in five areas), and Dance A- (Independent in six areas, Minimal in one).

18. The parties ultimately agreed to convene the IEP meeting on June 16, 2023. On June 9, 2023, DCPS forwarded a draft IEP to Petitioners.<sup>55</sup> DCPS received educational records from School B on June 12, 2023.<sup>56</sup> Witness A, Petitioners' educational consultant, reviewed the draft IEP and provided DCPS an edited version with suggested revisions.<sup>57</sup>

19. On June 16, 2023, at the end of Student's grade L year at School B, DCPS convened an IEP Annual Review meeting.<sup>58</sup> The Consideration of Special Factors was unchanged from the previous IEPs. In Mathematics, the PLOP reported Student's scores on the September 2022 WJ-IV conducted by Witness A and the MAP assessments administered by School B. The goals involved proficiency in the four basic functions, solving word problems, and determining the angles in geometric figures.<sup>59</sup> Witness A commented that the first goal was not measurable and that the goals did not address all of Student's math weaknesses, but did not propose additional goals.<sup>60</sup> In Reading, the PLOP reported Student's scores on the September 2022 WJ-IV conducted by Witness A and the MAP assessments administered by School B. The PLOP also reported Student's scores on a fall Language Arts Reading Assessment: Literary Text – High Average, Informational Text – Average, Vocabulary – Low Average. The goals involved answering comprehension questions with 80% accuracy related to grade level informational texts and using contextual clues to determine the meaning of unfamiliar words with 80% accuracy.<sup>61</sup> The first goal reflected a change from the draft as suggested by Witness A.<sup>62</sup> In Written Expression, In Written Expression, the PLOP reported Student's scores on the September 2022 WJ-IV conducted by Witness A. The goals involved using a variety of sentence structures and sentence starters to signal differing relationships among ideas, forming topic sentences and connecting key details in paragraphs.<sup>63</sup> Witness A offered no comments on the goals.<sup>64</sup> In Behavior, the PLOP repeated information from the previous IEP and the goals were unchanged.<sup>65</sup> Witness A offered no comments on the goals as there was no updated behavior information.<sup>66</sup>

The IEP team increased Student's specialized instruction services from eight to ten hours per week inside general education and maintained BSS at two hours per month, as well as the Other Classroom Aids and Services.<sup>67</sup>

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<sup>55</sup> P36:1 (299).

<sup>56</sup> P28:1 (275).

<sup>57</sup> P27:1 (255).

<sup>58</sup> P36:3 (301).

<sup>59</sup> R10:3-6 (123-26).

<sup>60</sup> P27:4-5 (256-57).

<sup>61</sup> R10:6-8 (126-28).

<sup>62</sup> P27:7 (261).

<sup>63</sup> R10:8-12 (128-32).

<sup>64</sup> P27:7-9 (261-63).

<sup>65</sup> R10:12-13 (132-33).

<sup>66</sup> P27:10 (264).

<sup>67</sup> R10:14 (134).

Petitioners' representatives asserted that Student "needs full-time special education services which [s/he] is currently receiving at [School B]. [S/he] needs a full-time special education setting throughout [his/her] entire day..."<sup>68</sup>

20. On August 3, 2023, Attorney A, Petitioners' attorney, notified DCPS that Student would attend School B during the 2023-24 school year for DCPS' failure to provide a FAPE, requested that DCPS fund the placement, and reserved the right to seek funding from DCPS.<sup>69</sup> On August 11, 2023, DCPS replied, asserting that it had offered a FAPE to Student and denying the request for funding of Student's placement at School B.<sup>70</sup>

21. Witness A, Petitioners' educational consultant, testified that at the IEP meeting on February 7, 2022, Petitioners stressed their desire to have Student work on self-advocacy and executive functioning, citing the Prior Written Notice issued after the IEP meeting,<sup>71</sup> but the IEP failed to address these concerns. Witness A opined that the IEP was inappropriate because Student requires services outside general education throughout the school day, noting that Student had not mastered any of his/her goals. As for the IEP developed on June 16, 2023, Witness A agreed with the School B evaluation that Student required S/L services. Witness A again opined that the IEP was inappropriate for Student because s/he requires special education services throughout the day in a small class environment, and that School B is an appropriate placement for Student. Witness A also opined that Student had made progress during the 2022-23 school year at School B academically, socially/emotionally, behaviorally, in perseverance, attitude towards school, writing, communication, and work completion. Witness A opined that Student was incapable of making progress in an environment less restrictive than School B due to the lack of full-time support, less redirection, and less executive function. She further testified that Student's anxiety is not triggered because the program at School B is individualized to meet his/her needs. On cross-examination, Witness A conceded that there was no basis to dispute the validity of Student's Progress Reports and report cards at School A. She also conceded that despite the fact the issue was the amount of services Student receives from certified special education teachers, she was unaware of the certification statuses of Student's teachers at School B.

22. Witness B, a speech-language pathologist at School B, is a co-teacher in Student's Grade K Seminar. Witness B reported that Student is an active student, participates in class, and needs repetition, rephrasing, and teacher check-ins. Witness B opined that Student requires continued S/L services to help him/her to understand concepts and engage in conversations. Witness B also opined that Student requires smaller classes throughout the day.

23. Witness C, is School B's Director of Jurisdictional Services. Among other duties, she represents School B in due process hearings and is responsible for coordinating responses to document requests related to hearings. Witness C testified that the scores on the WJ-IV Tests of Cognitive Abilities were consistent with Student's presentation at School B. Witness C opined that Student's anxiety impedes his/her ability to take in information. However, the scores on the Conners-3 indicating defiance and aggression were not consistent with her/his presentation at School B because "in a small, supportive environment [s/he] feels supported." Witness C

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<sup>68</sup> P28:1 (275)

<sup>69</sup> P30:1 (283).

<sup>70</sup> *Id.* at 2 (284).

<sup>71</sup> P6:1 (93).

characterized Student as having strong academic skills but has difficulty accessing information and presenting in classes at all times. Witness C opined that the February 7, 2022 IEP was inconsistent with Student's needs as s/he needs "far more" than was prescribed in the IEP; she opined that Student would not be able to perform well in a larger class environment. On cross-examination, when asked what School B provides that DCPS does not, Witness C replied arts integration, scaffolded roll-out of instruction, social workers in each division, integrated related services, and support in electives and specials, i.e., art, music, ceramics, dance, etc. She conceded that Student does not receive related services support during any class. Witness C conceded that the level of coursework that a special education teacher receives compared to a general education teacher is "extensive," and special education teachers also must pass a test to be certified; some candidates for certification complete the coursework but are not able to pass the test. Witness C conceded that a teacher can be hired at School B without having special education certification or having applied for certification. She also conceded that in all of her years of experience in special education, she had never recommended that a child with Student's profile required "specialized instruction in a private school, specialized instruction all day long, including lunch and recess."<sup>72</sup>

24. Petitioner A testified that Student began his/her education at School C where s/he received his/her first IEP in grade E. The IEPs worked well throughout his/her time at School C, where class sizes were 20-22. Petitioner A described School C as "great, supportive, and friendly." A highlight of Student's time at School C was being selected for the lead role in a school play in grade D. Student advanced to grade G and moved to School A for the 2020-21 school year. Student's instruction was provided virtually throughout the year due to COVID-19 restrictions. In-person instruction resumed for the 2021-22 school year. Petitioner A testified that the parents had difficulty locating Student's homework assignments.<sup>73</sup> On October 12, 2021, Student's Spanish teacher sent an email to all of students' parents providing information about the class including, but not limited to, how to access assignments and progress reports. Petitioners responded on October 13, asking for direction on "how better to support" Student, and expressing surprise at not receiving advance notice that Student would receive a D on the latest progress report.<sup>74</sup> On October 27, 2021, Petitioner A sent an email to Administrator A and Teacher A complaining that she had received no response to her inquiry as to how the parents could help support Student.<sup>75</sup> On November 10, 2021, Petitioner complained again about an inability to locate Student's homework assignment.<sup>76</sup> On November 17 and 20, 2021, Petitioner A sent an email to an unidentified recipient at School A concerning Student's failing and incomplete grades on assignments that were not submitted.<sup>77</sup> On December 8, 2021, Petitioner A complained to Teacher S that "...[Student] has not been in proper school since March 2020. [S/he] does not have the executive function skills to independently do what you're asking [him/her] to do and needs explicit coaching."<sup>78</sup> At the IEP meeting on February 7, 2022, Petitioners agreed to the IEP only because "we didn't know we couldn't disagree" with the level of services. Throughout March 2022, Petitioners wrote emails about Student's grades in Spanish and support on homework assignments.<sup>79</sup> Petitioners decided in

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<sup>72</sup> Testimony of Witness C.

<sup>73</sup> See P5:1 (83).

<sup>74</sup> *Id.* at 8 (90). Petitioners' email indicated that the grade was on Student's "report card," but DCPS report cards are not issued in early October.

<sup>75</sup> *Id.* at 3 (85).

<sup>76</sup> *Id.* at 4 (86).

<sup>77</sup> *Id.* at 5 (87).

<sup>78</sup> *Id.* at 7 (89).

<sup>79</sup> P7:1-5 (115-19).

April 2022 to send Student to School B: “We were getting no direction, no way forward, nobody cared.” On cross-examination, Petitioner A conceded that Teacher B, Student’s math teacher at School B, reported that Student “Is focused and works independently,” “completes homework,” and “Asks good questions in class.”<sup>80</sup> Petitioner A would not concede that Teacher B’s observation that Student “Advocates for clarification” was inconsistent with Witness A’s assertion that Student would not self-advocate in class.<sup>81</sup>

25. Witness D, School A’s Assistant Principal, opined that Student was very successful during the 2020-21 school year with grades of A’s and B’s and an English Lexile score of 1018 that was “well above grade level.” He also opined that Student’s performance on the W/J Test of Achievement was consistent with her/his Full Scale IQ. Witness D opined that Student has been successful the academic setting at School A and does not require the level of support provided at School B. On cross-examination, Witness D conceded that Student had not mastered any of his/her previous goals when the February 7, 2022 IEP was developed. He explained that distance learning during the 2020-21 school year “complicated matters,” and the goals would not be changed unless the IEP team was sure that they were mastered.<sup>82</sup>

26. Witness E was Student’s special education teacher during the 2020-21 school year and the LEA Representative during the 2021-22 school year. She “pushed-in” to Student’s reading and writing classes (“ELA”) and periodically in other classes. Witness E opined that Student did very well during the pandemic; s/he was able to use the supports provided to him/her, a graphic organizer, and showed growth. She opined that Student was successfully accessing grade level content during the 2020-21 and 2021-22 school years. Witness D testified that there was no disagreement that Student’s goals would be repeated on the February 7, 2022 IEP or with the Other Classroom Aids and Services. She opined that the level of services was appropriate based on Student’s progress and that clarification and repetition was included in the Aids and Services to ensure that s/he understood the expectations and the tasks at hand. Witness D opined that data does not exist that supports the need to separate Student completely from non-disabled peers. Witness E testified that no one has disputed the validity of Student’s grades.<sup>83</sup>

27. Witness F, a social worker at School B, provided Student’s BSS during the 2021-22 school year. She met with Student weekly and administered an SDQ and a Child Automatic Thoughts Scale (“CAPS”). Witness F testified that Student evinced no communications deficits in the classroom. She testified that there was no disagreement with the Behavior PLOP she drafted, with any of the Behavior goals, or with the level of BSS prescribed. Witness F opined that Student required continued BSS due to impulsivity and “irrational thoughts,” such as believing the teacher hates her/him alone when directing the entire class to be quiet. From a behavioral standpoint, she opined that data did not support the need for Student to be in a private school environment, segregated from non-disabled peers, to make progress.<sup>84</sup>

28. Witness G, the Special Education Coordinator for School A, testified that the PLOPs in the June 16, 2023 IEP were not completely updated because School A had not received

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<sup>80</sup> See P:25:1 (249).

<sup>81</sup> Testimony of Petitioner A.

<sup>82</sup> Testimony of Witness D.

<sup>83</sup> Testimony of Witness E.

<sup>84</sup> Testimony of Witness F.

all of the education records they requested from School B. She opined that the level of services prescribed in the IEP was appropriate, because Student made educational gains during the school year in a general education environment. She further opined that segregation in a private school environment would be warranted only if the child were unable to access the curriculum and required constant attention.<sup>85</sup>

29. Witness H was DCPS' Non-public Monitor, who is responsible for monitoring Students with IEPs at School B and other private schools in the area with COAs. He testified that on March 3, 2022, OSSE ordered School B to take corrective action, *inter alia*, for violating a local regulation that "Teachers should be certified per the state or district requirements where the school is located."<sup>86</sup> Witness H testified that on September 29, DCPS received the annually updated list of teachers at School B who are certified to provide special education services. The list provided that for the 2022-23 school year, only Teacher B, Teacher C, and Teacher R were certified; for school year 2023-24, only Teacher P and Teacher Q were specified in special education and three others had subject matter certifications, and four had no certification of any kind. Witness H opined that School B is not an appropriate placement for Student because over the two-year period, only five of her/his seventeen teachers were properly certified. He further testified that in his many visits to School B, he has never seen the "integrated" related services that they purport to provide and has never seen written report from an integrated service provider.<sup>87</sup>

30. Witness J, a School A Assistant Principal, was the Grade G Administrator for the 2020-21 school year. She testified that based on his/her grades, which Student fairly earned, s/he had a "strong" academic year. Witness J opined that no data exists that suggests Student requires a self-contained, segregated placement, apart from non-disabled peers, to make progress. Witness J opined that the June 2023 IEP was appropriate because Student does not need a restrictive, full-time setting to be successful. Witness J noted that Student earned grade K credit for Spanish while in grade B at School A, which is not a routine accomplishment.<sup>88</sup>

31. Witness K is a DCPS speech and language therapist. Regarding School B's July 2022 Speech and Language Evaluation of Student, Witness K opined that deficits on the metalinguistic portion of the CELF do not mean the student cannot access the curriculum; "metalinguistics are above the linguistic level," measuring one's responses to inferences and pragmatic language. Witness K questioned the validity of the scores in the evaluation because it did not include a statement of validity; Student's ADHD warranted a statement of validity. Witness K opined that the results of the evaluation did not warrant prescribing S/L services. Witness K testified that she would recommend visual accommodations, sentence starters, and use of graphic organizers for Student, which were included in his/her IEPs. Witness K opined that the results of the TAPS-4 did not suggest the need for services, nor the GORT, where Student's standard score (89) was one point below Average. She opined that "everything related to speech" on the evaluation was average. She further opined that a student with Student's profile, who has never had difficulty communicating in the classroom or in the community, does not need direct S/L services. Witness K opined that Teacher B's comments about Student's self-advocacy,

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<sup>85</sup> Testimony of Witness G.

<sup>86</sup> R14:1 (148).

<sup>87</sup> Testimony of Witness H.

<sup>88</sup> Testimony of Witness J.

following directions, and asking good questions are inconsistent with the need for S/L services.<sup>89</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:

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>90</sup>

The issue in this case involves the alleged failure of DCPS to provide an appropriate IEP and placement. Under District of Columbia law, DCPS bears the burden as to this issue. Petitioners bear the burden as to the propriety of School B as a placement for Student. The burden of persuasion must be met by a preponderance of the evidence.

**Whether DCPS denied Student a FAPE by failing to provide an appropriate IEP and location of service for the 2022-2023 school year. Specifically, Petitioners assert that the IEP did not provide a sufficient amount of self-contained special education services and the proposed LOS, School A, was too large of a setting.**

The Supreme Court's first opportunity to interpret the predecessor to IDEA, The Education of the Handicapped Act ("EHA"), came in *Board of Education of the Hendrick Hudson Central School District v. Rowley*.<sup>91</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>92</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>93</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

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<sup>89</sup> Testimony of Witness K.

<sup>90</sup> D.C. Code Sect. 38-2571.03(6)(A)(i).

<sup>91</sup> 458 U.S. 176, 187 (1982).

<sup>92</sup> *Id.* at 189-90, 200

<sup>93</sup> *Id.* at 200.

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>94</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>95</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>96</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 who cannot.<sup>97</sup>

In *Andrew*, 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. 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>98</sup>

In order for Petitioners to prevail on their claim, they must establish a *prima facie* case that DCPS failed to provide Student an appropriate IEP on February 7, 2022. They mastered this goal through the expert testimony of Witness A, their educational advocate, and Witness C, School B’s Director of Jurisdictional Services. Witness A, Petitioners’ educational consultant, testified that at the IEP meeting on February 7, 2022, Petitioners stressed their desire to have Student work on self-advocacy and executive functioning, but the IEP failed to address these concerns. She also opined that the IEP was inappropriate because Student requires services outside general education throughout the school day, noting that Student had not mastered any of his/her goals. Witness C opined that the February 7, 2022 IEP was inconsistent with Student’s needs as s/he needs “far more” than was prescribed in the IEP; she opined that Student would not be able to perform well in a larger class environment. For DCPS to prevail, the preponderance of the evidence must establish that the IEP was reasonably calculated to enable Student to make progress appropriate in light of his/her circumstances.

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<sup>94</sup> *Id.* at 203-04.

<sup>95</sup> *Andrew F. ex rel. Joseph F. v. Douglas County School District RE-1*, 137 S.Ct. 988 (2017).

<sup>96</sup> *Id.* at 997.

<sup>97</sup> *Id.* at 1000-01 (citations omitted).

<sup>98</sup> 137 S.Ct. at 1000-01.

The record reveals that Student first became eligible for services in grade E, during the 2015-16 school year. From that time through grade G (SY 2020-21), Student was educated in a general education setting. Her/his grade G IEP, developed on February 16, 2021, prescribed eight hours of specialized instruction inside general education and two hours per month of BSS. Petitioners offered no testimony or documentation that the IEPs during this period were inappropriate or that Student failed to thrive at School C or School A in any way. On the contrary, Petitioner A testified that Student did well at School C, which she described as “great, supportive, and friendly.” After the 2020-21 year of virtual instruction, Student’s grandparents commended the School A staff for providing Student “with an opportunity to grow emotionally, within the academics...,” with particular praise for Student’s special education teacher.

During the 2021-22 school year, Petitioners expressed concerns related exclusively to Student’s homework assignments in one course, Spanish. Student was earning failing grades in Spanish due primarily to poor performance on homework assignments. Petitioners were frustrated because they did not feel they were getting timely or constructive responses to their comments to the Spanish teacher regarding support for Student on homework assignments. There was no testimony or documentation that Petitioners had any concerns about Student’s progress in any of the areas of concern in the IEP: reading, writing, math, or behavior. Nor was there testimony or documentation that there was a problem with homework assignments in any class other than Spanish. Student earned a B in ELA and a B+ in math. His/her report card indicated that s/he was performing above grade level in reading, and while s/he remained below grade level in math, his/her BOY i-Ready assessment revealed that s/he had progressed two grade levels during the 2020-21 school year. Despite Petitioners’ concerns about Spanish class, by the end of the year, Student earned a C and earned credit for Spanish in the next higher school division. Petitioners’ witnesses conceded that there was no reason to doubt that Student earned the grades that were recorded.

The opinions of Witness A and Witness C that Student requires a full-time special education placement in a private school are belied by the record. First, the evaluation conducted immediately prior to the 2021-22 revealed that Student’s academic performance was consistent with her/his cognitive abilities. Her/his cognitive scores on the WISC-V were predominantly average (IQ, Verbal Comprehension, Working Memory, and Processing Speed); on the WJ-IV Tests of Achievement, s/he was High Average in Basic Reading Skills, Average in Broad Written Language, Academic Skills, and Academic Fluency, and Low Average in Math. Second, Witness A opined that the IEP was inappropriate because the IEP failed to address Student’s lack of self-advocacy and deficits in executive functioning. There was no persuasive evidence that Student was unable to self-advocate. On her/his 2020-21 report card, her/his teachers in Language Arts, Science, Spanish, and Health and Physical Education all commended Student’s class participation. On the PLOP of the February 7, 2022 IEP, Student’s special education teacher reported that s/he had no reluctance to ask questions when s/he was unsure about something. These observations are similar to those of Student’s math teacher at School B. As for executive functioning, the August 2021 examiners found that once Student was on prescribed medication for ADHD, s/he had no problems on tests of attention/executive functioning.

Third, that Student had not mastered any of the goals on the February 16, 2021 IEP does not mean s/he made no progress throughout the year. Petitioners’ witnesses did not question Student’s teachers’ reports on the Progress Reports that s/he was progressing on all of her/his goals, but argue that lack of mastery indicated that the following IEP with the same goals was

inherently inappropriate. IDEA requires an IEP reasonably calculated to produce progress, not necessarily mastery. Witness D testified that distance learning, which was implemented a month after the IEP was developed and lasted throughout the 2021-22 school year for Student, complicated instruction, leading the IEP team to maintain goals until they could be sure goals had been mastered. Nevertheless, Student advanced two grade levels in math during the 2020-21 school year on the i-Ready assessment, and at the end of the 2021-22 school year, s/he was well above grade level in reading. Finally, Witness A opined that Student requires special education services outside general education throughout the school day. However, there is no dispute that Student made progress in a general education environment from the 2015-16 school year through the 2020-21 school year, including the first half-year of the implementation of the February 7, 2021 IEP. During the 2021-22 school year, Petitioners raised no concerns about Student's ability to access the curriculum in any course but Spanish, and those concerns were largely related to homework support.

Witness A's opinion that Student is appropriately placed at School B was based on the premise that Student needed and would receive special education services throughout the school day. However, the testimony from Witness H revealed that of Student's seventeen teachers since s/he has been at School B, only five have been certified to provide special education services. Witness C conceded that School B has developed no education plan for Student or any other student not placed there by OSSE or an LEA. Witness C, who is certified in special education, also testified that the additional training provided to certified special education teachers is extensive. Thus, the instruction Student receives at School B is neither individualized nor required to be provided by special education professionals. Witness A testified that she was unaware of the certification status of the teachers at School B despite her fifteen-year of experience as an educational consultant in this jurisdiction. Either her knowledge of the program at School B was overstated, or she does not value the necessity of certification of special education teachers. In light of School B's required corrective action, it is unlikely that Witness A was unaware of School B's record regarding teacher certification.

Witness C opined that the IEP was inappropriate because Student requires "far more" than was prescribed in the IEP and Student could not make progress in a larger class. As previously discussed, Student had a consistent record of academic progress at School A in large, (20-22) general education classes. Neither Witness A nor Witness C attempted to discredit the grades, progress reports, or periodic assessments from School A. Moreover, Witness C conceded that she has never observed Student in a large class environment and had never before recommended that a child with a profile similar to Student required specialized instruction throughout the school day in a private school.

The record supports the opinions of DCPS' witnesses who testified that Student made consistent progress in a general education environment at School A. Student was performing above grade level in reading, at grade level in writing, and one grade below grade level in math, but progressed two grade levels in math during the implementation of the 2021 IEP that prescribed eight hours of specialized instruction inside general education. For the 2021-22 school year, s/he earned A's and B's in all courses except Spanish, in which s/he earned a C and qualified for advanced credit. Student's academic achievement was consistent with his/her cognitive ability. Throughout her/his time at School A, s/he presented no behavioral issues, and the 2021 examiners found that executive functioning was not a problem when Student was on her/his prescribed ADHD medication.

For these reasons, I conclude that DCPS has met its burden of proving that the IEP it developed for Student on February 7, 2022 was reasonably calculated to enable her/him to make progress appropriate in light of her/his circumstances.

**Whether DCPS denied Student a FAPE by failing to provide an appropriate IEP and location of services for the 2023-2024 school year. Specifically, Petitioners assert that Student’s previously developed IEP expired on February 6, 2023, and the IEP developed on June 16, 2023 (a) was not provided to Petitioners until September 25, 2023, (b) did not provide a sufficient amount of self-contained special education services or a LOS, and (c) did not include S/L services.**

Petitioners rely on the testimony of Witness A, Witness B, and Witness C to make the case that the June 2023 IEP was inappropriate. In large part, the analysis of the testimony of Witness A and Witness C provided above for the February 2022 IEP is equally applicable to the June 2023 IEP. At the June 2023 IEP meeting, Witness A argued for a full-time program, asserting that DCPS’ proposal would leave Student with no support in his/her electives, science, and social studies. Witness A again opined that the IEP was inappropriate for Student because s/he requires special education services throughout the day in a small class environment, and that School B is an appropriate placement for Student. Witness C’s testimony that Student requires far more than was provided on the February 2022 applies with equal force to the June 2023 IEP. However, these opinions are as unpersuasive as they were towards the earlier IEP. Student made progress throughout his/her time at School A and School C in a general education environment with eight hours per week of push-in support from a special education teacher. Witness A opined that Student was incapable of making progress in an environment less restrictive than School B due to the lack of full-time support, less redirection, and less executive function. Again, this opinion is belied by the progress Student made at School A as documented by her/his grades, progress reports, i-Ready and Lexile scores, and achievement scores on the WJ-IV revealing that her/his achievement scores were consistent with her/his cognitive ability.

Witness A testified further that Student’s anxiety is not triggered because the program at School B is individualized to meet his/her needs; Witness C opined that Student’s anxiety impedes her/his ability to access information. These opinions are unpersuasive for two reasons. First, Student has never been diagnosed with anxiety, only ADHD. S/he scored in the Low range for anxiety on the CATS, and Examiner A and Examiner B found that s/he exhibited no signs of inattention or impairment of executive function during their testing. The record at School A also does not support the claim that Student’s progress was affected by inattentiveness or deficits in executive functioning. Second, as discussed above, Witness C conceded that School B has not developed an individualized program for Student, and during the 2023-24 school year, only two of her/his nine teachers are certified in special education, four of the others have no subject matter certification, and none of the seven uncertified teachers have applications pending for special education certification. Thus, for most of each school day, while Student is in a small class environment at School B, s/he is not receiving specialized instruction from special education professionals.

Witness B, a speech-language pathologist at School B, is a co-teacher in Student’s Grade K Seminar. Witness B reported that Student is an active student, participates in class, and needs

repetition, rephrasing, and teacher check-ins. Witness B opined that Student requires continued S/L services to help him/her to understand concepts and engage in conversations. Witness B also opined that Student requires smaller classes throughout the day. Witness B's opinion is refuted by Student's history at School A and School C and by aspects of Examiner C's 2022 Speech and Language Evaluation. Throughout Student's years at School A, neither her/his parents nor her/his teachers expressed concerns about Student's speech and language skills. During his/her last year at School C, s/he was selected for the lead role in the school play. At the end of the 2020-21 school year at School A, his/her teachers in ELA, Science, Spanish, and Health and Physical Education all praised his/her class participation. During the 2021-22 school year, when Petitioners made the decision to move Student to School B, none of their expressed concerns related to speech and language difficulties.

During the summer of 2022, after Student had already been accepted at School B, Examiner C of School B conducted a Speech and Language evaluation and concluded that Student required speech and language therapy. However, s/he scored in the Expected range in receptive and expressive vocabulary skills. On "portions" of the TAPS-4, Student was Below Average on the Listening Comprehension Index, leading Examiner C to conclude that Student was "at a disadvantage in making connections in learning, in answering questions orally or in writing, and in participating effectively in the class discussion." These conclusions are inconsistent with Student's history and with teacher reports at School A and School C as discussed in the previous paragraph. Witness K, DCPS' speech and language expert, also disputed Witness B's opinion. Setting aside Witness K's concerns about the validity of Examiner C's evaluation, Witness K opined that "everything related to speech" on the evaluation was average. She also opined that a student with Student's profile, who has never had difficulty communicating in the classroom or the community does not need direct S/L services. Finally, Witness K opined that the comments of Student's math teacher at School B, endorsing Student's self-advocacy skills, his/her following directions, and asking good question in class, are all inconsistent with the need for direct S/L services.

This leaves the issue of DCPS' alleged failure to provide an IEP by the beginning of the 2023-24 school year. DCPS did not dispute Petitioners allegation that it did not provide a final copy of the 2023-24 IEP until September 25, 2023. This constitutes a clear procedural violation as "At the beginning of each school year, each public agency must have in effect, for each child with a disability within its jurisdiction, an IEP..."<sup>99</sup> However, a Hearing Officer's determination of whether a child received a FAPE must be based on substantive grounds. In matters alleging a procedural violation, a Hearing Officer may find that a child did not receive a FAPE only if the procedural inadequacies (i) impeded the child's right to a FAPE; (ii) significantly impeded the parent's opportunity to participate in the decision-making process regarding the provision of a FAPE to the parent's child; or (iii) caused a deprivation of educational benefit.<sup>100</sup> In other words, an IDEA claim is viable only if those procedural violations affected the child's substantive rights.<sup>101</sup>

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<sup>99</sup> 34 C.F.R. §. 300.323(a).

<sup>100</sup> 34 C.F.R. 300.513(a)(2).

<sup>101</sup> *Brown v. District of Columbia*, 179 F. Supp. 3d 15, 25-26 (D.D.C. 2016), quoting *N.S. ex rel. Stein v. Dist. of Columbia*, 709 F. Supp. 2d 57, 67 (D.D.C. 2010).

Petitioners first communicated their thoughts about leaving School A on December 8, 2021, when Petitioner A complained to Teacher S, Student’s Spanish teacher that “[Student] has not been in proper school since March 2020.” As previously discussed, as of that December date, Petitioners’ communications with School almost exclusively involved their displeasure with how homework was handled in Student’s Spanish class. There was no complaint that Student was not doing well in any other of his/her courses, no complaint of problems with homework in any class other than Spanish, and no complaint that Student’s IEP was inadequate for any reason. By the spring of 2022, Petitioners had decided that they would move Student out of DCPS to School B and had successfully completed the application process. Sometime after the development of the February 7, 2022 IEP, Petitioners retained counsel. On August 5, 2022, Petitioners’ counsel notified DCPS that Petitioners would enroll Student at School B for the 2022-23 school year and intended to hold DCPS responsible for funding that placement, which DCPS declined to do.

There was apparently no further communication between the parties until Witness G contacted Petitioners shortly before February 7, 2023, the one-year anniversary of Student’s previous IEP. On February 7, 2023, Petitioners’ counsel’s paralegal responded to DCPS’ request to Petitioners to provide dates for their availability for an IEP meeting. The dates provided by the paralegal ranged from March 1, 2023 through March 10, 2023. The parties exchanged emails over the next several months before agreeing to conduct the IEP meeting on June 16, 2023.

A week before the IEP meeting, DCPS forwarded a draft IEP to Petitioners. Witness A, their educational advocate, provided suggested revisions to the draft to DCPS. At the IEP meeting, there was minimal disagreement with most of the provisions of the IEP, but Petitioners’ representatives asserted that Student “needs full-time special education services which [s/he] is currently receiving at [School B]. [S/he] needs a full-time special education setting throughout [his/her] entire day...”<sup>102</sup>

In the previous section, I found that the IEP DCPS developed on February 7, 2022 was appropriate. Petitioners’ frustration over the lack of constructive communication with Student’s Spanish teacher did not constitute a denial of FAPE. Petitioner’s counsel’s letter of August 5, 2022 notified DCPS that for Petitioners, FAPE meant funding the placement at School B. Thus, when Witness G initiated correspondence to Petitioners shortly before the expiration of the previous IEP, neither party was motivated to prioritize scheduling the meeting. When a date was finally set, DCPS offered an IEP similar to the one it developed the year before, and Petitioners reiterated their demand for a private school placement.

While DCPS may not have sent Petitioners a final draft of the IEP until September 25, 2023, the late delivery did not (i) impede the child’s right to a FAPE; (ii) significantly impede the parent’s opportunity to participate in the decision-making process regarding the provision of a FAPE to the parent’s child; or (iii) cause a deprivation of educational benefit. Since the spring of 2022, it is clear from the record that Petitioners would accept no placement short of a private school placement. The late delivery did not impede the child’s right to a FAPE. Petitioners were represented by counsel on the anniversary of the February 7, 2022 IEP. If they were anxious for Student to have a placement within DCPS, they could have asked counsel to initiate this claim any time on or after February 8, 2023. The late filing did not impede Petitioners’ opportunity to participate in the development of the IEP. Their educational consultant received a draft a week in

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<sup>102</sup> P28:1 (275)

advance of the IEP team meeting and submitted proposed revisions. Petitioners were represented at the meeting by counsel and the educational consultant; the consultant's meeting notes confirm that all members of Petitioners' team participated actively in the meeting. However, both parties had been intractable in their respective positions since at least August 2022. The late delivery also did not cause a deprivation of educational benefit. Petitioners placed Student where they believe the educational benefit to him/her is optimal. Thus, I conclude that while DCPS committed a procedural violation by failing to provide Petitioners a final copy of the June 16, 2023 IEP before the beginning of the 2023-24 school year, the violation did not constitute a denial of FAPE.

In the previous section, I found that the IEP DCPS developed on February 7, 2022 was appropriate to meet Student's unique needs. Petitioners placed Student at School B for the 2022-23 school year. At the IEP meeting on June 16, 2023, the IEP team was presented with no data from School B that Student's performance had declined in any of the three areas of concern: math, reading, or written expression. Nevertheless, the IEP team increased Student's specialized instruction to ten hours per week inside general education. Student had documented academic improvement under the February 16, 2021 IEP. The February 7, 2022 IEP was appropriate, in part, because the level of services on the 2021 IEP yielded objective proof of academic progress. Similarly, as DCPS has demonstrated that Student has been able to make progress with an IEP providing eight hours of push-in support per week, without a showing that Student's needs have increased since the development of the 2022 IEP, an IEP that provides two additional hours per week of push-in support to a general education classroom is reasonably calculated to enable Student to make academic progress. Therefore, I conclude that DCPS has met its burden of proving that it developed an appropriate IEP for Student on June 16, 2023.

### **Whether School B is a proper placement for Student.**

In light of my findings in the previous sections that DCPS offered Student appropriate IEPs on February 7, 2022 and June 16, 2023, I need not reach the issue of the propriety of School B as a placement.<sup>103</sup>

### **RELIEF**

For relief, Petitioners request (1) an order requiring DCPS to place Student at [REDACTED] for the 2023-24 school year, and (2) an order requiring DCPS to reimburse them for the tuition and related services fees paid to [REDACTED] for the 2022-23 school year.

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<sup>103</sup> 20 U.S.C. § 1412(c)(i).

**ORDER**

Upon consideration of the *Complaint*, DCPS' *Response*, the exhibits from the parties' disclosures that were admitted into evidence, the testimony presented during the hearing, the closing arguments of counsel for the parties, *Petitioners' Closing Authorities*, and *District of Columbia Public Schools' Case Citations*, it is hereby

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

**APPEAL RIGHTS**

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

*Terry Michael Banks*  
Terry Michael Banks  
Hearing Officer

Date: October 16, 2023

Copies to: Attorney A, Esquire  
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