

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

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OSSE  
Office of Dispute Resolution  
October 9, 2024

**Confidential**

District of Columbia Public Schools	)	Case No. 2024-0158
	)	
Petitioner	)	Hearing Dates: September 25-26, 2024
	)	
v.	)	Conducted by Video Conference
	)	Date Issued: October 5, 2024
	)	
Parent on behalf of Student <sup>1</sup>	)	Terry Michael Banks,
Respondent	)	Hearing Officer

**AMENDED HEARING OFFICER DETERMINATION**

**INTRODUCTION**

Respondent is the mother of an X-year-old student (“Student”) who was last placed at School A. On August 21, 2024, Petitioner, District of Columbia Public Schools (“DCPS”), filed a Due Process Complaint Notice (“*Complaint*”) alleging that it offered Student a free appropriate public education (“FAPE”) at an Individualized Education Program (“IEP”) meeting in May 2024 when it proposed placing Student in a residential facility. On August 30, 2024, Respondent filed a *Response to DCPS’ Petition for Residential Treatment*, denying that Student requires placement in a residential facility.

**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 August 21, 2024, DCPS filed the *Complaint* alleging that it offered Student a FAPE when it proposed a residential placement at an IEP meeting in May 2024 that Respondent declined.

On August 30, 2024, DCPS filed its *Response*, in which it refuted allegations in the *Complaint* denying that DCPS had offered Student a FAPE, *inter alia*, as follows:

1. Student attended School B, a nonpublic therapeutic day school, from the fall of 2017 through October 2023. On October 5, 2023, School B indicated that it would terminate the student's enrollment. DCPS began applying to other non-public placements.
2. In the spring of 2024, Student began attending School A with the understanding that it would be an interim educational placement while DCPS continued to apply to non-public placements.
3. On April 19, 2024, Facility A evaluated Student's needs in an intake appointment. The medical professionals determined the appropriate level of care to be an intensive outpatient program, which is 5 days a week for 5 hours a day, for two weeks, not residential. Facility A supported Student continuing in a non-residential school and offered to train the staff so they could feel more equipped to support Student. Facility A scheduled Student for intensive outpatient treatment from October 28, 2024 to November 15, 2024.
4. On May 21, 2024, Respondent and staff from School A, DCPS, and the Office of the State Superintendent of Education's ("OSSE") Department of Transportation ("DOT") met in an IEP meeting. At that meeting, Staff Member A, DCPS' Director of the Non-Public Unit, proposed a residential placement for Student. Respondent did not agree to a residential placement based on Facility A's recommendation. On May 21, 2024, DCPS issued a Prior Written Notice ("PWN") stating that DCPS would not proceed with the residential placement without Respondent's consent.
5. On August 23, 2024, Staff Member A emailed Respondent and various other DCPS staff stating that Student would not be allowed to attend School A "due to concerns about both [Student] and other students' safety and welfare." No alternative location of services was provided. DCPS mandated that Student remain at home, offering an authorization of funding for parent to find independent service providers.
6. On August 23, 2024, Respondent and a representative of the DCPS central non-public unit, Witness C, visited School C as a potential non-public placement. During the tour, Respondent saw other children with similar disabilities and behaviors as Student. The School C guide indicated that Student's acceptance was more a question of available capacity than the suitability of services for

Student.

7. To date, no medical professional has recommended residential treatment for Student. There is no evidence supporting the need for residential care for Student to access FAPE. A nonpublic program that provides individualized academic, emotional, and behavioral support with research-based techniques for children with autism and intellectual disability can provide meaningful educational benefit. A nonpublic school can provide low staff/teacher to student ratio with specially trained educators and related staff without unduly restricting Student from the family and community provider support that is also important for [his/her] success.

The parties did not participate in a resolution meeting. No prehearing conference was held because two related complaints were filed and settled contemporaneously that adequately identified the issues in dispute. A *Prehearing Order* was issued on September 16, 2024.

The due process hearing was conducted on September 25-26, 2024 by video conference. The hearing was closed to the public at Respondent's request. Petitioner filed Five-day Disclosures on September 18, 2024, containing a witness list of five witnesses and 37 documents, although they were mismarked with R's instead of P's. Respondent did not file an objection to DCPS' disclosures. Petitioner's Exhibits P1-P37 were admitted into evidence. Respondent also filed Disclosures dated September 18, 2024 containing a witness list of three witnesses and including 15 documents. DCPS did not file objections to Respondent's Disclosures. Respondent's Exhibits R1 through R-15 were admitted into evidence.

Petitioner presented as witnesses in chronological order: Witness A, Witness B, and Witness C. Witness B and Witness C were admitted as experts in special education. Respondent presented as witnesses in chronological order: Respondent and Witness D. The first day of hearings concluded with Respondent's testimony. Before the second day of hearings, by email, I proposed a settlement in which DCPS would withdraw the *Complaint* without prejudice and resubmit applications to the non-public schools that had not rejected applications that DCPS had submitted on Student's behalf because they could not meet his/her needs. At the beginning of the second day of hearings, DCPS declined this proposal. Witness D was admitted an expert in special education. At the conclusion of testimony, the parties' counsel gave oral closing arguments.

## ISSUES

As identified in the *Complaint* and the *Prehearing Order*, the issue to be determined in this case is whether DCPS offered Student a FAPE when it proposed a residential placement at an IEP meeting in May 2024.

## FINDINGS OF FACT

1. During the 2022-23 school year, Student was in grade B at School B.<sup>1</sup>

2. On January 5, 2023, DCPS convened an IEP team meeting to amend Student's May 10, 2022 IEP. Student was classified with Multiple Disabilities ("MD"): Intellectual Disability ("ID") and Other Health Impairment ("OHI"). The amendment was to provide Student a dedicated aide.<sup>2</sup> In Consideration of Special Factors, the IEP discussed Student's maladaptive behaviors and revealed that s/he requires "constant adult support," and sometimes requires restraints:

[Student] has a behavioral intervention plan that addresses [his/her] maladaptive behaviors of aggression, property destruction, rectal digging, and playing/licking body fluids. Restraint may be necessary protect [Student] or another person from imminent, serious, physical harm after other less intrusive, nonphysical interventions have failed or been determined inappropriate. 1/5/2023 [Student] requires the supports of 2 dedicated aides due to the nature and intensity of maladaptive behaviors of aggression, spitting and inappropriate play/consumption of bodily fluids. This 2:1 support is required to successfully reduce [his/her] maladaptive behaviors. [Student] requires constant adult support, close supervision to implement [his/her] behavior intervention plan, and implement a dense schedule of reinforcement using concurrent schedules of reinforcement including a fixed interval during demand situations and a variable schedule during leisure and recreation times to positively reinforce appropriate replacement behaviors.<sup>3</sup>

The Present Levels of Academic Achievement and Functional Performance ("PLOP") in Mathematics reported that as of May 10, 2022, Student had made progress with her/his math skills but "[Her/his] behaviors impact [her/his] ability to complete math tasks; [s/he] requires adult support to remain on task to complete assignments."<sup>4</sup> In Reading, as of May 10, 2022, s/he also "has demonstrated sufficient progress with [her/his] reading goals" but "has difficulty staying on task due to being distracted and when [s/he] wants to escape [her/his] tasks. [Student's] behaviors impact [her/his] ability to complete [her/his] reading tasks."<sup>5</sup> In Adaptive/Daily Living Skills, Student was reported to have been demonstrating sufficient progress but has difficulty independently completing various activities of daily living with 75% accuracy.<sup>6</sup> In Communication, Student was reported to have made 75% progress on her/his goals as of May 10, 2022. There were no comments about her/his behavior.<sup>7</sup> In Emotional, Social, and Behavioral Development ("Behavior"), self-injury and elopement no longer required goals due to decreases in those behaviors:

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<sup>1</sup> Respondent's Exhibit ("R:") 6 at page 1 (35). The exhibit number is followed by the exhibit page number and the electronic page number in parentheses, e.g. R6:1 (35).

<sup>2</sup> *Id.* at 1 (35) and 17 (51).

<sup>3</sup> *Id.* at 2 (36).

<sup>4</sup> *Id.* at 3 (37).

<sup>5</sup> *Id.* at 5 (39).

<sup>6</sup> *Id.* at 7 (41).

<sup>7</sup> *Id.* at 8 (42).

However, due to increases in spitting, rectal digging, licking/playing with body fluids, these behaviors will be added to [Student's] BIP... [Student's] behaviors do not occur daily; [s/he] will go multiple days without exhibiting behaviors. Antecedents to high rates of aggressive behaviors have been transitioning from the bathroom to class and not receiving attention after exhibiting behaviors. The team will collect antecedent, behavior, and consequence data to identify additional information for the reinforcing antecedents or consequences of [Student's] target behaviors. [Student] is a social student who enjoys staff attention; when [s/he] is not receiving adequate attention, increases in target behaviors have been observed. [S/he] uses leisure time appropriately, playing with preferred break items such as dolls and dress up. [S/he] enjoys earning reinforcers that [s/he] earns with [her/his] token board. [S/he] likes to take walks throughout the building, giving [her/his] natural opportunities to socialize with school staff.<sup>8</sup>

3. On March 1, 2023, Examiner A completed a psychiatric evaluation at DCPS' request.<sup>9</sup> The history provided to Examiner A included the following:

[S/he] has been demonstrating aggressive behavior toward staff and peers at school. [S/he] has displayed inappropriate self-touch, anal digging, touching and throwing bodily fluids, disrobing, and throwing food at others. Staff report that is difficult to determine whether it is attention seeking or a result of developmental delay. [S/he] has reached the age of [W] and staff report that these behaviors are significantly worse when [s/he] is having [Y]. [S/he] has to wear a jumpsuit at school to prevent the inappropriate behaviors described above. The school reports that prior to COVID, the youth was less aggressive, and [his/her] behaviors were easier to manage. Since that time, [s/he] has become increasingly more aggressive at both home and school. Mother also reports that [s/he] had to call the crisis line once because the youth was defecating in [his/her] room at home while also screaming. Staff at school reports that [s/he] has to be on 2:1 management while [s/he] is in school and that [s/he] appears to escalate in groups of people. Staff report that it is frequently difficult to maintain [his/her] in a classroom setting and often [s/he] has to be in a separate location for significant periods of time. School staff report that it is frequently difficult to keep [him/her] safe while [s/he] is at school.<sup>10</sup>

Examiner A observed Student in three separate settings on March 1<sup>st</sup>. In the first, "[S/he] fluctuated between sitting calmly on the floor and becoming spontaneously aggressive. [S/he] was rolling around on the floor and attempting to kick staff at times. [S/he] later began beating on the walls and staff did a good job of redirecting [him/her] which [s/he] responded to for brief period of time. [S/he] later began screaming obscenities including, "fuck you bitch" very loudly." In the second observation, Student was observed in the hallway accompanied by two behavioral staff members. S/he appeared to be much calmer in the hallway with the staff members than in the classroom with

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<sup>8</sup> *Id.* at 10 (44). Respondent disclosed School B Progress Reports for the first three reporting periods of the 2022-23 school year, but only in Health/Physical and Motor Skills/Physical Development. R5:2-3 (32-33).

<sup>9</sup> Petitioner's Exhibit ("P:") 27 at pages 267-68. The exhibit number is followed by the electronic page number, *e.g.*, P27:267-68.

<sup>10</sup> *Id.* at 269.

her/his peers. Examiner A next observed Student receiving speech therapy. “[S/he] was calmer and more appropriate than at any point during the day... No impulsive or behaviors were noted during [his/her] time in speech therapy.”<sup>11</sup>

Examiner A diagnosed Student with Autism Spectrum Disorder (“ASD”), ID, and [Z]. His recommendations included consideration of a residential placement:

Currently, [Student] is in a day school program. The program is a 12-month school with two weeks off in the summer. Even with the services that are provided by the school, it is becoming increasingly difficult to maintain [Student] in the current setting. I have concerns that [s/he] will not continue to be maintained in this setting given the behaviors that were observed during this evaluation. It is recommended that a program with more in depth social-emotional treatment be explored. Exploration of residential treatment programming that can manage [her/his] increasingly problematic behavioral symptoms [should] be considered at this time given the increasing nature of [her/his] lability and potential to harm others.<sup>12</sup>

4. On May 22, 2023, School B’s Assistant Principal sent an email to Respondent, styled “KUDOS to [Student],” complimentary of Student’s significantly improved behavior.

[Student] has been doing so much better with [his/her] behaviors decreasing, using [his/her] words to request what [s/he] wants/needs, and overall seem to be back to having fun while learning. I also must attribute a lot of [his/her] progress to [his/her] bus staff because [s/he] isn't showing the previous behaviors as [s/he] did with [his/her] last bus staff. They are patient, listen to, engage [him/her], and smile when [s/he] gets on and off the bus. It makes a big difference. A part of [his/her] daily rewards is coming to my office to choose a snack, skip through the halls with me or pulling [her/him] in the wagon. Just wanted to take a moment to highlight [her/his] progress and hopefully add a smile to your day.<sup>13</sup>

5. On October 5, 2023, DCPS convened an IEP team meeting at Respondent’s request “to discuss and review [Student’s] progress and [her/his] increasing behavior issues at school.” Student had not come to school since an “incident” on the school bus on September 18, 2023; Respondent had refused to let Student ride the bus due to safety concerns.<sup>14</sup> At the meeting, it was noted that Student had 1000 instances of aggression during the 2022-23 school year and, despite improvement in the second half of the year, his/her behaviors had deteriorated during the early weeks of the 2023-24 school year:

During the 22-23 SY, [Student] had 1000 instances of aggression. Things did stabilize during the 3rd and 4th quarter. Since August 28th, there’s been an increase in significant behaviors. [Her/his] target behaviors have changed and [s/he] has recently started self-induce vomiting. [S/he’s] also started to smear and throw feces.

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<sup>11</sup> *Id.* at 270.

<sup>12</sup> *Id.* at 272.

<sup>13</sup> R7:1 (57).

<sup>14</sup> P14:174.

These behaviors weren't previously observed.<sup>15</sup>

School B notified Respondent that they could not longer meet Student's needs and would issue a 15-day termination letter.<sup>16</sup> After the meeting, School B issued the letter, indicating that it would terminate services to Student on October 25, 2023.<sup>17</sup>

6. Later on October 5, 2023, DCPS issued a Prior Written Notice ("PWN") indicating that it would "make referrals to OSSE approved non-public schools that serve students with [Student's] disability category."<sup>18</sup>

7. DCPS applied to twenty-five private day schools on Student's behalf. None of the schools accepted him/her.<sup>19</sup>

8. On or about February 1, 2024, DCPS convened an Analysis of Existing Data ("AED") meeting.<sup>20</sup> The multidisciplinary team ("MDT") indicated that Student has difficulty with identifying sight words and common CVC words, requires support and picture cues to be successful with reading comprehension and word identification skills, has challenges with independently following directions and completing multi-step daily living activities, is inattentive, difficulty with mobility affects his/her independence with daily living activities, and has difficulties maintaining appropriate social interactions.<sup>21</sup> The MDT concluded that no additional assessments were necessary to determine Student's eligibility for special education services.<sup>22</sup>

9. On February 1, 2024, DCPS issued a PWN indicating that "Once [Student] is enrolled and attending a new school, the IEP team will reopen eligibility, go through the AED process, and then finalize eligibility."<sup>23</sup>

10. On February 9, 2024, DCPS Staff Member A, by email, requested that School B reconsider admitting Student.<sup>24</sup> On February 29, 2024, School B replied, "Likely, this student wouldn't fit with our current population."<sup>25</sup>

11. On February 12, 2024, School E notified Respondent that "while we have served students similar to [Student] in the past, we do not have an appropriate classroom placement currently to meet [Student's] needs."<sup>26</sup>

12. On March 19, 2024, DCPS convened Student's Annual IEP Review meeting at

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<sup>15</sup> *Id.* at 174-75.

<sup>16</sup> *Id.* at 175. Student's fall 2023 report card reflects all A's. P26:266. However, Witness C testified that School B gives all A's to students on certification track rather than diploma track.

<sup>17</sup> P16:179.

<sup>18</sup> P15:177.

<sup>19</sup> P37: 345-46.

<sup>20</sup> P18:184.

<sup>21</sup> *Id.* at 186.

<sup>22</sup> *Id.* at 192.

<sup>23</sup> P19:194.

<sup>24</sup> P32:308.

<sup>25</sup> *Id.* at 307.

<sup>26</sup> P31:293.

School A.<sup>27</sup> The Special Considerations section that described his/her behavioral issues was similar to that in his/her 2023 IEP; the strike-throughs indicate text removed from the 2023 IEP:

[Student] has a behavioral intervention plan that addresses [his/her] maladaptive behaviors of aggression, property destruction, ~~rectal digging~~, and ~~playing/licking~~ inappropriate contact with body fluids. ~~Restraint may be necessary protect [Student] or another person from imminent, serious, physical harm after other less intrusive, nonphysical interventions have failed or been determined inappropriate.~~ 1/5/2023 [Student] requires the supports of 2 dedicated aids due to the nature and intensity of maladaptive behaviors of aggression, ~~spitting and inappropriate play/consumption of bodily fluids~~. This 2:1 support is required to successfully reduce [his/her] maladaptive incidents of behaviors, and consistently implement [Student] ~~requires constant adult support, close supervision to implement [his/her] behavior intervention plan, and implement~~ a dense schedule of positive reinforcement using concurrent schedules of reinforcement including a fixed interval during demand situations and a variable schedule during leisure and recreation times to positively reinforce appropriate replacement behaviors as outlined in [his/her] BIP.<sup>28</sup>

The IEP included goals in Mathematics, Reading, Adaptive Daily Living Skills, Communication, Behavior, Health/Physical, and Motor Skills. The Behavior PLOP documented Student's behavioral issues during the 2022-23 school year at School B:

According to current behavioral tracking data collected from July 1, 2022 through March 10, 2023. [Student] engaged in 1,671 occurrences of aggression, 376 occurrences of inappropriate interaction with bodily fluid, and 190 occurrences of spitting. While not targeted in [her/his] IEP, other unsafe behaviors have emerged during the second IEP quarter (September 15 through December 15). These behaviors include property destruction and disrobing. [Student] engaged in a total of 452 acts of property destruction and 46 acts of disrobing.

[Student] experienced an increase in all target behaviors during the second quarter. Incidents of aggression increased by 1077 occurrences, spitting incidents increased by 55 occurrences, and inappropriate interaction with bodily fluids occurrences increased by 262 occurrences. During the last quarter, [Student] engaged in an average of 27.6 incident of aggression per month, 59 incidents of spitting per month, 20 incidents of inappropriate interaction with bodily fluids per month, 21.6 incidents pe month of property abuse, and 1 occurrence of disrobing.

[Student] is most successful with consistent staff, a dense schedule of reinforcement, and a structured schedule. [Student] engages in maladaptive behaviors to access tangibles and attention from adults and to escape demands and nonpreferred tasks. [His/her] maladaptive behaviors impact [his/her] ability to progress and access the general education curriculum.<sup>29</sup>

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<sup>27</sup> P21:198.

<sup>28</sup> *Id.* at 199.

<sup>29</sup> *Id.* at 218.

The IEP team prescribed 28.25 hours per week of specialized instruction, four hours per month of speech and language pathology, two hours per month of occupational therapy, and one hour per month of physical therapy, all outside general education, as well as thirty minutes per month of behavioral consultation services<sup>30</sup> and a dedicated aide.<sup>31</sup> Because of disruptive behavior on the school bus, the IEP prescribed measures to ensure safety for Student and other passengers:

[Student] demonstrates behaviors of physical and verbal aggression (hitting, kicking, spitting, inappropriate speech), property abuse (throwing items), elopement (out of [his/her] seat) and non-compliant with bus staff instructions. [Student's] out of seat behavior puts [him/herself] and others' safety at risk and [s/he] requires a safety vest. [Student] should be monitored during the bus ride to ensure [s/he] does not disconnect the safety vest. [Student] requires a Backzip Cover-up to be worn over [his/her] clothes and under [his/her] transportation safety vest to deter [her/him] from disrobing and or inappropriately touching [him/herself] while riding the bus to and from school daily. [Student] requires a dedicated aide on the bus for behavior supports as well as a nurse for medical attention due to [his/her] severe seizures to administer medications while on the bus to and from school...<sup>32</sup>

The IEP team determined that Student's least restrictive environment ("LRE") was a separate day school with no interaction with non-disabled peers.<sup>33</sup> Inexplicably, the LRE section provided that Student would spend 7.5 hours per week, 20% of the school week, inside general education.<sup>34</sup>

13. On March 19, 2024, DCPS issued a PWN indicating that Student had not attended school since October 5, 2023 and that "The parent and DCPS agreed to finalize the IEP so that [s/he] wouldn't transfer to a new school or program with an expired IEP... No other options were considered... No other factors were considered."<sup>35</sup>

14. Student first attended School A, a DCPS school, in April 2024.<sup>36</sup>

15. Student was involved in an incident on the school bus that was not described in meeting notes or testimony but was significant enough to warrant an MDT meeting on May 21, 2024. Staff Member A, the Director of DCPS' Non-public Unit, suggested the possible need for a residential placement for Student due to the difficulty transporting him/her to school. Respondent "does not really like this idea." Transportation would resume for Student on May 28, 2024.<sup>37</sup> DCPS issued a PWN that day indicating that Respondent had opposed DCPS' proposal to place Student

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<sup>30</sup> *Id.* at 229.

<sup>31</sup> *Id.* at 230.

<sup>32</sup> *Id.* at 231.

<sup>33</sup> *Id.* at 233.

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

<sup>35</sup> P21:240.

<sup>36</sup> Testimony of Witness C. DCPS did not disclose a PWN placing Student at School A. DCPS Exhibit P10:124 is a settlement agreement between the parties resolving two additional complaints that were filed relatively contemporaneously with the instant *Complaint* and assigned to this hearing officer.

<sup>37</sup> P23:252, 254. Another incident on the bus was reported on June 13, 2024, but the school staff managed to control the situation before any harm was done. P24:256-57.

in a residential facility.

At [Student's] 30-Day Review meeting on May 21st, DCPS recommended that [Student's] placement should be changed to residential. The parent stated that [s/he] was opposed changing [Student's] placement to a more restrictive environment, a residential placement. The parent stated that she wants [Student] to remain in a separate day school. As a result, DCPS will not proceed with the residential placement process.<sup>38</sup>

16. On June 18, 2024, School D notified DCPS that the only classroom it had that was appropriate for Student was full. This decision was reached after representatives observed Student at School A and found her/his behavior challenging:

[Student] has significant needs in terms of staffing ([s/he] had 5 with [him/her] the day of the observation) and in terms of physical space. [S/he] displays behaviors that would require [him/her] to be out of the room and out of proximity to other students, probably for significant amounts of time, and we do not have an extra space to devote to programming for [Student].<sup>39</sup>

17. On July 11, 2024, DCPS Staff Member A, by email, requested that School D consider revisiting its decision not to admit Student. "We are happy to jump on a call to discuss what additional resources and supports we could put in place to make the potential placement work at one of your campuses."<sup>40</sup> Six days later, School D replied, "Unfortunately we do not have an appropriate classroom for [Student] at this time. Should something change after the start of the school year, we will reach back out to you."<sup>41</sup>

18. On June 20, 2024, DCPS issued Student's year-end Progress Report. S/he was reported to be Progressing on his/her two Mathematics goals.<sup>42</sup> In Reading, Student was reported to have mastered two goals:

[Student] likes working on assignments. [S/he] raises [his/her] hand to go to the board to answer questions. [S/he] uses a pencil or marker to choose [his/her] answers. [S/he] is verbal when working on assignments. [S/he] enjoys being praised for [his/her] hard work and correct answers. [Student] has mastered [his/her] first and second reading goal.<sup>43</sup>

Student was progressing on his/her goal in Adaptive Daily Living Skills, independently completing various activities of daily living with 60% accuracy in 4 out of 5 trials.<sup>44</sup> Student was not making progress on his/her Communication goal due primarily to unresponsiveness to prompts from the

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<sup>38</sup> P34:339.

<sup>39</sup> P33:310.

<sup>40</sup> P29:287.

<sup>41</sup> Id. at 286. School D declined Student's admission for the 2023-24 school year on January 31, 2024 due to a lack of space. P33:331.

<sup>42</sup> P25:258.

<sup>43</sup> Id. at 258-59.

<sup>44</sup> Id. at 259.

speech pathologist.<sup>45</sup>

Student's Behavior goal addressing his/her spitting had not been introduced, but the social worker reported that Student had not been present for the majority of the quarter. When present, "[s/he] has engaged in several acts of spitting when experiencing emotional outbursts." Student's goal addressing disrobing also had not been introduced, but the social worker noted that "[S/he] has not been successful in disrobing and exposing [him/herself] to others during the time [s/he] has been present in school." Student's goal of decreasing "inappropriate interaction of bodily fluid" had not been introduced: "During the time [s/he] has been present, [s/he] has displayed inappropriate [sic] with [his/her] bodily fluids with minimal success." His/her goal of decreasing incidents of property destruction had not been introduced, but "During the time [s/he] has been present [s/he] has engaged in some property damage, nothing extreme that posed a danger to him/herself nor others."<sup>46</sup> Student's Health/Physical goals had not been introduced, and the therapist's comments did not address behavioral issues.<sup>47</sup> S/he had made no progress on his/her Motor Skills goals "as [s/he] was absent for an extended period of time and was often behaviorally unavailable for occupational therapy services."<sup>48</sup>

19. On July 11, 2024, DCPS Witness A sent an admissions referral to Facility A on Student's behalf, which operates a day school for special education students.<sup>49</sup> On July 18, 2024, Staff Member A followed up: "Again, just want to reiterate that DCPS and OSSE will work with you to ensure whatever resources are needed to make it work are in place. We know [s/he's] a complex student and we're committed to doing whatever we can to make it work."<sup>50</sup> Eleven minutes later, Facility A advised DCPS and OSSE that "We hope to have a response by COB tomorrow or Monday at the latest. In full transparency many of the programs already have limited space and resources at this time (but we are trying to consider any possible options)."<sup>51</sup>

20. Witness A, DCPS' Non-public Placement Specialist, was responsible for sending the referrals to private day schools on Student's behalf. He conceded on cross-examination that some of the rejected applications were due to the schools' lack of space rather than an inability to meet Student's needs.<sup>52</sup>

21. Witness B, DCPS' Program Manager, was responsible for ensuring adequate support for DCPS special education students. She assigned a behavior technician, a third dedicated aide, and a behavior specialist to Student's classroom at School A to address Student's disruptive behavior. These behaviors occurred "daily" and included fighting, kicking, biting, hitting, throwing bodily fluids, throwing other items around the classroom, profanity directed towards staff members, and physical and verbal aggression towards teachers. Student's behavior required the support of five adults throughout the school day: three dedicated aides, the behavior technician, and the behavior specialist. Three adults accompanied [her/him] to the restroom, with two going

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<sup>45</sup> *Id.* at 260.

<sup>46</sup> *Id.* at 261-62.

<sup>47</sup> *Id.* at 262-63.

<sup>48</sup> *Id.* at 263-64.

<sup>49</sup> R30:291.

<sup>50</sup> *Id.* at 289

<sup>51</sup> *Id.*

<sup>52</sup> Testimony of Witness A

inside the restroom with her/him, to prevent smearing of feces and other inappropriate handling of excrement. School A supports students who are cognitively impaired or who have complex physical disabilities such as the use of G-tubes, wheelchairs, or are immobile. Because of Student's behaviors, "literally all day," s/he was segregated to a room by him/herself to ensure the safety of other students. "It's the level of aggression, the level of spitting, the level of property abuse..." Witness B opined that a residential placement would be appropriate for Student; there, her/his behaviors could be addressed 24 hours a day. The staff at School A was not trained or capable of handling the aggressive behaviors Student exhibited. Student also presented problems on the school bus. S/he had to wear a back-zipped suit to prevent disrobing that was covered by a vest the served as a harness to keep her/him in her/his seat.<sup>53</sup>

22. Witness C, a DCPS Non-public Monitor, provided testimony that corroborated Witness B's testimony about Student's behavior in school. He observed Student twice, including once in June 2024 with representatives of School D for the visit described in paragraph 16 above. Witness C also testified that Student's disruptive and inappropriate behavior on the bus was a factor in DCPS' conclusion that Student required a residential placement; s/he was difficult to manage on the relatively short ride from her/his home to School A. If s/he were placed in a private day school, the ride would be much longer into the Maryland or Virginia suburbs, and s/he would be more difficult to control for significantly longer periods of time. Witness C testified that DCPS sent referrals to private day schools despite believing Student required a residential placement because Respondent would not consent to a residential placement. On cross-examination, Witness C conceded that there were only two incident reports in the record involving transportation. In response to my question, Witness C testified that Student's non-attendance from October 2023 until April 2024 was due to DCPS' inability to locate a suitable interim placement. While s/he was placed at School A in March 2024, Student did not begin attending until April because OSSE DOT had to hire a nurse to ride with her/him, and DCPS had to purchase the protective jumpsuit and vest. On re-cross examination, Witness C conceded that the nurse was hired by March 27, 2024.<sup>54</sup>

23. Respondent testified that Student has a relatively normal home life. S/he is very social, likes to help out around the house, likes to play with his/her two siblings, to dance, and to greet everyone s/he meets. When Respondent testified that Student's home health aide arrives daily at 3:00, I asked why s/he needs a home health aide. Respondent replied that Student has had an aide since the age of five or six due to epilepsy, ASD, and developmental delays. However, the incidence of seizures has not been a recent issue; Student has not had a seizure in five years. Respondent testified that she takes Student everywhere: restaurants, parks, waterparks, other cities, etc. On road trips, Student never sleeps in the car; s/he is alert and singing. Respondent testified that Student is verbal at home: "s/he talks very well." Respondent conceded that Student sometimes acts out at home, but Respondent and Student's brother deal with it by ignoring the disruptive behavior, not rewarding it with attention. Respondent will remove herself or Student from the room to deescalate behaviors. If Student throws something at his/her brother, the brother will leave the room. Respondent reported that Student has a good relationship with his/her home health aide for the last three years as well as a second aide that has been serving for two months while the first aide has been on military duty. Respondent testified that Student's medication recently changed from Olanzapine to Risperdal and Prozac; Student has had no behavioral

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

<sup>54</sup> P8:118. Testimony of Witness C.

episodes at home since the change in medications. Respondent testified that she could determine that Student was making progress at School B based on her own “pop-up” visits, reports from the staff, and progress reports. She testified that School B would give Student new goals once goals were mastered, indicating that progress was being made. Respondent opposes a residential placement because she is concerned that if Student is separated from [his/her] family, s/he will suffer emotional trauma. Respondent believes that some of the schools that denied Student’s application did so because of lack of space rather than an inability to meet her/his needs.

24. Witness D, Respondent’s educational consultant, testified that there were at least five day schools that he believed could meet Student’s needs: School C, School D, School E, School F, and Facility A. He opined that a residential placement was not appropriate because the behaviors reported at school were not seen at home. He characterized Student as a “pretty docile kid.” On cross examination, Witness D conceded that he first became involved in this case in June 2024 and has never observed Student in a classroom environment.<sup>55</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>56</sup>

The issue in this case is DCPS’ assertion that it provided Student an appropriate IEP and placement. Under District of Columbia law, DCPS bears the burden as to these issues.<sup>57</sup>

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<sup>55</sup> Testimony of Witness D. Witness D and Respondent’s counsel, in her closing, placed great reliance on an outpatient program in which Student will participate at Facility A. Witness D seemed to suggest that participation in the outpatient program would increase the likelihood of Student’s acceptance into Facility A’s special education school. Respondent offered no witness from Facility A, and the letter from Facility A inviting Student to participate in its program provides no information that is material to the issues in this case. R14:1 (107).

<sup>56</sup> D.C. Code § 38-2571.03(6)(A)(i).

<sup>57</sup> *Schaffer v. Weast*, 546 U.S. 49 (2005).

**Whether DCPS offered Student a FAPE when it proposed a residential placement at an IEP meeting in May 2024.**

District of Columbia regulations require that an educational placement for a child with a disability to be based on the child's current level of need as documented in the child's IEP.<sup>58</sup> The IEP here provides that Student's LRE is a separate day school, not a residential placement.<sup>59</sup> Witness C testified that DCPS sent referrals to private day schools despite believing Student required a residential placement because Respondent would not consent to a residential placement. However, the need for a residential placement was not reflected in the IEP, DCPS did not introduce meeting notes of the IEP meeting on March 19, 2024, and there was no reference to Student's need for a residential placement or Respondent's opposition thereto in the PWN issued that day.

In the overwhelming majority of disputes resulting in due process complaints, DCPS has developed an IEP with which the parents disagree, usually because DCPS provided an allegedly insufficient amount of services and/or an insufficiently restrictive placement. Thus, DCPS is not generally averse to issuing IEPs as to which parents disagree if it believes its position to be sound. While DCPS should be commended for being sensitive to Respondent's concerns about their proposed placement, there is no documentation that DCPS believed Student required a residential placement at the time the IEP was developed. In fact, from the time Student was expelled from School B until the IEP meeting in March 2023, DCPS pursued admissions for Student at local day schools. DCPS' first documented proposal for a residential setting for Student came only after all of the potential day school placements declined Student's admission. On May 21, 2024. Staff Member A suggested the need for a residential placement at an MDT meeting, to which Respondent objected. The PWN issued that day indicated that DCPS would not pursue a residential placement in light of Respondent's objection.

Respondent argues that a residential placement is not appropriate unless a student requires a residential placement to make meaningful educational progress, and that the courts require that the judge or hearing officer point to objective evidence of a child's regression in a day-program before finding that a residential placement is required by the IDEA.<sup>60</sup> The cases cited by Respondent are unavailing because the record clearly establishes that Student made no progress in her/his final year at School B, a day program. The Behavior PLOP in the March 19, 2024 IEP documented Student's behavioral issues during the 2022-23 school year at School B. From July 2022 through March 2023, Student engaged in 1,671 acts of aggression and hundreds of additional disruptive and unsafe behaviors. During the third quarter of the 2022-23 school year, Student engaged in an average of 27.6 incident of aggression per month, 59 incidents of spitting per month, 20 incidents of inappropriate interaction with bodily fluids per month, 21.6 incidents per month of property abuse, and one occurrence of disrobing. At the beginning of the 2023-24 school year, School B reported that Student's behavior deteriorated even further. At the October 5, 2023 meeting at which School B notified Respondent of Student's expulsion, the school reported that there had been an increase in significant behaviors since the beginning of the school year and

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<sup>58</sup> 5-A DCMR § 3022.1(a).

<sup>59</sup> The LRE section also provides that Student would spend 7.5 hours per week, 20% of the school week, inside general education, which does not exist in private day schools that serve children with Student's profile, i.e., ASD and intellectual disability. Thus, I presume that this line in the IEP was an oversight.

<sup>60</sup> R2:5-6 (15-16).

Student's behaviors had escalated to include self-induced vomiting and smearing and throwing feces. Thus, it cannot be credibly disputed that Student regressed during her/his final fifteen months at School B.

In Case No. 2021-0026,<sup>61</sup> I ordered DCPS to develop an IEP providing a residential placement to a student with a frequency of disruption comparable to Student's. The decision included a seven-page, single-spaced appendix listing behavioral incidents spanning 25 months. Two of the cases cited there are instructive. In *Seattle School District, No. 1 v. B.S.*,<sup>62</sup> like Student, the child exhibited frequent behavioral problems including physical and verbal aggression, oppositionality, tantrums, and attention difficulties. The school district determined that the child's least restrictive environment was a self-contained classroom, rejecting the opinion of an independent evaluator who concluded that the child was unable to progress outside a residential school environment. Despite the child's academic proficiency, the court upheld the lower court's determination that a residential placement was appropriate and necessary.<sup>63</sup>

The second case involved maladaptive behaviors that were similar to those committed by Student, but much less frequently observed than in Student's case. In *Linda E. v. Bristol Warren Regional School District*,<sup>64</sup> the student was reported to have pushed a student down, was unconcerned about misbehaving, and was guilty of rudeness, disruptive behavior, and theft, and was "out of control" on the school bus. The court rejected the school district's argument that the student's behaviors were "segregable from the learning process" and found that the school district had failed to meet its burden of proving that it had provided an appropriate placement.<sup>65</sup>

Here, DCPS seeks approval of its undocumented belief rather than for the setting it actually prescribed in Student's IEP. In the *Complaint*, DCPS stated the issue presented as follows: "Whether the IEP proposed complied with IDEA and offered F APE when it proposed a residential placement for Student in May 2024 and to date with a PWN date May 21, 2024 offering this FAPE need for the student."<sup>66</sup> Not yet having access to the IEP, at the prehearing conference and in the *Prehearing Order*, I restated the issue presented to be "whether DCPS offered Student a FAPE when it proposed a residential placement at an IEP meeting in May 2024." In fact, the record reveals that there was no IEP meeting in May 2024; the PWN DCPS issued after the meeting characterized it as a 30-Day Review meeting, not an IEP meeting.<sup>67</sup> Had it been an IEP meeting, DCPS would have been required to circulate a draft IEP a week before the meeting,<sup>68</sup> staff members with specified titles would have been at the meeting,<sup>69</sup> and an IEP would have been developed. None of these requirements were met. There is no record of a draft IEP being provided in advance or that one was developed at the meeting, DCPS' Meeting Notes described the meeting as an MDT Meeting, not an IEP Meeting, and no general education or special education teacher was present as would be required at an IEP Meeting.<sup>70</sup>

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<sup>61</sup> *Hearing Officer Determination* (Aug. 23, 2021).

<sup>62</sup> 82 F.3d 1493 (9th Cir. 1996).

<sup>63</sup> *Id.* at 1502.

<sup>64</sup> 758 F.Supp.2d 75 (D.R.I. 2010).

<sup>65</sup> *Id.* at 90-92.

<sup>66</sup> R1:6 (9).

<sup>67</sup> P34:339.

<sup>68</sup> 5-A DCMR § 3009.4

<sup>69</sup> 5-A DCMR § 3008.1

<sup>70</sup> P23:251.

Thus, there was no IEP meeting on May 21, 2024 and no IEP was developed that day. The only IEP developed for Student in 2024 was developed on March 19, 2024. That IEP established Student's LRE to be a separate day school, not a residential facility.

Therefore, I conclude that DCPS has failed to meet its burden of proving that it offered Student a FAPE when it proposed a residential placement at an IEP meeting in May 2024; Petitioner's IEP provides that his/her LRE is a separate day school and DCPS' proposal of a residential placement was made at an MDT meeting, not an IEP meeting.

### **RELIEF**

Petitioner requests a finding that it has proposed a FAPE and sought to make a FAPE available to Student.

### **ORDER**

Upon consideration of DCPS' *Complaint*, the *Response*, the *Prehearing Order*, the exhibits that were admitted into evidence, the testimony presented during the hearing, and the closing arguments of counsel for the parties, it is hereby

**ORDERED** that within five school days of the issuance of this order, DCPS shall again send admissions referrals on Student's behalf to all of the private schools that did not previously reject Student because they could not meet her/his needs. Any school that previously indicated that its admission decision was based, in part, on lack of enrollment space, should be sent a referral. DCPS shall notify Respondent's counsel by email of each recipient of a referral within twenty-four hours of issuing a referral. During the referral process, Student will continue to be entitled to tutoring services pursuant to the settlement agreement executed by the parties on September 11, 2024.

**IT IS FURTHER ORDERED** that in the event DCPS determines that Student has not been, and is not likely to be, accepted by any of the day schools to which referrals have been sent, DCPS shall coordinate reconvening an IEP team meeting through Respondent's counsel to develop an IEP and placement for Student.

## 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  
Hearing Officer

Date: October 5, 2024

Copies to:     Attorney A, Esquire  
                  Attorney B, Esquire  
                  Attorney C, Esquire  
                  Attorney D, Esquire  
                  OSSE Office of Dispute Resolution