

District of Columbia
Office of the State Superintendent of Education
Office of Dispute Resolution
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Parents, on behalf of Student,¹)	
Petitioners,)	
)	Hearing Dates: 9/30/24; 10/1/24;
v.)	10/7/24; 10/8/24
)	Hearing Officer: Michael Lazan
District of Columbia Public Schools,)	Case No. 2024-0147
Respondent.)	

HEARING OFFICER DETERMINATION

I. Introduction

This is a case involving an X-year-old student who is currently eligible for services as a student with Specific Learning Disability (the “Student”). A due process complaint (“Complaint”) was received by District of Columbia Public Schools (“DCPS” or “Respondent”) pursuant to the Individuals with Disabilities Education Act (“IDEA”) on August 9, 2024. The Complaint was filed by the Student’s parents (“Petitioners”). On August 27, 2024, Respondent filed a response. A resolution meeting was held on August 27, 2024. The matter was not settled. The resolution period expired on September 8, 2024.

II. Subject Matter Jurisdiction

This due process hearing was held, and a decision in this matter is being rendered, pursuant to the IDEA, 20 U.S.C. 1400 et seq., its implementing regulations, 34 C.F.R.

¹Personally identifiable information is attached as Appendix A and must be removed prior to public distribution.

Sect. 300 et seq., Title 38 of the D.C. Code, Subtitle VII, Chapter 25, and the District of Columbia Municipal Regulations (“DCMR”), Title 5-A, Chapter 30.

III. Procedural History

A prehearing conference was held on September 24, 2024. Attorney A, Esq., and Attorney B, Esq, counsel for Petitioners, appeared. Attorney C, Esq., counsel for Respondent, appeared. A prehearing conference order was issued on September 24, 2024, and revised on September 26, 2024, summarizing the rules to be applied in the hearing and identifying the issues in the case.

The hearing was conducted through the Microsoft Teams videoconferencing platform, without objection. Petitioners were again represented by Attorney A, Esq. and Attorney B, Esq. Respondent was again represented by Attorney C, Esq. This was a closed proceeding.

The matter proceeded to trial on September 30, 2024, October 1, 2024, October 7, 2024, and October 8, 2024. At the close of Petitioners’ case, Respondent orally moved for a directed verdict against Petitioners. This motion was denied on the record. The parties presented closing arguments on the record on October 8, 2024. It was also agreed that the parties could submit a list of legal citations to this Hearing Officer by October 11, 2024. The parties filed citation lists on October 11, 2024.

During the proceeding, Petitioners moved into evidence exhibits P-1 through P-68 without objections. Respondent moved into evidence exhibits R-1 through R-29. Objections were filed with respect to exhibits R-19 and R-29. These objections were overruled. Exhibits R-1 through R-29 were admitted.

Petitioners presented as witnesses, in the following order: Witness A, an educational consultant (expert in special education placement and Individualized Education Program (“IEP”) development); the Student’s father (“Father”); the Student; Witness B, Head of School at School B (expert in special education programming and placement); and the Student’s mother (“Mother”). Respondent presented as witnesses, in the following order: Witness C, a social worker (expert in IEP programming and placement related to behavior support); Witness D, director of a DCPS middle school; and Witness E, a program specialist with DCPS (expert in special education planning and placement with an emphasis on private school unilateral placement).

IV. Issues

As identified in the revised Prehearing Order and in the Complaint, the issues to be determined in this case are as follows:

- 1. Did DCPS deny the Student a Free Appropriate Public Education (“FAPE”) through the creation of the May 23, 2023/June 20, 2023 IEP, which is contrary to the findings/conclusions that Impartial Hearing Officer Peter Vaden made in July 2023?**
- 2. Did DCPS deny the Student a FAPE because it did not convene a timely annual review for the Student by April 2, 2023?**
- 3. Did DCPS deny the Student a FAPE by failing to finalize or send the IEP for the 2023-2024 school year within the required time frame?**
- 4. Did DCPS deny the Student a FAPE through the May 23, 2023/June 20, 2023 IEP because: 1) the IEP’s present levels of performance sections were not updated; 2) during the IEP meeting, DCPS falsely alleged that it did not have updated social/emotional/behavioral data and failed to gather that data or conduct its own evaluation; 3) DCPS failed to properly assess the Student’s academic and functional performance in order to write the IEP; 4) the IEP would result in the Student being placed a less restrictive setting than School B without DCPS assessing the Student’s readiness, and without DCPS creating a transition plan; 5) DCPS proposed a setting that was too large, at School C; 6) the IEP recommended insufficient hours/type of specialized instruction based on the data available to the**

team at the time; 7) the IEP failed to provide appropriate behavioral support to address social-emotional challenges that were reasonably to be anticipated if the Student were to move to School C from School B; 8) the IEP failed to specify that the Student required small class sizes; 9) the IEP failed to require twice-daily check-ins with an adult for academic, executive-functioning, and social-emotional support in the morning and afternoon; 10) the IEP contained inappropriate, inadequate, and/or outdated goals, objectives, and related baselines that were not designed to address the individual needs of the Student; and/or 11) the IEP contained inadequate “other classroom aids and services” that are vague, unstructured, and discretionary, and did not include language requiring an evidence-based reading and writing intervention.

As relief, Petitioners seek tuition reimbursement for School B for the 2023-2024 school year, plus mileage reimbursement at the federal rate.

V. Findings of Fact

1. The Student is an X-year-old student who is eligible for services as a student with Specific Learning Disability. The Student has a history of issues with, among other things, inattention, long-term working memory, and multi-step problems. Academically, the Student is below grade level in reading, and well below grade level in mathematics. Cognitively, the Student consistently scores in the average range, though the Student’s working memory depresses his/her scores. Without the Student’s working memory issues, the Student shows higher ability on testing. Testimony of Witness A.

2. During the 2019-2020 school year, the Student attended School A, a public school run by DCPS. Notwithstanding the Student’s IEP mandate, s/he received ten hours of specialized instruction inside general education every week. Testimony of Witness A. The Student felt that the general education instruction was delivered at a pace that was too fast for him/her. The Student felt uncomfortable in an environment where s/he was functioning below most of the other students in the room. The Student’s grades were poor during this time at School A. Testimony of Student.

3. After the 2019-2020 school year, Petitioners removed the Student from DCPS schools and sent the Student to School B, a private school for students with disabilities, which s/he currently attends. Testimony of Mother; Testimony of Father.

4. The Student attended School B for the 2020-2021 school year. A Confidential Psychological Triennial Re-evaluation of the Student was conducted by a DCPS psychologist on January 26, 2021, and January 27, 2021. The Student earned a composite intelligence index score of 90 on the Reynolds Intellectual Assessment Scales (“RIAS”), in the average range, at the 25th percentile. On the Woodcock-Johnson Tests of Achievement-IV (“WJ-IV”), the Student scored in the average range in passage comprehension and word attack, and in the low average range in oral reading and letter-word identification. The Student’s overall mathematics score was in the low range. P-2.

5. The Student attended School B for the 2021-2022 school year. The Student’s IEP dated May 25, 2021, written by DCPS, which Petitioners disagreed with, included recommendations for ten hours per day of specialized instruction inside general education and five hours per week of specialized instruction outside general education, with 120 minutes per month of behavioral support (consultation) services. The “Other Classroom Aids and Services” in the IEP included teacher check-ins when needed, pre-teach and re-teach when needed, visual supports, chunked assignments, one-to-one support when needed, a small group setting, computerized access to reading intervention programs, a laptop or computer for written work using enlarged font and spell checks, a task list to breakdown steps, checklists, graphic organizers, checks for understanding, multisensory instruction, color coding, highlighting, scaffolding, an assignment tracker, and daily check-ins for social/emotional concerns. P-4.

6. The Student's April 1, 2022, IEP, also written by DCPS, contained the same recommendations as the May 25, 2021, IEP, except that the "Other Classroom Aids and Services" section included language stating that exemplars were to include math manipulatives and reading and writing evidence-based interventions. P-7. Petitioners disagreed with this IEP and again placed the Student at School B for the 2022-2023 school year. Testimony of Mother; Testimony of Father. At this time, according to the Hearing Officer Determination ("HOD") of Hearing Officer Vaden, DCPS recommended School C, a DCPS school, for the Student for the 2022-2023 school year. P-62-20.

7. Witness C conducted a virtual observation of the Student at School B for DCPS during the 2022-2023 school year. The Student seemed jovial, engaged with peers, required minimal support, and worked independently or with a peer. No anxiety was apparent during the observation. Testimony of Witness C.

8. By the fall of 2022, Measures of Academic Progress ("MAP") testing indicated that the Student's "growth rate" in reading was at the 90th percentile, which means that s/he made more progress than ninety percent of his/her peers. Testing also indicated that the Student's growth rate in math was at the 72nd percentile, which means that s/he made more progress than seventy-two percent of his/her peers. P-30-4.

9. In January 2023, the Mother sought permission to visit School C but was denied. Testimony of Mother. Petitioners were then required to pay a deposit to School B for the 2023-2024 school year. Testimony of Father.

10. During the latter part of the 2022-2023 school year, Petitioners and the Student contemplated going to School C, due to its social life. However, when the

Student was told how big the classes were and how much work the students had to do, s/he felt that School C was not the right place for him/her. Testimony of Student.

11. An IEP meeting was scheduled for the Student on February 13, 2023. However, DCPS was not able to review the documents that School B had sent before the meeting. Testimony of Witness A; P-21. As a result, the meeting was rescheduled to May 2023. Testimony of Witness C.

12. At the May 2023 IEP meeting, a representative from School B did not appear, due to School B policy. Behavior was the primary focus of the meeting. Testimony of Witness E. Petitioners told the IEP team that the Student was doing well academically and socially at School B. The Mother said that the school's use of technology, higher expectations, and scaffolding were bringing out the Student's strengths. Petitioners indicated that the Student needed support across his/her entire school day, and they again proposed a "full-time" IEP for the Student, with small special education classes in all subjects. P-27.

13. The parties went through the Student's draft IEP, discussed timeline issues, agreed on certain changes, and discussed services. Changes to the math and reading goal were proposed and agreed to. The parties agreed to twice-daily check-ins. The parties disagreed about whether the Student should receive behavioral support services on a direct basis. DCPS expressed that the Student did not need behavior support services, per its observation of him/her at School B and reports from School B. DCPS indicated that no data supported the request for direct services. Petitioners indicated that a transition between schools would necessitate counseling for the Student. There was no specific discussion of the Student's potential transition from School B to

School C. Nor was there a conversation about how the Student did at School A or whether s/he was ready to return to a public school. Testimony of Witness E. At the meeting, Petitioners said that they had reached out multiple times to School C for information but had not received a response. DCPS team members agreed to help Petitioners with this issue. Testimony of Witness A; P-26.

14. The “present levels” sections of the Student’s IEP were based on the data that the team had from the school and Petitioners. There was no request by Petitioners to re-evaluate the Student at this time. Testimony of Witness C. The IEP included the same “Other Classroom Aids and Services” section as the earlier IEP, which had added language relating to the use of evidence-based reading and writing interventions. These recommendations were for teacher check-ins when needed, pre-teaching and re-teaching when needed, visual supports, chunked assignments, 1:1 support when needed, a small group setting, computerized access to a reading intervention program, a laptop or computer for written work using enlarged font and spell checks, a task list to breakdown steps, checklists, graphic organizers, checks for understanding, multi-sensory instruction, color-coding and highlighting, scaffolding, an assignment tracker, and daily check-ins morning, afternoon, and as needed for social/emotional concerns, and exemplars, including math manipulatives and reading and writing evidence-based interventions. Testimony of Witness A; P-32.

15. The IEP recommended specialized instruction for ten hours per week inside general education and six hours per week outside general education, with 120 minutes per month of behavioral support consultation services. At the IEP meeting, Witness A asked how the sixteen hours of specialized instruction would be provided to

the Student. DCPS staff said that there would be a “thirty-day review” after the Student completed a month of school. DCPS staff also said that the ten hours inside general education would consist of a special education teacher pushing in for classes. The six hours outside general education would be provided by a special education teacher in a self-contained classroom, to work on goals. DCPS gave an example and said that a student who is recommended for ten hours of specialized instruction inside general education could receive two hours of specialized instruction support for each academic class per week. Testimony of Witness A; P-32.

16. Petitioners did not receive the IEP until after the 2022-2023 school year ended. Language in the math and reading goals that was agreed to at the meeting was not included in the final IEP, nor was language proposed by Petitioners in the “Other Classroom Aids and Services” section. Testimony of Witness A; P-32. Agreed-upon changes were also not made relating to social-emotional and executive functioning. Testimony of Witness C.

17. The Student’s report card for the 2022-2023 school year at School B indicated that s/he occasionally had days when s/he was tired or less focused in class, especially when s/he worked on long-term individual work. The Student was encouraged to use strategies like taking a walk, taking a break, or getting a drink to break up the independent work class. However, the Student’s grades were all in the “B” or “A” range. The report card stated that the Student “continued to produce excellent work” during the fourth quarter and was fully prepared for all class discussions and activities. P-23; P-29.

18. An HOD on a due process complaint filed by Petitioners with respect to the 2022-2023 school year was issued in Petitioners’ favor on July 22, 2023, by Hearing

Officer Vaden. P-62. After the issuance of this HOD, Petitioners expected that there would be an IEP meeting to address the findings of the HOD (since Petitioners felt that the May 2023 IEP was similar to the IEP that Hearing Officer Vaden found to be defective). Testimony of Mother; Testimony of Witness A. However, DCPS did not revise the IEP. Petitioners then notified DCPS, on August 16, 2023, of the Student's placement at School B for the 2023-2024 school year. P-34-1; Testimony of Mother.

19. School B services students with mild to moderate needs who are emotionally healthy and behaviorally appropriate. Students at School B tend to have needs in language-based learning issues, including processing, expression, reading, and writing. Approximately 150 children attend the school, from grades four through twelve. School B had only sixteen students in the Student's whole grade. Academic classes have a maximum 10:1 student-teacher-ratio. All the children in the school have disabilities and submit to neuropsychological testing. The school is not certified by the Office of the State Superintendent of Education ("OSSE") but is approved through Maryland and the Middle States Commission on Higher Education. School B does not require teachers to be certified. Teachers must have a master's degree in content or education. Testimony of Witness B.

20. Instruction at School B is based on the "common core" and Maryland standards. Reading is based on a "structured literacy" approach, like Orton-Gillingham instruction. Teachers are trained in multisensory math techniques and use the "step up to writing" program for writing instruction. Classes run for ten months during the year. The school has a licensed professional counselor. The Student was provided with a 1:1 "chrome book" with assistive technology tools, such as speech-to-text software. The

Student was also provided with an advisor, as is every student at School B. The school is different than a traditional setting because of its emphasis on breaking down and chunking information. The school tries to be thoughtful about visuals, fonts, and color coding, and provides extra support through reading, writing, and math tutorials. Students are graded as in a traditional school program. School B uses annotation to help students with reading assignments, and students are allowed to write directly in their books, which helps them slow down and check for understanding. Testimony of Witness B.

21. The Father drove the Student fifteen miles to School B every day during the 2023-2024 school year. Testimony of Father. At school, the Student received two check-ins, one in the morning to see how s/he felt and prepare for tests and assignments, and one after school to talk about how the day went. The Student still had challenges in English, science, and Spanish due to his/her reading issues. When s/he read a chapter book without audio, s/he had difficulty remembering what s/he had read. In math, the Student received support after class through tutorials. Testimony of Mother; Testimony of Father; Testimony of Witness B.

22. School B offered the following accommodations for the Student: extended time for assignments and exams; answers marked directly on tests; assistive technology (e.g. Read & Write, Webspiration, and audio books); text-to-speech software or a reader during testing; a computer with spell-check for written work; small-group testing and breaks; no more than two assessments per day; scrap paper for tests; a fidget; permission to stand as needed; a calculator for math; a reading rod or ruler; manipulatives in math; a highlighter; graph paper; a large font for printed materials; reduced length for written assignments; checklists for editing, proofreading, and grammar; reduced copying of

assignments; multi-step directions; chunking of long assignments; repeated directions and checks for understanding; graphic organizers; and a planner to record short-term and long-term assignments. P-23.

23. The Student now presents differently than s/he did when s/he started at School B. The Student is now “pretty organized.” S/he is a leader, a co-captain of a sports team, and has performed in a school musical. The Student benefits from the close-knit environment at the school, where teachers are supportive no matter what, where everyone knows each other, and where small classes contain a maximum of ten children. Testimony of Father; Testimony of Mother; Testimony of Witness A.

24. In May 2024, Witness C observed the Student at School B for about seventy minutes. Witness C sat next to the Student during English class, during which the Student took some time to get into the class. The Student had positive interactions with peers, self-advocated, asked clarifying questions, and fidgeted when working independently. The Student was engaged during most of the observation. Witness C spoke to one of the Student’s teachers at this time and compiled a Strengths and Difficulties Questionnaire (“SDQ”) for the Student. The teachers reported that, in regard to social and emotional issues, the Student was mainly functioning in the average range, with slight elevation in some areas. Testimony of Witness C; P-44.

25. School C is a large public high school with about 2,000 students. School C can implement the Student’s May 2023 IEP. The school provides every student with a laptop and manipulative learning tools. Students with dyslexia have access to tools for highlighting, dictation, speech-to-text conversion, and markup. Classes at School C last eighty-two minutes each, with four classes per day. Class size is capped at twenty-five

students per class. Each class is 3.41 hours per week. If the Student had attended School C, the recommended six hours of specialized instruction outside general education would have been used for a reading and writing workshop in “resource room” classes.

Academic classes would have included math, reading, writing, science, and social studies. If the Student had received specialized instruction inside general education in each academic class at School C during the 2023-2024 school year, the mandate would have been for more than ten hours per week. Testimony of Witness D.

26. Psychological testing of the Student was conducted by a DCPS psychologist in May 2024. The ensuing report, dated July 3, 2024, indicated that, on the Wechsler Adult Intelligence Scale (“WAIS-IV”), the Student performed in the average range of cognitive ability. The report also included the results of a WJ-IV, which found that the Student was in the 10th percentile in broad achievement and 20th percentile in reading. In the mathematics cluster of the WJ-IV, a measure of numeric skills including calculating and numeric reasoning, the Student received a standard score of 68, placing him/her in the 2nd percentile. P-49.

27. The Student’s MAP testing between the fall of 2020 and the fall of 2023 reflected progress in reading, though the Student continued to function below his/her peers. The Student scored at the 33rd percentile in reading in 2020 and in the 42nd percentile in 2023. The Student scored in the 32nd percentile in mathematics in the fall of 2020 and in the 33rd percentile in the fall of 2023. P-39-9.

VI. Conclusions of Law

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.” D.C. Code Sect. 38-2571.03(6)(A)(i). Accordingly, on Issue #1, Issue #2, and Issue #3, the burden of persuasion is on Petitioners. On Issue #4, the burden of persuasion is on Respondent if Petitioners present a *prima facie* case.

1. Did DCPS deny the Student a FAPE through the creation of the May 23, 2023/June 20, 2023 IEP, which is contrary to the findings/conclusions that Hearing Officer Vaden made in July 2023?

In Endrew F. v. Douglas County School District, 137 U.S. 988 (2017), the Court held that an IEP must be reasonably calculated “in light of the child’s circumstances.” *Id.* at 999-1000. The Court also held that its ruling “should not be mistaken for an invitation to the courts to substitute their own notions of sound educational policy for those of school authorities, to whose expertise and professional judgment deference should be paid.” *Id.* at 1001-1002. The Endrew F. decision reaffirmed the Court’s holding in Board of Education v. Rowley, 458 U.S. 176 (1982). In Rowley, the Court held that if a child is fully integrated into a regular classroom, receives passing marks, and advances from grade to grade through the general curriculum, the student’s IEP will ordinarily satisfy the IDEA standard. However, a footnote in Endrew F. warns that this “guidance should not be interpreted as an inflexible rule” and that Endrew F. should not be read to

hold that every child advancing from one grade to the next “is automatically receiving an appropriate education.” *Id.* at 1001 n.2 (citation omitted).

The Andrew F. Court made clear that the standard for determining the appropriateness of an IEP is “markedly more demanding than the ‘merely more than *de minimis*’ test applied by many courts.” *Id.* at 1000. The Court stated that courts should fairly expect those authorities to offer a “cogent and responsive explanation” for their decisions. *Id.* at 1002. As stated by the District of Columbia Circuit Court of Appeals: “the key inquiry regarding an IEP’s substantive adequacy is whether, taking account of what the school knew or reasonably should have known of a student’s needs at the time, the IEP it offered was reasonably calculated to enable the specific student’s progress.” Z. B. v. District of Columbia, 888 F.3d 515, 524 (D.C. Cir. 2018).

Petitioners argued that the IEP team was bound to at least consider the impact of Hearing Officer Vaden’s HOD, which was issued in July 2024, after the date of the IEP meeting but before the start of the school year. Petitioners suggested that a meeting to revise the IEP was then necessary, pursuant to the IDEA, since Hearing Officer Vaden assessed a similar IEP to the IEP at issue in this case. Hearing Officer Vaden ruled for Petitioners and awarded them tuition for School B for the 2022-2023 school year.

Petitioners did not provide specific authority in support of this claim. Nor did this Hearing Officer find any caselaw or related authority to suggest that a school district has a duty to revise an IEP after an HOD that favors the Petitioners is issued, even if that HOD addresses similar issues. There is nothing in the IDEA statute, the applicable regulations, the District of Columbia Code, or the DCMR that suggests that an IEP can be invalidated because of the issuance of an HOD relating to a different school year. The

IEP team is held only to the data, facts, and circumstances that it could have reviewed at the applicable IEP meeting. An HOD issued by another hearing officer has no binding effect on this Hearing Officer, and Hearing Officer Vaden's HOD related to an entirely different school year, with an entirely different set of circumstances. This claim is without merit.

2. Did DCPS deny the Student a FAPE because it did not convene a timely annual review for the Student by April 2, 2023?

3. Did DCPS deny the Student a FAPE by failing to finalize or send the IEP for the 2023-2024 school year within the required time frame?

Due to the overlap of these issues, both claims are considered in this section.

According to 20 U.S.C. Sect. 1414 (d)(4)(A) through 20 U.S.C. Sect. 1414 (d)(4)(B), the local educational agency ("LEA") must ensure that the IEP team reviews the child's IEP periodically, but not less frequently than annually, to determine whether the annual goals for the child are being achieved, and revises the IEP as appropriate to address any lack of expected progress toward the annual goals and in the general education curriculum, where appropriate, the results of any reevaluation conducted under this section, information about the child provided to, or by, the parents, and the child's anticipated needs, or other matters. That IEP must be sent to the parent within five days of the IEP meeting, pursuant to the Special Education Student Rights Act of 2014. This act states as follows:

No later than 5 business days after a meeting at which a new or amended IEP has been agreed upon, the public agency shall provide the parents with a copy of the IEP. If an IEP has not yet been completed by the 5th business day after the meeting or additional time is required to comply with subchapter II of Chapter 19 of Title 2 [§ 2-1931 et seq.] ("Language Access Act"), the public agency shall provide the parent with the latest available draft IEP and a final copy upon its completion; provided, that the

final copy of the IEP shall be provided to the parents no later than 15 business days after the meeting at which the IEP was agreed upon.

D.C. Code Sect. 38-2571.03(4)(A).

Petitioners contended that the May 26, 2023, annual meeting for the Student was late, since the prior IEP was written on April 1, 2023, more than a year earlier.

Petitioners also contended that the May 26, 2023, IEP was sent to them in tardily, on June 20, 2023.

DCPS did not contest these facts at the hearing. However, DCPS argued that these claims are only procedural and did not deny the Student a FAPE. “An IDEA claim is viable only if those procedural violations affected the student’s substantive rights.” Lesesne ex rel. B.F. v. District of Columbia, 447 F.3d 828,834 (D.C. Cir. 2006) (evaluations); Hill v. District of Columbia, No. 14-CV-1893 (GMH), 2016 WL 4506972, at *18 (D.D.C. Aug. 26, 2016) (vocational assessment and speech and language assessment). Pursuant to the IDEA, when procedural violations are alleged, an administrative officer may find that a child did not receive a FAPE only if the procedural inadequacies (a) impeded the child’s right to a FAPE, (b) significantly impeded the parents’ opportunity to participate in the decision-making process regarding the provision of a FAPE to the child, or (c) caused a deprivation of educational benefits. 20 U.S.C. Sect. 1415(f)(1)(E)(ii); 34 C.F.R. Sect. 300.513(a)(2).

Petitioners argued that these two procedural errors, when considered together, did amount to a denial of FAPE. Petitioners contended that the school district was not prepared at the February 2024 IEP meeting, which did not proceed due to, among other things, the school district’s failure to review the documents submitted by School B.

Petitioners contended that, if the IEP meeting had been held in February 2024, they might have been able to visit School C long before they opted to place the Student at School B again. Petitioners also claimed that they could not visit the proposed setting because the IEP was not finalized until after the end of the school year, on June 20, 2024.

This Hearing Officer does not find this argument convincing. The record suggests that Petitioners knew from the meeting that the proposed placement would be School C. Petitioners did not need to wait until the final IEP was issued to arrange to visit the school. Moreover, the record indicates that both Petitioners and the Student knew School C. The Student, in fact, has friends at the school. During testimony, Petitioners did not point to anything that they especially needed to know about School C from an observation or interview, and Petitioners did not underscore the importance of these claims during their closing argument. These claims must be dismissed.

4. Did DCPS deny the Student a FAPE through the May 23, 2023/June 20, 2023 IEP because: 1) the IEP's present levels of performance sections were not updated; 2) during the IEP meeting, DCPS falsely alleged that it did not have updated social/emotional/behavioral data and failed to gather that data or conduct its own evaluation; 3) DCPS failed to properly assess the Student's academic and functional performance in order to write the IEP; 4) the IEP would result in the Student being placed a less restrictive setting than School B without DCPS assessing the Student's readiness, and without DCPS creating a transition plan; 5) DCPS proposed a setting that was too large, at School C; 6) the IEP recommended insufficient hours/type of specialized instruction based on the data available to the team at the time; 7) the IEP failed to provide appropriate behavioral support to address social-emotional challenges that were reasonably to be anticipated if the Student were to move to School C from School B; 8) the IEP failed to specify that the Student required small class sizes; 9) the IEP failed to require twice-daily check-ins with an adult for academic, executive-functioning, and social-emotional support in the morning and afternoon; 10) the IEP contained inappropriate, inadequate, and/or outdated goals, objectives, and related baselines that were not designed to address the individual needs of the Student; and/or 11) the IEP contained inadequate "other classroom aids and services" that are vague, unstructured, and discretionary, and did not include language requiring an evidence-based reading and writing intervention.

As an initial matter, Petitioners effectively argued that, because this Hearing Officer and other hearing officers have ruled for Petitioners in the past on similar issues, that this Hearing Officer is effectively estopped from even considering DCPS's arguments in support of its May 26, 2023, IEP. However, this Hearing Officer knows of no such authority in the caselaw, and Petitioners presented no such authority. This is because special education students can change from year to year, which is why IEPs are written every year in the first place. This case involves a new school year, the 2023-2024 school year, and the IEP corresponding to this school year must be judged on its own.

Petitioners emphasized Sub-Issue #5, Sub-Issue #6, Sub-Issue #8, Sub-Issue #9, and Sub-Issue #11, which relate to the amount and type of specialized instruction, class size, school size, check-ins during the day, and the other classroom aids and services listed on the IEP. Petitioners' main claim was premised on their request for the Student to receive small classes with specialized instruction in all of his/her academic subjects. Petitioners objected to DCPS's recommendation for the Student's placement in larger general education classes, even if some of those classes include specialized instructional support, per the IEP.

The last time the Student was in a large general education setting was at School A, a DCPS public school, in the 2019-2020 school year. During that year, the Student received ten hours of specialized instruction inside general education, which is the exact amount of specialized instruction that is proposed for the Student inside general education now. There is no dispute that this program was ineffective for the Student. At the hearing, the Student said that the general education instruction was delivered at a pace that was too fast for him/her. The Student also felt uncomfortable in an environment

where s/he was functioning several grade levels below most of the other students in the room, had poor grades, and felt stigmatized by being pulled out of classes. The Student was so distressed at School A that physical symptoms manifested as a result of the difficulties s/he experienced at the school.

Nevertheless, DCPS speculated that the Student would be able to handle a larger setting because s/he was able to handle the smaller setting at School B. DCPS pointed to testimony from the Student and Petitioners that the Student has improved greatly since attending School B, and the record bears this out. However, as Witness A pointed out, the Student's better performance at School B was a function of the school's small classes and setting. The Student felt less anxious at School B because the schoolwork was modified, presented at a slower pace, and because there were more teachers available to students. Witness E from DCPS suggested during testimony that any child would do better in smaller classes, indicating that the Student did not need small classes for academics. However, Witness E stated in a prior hearing that "(o)f course, the team believes [the Student] needs small class sizes." P-65-21. At the hearing, Witness C from DCPS agreed that the Student could benefit from academic instruction within small special education classes, but denied the Student "needed" small classes. However, Witness C testified in a prior hearing that the Student needed a modified instructional approach in academic classes. P-66-6.

Witness E tried to defend the IEP by indicating that the IEP, as written, did provide the Student with specialized instruction in all academic classes. But the Student would not have received specialized instruction in all of his/her academic classes at School C. The IEP recommended weekly specialized instruction for ten hours inside of

general education and for six hours outside of general education. As Witness D made clear, this mandate would not provide for specialized instruction support in all the Student's academic classes. Witness D testified that the IEP needed to be revised in order for the Student to get specialized instruction in every academic class.

Witness E said that the specialized instruction mandate in the May 26, 2023, IEP was premised on a finding that the Student's success at School B was not accomplished through the use of specialized instruction. Witness E suggested that sixteen hours of specialized instruction would be a lot for the Student, who did not get any specialized instruction at School B. But the record indicates that School B does provide specialized instruction to students, including the Student, and is a licensed school that is certified by the state of Maryland (which does not require that all of the teachers at a given school be certified). Witness B discussed how School B breaks down assignments, how reading instruction is based on an approach like Orton-Gillingham instruction, that School B emphasizes chunking information, that the school tries to be thoughtful about visuals, fonts, and color coding, and that students at the school get extra support through reading, writing, and math tutorials. School B also uses annotation to help students with reading assignments and limits class size to ten students per class. There are only sixteen students in the Student's grade, and students are allowed to write directly in their books to help them slow down and check for understanding.

It is noted that School C is a bigger school than School A. School C has more open spaces, more places to congregate, and more movement during the school day than School A, and class sizes in electives are larger at School C. Moreover, the Student is still below grade level in all subjects. The recent results of the WJ-IV found the Student

to be in the 10th percentile in broad achievement, and 20th percentile in reading. In the mathematics cluster of the WJ-IV, a measure of numeric skills including calculating and numeric reasoning, the Student received a standard score of 68, placing him/her in the 2nd percentile. There is nothing in the record to explain how this Student could possibly perform well in a large general education math class at School C, even with a special education teacher in the room.

Additionally, the IEP appears to contain an inconsistency with respect to reading instruction. Witness E said that this IEP provided for one extra one hour of reading instruction, which is why the hours of specialized instruction increased to a total of sixteen hours, compared to the fifteen hours of specialized instruction recommended in 2022. But the IEP says nothing about the Student receiving specialized reading instruction, except in the “Other Classroom Aids and Services” section of the document, which indicated “exemplars to include math manipulatives and reading and writing evidence-based interventions.” Witness D said that the reference to the evidence-based reading and writing in the “Other Classroom Aids and Services” section of the IEP was at the discretion of the teacher.

DCPS argued that class-size claims and school-size claims are not favored in IDEA litigation. However, in M.G. v. District of Columbia, 246 F. Supp. 3d 1 (D.D.C. 2017), District of Columbia v. Bryant–James, 675 F. Supp. 2d 115, 120 (D.D.C. 2009), and Gellert v. District of Columbia Public Schools, 435 F. Supp. 2d 18 (D.D.C. 2006), federal judges in the District of Columbia found that inappropriate class or school sizes resulted in FAPE denial.

This Hearing Officer therefore agrees with Petitioners that the May 26, 2023, IEP did not provide the Student with a sufficient mandate for specialized instruction, a requirement for an appropriately small class size, and a requirement for an appropriately small school size.²

With respect to Sub-Issue #10, pertaining to IEP goals, this Hearing Officer agrees with Petitioners that the school district's failure to incorporate agreed-upon changes, including goals, in the final draft of the IEP is problematic. An IEP is supposed to provide parents with assurances that their child will be properly educated in the forthcoming school year. At the time the parents must choose whether to accept the school district's recommendation or place their child elsewhere, they have only the IEP to rely on, and therefore the adequacy of the IEP itself creates considerable reliance interests for the parents. R.E. v. New York City Dep't of Educ., 694 F.3d 167, 186 (2d Cir. 2012). Moreover, DCPS did not change the Student's goals in reading or written expression from the prior IEP, and DCPS, which has the burden, did not clearly explain why the goals stayed the same from IEP to IEP. Courts in this jurisdiction have found that the wholesale repetition of goals and objectives across multiple IEPs is of great concern.

²Since the "Other Classroom Aids and Services" section of the IEP requires "daily check-ins" in the "morning, afternoon, and as needed for social/emotional concerns" and "teacher check-ins when needed," this Hearing Officer disagrees with Petitioners that the IEP did not contain sufficient requirements for student check-ins during the day. Petitioners also contended that the "Other Classroom Aids and Services" section in general is unduly vague and discretionary, which is effectively how this Hearing Officer ruled in an earlier case involving the same kind of language and the same parties. While I continue to have concern that the "Other Classroom Aids and Services" section of the IEP is vague and discretionary, the Student's relatively seamless performance in school over the past several years suggests to this Hearing Officer that an IEP would have been appropriate if it had recommended that the Student receive small special education classes in all academic subjects, in a small setting, even without the accommodations in the "Other Classroom Aids and Services" section of the IEP.

Damarcus S. v. District of Columbia, 190 F. Supp. 3d 35, 52 (D.D.C. 2016). This Hearing Officer agrees with Petitioners that the goals in the May 26, 2023, IEP were defective.

In regard to the other issues raised by Petitioners, this Hearing Officer is less convinced by their arguments, many of which were only mentioned in passing during closing. There is no evidence that the failure to update the IEP's present levels of performance sections had any substantive impact on the Student, and Petitioners did not so argue during closing. There is also insufficient credible evidence that, during the IEP meeting, DCPS "falsely alleged" they did not have updated social/emotional/behavioral data, failed to gather data, failed to conduct its own evaluation, and failed to properly assess the Student's academic and functional performance. The record shows that the IEP team had more than enough information about the Student from his/her school and Petitioners in order to write a comprehensive IEP at the May 26, 2023, IEP meeting.

Petitioners also argued that the Student needed behavioral support services upon re-entry to the public school system at School C, including transition services, pointing to the testimony of Witness A. But this Hearing Officer agrees with DCPS that there is no IDEA requirement for a "transition plan" when a student transfers between schools, and this Hearing Officer is also not convinced that DCPS's choice to include behavioral support services on a consultation basis was unfairly calculated, given the Student's virtually behavior-free experience at School B and given that Witness A is not an expert in social work like Witness C, a social worker who testified that direct behavioral support services were not needed for the Student.

In sum, as a result of the foregoing, this Hearing Officer finds that DCPS denied the Student a FAPE through its May, 2023, IEP.

RELIEF

As relief, Petitioner seeks tuition reimbursement for the 2023-2024 school year at School B. A school district may be required to pay for educational services obtained for a student by the student's parent, if the services offered by the school district are inadequate or inappropriate, the services selected by the parent are appropriate, and equitable considerations support the parents' claim, even if the private school in which the parents have placed the child is unapproved. Florence County School District Four et al. v. Carter by Carter, 510 U.S. 7 (1993). Courts must consider "all relevant factors" including the nature and severity of the student's disability, the student's specialized educational needs, the link between those needs and the services offered by the private school, the placement's cost, and the extent to which the placement represents the least restrictive educational environment. Branham v. District of Columbia, 427 F.3d 7, 12 (D.C. Cir. 2005).

The testimony of Witness B established that the services that the Student received at School B continued to help the Student progress academically and emotionally during the 2023-2024 school year. The school, which is approved by the Maryland state educational agency, provides the Student with small classrooms, a warm supportive environment, close contact with teachers, and a small physical plant, with behavioral and academic supports imbedded into the school days. Approximately 150 children attend the school, from grades four through twelve. School B had only sixteen students in the Student's whole grade. The school has a licensed professional counselor. The Student is

provided with a 1:1 “chrome book” with assistive technology tools, such as speech-to-text software, and every student has an advisor. The school is different than a traditional setting due to the emphasis on breaking down and chunking information. The school emphasizes visuals and provides extra support through reading, writing, and math tutorials. The school uses annotation to help students with reading assignments, and students are allowed to write directly in their books.

The Student takes advantages of the supports and the tools at the school, though math is an area of struggle, and in Spanish, there is inconsistency with homework. The Student receives two check-ins, one in the morning to see how s/he feels and to prepare for tests and assignments, and one after school to talk about how the day went. In May 2024, Witness C observed the Student at School B for about seventy minutes. Witness C saw the Student engaging in positive interactions with peers, self-advocating, and asking clarifying questions, though s/he fidgeted when working independently. The Student was engaged during most of the observation and his/her teachers reported that, in regard to social and emotional issues, s/he was mainly functioning in the average range, with slight elevation in some areas.

DCPS contended that School B is not certified and does not have a roster that consists entirely of certified teachers, but there is no requirement that parental placements be certified or that they employ only certified special education teachers. Florence County, 510 U.S. at 15. DCPS also indicated, pointing to MAP testing, that the Student has not benefitted from the services provided by School B. But according to MAP testing on reading, the Student improved from the 33rd percentile in the fall of 2020 to the 42nd percentile in the fall of 2023. The record also indicates that the Student’s growth in

reading from the fall of 2021 to the fall of 2022 was in the 90th percentile, which means that s/he made more progress than 90% of his/her peers. While the Student's percentile rank in math stayed about the same during this period, the record indicates that the Student did make some progress in math. The record indicates that the Student's growth in math from the fall of 2021 to the fall of 2022 was in the 72nd percentile, which means that s/he made more progress than 72% of his/her peers. And there is no dispute that the Student made great progress emotionally at School B, where the Student is now a leader at the school.

Finally, to put this in context, Hearing Officer Vaden had just decided that School B was appropriate for the Student for the 2022-2023 school year when Petitioners had to decide whether to send the Student to School B. Under the circumstances, this Hearing Officer agrees with Petitioners that their choice to place the Student in School B for the 2023-2024 school year was proper.

The IDEA allows for tuition reimbursement to be reduced or denied when parents fail to raise the appropriateness of an IEP in a timely manner, fail to make their child available for evaluation by the district, or upon a finding of unreasonableness with respect to the actions taken by the parents. 20 U.S.C. Sect. 1412(a)(10)(C)(iii). Under 20 U.S.C. Sect. 1412(a)(10)(C)(iii), a denial or reduction in reimbursement is discretionary. The Supreme Court has suggested that the statutory factors are a non-exhaustive list. Forest Grove Sch. Dist. v. T.A., 557 U.S. 230, 241 (2009) (“(t)he clauses of Sect. 1412(a)(10)(C) are...best read as elucidative rather than exhaustive”). In addition, courts have broad discretion to consider the range of all relevant facts in determining whether and to what extent awarding relief is equitable. Carter, 510 U.S. at 16.

The main issue with respect to equities in this case is that DCPS said that it did not receive all the documents that it requested from School B and Petitioners. However, DCPS did receive all the documents that it requested from Petitioners and the school by the date of the IEP meeting in May 2023. Indeed, DCPS received a link to documents from School B in February 2023, before the IEP meeting that was scheduled for February 2023. However, DCPS did not review these documents before the meeting, which led to a four-month delay in the meeting. There is nothing in the record to suggest that Petitioners had anything to do with making the Student unavailable for DCPS to observe or evaluate him/her. This Hearing Officer therefore finds that there should be no reduction on equities, and that Petitioners should be awarded tuition reimbursement and related expenses for School B for the 2023-2024 school year, including transportation reimbursement for mileage, per the IRS rate.

VII. Order

As a result of the foregoing, the following is ordered:

1. Upon receipt of documentation of payment by Petitioners, as may be reasonably required, Respondent shall, without undue delay, reimburse Petitioners for their costs for covered tuition and related expenses for Student's enrollment at School B for the 2023-2024 school year, including transportation reimbursement for miles driven by Petitioners to and from the school at the then-applicable IRS rate.

Dated: October 23, 2024

Michael Lazan
Impartial Hearing Officer

cc: Office of Dispute Resolution

Hearing Officer Determination
Michael Lazan, Hearing Officer
Case # 2024-0147

Attorney A, Esq.
Attorney B, Esq.
Attorney C, Esq.

VIII. Notice of Appeal Rights

This is the final administrative decision in this matter. Any party aggrieved by this Hearing Officer Determination may bring a civil action in any state court of competent jurisdiction or in a District Court of the United States without regard to the amount in controversy within ninety days from the date of the Hearing Officer Determination in accordance with 20 U.S.C. Sect 1415(i).

Dated: October 23, 2024

Michael Lazan
Impartial Hearing Officer