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: 7/24/19 (Room**
	)	**423); 7/25/19 (Room 423); 8/9/19**
v.	)	**(Room 112)**
	)	**Hearing Officer: Michael Lazan**
	)	**Case No.: 2019-0111**
District of Columbia Public Schools,	)	
Respondent.	)	

HEARING OFFICER DETERMINATION

I. Introduction

This is a case involving a student who is currently eligible for services as a student with Multiple Disabilities (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 April 26, 2019. The Complaint was filed by the parents of the Student ("Petitioners"). On May 7, 2019, Respondent filed a response. The resolution period expired on May 26, 2019.

II. 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. Sect. 1400 et seq., its implementing regulations, 34 C.F.R. Sect. 300 et seq., Title

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

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

III. Procedural History

On June 17, 2019, this Impartial Hearing Officer held a prehearing conference. Attorney A, Esq., counsel for Petitioners, appeared. Attorney B, Esq., counsel for Respondent, appeared. A prehearing conference order was issued on June 24, 2019, summarizing the rules to be applied in this hearing and identifying the issues in the case. DCPS moved for partial dismissal through a written motion dated June 28, 2019. The motion was denied by an interim order dated July 19, 2019.

The Hearing Officer Determination ("HOD") due date was July 10, 2019. Because of unavailability of counsel and witnesses, and to allow the scheduling of hearing dates on July 24 and July 25, 2019, Petitioners filed a motion for continuance, on consent. This Impartial Hearing Officer granted the motion on July 10, 2019, extending the decision date to August 5, 2019. After the hearings were held, one additional hearing date was added to allow for the presentation of more witnesses by DCPS. On August 5, 2019, Respondent filed a corresponding motion for a continuance for a final hearing date, to allow the parties to submit briefs and enable this Impartial Hearing Officer to render a decision. The motion was granted by this Impartial Hearing Officer, and the new decision date was set for September 9, 2019.

There were three hearing dates: July 24, 2019, July 25, 2019, and August 9, 2019. This was a closed proceeding. Petitioners were represented by Attorney A, Esq. Respondent was represented by Attorney B, Esq. Petitioners moved into evidence exhibits 1-42. Objections were filed with respect to exhibits 2, 3, 5, 6, 11, 13, 15, 17, 18,

19, 33, 37, and 38-40. All objections were overruled and exhibits 1-42 were admitted. Respondent moved into evidence exhibits 1-31. Petitioners objected to exhibit 1. The objection was sustained. Exhibits 2-31 were admitted. Written closing statements were presented by both sides on August 26, 2019.

Petitioners presented as witnesses: the Student's mother; Witness A, an educational consultant (expert: special education); and Witness B, assistant head of the middle school at School B. Respondent presented as witnesses: Witness C, a social worker (expert: social, emotional behavior support, programming, and placement for disabled students); Witness D, a special education program specialist (expert: special education programming and placement); Witness E, a special education coordinator at School C (expert: special education programming, placement, and evaluation); and Witness F, a psychologist (expert: school psychology and evaluation).

IV. Issues

As identified in the Prehearing Conference Summary and Order and in the Due Process Complaint, the Free Appropriate Public Education ("FAPE") issues to be determined in this case are as follows:

1. Did DCPS fail to recommend an appropriate school/location of services/placement for the Student at School C during the 2017-2018 and 2018-2019 school years? If so, did Respondent violate the principles in such cases as Gellert v. District of Columbia, 435 F. Supp. 2d 18 (D.D.C. 2006)? If so, did Respondent deny the Student a FAPE?

Petitioners contended that the proposed school had class sizes that were too large, did not provide appropriate recommendations for the Student, and did not provide appropriate reading instruction and interventions for the Student.

2. Did DCPS fail to include the Student's current school staff/regular education teacher(s) at the Individualized Education Program ("IEP")

meeting in October, 2017? If so, did DCPS violate 34 CFR 300.321(a)(2), 300.324(a)(3), and related provisions? If so, did DCPS deny the Student a FAPE?

3. Did DCPS fail to review information sent to it by Petitioners in or about December, 2017, and January, 2018, which was related to the Student's attendance at School B? If so, did DCPS deny the Student a FAPE?

4. Did DCPS fail to provide the Student with an IEP from November 21, 2017, to January 10, 2019? If so, did DCPS violate 34 CFR 300.324(b)(1)(i) and related provisions? If so, did DCPS deny the Student a FAPE?

5. Did DCPS fail to provide the Student with an appropriate IEP for the 2018-2019 school year? If so, did DCPS act in contravention of 34 CFR 300.320, Endrew F. v. Douglas County School District, 137 U.S. 988 (2017), and Hendrick Hudson Bd. of Educ. v. Rowley, 458 U.S. 176 (1982)? If so, did DCPS deny the Student a FAPE?

Petitioners contended that the Student's IEP for the 2018-2019 school year, issued in January, 2019, did not provide the Student with appropriate specialized instruction and sufficient specialized instruction hours. Petitioners contended that the Student needed small general education classes with appropriate accommodations.

V. Findings of Fact

1. The Student is an X-year-old who is eligible for services as a student with Multiple Disabilities (Specific Learning Disability, Other Health Impairment). The Student is emotionally vulnerable and needs staff to interact with him/her frequently to be able to manage in school. The Student needs specialized instruction in all academic areas, including reading, math, and writing. Testimony of Witness A; P-35.

2. The Student has average cognitive abilities but is diagnosed with learning disabilities together with Attention Deficit Hyperactivity Disorder ("ADHD") and Generalized Anxiety Disorder ("GAD"). In class, the Student requires, among other things, modified texts; prompting; repetition of concepts; visual aids; information previewed; text to speech or speech to text software; computer access; and instruction

broken down into its component parts. The Student does not need specialized instruction or supports in non-academic classes, including lunch and transitions. Testimony of Witness A; P-35; P-2-4.

3. The Student began his/her academic career in a general education program at School A, where the Student received special education services in the general education setting. A neuropsychological evaluation of the Student was conducted in April-June, 2015. This testing indicated that the Student was at the 66th percentile cognitively, with a full scale IQ of 106 on the Wechsler Intelligence Scale for Children-IV ("WISC-IV"). But on the Woodcock-Johnson IV Tests of Achievement ("WJ-IV"), the Student scored below average in reading, with scores at the 5th percentile in fluency and passage comprehension and at the 7th percentile in spelling. In broad mathematics, the Student scored at the 26th percentile. The Student's behavior was also examined through the Conners-3 assessment, the Behavior Rating Inventory of Executive Function ("BRIEF"), and the Behavior Assessment System for Children-2 ("BASC-2"). These assessments indicated that the Student presented with issues with respect to attention, impulsiveness, working memory, attitude toward school, attitude toward adults, social stress, anxiety, depression, and executive functioning. Memory testing was also conducted on the Student. The Student tested well below level in "working memory" on the Wide Range Assessment of Memory and Learning-2 ("WRAML-2"). P-2; Testimony of Petitioner.

4. For the 2015-2016 school year, the Student attended School B, a non-public school that provides its population of approximately 180 students with class sizes of eight to twelve students each. About thirty percent of the students at School B are

"typical" general education students. About seventy percent of the students have been diagnosed with a disorder of some kind. The school is approved as a general education school in Maryland. The school offers students some instruction with a special educator teacher, but much of the instruction is provided by general education teachers. The school is designed to help children who learn differently, children with ADHD, children with executive functioning issues, and children with mild to moderate learning challenges. The school provides accommodations as necessary, including preferential seating, assistive technology, scribes, and readers. Testimony of Witness A; Testimony of Witness B.

5. On August 26, 2016, the Student was assessed by the evaluator who had conducted the Student's neuropsychological evaluation in 2015. The evaluator again administered the WJ-IV tests and the Conners-3 rating scale and found that the Student's achievement scores were appropriately the same as those compiled in 2015. The Conners-3 showed that the Student displayed greater confidence in his/her academic abilities as a result of the Student's attendance at School B. P-3.

6. On November 21, 2016, an IEP meeting was held for the Student. The resultant IEP included goals in math, reading, written expression, and emotional, social and behavior development, and required ten hours of specialized instruction per week inside general education, with ninety minutes per month of behavioral support services. The IEP also recommended seat placement close to the teacher, frequent teacher check-ins, movement breaks every one to two minutes, repetition/simplification of instructions, visual aids, graphic organizers, manipulatives, scaffolding of assignments, modified spelling lists, teacher read-alouds/modification of reading texts (as needed), the option to

have a quiet workspace, noise-cancelling headphones, small group testing, small group instruction "whenever possible," and the use of calculators. Exh. P-4-12.

7. The Student continued to attend School B for the remainder of the 2015-2016 school year and the beginning of the 2016-2017 school year. An HOD from Impartial Hearing Officer Coles Ruff ("IHO Ruff") was issued on September 26, 2017, in regard to the Student. The HOD ordered DCPS to convene an IEP meeting within ten school days "to reflect specialized instruction in all academic subjects in the general education setting. The team shall determine based upon this directive the specific number of hours of specialized instruction the Student will receive per week." IHO Ruff also found that "the Student does not require specialized instruction for non-academic subjects," ordered DCPS to determine a location of service to implement the Student's IEP for the remainder of the 2017-2018 school year ("SY"), and issued Petitioners a Prior Written Notice to that effect. Additionally, IHO Ruff ordered DCPS to reimburse Petitioners the costs of the Student's attendance at School B "for all of SY 2016-2017 and for the portion of SY 2017-2018 until the date DCPS complies with the directive above that DCPS provide the Student a placement and location of services for the remainder of SY 2017-2018." P-7-20-21.

8. On or about October 3, 2017, DCPS sent Petitioners a proposal to increase the Student's specialized instruction hours in accord with the HOD of IHO Ruff. DCPS indicate that it wanted to amend the Student's IEP to reflect specialized instruction in all academic subjects in the general education setting. P-8.

9. An IEP meeting was conducted for the Student on October 6, 2017. Attending this meeting were Petitioners; Witness C; Witness D; a DCPS "general

education specialist; a DCPS case manager; and a DCPS compliance case manager. At the meeting, DCPS proposed that the Student receive sixteen hours per week of specialized instruction inside general education. Petitioner disagreed and sought full-time special education instruction for the Student. The parties understood that the IEP would only last until November, 2018. Witness D accordingly told the attorney for Petitioners that DCPS would reach out to set up another IEP meeting. Witness D also asked if Petitioners' counsel could contact School B to get meeting dates that would be convenient for a new IEP meeting. Petitioner expressed assent to this request. Minutes were written stating that "Central office IEP team will follow up with counsel and parents for another meeting that includes [School B] staff." An IEP amendment dated October 12, 2017, was then issued, increasing the Student's specialized instruction hours to sixteen per week, through November 20, 2017. Otherwise, this IEP was virtually identical the Student's IEP issued in November, 2016. Testimony of Petitioner; Testimony of Witness D; P-9; P-10.

10. DCPS did not reach out to Petitioners' counsel after the IEP meeting. Petitioner was not contacted by DCPS in regard to the IEP for the remainder of the 2017-2018 school year, though Petitioner sent DCPS copies of the Student's report cards from School B. Testimony of Petitioner; Testimony of Witness D; P-9; P-12; P-13.

11. At the October, 2017, IEP meeting, DCPS proposed School C for the Student. School C is a public school with approximately 1,500 students, and each student has four core teachers. Ten percent of the students in the school have IEPs. Classes at School C can have as many as thirty students. For the 2017-18 school year, School C had the ability to provide the Student with "co-taught" classes for three of the Student's four

core classes: mathematics, English language arts, and history. This amounts to twelve hours of specialized instruction per week inside general education. The school would have added a special education teacher to an existing class to implement the Student's IEP. Reading instruction at the school is provided through a variety of methodologies such as "Read 180," "Lexia," "SpellRead," and "Edmark." Testimony of Witness E.

12. Petitioners kept the Student at School B for the rest of the 2017-2018 school year. The Student passed every class at School B during the year. The Student's grades generally ranged from "A" to "B+," with one "B-" in math for the second quarter. In English language arts, the Student made progress in understanding the "vagaries" of language but did not do his/her homework all the time. The Student did not always like phonics, and struggled with decoding during this school year. The Student was hard-working in history, showing growth, and considered a "great" literature student, though s/he continued to be reluctant to read and fatigued easily. In mathematics, the Student benefitted from visuals and was inconsistent with homework. The Student was considered a "tenacious" student and a leader in science. The Student also improved in self-advocating and grew in confidence during the school year, during which the Student's tendency toward anxiety was not usually on display. P-13-5-8; P-18; Testimony of Witness B; Testimony of Petitioner.

13. On August 3, 2018, Petitioner sent a letter to DCPS indicating that the Student would be attending School B for the 2018-2019 school year. An IEP meeting was then held for the Student on August 27, 2018. At this meeting, Petitioner noted that the Student had not been reevaluated and asked for the Student to be evaluated prior to

the development of program recommendations. DCPS agreed and adjourned the meeting. P-21; P-22; Testimony of Witness D; Testimony of Petitioner.

14. Evaluations of the Student were subsequently conducted. A speech and language evaluation showed no significant issues in expressive or receptive speech. A "Strength and Difficulties Questionnaire" indicated that the Student was somewhat overactive, fearful, had some complaints about headaches or sickness, and would squirm and be easily distracted. However, this document also indicated that the Student was otherwise well-behaved. A Motivation Assessment Scale was compiled through an interview with Petitioners. This assessment indicated that the Student's primary behavioral motivation was escape. The Student was observed on October 9, 2018, but no major issues were reported. A Comprehensive Psychological Evaluation of the Student was conducted on October 1, 2018. The corresponding report of Witness F, issued on October 10, 2018, found that the Student presented with a full-scale IQ of 101 on the WISC-V. On the WJ-IV, the Student's broad reading score was at the 14th percentile, with reading fluency at the 18th percentile, passage comprehension at the 7th percentile, oral reading at the 2nd percentile, broad math at the 9th percentile, and broad written language at the 16th percentile. P-25-3-4; P-26; P-27; P-28; P-29; Testimony of Witness C; Testimony of Witness F.

15. On December 3, 2018, an eligibility meeting was held for the Student. The Student was again determined to be eligible for services. An IEP meeting followed on January 10, 2019. Attending the meeting were Petitioners, their counsel, Witness A, Witness B, and several representatives from DCPS: Witness D, Witness C, Teacher A, and a case manager. There was not much disagreement at the meeting except for one

point: the parties could not agree whether the Student was receiving specialized instruction at School B. DCPS agreed that the Student had shown growth in reading and writing but was concerned about the Student's math levels, resulting in an increase in services to eighteen hours per week of specialized instruction, including two new hours of instruction outside general education. DCPS was open to the suggestions of Witness A at the meeting, including suggestions that the Student's goals be premised on "evidence-based" and "small group" instruction. To underscore the point, the team omitted the words "wherever possible" from the language in the IEP requiring small group instruction. Petitioners did not object to the Student's IEP goals, or the recommended aids and services. Testimony of Witness A; Testimony of Witness C; Testimony of Witness F; P-15; P-33; P-34; P-35; R-15.

16. For the 2018-2019 school year, School C offered two classes per week that could provide the Student with specialized instruction inside general education, per the IEP. Since the two classes amounted to only eight hours of specialized instruction per week inside general education, School C would have to provide the other eight hours required by adding special education teachers to existing general education classes in history and science. Testimony of Witness E.

17. During the 2018-2019 school year, the Student's largest class at School B, Spanish, had approximately fifteen students in it. The Student's English language arts class was supported by a speech and language pathologist three times a week. The Student's math class was taught by a learning specialist who is a certified special education teacher. There was also 1:1 Orton-Gillingham instruction once weekly with a

reading specialist who is special education certified. Testimony of Witness A; Testimony of Witness B.

VI. Conclusions of Law

Based upon the above Findings of Fact, the arguments of counsel, and this Impartial Hearing Officer's own legal research, the Conclusions of Law of this Impartial 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.

See D.C. Code § 38-2571.03(6)(A)(i)

Issues # 1, #4, and #5 involve a challenge to the appropriateness of the Student's existing or proposed IEP or placement. Accordingly, on those issues, the burden of persuasion is with Respondent, provided that Petitioner presents a *prima facie* case. Issues #2 and #3 do not directly relate to the appropriateness of Student's existing or proposed IEP or placement. For those issues, the burden of proof lies with the party seeking relief. Schaffer v. Weast, 546 U.S. 49 (2005).

1. Did DCPS fail to recommend an appropriate school/location of services/placement for the Student at School C during the 2017-2018 and 2018-2019 school year? If so, did Respondent violate the principles in such cases as Gellert v.

District of Columbia, 435 F. Supp. 2d 18 (D.D.C. 2006)? If so, did Respondent deny the Student a FAPE?

A main role of a hearing officer is to determine if a student's IEP is reasonably calculated to enable the child to receive additional benefits. Hendrick Hudson Bd. of Educ. v. Rowley, 458 U.S. 176 (1982). The IEP should be both comprehensive and specific and targeted to the student's "unique needs." McKenzie v. Smith, 771 F.2d 1527, 1533, D.C. Cir. (1985); N.S. ex rel. Stein v. District of Columbia, 709 F.Supp.2d 57, 60 (D.D.C. 2010); 34 CFR Sect. 300.320(a)(2)(B) (the IEP must contains goals that meet each of the child's educational needs that result from the child's disability); 34 CFR Sect. 300.324(a)(1)(iv) (the IEP must address the academic, developmental, and functional needs of the child). Most due process claims therefore relate to the IEP, the "centerpiece" of the Act. Honig v. Doe, 484 U.S. 305, 311 (1988).

Nevertheless, Petitioners may bring claims based upon an inappropriate placement[2] in certain situations. Although the local education agency ("LEA") has some discretion with respect to school selection,[3] that discretion cannot be exercised in such a manner to deprive a student of a FAPE, even if the school placement can implement the Student's IEP. Gellert v. District of Columbia, 435 F. Supp. 2d 18 (D.D.C. 2006); Holmes v. District of Columbia, 680 F. Supp. 40 (D.D.C. 1988). Courts can accordingly rule that school assignments violate the IDEA if, for instance, the school contains an environment that allows bullying. Shore Regional High School Board of Education v. P.S., 381 F.3d 194 (3d Cir. 2004) (placement would subject a student with an emotional

[2] As pointed out in Eley v. District of Columbia, 47 F. Supp. 3d 131 (D.D.C. 2014), a student's educational placement includes the school, or location of services.
[3] See Jalloh v. District of Columbia, 968 F. Supp. 2d 203 (despite complaints about, among other things, the school's use of computers for instruction, the school was deemed able to implement the IEP and placement claims were denied).

disability to continued bullying); M.L. v. Federal Way School District, 394 F.3d 634 (9th Cir. 2005) (if the abuse is so severe that the child can derive no benefit from the services that he or she is offered by the school district, the child has been denied a FAPE).

In Petitioners' brief, Petitioners alleged a "failure to implement" claim. Van Duyn v. Baker Sch. Dist. 5J, 502 F.3d 811, 822 (9th Cir. 2007). Petitioners alleged that no DCPS witnesses explained how the Student's sixteen hours of special education support inside general education was to be implemented at School C. Petitioners pointed out that School C did not have enough co-taught classes for the Student's IEP to be implemented there during the 2017-2018 and 2018-2019 school years, noting that Witness E said that the school would have to add a teacher to the Student's science class in the first year, then add a teacher to both the Student's science and history classes in the second year. Petitioners also alleged that DCPS did not put on a case to explain what the Student's specialized instruction classes would "look like" at School C, underscoring that there was no description of who the other students in the class would be.

A party requesting an impartial hearing may not raise issues at the hearing that were not raised in its original due process complaint notice, unless the other party agrees. 20 U.S.C. Sect. 1415(f))(3)(B); 34 CFR 300.508(d)(3)(i), 300.511(d). Neither of the above issues were clearly raised in the Complaint, which references that the Student needs small class sizes and specific reading interventions, that the Student's reading assignments at School C would be too difficult, that the Student would not get a reading support class at School C, and that mathematics classes at School C would be too easy. Nor were either of the issues mentioned in the Prehearing Order. In the order, Petitioners contended that the proposed school, School C, had class sizes that were too large and did

not provide appropriate recommendations, reading instruction, and interventions for the Student.

Since these issues were first raised during the hearing process, this Impartial Hearing Officer is without jurisdiction to hear these two arguments in connection to Issue #1.[4]

In Petitioners' brief, Petitioners also contended that DCPS provided no evidence that its proposed program could provide the Student with appropriate reading instruction, pointing to testimony from Witness A and Witness B. These witnesses indicated that the Student requires a particular evidence-based reading intervention, such as the Orton-Gillingham reading program. They also indicated that School C should have had those interventions available to the Student. However, parents do not ordinarily have the right to dictate to school districts which instructional methodologies to use. The U.S. Department of Education stated that "there is nothing in the [IDEA] that requires an IEP to include specific instructional methodologies." 71 Fed. Reg. 46,665 (2006). As the United States Supreme Court stated in Rowley: "Congress' intention was not that the Act displace the primacy of States in the field of education, but that States receive funds to assist them in extending their educational systems to the handicapped. Therefore, once a court determines that the requirements of the Act have been met, questions of methodology are for resolution by the States." 458 U.S. at 208; see also Fairfax Cty. Sch. Bd. v. Knight, No. 1:05CV1472 (LMB), 2006 WL 6209927, at *8 (E.D. Va. Aug. 23,

[4] Moreover, the record shows that School C could implement the Student's IEPs in October, 2017, and January, 2019, because Witness E said that the school would have added a teacher or teachers to science and/or history classes. Petitioners pointed to N.W. v. District of Columbia, 253 F. Supp. 3d 5, 11 (D.D.C. 2017), where an IEP called for self-contained specials and DCPS proposed housing in a student for a class by him/herself, and the Court concluded that the "class of one" would not be capable of advancing the student's goals. But there is no "class of one" proposed here. The Student would have been placed in a classroom with other students during the entire time s/he would have been at School C.

2006), aff'd, 261 F. App'x 606 (4th Cir. 2008) ("(o)f course, it is not the place of this Court to pass upon the relative merits of educational theories and methodologies"); S.M. v. Hawai'i Dep't of Educ., 808 F. Supp. 2d 1269, 1278 (D. Haw. 2011) (IEP did not specifically need to require the ABA methodology to pass muster under the IDEA).[5]

Here, the record does not adequately support the contention that the Student's academic needs are so particular that the Student should have been offered Orton-Gillingham instruction (or something similar to that program). School district witnesses credibly testified that the district has several reading programs that could have worked for the Student. Petitioners contended that DCPS's reading interventions are not "evidence-based" and are instead "research-based," and Witness A explained that none of the DCPS interventions are approved for special education students by the United States Department of Education's initiative called "What Works Clearinghouse." But there is no requirement in the IDEA that a school district's choice of methodology must be premised on a program that is "evidence-based" or approved by "What Works Clearinghouse."

Also in Petitioners' brief, Petitioners alleged that, at the hearing, none of DCPS's witnesses could explain how the Student could progress in classes of twenty-five students. However, the academic classrooms proposed for the Student at School C are

[5] As stated in the comments to the 1999 IDEA regulations:

> In light of the legislative history and case law, it is clear that in developing an individualized education there are circumstances in which the particular teaching methodology that will be used is an integral part of what is ''individualized'' about a student's education and, in those circumstances will need to be discussed at the IEP meeting and incorporated into the student's IEP. For example, for a child with a learning disability who has not learned to read using traditional instructional methods, an appropriate education may require some other instructional strategy.

Fed. Reg. Vol. 64, No. 48 (March 12, 1999) at 12552.

not simply classrooms with twenty-five students. They are also classrooms with two teachers: a certified special education teacher and a certified general education teacher. The teacher-to-student ratio in the classrooms (with a maximum of thirty students, but generally less) is therefore similar to the teacher-to-student ratio at School B, where classes can be as large as fifteen students in a class with one teacher.

In this connection, Petitioner did not consider the school district's duty to place students in the least restrictive environment. In formulating an appropriate IEP, an IEP team must "be mindful of IDEA's strong preference for 'mainstreaming,' or educating children with disabilities '[t]o the maximum extent appropriate' alongside their non-disabled peers." Gagliardo v. Arlington Cent. Sch. Dist., 489 F.3d 105, 108 (2d Cir. 2007) (quoting 20 U.S.C. § 1412(a)(5)); Lachman v. Ill. State Board of Educ., 852 F.2d at 295 ("[IDEA's] requirement that mainstreaming be provided to the maximum extent appropriate indicates a very strong congressional preference"). Especially given this Student's ability to associate with non-disabled peers, it was fair for the school district to place the Student in co-taught classes for all academic subjects, as IHO Ruff also concluded. In sum, this claim must be dismissed in its entirety.[6]

2. Did DCPS fail to include the Student's current school staff/regular education teacher(s) at the IEP meeting in October, 2017? If so, did DCPS violate 34 CFR 300.321(a)(2), 300.324(a)(3), and related provisions? If so, did DCPS deny the Student a FAPE?

The IDEA requires a district to ensure that an IEP team for a child with a disability includes "(n)o less than one general education teacher of the child (if the child

[6] Parenthetically, Petitioners did not clearly mention in their brief several of the claims that were raised in the Complaint and the Prehearing Conference Order. In particular, Petitioner did not argue that the reading assignments at School C would be too difficult for the Student, or that the mathematics classes at School C would be too easy for the Student. To the extent that these claims can even be considered by this Impartial Hearing Officer, Petitioners did not satisfy the requirement to present a *prima facie* case on these issues.

is or may be participating in the general education environment)." 34 CFR 300.321 (a). Teacher A was listed as the general education teacher at the October, 2017, IEP meeting, as reflected by the DCPS meeting minutes. There was no argument on this issue in Petitioner's brief, which did not even mention it. Petitioners therefore did not meet their burden to present a *prima facie* case on this issue. This claim is dismissed.

3. Did DCPS fail to review information sent to it by Petitioners in or about December, 2017, and January, 2018, which was related to the Student's attendance at School B? If so, did DCPS deny the Student a FAPE?

Petitioners contended that the report cards they sent to DCPS in December, 2017, and January, 2018, should have been reviewed by DCPS, but they did not clearly reference this claim in their brief. School districts are under no specific duty to review report cards every time they receive them, though they must review evaluative data such as report cards during IEP meetings. 34 CFR Sect. 300.324(a)(1) (school districts are under a duty to consider the strengths of the child, the concerns of the parents for enhancing the education of their child, the results of the initial or most recent evaluation of the child, and the academic, developmental, and functional needs of the child). The only IEP that was created after the report cards were sent to DCPS was the IEP from January, 2019. At this IEP meeting, there was sufficient consideration of the Student's performance at School B, since Witness A and Witness B both actively participated in the meeting. This claim must be dismissed.

4. Did DCPS fail to provide the Student with an IEP from November 21, 2017, to January 10, 2019? If so, did DCPS violate 34 CFR 300.324(b)(1)(i) and related provisions? If so, did DCPS deny the Student a FAPE?

At the beginning of each school year, each public agency must have in effect, for each child with a disability within its jurisdiction, an IEP. 34 CFR Sect. 300.323(a).

Since it is apparent that the intent of this regulation is that an IEP should be in effect for a student for an entire school year, the failure to have an IEP in effect during a portion of the school year is an error that may result in an IHO's finding of a denial of FAPE. However, this error may not amount to a denial of FAPE if the failure to create the IEP is the fault of the parents. C.H. v. Cape Henlopen Sch. Dist., 606 F.3d 59 (3d Cir. 2010); MM v. School District of Greenville County, 303 F.3d 523 (4th Cir.2002); compare Leggett v. District of Columbia Public Schools, 793 F.3d 59, 68 (D.C. Cir. 2015) (parent cooperated with school district).

Here, Petitioners did not do anything to resist the creation of a new IEP for the Student after the October, 2017, IEP expired. In fact, after the October, 2017, IEP meeting, DCPS told Petitioners that *it* would contact *them* to set up a new IEP meeting, since the October, 2017, IEP was going to expire. DCPS never did so, however, even though it was obvious that the October, 2017, IEP had to be updated. Not only did the October, 2017, IEP have an expiration date of November 21, 2017, the IEP did not update any of the Student's levels, goals, or services from the November, 2016, IEP. Except for the increase in specialized instruction hours, the October, 2017, IEP is the same, word for word, as the IEP written for the Student in November, 2016. A new IEP meeting was required to address the expiration of services and to update the goals and levels of performance on the IEP.

It is noted that DCPS did not provide any reason that the Student's October, 2017, IEP was not updated. DCPS denied the Student educational benefit, and therefore a FAPE, when it failed to create an IEP for the Student from November 21, 2017, through January 10, 2019.

5. Did DCPS fail to provide the Student with an appropriate IEP for the 2018-2019 school year? If so, did DCPS act in contravention of 34 CFR 300.320, Endrew F. v. Douglas County School District, 137 U.S. 988 (2017), and Hendrick Hudson Bd. of Educ. v. Rowley, 458 U.S. 176 (1982)? If so, did DCPS deny the Student a FAPE?

Petitioners contended that the Student's IEP of January, 2019, did not provide appropriate specialized instruction because the Student needed small general education classes with appropriate accommodations. Petitioner pointed to the testimony of Witness A, who noted that the Student is highly distractible, struggles with concentration, and can easily become overwhelmed due to anxiety. Witness A stressed the importance of providing the Student with small classes, as they would allow him/her to be "free from the distractions present in larger classes."

There was, however, no need for the IEP to require the Student to attend small classes. As discussed in connection to Issue #1, the IEP recommended academic classrooms with a favorable teacher-to-student ratio, much as a small class might. The record is clear that the sixteen hours per week of specialized instruction inside general education was to be delivered in a classroom with two teachers: a certified special education teacher and a certified general education teacher. The teacher-to-student ratio in such classrooms is similar to the teacher-to-student ratio at School B, where classes can be as large as fifteen students per class.

Petitioner also pointed out that the Student needs "small group" instruction. But the IEP referenced "small group" instruction in the goals, and testimony from Witness E indicated that small group instruction would be provided at School C because instruction in co-taught classrooms is ordinarily delivered through the use of "stations" rather than lectures to the entire class. It is further noted that Petitioners agreed with virtually all of

the other language in the IEP at the IEP meeting. Although there was a dispute between the parties about whether the IEP should describe the Student as having received "specialized instruction" at School C, that issue was not raised in the Complaint or the Prehearing Order. This claim must be dismissed.

RELIEF

When school districts deny students a FAPE, courts have wide discretion to ensure that students receive a FAPE going forward. As the Supreme Court stated, the statute directs the Court to "grant such relief as [it] determines is appropriate." School Committee of the Town of Burlington v. Dep't of Education, Massachusetts, 471 U.S. 359, 371 (1985). The ordinary meaning of these words confer broad discretion on a hearing officer, since the type of relief is not further specified, except that it must be "appropriate."

Respondent may be required to pay for educational services obtained for a student by a student's parent if the services offered by the school district are inadequate or inappropriate ("first prong"), the services selected by the parent are appropriate ("second prong"), and equitable considerations support the parents' claim ("third prong"), 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). In Branham v. District of Columbia, 427 F.3d 7 (D.C. Cir. 2005), the Circuit laid forth rules for determining when it is appropriate for Impartial Hearing Officers to order funding of non-public placements. First, the court indicated that "(i)f no suitable public school is available, the [school system] must pay the costs of sending the child to an appropriate private school." Id. at 9 (citing to Jenkins v. Squillacote, 935 F.2d 303, 305 (D.C. Cir.

1991)). The Circuit then explained that such relief "must be tailored" to meet a student's "unique needs." Id. at 11-12 (citing to Florence County School Dist. v. Carter, 510 U.S. 7, 16 (1993)). To inform this individualized assessment, courts must consider "all relevant factors" including the nature and severity of the student's disability, the student's specialized educational needs, the link between those needs and the services offered by the private school, the placement's cost, and the extent to which the placement represents the least restrictive educational environment. Id. at 12.

Petitioner seeks reimbursement for expenses at School B for the 2017-2018 school year and the 2018-2019 school year, exclusive of the time period that IHO Ruff addressed in his HOD. Consistent with the findings in this HOD, relief is considered only after the expiration of the October, 2017, IEP through to the date of the January, 2019, IEP.

School B is a non-public school that is neither a stand-alone special education school nor a typical general education school with mostly non-disabled students. The school is designed to help children who learn differently, including children with ADHD, children with executive functioning issues, and children with mild to moderate learning challenges. The school provides small class sizes and accommodations as necessary, including preferential seating, assistive technology, scribes, and readers. The Student was also provided with some specialized instruction at the school, particularly through individualized reading interventions.

These interventions have been helpful to the Student. Before the Student began at School B, s/he was at a very low level in reading and writing due to his/her disability. In 2015, on the WJ-IV, the Student scored at the 5th percentile in fluency and passage

comprehension and at the 7th percentile in spelling. After the Student spent time at School B, the Student was again tested on the WJ-IV in December, 2018. The Student's scores, while still not excellent, had improved enough that DCPS noted the increases at the January, 2019, IEP meeting. On the WJ-IV, the Student's broad reading score increased to the 14th percentile, with reading fluency at the 18th percentile. Additionally, the Student's broad written language score increased to the 16th percentile. The Student has passed all classes with grades generally ranging from "A" to "B+." Reports indicated that the Student was hard-working in history, a "great" literature student, and the Student's anxiety level had decreased significantly since s/he had started at the school.

Additionally, School B is not a unilateral placement that keeps disabled students apart from non-disabled peers. School B contains many general education students and therefore is consistent with the mandate to provide students with an education in the least restrictive environment. Respondent argued that School B cannot implement the Student's IEP, but there is no requirement that a unilateral placement must be able to implement a student's current IEP in order for a parent to receive tuition reimbursement. Petitioner is therefore awarded tuition reimbursement for the Student's education at School B from November 21, 2017, through January 11, 2019.

VII. Order

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

1. Respondent shall reimburse Petitioners for all tuition money paid to School B corresponding to the period of November 21, 2017, through January 11, 2019;

2. Petitioner's other requests for relief are hereby denied.

Dated: September 9, 2019

Michael Lazan
Impartial Hearing Officer

cc: Office of Dispute Resolution
Petitioner's Representative: Attorney A, Esq.
Respondent's Representative: Attorney B, Esq.
OSSE Division of Specialized Education
Contact.resolution@dc.gov

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 (90) days from the date of the Hearing Officer Determination in accordance with 20 USC §1415(i).

Date: September 9, 2019

Michael Lazan
Impartial Hearing Officer