

District of Columbia
Office of the State Superintendent of Education
Office of Dispute Resolution
1050 - First Street, N.E.; Washington, D.C. 20002
(202) 698-3819 www.osse.dc.gov

OSSE
Office of Dispute Resolution
September 21, 2023

Confidential

Parent on behalf of Student ¹)	Case No. 2023-0088
)	
Petitioner)	Hearing Dates: September 6-8, 2023
)	
v.)	Conducted by Video Conference
)	Date Issued: September 21, 2023
District of Columbia Public Schools)	
)	Terry Michael Banks,
Respondent)	Hearing Officer

AMENDED HEARING OFFICER DETERMINATION

INTRODUCTION

Petitioners are the parents of an X-year-old student (“Student”) attending the School A. On May 15, 2023, Petitioners filed a Due Process Complaint Notice (“*Complaint*”) alleging that the District of Columbia Public Schools (“DCPS”) denied the student a free appropriate public education (“FAPE”) by failing timely to comply with its child find obligation and, subsequently, by failing provide [him/her] an appropriate Individualized Education Programs (“IEP”) and placements for the 2022-23 and 2023-24 school years. On May 19, 2023, DCPS filed *District of Columbia Public Schools’ Response to Petitioners’ Administrative Due Process Complaint*, denying that it had denied Student a FAPE in any way.

SUBJECT MATTER JURISDICTION

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

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

PROCEDURAL HISTORY

On May 15, 2023, Petitioner filed the *Complaint* alleging that DCPS denied Student a FAPE by to provide an appropriate IEP and location of services for the 2023-2024 school year. On May 19 2023, DCPS filed its *Response*, in which it refuted allegations in the *Complaint* denying that it had denied Student a FAPE in any way. DCPS asserted that after an Analysis of Existing Data meeting in November 2022, it determined that Student did not qualify for services under IDEA. However, upon its review of independent evaluation submitted by Petitioners, a multidisciplinary team (“MDT”) met in March 2023 and found Student eligible as a student with Autism. In early April 2023, DCPS proposed an initial IEP addressing the student’s disability.

The parties participated in a resolution meeting on May 30, 2023 that did not result in a settlement. A prehearing conference was conducted on June 5, 2023 by video conference, and the *Prehearing Order* was issued that day.

The due process hearing was conducted September 6-8, 2023 by video conference. The hearing was closed to the public at Petitioner’s request. Petitioners filed Five-day Disclosures on August 29, 2023 containing a witness list of four witnesses and documents P-1 through P-35. DCPS filed no objections to Petitioners’ disclosure. Therefore, Petitioner’s Exhibits P1 through P35 were admitted into evidence.

Respondent’s disclosures, also filed on August 29, 2023, contained a witness list of thirteen witnesses and documents R1 through R-31. Petitioners filed objections to Respondent’s disclosures on September 1, 2023. Petitioners objected to expert testimony from Witness E, Witness F, Witness G, and Witness H because Respondent’s disclosure did not include the witnesses’ curriculum vitae. This objection is sustained. Petitioners also object to Respondent’s proposed exhibits R4, R15, and R29 on grounds of lack of authentication. During Respondent’s direct case, these documents were authenticated and Petitioners withdrew their objections to their admission. Respondent’s proposed Exhibit R32 was offered during the hearing and was reviewed by Petitioners’ counsel, who interposed no objection to its admission. Respondent’s Exhibits R4-6, R9-R10, R14-R15, R18-R19, R21-R23, R26, R29, and R32 were offered and admitted into evidence,

Petitioner presented as witnesses in chronological order: Witness A, Witness B, and Petitioner/mother. Witness A was admitted as an expert in Special Education and Witness B was admitted as an expert in Neuropsychology without objection.² Respondent presented as witnesses in chronological order: Witness C, Witness D, Witness E, and Witness F. Witness C was accepted as an expert in Special Education and Witnesses D was accepted as an expert in Occupational Therapy (“OT”). At the conclusion of Respondent’s direct case, Petitioner/mother provided rebuttal testimony. At the conclusion of the testimony, the parties’ counsel gave oral closing arguments. The Hearing Officer authorized the parties to submit authorities upon which they rely on or before September 13, 2023, which deadline was subsequently extended to September 14, 2023. On September 14, 2023, Respondent filed *DCPS Citations for Closing* and Petitioners filed

² Witness B’s doctorate and professional licenses are in Psychology. Petitioners’ Exhibit (“P:”) 34 at page 1 (391). The exhibit number and exhibit page numbers are followed by the electronic page number in the disclosure in parentheses, i.e., P34:1 (391). However, she completed the Neuropsychological Evaluation described in paragraph 25, *infra*.

ISSUES

As identified in the *Complaint* and the *Prehearing Order*, the issue to be determined in this case is whether DCPS denied Student a FAPE by failing to provide an appropriate IEP and location of services for the 2023-2024 school year. Specifically, Petitioners assert that Student requires placement a full-time special education school.³

FINDINGS OF FACT

1. Student is X years old and was enrolled in grade E in School A in during the 2022-23 school year.⁴

2. On a beginning of the year ("BOY") i-Ready Math assessment conducted on September 13, 2022, Student's score of 370 placed her/him at a performance level of grade H, one grade level below her/his grade-level expected score of 399. S/he scored at grade level in Algebra and Algebraic Thinking, but at grade H in Number and Operations, Measurement and Data, and Geometry.⁵

3. On September 13, 2022, Teacher A sent Petitioners an email informing them that Student was meeting grade level expectations in reading and math, engages in independent reading, had strong writing habits, was transitioning well from one activity to the next, was playing appropriately with classmates at recess, and shares her/his thoughts during whole-group lessons. Teacher A also noted that some of Student's behaviors were inhibiting her/his ability to access the curriculum:

[Student] has been struggling with working in small groups, making loud noises and touching students and their things without asking. Some students have gotten frustrated with [Student] because of this, and I have had to diffuse these situations myself as [Student] does not seem to understand how [her/his] actions are affecting others' emotions. Today, [Student] was struggling controlling [her/his] body during carpet time and was actively defying directions on classwork and on assessments with other teachers. When asked about why [s/he] did not want to follow directions, [Student] said [s/he] preferred to be silly, enjoyed lying to teachers and [her/his] parents, and wanted to have screen time at home rather than be in school. I am worried that [Student's] behaviors are impacting [her/his] ability to access the curriculum, and I hope to receive your input on how I can best reach [Student]... I hope this update is helpful as we begin the school year, and I thank you both for

³ The *Complaint* also included allegations that DCPS failed to comply with its child find obligations during the 2022-23 school year and failed to provide an appropriate IEP and placement for the 2022-23 school year. However, in light of Petitioners' prayer for relief, which requested only a non-public placement for the 2023-24 school year, Petitioners' counsel concurred with the Hearing Officer's suggestion to withdraw these claims during the prehearing conference.

⁴ P19:1 (197).

⁵ P2:1 (15).

your collaboration.⁶

4. On September 26, 2022, Teacher A informed Petitioners by email of his continuing concerns as to Student's sometimes unruly behavior, his/her abilities to make friends, and his/her adjustment to grade E. Because of those behaviors, Teacher A stated that he would refer Student to Dean and Counselor A.⁷ Petitioners responded the next day, expressing support for Teacher A's efforts: "Appreciate your and the school team's assistance to come up with ways to encourage stronger pro-social behavior at school. If there are incentives and calming strategies you're using at school that could helpfully be reinforced at home to gain traction, happy to take your lead to ensure that what [s/he] hears in the classroom is reflected here at home, too."⁸

5. On October 6, 2022, Counselor A informed Petitioners by email that Student's disruptive behaviors were unlike anything the school saw during the previous school year:

During our time together, I did notice behaviors in [Student] that were not present at all last school year. This includes creating a variety of noises during my introduction to the class, speaking and sharing [his/her] opinion when I selected other students to share their perspective with the class, and various sudden movements when seated on the carpet, and leaving [his/her] seat various times while working on our final activity at our desks. I want to emphasize that I did not observe any of these behaviors in the classroom with [Student] last year, yet I observed them throughout my very first lesson with [his/her] classmates this year.⁹

6. On October 14, 2022, Petitioner/mother requested a Section 504¹⁰ meeting to address Student's diagnoses of unspecified developmental disorder and anxiety:

I've been in conversation with [Teacher A], [Dean A] and [Counselor A]. I'm very grateful for how observant and thoughtful [Teacher A] is in the information he is providing to assist in therapy and behavioral management at home. I really appreciate that [Counselor A] is doing morning check ins with [Student]. I feel really lucky in the teacher and classroom [Student] was assigned to... How can we move forward and schedule a 504 conversation that would help us use [Therapist A's] insights and information to get the right support in the classroom?¹¹

Witness C, School A's Special Education Coordinator, replied later that day, explaining the steps leading to a Section 504 meeting and offering November 9, 2022 for that meeting.¹²

7. In response to a report from School A that Student had seriously misbehaved the previous day, prompting a call to Petitioners to take her/him home, on October 21, 2022,

⁶ P23:2 (236).

⁷ P23:3 (237).

⁸ *Id.* at 3 (237).

⁹ P14:5 (81).

¹⁰ See 29 U.S.C. § 794, Section 504 of the Rehabilitation Act of 1973.

¹¹ P14:2 (78).

¹² *Id.* at 3 (79).

Petitioner/mother requested a more detailed explanation of. What had occurred.¹³ Witness C, School A's Special Education Coordinator, replied later that day, stating that the behaviors included disregarding class norms ("calling out, invading personal space, climbing on tables, interrupting, constant moving, and being incredibly unsafe with self and others"), not returning inside after recess, and not calming down when brought inside to Dean A's office:

When students [are] consistently unsafe with self and others, we attempt various strategies and calming techniques, and give students various opportunities to rejoin their peers. By the time we called and requested that [Student] be picked up, there had been multiple attempts at redirection and de-escalation. A request to pick up is a last resort.¹⁴

Later in the day, Witness C, School A's Special Education Coordinator, inquired if Petitioners' references to assessments in previous correspondence indicated a desire for DCPS to conduct evaluations and which particular assessments they were requesting,¹⁵ Petitioner/mother responded later that day, requesting that Student be evaluated

to see what social or learning impediments need support... If we are at the point where the school sent [her/him] home, that's a clear sign [s/he] needs something that [s/he] is not currently getting at school. I would like the school to do and to authorize any assessment that would help us understand the resources [s/he] needs to consistently access the [grade E] curriculum.¹⁶

8. On October 24, 2022, Witness C, School A's Special Education Coordinator, notified that their request for evaluations triggered an obligation to determine student's eligibility for services under IDEA, requiring the school to "shift gears" from developing a Section 504 Plan to the special education process, the need to receive parental consent to proceed, and confirming that the meeting scheduled for November 9, 2022 would be held.¹⁷

9. On October 25, 2022, Dean A sent Petitioners an email providing a step-by-step report on Student's behaviors that led to the decision to have Petitioners pickup Student from school that day. The behaviors included refusing to comply with directions from staff, extremely disruptive behavior in the classroom, inappropriate, insubordinate, and threatening language, and hitting staff members.¹⁸

10. At 11:01 a.m. on November 3, 2022, Dean A texted Petitioners to inform them that Student had caused damage in the classroom that morning. After lunch, Dean A reported that Student was throwing rocks. Petitioners "Defer to y'all how to handle... shall I pick [her/him] up?" Dean A replied: "...[REDACTED] has disrupted the entire floor. In addition to scratching, hitting, kicking and trying to bite, [s/he] kept trying to take [his/her] pants down. Yes it would be helpful if you came thanks." Petitioners agreed to pick up Student from school.¹⁹

¹³ P14:9 (85).

¹⁴ *Id.* at 11 (87).

¹⁵ *Id.* a 14 (90).

¹⁶ *Id.* at 15 (91).

¹⁷ *Id.* at 16 (92).

¹⁸ *Id.* at 17-19 (93-95).

¹⁹ P6:1-3 (29-31).

11. On November 4, 2022, the director of School A's aftercare program reported that Student hit and kicked her, other staff members, and other students, and threw "multiple items" at her, other students, and other staff members. The aftercare program would not allow Student to return until Petitioners completed the attached behavior plan.²⁰

12. On November 9, 2022, DCPS issued a Prior Written Notice ("PWN") indicating its determination that Student was not eligible for special education services and recommending the development of a Section 504 Plan. "The student does not present with a disability that impacts [her/his] academic performance. [S/he] demonstrates a need for behavior supports and has sensory processing challenges that need to be addressed."²¹

13. On November 15, 2022, DCPS developed a Section 504 Plan for Student. The plan included a number of accommodations to moderate Student's behavior: implementation of a token economy, use of a fidget, access to a quiet calm down space, use of a wiggle cushion, advance warning of changes in schedule and of transitions, repetition of directions, access to noise-cancelling headphones, and prompting to take breaks as needed.²² The Plan also included behavior support service goals including the implementation of a daily behavior chart, and an occupational therapy goal to address Student's behavior in class.²³

14. On November 15, 2022, Student was suspended for two days for behavior that was a Tier III violation: "Obscene, seriously offensive, or abusive language or gestures."²⁴ Teacher A reported that Student refused to enter the classroom, engaged in disruptive behavior in the hallway, crawled into the classroom then engaged in very disruptive behavior during instruction. Teacher A reported that Student struck Social Worker A, who entered the classroom to assist Teacher A with Student.²⁵ Social Worker A reported that he escorted Student from the classroom after disruptive behavior including, shouting out, banging on the glass on the classroom door, and hitting Social Worker A. Once they were out of the classroom, Student continued to "kick and punch in my general direction." While Social Worker A was on the phone with Petitioner/father, Student kicked him and later tried to bite Social Worker A's leg. When s/he was taken to the Assistant Principal's office, Student grabbed an office phone and "tried to mess with" a computer.²⁶

15. Later that day, Petitioner/mother replied, objecting to the suspension in light of pending negotiations as to the necessary and appropriate accommodations in the Section 504 Plan. Petitioner/mother asserted that the 504 Plan was inadequate because

... [t]he school declined to provide breaks at specified and requested intervals of less than 15 minutes, has only agreed to OT interventions of 60 minutes a month ([his/her] therapist believes that 60 minutes a week is probably needed), has agreed

²⁰ *Id.* at 20 (96).

²¹ P7:1 (37); The Final Eligibility Determination Report indicates that Petitioner agreed with the determination of non-eligibility. P8:3 (41).

²² P9:2 (56). *See* 29 U.S.C. § 794, Section 504 of the Rehabilitation Act of 1973.

²³ P9:2 (58).

²⁴ P10:1 (63); 5-B DCMR § 2502.3(a)(9).

²⁵ P14:22-23 (98-99).

²⁶ *Id.* at 23 (99).

to social worker interventions of only 4 hours a month, didn't put on the full sensory diet recommended by the therapist, has not agreed to a more substantial behavioral intervention plan with more robust and frequent positive reinforcements, and did not take the therapist recommendation of a room [s/he] could go to with work immediately upon signs of dysregulation.²⁷

On November 16, 2022, Witness C, School A's Special Education Coordinator, replied. S/he stated that the November 9th meeting was an Analysis of Existing Data ("AED") meeting and an eligibility meeting. Student was determined not to be eligible for services because "[s/he] is meeting or exceeding all academic expectations... Yesterday's meeting was to determine eligibility for a 504 Plan and to create an initial plan." She also explained the purpose of the goals prescribed in the Plan: to build pro-social behavior, emotional understanding, and empathy, and frequent breaks as needed rather than at specified intervals "allows both the student and teacher more flexibility and ability to provide breaks as needed, regardless of the time." Witness C defended the amount of occupational therapy ("OT") and behavioral support services ("BSS") prescribed in the Plan as offering an appropriate balance between providing related services and minimizing time away from the classroom.²⁸

16. On November 19, 2022, Dean A reported that Student engaged in disruptive behavior in the classroom that day including kicking classmates, yelling, and throwing objects at others.²⁹ On December 6, 2022, Assistant Principal reported that Student refused to engaged in in the assigned activities and attempted to cut a classmate's hair in Physical Education class.³⁰

17. On December 1, 2022, Petitioners sent School A an email entitled "Parent Concern Letter,"³¹ noting the arrest of Dean A. DCPS docketed the letter as a grievance: "Specifically, you [are] reporting that your student had a drastic increase of behavioral problems at [School A] after receiving multiple hours of one on one services with [Dean A} since October 20, 2022."³² Superintendent A responded on behalf of DCPS on December 6, 2022, indicating that Dean A was suspended on November 29, 2022, when DCPS was made aware of allegations about Dean A, and that the suspension would endure "pending the outcome of the law enforcement investigation as per the labor management and employee relations (LMER) policies of the D.C. Public Schools... I want to be clear that the allegations, as outlined, are related to a personal matter, and did not occur on campus or involve DCPS students."³³

18. On December 16, 2022, Petitioner/father had Student examined at Children's National Hospital due to a concern for possible sexual abuse. "[Student's] anogenital examination was unremarkable for signs of trauma, which does not rule out the possibility of sexual abuse."³⁴

19. On December 19, 2022, Petitioner/mother notified School A that she was rescinding her agreement to the eligibility determination and had scheduled Student for

²⁷ *Id.* at 27 (103).

²⁸ *Id.* at 29-30 (105-06).

²⁹ *Id.* at 34-35 (110-11).

³⁰ *Id.*

³¹ P11:3 (67); P14:36 (112).

³² P12:1 (71).

³³ P11:1 (65).

³⁴ P13:1 (73).

assessments in January. Petitioner/mother took issue with the manner in which Student’s behaviors were being addressed, specifically “Three adults providing intense attention onto [Student], three adults giving instructions for [Student] to comply with, no time or space for [Student] to regulate [her/his] body, A requirement that [Student] tidy everything [s/he] messed up before [s/he] could leave (an enormous ask while [s/he] is dysregulated)...” Petitioner/mother complained that the 504 Plan “seems to be adding pressure, attention eye contact, and shame into situations where [s/he] is dysregulated and none of that will help [Student] work effectively within the demands of school.” Petitioner/mother requested that DCPS conduct a functional behavior assessment (“FBA”).³⁵

20. Later on December 19, 2022, Assistant Principal reported that Student was removed from his/her classroom for running around the classroom, rolling around on the floor, and disregarding redirection. Once s/he was taken to the principal’s office, Student jumped on chairs, ran around the office, turned out desk drawers, threw books at Principal and Assistant Principal, threw his/her shoes at Assistant Principal, and hit and kicked Principal and Assistant Principal. School A suspended Student for the following school day.³⁶

21. On December 21, 2022, Principal reported that Student was physically aggressive with many students at lunch that day, including one that was treated by the nurse. Once s/he calmed down, Student created writing and a drawing that Principal characterized as inappropriate.³⁷

22. On December 22, 2022, Principal reported that Student “struggled throughout the day.” At lunch, s/he threw his/her shoes on the table, ran around the cafeteria, and slapped several students. In the afternoon, s/he absconded from his/her classroom and was taken to the principal’s office from which s/he attempted to elope, then jumped on furniture, crawled under furniture, kicked and hit staff members, beat on doors, and spat on Principal. School A reported the incidents to the Metropolitan Police Department (“MPD”) and suspended Student for January 3-5, 2023.³⁸

23. On January 6, 2023, School A initiated the behavior chart referenced in the behavioral goal of the Section 504 Plan.³⁹ The recorded behaviors are listed in Appendix A.⁴⁰

24. On January 12, 2023, a student alleged that Student hit him/her on the buttocks. The incident was reported to the MPD and a grievance proceeding was initiated. On August 4,

³⁵ *Id.* 51-52 (127-28).

³⁶ *Id.* at 43-44 (119-20).

³⁷ *Id.* at 48 (124).

³⁸ *Id.* at 49-50 (125-26); P15:1-4 (131-34).

³⁹ P31:1 (279).

⁴⁰ The chart reflects Student’s behavior in each of Student’s classes: Phonics, Small Group, Science, Lunch, Recess, Closed Reading, Social Studies, Reunion de la tarde, Lectura en voz alta, Grupo Pequeno, Escritura, and Matematicas. The “Negative Behaviors” in Appendix A are the teacher comments on the chart that clearly reflect disruptive behavior or refusal to work throughout a class period. The chart also reflects Student’s unsafe behaviors, appropriate voice level, and class participation by happy and sad faces. Appendix A does not include the positive teacher comments on the chart; the purpose of Appendix A is to document the extent to which Student’s disruptive behaviors decreased during the school year. Note, for example, that despite negative characterizations of Student’s behavior in most classes on March 13, 2023, the teacher entered “Really good day!” suggesting that the positive behaviors significantly outweighed the negative behaviors that day. *See also*, the entry on March 15, 2023. Neither positive comment is reflected on Appendix A. However, Appendix A does reflect the ratio of daily smiley faces to the amount that could have been earned throughout the day (three per class), which reflect teachers’ characterizations of Student’s unsafe behaviors, appropriate voice level, and class participation during class each day.

2023, DCPS denied the grievance, concluding that it was unable to substantiate the allegation.⁴¹

25. On or about February 7, 2023, Witness B and Examiner A completed testing Student for a Neuropsychological Evaluation that they completed on an unspecified date.⁴² On the Wechsler Intelligence Scale for Children (“WISC-V”), Student scored in the Average range in Processing Speed (95), in the High Average range in Verbal Comprehension (113), in the Very High range in Full Scale IQ (121), Fluid Reasoning (123), and Working Memory (125), and Extremely High in Visual Spatial (135).⁴³ “These results indicate that [Student] has very impressive core intellectual capacities that will serve [him/her] well in school and in life.”⁴⁴ On the Kaufman Assessment Battery for Children (“KABC-II”), Student scored in the Average range (103).⁴⁵ On the Wechsler Individual Achievement Test (“WIAT-4”), Student scored in the Average range in Mathematics Composite (103) and Sentence Building (99), in the High Average range in Reading Composite (118), and Extremely High in Spelling (133).⁴⁶

Attention, behavior, and executive functioning were measured on the Behavior Rating Inventory of Executive Function (“BRIEF-2”) and the Behavioral Assessment Scale for Children (“BASC-3”). Rating scales completed by both parents and a teacher yielded average scores in cognitive regulation and planning/organization, task monitoring, and organization of materials. The parents’ and teacher’s scores were also consistent concerns for behavioral regulation, including behavioral inhibition (“does not think before doing”), self-monitoring (“is unaware of how [his/her] own behavior affects or bothers others”), emotional regulation, including shifting attention from task to task (“gets stuck on one topic or activity”), and emotional control (“small events trigger big reactions”). While ratings on the BASC-3 “did not indicate clinically significant elevation in the area of attention problems,” Petitioners’ interview indicated that Student’s focus and attention vary depending on the task and that s/he struggles to remain on task for more than a minute unless engaged in a preferred activity. The examiners concluded that these results and reports qualified Student for a diagnosis of Attention-Deficit Hyperactivity Disorder (“ADHD”).⁴⁷

The examiners concluded that Student had “cognitive weaknesses” in three areas: (1) Social-Emotional Development and Behavioral Functioning, (2) Attention Regulation and Behavioral Functioning, and (3) Expressive and Pragmatic Language. They listed a number of Student’s social challenges including, but not limited to, nonverbal communication, reading social cues, limited social reciprocity, poor social cognition, appropriate peer relationships and social engagement, recognizing and labeling his/her emotions, expressing frustration appropriately, repetitive behaviors, and inflexibility. “Taken together, [Student] meets the diagnostic criteria for an Autism Spectrum Disorder” (“ASD”).⁴⁸ The examiners also diagnosed Student with “Executive dysfunction affecting working memory, initiation, flexibility, planning/organization, emotional control, task-monitoring and self-monitoring and Vulnerabilities to anxiety and motor planning.”⁴⁹ The examiners recommended placement in a full-time special education school:

⁴¹ P32:1-2 (383-84).

⁴² P16:1 (135).

⁴³ *Id.* at 26 (160).

⁴⁴ *Id.* at 15 (147).

⁴⁵ *Id.* at 26 (160).

⁴⁶ *Id.* at 27 (161).

⁴⁷ *Id.* at 11-12 (145-46).

⁴⁸ *Id.* at 15 (149).

⁴⁹ *Id.* at 17 (151).

It is clear that [Student] requires an Individualized Education Program (IEP) under the primary eligibility designation of Autism Spectrum Disorder to appropriately address [her/his] complex profile, including [her/his] autism symptoms, deficits in attention regulation and executive functioning, and higher order language impairment. [Student's] current educational placement has clearly been unable to adequately meet [her/his] needs. An appropriate setting will include access to an educational curriculum that is appropriate for [Student's] exceptional cognitive abilities, as [s/he] is a child who is best described as "twice exceptional." To be available for learning, [Student] requires a small, self-contained, special education classroom within a full-time special education school with a consistent schedule, cognitively and linguistically similar peers, and routines specifically designed to support children who are bright, academically capable, and who have unique learning and social challenges. [S/he] needs an educational placement that can provide [her/him] with intensive systematic instruction that incorporates principles found in applied behavior analysis (ABA), such as prompt hierarchies, errorless teaching strategies, and reinforcement systems when needed. [Student] requires individualized programming staffed by educators and ancillary service providers specifically trained to work with children who have autism spectrum disorders, who are interpersonally flexible and who are able to form a relationship with [her/him]...⁵⁰

The examiners further recommended the following classroom accommodations: get his/her attention before giving a direction, written instructions, preferential seating away from distractions, frequent check-ins, regularly scheduled down time, and positive reinforcement for following directions.⁵¹

26. On February 17, 2023, Witness D completed a Comprehensive Occupational Initial Evaluation to examine Student's visual perception, visual motor, and sensory processing skills.⁵² The Bruininks-Oseretsky Test of Motor Proficiency ("BOT-2") measures motor skills for student ages 4-22. Student scored in the Below Average range in Manual Coordination, in the Average range in Fine Motor Composite, and in the Above Average range in Fine Manual Control.

Overall, the composite of all the scores described above (above average fine motor precision, average fine motor integration, above average fine manual control, well below average manual dexterity, average upper-limb coordination and below average manual coordination) contributed to an average fine motor composite score compared to same-aged [male/female] peers. Overall, [Student's] fine motor skills present as average compared to [her/his] peers.⁵³

The Motor-Free Visual Perception Test ("MVPT-4") measures "the ability to perceive, process, and respond to information within the environment in order to discriminate position, shapes, colors and letter like forms... Student's overall visual perceptual skills landed in the 90th

⁵⁰ *Id.* at 17-18 (151-52).

⁵¹ *Id.* at 19 (153).

⁵² P17:1 (165).

⁵³ P17:6-8 (170-72).

percentile compared to same-aged peers.”⁵⁴ The Sensory Processing Measure-2 (“SPM-2”) evaluates a child’s responses to various sensory experiences. The scores were based on questionnaires completed by Petitioners and Teacher A. Student’s scores were Typical in Taste and Smell (44), in the Moderate Difficulties range in Vision (63), Balance and Motion (66), and Planning and Ideas (65), and has Severe Difficulties in Social Participation (78), Hearing (77), Touch (74), and Body Awareness (80).⁵⁵

The SPM-2 school form indicated severe difficulties with social participation related to sensory processing. Specifically reporting by [Teacher A] indicates that [Student] never works well as part of a group; shows caring toward other students; handles frustration without outbursts or aggressive behavior; joins in play with others without disrupting the ongoing activity; carries on a conversation without standing or sitting too close to others; maintains appropriate eye contact during conversation and demonstrates respect and courtesy toward teachers and staff.

Overall, [Teacher A’s] responses on the SPM-2 indicate severe difficulties with overall sensory processing in the classroom. Namely, [her/his] visual and auditory processing impact [her/his] ability to attend and participate in the classroom. [Her/his] proprioceptive and vestibular processing impact [her/his] ability to maintain [her/his] personal space and [her/his] awareness of [her/his] body in space. These deficits impact [her/his] relationship with peers and [her/his] ability to plan and execute ideas in the classroom...⁵⁶

[Student’s] deficits in sensory processing, manual dexterity and letter reversals impact [his/her] ability to complete work quickly and efficiently in the classroom. Additionally, [his/her] letter reversals impact [his/her] writing legibility, but not significantly currently. [Student’s] sensory processing contributes to the biggest barrier to [his/her] achievement in the classroom as it negatively impacts [his/her] ability to function in a group of peers without interrupting the flow of the class. This can impact [Student’s] ability to access the curriculum in the general education setting because [s/he] is unable to take in information without disrupting the class. Overall, [Student’s] deficits do have an impact on learning and participation, as highlighted above.⁵⁷

Witness D recommended use of a token economy to reinforce effort, presenting work without time constraints, use of noise cancelling headphones in loud environments, providing Student a safe space away from visually distracting peers or loud noises to complete work or when s/he is upset, her/his own visual schedule to cross off with clear expectation for each task, and movement breaks every 30 minutes.⁵⁸

27. On March 3, 2023, DCPS developed an FBA for Student.⁵⁹ The FBA was developed to address Student’s behaviors that affect his/her relationships with peers, limit his/her

⁵⁴ *Id.* at 8 (172).

⁵⁵ *Id.* at 9 (173).

⁵⁶ *Id.* at 10 (174).

⁵⁷ *Id.* at 17 (181).

⁵⁸ *Id.*

⁵⁹ P18:1 (183)

access to needed resources in the general education setting, limit the teacher's ability to manage the classroom, cause an "extensive" loss of instruction time, and affect Student's social and emotional learning.⁶⁰ S/he is most likely to misbehave when compelled to participate in a non-preferred activity, during transitions, and during independent work time. Student enjoys praise and earning free choice time as a reward. Use of a substitute teacher as additional support was a successful intervention. Other interventions have included, but were not limited to, a visual schedule, clearly defined structures/expectations, close proximity to the teacher, frequent breaks, token economy, wiggle cushion, fidgets, access to headphones, multi-learning approach, parent conference, and verbal redirections. Student's ability to meet expectations varies from week to week, but overall, s/he meets expectations 53.5% of the time. However, in the previous six weeks, that level dropped to 35.5% of the time.

The result of observations, interview with student, parent, teachers, review of FAST, SDQ, MAS, PBQ, teacher surveys, attendance records, and behavioral reports suggested that [Student] displays appropriate ready to learn behaviors 60.69% of the time, Inappropriate Verbal Behaviors 22.76% of the time, Noncompliance 15.55% of the time, and unsafe behaviors 11.76% of the time. Specifically, [Student's] behaviors categorized as unsafe manifest as: pushing/bumping into other peers (4x), throwing objects at peers or adults (2x), Running (away from adults, classroom) (4x), running with pencils (1x), not keeping hands to self (3x) (including elbowing a peer), knocking/pulling peers to the ground (2x), chasing peers with balls (1x), knocking objects away from peers (2x), stepping on peers' personal property (1x), leaving the line during transition (1x), and invading the personal space of peers (1x). As it relates to non-compliance, [Student's] behaviors include responding "no" or refusing to complete work or follow directions (16x), not cleaning up or putting work away for transition (3x), not completing tasks (2x), and not following directions while walking (3x). As it relates to inappropriate verbal behaviors, [Student]'s behaviors include speaking out of turn (11x), making sounds (11x), taking out loud while working (11x), singing (1x), and making fun of others (3x). [Student's] behaviors frequently occur in the general education classroom and are varied on the time they occur with no identifiable triggers to the behaviors. Alternatively, [Student] has demonstrated some success with consistent praise and the use of the token economy system. When [Student] is working independently on the tablet, [s/he] has also demonstrated an ability to meet expectations some of the time.

Since the beginning of the year, [Student] has received 30 office referrals and two minor incident reports. Of the referrals, 27% have been for major-fighting/physical aggression, 23% for class disruptions, 17% displaying unsafe behaviors, 10% for inappropriate sexual behaviors, and 10% for hitting others. The remaining 13% of referrals included were for fighting, physical aggression, major-defiance/disrespect/non-compliance, and major class disruptions...

[B]ehaviors occur most days and are present in most setting across the school building. Although minimal unsafe behaviors were observed during the observation periods, social worker and counselor have been requested to respond to the

⁶⁰ *Id.*

classroom, lunchroom, and recess for unsafe behaviors frequently (over 20 times) during the assessment period.⁶¹

The MDT conducted a record review including attendance and disciplinary records. A Strength and Difficulties Questionnaire (“SDQ”) was completed in January 2023 by Teacher A, and Student’s Physical Education and Music teachers. “Overall, the data collected from the SDQ supports that [Student’s] social/emotional functioning impact [her/his] access to the general education curriculum.”⁶² A Functional Assessment Screening Tool (“FAST”) was administered to Teacher A and three other staff members. Teacher A’s responses indicate that Student’s behaviors in the general education setting were motivated either to escape or gain attention, followed by access to specific activities items. Teacher B, Student’s Physical Education teacher, ascribed Student’s motives to escape followed by gaining attention and sensory stimulation. Teacher C, another Physical Education teacher, attributed the behaviors to sensory stimulation followed by gaining attention and escape. The school’s librarian opined that the behaviors were motivated by a desire to escape followed by attention, access to specific activities/items, and sensory stimulation.⁶³ The Motivational Assessment Scale (“MAS”) was administered to Teacher A, Teacher B, Teacher C, Librarian, and Teacher D, Student’s Art teacher. Escape, attention, and sensory stimulation were all identified as primary motivations for Student’s behaviors.⁶⁴ The Problem Behavior Questionnaire (“PBQ”) was administered to the same staff members “to further narrow down and assess the function of the target behaviors presented.” The data from the PBQ were similar to those in the FAST and MAS, “indicating that [Student’s] behaviors primarily serve the function of escape or attention.”⁶⁵

28. On April 4, 2023, Student attended the aftercare program at School A for the first time since the program conditioned his/her return on Petitioners’ agreement to a behavior plan on November 4, 2022. Student returned despite Petitioners’ not having submitted the requested behavior plan. The program did not reiterate the requirement for the plan upon Student’s continued attendance beginning in April 2023.⁶⁶

29. On April 6, 2023, DCPS convened an Initial IEP meeting. Student was classified with Autism.⁶⁷ The Consideration of Special Factors reported that Student’s behaviors sometimes prevent her/him from being successful in the classroom and affect her/his relationship with peers. A behavior chart is being used

...[t]o provide feedback to [Student] and [her/his] parents regarding [her/his] meeting of expectations in the classroom, broken down to small periods of the day. Additionally, the following interventions have been implemented by staff members to help support [Student]: visual schedule, clearly defined structure/expectations, daily review of expectations, close proximity to an adult, frequent breaks, token economy, wiggle cushion, fidgets, access to noise-cancelling headphones, multi-

⁶¹ *Id.* at 3 (185).

⁶² *Id.* at 4-5 (186-87).

⁶³ *Id.* at 5-6 (187-88).

⁶⁴ *Id.* at 6-8 (188-90).

⁶⁵ *Id.* at 8-9 (190-91).

⁶⁶ Testimony of Petitioner/mother.

⁶⁷ P19:3 (197).

learning approach, parent conference, and verbal/visual redirection.⁶⁸

In Mathematics, the Present Levels of Academic Achievement and Functional Performance (“PLOP”) reported Student’s WIAT scores that “demonstrated math skills consistent with age and grade expectations.” On the middle of the year (“MOY”) i-Ready Math assessment, Student’s score of 399 was in the 61st percentile and 14 points below the mid-year expectation of 413. Student’s Math teacher reported inconsistency in following directions and turning in assignments. There were three Math goals: addressing addition, subtraction, and word problems.⁶⁹ In Reading, the PLOP reported Student’s “Superior to Very Superior” WIAT-4 scores, as well as the reading comprehension score that was in the Average range. On the MOY DIBELS assessment, Student scored 75 points higher than the benchmark. In the Close Read portion of the English Language Arts (“ELA”) period, Student engages and is comprehending grade level work. There were three Reading goals: addressing recall and comprehension, identification of main topics, and understanding of key details in a text.⁷⁰ In Written Expression, the PLOP reported Student’s Very Superior Spelling score on the WIAT and his/her Average score in Sentence Building. Student was reported to complete writing assignments inconsistently and usually needs several prompts and redirections to initiate and complete tasks. There were two written expression goals: addressing editing his/her work and writing a full paragraph to introduce a topic, use facts to develop points, and provide a concluding statement or section.⁷¹

In Emotional, Social, and Behavioral Development (“Behavior”), the PLOP reported that after a 504 Plan was developed in November 2022, an “expectations chart” was kept to track Student’s progress in meeting specific expectations in school in the following categories: Safe Body, Appropriate Voice Level, and Participation.

As of March 22, 2023, [Student] was meeting expectations 57.62% of the time. During the most recent week during the monitoring period, [Student] met expectations 83.06% of the time... Based on [Student’s] chart (Nov. 2022-February 17, 2023), [Student] has met expectations 53.53% of the time across all settings. This includes a low of 6.67% (December 19, 2022) meeting expectations and a high of 100% (December 15th and 16th, 2022) meeting expectations... Alternatively, the most recent six-week period (December 19, 2022-February 17, 2023) indicated that [Student] met expectations 35.53% of the time... The result of observations, interviews with student, parent, teachers, review of FAST, SDQ, MAS, PBQ, teacher surveys, attendance records, and behavioral reports suggested that [Student] displays appropriate ready to learn behaviors 60.69% of the time, Inappropriate Verbal Behaviors 22.76% of the time, Noncompliance 16.53% of the time, and unsafe behaviors 11.72% of the time.⁷²

The PLOP summarized the March 3, 2023 FBA. There were three Behavior goals: addressing improved self-awareness, demonstration of social skills among peers, and using problem-solving during challenging moments.⁷³ In Motor Skills/Physical Development (“Motor

⁶⁸ *Id.* at 4 (198).

⁶⁹ *Id.* at 5-7 (199-201).

⁷⁰ *Id.* at 7-9 (201-203).

⁷¹ *Id.* at 9-10 (203-4).

⁷² *Id.* at 11 (205).

⁷³ *Id.* at 11-12 (205-6).

Skills”), the PLOP reported some of the findings of the OT evaluation, particularly that Student has well below average manual dexterity as well as concerns with visual, auditory, tactile and proprioceptive input that affect Student’s planning, ideas, and letter reversals. Observations revealed that Student needs movement breaks every 30 minutes to help maintain attention, had more difficulty in larger groups with more visual and auditory distractions, and benefitted from star charts during testing, “which does indicate that there is a behavioral component intertwined with these sensory aspects. Overall, observations and reporting from [Student’s] teacher and parents report that there are some sensory processing concerns, but the tools to help these sensory processing concerns have varied success.” There were four Motor Skills goals: addressing letter formation, keyboarding, use of sensory strategies, and executive functioning.⁷⁴

The IEP team prescribed four hours per week of specialized instruction outside of general education (one hour of Mathematics, 90 minutes each of Reading and Written Expression), two hours per month of OT (90 minutes outside general education, 30 minutes inside), and four hours per month of BSS (two hours outside general education, two hours inside). Other Classroom Aids and Services included securing Student’s attention before give a direction, written instructions, preferred seating, frequent teacher/staff check-ins, frequent positive reinforcement for desired behaviors, advance warning of transitions, visual aids, segmenting of assignments, use of token economy, quiet space and time to reregulate, visual and verbal reminders of expectations, and additional time to respond to verbal questions.⁷⁵ Classroom Accommodations included clarification/repetition of directions, redirecting Student to the test, noise buffer or headphones, location with minimal distractions, small group testing, extended time, flexibility in scheduling, and frequent breaks.⁷⁶

30. Petitioners agreed with the goals in the IEP, “but expressed strong disagreement with proposed hours of service” and requested consideration of a placement in a non-public school “to address [Student’s] high intellectual capacity, ASD, ADHD, and anxiety.”⁷⁷

31. Witness A, Petitioners’ Educational Consultant, testified that she has never met or interacted with Student. Witness A submitted comments on the proposed IEP and attended the April 6, 2023 IEP meeting. She did not agree with the amount of services proposed by DCPS and opined that Student required a full-time special education program because she had heard not evidence at the meeting that Student was benefitting from the general education program. Witness A reviewed the behavior charts in Petitioners’ Exhibit 31 and opined that they did not reflect that Student was making any educational progress. Witness A also opined that Student should be placed in a non-public school. When asked why a public school would not be appropriate, she opined that DCPS has programs for children with multiple disabilities, but not for young, high-functioning children. When asked what would she need to see to visualize progress, Witness A replied, less behaviors.

32. On June 1, 2023, Student was administered the year-end Math assessment that reflected that Student was taught in Spanish. The report revealed that Student was Approaching Grade E level with his/her beginning of the year (370) and middle of the year (399) scores, and

⁷⁴ *Id.* at 13-15 (207-9).

⁷⁵ *Id.* at 17 (211).

⁷⁶ *Id.* at 19 (213).

⁷⁷ *Id.* at 1 (195).

had reached grade level with his/her year-end score of 424.⁷⁸

33. On June 23, 2023, DCPS issued Student's year-end IEP Progress Report. Student was reported to be Progressing on two of the three goals in Mathematics and Reading, and the third had been Just Introduced. Student was reported to be Progressing on both goals. In Behavior, two goals were Just Introduced and one was Not Introduced. In Motor skills, Student was Progressing on three goals and the fourth was Not Introduced.⁷⁹

34. On June 27, 2023, DCPS issued Student's year-end report card. During the school year, Student was absent twenty times: twice in the first term, eleven times in the second term, six times in the third term, and once in the fourth term. Teacher A reported that Student had shown significant growth in Relationship Skills: "Building and maintaining healthy relationships across differences by listening, communicating, and collaborating." Student's fourth term grades were as follows: "Exceeds the Standard" in Mathematics (Meets Standard in the first three terms) and Health and Physical Education (Approaches Standard in first two terms, Exceeds in third), and "Meets the Standard" in English Language Arts (the same in the first three terms), Spanish Language Arts (Approaches the Standard in first term, Meets in second and third), Art (Approaches in first term, Meets in third), and Music (Approaches in second term, Meets in all others).⁸⁰

35. Witness B, the licensed psychologist who authored the February 7, 2023 Neuropsychological Evaluation, testified that she is also a board-certified behavior analyst: certified in delivering and analyzing behavioral data for FBAs and developing behavior intervention plans. Witness B testified that she diagnosed Student with ADHD even though his/her scores on the BASC-3 "did not indicate clinically significant elevations in the area of attention." She made the diagnosis because during her observation of Student in the classroom, s/he was easily distracted. Witness B also conceded that her diagnosis of Vulnerabilities to anxiety and motor planning is not a diagnosis found in the Diagnostic and Statistical Manual of Mental Disorders ("DSM-5"). Rather, "it's sort of our office practice to indicate such areas of vulnerability... even though the symptoms at this point do not actually reach the clinical threshold of being an anxiety disorder at this time. And it's similarly the case for motor planning as well." Similarly, Witness B conceded that her diagnosis of "Executive dysfunction affecting working memory, initiation, flexibility, planning/organization, emotional control, task-monitoring and self-monitoring" is not a diagnosis recognized in the DSM-5. Witness B opined that Student needs to be in a small education classroom within a special education school with Applied Behavior Analysis ("ABA") based interventions. "If the right supports and interventions aren't provided, we're not gonna see the level of academic development and growth that would be expected and that [s/he] is otherwise capable of..." Witness B also opined that the four hours of specialized instruction prescribed in Student's IEP was insufficient to meet her/his needs, and needs a smaller classroom "that is less busy and that has less sort of going on." Witness B opined that Student needed the full-time, small class environment to provide access to "direct adult attention" that s/he requires, and that it is not possible for Student to get the level of support s/he needs in a general education environment.

36. Petitioner/mother testified that entering the 2022-23 school year, she had no

⁷⁸ P20:1 (215).

⁷⁹ P21:1-13 (217-29).

⁸⁰ P221-4 (231-34).

concerns about Student's academic progress or his/her behavior; her only concern was for his/her development of socially empathetic expressions. While there had been some disengagement during the previous school year at School A, there was no history of disruptive behaviors. She agreed to a Section 504 Plan because Witness C, School A's Special Education Coordinator, advised her that was the appropriate program for Student to receive support. Petitioner/mother was scared and alarmed when DCPS reported Student's behavior to the MPD on December 22, 2023; she felt betrayed because Petitioners were "trying to work together" with DCPS to solve Student's behavioral issues.

37. Witness C, School A's Special Education Coordinator, testified that she first began to notice Student's behavior in mid-October of the 2022-23 school year, as there had been no previous history of disruptive behaviors. The school did not suspect a disability because the behaviors were new and Student was performing at or above grade level expectations in English Language Arts ("ELA"), Spanish Language Arts ("SLA") and Math. Witness C recommended a Section 504 Plan when the behaviors persisted and then escalated in frequency and severity. The 504 Plan included a number of provisions designed to reduce distractions, provide a calming atmosphere, and offer rewards for appropriate behaviors. After receiving Witness B's evaluation, School A agreed that Student was eligible for special education as a child with ASD. The change was necessary because Student's behavior was preventing her/him from completing a lot of classwork. When asked why the IEP team did not prescribe more hours of specialized instruction, she testified that Student was not presenting with significant academic deficits, citing Student's assessment scores. Witness C also cited the behavioral chart in the IEP's Consideration of Special Factors; on a daily basis in each class, Student would be reminded of behavioral expectations and rewarded through a token economy. Witness C opined that a full-time special education placement would have been inappropriate because it would have been a "big leap" for such a young child where s/he was still learning alongside his/her peers.

38. Witness D, who recommended implementation of a token economy for Student in her February 17, 2023 OT evaluation, testified that the initiation of the token economy "was the turning point" for Student. She testified that before she went on maternity leave on April 19, 2023, Witness F, a School Social Worker, reported to her that Student's behavior had improved with the implementation of the token economy. Witness D opined that the moderate level of OT services prescribed in the IEP, two hours per month, was appropriate. She testified that a more intensive level of services, four hours per month, would be appropriate for a student with more severe deficits such as being non-verbal or having toileting challenges.

39. Witness F, Student's Social Worker, testified that from November 2022 through the end of the school year, he was in Student's classroom three times per week. He testified that in February 2023, Student was having trouble managing him/herself: running around the room, running into other students, inability to regulate his/her behavior at times. By the end of the year, Student's behavior was improved. Over the course of weeks, Student was being more purposeful in his/her communication. S/he was able to verbalize more and apologize quicker than earlier in the year. The token economy enabled Student to earn Legos for positive behavior as well as "choice time," the ability to engage in preferred activities. Student also responded well to being involved with recording his/her checklist of completion of tasks. By the end of the school year, Student was a line leader during transitions. In the 2023-24 school year s/he is no longer engaged in unsafe behaviors: no throwing and no hitting. This year, Witness F is in Student's class two to three times a week for 30 to 60 minutes. The calling out in class has decreased in frequency,

although s/he will still raise his/her voice with trying to make a point. This year, Student can be redirected more successfully than last year. During the previous week, Witness F noticed Student waiting his/her turn to swing on the playground, which s/he did not do last school year.

40. In her rebuttal testimony, Petitioner/mother confirmed Witness F's testimony that Student is doing better this school year, and Petitioners are "really proud of [REDACTED] The only problems they are having this year, so far, are getting him/her out of bed, getting ready for school, and getting him/her out of the car once s/he gets to school.

CONCLUSIONS OF LAW

Based upon the above Findings of Fact, the arguments of counsel, and this Hearing Officer's own legal research, the Conclusions of Law of this Hearing Officer are as follows: The burden of proof in District of Columbia special education cases was changed by the local legislature through the District of Columbia Special Education Student Rights Act of 2014. That burden is expressed in statute as the following:

Where there is a dispute about the appropriateness of the child's individual educational program or placement, or of the program or placement proposed by the public agency, the public agency shall hold the burden of persuasion on the appropriateness of the existing or proposed program or placement; provided, that the party requesting the due process hearing shall retain the burden of production and shall establish a prima facie case before the burden of persuasion falls on the public agency. The burden of persuasion shall be met by a preponderance of the evidence.⁸¹

The issues in this case involve the alleged failure of DCPS to provide an appropriate IEP and placement. Under District of Columbia law, DCPS bears the burden as to these issues. The burden of persuasion must be met by a preponderance of the evidence.⁸²

Whether DCPS denied Student a FAPE by failing to provide an appropriate IEP and location of services for the 2023-2024 school year. Specifically, Petitioners assert that Student requires placement a full-time special education school.

The Supreme Court's first opportunity to interpret the predecessor to IDEA, The Education of the Handicapped Act ("EHA"), came in *Board of Education of the Hendrick Hudson Central School District v. Rowley*.⁸³ The Court noted that the EHA did not require that states "maximize the potential of handicapped children 'commensurate with the opportunity provided to other children.'" ⁸⁴ Rather, the Court ruled that "Implicit in the congressional purpose of providing access to a 'free appropriate public education' is the requirement that the education to which access is

⁸¹ D.C. Code Sect. 38-2571.03(6)(A)(i).

⁸² *Schaffer v. Weast*, 546 U.S. 49 (2005).

⁸³ 458 U.S. 176, 187 (1982).

⁸⁴ *Id.* at 189-90, 200

provided be sufficient to confer some educational benefit upon the handicapped child...⁸⁵ Insofar as a State is required to provide a handicapped child with a ‘free appropriate public education,’ we hold that it satisfies this requirement by providing personalized instruction with sufficient support services to permit the child to benefit educationally from that instruction... In addition, the IEP, and therefore the personalized instruction should be formulated in accordance with the requirements of the Act and, if the child is being educated in the regular classrooms of the public school system, should be reasonably calculated to enable the child to achieve passing marks and advance from grade to grade.”⁸⁶

More recently, the Court considered the case of an autistic child under IDEA who, unlike the student in *Rowley* was not in a general education setting.⁸⁷ The Tenth Circuit had denied relief, interpreting *Rowley* “to mean that a child’s IEP is adequate as long as it is calculated to confer an ‘educational benefit [that is] merely... more than *de minimis*.”⁸⁸ The Court rejected the Tenth Circuit’s interpretation of the state’s obligation under IDEA. Even if it is not reasonable to expect a child to achieve grade level performance,

... [h]is educational program must be appropriately ambitious in light of [his/her] circumstances, just as advancement from grade to grade is appropriately ambitious for most children in the regular classroom. The goals may differ, but every child should have the chance to meet challenging objectives... It cannot be the case that the Act typically aims for grade-level advancement for children with disabilities who can be educated in the regular classroom, but is satisfied with barely more than *de minimis* progress for those who cannot.⁸⁹

In *Endrew*, the Supreme Court held that an IEP must be designed to produce more than minimal progress in a student’s performance from year to year:

When all is said and done, a student offered an educational program providing ‘merely more than *de minimis*’ progress from year to year can hardly be said to have been offered an education at all. For children with disabilities, receiving instruction that aims so low would be tantamount to ‘sitting idly... awaiting the time when they were old enough to drop out...’ The IDEA demands more. The IDEA demands more. It requires an educational program reasonably calculated to enable a child to make progress appropriate in light of the child’s circumstances.”⁹⁰

Petitioners’ co-counsel began her opening statement with the assertion that this was a hearing about a student who was “completely failed by [his/her] local school system... DCPS dealt with [his/her] need for special education by punishing [him/her] for being disabled... [Student] was regularly removed from the classroom, separated from [his/her] peers when [s/he] was in the classroom, suspended on multiple occasions, and even had the police called at times due to incidents at school...”

⁸⁵ *Id.* at 200.

⁸⁶ *Id.* at 203-04.

⁸⁷ *Endrew F. ex rel. Joseph F. v. Douglas County School District RE-1*, 137 S.Ct. 988 (2017).

⁸⁸ *Id.* at 997.

⁸⁹ *Id.* at 1000-01 (citations omitted).

⁹⁰ 137 S.Ct. at 1000-01.

The record reveals that Petitioners and School A staff were in alignment with the staff's treatment of Student on September 13, 2022, when Teacher A first notified Petitioners that Student's behavior was becoming problematic. Petitioner/father sent a cordial and grateful response the next day.⁹¹ Similarly on September 27, 2022, when Teacher A informed Petitioner that Student's behaviors required a referral to the school dean, Petitioners sent an appreciative response. On October 14, 2022, after Counselor A's October 6th email reporting that Student's behaviors were unlike anything seen during the previous school year, Petitioners requested a Section 504 meeting, but expressed their appreciation for Counselor A's and Teacher A's support of Student, with whom they had been in contact. It was only when School A asked Petitioners to pick up Student after serious misbehavior on October 20, 2022 that Petitioners' perspective changed – "If we are at the point where the school sent [her/him] home, that a clear sign [s/he] needs something that [s/he] is not currently getting at school..." - and requested that DCPS evaluate Student for eligibility for services. Student was subsequently sent home on October 25, 2022 and November 3, 2022, was discharged from the aftercare program on November 4, 2022, suspended for two days on November 15, 2022, suspended for one day on December 21, 2022, and suspended for the first three school days in January 2023 on December 22, 2022. The MPD was called for this incident as the allegations included Student slapping several students, kicking and hitting staff members, and spitting on the principal. The MPD was also notified on January 12, 2023 when a student made an allegation that was construed as inappropriate sexual contact.

However, this case is not about an alleged failure by DCPS to fulfill its child find obligations.⁹² It is not a case about an inappropriate Section 504 Plan, an inappropriate FBA, the propriety of any of the suspensions, the referrals to MPD, or about misconduct of Dean A that did not involve Student or any other students at School A. The only issue pled in this matter is the inappropriateness of the IEP that DCPS developed on April 6, 2023. As to that issue, all of the facts set forth above that occurred prior to the development of the IEP are relevant only insofar as they informed, or should have informed, the IEP team's deliberations on April 6, 2023.

Thus, the issue to be resolved is whether the April 6, 2023 IEP was reasonably calculated to enable a child to make progress appropriate in light of the child's circumstances. Petitioners have no quarrel with the Areas of Concern, goals, or the related services prescribed in the IEP. The only dispute is as to the amount of specialized instruction and the setting; Petitioners assert that Student requires a full-time special education setting in a non-public school, while DCPS insists that four hours of specialized instruction outside general education is sufficient to meet Student's needs.

Petitioners rely on the opinions of Witness A, their Educational Consultant, and Witness B, who conducted the Neuropsychological Evaluation in February 2023. Witness A opined that there was no evidence presented at the meeting that Student was benefitting from the general education program. When asked what would she need to see to visualize progress, Witness A testified that she would have to see a reduction in inappropriate behaviors on Student's behavior charts. She further opined that a private school placement is required, because DCPS has programs for children with multiple disabilities, but not for young, high-functioning children. Witness B opined that Witness B opined that Student would not enjoy academic development and growth

⁹¹ P23:1 (235).

⁹² 20 U.S.C. §1412(a)(3)(A).

unless s/he is placed in a small education classroom within a special education school with ABA based interventions.

DCPS relies on the opinions of Witness C, School A's Special Education Coordinator, Witness D, the school's occupational therapist, and the behavior chart that Student and his/her teachers completed beginning on January 6, 2023 through the remainder of the school year. In her evaluation, Witness D concluded that Student's deficits in sensory processing, manual dexterity and letter reversals impact his/her ability to complete work quickly and efficiently in the classroom. She concluded that Student's letter reversals did not currently significantly impact his/her writing legibility. However, Student's sensory processing was the biggest barrier to his/her achievement in the classroom as it negatively impacted his/her ability to function in a group of peers without interrupting the class. Among other recommendations, her first was to employ a token economy to encourage appropriate behaviors. Witness C opined that the level of services prescribed was sufficient for Student based on his/her assessment scores. She also cited the use to the behavioral chart in the IEP's Consideration of Special Factors and the implementation of a token economy, both of which were expected to moderate Student's behavior.

On the WIAT-4, conducted by Witness B, Student scored in the Average range in Mathematics Composite (103) and Sentence Building (99), in the High Average range in Reading Composite (118), and Extremely High in Spelling (133). Thus, Student was meeting expectations in Math and one Writing subtest, and was well above average in achievement in Reading and a different Writing subtest. The issue with Student was not his/her ability to access the curriculum while behaving appropriately; prior to the 2022-23 school year, Petitioners had no concerns about the competence of School A's staff or Student's academic progress. As Petitioner/mother noted on October 20, 2022, the issue was the extent to which Student's behavior precluded her/his being in class and/or or participating while in class, thereby failing to access the curriculum.

The most significant data documenting Student's behavior is the behavior chart that Student's teacher's implemented pursuant to the Section 504 Plan and later incorporated into the IEP in the Consideration of Special Factors. The Behavior PLOP reported that during the period of time when Student exhibited the most disruptive behaviors, including those that led to suspensions, from November 2022 until February 17, 2023, the chart reflected that Student met expectations 53.53% of the time across all settings. As of March 22, 2023, Student was meeting expectations 57.62% of the time; the increase could be attributed to the most recent week in which Student met expectations 83.06% of the time.

Appendix A is a compilation of negative teacher comments from the daily charts in Petitioners' Exhibit 31 as well as the daily record as to whether Student met expectations in each class in three categories: Safe Body, Appropriate Voice Level, and Participation. From January 6, 2023 through January 26, 2023, Student met expectation 82 times out of 249 opportunities, or 32.93% of the time. From February 1 through February 28, 2023, s/he met expectations 133 times out of 339 opportunities, or 39.23% of the time. From March 1 through March 30, 2023, s/he met expectations 342 times out of 447 opportunities, or 76.5% of the time. From the first undated entry after March 30th through April 27, 2023, s/he met expectations 286 times out of 339 opportunities, or 84.37% of the time. From the first undated entry after April 27, 2023 through the last undated entry before June 2, 2023, s/he met expectations 388 times out of 433 opportunities, or 89.6% of the time. From June 2, 2023 through the rest of the school year, s/he met expectations 253 out of 276 opportunities, or 91.67%.

Thus, from the earliest entry on Petitioners' Exhibit 31 through the end of the 2022-23 school year, Student's record of meeting behavioral expectations rose monthly from 32.93% to 91.67%. During the three months in which the IEP was effective, s/he met expectation 84.37 – 91.67% of the time. A perusal of the negative comments also reflects a significant improvement in behavior and a significant reduction in the physical aggression reported earlier in the school year. S/he was reported to have hit a student in Social Studies on June 9, 2023. This was the first such report since March 3, 2023. Many of the recent entries involve brief periods of non-participation and difficulty transitioning, and many days reflect no inappropriate behaviors.

The opinions of Witness A and Witness B that Student requires a full-time special education program to make educational progress are not credible. Petitioner is performing at or above grade level in the core subjects, Math, Reading, and Writing. S/he exhibited extremely disruptive behavior during the fall of 2022 that was completely out of character from the behaviors s/he exhibited during the previous school year. However, after implementing the interactive behavior chart and token economies, Student's behavior gradually improved to the point that his/her behavior was meeting expectations over 90% of the time by the end of the school year. Student's behavior caused him/her to be removed from the classroom many times in the fall of 2022 and led to several suspensions. Moreover, his/her behavior through February 2023 was sufficiently disruptive that it clearly precluded the opportunity to access the curriculum. However, since the IEP became effective, the charts reveal that Student is consistently available for learning, and his/her inappropriate behaviors – non-participation, unruliness during transitions – do not have a significant effect on his/her ability to access the curriculum. Witness A testified that in order for her to see progress, she would have to see a reduction in Student's disruptive behaviors. Petitioners' Exhibit 31 provides the data that documents a significant reduction in those behaviors.

In the *Prehearing Order*, I invited the parties to submit memoranda of points and authorities on any issue relevant to this proceeding on or before the due date for disclosures. At the hearing, I specifically invited counsel to provide authorities involving “twice exceptional” students in response to Witness B's characterization of Student. While both parties submitted authorities, none of the cases cited was instructive as to the intensity of the educational program a twice exceptional or highly functional student should receive. Petitioners cited several cases including *Mr. I. ex rel. L.I. v. Maine School Administration District No. 55*.⁹³ This case involved the eligibility of a high functioning child with Asperger's Syndrome rather than the appropriate program for that child.⁹⁴ The student in *Polk v. Central Susquehanna Intermediate Unit 16*⁹⁵ was “severely developmentally disabled,” not high functioning.⁹⁶ The child in *Ridgewood Board of Education v. N.E. ex rel. M.E.*⁹⁷ had high cognitive scores but extremely low achievement scores, indicative of a learning disability; again this did not involve a high functioning student already found to be eligible for some level of services. Finally, in *Nein v. Greater Clark County School Corporation*, the fourth-grade student was dyslexic, had an IQ of 75, and could not read.⁹⁸

⁹³ 480 F.3d 1 (1st Cir. 2007).

⁹⁴ *Id.* at 17-23.

⁹⁵ 853 F.2d 171 (3rd Cir. 1988).

⁹⁶ *Id.* at 173.

⁹⁷ 172 F.3d 238 (3rd Cir. 1999).

⁹⁸ 95 F.Supp.2d 961, 963 (S.D. Ind. 2000).

The only obstacle preventing Student from accessing the curriculum in his/her general education classroom was his/her own behavior. It is not apparent from the record that Student required more than a minimal amount of specialized instruction based upon his/her performance on achievement tests, standardized tests, and his/her grades. However, the behavior chart and token economy appear to have played a role in significantly moderating Student's behavior to the point that s/he can access the curriculum in the general education environment. In the small sample size, Petitioner/mother conceded that Student was doing well in the early days of the 2023-24 school year. I conclude that DCPS has met its burden of proving that it provided Student an appropriate IEP on April 6, 2023.

RELIEF

For relief, Petitioners request an order requiring DCPS to place and fund Student's placement in a full-time special education school for the 2023-24 school year.


ORDER

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



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

APPEAL RIGHTS

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


Terry Michael Banks
Hearing Officer

Date: September 21, 2023

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