

**DISTRICT OF COLUMBIA
OFFICE OF THE STATE SUPERINTENDENT OF EDUCATION**
Office of Dispute Resolution
1050 First Street, NE, 3rd Floor
Washington, DC 20002

OSSE
Office of Dispute Resolution
April 18, 2019

PARENTS,
on behalf of STUDENT,¹

Date Issued: April 18, 2019

Petitioner,

Hearing Officer: Peter B. Vaden

v.

Case No: 2019-0011

DISTRICT OF COLUMBIA
PUBLIC SCHOOLS,

Hearing Dates: April 4 and 10, 2019

Office of Dispute Resolution, Room 423
Washington, D.C.

Respondent.

HEARING OFFICER DETERMINATION

INTRODUCTION AND PROCEDURAL HISTORY

This matter came to be heard upon the Administrative Due Process Complaint Notice filed by the Petitioners (PARENTS), under the Individuals with Disabilities Education Act, as amended (the IDEA), 20 U.S.C. § 1400, *et seq.*, and Title 5-E, Chapter 5-E30 of the District of Columbia Municipal Regulations (“D.C. Regs.”). In their due process complaint, Petitioners seek reimbursement from Respondent District of Columbia Public Schools (DCPS) for Student’s private school tuition on the grounds that DCPS allegedly failed to ensure that an appropriate Individualized Education Program (IEP) was developed for Student in September 2018.

¹ Personal identification information is provided in Appendix A.

Petitioners' Due Process Complaint, filed on January 15, 2019, named DCPS as Respondent. The undersigned hearing officer was appointed on January 16, 2019. On February 7, 2019, I convened a telephone prehearing conference with counsel to discuss the issues to be determined, the hearing date and other matters. The due process hearing was initially set for April 2-3, 2019. Due to the unavailability of Petitioners' witnesses on those dates, counsel agreed to reschedule the hearing for April 4 and 10, 2019. To accommodate these hearing dates, on March 21, 2019, I granted DCPS' unopposed continuance request to extend the final decision due date for this case from March 31, 2018 to April 26, 2018. On January 28, 2019, the parties met for a resolution session and were unable to resolve the issues in dispute.

The due process hearing was convened before the undersigned impartial hearing officer on April 4 and 10, 2019 at the Office of Dispute Resolution in Washington, D.C. The hearing, which was closed to the public, was recorded on an electronic audio recording device. The Petitioners appeared in person and were represented by PETITIONERS' COUNSEL. Respondent DCPS was represented by MANAGER and by DCPS' COUNSEL.

Petitioners' Counsel made an opening statement. MOTHER testified at the hearing and the parents called as additional witnesses EDUCATIONAL CONSULTANT, INDEPENDENT PSYCHOLOGIST and DIVISION HEAD. At the conclusion of Petitioners' case in chief, DCPS' Counsel made an opening statement. DCPS then called as witnesses SCHOOL PSYCHOLOGIST, TEACHER 1, SOCIAL WORKER, TEACHER 2, PRINCIPAL and Manager.

Petitioners' Exhibits P-1 through P-8, P-10 through P-33, P-33A, P-34 and P-36 through P-39 were admitted into evidence, including Exhibits P-5 and P-31 through P-

34 admitted over DCPS' objections. Exhibit P-9 was withdrawn. DCPS' objection to Exhibit P-35 was sustained. DCPS' Exhibits R-1, R-2 (pages 1 through 9 only), R-3, R-4, R-6 and R-7 were admitted into evidence without objection. Exhibit R-5 and the remaining pages of Exhibit R-2 were withdrawn. Counsel for the respective parties made oral closing arguments.

At the conclusion of Petitioners' case in chief, DCPS' Counsel made an oral motion to dismiss Petitioners' complaint on the grounds that subsequent to the September 17, 2018 meeting of Student's IEP team, the parents did not inform DCPS that they were rejecting the placement proposed for Student, including stating their intent to enroll Student in a private school at public expense. *See* 34 CFR § 300.148(d)(1). I took the motion under advisement. DCPS renewed this motion at the end of the hearing. I now deny DCPS' motion because Petitioners' Counsel had provided such notice in an email sent to DCPS on August 23, 2018, the date of the last IEP team meeting that the parents attended prior to Student's removal from public school.

JURISDICTION

The hearing officer has jurisdiction under 20 U.S.C. § 1415(f) and D.C. Regs. tit. 5-E, § 3029.

ISSUE AND RELIEF SOUGHT

The issue for determination, as certified in the February 7, 2019 Prehearing Order, is:

Whether the September 2018 IEP and educational placement proposed by DCPS are inappropriate for Student because the IEP does not provide Student with sufficient special education instruction outside of general education in order for Student to make meaningful progress and because Student suffers emotionally from splitting school time between two

different, inside/outside of general education environments.

For relief, the parents initially requested that the hearing officer order DCPS to reimburse them for Student's placement at NONPUBLIC SCHOOL for the 2018-2019 school year including tuition, related services, transportation and extended school year (ESY); and to maintain Student at Nonpublic School until such time as DCPS makes an appropriate placement available. At the beginning of the due process hearing, Petitioners' Counsel clarified that the parents seek reimbursement for the private school expenses incurred only subsequent to the September 17, 2018 IEP team meeting.

FINDINGS OF FACT

After considering all of the evidence received at the due process hearing in this case, as well as the argument of counsel, my findings of fact are as follows:

1. Student, an AGE child, resides in the District of Columbia with the parents. Testimony of Mother.
2. Student is eligible for special education under the IDEA disability classification Specific Learning Disability (SLD). Exhibit P-2.
3. Since September 4, 2018, Student has attended Nonpublic School, where Student was unilaterally placed by the parents. Testimony of Mother.
4. Prior to the 2018-2019 school year, Student attended City School for 4 years. Testimony of Principal. At the end of the 2013-2014 school year, Student's lack of academic progress caused significant concern and Student was referred for a psychoeducational evaluation. Student was classified as a student with an SLD and began receiving special education services at the beginning of the 2014-2015 school year. Exhibit P-5.
5. At the beginning of the 2017-2018 school year, Student's IEP provided for

placement in the general education setting, with pull-out services for 2.5 hours per week each in math, reading and written expression. Exhibit P-5. In math, Student would make small gains, but then lose it and need re-teaching. Student's writing was underdeveloped. By December 2017, Student was working on writing good sentences and Student's stories were more developed. Student met with a reading teacher every week. Student was reading below grade level and Student's reading comprehension was much lower. Student flourished in Specials classes with typically developing peers. By December 2017, there was consensus among the parents and Student's educators that Student needed more special education support. Testimony of Teacher 2.

6. In November 2017, School Psychologist conducted a comprehensive psychological reevaluation of Student. She summarized that Student's cognitive abilities, as measured by the Woodcock Johnson Tests of Cognitive Abilities - Fourth Edition (WJ-IV), were found to be in the Low range overall, although there was variability between composites and subtests. Student displayed Average processing speed and Below Average abilities in comprehensive knowledge, fluid reasoning, auditory processing and visual processing. For short-term working memory, Student tested in the Low range. Long-term retrieval tested in the Very Low range. On the Kaufman Test of Educational Achievement - Third Edition (KTEA-3), Student showed skills within the Low range overall in reading, writing and math. Student had difficulty across all reading areas including decoding, comprehension, and fluency. In math Student did better with basic computation than on more complex problems. Word problems and subtraction were notable areas of difficulty. With writing, Student fared better when using writing conventions than when spelling. Student had difficulty with silent letters, short vowels, punctuation, capitalization, and sentence structure. School

Psychologist concluded that the educational diagnosis of SLD continued to be appropriate for Student. She recommended, *inter alia*, that Student's IEP team should consider increasing Student's level of support through placement in a self-contained classroom for students with learning disabilities. Exhibit P-5.

7. Student's City School IEP team met on December 12, 2017. Student's continued special education eligibility as a student with an SLD was confirmed. The IEP team identified Mathematics, Reading, Written Expression and Emotional/Social/Behavioral Development as IEP Areas of Concern. The IEP team increased Student's Special Education Services to 19.5 hours per week, divided equally among Reading, Written Expression and Mathematics, all outside general education, and provided for 120 minutes per month of Behavioral Support Services. The new placement for Student was the City School Specific Learning Support (SLS) classroom. Exhibit P-7, Testimony of Teacher 1. Mother agreed with this IEP. Testimony of Mother. Under the December 12, 2017 IEP, Student continued to attend Specials classes, as well as lunch and recess, with typically developing peers. Student also started every morning in the general education classroom where Student worked on ST Math, a computer instructional program, for 45 minutes. Testimony of Teacher 1.

8. After being placed in the SLS classroom, Student reportedly made progress on all of the December 12, 2017 IEP goals but did not master any of the goals during that period. Exhibit R-1. By the end of the school year, Student was showing growth in all IEP academic areas of concern. Testimony of Teacher 1.

9. Prior to the December 12, 2017 IEP team meeting, Student engaged in school refusal when Student would arrive at school in the mornings. Mother would bring Student into Social Worker's office where Social Worker would work on coping

skills with Student to overcome Student's not wanting to go to the classroom. Once Student got into class, Student was fine. The challenge was to get Student into the first class. After Student was moved to the SLS classroom, it took a few days to get Student to start the day independently, but Student's resistance phased out quickly. During the time Student was in the SLS classroom, Student made great improvement behaviorally. Student made progress on all IEP social-emotional goals. Testimony of Social Worker.

10. As of June 2018, Student was reported to be Progressing on all of the December 12, 2017 IEP academic goals. For mathematics goals, where the annual goal (for December 2018) was 80% accuracy, by June 2018, Student was able to perform most operations with 50% accuracy. For reading, Student was reported to have almost mastered annual IEP goals for answering "Wh" questions, reading accuracy and "vowel team" word decoding, and to have attained 60% accuracy on consonant blend word decoding, where the annual goal was 80% accuracy. For written expression, by June 2018, Student had reached 50-60% accuracy on annual goals, most of which aimed for 80% accuracy. Social Worker reported that as of June 2018, Student was also making good or steady progress on the IEP Emotional, Social and Behavioral Development annual goals. Notably, Student did not have any reported school refusal episodes during the 4th quarter of the 2017-2018 school year and was reported to follow the class schedule well, navigating between SLS and Student's "home base." Exhibit R-1.

11. On March 15, 2018, FATHER wrote the Special Education Coordinator at City School that the parents continued to be concerned about Student and Student's academic progress. Father requested an independent educational evaluation (IEE). On April 6, 2018, DCPS issued funding authorization for the parents to obtain an IEE evaluation for Student. The parents obtained an IEE psychological evaluation of

Student by Independent Psychologist and provided a copy to City School on August 3, 2018. Exhibit P-16.

12. On the Text Reading and Comprehension (TRC) assessments administered to Student in the 2017-2018 school year, Student's score, level "H", did not improve from beginning of year to end of year. These scores were well below grade level expectations and indicated Student was following further behind same aged peers. On the Read Naturally program, Student ended the 2017-2018 school year at the same level as at the beginning of the school year. On the Dynamic Indicators of Basic Early Literacy Skills (DIBELS), Student's reading skills showed slow improvement in oral reading fluency and reading comprehension, but at the end of the 2017-2018 school year, Student's scores remained well below grade level. Exhibit P-2.

13. On the i-Ready math assessment given at the beginning, middle and end of the 2017-2018 school year, Student's overall scores were 405 (BOY), 384 (MOY) and 399 (EOY). These scores were all well below grade-level expectations. Exhibit P-2.

14. Independent Psychologist conducted a Psychological Evaluation of Student in June and July 2018. Independent Psychologist administered a battery of cognitive and educational assessments, conducted a classroom observation and interviewed the parents and Student. Independent Psychologist reported that his findings from the Wechsler Intelligence Scale for Children - Fifth Edition (WISC-V) and the Differential Abilities Scales - Second Edition (DAS-II) revealed variability, with Student's standard scores ranging from Below Average to Low Average. Student achieved Below Average performance on Verbal Comprehension, Nonverbal Reasoning, Visual Spatial, Fluid Reasoning, and Working Memory. Low Average skills were noted in Processing Speed and Spatial. Data from the Wide Range Assessment of Memory and

Learning, Second Edition (WRAML 2), revealed inconsistent skills across the verbal (auditory) and visual memory domains, with stronger skills noted in the visual domain. Visual motor integration and visual perception skills were within the Low Average range, but weaker skills were found in motor coordination. Student's academic achievement standard scores ranged from Extremely Low (Passage Comprehension) to Average (Writing Fluency). An analysis of responses to the Conners, Third Edition (Conners 3) rating scales noted consistent traits, aligned with the diagnosis of ADHD-Combined Type, across the home and school environments. In addition, executive functioning skills were noted to be atypical based on the parent's rating in the areas of attention, organization, self monitoring and working memory. Independent Psychologist diagnosed Student with Attention Deficit Hyperactivity Disorder – Combined Presentation and Specific Learning Disorder with Impairments in Reading and Mathematics. Independent Psychologist recommended, *inter alia*, the continuation [*sic*] of special education classifications for Student of Other Health Impairment - Attention Deficit Hyperactivity Disorder (OHI-ADHD) and SLD in Reading and Mathematics. Exhibit P-4.

15. In June 2018, the parents enrolled Student in the summer tutorial program at Nonpublic School for reading instruction. The parents considered this to be the most positive learning experience Student had ever had. Testimony of Mother.

16. On July 23, 2018, Father contacted City School to request an IEP team meeting for Student. A multidisciplinary team (MDT) meeting was scheduled for August 23, 2018. At the meeting, the team reviewed Independent Psychologist's psychological evaluation of Student. The school representatives at the meeting stated that Student's placement in the SLS program at City School remained correct.

Petitioners' counsel stated that the parents did not agree with Student's City School placement and that the parents would be sending Student to Nonpublic School for the 2018-2019 school year and would seek tuition reimbursement from DCPS. He and the parents stated that Student would be starting at Nonpublic School on September 4, 2018. Exhibit R-6.

17. On August 23, 2018, after the MDT meeting, Petitioners' Counsel wrote Principal, by email, that the parents were not in agreement with the current [December 12, 2017] IEP, that the parents would make a unilateral placement of Student at Nonpublic School and unless a consensus on a free appropriate public education (FAPE) could be reached, the parents demanded that Student's placement at Nonpublic School be at public expense. Exhibit P-11. Principal responded, by an email sent the same day, that the August 23, 2018 meeting was an eligibility meeting to review the IEE psychological evaluation, not an IEP meeting. Principal asserted that at the August 23, 2019 meeting, she had stated that the team was not in a position then to make commentary about IEP revisions and that for the next meeting scheduled for September 14, 2018 [*sic*], they discussed drafting a new IEP, incorporating the new information and consideration of Student's least restrictive environment (LRE). Exhibit R-4.

18. Near the time of the August 23, 2018 IEP meeting, the parents engaged Educational Consultant to review Student's education records and the IEE psychological evaluation and to make educational recommendations for Student. On August 22, 2018, Educational Consultant issued written recommendations for Student. These included the recommendation that Student required a full time special education program for all classes, not just reading, math and written expression. Subsequently, Educational Consultant conducted several classroom observations of Student at Nonpublic School.

Testimony of Educational Consultant, Exhibit P-31.

19. Student did not return to City School for the 2018-2019 school year, but was unilaterally placed by the parents at Nonpublic School, starting there on September 4, 2018. Testimony of Mother. Nonpublic School is a full-time nonpublic special education day school in the District of Columbia, which serves students with language-based learning disabilities. Nonpublic School holds a current Certificate of Approval (COA) from the D.C. Office of the State Superintendent of Education (OSSE). The tuition cost is approximately \$46,000 per year, plus additional charges for related services. Testimony of Division Head.

20. Student is making progress at Nonpublic School. Socially-emotionally, Student is also doing well and forming relationships with other students. Testimony of Division Director. At Nonpublic School, Student has grown academically. Student is progressing in math and does well in science. Testimony of Educational Consultant. The Nonpublic School reading teacher reported that Student was responding to the one-on-one reading instruction at Nonpublic School and as of October 2018, had gained skills since the beginning of the year. Exhibit P-30. At Nonpublic School, Student seems to “fit in”. Student is happy and now wants to read at home. Student now has a confidence level which the parents had not seen in a long time. Testimony of Mother.

21. On September 17, 2018, after the parents had unilaterally enrolled Student at Nonpublic School, an IEP team meeting was convened at City School to review Student’s DCPS IEP. Mother, Educational Consultant and Independent Psychologist attended the IEP meeting. The IEP team updated Student’s present levels of performance, annual goals and classroom accommodations and services, adopting input from the IEE psychological evaluation and from Educational Consultant’s

recommendations. Exhibit P-2, Testimony of Teacher 1.

22. In the September 17, 2018 IEP description of how the Student's disability affects academic access to the general education curriculum, the members of the IEP team agreed that Student has a specific learning disability in reading, which affects math output, reading and writing and affects access to the general education curriculum; that Student has difficulty processing and retaining information; that Student's inattention is also impacting the ability to focus on instruction; that Student has difficulty reading and understanding most grade-level math instructions and word problems; that Student also has difficulty understanding the steps needed to correctly and independently solve math problems; that Student needs assistance to ensure Student is not rushing and is following every step needed to solve the given problem; that Student needs reminders of what steps are needed to complete certain math tasks and needs an exemplar and a visual set of directions for the steps and problems; that Student needs additional practice when going over modified concepts in the classroom; that Student requires highly modified work and math aids such as a times table, graph paper to correctly line up numbers, a place value mat, counters and an anchor chart; that Student requires a lot of scaffolding in math and reading; that Student's SLD causes Student to have difficulty reading a grade level text, so Student is not able to access the grade level curricula without assistance and systematic practice in reading; that even with this support, Student continues to struggle with decoding, fluency and comprehension; that Student is a very slow reader and could only read 97 correct words per minute, which was much slower than grade level peers; that Student is also not accurate in reading; that Student has a lot of miscues, which affects comprehension; that Student's ADHD and working memory affect Student's access in the general education curriculum; that Student's

deficits affect Student's understanding of grade level reading concepts which often produces frustration; that Student's SLD also affects Student's writing; that Student is not able to access the grade level curriculum without intervention and assistance in writing and that Student cannot spell grade-level words and can only write a basic sentence. Exhibit P-2.

23. Describing how Student's disability affects Student in the Emotional, Social and Behavioral Development area of concern, the IEP team agreed that as Student has gotten older, Student has become more aware of learning differences, which can impact Student's self esteem, mood and self determination; that Student continues to struggle to recall facts and can sometimes jumble real fears with perceived fears; that memory issues sometimes impact Student's ability to recall details and the logical sequence of problem situations later in the day or week; that Student's difficulties with organizing academics tasks, activities and social scripts also present concerns; that issues with anxiety related to attending school regularly and feelings that academic tasks may be difficult were also of concern. Exhibit P-2.

24. DCPS' proposed September 17, 2018 IEP continued provision for Student to receive 19.5 hours per week of Specialized Instruction in the SLS classroom at City School with Specials classes, lunch and recess to be provided with general education peers. The IEP also provide for Student to receive 120 minutes per month of Behavioral Support Services, divided between 60 minutes outside general education and 60 minutes in general education. Exhibit P-2. The parents and their representatives disagreed with the September 17, 2018 IEP because they were looking for more support, especially for academics. The parents renewed their request for DCPS to fund Student's attendance at Nonpublic School. None of the City School representatives considered

there was data to support placing student in a full-time special education school with no access to general education peers. Testimony of Teacher 1, Testimony of Principal.

CONCLUSIONS OF LAW

Based upon the above Findings of Fact and argument of counsel, as well as this hearing officer's own legal research, my Conclusions of Law are as follows:

Burden of Proof

As provided in the D.C. Special Education Student Rights Act of 2014, the party who filed for the due process hearing, the Petitioners in this case, shall bear the burden of production and the burden of persuasion, except that where there is a dispute about the appropriateness of the student's IEP or placement, or of the program or placement proposed by the local education agency, in this case DCPS, the agency shall hold the burden of persuasion on the appropriateness of the existing or proposed program or placement; provided that the Petitioners shall retain the burden of production and shall establish a *prima facie* case before the burden of persuasion falls on the agency. The burden of persuasion shall be met by a preponderance of the evidence. *See* D.C. Code § 38-2571.03(6).

Analysis

Was DCPS' September 2018 proposed IEP and educational placement inappropriate for Student because the IEP did not provide Student with sufficient special education instruction outside of general education in order for Student to make meaningful progress and because Student suffers emotionally from splitting school time between two different, inside/outside of general education environments?

As the Circuit Court for the District of Columbia explained in *Leggett v. District of Columbia*, 793 F.3d 59 (D.C. Cir. 2015), in order to fulfill their statutory obligation to

provide a free appropriate public education, school officials must have an appropriate IEP in place for each student with a disability “[a]t the beginning of each school year.” *Leggett* at 67 (citing 20 U.S.C. § 1414(d)(2)(A).) In this case, on August 23, 2018, City School convened a multidisciplinary team (MDT) meeting to review the Independent Educational Evaluation (IEE) psychological evaluation of Student obtained by the parents. At that meeting, the parents objected to Student’s continued placement in the SLS classroom at City School and requested that Student’s placement be changed to an “entire special education school.” The school members of the MDT team responded that there was no data to support a change in Student’s placement. The parents disagreed with this decision and unilaterally placed Student at Nonpublic School on the private school’s first day of school, September 4, 2018.

The issue for determination, as framed by the Petitioners in this case, is whether DCPS failed to propose an appropriate IEP for Student at the September 17, 2018 IEP meeting at City School. However, it appears that what is actually in dispute is whether DCPS failed to have an appropriate IEP in place for Student at the beginning of the 2018-2019 school year, before the Parents enrolled Student in Nonpublic School. That is, whether DCPS denied Student a FAPE by not changing Student’s educational placement to a full-time special education school at the time of the August 23, 2018 MDT meeting. That was why the parents enrolled Student in Nonpublic School on September 4, 2019. Notwithstanding, the proposed September 17, 2018 IEP carried over, unchanged, Student’s December 12, 2017 IEP placement provision for 19.5 hours per week of special education outside the general education setting. I conclude, therefore, that the Petitioners’ election to challenge the September 17, 2018 IEP, instead of the December 12, 2017 IEP which was in place when they enrolled Student at

Nonpublic School, should have no substantive bearing on the outcome in this proceeding, except as to any relief which may be warranted.

In this proceeding, the parents seek reimbursement from DCPS for their expenses, after September 17, 2018, for Student to attend Nonpublic School in the 2018-2019 school year. Under the IDEA, parents who unilaterally decide to place their disabled child in a private school, without obtaining the consent of local school officials, “do so at their own financial risk.” *Florence County Sch. Dist. Four v. Carter*, 510 U.S. 7, 15, 114 S.Ct. 361, 126 L.Ed.2d 284 (1993) (*quoting Sch. Comm. of the Town of Burlington v. Dep’t of Educ.*, 471 U.S. 359, 374, 105 S.Ct. 1996, 85 L.Ed.2d 385 (1985)). However, “[i]f a school system fails to provide a [disabled] student with an appropriate education and such education is offered at a private school, the school system may be liable to reimburse the student for the cost of private education.” *Z. B. v. District of Columbia*, 888 F.3d 515, 519 (D.C. Cir. 2018) (citing 20 U.S.C. § 1412(a)(10)(C)(ii); *Leggett, supra*). “As interpreted by the Supreme Court, IDEA requires school districts to reimburse parents for their private-school expenses if (1) school officials failed to offer the child a free appropriate public education in a public or private school; (2) the private-school placement chosen by the parents was otherwise “proper under the Act”; and (3) the equities weigh in favor of reimbursement—that is, the parents did not otherwise act “unreasonabl[y].” *Leggett, supra*, at 66-67, (citing *Carter, supra*, 510 U.S. at 15–16, 114 S.Ct. 361; 20 U.S.C. § 1412(10)(C)(iii)(III)).

The indispensable condition for private school reimbursement from the *Z. B.* and *Leggett* decisions is that the public school officials failed to offer the child a FAPE. That leads to the principle query in this case: Was the September 17, 2018 IEP, specifically the proposed educational placement at City School, appropriate for Student? In

Moradnejad v. District of Columbia, 177 F. Supp. 3d 260 (D.D.C. 2016), the Court adopted the Report and Recommendation of U.S. Magistrate Judge G. Michael Harvey, which explained how a court or a hearing officer must assess an IEP:

The Supreme Court explained in [*Bd. of Educ. v. Rowley*, 458 U.S. 176, 102 S.Ct. 3034, 73 L.Ed.2d 690 (1982)] that a court’s assessment of an IEP involves two inquiries:

First, has the State complied with the procedures set forth in the [IDEA]? And second, is the [IEP] developed through the [IDEA’s] procedures reasonably calculated to enable the child to receive educational benefits? If these requirements are met, the State has complied with the obligations imposed by Congress and the courts can require no more.

Moradnejad at 274-75. Here, the parents do not allege that DCPS failed to comply with the IDEA’s procedural requirements. Therefore, I turn to the second, substantive, prong of the *Rowley* inquiry, was DCPS’ proposed September 17, 2018 IEP appropriate for Student?

In *Endrew F. ex rel. Joseph F. v. Douglas Cty. Sch. Dist. RE-1*, — U.S. —, 137 S.Ct. 988, 197 L.Ed.2d 335 (2017), the U.S. Supreme Court elaborated on the standard, first enunciated in *Rowley*, for what constitutes an appropriate IEP under the IDEA:

To meet its substantive obligation under the IDEA, a school must offer an IEP reasonably calculated to enable a child to make progress appropriate in light of the child’s circumstances. *Endrew F.*, 137 S.Ct. at 999. . . . The ‘reasonably calculated’ qualification reflects a recognition that crafting an appropriate program of education requires a prospective judgment by school officials. *Id.* . . . Any review of an IEP must appreciate that the question is whether the IEP is *reasonable*, not whether the court regards it as ideal. *Id.* (emphasis in original.) . . . The IEP must aim to enable the child to make progress. . . . [T]he essential function of an IEP is to set out a plan for pursuing academic and functional advancement. *Id.* . . . A focus on the particular child is at the core of the IDEA. The instruction offered must be “*specially designed*” to meet a child’s “*unique needs*” through an “*individualized* education program.” An IEP is not a form document. It is constructed only after careful consideration of the child’s present levels of achievement, disability and potential for growth. *Id.* (emphasis in original.) . . . When a child is fully integrated in the regular classroom, as

the Act prefers, what that typically means is providing a level of instruction reasonably calculated to permit advancement through the general curriculum. *Id.*, 137 S.Ct. at 1000. . . . [For a child who is not fully integrated in the regular classroom and not able to make grade-level advancement] his educational program must be appropriately ambitious in light of his 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. *Id.* . . . A reviewing court may fairly expect [school] authorities to be able to offer a cogent and responsive explanation for their decisions that shows the IEP is reasonably calculated to enable the child to make progress appropriate in light of his circumstances. *Id.*, 137 S.Ct. at 1002.

See also Z. B. v. District of Columbia, 888 F.3d 515, 517 (D.C. Cir. 2018) (In *Endrew F.*, Supreme Court held that the IDEA requires education “reasonably calculated to enable a child to make progress in light of the child’s circumstances”—a standard markedly more demanding than requiring merely some educational benefits.)

Through the testimony of their expert witnesses, Petitioners established a *prima facie* case that the September 17, 2018 IEP, specifically the less than full time special educational placement, was inappropriate for Student. Therefore, under the Special Education Student Rights Act, the burden of persuasion as to the appropriateness of the September 17, 2018 IEP falls on DCPS.

The description of how Student’s IDEA disability affects Student’s access to the general education curriculum, as recited in the September 17, 2018 IEP, is not in dispute. The IEP team agreed that Student has a specific learning disability (SLD) in reading, which affects math, reading and writing and consequently Student’s access to the general education curriculum; that Student has difficulty processing and retaining information; that Student’s inattention affects the ability to focus on instruction; that Student has difficulty reading a grade level text, and so is not able to access the grade level curricula without assistance and systematic practice in reading; that Student

struggles with reading decoding, fluency and comprehension; that Student cannot spell grade-level words and can only write a basic sentence and that Student's ADHD and working memory deficit affect Student's access to the general education curriculum. The IEP team agreed that as Student has gotten older, Student has become more aware of these learning differences, which can impact Student socially-emotionally.

At the start of the 2017-2018 school year, Student's City School IEP provided for Student's placement in the general education setting with pull-out special education services for 7.5 hours per week. By December 2017, there was consensus among the parents and Student's educators that Student needed more special education support. In the December 12, 2017 IEP, Student was placed in City School's Specific Learning Support (SLS) classroom for 19.5 hours per week and only participated with typically developing peers for ST Math, Specials classes, lunch and recess. For the 2018-2019 school year, DCPS proposed the same special education services and placement for Student.

The parents' primary contention in this case is that the special education services and placement offered by DCPS were not sufficient special education instruction outside of general education and that Student required placement in a separate school, apart from typically developing peers, in order to make meaningful progress. DCPS asserts that in the half-year that the December 12, 2017 IEP was in place, Student made appropriate progress and its proposal to continue those services was reasonably calculated to enable Student's continued progress.

In support of its position, DCPS called teachers and other educators who had worked with Student at City School during the 2017-2018 school year. Most of these witnesses knew Student very well and they agreed that Student was being appropriately

served in the SLS classroom at City School. Principal testified that she agreed with the September 17, 2018 IEP team decision to continue Student's placement for 19.5 hours per week in the SLS classroom at City School. Principal testified that Student was really successful in the self-contained SLS classroom and that the data showed Student was growing during the period after being moved to this setting. She testified that in the general education setting at City School, Student had friends, always enjoyed going to Specials classes with typically developing peers, loved physical education class and was on the basketball team. Principal thought that the proposed September 17, 2018 IEP provided Student the "best of all worlds" with academic and behavioral support and continued access to general education peers. Principal testified that she had been together with Student for four years at City School and had worked closely with the parents during that time. I found her to be a very credible witness.

Teacher 1 was Student's case manager at City School. She was on maternity leave when Student was moved to the SLS classroom in January 2018 and only taught Student for the last several weeks of school. However, she recalled that Student's 2017-2018 school year ended on a positive note. She testified that while Student's standardized test scores did not improve over the school year, Student was making satisfactory progress on all December 12, 2017 IEP goals and was showing growth in all areas. .

Social Worker worked with Student throughout the 2017-2018 school year. She testified that after being placed in the SLS classroom for the second half of the 2017-2018 school year, Student made great social-emotional improvement and, over time, did not have any more school avoidance issues or crisis situations.

For their part, the parents contend that even in the more restrictive SLS classroom setting, Student did not make meaningful progress under the December 12,

2017 IEP and that Student required a full-time special education placement for the 2018-2019 school year. Petitioners' expert, Educational Consultant, relying chiefly on Student's beginning-of-year and end-of-year standardized test scores, opined that Student did not make meaningful progress after being placed in the SLS classroom. Citing Student's scores on the TRC assessment and the Read Naturally placement test, Educational Consultant concluded that except for a slight increase for reading fluency, Student had made no progress in reading over the 2017-2018 school year. Similarly, citing Student's i-Ready math assessment results, Educational Consultant opined that Student did not make meaningful progress in math over the school year. For Written Expression, Educational Consultant opined that Student was "alarmingly low" in writing. Here, she cited the present levels of performance statement in the September 17, 2018 IEP that Student could not spell grade-level words and could only write a basic sentence.

Based on these data and reports from the parents that Student's frustration was affecting Student in both special education and general education settings, Educational Consultant asserted that Student required a specialized separate education program throughout the day, including during lunch and recess and when transitioning between classes. She opined that the hours of special education services and the educational setting in the proposed September 17, 2018 IEP did not meet Student's needs.

Independent Psychologist also testified as an expert for the parents. Contrary to the opinion of Educational Consultant, he agreed that Student benefits from time in school with typically developing students and that Student was able to participate in lunch, recess and hallway time with general education peers. Notwithstanding, Independent Psychologist opined that due to Student's severe learning deficits, Student

needed the interventions of a special school.

Weighing this conflicting testimony, I find the DCPS witnesses more persuasive for several reasons. First, most of them had known Student for the entire 2017-2018 school year or longer, and were very familiar with Student's deficits and special education needs. Educational Consultant, by contrast, only became involved in August 2018 and never observed Student in the City School setting. This may explain Educational Consultant's opinion that Student needed a special education setting for lunch, recess and transitions, when the evidence was overwhelming that at City School, Student flourished when placed with general education peers for nonacademic parts of the school day.

Moreover, as Principal explained, Student had only been in the SLS classroom setting for some six months before the parents requested the private school placement. For the preceding 3½ years, Student's educational placement had been the "regular educational environment." To make the placement change requested by the parents in August 2018, the IEP team would have had to decide that the severity of Student's disability was such that Student's education in the SLS classroom could not be achieved satisfactorily and that Student required placement in a full-time special education school. *See, e.g., Z. B., supra*, 888 F.3d at 528 (To "the maximum extent appropriate," public schools provide students with disabilities an education in the "least restrictive environment" possible. *Id.*, citing 20 U.S.C. § 1412(a)(5)(A).)

The parents' concern over Student's lack of improvement on most of the DCPS standardized tests is certainly valid, and the September 17, 2018 IEP team took those scores into account, as reflected in the IEP present levels of performance. However, the IEP team also considered Student's spring 2018 IEP progress reports, which

documented that Student was making measurable progress after only two reporting periods in the SLS classroom. The accuracy of these progress reports was not disputed by Petitioners and these data were supported by the first hand observations of Teacher 1, Principal and Social Worker.

The Petitioners also alleged that the proposed September 17, 2018 IEP is inappropriate because Student suffered emotionally from splitting school time between two different, inside/outside of general education environments, that is, from splitting time between the SLS classroom for 19.5 hours per week and the general education setting for the rest of the time. I find that DCPS' evidence, notably the testimony of Social Worker and Principal, establishes to the contrary that at City School, Student benefitted from the opportunity to interact with typically developing peers.

Independent Psychologist's opinion that transitions between settings makes it more likely that Student would become a "disjointed" person was not persuasive.

Independent Psychologist only observed Student for one hour at City School and then, only in the special education classroom. Principal, who saw Student in transitions several times a week, observed that Student was always smiling and enjoyed time with nondisabled peers.

That is not to say that Student is not well-served at Nonpublic School. The hearing evidence established that Student is receiving educational benefit in the private school setting, notwithstanding the total separation from nondisabled peers. However, whether Nonpublic School is able to offer Student a better program than City School is not the issue. *See Kerkam v. McKenzie*, 862 F.2d 884, 886 (D.C.Cir.1988) (Proof that loving parents can craft a better program than a state offers does not, alone, entitle them to prevail under the IDEA.) The IDEA requires that an IEP be reasonable, not

necessarily ideal. *See Z. B., supra*, 888 F.3d at 528 (“If there is a gap between the best education that money can buy at a private school for a student with disabilities and the free and appropriate education at a public school that the IDEA promises, one might justly hope to close that gap for all students.”)

DCPS’ burden in this case was to show that the September 17, 2018 IEP, which continued Student’s educational placement in the SLS classroom at City School, was reasonably calculated to enable Student to make progress appropriate in light of Student’s circumstances. *See Endrew F.*, 137 S.Ct. at 1001. I conclude that the preponderance of the evidences establishes that Student did make appropriate progress in the SLS classroom for the two reporting periods after the December 12, 2017 IEP was adopted and that the IEP team’s decision to continue that placement in the September 17, 2018 IEP was reasonably calculated to enable Student to continue to make progress. I conclude, therefore, that under the D.C. Circuit Court’s decisions in *Leggett* and *Z. B., supra*, DCPS cannot be required to reimburse the parents for their expenses for Student to attend Nonpublic School in the 2018-2019 school year.

ORDER

Based upon the above Findings of Fact and Conclusions of Law, it is hereby ORDERED:

All relief requested by the Petitioners herein is denied.

Date: April 18, 2019

s/ Peter B. Vaden
Peter B. Vaden, Hearing Officer

NOTICE OF RIGHT TO APPEAL

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 U.S.C. § 1415(i).

cc: Counsel of Record
Office of Dispute Resolution
OSSE - SPED
DCPS Resolution Team