

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

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Office of Dispute Resolution
April 30, 2021

PARENTS, on behalf of STUDENT, ¹	Date Issued: April 30, 2021
Petitioners,	Hearing Officer: Peter B. Vaden
v.	Case No: 2021–0002
DISTRICT OF COLUMBIA PUBLIC SCHOOLS,	Online Video Conference Hearing
Respondent.	Hearing Dates: March 25 and 29, 2021 April 19, 2021

HEARING OFFICER DETERMINATION

INTRODUCTION AND PROCEDURAL HISTORY

This matter came to be heard upon the Administrative Due Process Complaint Notice filed by the parents (PETITIONERS) 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 this administrative due process proceeding, the parents seek private school tuition reimbursement from Respondent District of Columbia Public Schools (DCPS) on the grounds that DCPS allegedly denied their child a free appropriate public education (FAPE) by failing to offer the child an appropriate Individualized Education Program (IEP) and educational placement for the 2020-2021 school year.

Petitioners’ Due Process Complaint, filed on January 8, 2021, named DCPS as Respondent. The undersigned hearing officer was appointed on January 11, 2021. On

¹ Personal identification information is provided in Appendix A.

January 29, 2021, the parties met for a resolution session and were unable to resolve the issues in dispute. On February 2, 2021, I convened a telephone prehearing conference with counsel to discuss the issues to be determined, the hearing date and other matters. By orders issued February 22, 2021 and April 5, 2021, I granted unopposed continuance requests of Petitioners and DCPS respectively. My final decision in this case is now due by May 9, 2021.

Due to the closing of the hearing rooms at the Office of Dispute Resolution in the wake of the Coronavirus outbreak, the due process hearing was held online and recorded, using the Microsoft Teams video conference platform. The hearing, which was closed to the public, was convened before the undersigned impartial hearing officer on March 25 and 29, 2021 and April 19, 2021. The parents appeared online for the hearing and were represented by PETITIONERS' COUNSEL and PETITIONERS' CO-COUNSEL. Respondent DCPS was represented by LEA REPRESENTATIVE and by DCPS' COUNSEL.

Counsel for the Petitioners made an opening statement. Petitioners called as witnesses MOTHER, EDUCATIONAL CONSULTANT and PRIVATE SCHOOL ADMINISTRATOR. DCPS called as witnesses SOCIAL WORKER, SPECIAL EDUCATION COORDINATOR, LEA Representative and SCHOOL PSYCHOLOGIST. Petitioners' Exhibits P-2 through P-9, P-15, P-19, and P-21 through P-25 were admitted into evidence, including Exhibits P-2 through P-9 admitted over DCPS' objections. I sustained DCPS' objection to Exhibit P-1. DCPS' Exhibits R-1 through R-14 were all

admitted into evidence without objection.

On the last day of the hearing, after the taking of the evidence, counsel for the respective parties made oral closing arguments. The parties were granted leave until November 23, 2021 to submit, by email, citations to persuasive or controlling authority. Counsel for Petitioners timely submitted citations to authority.

JURISDICTION

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

ISSUES AND RELIEF SOUGHT

The issues for determination in this case are:

Did DCPS deny Student a FAPE by proposing an inappropriate IEP and placement for Student in spring 2020 that did not provide for a full-time special education setting to address Student's learning disabilities, Attention Deficit-Hyperactivity Disorder, and resulting anxiety and did not adequately address Student's reading and writing challenges?

Did DCPS' April 2020 eligibility decision that Student was eligible for services as a student with Multiple Disabilities, including Other Health Impairment (OHI) and Emotional Disturbance (ED), contrary to the parents' belief that Student should be eligible as a student with a Specific Learning Disability and OHI – but not ED – result in DCPS' developing an inappropriate IEP and educational placement for Student?

For relief, Petitioners request that the hearing officer order DCPS to reimburse the parents for the cost of tuition and all related services for Student's placement at NONPUBLIC SCHOOL from January 2020 through the present, as well as placement and funding at Nonpublic School for the remainder of the 2020-2021 school year.

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 youth, resides with the parents in the District of Columbia. The family moved to the District in the spring of 2019. Previously, the family lived in Fairfax County, Virginia. Testimony of Mother.

2. Student was determined eligible for special education by Fairfax County Public Schools (FCPS) in the 2014-2015 school year, reportedly under the Other Health Impairment - Attention Deficit Hyperactivity Disorder (OHI-ADHD) and SLD disability classifications. Testimony of Mother, Exhibit R-3. In April 2020, Student was determined eligible for special education by DCPS under the Multiple Disabilities (MD) classification based upon having concomitant OHI-ADHD and ED impairments. Exhibit R-7.

3. In November 2014, a neuropsychologist conducted a comprehensive neuropsychological evaluation of Student, upon referral from Student's pediatrician due to a history of difficulties with attention, impulsivity, and motor functioning. In her November 10, 2014 report, the neuropsychologist diagnosed Student with ADHD - combined type, Generalized anxiety disorder and a Specific learning disorder with reading impairment. The neuropsychologist reported, *inter alia*, that Student's anxiety symptoms were significant enough to warrant intervention and she strongly recommended individual psychotherapy services for the child. Exhibit P-4.

4. In Spring 2016 Parents obtained a speech and language assessment of Student by a speech-language pathologist because of concerns regarding Student's language, specifically difficulty sequencing sounds in words and trouble expressing self and because of teacher reports that Student exhibited difficulty listening as well. The speech-language pathologist reported, *inter alia*, that Student struggled in both structured and less-structured activities because of significant attention difficulties and various memory, processing, and language vulnerabilities. Student also exhibited a central auditory processing disorder (CAPD). Many features of Student's reading, writing, and spelling were consistent with weak phonologic perception. Student's dyslexia condition reflected unexpected difficulty acquiring and developing the reading/writing process when considering Student's overall capabilities. Exhibit P-5.

5. For the 2015-2016 school year, while still residents of Fairfax County, the parents made a unilateral private placement of Student at Nonpublic School in the District of Columbia, because the parents felt Student needed more special education support than FCPS offered. FCPS did not fund Student's placement at Nonpublic School. Student has been continuously enrolled in Nonpublic School through the current, 2020-2021, school year. Student is now in GRADE. Testimony of Mother.

6. Student received behavioral support counseling when Student started at Nonpublic School. In November 2019, for insurance coverage reasons, the parents stopped counseling services at Nonpublic School and Student began seeing a private psychologist. At the end of March 2020, Mother stopped the private psychological

services because Mother did not think Student needed counseling anymore. Testimony of Mother.

7. On November 22, 2019, the parents made a referral to DCPS for an initial eligibility evaluation of Student by DCPS to determine whether Student was a child with an IDEA disability. Exhibits P-10, P-11. On January 15, 2020, DCPS' Private and Religious Office (PRO) issued written notice to the parents that DCPS would complete assessments of Student, including a Comprehensive Speech Evaluation, Motivations Assessment Scale, Strengths and Difficulties Questionnaire, Comprehensive Psychological Evaluation and observations. Exhibit P12.

8. DCPS' Comprehensive Speech Language Evaluation was completed in February 24, 2020. The DCPS Speech-Language Pathologist reported that overall, Student demonstrated standard scores that ranged from the average range to the above average range. For language processing, Student demonstrated skills in all assessed areas at a level similar to or above age-matched peers. Given formal and informal data from multiple sources, this assessor concluded that Student's oral language skills were commensurate with age-matched peers and were not consistent with an oral communication disorder that would prevent Student from accessing or gaining benefit from the educational environment. Exhibit P-13.

9. School Psychologist completed a comprehensive psychological evaluation of Student on February 25, 2020 to provide current information regarding Student's cognitive, academic, and socio-emotional functioning. On the Reynolds Intellectual

Assessment Scales-Second Edition (RIAS-2), Student obtained a Composite Intelligence Index (CIX) score of 97, in the Average range for cognitive functioning. On the Kaufman Test of Educational Achievement-Third Edition (KTEA-3), a measure of academic achievement, Student obtained a Reading Composite standard score of 90, which falls within the Average range. All KTEA-3 Reading subtests also scored within the Average or Above Average range except for Below Average on the Decoding Composite. Student scored within the Low range on the Written Language Composite, comprised of the Written Expression and Spelling subtests. Student obtained a Math Composite score of 96, which falls within the Average range. Math was an area of relative strength for Student. Exhibit P-14.

10. To assess social-emotional functioning, School Psychologist had Student, the parents and a teacher from Nonpublic School complete the Behavior Assessment System for Children-3rd Edition (BASC-3) rating scales. The parents and the teacher were also administered the Conners-Third Edition (Conners-3) questionnaires to assess for ADHD, and the Behavior Rating Inventory of Executive Function-Second Edition (BRIEF-2) to assess executive functioning behaviors. On the BASC-3, the teacher's responses yielded clinical elevation on the Internalizing Problems composite scale and At-Risk elevation on the Externalizing Problems, Behavioral Symptoms Index, Adaptive Skills and School Problems composite scale. On the BASC-3, the parents' responses yielded At-Risk elevations on the Externalizing Problems, Internalizing Problems, and Behavioral Symptoms Index composite scales. The parents' and teacher's responses on

the Conners-3 indicated that Student demonstrated significant difficulties with maintaining concentration and attention, impulsivity, and executive functioning consistent with Student's ADHD diagnosis. On the BRIEF-2, the teacher's responses indicated clinically elevated scores on the Global Executive Composite (GEC). The parents' responses on the BRIEF-2 indicated Student was in the clinically elevated range on the GEC index and on the Inhibit, Self-Monitor, Shift and Task-Monitor subscales.

Exhibit P-14.

11. School Psychologist concluded that the parents', teacher's, and Student's self-ratings indicated that Student met IDEA criteria for ED. She explained that Student was presenting with significant difficulty managing anxiety. On the BASC-3, the teacher, parents, and Student endorsed significant elevations on the Anxiety subscale. School Psychologist's interviews with teachers and parents also indicated concerns that Student was anxious about school. Student self-endorsed significant feelings of worry and anxiety as well as negative feelings of self-esteem. Teachers reported that Student often engaged in negative self-talk and anxious thoughts. Exhibit P-14.

12. School Psychologist reported that Student met IDEA criteria for OHI-ADHD. She noted that Student had been diagnosed with ADHD since age 7 and had been treated with various psychotropic medications through the years and currently; that results from the Conners-3 indicated elevated or very elevated scores in the areas of Inattention, Hyperactivity/Impulsivity, Learning Problems and Executive Functioning subscales. Parent and teacher ratings from the BRIEF-2 forms also indicated that

Student struggled with executive functioning, which included inhibitory control and self-monitoring. Exhibit P-14.

13. School Psychologist reported that Student did not meet IDEA criteria for an SLD because academic testing did not show that Student was not achieving adequately for Student's age or not meeting District of Columbia grade level standards, and Student was not performing significantly below Student's cognitive functioning which measured in the Average range. Exhibit P-14.

14. DCPS school buildings have been closed since March 16, 2020 due to the Coronavirus pandemic. Hearing Officer Notice.

15. On April 2, 2020, the DCPS eligibility team determined that Student was eligible for special education and related services under the Multiple Disabilities (MD) classification based on concomitant OHI and ED impairments, due to ADHD and anxiety. The areas determined impacted were math, writing, and social-emotional. The eligibility team considered SLD, but did not find Student met criteria for a learning disability. The parents disagreed with this decision. The team considered adding reading as an area of concern, but did not due to Student's KTEA-3 scores in reading. The parents also disagreed with this decision. Exhibit P-16. The parents also disagreed with the determination that Student had an emotional disturbance and contended that Student should have been determined eligible under the MD category, based on OHI-ADHD and SLD impairments. Testimony of Mother.

16. The parents and DCPS staff convened for an initial IEP meeting, by

telephone, on or about May 14, 2020. Petitioners' Counsel, Educational Consultant, Private School Administrator, another administrator and a teacher from Nonpublic School also participated in the meeting. The May 14, 202- IEP team identified Mathematics, Written Expression and Emotional, Social & Behavioral Development as areas of concern for Student. The parents objected that Reading was not identified as an area of concern. The May 14, 2020 IEP provided for Student to receive 10 hours per week of Specialized Instruction Services, all in the general education setting², and 90 minutes per month of Behavioral Support Services (BSS), as well as 20 minutes per month of BSS consultation services. The parents disagreed with this placement. The parents also objected that anxiety did not impede Student's learning and that Student did not need Behavioral Support Services. For Other Classroom Aids and Services, the IEP provided for Student to have a modified workload, step-by-step instructions, graphic organizers, use of manipulatives, increased environmental structure, external prompting, checklist, scaffolding, and interim deadlines. Exhibits R-8, R-9.

17. On August 23, 2020, Petitioners' Counsel wrote DCPS to give notice that consistent with the parents' position at the May 14, 2020 IEP team meeting, the parents rejected the program and placement proposed by DCPS, and that Student would continue at Nonpublic School. Petitioners' Counsel wrote that the parents reserved the

² In a May 14, 2020 prior written notice to the parents, DCPS wrote that the May 13, 2020 IEP team had provided for 10 hours of specialized instruction *outside* the general education setting. This was a typographical error. Testimony of LEA Representative.

right to seek funding from DCPS. On August 26, 2020, the director of DCPS' resolution team responded that DCPS had made a FAPE available to Student with an appropriate IEP and a placement at City School and that, if the parents chose not to enroll Student at City School, DCPS would consider Student a parentally-placed private school student.

Exhibit P-19.

18. The parents did not enroll Student at City School and Student returned to Nonpublic School for the 2020-2021 school year. Testimony of Mother.

19. Nonpublic School is a private school in Washington, D.C., serving average and above average students, elementary through high school, who have language-based learning disabilities. Some student also have ADHD. There are some 375 students enrolled in the school, including about 100 students in Student's division. Most classes have 6 students with 1 primary teacher. Nonpublic School holds a current certificate of approval from the D.C. Office of the State Superintendent of Education. Testimony of Private School Administrator.

20. According to Nonpublic School's March 10, 2020 Individualized Education Program, Student was reading at, or close to, grade level. Student's reading needs were reported to affect Student's ability to successfully read literature and content area materials, to require specialized intervention, and to interfere with the ability to access and make progress in the general education curriculum. Reading fluency was reported as a strength, but comprehension and analytic reading were areas that need to be developed in order for Student to access higher level expository and literary texts. In

Written Language, Student's needs were reported to affect Student's ability to acquire effective writing skills and successfully communicate thoughts and knowledge in writing and, therefore, hinder the ability to access and make progress in all areas of the general education curriculum. In mathematics, Student's needs were reported affect Student's ability to acquire and apply math skills to real-life math situations, required specialized instruction, and interfered with the ability to access and progress in the general education curriculum. For Academic Behavior/Executive Functioning, Student's needs were reported to compromise Student's ability to engage in the learning process (maintain attention, organize materials and information, use effective independent learning skills, and develop relationships) in the general education curriculum and it was reported that Student required concrete visual representations of material. For social-behavioral, it was reported that Student had needs to demonstrate/verbalize knowledge of own strengths/needs and when feeling anxious, to use strategies to attempt assigned tasks. Exhibit P-15.

21. According to Nonpublic School's March 10, 2021 Individualized Education Program, it takes Student several months each year to acclimate to being with a new team of teachers. It was reported that Student is anxious about educational performance as it is impacted by Student's learning disabilities and that Student's learning disabilities contribute to a lack of self-confidence and can make Student feel anxious when in the classroom or completing work. Exhibit P-23.

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 public agency, in this case DCPS, the agency shall hold the burden of persuasion on the appropriateness of the proposed 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

Did DCPS' April 2020 eligibility decision that Student was eligible for services as student with Multiple Disabilities, including Other Health Impairment (OHI) and Emotional Disturbance (ED), contrary to the parents' belief that Student should be eligible as a student with a Specific Learning Disability (SLD) and OHI – but not ED, result in DCPS' developing an inappropriate IEP and educational placement for Student?

Did DCPS deny Student a FAPE by proposing an inappropriate IEP and placement in spring 2020 that did not provide for a full-time special education setting to address Student's learning disabilities, Attention Deficit-Hyperactivity Disorder (ADHD), and resulting anxiety and did not adequately address Student's reading and writing challenges?

In this due process proceeding, the parents seek reimbursement from DCPS for their unilateral placement of Student, for the 2020-2021 school year, at Nonpublic School, a private special education day school in the District of Columbia. As U.S. District Judge Rosemary M. Collyer, explained in *R.B. v. District of Columbia*, No. CV 18-662, 2019 WL 4750410, (D.D.C. Sept. 30, 2019), the IDEA authorizes retroactive reimbursement to parents for private-school expenses under certain circumstances:

School districts must “reimburse parents for their private-school expenses if[:] (1) school officials failed to offer the child a [FAPE] in a public or private school; (2) the private-school placement chosen by the parents was otherwise ‘proper under the [IDEA]’; and (3) the equities weigh in favor of reimbursement.” *Leggett v. District of Columbia*, 793 F.3d 59, 66-67 (D.C. Cir. 2015) (citing *Florence Cty. Sch. Dist. Four v. Carter By and Through Carter*, 510 U.S. 7, 15-16 (1993)).

R.B., *supra* at 7. See, also, *School Committee of Town of Burlington v. Department of Education of Massachusetts*, 471 U.S. 359, 369, 105 S.Ct. 1996, 85 L.Ed.2d 385 (1985).

This is often cited as the *Burlington Carter* test.

Here, the parents allege that DCPS failed to offer Student a FAPE because the District proposed an inappropriate initial IEP and educational placement for Student in May 2020. The parents also allege that DCPS made an erroneous initial eligibility determination in April 2020 when it found Student eligible for special education under the Multiple Disabilities (MD) classification, based on concomitant Other Health Impairment - Attention Deficit Hyperactivity Disorder (OHI-ADHD) and Emotional Disturbance (ED) impairments, but not based on a Specific Learning Disability (SLD).

Through the testimony of their experts, Petitioners made a *prima facie* showing

that DCPS' May 14, 2020 IEP and proposed general education placement at City School were not appropriate for Student. Therefore, DCPS must shoulder the burden of persuasion on the appropriateness of the proposed IEP and placement. However, the Petitioners have the burden of proving that Student was denied a FAPE by DCPS' April 2, 2020 eligibility determination.

1. Did DCPS deny Student a FAPE, by its April 2020 determination that Student is eligible for special education as a child with Multiple Disabilities, but not a Specific Learning Disability?

On April 2, 2020, the DCPS eligibility team determined that Student was eligible for special education and related services under the Multiple Disabilities (MD) classification based on concomitant OHI and ED impairments, due to Student's ADHD and Anxiety Disorder. The eligibility team considered whether Student also had a Specific Learning Disability (SLD), but found Student did not meet eligibility criteria for SLD. In their due process complaint, the Petitioners contend that DCPS denied Student a FAPE by not "coding" Student as SLD, as Nonpublic School had done. (The parents also disagreed with the eligibility team's determination that Student had an emotional disturbance, but agreed that Student met criteria for OHI-ADHD.)

The IDEA requires that upon completion of an eligibility evaluation, the LEA eligibility team, including the parents, determines whether the child is a child with an IDEA disability who, by reason thereof, needs special education and related services. *See* 34 C.F.R. § 300.8. But the Act does not require school districts to classify a student with a disability in a particular category. *See, e.g. Letter to Anonymous*, 48 IDELR 16

(OSEP 2006) (Child's identified needs, not the child's disability category, determine the services that must be provided to her); *Heather S. v. State of Wis.*, 125 F.3d 1045, 1055 (7th Cir. 1997) (IDEA not concerned with labels, but with whether a student is receiving a FAPE); *Lauren C. by & through Tracey K. v. Lewisville Indep. Sch. Dist.*, 904 F.3d 363, 377 (5th Cir. 2018) (IDEA promises—a FAPE—regardless of child's diagnosis.)

In this case, regardless of the disability category identified for Student, DCPS correctly determined that Student was a child with an IDEA disability in need of special education and related services. I find that the parents have not shown that by not finding Student eligible under SLD, in addition to the OHI-ADHD and ED disabilities, DCPS denied Student a FAPE.

The parents contend that because DCPS determined that Student did not have an SLD disability, the May 14, 2020 IEP team failed to address Student's alleged areas of need in Reading and Written Expression. Regardless of the disability classification for special education eligibility relied upon by the LEA, the LEA must ensure that IEP special education and related services are tailored to the unique needs of each child. *See Andrew F. ex rel. Joseph F. v. Douglas Cty. Sch. Dist. RE-1*, 137 S. Ct. 988, 994, 197 L. Ed. 2d 335 (2017). Whether the May 14, 2020 IEP appropriately addressed Student's academic needs in Reading and Written Expression, goes to the appropriateness of the May 14, 2020 IEP, which I address next.

2. Appropriateness of May 14, 2020 IEP

In DCPS' initial May 14, 2020 IEP for Student, the IEP team identified

Mathematics, Written Expression and Emotional, Social & Behavioral Development as areas of concern for Student. For special education services, the proposed IEP provided for Student to receive 10 hours per week of Specialized Instruction Services, all in the general education setting. The parents allege that the proposed IEP was inappropriate because it did not provide for a full-time special education setting and did not adequately address Student's reading and writing challenges.

U.S. District Judge Rudolph Contreras explained in *Middleton v. District of Columbia*, 312 F. Supp. 3d 113 (D.D.C. 2018), how a hearing officer must assess an IEP:

In reviewing a challenge under the IDEA, courts conduct a two-part inquiry: "First, has the State complied with the procedures set forth in the Act? And second, is the individualized educational program developed through the Act's procedures reasonably calculated to enable the child to receive educational benefits?" *Bd. of Educ. of Hendrick Hudson Cent. Sch. Dist. v. Rowley*, 458 U.S. 176, 206–07, 102 S.Ct. 3034, 73 L.Ed.2d 690 (1982) (footnotes omitted).

Middleton at 128. In the present case, the Petitioners have not alleged that DCPS failed to comply with the IDEA's procedural requirements in developing the May 14, 2020 IEP. Therefore, I turn to the second, substantive, prong of the *Rowley* inquiry: Was DCPS' proposed May 14, 2020 IEP inappropriate because it only provided for 10 hours per week of Specialized Instruction Services inside general education and did not adequately address Student's reading, mathematics and writing challenges?

In *Endrew F. ex rel. Joseph F. v. Douglas Cty. Sch. Dist. RE-1*, *supra*, the U.S. Supreme Court elaborated on the standard, first enunciated in *Rowley*, *supra*, 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.) . . . 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 (D.C. Cir. 2018).

Since the parents unilaterally placed Student at Nonpublic School at the start of the 2015-2016 school year, Student's educational setting has been a full-time self-contained classroom in a special school for children with learning disabilities and ADHD. In its May 14, 2020 IEP, DCPS proposed to place Student, full-time, in the general education classroom at City School, with 10 hours per week of "push-in" Specialized Instruction Services.

In support of the full-time general education placement it proposed for Student, DCPS called several members of its staff who had evaluated Student or contributed to the IEP development. DCPS' expert, School Psychologist, evaluated Student in winter 2020. School Psychologist testified that the placement proposed in the initial IEP was

consistent with her recommendations for Student. This assertion was not convincing. School Psychologist stated in her February 25, 2020 psychological evaluation report that often, it is important to limit distractions that are problematic for children, like Student, with attention difficulties, including visual and auditory distractions, other students, or activities that can pull Student's attention away from a task. In her report, School Psychologist cautioned that open classroom settings often have too many distractions and too many opportunities for impulsive behaviors. School Psychologist also recommended in the report that Student may benefit from increased environmental structure and working in small groups with good peer models. School Psychologist did not attend the May 14, 2020 IEP team meeting, but her report recommendations, particularly the concern about open classroom settings with too many distractions, do not appear to be consistent with the May 14, 2020 IEP team's decision to place Student full-time in the general education classroom.

LEA Representative, who was qualified as an expert in special education programming and placement testified that she had not seen any data showing that only a small group setting would work for Student. She opined that the general education setting was appropriate for Student, because Student could benefit from access to typically developing peers. Social Worker opined that it was "non inconsistent" that Student could be successful in the general education setting despite Student's experiencing stress and anxiety in the self-contained classroom at Nonpublic School. These opinions could support a decision that Student does not require a full-time

placement in a special education setting. However they do not adequately explain the IEP team's decision to place Student full time in the regular education classroom with only 10 hours per week per week of push-in Specialized Instruction Services.

I found the opinions of Petitioners' expert, Educational Consultant, more credible. Educational Consultant first worked with Student in the 2014-2015 school year when Student attended a public school in Fairfax County and recently observed Student at Nonpublic School. He testified that he had stated at the May 14, 2020 IEP team meeting that Student's ADHD is significant and Student needs a small class room setting to focus and make progress. He opined that the class size at City School is much too large for Student and it would be detrimental for Student to have no special education support for 5 of the 7 hours in the school day.

I did not find the hearing evidence persuasive that Student currently requires a full-time special education setting. *See, e.g., Adams v. District of Columbia*, 285 F. Supp. 3d 381, 389 (D.D.C. 2018) (IDEA requires that children with disabilities be placed in the least restrictive environment so that they can be educated in an integrated setting with children who are not disabled to the maximum extent appropriate.) However, to satisfy the first prong of the *Burlington Carter* test, it need only be established that DCPS failed to offer Student a FAPE with *its* proposed educational placement. *See, Leggett*, 793 F.3d 59 at 66-67 (D.C. Cir. 2015). I find that DCPS, which has the burden of persuasion on this issue, has not offered a "cogent and responsive explanation" for the decision of the May 14, 2020 IEP team to place student full-time in the regular

education classroom with only 10 hours per week of push-in Specialized Instruction Services. *See Endrew F.*, 137 S.Ct. at 1002. I conclude that DCPS failed to offer Student a FAPE with the full-time placement in the general education setting, as proposed in the May 14, 2020 IEP.

To be clear, while I find that DCPS' proposed full-time placement of Student in the general education setting was not appropriate and Student's IEP must be revised, I make no finding as to what is Student's appropriate educational setting and least restrictive environment. It remains the responsibility of Student's IEP team, with the participation of the parents and their representatives, to make that determination.

In light of my conclusion that DCPS' proposed educational placement of Student in the May 14, 2020 IEP did not offer Student a FAPE, it is not necessary to reach Petitioners' additional claims that the May 14, 2020 IEP did not adequately address Student's reading and writing challenges. *See Adams v. District of Columbia*, 285 F. Supp. 3d 381 (D.D.C. 2018) ("[W]hen an HOD finds an IDEA violation, '[w]hether the Hearing Officer based such a finding on one, or two, or three alleged violations is irrelevant—the result would be the same.'" *Id.* at 391, quoting *Green v. District of Columbia*, 2006 WL 1193866, at 9 (D.D.C. May 2, 2006)). However, for completeness and to provide guidance for the development of a revised IEP for Student, I consider whether the May 14, 2-2- IEP appropriately addressed those challenges.

The IDEA requires that each child's IEP must include a statement of measurable annual goals, including academic and functional goals, designed to,

(A) Meet the child's needs that result from the child's disability to enable the child to be involved in and make progress in the general education curriculum; and

(B) Meet each of the child's other educational needs that result from the child's disability.

and a statement of the special education and other services to be provided to enable the child to advance toward attaining the goals. *See* 34 CFR § 300.320(a)(2)(i), (a)(4).

DCPS' proposed May 14, 2020 IEP omitted annual goals for reading. I find that DCPS established at the due process hearing that this decision was appropriate based on the information available to the May 14, 2020 IEP team. *See, e.g., A.B. by Holmes-Ramsey v. District of Columbia*, No. CV 10-1283 (ABJ/JMF), 2012 WL 13041578, at *8 (D.D.C. Feb. 14, 2012). (Appropriateness of IEP must be judged prospectively based on the information available to Student's IEP team at the time of its development.) The March 20, 2020 Nonpublic School IEP stated that Student was reading at, or close to, grade level and that Reading fluency was a strength, while comprehension and analytic reading were areas that need to be developed in order for Student to access higher level expository and literary texts. According to LEA Representative, Student's Nonpublic School report card showed Student was proficient in all areas in Reading. Most important, School Psychologist opined, credibly, that Reading was not a special education area of need for Student because Student's scores on the KTEA-3 achievement test in Reading, administered in winter 2020, were all in the Average or Above Average range except for Below Average on the Decoding

Composite.

At the due process hearing, Private School Administrator testified that Student still has difficulty with Reading fluency and Educational Consultant testified that Student still needs reading goals on the IEP. Going forward, in light of the parents' concerns, the IEP team must review whether Reading is an area of need for Student, when it next revises Student's IEP. *See* 34 C.F.R. § 300.324(b)(ii)(C) (Duty to review and revise IEP, as appropriate, to address information provided by the parents.)

The May 14, 2021 IEP team did identify Written Expression as an area of need for Student and provided two annual goals for writing. Petitioners' expert, Educational Consultant, opined that the written language section of the IEP was appropriate. I conclude that DCPS met its burden of persuasion that the proposed IEP adequately addressed Student's writing challenges.

3. Tuition Reimbursement

I have concluded that DCPS denied Student a FAPE with its May 14, 2020 IEP by proposing an inappropriate educational placement in the general education classroom. I turn, next, to the other two requirements for tuition reimbursement pronounced in the D.C. Circuit's *Leggett* decision – that the private school chosen by the parents, Nonpublic School, was proper and that the parents did not otherwise act unreasonably.

In *Leggett*, analogizing to the standard for IEP appropriateness from the U.S. Supreme Court's decision in *Bd. of Ed. of Hendrick Hudson Cent. Sch. Dist., Westchester Cty. v. Rowley*, 458 U.S. 176 (1982), the D.C. Circuit held that for the

private school chosen by the parents to be proper, it need be “reasonably calculated to enable the child to receive educational benefits.” *Leggett, supra*, at 71. The *Rowley* standard was updated in the Supreme Court’s decision in *Endrew F., supra*. In *L.H. v. Hamilton Cty. Dep’t of Educ.*, 900 F.3d 779 (6th Cir. 2018), the Sixth Circuit Court of Appeals explained the requirements which a private school must satisfy to be found appropriate after the *Endrew F.* decision:

[E]ven though the IDEA’s requirements do not apply to private schools, *Florence Cnty. Sch. Dist. Four v. Carter*, 510 U.S. at 13-14, for reimbursement purposes, the private school must satisfy the substantive IEP requirement, *i.e.*, it must be “reasonably calculated to enable a child to make progress appropriate in light of the child’s circumstances.” *Endrew F.*, 137 S.Ct. at 999. But the private school need not meet the full public school standards. 34 C.F.R. § 300.148 (“A parental placement may be found to be appropriate by a hearing officer or a court even if it does not meet the State standards that apply to education provided by [state and local education agencies].”) (codifying *Florence Cnty.*); *see also C.B. v. Garden Grove Unified Sch. Dist.*, 635 F.3d 1155, 1159 (9th Cir. 2011) (“To qualify for reimbursement under the IDEA, parents need not show that a private placement furnishes every special service necessary to maximize their child’s potential. They need only demonstrate that the placement provides educational instruction specially designed to meet the unique needs of a handicapped child, supported by such services as are necessary to permit the child to benefit from instruction.”) (quoting with approval *Frank G. v. Bd. of Educ.*, 459 F.3d 356, 365 (2d Cir. 2006)).

L.H., 900 F.3d at 791. Drawing on the *Leggett* and *L.H.* decisions, I conclude that for the parent’s private school placement to be proper, the parents must show their school choice was reasonably calculated to enable the student to make progress appropriate in light of the child’s circumstances.

Nonpublic School is a private school in Washington, D.C. serving average and

above average students, elementary through high school, who have language-based learning disabilities. Some student also have ADHD. There are some 375 students enrolled in the school, including about 100 in Student's division. Most classes have 6 students with 1 primary teacher. Nonpublic School holds a current certificate of approval from the D.C. Office of the State Superintendent of Education.

Student has been a parentally-placed student at Nonpublic School since the 2015-2016 school year. Educational Consultant, who worked with Student before Student started at Nonpublic School, testified that Student had made a lot of progress at Nonpublic School and is now handling grade-level content with "scaffolding" accommodations. He testified that Student has also made progress with executive functioning, but still needs support in that area. Private School Administrator also testified to Student's progress at Nonpublic School. DCPS' expert, School Psychologist testified that on the KTEA-3 test of educational achievement administered in winter 2020, Student had done "really well." On this evidence, I find that the parents' choice to continue Student's enrollment at Nonpublic School for the 2020-2021 school year was reasonably calculated to enable Student to make progress appropriate in light of Student's circumstances and was, therefore, proper under the *Leggett* standard.

Lastly, the *Leggett* decision requires that the "equities weigh in favor of reimbursement — that is, the parents did not otherwise act 'unreasonabl[y]'" *Leggett*, 793 F.3d at 67. Reimbursement may be "reduced or denied" if the parents failed to notify school officials of their intent to withdraw the child or otherwise acted

unreasonably. *Leggett, supra*, 793 F.3d at 63. The IDEA provides that the cost of reimbursement for private school may be reduced or denied if —

(i) At the most recent IEP Team meeting that the parents attended prior to removal of the child from the public school, the parents did not inform the IEP Team that they were rejecting the placement proposed by the public agency to provide FAPE to their child, including stating their concerns and their intent to enroll their child in a private school at public expense; or

(ii) At least ten (10) business days (including any holidays that occur on a business day) prior to the removal of the child from the public school, the parents did not give written notice to the public agency of the information described in paragraph (d)(1)(i) of this section.

34 CFR § 300.148(d).

In their due process complaint, Petitioners seek reimbursement from DCPS for the cost of tuition and all related services for Student's placement at Nonpublic School from January 2020 through the present, as well as placement and funding at Nonpublic School for the remainder of the 2020-2021 school year. However, Petitioners moved from Virginia to the District of Columbia in spring 2019 and they did not request DCPS to conduct a special education eligibility evaluation of Student until November 2019. DCPS found Student eligible for special education in April 2020 and developed Student's initial IEP on May 14, 2020. Petitioners' Counsel gave written notice to DCPS on August 23, 2020 that the parents rejected the IEP program and placement proposed by DCPS and that Student would continue at Nonpublic School. Petitioners have not alleged that DCPS committed any procedural violations in evaluating Student or developing the initial IEP. On these facts, I find no meritorious basis for the parents to

seek reimbursement for expenses incurred for Student prior to the 2020-2021 school year. Otherwise, I do not find that the parents have acted unreasonably. I will, therefore, order DCPS to reimburse the parents for their expenses for Student to attend Nonpublic School from the beginning of the 2020-2021 school year.

4. Placement for the remainder of the 2020-2021 school year

The parents also request that I order DCPS to place and fund the student at Nonpublic School for the remainder of the 2020-2021 school year. As of the due process hearing date, DCPS had not offered Student an appropriate IEP and educational placement. At this point in the spring term, I find that it would be too disruptive for Student to have to change schools before the end of the current school year. *Cf. Branham v. Government of the Dist. of Columbia*, 427 F.3d 7, 12-13 (D.C. Cir. 2005) (Asking whether setting aside placement order might disrupt child's education.) Therefore, I will require DCPS to fund parent's tuition obligation for Student's placement at Nonpublic School for the remainder of the private school's 2020-2021 school year. I will also order DCPS to ensure that a new IEP for Student is promptly developed, in accordance with this decision and the requirements of the IDEA.

ORDER

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

1. Upon receipt of documentation of payment by the parents, as may be reasonably required, DCPS shall, without undue delay, reimburse the parents their costs for covered tuition and related expenses for Student's

enrollment at Nonpublic School from the start of the private school's 2020-2021 regular school year through the present and shall fund Student's placement at Nonpublic School through the end of Nonpublic School's regular 2020-2021 school year;

2. DCPS shall promptly convene Student's IEP team, including the parents and their representatives, to review and revise Student's IEP in accordance with this decision and with 34 C.F.R. § 300.324 *et seq.* and
3. All other relief requested by the Petitioners herein is denied.

Date: April 30, 2021

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
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