

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 25, 2023

PARENTS, on behalf of STUDENT, ¹)	
)	
Petitioners,)	Date Issued: April 25, 2023
)	
v.)	Hearing Officer: Peter B. Vaden
)	
PUBLIC CHARTER SCHOOL and)	Case No: 2022-0216
)	
D.C. OFFICE OF THE STATE)	Online Videoconference Hearing
SUPERINTENDENT OF EDUCATION,)	
)	Hearing Dates: March 20, 22 and
Respondents.)	23, 2023

HEARING OFFICER DETERMINATION

INTRODUCTION AND PROCEDURAL HISTORY

This matter came to be heard upon the Administrative Due Process Complaint Notice filed by Petitioners (PARENTS) under the Individuals with Disabilities Education Act, as amended (the IDEA), 20 U.S.C. § 1400, *et seq.*, and Title 5-A, Chapter 5-A30 of the District of Columbia Municipal Regulations (DCMR).² In this administrative due process proceeding, the parents seek private school tuition reimbursement from Respondents PUBLIC CHARTER SCHOOL (PCS) and D.C. OFFICE OF THE STATE SUPERINTENDENT OF EDUCATION (OSSE) on the grounds that the Respondents allegedly denied their child a free appropriate public education (FAPE) by failing to offer

¹ Personal identification information is provided in Appendix A.

² In this decision, in place of using masculine or feminine pronouns when referring to Student, I use the gender-neutral pronoun known as the “singular they” or its possessive form “their”.

an appropriate Individualized Education Program (IEP) educational placement for the 2022-2023 school year.

Petitioners' Due Process Complaint, filed on December 15, 2022, named PCS and OSSE as Respondents. The undersigned hearing officer was appointed on December 16, 2022. On February 2, 2023, Petitioners filed a motion to inspect records, which I denied by order issued February 7, 2023. On February 28, 2023, Petitioners filed a motion for partial summary decision. On March 9, 2023, OSSE filed a motion for summary decision. I denied both motions by order issued March 10, 2023.

By order issued December 21, 2022, I granted OSSE's unopposed motion to align the final decision due date for OSSE to the corresponding due date for PCS. On January 10, 2023, I convened a telephone prehearing conference with counsel to discuss the issues to be determined, the hearing date and other matters. On January 11, 2023 and March 22, 2023, I granted Petitioners' unopposed continuance requests to extend the final decision due date as to both OSSE and PCS. My final decision in this case is now due by April 28, 2023.

With the Parents' consent, the due process hearing was held online and recorded by the hearing officer, using the Microsoft Teams videoconference platform. The hearing, which was closed to the public, was convened before the undersigned impartial hearing officer on March 20, 22 and 23, 2023. The Parents appeared online for the hearing and were represented by PETITIONERS' COUNSEL. Respondent PCS was

represented by PCS DIRECTOR and by PCS' COUNSEL. Respondent OSSE was represented by PROGRAMS MANAGER and by OSSE's COUNSEL and OSSE's CO-COUNSEL. Petitioners' Counsel, PCS' Counsel and OSSE's Counsel made opening statements. Petitioners called as witnesses MOTHER, SPECIAL EDUCATION CONSULTANT, PSYCHIATRIST, NEUROPSYCHOLOGIST and ASSISTANT DIRECTOR. OSSE called as witnesses Programs Manager, CIP COORDINATOR, and INFORMATION OFFICER. PCS called as witnesses ENGLISH TEACHER, HISTORY TEACHER, COMPUTER TEACHER, SOCIAL WORKER, SPECIAL EDUCATION TEACHER and PCS Director.

Petitioners' Exhibits P-1 through P-28 and P-30 through P-45 were admitted into evidence, including Exhibits P-21, P-23, P-28, P-34 and P-36 admitted over the Respondents' objections. I sustained the Respondents' objections to Exhibit P-29. PCS' Exhibits LEA-1 through LEA-44 and OSSE's Exhibits OSSE-1 through OSSE-5 were all admitted into evidence without objection. In lieu of making oral closing arguments, counsel requested leave to file written closings. Each of the parties, by counsel, timely filed written closing memoranda.

JURISDICTION

The hearing officer has jurisdiction under 20 U.S.C. § 1415(f) and 5A DCMR § 3049.1.

ISSUE AND RELIEF SOUGHT

The issue for determination in this case, as set out in the January 10, 2023

Corrected Prehearing Order is:

Did PCS and OSSE deny Student a FAPE by failing to propose an appropriate educational placement for the 2022-2023 school year?

For relief, the Parents request that the hearing officer order PCS and/or OSSE to reimburse them for their unilateral placement expenses to enroll Student at NONPUBLIC SCHOOL for the 2022-2023 school year and to fund Student's enrollment at the private school for the remainder of the 2022-2023 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. Testimony of Mother.
2. Student is eligible for special education as a student with Autism Spectrum Disorder (known as Autism) (ASD). Exhibit LEA-2.
3. Respondent PCS is a public charter school in the District of Columbia. PCS serves as its own Local education agency (LEA). Hearing Officer Notice.
4. PCS is an International Baccalaureate program school and considers all academic courses to be at the advance placement (AP) level. Testimony of PCS Director.

5. Respondent OSSE is the State education agency (SEA) for the District of Columbia. Hearing Officer Notice.

6. Assessments of Student in 2020 reflected strengths, including outstanding verbal, visual, and spatial reasoning ability. robust language skills and strengths in applied math, reading comprehension, and spelling. Student was diagnosed with an Autism Spectrum Disorder, similar to what was previously known as Asperger's Disorder, due to their history of vulnerabilities related to socio-emotional reciprocity, nonverbal communication, social awareness, cooperative play, the development and maintenance of friendships, rigidity, intense interests, and sensory sensitivities. Student's profile also reflected weaknesses related to attention and executive functioning, consistent with an Attention Deficit/Hyperactivity Disorder (ADHD) diagnosis, as well as commonly associated academic vulnerabilities, including difficulty automatizing math facts, vulnerability to inattentive/careless computation errors during multi-step math problems and insufficient attention to detail/context in their writing. Broader self-regulatory difficulties were also observed including emotional sensitivity/reactivity observed in a sensitive stress response, and vulnerability to anxiety and depressed mood, resulting in diagnoses of unspecified anxiety and depressive disorders. Exhibit P-28.

7. Student attended PCS from STARTING GRADE until the end of the 2021-2022 school year. Testimony of Mother.

8. PCS' October 18, 2021 IEP identified Student's areas of concern as Mathematics, Cognitive and Emotional, Social and Behavioral Development. The IEP provided for Student to receive 27 hours per month of Specialized Instruction in the general education setting and 180 minutes per month of Behavioral Support Services. The IEP also provided a host of Other Classroom Aids and Services and accommodations for tests and assessments. Exhibit LEA-11.

9. PCS was closed to in-person learning beginning in March 2020 due to the COVID-19 pandemic. Student returned to in-person classes for the 2021-2022 school year. Student was happy to back with their friend group, but not happy to be back in school. In the fall of 2021, Student was not turning in work and assignments and was failing their world history class. Testimony of Mother.

10. In the second semester of the 2021-2022 school year, Student had challenges at school, missing assignments, problems with grades, heightened anxiety and emotional breakdown incidents. The Parents were in constant contact with the PCS IEP team. Testimony of Mother.

11. In spring 2022, the Parents sought outside psychiatric care for Student to address "screen time addiction." Testimony of Mother.

12. On May 17, 2022, Mother wrote LEA REPRESENTATIVE by email that the two issues the Parents most wanted to address were finding ways to incorporate support for developing Student's executive functioning skills into their IEP and

strategies for decreasing Student's anxiety, which the Parents thought was one of the biggest roadblocks to accessing the curriculum. In that email, Mother wrote that the day before, the Parents spoke with an educational consultant about Student's IEP and the consultant said the IEP was one of the best she had ever seen. Exhibit P-43.

13. On May 24, 2022, at the Parents' request, PCS convened a meeting of Student's IEP team to review Student's October 18, 2021 IEP. The Parents wished to address questions about Student's transition class, executive functioning as a core concern in Student's IEP and working with Student's anxiety. The IEP team agreed to craft a revised IEP with proposed changes to cognitive goals for the 2022-2023 school year. Exhibit P-16.

14. Notwithstanding Student's emotional challenges in the 2021-2022 school year, academically, Student completed the school year successfully. In English, Student exceeded grade-level expectations. In history class, missing and late assignments were a concern, but Student still performed at grade-level or above and made a good grade. In computer science, Student engaged in some off-task activities, but when redirected, they finished it with ease. Testimony of English, History, Computer and Special Education Teachers. Toward the end of the year, Student was a higher performer. Student's final grades for the 2022-2023 school year were two 4's (Produces generally high-quality work); four 5's (Produces generally high-quality work), and one 6 (Produces high-quality, occasionally innovative work.) Exhibit LEA-8. On norm-based MAP

Growth Assessments, in both Math and Reading, Student consistently scored above the norm grade level mean. Exhibit LEA-15.

15. On June 28, 2022, LEA Representative wrote the Parents to recommend that the IEP team “create” the amendments around Student’s cognitive goals and executive functioning skills during the first week of August, 2022 when some of the school staff returned from summer break. She wrote that the team could get together sooner if the Parents wanted something in place earlier. Exhibit P-20.

16. On August 2, 2022, Social Worker wrote the Parents that she had just returned to school after the July break and asked if the Parents still wanted to meet before Student returned to school for the 2022-2023 school year. The Parents responded in an August 7, 2022 email with suggestions for revisions to the meeting notes from the May 24, 2022 IEP team meeting, but did not indicate that they wanted to meet before PCS’ return to school. Exhibit P-20.

17. In the summer of 2022, the Parents sent Student to Nonpublic School initially for summer tutoring. In June or July, the Parents decided to unilaterally enroll Student in Nonpublic School for CURRENT GRADE. The Parents were looking for a school environment for Student where Student would get more support and find help for their anxiety. Testimony of Mother.

18. Around August 7, 2022, the Parents retained Petitioners’ Counsel. Testimony of Mother. On August 7, 2022, the Parents wrote PCS by email that Student

would attend Nonpublic School for the 2022-2023 school year. The email subject line was “[Student] Withdrawal”. The Parents wrote that their decision was made in order to provide Student the FAPE to which they are entitled under the IDEA. The Parents requested that PCS place and fund Student at Nonpublic School and gave notice that “[s]hould the school system refuse our request for funding, we reserve the right to seek funding for that placement.” The Parents wrote that they did not believe that the proposed program at PCS was appropriate to meet Student’s unique needs and that if PCS did not believe that an appropriate IEP had been proposed for Student and wished to return to an IEP meeting, they would cooperate with the process. Exhibit P-19.

19. On August 8, 2022, PCS Director responded by email to the Parents. PCS Director wrote that PCS’ position was that Student could learn and thrive at PCS and at no point had they been denied a FAPE, and that PCS felt that the IEP that had been developed was appropriate. Director offered to set up a meeting to discuss the Parents’ concerns and how PCS could rectify them “as we prepare for [Student] to attend [Current Grade] next year.” PCS Director requested that the Parents send her available dates and times for a meeting. Exhibit P-19.

20. On August 30, 2022, PCS’ OFFICE ADMINISTRATOR sent the Parents an email attaching a withdrawal form for Student for the Parents to fill out, and requested that the Parents please be sure to return the form to PCS. Exhibit P-22.

21. On September 6, 2022, PCS convened a virtual IEP team meeting for

Student. The Parents and Special Education Consultant participated in the meeting. Special Education Consultant reported that Student was then enrolled in Nonpublic School, which the Parents believed was an appropriate placement and for which they were seeking funding from OSSE. PCS staff stated at the meeting that they were there to work with the Parents to develop an appropriate IEP. PCS staff stated that PCS was able to provide appropriate services for Student to implement their IEP and provide appropriate access to the curriculum. School staff advised that for a change in Student's placement, the school would have to go through the OSSE placement process. PCS Director stated that the school would open up the process so as not to have OSSE get delayed. The Parents advised at the meeting that they were having Student reassessed by a private psychologist. The team, including the Parents, agreed to wait for the psychological evaluation to be completed, after which the team would reconvene to review the evaluation and amend Student's PCS IEP. Exhibits P-25, P-26, Testimony of Special Education Consultant.

22. On September 10, 2022, the Parents completed the PCS withdrawal form giving August 7, 2022 as the date of Student's withdrawal. As the reason for withdrawing, the Parents wrote that PCS' International Baccalaureate instruction approach was not well suited to their child's special needs and that the IEP supports provided were not sufficient to mitigate their child's challenges. Exhibit P-19.

23. On October 4, 2022, an OSSE CHANGE IN PLACEMENT

COORDINATOR (CIP Coordinator) contacted the Parents and Special Education Consultant, by email, about setting a change in placement meeting. On October 14, 2022, the Parents wrote by email that they did not want to proceed with the Change in Placement (CIP) meeting until they received the updated psychological assessment of Student. Exhibit LEA-28.

24. NEUROPSYCHOLOGIST conducted a neuropsychological assessment of Student in October 2022. The Parents had referred Student for the assessment because of their concerns about Student's social-emotional well-being, learning and academic progress. In her October 22, 2022 Report of Consultation, Neuropsychologist reported, *inter alia*, that Student and their parents describe growing levels of anxiety, depression, overwhelm, and academic disengagement over the course of the 2021-2022 school year; that Student clearly felt safe and supported in their current academic setting at Nonpublic School, and there had been an associated positive effect on their capacity to attend to and persist with learning activities and to complete assignments; and that Student's availability for learning and their emotional well-being had improved significantly at Nonpublic School. Neuropsychologist recommended that Student continue to attend Nonpublic School in the near future, where Student was receiving specialized instruction in a one-to-one setting throughout most of the school day, as well as an opportunity to work on social interactions and executive functioning during the homework café. Psychotherapist also recommended ongoing implementation of

psychotherapy, either individual or group, with a professional who had experience working with patients with Student's profile. On October 25, 2022, Mother provided PCS the completed neuropsychological evaluation report on Student. Exhibit LEA-28, Exhibit P-28.

25. On October 24, 2022, CIP Coordinator scheduled a CIP meeting for Student for November 8, 2022. Exhibit LEA-28.

26. By email of October 26, 2022, PCS Director informed the Parents that Student was no longer in PCS' system since they had been withdrawn and that the scheduled meeting would be to review the neuropsychological report provided by the Parents for additional recommendations. Exhibit LEA-28.

27. Following PCS Director's email of October 26, 2022, the Parents did not express an intent to re-enroll Student in PCS and because of PCS' wait list, PCS Director was not sure that Student could have re-enrolled. Testimony of PCS Director.

28. On or about October 31, 2022, Student's IEP team met to consider Neuropsychologist's October 22, 2022 report on Student. Testimony of Mother.

29. By email of November 1, 2022, CIP Coordinator advised PCS Director that once a student withdraws from a public charter school, District of Columbia Public Schools (DCPS) is not automatically the child's LEA. She advised PCS to notify the parents that by withdrawing from PCS, the change in placement process is closed and that it could be reopened when the parents enrolled their child in an LEA. PCS Director

immediately passed that information on to the Parents and notified them that they needed to enroll Student with DCPS immediately to continue the change in placement process. Exhibit P-32. The Parents did not respond to this email. Testimony of PCS Director. By email of November 2, 2022, CIP Coordinator provided DCPS enrollment information to the Parents and advised them that Student must be enrolled in an LEA in the District of Columbia in order to proceed with the change in placement process through OSSE. Exhibit P-33.

30. Nonpublic School is a for-profit private day school in the District of Columbia serving students in 6th through 12th grades. The school offers a high school diploma. Although the private school serves some students with special needs, it is not a special education school. Classes are all taught 1 teacher to 1 student. For every hour of class, there is an hour of “homework café”, where teachers check in on all students and help manage the students’ homework. Nonpublic School does not offer social work or counseling services. Only one teacher at Nonpublic School is certified as a special education teacher (not in the District of Columbia). Testimony of Assistant Director. The tuition charge at Nonpublic School is around \$70 thousand per year. Testimony of Mother. Nonpublic School does not hold an OSSE Certificate of Approval (COA). Hearing Officer Notice.

31. Student has attended Nonpublic School since the start of the 2022-2023 school year. When Student started at the school, they were anxious and uptight. Now

Student is responsive, greets everyone, does their homework and is engaged in class.

Student stills avoids interaction at times with others. Testimony of Assistant Director.

32. Student is now in two honors classes at Nonpublic School. Student has excellent grades and is learning. Student still tends to opt out of social engagement at Nonpublic School. Testimony of Mother.

CONCLUSIONS OF LAW

Based upon the above Findings of Fact and argument and legal memoranda 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 Parents 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 child's IEP or placement, or of the program or placement proposed by the public agency, the public agency shall hold the burden of persuasion on the appropriateness of the existing or proposed program or placement; provided, that the party requesting the due process hearing shall retain the burden of production and shall establish a *prima facie* case before the burden of persuasion falls on the public agency. The burden of persuasion shall be met by a preponderance of the evidence. *See*

D.C. Code § 38-2571.03(6).

ANALYSIS

ARE PCS AND OSSE REQUIRED TO REIMBURSE THE PARENTS FOR STUDENT'S PRIVATE SCHOOL EXPENSES FOR THE 2022-2023 SCHOOL YEAR?

In this case, the Parents allege that PCS and OSSE denied Student a free appropriate public education (FAPE) by failing to propose an appropriate educational placement for Student for the 2022-2023 school year. PCS had proposed for Student to continue at PCS this school year under the charter school's October 18, 2021 IEP. The Parents notified PCS on August 7, 2022 that they did not believe that the proposed program at PCS was appropriate to meet Student's unique needs and requested that PCS place and fund Student at Nonpublic School. In response, PCS maintained that Student could learn at PCS and that its IEP for Student was appropriate. Notwithstanding, the Parents unilaterally placed Student at Nonpublic School for the 2022-2023 school year and they now seek reimbursement from PCS or OSSE for their private school expenses.

For the reasons explained below, I find that PCS offered Student an appropriate IEP and educational placement for the start of the 2022-2023 school year, but improperly ceased offering Student a FAPE on or about November 1, 2022. OSSE contends that it was PCS' obligation – not OSSE's – to provide FAPE to Student. I agree with OSSE that it was the duty of PCS as Student's LEA, not OSSE, to offer Student an appropriate educational placement. However, under District of Columbia Municipal

Regulations, OSSE may be required to reimburse parents for the cost of the private enrollment where the hearing officer finds that the LEA had not made FAPE available in a timely manner.

Reimbursement for Private School Tuition

In *A.D. v. Creative Minds Int’l Pub. Charter Sch.*, No. CV 18-2430 CRC/DAR, 2020 WL 12654618 (D.D.C. Aug. 14, 2020)³, U.S. Magistrate Judge Deborah Robinson explained the standards, in this judicial circuit, for public reimbursement of parents who place their child with a disability in a private school.

The IDEA requires the school district to reimburse parents for the expenses for private school if “(1) the school officials failed to offer the child a [FAPE] in a public or private school . . . ; (2) the private school placement chosen by Plaintiffs was otherwise ‘proper under the Act’; and (3) . . . Plaintiffs did not otherwise act unreasonably.” *Leggett v. Dist. of Columbia*, 793 F.3d 59, 66 (D.C. Cir. 2015) (citing [*Florence County Sch. Dist. Four v. Carter*, 510 U.S. 7, 15-16 (1993)]); 20 U.S.C. § 1412(10)(c)(iii)(III)). (internal quotation marks omitted). “Reimbursement, moreover, may be ‘reduced or denied’ if the parents fail to notify school officials of their intent to withdraw the child, . . . deny them a chance to evaluate a student, . . . or otherwise act ‘unreasonably[.]’” *Id.* at 63 (citation omitted).

A.D. v. Creative Minds Int’l Pub. Charter Sch. at *19. 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).

In the District of Columbia, the school district’s obligation to offer FAPE has been

³ *A.D. v. Creative Minds Int’l Pub. Charter Sch.*, No. CV 18-2430 CRC/DAR, 2020 WL 12654618 (D.D.C. Aug. 14, 2020), *report and recommendation adopted*, No. 18CV2430CRCDAR, 2020 WL 6373329 (D.D.C. Sept. 28, 2020), *appeal dismissed sub nom. A. D. by E.D. v. Creative Minds Int’l Pub. Charter Sch.*, No. 20-7106, 2021 WL 1654481 (D.C. Cir. Mar. 31, 2021).

extended to public charter schools. *See* 5A DCMR §§ 3001.2, 3001.3. For charter schools, the responsibility to offer FAPE is based upon the enrollment of the child with a disability in the charter school. *See id.* If the parents of a child with a disability, who previously received special education and related services from a public charter school, enroll the child in a private placement without the consent of or a referral by the charter school, the hearing officer may require the SEA to reimburse the parents for the cost of that enrollment, if the hearing officer finds that the LEA charter school had not made FAPE available to the child in a timely manner prior to that enrollment, and that the private placement is appropriate. 5A DCMR § 3039.3.

Did PCS offer Student a FAPE?

The first factor in deciding whether Respondents must reimburse the Parents is whether PCS failed to offer Student a FAPE with an appropriate educational placement for the 2022-2023 school year. *See Leggett, supra.* “Educational placement” means educational program as opposed to the particular institution where that program is implemented. *See B.B. v. Dist. of Columbia*, No. CV 20-2467 (CKK), 2022 WL 834146, at *12 (D.D.C. Mar. 21, 2022) (citations omitted.)

In *A.D. v. Dist. of Columbia*, No. 20-CV-2765 (BAH), 2022 WL 683570, (D.D.C. Mar. 8, 2022), U.S. District Judge Beryl Howell explained the IDEA’s FAPE requirement:

A “free and appropriate public education,” or “FAPE,” is delivered by local education authorities through a uniquely tailored “‘individualized

education program,’ ” or “IEP.” *Endrew F. ex rel. Joseph F. v. Douglas Cty. Sch. Dist.*, 137 S. Ct. 988, 993-994 (2017); *see also* 20 U.S.C. §§ 1401(9)(D), 1412(a)(1). To be IDEA-compliant, an IEP must reflect “careful consideration of the child's individual circumstances” and be “reasonably calculated to enable the child to receive educational benefits,” *Endrew F.*, 137 S. Ct. at 994, 996 (cleaned up), “even as it stops short of requiring public schools to provide the best possible education for the individual child,” *Z.B. v. District of Columbia*, 888 F.3d 515, 519 (D.C. Cir. 2018). . . . Moreover, it is “imperative that, to ‘the maximum extent appropriate,’ public schools provide students with disabilities an education in the ‘least restrictive environment,’ ” *id.* at 528 (*quoting* 20 U.S.C. § 1412(a)(5)(A)), which, as recently emphasized by the Supreme Court, “requires that children with disabilities receive education in the regular classroom whenever possible,” *Endrew F.*, 137 S. Ct. at 999. An IEP failing to satisfy these statutory directives may be remedied through an IDEA claim to the extent the IEP “denies the child an appropriate education.” *Z.B.*, 888 F.3d at 519.

A.D., 2022 WL 683570 at *1. I find that the Parents established a *prima facie* case, through their expert witness’ testimony, that PCS’ proposed continued placement of Student in the general education setting at PCS, for the 2022-2023 school year, was not appropriate. Therefore, PCS must bear the burden of persuasion on the appropriateness of its proposal for Student to remain at the charter school.

Student’s Educational Placement in the October 18, 2021 IEP

PCS’ proposed educational placement for Student for the 2022-2023 school year was based on the October 18, 2021 IEP. *See* 34 C.F.R. § 300.116(b)(2) (requiring that the placement decision be based on a child's IEP.) This IEP educational program provided for Student to receive 27 hours per month of Specialized Instruction in the general education setting at PCS, supported by 180 minutes per month of counseling to

address emotional challenges and interpersonal difficulties which inhibited them from fully participating in the classroom setting. In spring 2022, Mother wrote PCS to request an IEP team meeting to address (1) finding ways to incorporate support for developing Student's executive functioning skills into the IEP, and (2) strategies for decreasing Student's anxiety, which the Parents thought was one of the biggest roadblocks to Student's accessing the curriculum. However, the hearing evidence does not show that prior to the Parents' August 7, 2022 unilateral placement notice, the Parents or anyone else expressed concerns to PCS that Student's educational placement at PCS was not appropriate.

In August 2022, around the time the Parents decided to send Student to Nonpublic School, they engaged Special Education Consultant to provide an expert opinion on Student's educational placement. At the due process hearing, Special Education Consultant, opined that Student's placement at PCS was not appropriate. He opined, summarily, that the hours of special education services in the October 18, 2021 IEP were insufficient and not provided in a way that would help Student to make progress. Special Education Consultant testified that PCS did not have the resources or educational setting to provide the services that Student needed and therefore Student's continued placement at PCS was not appropriate.

PCS offered a contrary viewpoint from four educators who taught Student at PCS. English Teacher testified that Student did struggle at times at PCS, but responded well

to accommodations and met or exceeded grade-level expectations. English Teacher testified that he did not have concerns about Student being supported at PCS. History Teacher testified that Student was a good student who took advantage of supports offered in class. He stated that Student was more than capable of learning the grade-level material and was reading and writing above grade level. Computer Teacher testified that with IEP accommodations and classroom aids and services, Student was on the higher performance end of the class. Special Education Teacher testified that the October 18, 2021 IEP appropriately identified Student's areas of concern and appropriately addressed Student's needs. She testified that Student passed all courses for the 2021-2022 school year with "really good" scores. She opined that Student's educational placement at PCS for the 2022-2023 school year was extremely appropriate.

I found the testimony and opinions of Student's teachers from PCS about the appropriateness of Student's educational programming at PCS more persuasive than Special Education Consultant's contrary opinion. Special Education Consultant only became involved in the case in August 2022, after the Parents had decided to send Student to Nonpublic School and to seek public funding for their private placement. Special Education Consultant did not have the opportunity to observe Student at PCS or to meet Student's teachers or service providers at the charter school. Even Mother wrote in a May 17, 2022 email to PCS that the Parents had spoken with a different Special Education Consultant about the October 18, 2021 IEP and that consultant said it

was “one of the best [IEPs] she had ever seen.” The testifying teachers from PCS had all worked with Student in the classroom and each of them confirmed that they had no concerns about the ability of PCS to meet Student’s needs. The teachers’ testimony was consistent with Student’s academic record at PCS. Student’s final grades in PCS’ challenging International Baccalaureate program were considered good and Student’s performance on norm-based achievement testing exceeded the grade-level mean.

On this evidence, I conclude that PCS has met its burden of persuasion that the educational placement of Student in the October 18, 2021 IEP was reasonably calculated to enable Student to make appropriate progress at the time it was developed and that PCS’ proposed placement of Student at the charter school remained appropriate for the start of the 2022-2023 school year.

Offer of FAPE Withdrawn in November 2022

Although PCS met its burden of persuasion that it offered Student an appropriate educational placement for the start of the 2022-2023 school year, that changed around November 1, 2022. On August 7, 2022, the Parents had provided written notice to PCS that Student would attend Nonpublic School for the 2022-2023 school year and they requested PCS to place and fund Student at the private school. On August 30, 2022, a PCS staff member directed the Parents to complete a PCS withdrawal form because Student was no longer attending PCS. The Parents completed the withdrawal form on September 10, 2022 with their written explanation that the IEP supports provided

Student by PCS were not sufficient to mitigate their challenges. PCS initially continued to act as Student's LEA, including convening meetings in September and October 2022 to update Student's IEP and review a recent psychological assessment. Following the September meeting, at the Parents' behest, PCS initiated a change in placement (CIP) process with OSSE for review of whether Student needed a more restrictive placement.

That came to a halt at the end of October 2022. On October 26, 2022, PCS Director wrote the Parents that Student was no longer in PCS' system since having been withdrawn. On November 1, 2022, PCS Director, apparently on the advice of OSSE's CIP Coordinator, informed the Parents that they needed to enroll Student in DCPS immediately in order to continue OSSE's CIP process. This was improper. *See* 5A DCMR § 3025.19 (A child with a disability who is placed at a nonpublic special education school or program shall remain enrolled in and is the responsibility of the LEA, unless and until the parent enrolls the child in another LEA.) Although on September 10, 2022, the Parents complied with PCS' instructions to complete and return the withdrawal form, they never stopped seeking a FAPE for Student from PCS or enrolled Student in a another LEA. *Cf., e.g., D.R. v. District of Columbia*, No. CV 21-0597 (ABJ), 2022 WL 59391 (D.D.C. Jan. 6, 2022) (District conflates its responsibility to offer FAPE with its responsibility to provide the actual services. It is true that when the parents make clear their intent to keep the child enrolled elsewhere, the District is not required to provide the services that would constitute a FAPE.

However, it is also quite clear that the District is still required to make an offer of FAPE. *Id.* at 7 (citations and internal quotations omitted.)) I find that even though Student was attending Nonpublic School from the start of the 2022-2023 school year, PCS was obliged to continue to offer Student a FAPE. PCS' unilateral termination of services to Student on November 1, 2022 violated the IDEA.

PCS argues on brief that its termination of services to Student on November 1, 2022, even if found improper, was only a procedural violation of the IDEA. *See* 34 C.F.R. § 300.513(a)(2).⁴ I disagree. The mandate to offer an appropriate IEP is a substantive obligation under the IDEA. *See Endrew F. ex rel. Joseph F. v. Douglas Cnty. Sch. Dist. RE-1*, 580 U.S. 386, 399, 137 S. Ct. 988, 999, 197 L. Ed. 2d 335 (2017). By telling the Parents that they had to enroll Student in a different LEA for their child to continue to receive services, PCS effectively ceased offering any educational placement to Student. This was a substantive violation of IDEA and a denial of FAPE.

⁴ Procedural violations may only be deemed a denial of FAPE if the procedural inadequacies—

- (i) Impeded the child's right to a FAPE;
- (ii) Significantly impeded the parent's opportunity to participate in the decision-making process regarding the provision of a FAPE to the parent's child;
or
- (iii) Caused a deprivation of educational benefit.

34 C.F.R. § 300.513(a)(2)

Nonpublic School was Proper

Having found that after November 1, 2022, PCS no longer offered Student a FAPE, I turn, next, to the other two requirements for tuition reimbursement pronounced in the *Leggett* decision – that the private school chosen by the parent, Nonpublic School, was proper and that the parent did not otherwise act unreasonably. When evaluating whether a unilateral private placement was proper, the hearing officer is to employ the same standard used in evaluating the education offered by a public school district. *See M.G. v. Dist. of Columbia*, 246 F. Supp. 3d 1, 12 (D.D.C. 2017). All that is required of the parents is that the private school be reasonably calculated to enable a child to make progress appropriate in light of the child's circumstances. *See Leggett, supra* at 70; *Endrew F. ex rel. Joseph F. v. Douglas Cnty. Sch. Dist. RE-1*, 580 U.S. 386, 399 (2017).

Nonpublic School is a for-profit private day school in the District of Columbia serving students in 6th through 12th grades. Although the school serves some students with special needs, it is not a special education school. Classes at Nonpublic School are all taught 1 teacher to 1 student. For every hour of class, there is an hour of “homework café”, where teachers check in on students and help manage the students’ homework. Nonpublic School does not offer social work or counseling services. Only one teacher at Nonpublic School is certified as a special education teacher (not in the District of Columbia). The tuition charge at Nonpublic School is around \$70 thousand per year.

PCS argues on brief that Nonpublic School is not proper for Student because it does not offer any behavior or therapeutic support services and does not employ special education teachers. These are significant concerns. Nor does Nonpublic School hold a Certificate of Approval from OSSE. However, in its decision in *Leggett*, the D.C. Circuit found that the private school chosen by the parent was proper even though it was not primarily a school for kids with learning or emotional issues. In that case, DCPS had failed to offer any special education program for the child. The Court of Appeals held that because the private school was “‘necessary’ to K.E.’s education and because it was ‘reasonably calculated to provide educational benefit,’ it was “proper under the Act.” *Id.*, 793 F.3d at 72.

In the present case, in her October 22, 2022 neuropsychological assessment, Neuropsychologist reported that Student’s emotional well-being had improved significantly at Nonpublic School and recommended that Student continue to attend Nonpublic School in the near future, where Student was receiving specialized instruction in a one-to-one setting throughout most of the school day, as well as an opportunity to work on social interactions and executive functioning during the homework café. Mother testified that at Nonpublic School, Student has excellent grades and is learning. “Student now knows they can learn and is proud of their work.” Moreover, as was the case with DCPS in the *Leggett* matter, after November 1, 2022, PCS did not offer any IEP educational placement for Student. I conclude that the

Parents have established that, because PCS stopped offering Student a FAPE after November 1, 2022, Nonpublic School was necessary for Student's education and the private school was reasonably calculated to provide education benefit. The Parents' choice of Nonpublic School for Student was therefore proper under the IDEA.

Parents did not act unreasonably.

Lastly, the D.C. Circuit's *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*, at 63; 34 C.F.R. § 300.148(d).⁵ The Parents gave notice to

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Limitation on reimbursement. The cost of reimbursement described in paragraph (c) of this section may be reduced or denied—

(1) 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;

(2) If, prior to the parents' removal of the child from the public school, the public agency informed the parents, through the notice requirements described in §300.503(a)(1), of its intent to evaluate the child (including a statement of the purpose of the evaluation that was appropriate and reasonable), but the parents did not make the child available for the evaluation; or

(3) Upon a judicial finding of unreasonableness with respect to actions taken by the parents.

PCS on August 7, 2022 that Student would attend Nonpublic School for the 2022-2023 school year. They requested PCS funding for Student to attend the private school because they did not believe that the proposed program at PCS was appropriate to meet Student's unique needs. While I have found that PCS offered Student an appropriate educational placement for the beginning of the 2022-2023 school year, the charter school effectively disenrolled Student on November 1, 2022. In those circumstances, I find that PCS has not shown that the Parents acted unreasonably in continuing Student's unilateral placement at Nonpublic School.

Order to OSSE to Provide Reimbursement

The DCMR provides that, “[i]f the parents of a child with a disability, who previously received special education and related services under the authority of the LEA, enroll the child in a private placement without the consent of or a referral by the LEA, a court or impartial hearing officer may require the SEA to reimburse the parents for the cost of that enrollment if the court or impartial hearing officer finds that the LEA had not made FAPE available to the child in a timely manner prior to that enrollment, and that the private placement is appropriate. . . . 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 the SEA and LEAs.” 5A DCMR § 3039.3.

In this decision, I have determined that Student previously received special

34 C.F.R. § 300.148(d)

education from PCS but that after November 1, 2022, PCS has not made FAPE available to Student. I have also found that the private placement of Student at Nonpublic School was appropriate. The Parents continued Student's enrollment at Nonpublic School after PCS stopped making FAPE available around November 1, 2022. Pursuant to 5A DCMR § 3039.3, I will require the SEA (OSSE) to reimburse Parents for the cost of Student's enrollment at Nonpublic School after November 1, 2022.

Because the 2022-2023 school year is now in its final quarter, I will also order OSSE to pay the cost of Student's enrollment at Nonpublic School through the end of the private school's regular 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.) The Parents are not entitled to tuition reimbursement for the period prior to PCS' effective disenrollment of Student on November 1, 2022.

Other Relief

When a school district denies a child a FAPE, the hearing officer has "broad discretion" to fashion an appropriate remedy. *See, e.g., Boose v. District of Columbia*, 786 F.3d 1054, 1056 (D.C. Cir. 2015). The DCMR provides that while a child with a disability is placed at a nonpublic school, the LEA shall maintain the capacity to serve the child at the LEA (*i.e.*, hold an open seat for the child) unless and until the child's parent enrolls the child in another LEA. *See* 5A DCMR § 3025.20(c). I have determined

in this decision that PCS denied the Student a FAPE by its effective disenrollment of Student on November 1, 2022. I will order PCS to restore Student's enrollment in the charter school, as a nonattending student, retroactive to the start of PCS' 2022-2023 school year.

ORDER

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

ORDERED:

1. PCS shall, within 5 school days of the date of this decision, reinstate Student's enrollment at the public charter school, as a nonattending student, retroactive to the start of the 2022-2023 school year;
2. Upon receipt of documentation of payment by the Parents as may be reasonably required, OSSE shall, without undue delay, reimburse the Parents their expenses heretofore paid for covered tuition and related expenses incurred for Student's enrollment at Nonpublic School since November 1, 2022. OSSE shall fund Student's covered enrollment expenses at Nonpublic School, not yet paid, for the remainder of the private school's 2022-2023 regular school year and
3. All other relief requested by the Petitioners herein is denied.

Date: April 25, 2023

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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