

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

OSSE  
Office of Dispute Resolution  
August 15, 2022

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PARENT, on behalf of STUDENT, <sup>1</sup>	)	Date Issued: August 15, 2022
	)	
Petitioner,	)	Hearing Officer: Peter B. Vaden
	)	
v.	)	Case No. 2022-0084
	)	
	)	Online Video Conference Hearing
DISTRICT OF COLUMBIA	)	
PUBLIC SCHOOLS,	)	Hearing Dates: July 6, 2022
	)	August 4 and 5, 2022
Respondent.	)	
	)	

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**HEARING OFFICER DETERMINATION**

**INTRODUCTION AND PROCEDURAL HISTORY**

This matter came to be heard upon the Administrative Due Process Complaint Notice filed by the Petitioner (the Parent or MOTHER) 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 Parent seeks reimbursement for private school expenses and compensatory education for her child from Respondent District of Columbia Public Schools (DCPS) on the grounds that DCPS allegedly denied the student a free appropriate public education (FAPE) by failing to offer appropriate Individualized Education Programs (IEPs) and educational placements in the 2021-2022 school year.

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<sup>1</sup> Personal identification information is provided in Appendix A.

Petitioner's Due Process Complaint in the present case was filed on May 9, 2022 and assigned to the undersigned hearing officer on May 10, 2022. The complaint named DCPS as Respondent. On May 19, 2022, DCPS convened a resolution session between the parties. No agreement was reached.

On May 16, 2022, Petitioner filed a motion for summary judgment which I denied by order issued May 23, 2022. In the order denying her motion for summary judgment, I ordered DCPS to promptly provide access to Petitioner's educational consultant to observe the Specific Learning Support program at CITY SCHOOL 2, which DCPS had proposed for Student.

On May 23, 2022, I convened a telephone prehearing conference with counsel to discuss the issues to be determined, the hearing date and other matters. The due process hearing date was set for July 11, 12 and 13, 2022. The May 23, 2022 prehearing order identified as issues whether DCPS denied Student a FAPE by failing to provide appropriate IEPs on February 5, 2018, April 20, 2018, October 29, 2021 and December 17, 2021. Subsequently, Petitioner withdrew her claims regarding the appropriateness of the 2018 IEPs. On June 10, 2022, I issued a revised prehearing order limiting the issues to the appropriateness of the October 29, 2021 and December 17, 2021 IEPs. The hearing dates were moved up to July 6 and 8, 2022.

The due process hearing was convened, as scheduled, on July 6, 2022. On July 8, 2022, Petitioner was unable to proceed because one of her expert witnesses was ill. At Petitioner's request, I continued the due process hearing to August 4 and 5, 2022 and

granted Petitioner's unopposed motion to extend the final decision due date from July 23, 2022 to August 19, 2022.

At the July 6, 2022 hearing, Petitioner, by counsel, made an oral motion to bar DCPS from proposing an educational placement or location of services for Student different from City School 2, which allegedly had been identified in a DCPS January 25, 2022 location of services letter. I denied the motion.

The due process hearing, which was closed to the public, was convened before the undersigned impartial hearing officer on July 6 and August 4-5, 2022. With the parent's consent, the hearing was held online and recorded by the hearing officer, using the Microsoft Teams video conference platform. The Parent appeared online for the hearing and was represented by PETITIONER'S COUNSEL. Respondent DCPS was represented by LEA REPRESENTATIVE and by DCPS' COUNSEL.

Petitioner's Counsel made an opening statement. DCPS waived making an opening. Mother testified and called as witnesses INDEPENDENT PSYCHOLOGIST, ACADEMIC THERAPIST, HEAD OF SCHOOL and EDUCATIONAL CONSULTANT. DCPS called as witnesses CASE MANAGER, COMPLIANCE MANAGER and PROGRAM DIRECTOR. Petitioner's Exhibits P-7 through P-9, P-16 through P-26, P-28, P-29, P-31, P-33 through P-48, P-51, P-52, P-61 through P-63, P-73, P-74 and P-77 through P-79 were admitted into evidence, including Exhibits P-8, P-9, P-16, P-17, P-33 through P-43, P-47, P-48, P-73, P-74, and P-77 through P-79 admitted over DCPS' objections. I sustained DCPS' objections to Exhibit P-27, P-58, P-59 and P-64 through P-72. DCPS'

Exhibits R-1 through R-7, R-9, R-10, R-18, R-20, R-22, R-24 through R-28, R-30 through R-32 and R-34 were admitted without objection. After the taking of the evidence was completed on August 5, 2022, counsel for the respective parties made oral closing arguments. The hearing officer granted counsel leave to submit citations to relevant authority on or before August 8, 2022. Counsel for both parties filed citation lists by email.

### **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 remaining for determination in this case, as set out in the June 10, 2022 Revised Prehearing Order, are:

- Whether DCPS denied Student a FAPE by failing to ensure that its October 29, 2021 IEP was appropriate for Student in that the IEP provided inappropriate/inadequate annual goals and insufficient Specialized Instruction Services; and
- Whether DCPS denied Student a FAPE by failing to ensure that its December 17, 2021 IEP, as amended on December 22, 2021, was appropriate for Student in that the IEP provided inappropriate/inadequate annual goals, insufficient Specialized Instruction Services, services and an inappropriate placement/location of services.

For relief in this case, the parent requests that the hearing officer,

- Determine that City School 2 is not an appropriate placement for this student and that PRIVATE SCHOOL 1 is appropriate;
- Order DCPS to fund Student's placement at Private School 1 beginning approximately February 15, 2022 through the end of the 2021-2022 school year;

- Order DCPS to reimburse the parent for all expenses related to Student’s placement, including transportation, at Private School 1 up until the date DCPS is required start funding the placement;
- Order DCPS to continue to fund Student’s placement at Private School 1 for the 2022-2023 school year;
- Order DCPS to fund any related services which Private School 1 recommends;
- Order that for so long as Student is making academic and social progress at Private School 1, DCPS will continue to fund the placement there until such time as the staff at Private School 1 believes that the student is ready to move to a less individualized program and
- Order DCPS to provide or fund compensatory education for the alleged denials of FAPE (a) as determined appropriate by the Hearing Officer, (b) based on a compensatory education study ordered by the Hearing Officer and/or (c) which will be reserved and determined, settled or litigated later.

### **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 Mother in the District of Columbia.

#### **Testimony of Mother.**

2. Student is eligible for special education as a student with Multiple Disabilities. Exhibit P-51.
3. Student attended City School 1, a DCPS public school, from the fall of 2015 (START GRADE) through January 2021, when the Mother unilaterally placed him/her at Private School 1. Exhibits P-19, P-45.
4. Student was initially evaluated for special education by DCPS in 2013 and

identified as a student with Developmental Delay. Student was reevaluated by DCPS in 2018 and found to meet the classification criteria for Multiple Disabilities: Other Health Impairment (OHI) due to Attention Deficit Hyperactive Disorder (ADHD) and Specific Learning Disability (SLD). Exhibit P-18.

5. For Student's 2018-2019, 2019-2020 and 2020-2021 school years, DCPS IEPs provided the following special education and related services:

<u>IEP Date</u>	<u>Specialized Instruction</u>	<u>Related Services</u>
April 20, 2018	Reading Outside General Education 4 hours/week	Speech-Language Pathology 120 min/month
	Written Expression Outside General Education 2 hours/week	Behavioral Support Services 2 hours/month
	Mathematics Outside General Education 4 hours/week	Occupational Therapy 120 min/month
March 1, 2019	Reading Outside General Education 4 hours/week; In General Education 30 min/week	Speech-Language Pathology 120 min/month
	Written Expression Outside General Education 2 hours/week	Behavioral Support Services 2 hours/month
	Mathematics Outside General Education 4 hours/week; In General Education 30 min/week	Occupational Therapy 120 min/month

Case No. 2022-0084  
Hearing Officer Determination  
August 15, 2022

January 15, 2020	Reading Outside General Education 4 hours/week; In General Education 30 min/week	Speech-Language Pathology 120 min/month
	Written Expression Outside General Education 2 hours/week	Behavioral Support Services 2 hours/month
	Mathematics Outside General Education 4 hours/week; In General Education 30 min/week	Occupational Therapy 120 min/month
	Specialized Instruction (undesignated) in General Education 2 hours/month	
January 13, 2021	Reading Outside General Education 4 hours/week; In General Education 30 min/week	Speech-Language Pathology 120 min/month
	Written Expression Outside General Education 2 hours/week	Behavioral Support Services 2 hours/month
	Mathematics Outside General Education 4 hours/week; In General Education 30 min/week	Occupational Therapy 90 min/month
	Specialized Instruction (undesignated) in General Education 2 hours/month	

March 31, 2021	Reading Outside General Education 4 hours/week; In General Education 30 min/week	Speech-Language Pathology 120 min/month
	Written Expression Outside General Education 2 hours/week	Behavioral Support Services 2 hours/month
	Mathematics Outside General Education 4 hours/week; In General Education 30 min/week	Occupational Therapy 90 min/month
	Specialized Instruction (undesignated) in General Education 2 hours/month	

Exhibits P-9, P-10, P-11, P-12, P-17.

6. Student is severely dyslexic. Testimony of Academic Therapist. In January 2021, DCPS SCHOOL PSYCHOLOGIST conducted a psychological triennial reevaluation of Student. Based on her assessments, the school psychologist reported, *inter alia*, that data obtained from the administration of the academic assessments combined with information from classroom observations, teachers, parent and student interviews and report cards indicated that Student demonstrated marked weakness in all the academic areas including reading, math and writing. Student lacked basic reading skills including decoding, vocabulary and sight words as well as reading comprehension. Student was performing on the Kindergarten reading level as measured by the Woodcock-Johnson IV achievement test (WJ-IV). Student's math performance was also comparable to his/her reading level. Student struggled with calculation, math fluency and solving math problems and fell well below grade level



expectation. According to the test results from the WJ-IV, he/she scored on the Kindergarten level on math. Student also struggled with spelling and forming sentences and performed very low in the writing test. Student's academic performance had posed a significant challenge for him/her to access grade level curriculum and Student continued to need very strong support to make academic progress. Student had been receiving ongoing interventions, consisted of specialized instruction in reading, math and writing with small group and one-on-one support, to address his/her areas of weakness. Nevertheless, Student's academic progress had been very slow and inconsistent as he/she continued to struggle significantly with retaining, processing and mastering the given information, which posed a challenge for him/her to access grade-level material. Student lacked confidence in his/her ability and always relied heavily on the teacher's support. Student's pattern of academic weakness was consistent with a specific learning disability, namely: a disorder in 1 or more of the basic psychological processes involved in understanding or in using language, spoken or written, which disorder may manifest itself in the imperfect ability to listen, think, speak, read, write, spell or do mathematical calculations. Student was diagnosed with ADHD when he/she was in the 2nd grade. He/she presented challenges with staying focused and lost concentration quickly. Additionally, Student constantly moved from his/her seat and appeared to be fidgety a lot. Social-emotional assessment as measured by the Conner-3 indicated significant elevated scores in the content areas of Inattention; Hyperactivity/Impulsivity; Learning Problems and Executive Functioning. Although

Student was taking medication and received behavioral support to address the behaviors associated with the ADHD, despite the interventions, Student's elevated scores on the Conner's scale, combined with the behavioral observations and interviews/reports, confirmed his/her ADHD diagnosis. The school psychologist determined that Student met the criterion indicated in IDEA 2004 and DCPS guidelines for a student suspected of having Other Health Impairment (*i.e.*, ADHD ). Exhibit P-7.

7. In June 2021, Independent Psychologist conducted a psychoeducational evaluation of Student. Independent Psychologist reported in her September 15, 2021 evaluation report, *inter alia*, that despite being a hardworking and well-behaved student with excellent school attendance, Student had made very minimal academic progress since kindergarten. Student's reading, writing and math skills were at a kindergarten level. Student's nonverbal reasoning and spatial visualization were low to below average. Deficits were evident in his/her processing speed, visual motor integration, and fine motor control. Significant weakness in word knowledge and word retrieval negatively affected Student's ability to convey his/her good knowledge. Student's brief auditory memory was low average, but as information increased in length and complexity, Student struggled to remember verbal information. Significant expressive and receptive language deficits were evident. Student had marked difficulty following multi-step directions and had particular difficulty comprehending sequencing words. Student's independent reading skills were at the pre-primer level. Due to Student's severe decoding deficits, he/she was unable to comprehend reading material in written

language. Student's handwriting was slow and immature. Student could not correctly write the alphabet because he/she continued to reverse letters. Student was able to spell very few words, beyond his/her own name. Student was unable to independently write single sentences that were coherent to others. For adaptive skills, Student had age appropriate self-care, health and safety skills and social skills, but had greater difficulties in the areas of communication, community use and functional academics. Despite having been provided special education services since age three, Student had made very minimal academic progress. Student had almost no independent reading or writing skills. Assessment results indicated the Student had severe impairment in language with global learning delays. Student exhibited severe deficits in orthographic processing and memory. Almost no words were immediately recognizable as sight words to Student. Independent Psychologist recommended in her report that children such as Student, with severe deficits in orthographic processing, require highly specialized, structured, and sequential reading instruction, involving intensive one-on-one, multi-sensory instruction. Independent Psychologist cautioned that without immediate and aggressive intervention, Student was at grave risk for serious lifetime consequences of being unable to read and write. Exhibit P-19.

8. The City School 1 multidisciplinary team (MDT) met on October 1 and October 29, 2021 to review Independent Psychologist's psychological evaluation report on Student. DCPS School Psychologist stated that she agreed with the independent assessment and recommended that Student would benefit from intensive specialized

instruction and interventions in reading, writing and mathematics. Student's IEP annual goals were updated. IEP special education and related services were left unchanged from the March 31, 2021 IEP except to eliminate the provision for 2 hours per month of undesignated (*i.e.*, not specified for reading math or written expression) Specialized Instruction in general education. Exhibits P-20, P-22, P-23.

9. On November 24, 2021, Petitioner, by Petitioner's Counsel, filed a prior due process complaint on behalf of Student (Case No. 2021-0191). In the December 16, 2021 Prehearing Order in Case No. 2021-0191, this hearing officer memorialized the following issues for determination:

Did DCPS deny Student a FAPE by a failure to evaluate in all areas of suspected disabilities by the 2017-2018 school year, specifically for Assistive Technology, Occupational Therapy, Behavior (Functional Behavior Assessment) and Speech and Language?

Did DCPS deny Student a FAPE by a failure to develop appropriate IEPs from the start of the 2017-2018 school year, in that the IEPs lacked appropriate annual goals in Reading, Math and Written Expression, and provided insufficient hours of specialized instruction both inside and outside of the general education setting?

Did DCPS deny Student a FAPE by a failure to appropriately revise Students' IEPs from the start of the 2017-2018 school year in light of Student's alleged lack of progress?

Hearing Officer Notice.

10. At a December 6, 2021 resolution session meeting (RSM), DCPS proposed to increase Student's special education services to 20 hours per week in a Specific Learning Support (SLS) program. No agreement was reached at the meeting. Exhibit

R-3.

11. On December 17, 2021, DCPS convened an IEP team meeting, where Student's special education services were changed to 20 hours per week in a SLS classroom. The location of services was not initially identified. Exhibits P-24, R-5.

12. On or about January 25, 2022, DCPS issued notice to Mother that Student's new location of services would be the SLS program at City School 2. Exhibit P-44.

13. On or about February 1, 2022, Petitioner, by counsel, provided written notice to DCPS that the parent believed that DCPS was not currently providing an appropriate placement for Student and had not proposed an appropriate placement. The notice informed DCPS that the parent intended to unilaterally place Student at Private School 1 and would be requesting reimbursement from DCPS for fees and costs associated with the unilateral placement. Exhibit P-45.

14. On or about January 31, 2022, Petitioner withdrew without prejudice her November 24, 2021 due process complaint in Case No. 2021-0191. Hearing Officer Notice.

15. On February 17, 2022, Petitioner, by Petitioner's Counsel, filed a second due process complaint on behalf of Student (Case No. 2022-0065). In the March 16, 2022 Prehearing Order in Case No. 2022-0065, the hearing officer memorialized the following issues for determination:

Whether DCPS denied Student a FAPE by failing to ensure that its February 10,

2017 IEP and May 11, 2017 amended IEP were appropriate for Student in that the IEPs provided inappropriate/inadequate annual goals, insufficient Specialized Instruction Services and insufficient Speech and Language services;

Whether DCPS denied Student a FAPE by failing to ensure that its February 5, 2018 IEP was appropriate for Student in that the IEP provided inappropriate/inadequate annual goals, insufficient Specialized Instruction Services, insufficient Speech and Language services and insufficient Behavioral Support Services;

Whether DCPS denied Student a FAPE by failing to ensure that its April 20, 2018 IEP was appropriate for Student in that the IEP provided inappropriate/inadequate annual goals, insufficient Specialized Instruction Services, insufficient Speech and Language services, insufficient Behavioral Support Services and insufficient Occupational Therapy services;

Whether DCPS denied Student a FAPE by failing to ensure that its March 19, 2019 IEP was appropriate for Student in that the IEP provided inappropriate/inadequate annual goals, insufficient Specialized Instruction Services, insufficient Speech and Language services, insufficient Behavioral Support Services and insufficient Occupational Therapy services;

Whether DCPS denied Student a FAPE by failing to ensure that its January 15, 2020 IEP was appropriate for Student in that the IEP provided inappropriate/inadequate annual goals, insufficient Specialized Instruction Services, insufficient Speech and Language services, insufficient Behavioral Support Services and insufficient Occupational Therapy services;

Whether DCPS denied Student a FAPE by failing to ensure that its January 13, 2021 IEP was appropriate for Student in that the IEP provided inappropriate/inadequate annual goals, insufficient Specialized Instruction Services, insufficient Speech and Language services, insufficient Behavioral Support Services and insufficient Occupational Therapy services;

Whether DCPS denied Student a FAPE by failing to ensure that its March 31, 2021 IEP was appropriate for Student in that the IEP provided inappropriate/inadequate annual goals, insufficient Specialized Instruction Services, insufficient Speech and Language services, insufficient Behavioral Support Services and insufficient Occupational Therapy services;

Whether DCPS denied Student a FAPE by failing to ensure that its October 6,

2021 IEP was appropriate for Student in that the IEP provided inappropriate/inadequate annual goals, insufficient Specialized Instruction Services, insufficient Speech and Language services, insufficient Behavioral Support Services and insufficient Occupational Therapy services.

At the start of the May 3, 2022 due process hearing for Case No. 2022-0065, the hearing officer granted, subject to conditions, the request of Petitioner's Counsel to withdraw Petitioner's complaint without prejudice. DCPS had opposed allowing this second withdrawal unless the complaint case were dismissed with prejudice. Hearing Officer Notice.

16. In February 2022, Student began attending Private School 1 upon Mother's unilateral placement. Private School 1, located in suburban Virginia, serves students in kindergarten through 8<sup>th</sup> grade. Head of School initially started a half-day program to offer the Orton-Gillingham instructional approach to children in public schools with reading/writing challenges. When public schools were closed to in-person learning due to the Coronavirus pandemic, Head of School opened nonpublic school locations in Northern Virginia. The Private School 1 location, attended by Student, opened in September 2021. Testimony of Head of School.

17. On or about January 2022, Petitioner's Counsel contacted Private School 1 about admitting Student. Although Student had the biggest reading deficits ever seen by Head of School, she did not see a reason in Student's psychological assessments for why Student should not be able to read. Head of School agreed to admit Student to "give [Student] a shot" to see how Student responded to their program. Testimony of Head

of School.

18. There are about 80 Student's at Private School 1 in Grades K through 8. The population is divided equally among students with learning disabilities (1/3), typically developing students (1/3) and high-achieving students, who may also have a disability (1/3). There are 13 teachers on the staff. Class size at Private School 1 is limited to 9 students. It is a fully-inclusive program, meaning that students with disabilities are taught with their typically developing peers for most of the day.

Testimony of Head of School.

19. At Private School 1, Student received 5 hours per week (plus 3 hours one-on-one) of Orton-Gillingham based interventions. For the Orton-Gillingham reading instruction and for math class, Student was placed with classes of much younger students. Student did fine in the class with the younger children. For the rest of the school day, Student was with other students closer to Student's expected grade level.

Testimony of Head of School.

20. When Student arrived at Private School 1 in February 2022, he/she did not recognized all of the letters of the alphabet and the corresponding letter sounds. By the end of the school year, Student had advanced to start of 1<sup>st</sup> grade reading level.

Testimony of Head of School.

21. Student was not charged tuition for the 2021-2022 school year at Private School 1. That was because Head of School was not secure that Student would be able to succeed at the school. Head of School decided to see if it worked out for Student at the



private school, and if so, to charge usual tuition for the 2022-2023 school year.

Testimony of Head of School, Testimony of Mother.

22. Private School 1 does not hold a certificate of approval (COA) from the D.C. Office of the State Superintendent of Education (OSSE). The base tuition at Private School 1 is \$29,500 for the regular school year and \$1,300 for school summer camp.

Testimony of Head of School.

23. At the May 19, 2022 RSM for the present case, LEA Representative stated that the DCPS team believed that Student's least restrictive environment (LRE) was a nonpublic day school. Resolution Specialist stated that DCPS has sent referral packets to 13 nonpublic schools which hold OSSE COAs. Exhibit P-49.

24. DCPS convened an IEP meeting for Student on June 3, 2022. Mother and Petitioner's Counsel attended the meeting. LEA Representative stated that the hours of special education services on Student's IEP were being increased from 20 to 28.5 hours per week, to reflect a nonpublic placement. The resulting June 3, 2022 IEP provides that in order for Student to learn and develop academic skills, he/she needs specialized instruction throughout the day, rather than time in the general education classroom, and that he/she benefits from access to special education methods and materials consistently throughout his/her time in school. Exhibit P-51. The appropriateness of the June 3, 2022 IEP is not at issue in this case.

25. Following the June 3, 2022 IEP meeting, OSSE's Nonpublic Placement Specialist sent out referrals for Student to a number of private nonpublic day schools,

including, *inter alia*, Private School 2, Private School 3, Private School 4, Private School 5, Private School 6, Private School 7, Private School 8, Private School 9 and Private School 10. Testimony of Resolution Specialist, Exhibits R-30, R-31 and R-32. When the private schools reached out to Mother to schedule intake interviews, Mother referred the schools to Petitioner's Attorney. Mother did not participate in interviews with any of the referral private schools. Testimony of Resolution Specialist.

26. On or about August 3, 2022, while the due process hearing was underway, Private School 2 issued an acceptance letter for Student. As of August 4, 2022, OSSE was prepared to advise DCPS that Private School 2 would be the designated location of services for Student for the 2022-2023 school year. Testimony of Resolution Specialist. The appropriateness of OSSE's or DCPS' proposed placement of Student at Private School 2 is not at issue in this case.

### **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 Petitioner 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 Petitioner 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

This is the third due process proceeding brought by the Parent for Student in the 2021-2022 school year. The Parent withdrew without prejudice the two prior complaints. The issues for determination and relief requested have evolved considerably since the Parent filed her initial prior due process complaint on November 24, 2021. In the present proceeding, the Parent alleges that DCPS developed inappropriate IEPs for Student in October and December 2021 and that DCPS proposed an inappropriate educational placement for Student in December 2021. For relief, the Parent seeks reimbursement from DCPS for her unilateral placement of Student at Private School 1 in February 2022, an order for DCPS to fund Student's continued placement at Private School 1 and a compensatory education award.

### Appropriateness of October 29, 2021 IEP

U.S. District Judge Rudolph Contreras explained in *Middleton v. District of Columbia*, 312 F. Supp. 3d 113 (D.D.C. 2018), how a court or 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 this case, Petitioner has not raised a procedural compliance objection.

Therefore, I turn to the substantive prong of the *Rowley* IEP inquiry: Was the October 29, 2021 IEP appropriate for Student? In *Endrew F. ex rel. Joseph F. v. Douglas Cty. Sch. Dist. RE-1*, 137 S. Ct. 988, 998 (2017), the U.S. Supreme Court elaborated on the standard, first enunciated in *Rowley*, for what constitutes an appropriate IEP under the IDEA:

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

*Endrew F.*, 137 S.Ct. at 1002. *See, also, Z. B. v. District of Columbia*, 888 F.3d 515 (D.C.

Cir. 2018). At the due process hearing, the Parent made a *prima facie* showing that the IEPs at issue in this case were not appropriate for Student. Therefore, DCPS holds the burden of persuasion as to the appropriateness of its IEPs for Student and proposed educational placements.

Independent Psychologist reported in her September 15, 2021 psychological evaluation report that, despite being a hardworking and well-behaved student with excellent school attendance, Student, then completing EVALUATION GRADE, had made very minimal academic progress in the years since kindergarten. Student had almost no independent reading or writing skills. His/her independent reading was at the pre-primer level. Student could not correctly write the alphabet and was able to spell very few words, beyond his/her own name. Independent Psychologist cautioned that without immediate and aggressive intervention, Student was at grave risk for serious lifetime consequences of being unable to read and write.

At the next IEP team meeting in October 2021, DCPS' school psychologist told the IEP team that she agreed with Independent Psychologist's assessment of Student. Notwithstanding, when the City School 1 IEP team met on October 29, 2021, the team reduced the Student's special education services from 11½ hours per week in the March 31, 2021 IEP to 11 hours per week. Case Manager testified that at the time of the October IEP team meeting, she did not know Student very well and did not then have a sense that Student needed a more restrictive setting. However, while Student was new to Case Manager's case load, the child had been attending City School 1 since

kindergarten and, as Case Manager testified, had not been making significant progress.

Petitioner's expert, Educational Consultant, opined credibly that Student should be a functional reader and has the potential to read and do math. In light of Independent Psychologist's undisputed evaluation findings that Student had made very minimal academic progress at City School 1 since kindergarten, and the opinion of Educational Consultant that the child should be a functional reader, I find that DCPS has not offered "a cogent and responsive explanation" for the decision of the October 29, 2021 IEP team not to increase Student's special education services and not to change Student's educational placement. I conclude that DCPS has not met its burden of persuasion that the October 29, 2021 IEP was reasonably calculated to enable Student to make progress appropriate in light of his/her circumstances. *See Endrew F., supra.*

Appropriateness of December 17, 2021 IEP

After the Parent brought filed her first due process complaint on behalf of Student on November 24, 2021, the City School 1 IEP team met on December 17, 2021 and increased Student's special education services to 20 hours per week and changed his/her educational placement to a Specific Learning Support (SLS) classroom in a different DCPS school.

In her September 15, 2021 psycho-educational evaluation report, Independent Psychologist had recommended that Student needed a fully self-contained special education placement with teachers who have experience working with children with moderate to severe language-based learning disabilities. She highly recommended a

multi-sensory approach such as Orton-Gillingham, Wilson Reading Program, Phono-Graphix Reading Program or Lindamood Bell. Although DCPS School Psychologist agreed with Independent Psychologist's evaluation, the December 17, 2021 IEP specified that Student would continue to be placed with non-disabled peers for specials and electives classes. It was not until DCPS revised Student's IEP again in June 2022, after the Parent had brought her third due process complaint, that the IEP team acknowledged that Student needed specialized instruction throughout the day and that Student benefitted from access to special education methods and materials consistently throughout his/her time in school.

I find that DCPS has not offered a convincing explanation for the decision of the December 12, 2021 IEP team not to provide Student a full-time self-contained special education placement throughout the school day. As with the October 29, 2021 IEP, I conclude that DCPS has not met its burden of persuasion that the December 12, 2021 IEP was reasonably calculated to enable Student to make appropriate progress.

On or about January 25, 2022, DCPS identified the SLS program at City School 2 as the site where the December 12, 2021 IEP would be implemented. The Parent contends that City School 2 was an inappropriate placement/location of services. Because Student never attended City School 2 and because I have determined that DCPS did not establish that the December 12, 2021 IEP was appropriate for Student, I do not reach the issue of whether City School 2 was an appropriate location to implement the IEP.

## REMEDIES

### Reimbursement for Private School Expenses

In this case, the Parent seeks reimbursement from DCPS for her expenses for Student to attend Private School 1 beginning in February 2022. Private School 1 did not charge tuition or other fees for Student in the 2021-2022 school year. However, Mother testified that she drove Student back and forth between their home in the District of Columbia and the private school in Virginia. *Cf. K.W. v. Dist. of Columbia*, 385 F. Supp. 3d 29, 44 (D.D.C. 2019) (District ordered to reimburse family for education related travel expenses.) Mother may, therefore, still assert a reimbursement claim for Student's private school transportation expenses.

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 reimbursement to parents for private school expenses under certain circumstances:

School districts must "reimburse Parent 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 Parent 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). See also, *N.G. v. E.L. Haynes Pub. Charter Sch.*, No. 20-CV-1807-TJK-ZMF, 2021 WL



3507557 at \*14 (D.D.C. July 30, 2021). These private school expenses reimbursement criteria are often cited as the *Burlington-Carter* test.

Applying the *Burlington-Carter* test to this case, the first factor in deciding whether DCPS must reimburse the Parent for Student's school transportation expenses is whether DCPS failed to offer Student a FAPE in a public or private school. In this decision, I have determined that DCPS did not meet its burden of proof that the October 29, 2021 IEP or the December 17, 2021 IEP was appropriate for Student. I find, therefore, that DCPS failed to offer Student a FAPE with either IEP.

I turn, next, to the other two requirements for tuition reimbursement pronounced in the *Leggett* decision – that the private school chosen by the Parent, Private School 1, was proper and that the Parent did not otherwise act unreasonably. Analogizing to the standard for IEP appropriateness from the U.S. Supreme Court's *Rowley* decision, the D.C. Circuit held in *Leggett* that for the private school chosen by the Parent to be proper, it need be “reasonably calculated to enable the child to receive educational benefits.” *Leggett, supra*, at 71. 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 for reimbursement purposes 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. . . . *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, Parent 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 guidance in the *Leggett* and *L.H.* decisions, I conclude that for the Parent’s private school placement to be proper, the Parent must show that her school choice was reasonably calculated to enable the child to make progress appropriate in light of the child’s circumstances.

Mother has met that burden in this case. The hearing evidence establishes that Private School 1 is a school serving children in Grades K through 8. The population of about 80 students is divided equally among students with learning disabilities (1/3), typically developing students (1/3) and high-achieving students, who may also have a disability (1/3). There are 13 teachers on the staff. Class size at Private School 1 is limited to 9 students. It is a fully-inclusive program, meaning that students with disabilities are taught with their typically developing peers for most of the day.

At Private School 1, Student received 5 hours per week (plus 3 hours one-on-one) of Orton-Gillingham based reading interventions. Because of Student’s extreme reading deficit, he/she was placed with classes of much younger students for the Orton-Gillingham reading instruction and for math class. Student did fine with the younger children. For the rest of the school day, Student was with other students closer to

Student's expected grade.

The evidence establishes clearly that Private School 1 provided educational benefit to Student. By the accounts of Mother, Head of School and Educational Consultant, Student made academic progress at Private School 1, notably in reading. When Student arrived at the private school in February 2022, he/she did not recognize all of the letters of the alphabet and the corresponding letter sounds. By the end of the school year, Student had advanced in reading to start of 1<sup>st</sup> grade level. Student and Mother both have said that he/she is happy and learning at Private School 1.

At Private School 1, Student did not receive the related services specified on his/her DCPS IEPs, namely Speech-Language Pathology, Behavioral Support Services or Occupational Therapy. But Head of School and Educational Consultant testified that Student was making progress in academics without those services. At least in the educational environment at Private School 1, it appears that the IEP related services were not necessary to permit Student to benefit from instruction. *See L.H., supra.*<sup>2</sup>

Private School 1 is not on OSSE's "approved list" of nonpublic schools for District of Columbia children. But the private school need not meet the full public school standards. *See* 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

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<sup>2</sup> The hearing officer takes no position on whether Student requires related services on his/her IEP.

*Florence Cnty. Sch. Dist. Four v. Carter*, 510 U.S. 7 at 13-14, 114 S. Ct. 361, 126 L. Ed. 2d 284 (1993)). I find that the Parent has established that her choice of Private School 1 for Student was reasonably calculated to enable the child to make appropriate progress, and was therefore proper under the *Leggett/L.H.* standards.

Lastly, the *Leggett* decision requires that the “equities weigh in favor of reimbursement — that is, the Parent did not otherwise act ‘unreasonabl[y].” *Leggett*, 793 F.3d at 67. Reimbursement may be reduced or denied if the Parent failed to notify school officials of her intent to withdraw the child or otherwise acted unreasonably. *Leggett, supra*, 793 F.3d at 63. On February 1, 2022, the Parent gave timely notice to DCPS that she did not believe that DCPS had offered Student appropriate IEPs or an appropriate placement, that Student would attend Private School 1 and that the Parent would be requesting reimbursement from the District for all fees and costs associated with the unilateral placement. *See* 34 C.F.R. § 300.148(d).<sup>3</sup>

The annual tuition cost at Private School 1 is about \$29,300. DCPS has not shown that this rate is out of line with other private day schools in the region. In any case, Private School 1 did not charge tuition fees for Student during the 2021-2022 school year. Nor has DCPS shown that the Parent otherwise acted unreasonably in unilaterally placing Student at Private School 1. I find that under the *Leggett* criteria

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<sup>3</sup> The cost of reimbursement may be reduced or denied if at the most recent IEP Team meeting that the Parent attended prior to removal of the child from the public school, the Parent 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.

for reimbursement, Private School 1 was proper and appropriate for Student. DCPS must reimburse the Parent for private school expenses she incurred for Student to attend Private School 1 from February 2022 through the end of the 2021-2022 school year. Since the Parent was not charged for Student's tuition at Private School 1, the only potentially reimbursable costs identified by Petitioner were Mother's expenses for driving Student to and from school.

Prospective Placement at Private School 1

As part of her prayer for relief in this case, the Parent requests the hearing officer to order DCPS to fund Student's placement at Private School 1 for the 2022-2023 school year and until such time as the staff at Private School 1 believes that the Student is ready to move to a less individualized program. A hearing officer can remedy the denial of a FAPE by ordering prospective relief. *See, e.g., Collette v. Dist. of Columbia*, No. CV 18-1104 (RC), 2019 WL 3502927, at \*14 (D.D.C. Aug. 1, 2019). In this case, however there has been no showing that DCPS has denied Student a FAPE for the 2022-2023 school year. Following a June 3, 2022 IEP team meeting, which Mother and Petitioner's Counsel attended, DCPS offered a revised IEP for Student which provided for a full-time nonpublic placement. On or about August 3, 2022, while the due process hearing was underway, Private School 2 issued an acceptance letter for Student. As of August 4, 2022, OSSE was prepared to advise DCPS that Private School 2 would be the designated location of services for Student for the 2022-2023 school year.

As set forth in the June 10, 2022 revised prehearing order, the issues before the

hearing officer are whether DCPS' October 29, 2021 and the December 22, 2021 IEPs were inappropriate for Student. (As explained above, I do not reach the separate issue of whether City School 2 was a suitable location to implement the December 22, 2021 IEP.) Whether DCPS denied Student a FAPE for the upcoming 2022-2023 school year, with its June 3, 2022 IEP and proposed placement, are not issues before me.<sup>4</sup> Therefore, prospective placement at Private School 1 for the 2022-2023 school year is not an available remedy in this case.

#### Compensatory Education

Lastly, Petitioner seeks a compensatory education award for Student for the denials of FAPE in this case. When a hearing officer finds a denial of FAPE she has "broad discretion to fashion an appropriate remedy, which can go beyond prospectively providing a FAPE, and can include compensatory education. . . . [A]n award of compensatory education must be reasonably calculated to provide the educational benefits that likely would have accrued from special education services the school district should have supplied in the first place." *B.D. v. District of Columbia*, 817 F.3d 792, 797-98 (D.C. Cir. 2016) (internal quotations and citations omitted.)

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<sup>4</sup> When it was learned from Resolution Specialist's testimony at the second day of the due process hearing that Private School 2 had accepted Student and would be identified as Student's location of services for the 2022-2023 school year, I allowed the parties to offer additional evidence on the appropriateness of Private School 2 for Student. DCPS maintained its objection to my considering the appropriateness of the June 3, 2022 IEP and placement. Upon review of the case record, I conclude that the appropriateness of the June 3, 2022 IEP and the possible placement of Student at Private School 2 are not issues before me in this proceeding.

In this decision, I have found that DCPS denied Student a FAPE by providing inappropriate IEPs on October 29, 2021 and December 17, 2021. Based on the recommendations in Independent Psychologist's September 15, 2021 comprehensive psychological evaluation report, with which the DCPS school psychologist agreed, as well as the June 3, 2022 decision by the DCPS IEP team that Student required a full-time placement at a nonpublic special education day school, I find that in the October 29, 2021 and December 17, 2021 IEPs, DCPS should have offered Student educational placement in a full-time nonpublic special education day school. These are the special education services DCPS "should have supplied in the first place."

Petitioner's compensatory education witness, Academic Therapist, recommended that Student be provided, as compensatory education, 4 years of instruction, by a certified dyslexia specialist instruction, for 5 hours per week (1 hour per day). Assuming a 36-week school year, this amounts to approximately 180 hours of instruction per school year. Academic Therapist's recommendation was based on the premise that Student had been denied a FAPE for "several years." However, in this proceeding, the Parent only claimed that DCPS denied Student a FAPE with the October 29, 2021 and December 17, 2021 IEPs. The period of harm extended from the end of October 2021 until on or about February 15, 2022, when Mother unilaterally placed Student at Private School 1 – a period of about 3 school months. Working from the recommendation of Academic Therapist, and accounting for the much shorter period of harm established in this case, I will award Student, as compensatory education, 60 hours of instruction by a

dyslexia specialist.

**ORDER**

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

**ORDERED:**

1. Upon receipt of documentation as may be reasonably required, DCPS shall, without undue delay, reimburse the Parent for covered transportation expenses incurred for Student's enrollment at Private School 1 from February 2022 through the end of the 2021-2022 school year;
2. As compensatory education for the denials of FAPE found in this decision, DCPS shall promptly issue funding authorization to the parent for Student to receive 60 hours of 1:1 instruction by a qualified dyslexia specialist. If these services are provided outside the home, DCPS shall also fund reasonable transportation expenses for Student to attend this programming;
3. All other relief requested by the Petitioner herein is denied, without prejudice to any claims as to the inappropriateness of IEPs developed or educational placements proposed after the due process complaint in this case (Case No. 2022-0084) was filed.

Date: August 15, 2022

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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