

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

PARENTS, on behalf of STUDENT,¹

Date Issued: December 4, 2020

Petitioners,

Hearing Officer: Peter B. Vaden

v.

Case No: 2020–0170

DISTRICT OF COLUMBIA
PUBLIC SCHOOLS,

Online Video Conference Hearing

Respondent.

Hearing Date: November 30, 2020

HEARING OFFICER DETERMINATION

INTRODUCTION AND PROCEDURAL HISTORY

This matter came to be heard upon the Administrative Due Process Complaint Notice filed by the parents, Petitioners, under the Individuals with Disabilities Education Act, as amended (the IDEA), 20 U.S.C. § 1400, *et seq.*, and Title 5-E, Chapter 5-E30 of the District of Columbia Municipal Regulations (“D.C. Regs.”). In this proceeding, Petitioners allege that Respondent District of Columbia Public Schools (DCPS) has denied Student a free appropriate public education (FAPE) by not implementing the requirement of Student’s Individualized Education Program (IEP) for a dedicated aide during the COVID-19 school closings. For the 2020-2021 school year, Petitioners have unilaterally obtained dedicated aide services for Student and they seek reimbursement from DCPS for their expenses for the aide.

¹ Personal identification information is provided in Appendix A.

Petitioners' Due Process Complaint, filed on September 24, 2020, named DCPS as respondent. The undersigned hearing officer was appointed on September 25, 2020. On October 7, 2020, the parties met for a resolution session and were unable to resolve the issues in dispute. On October 15, 2020, I convened a telephone prehearing conference with counsel to discuss the issues to be determined, the hearing date and other matters. My final decision in this case is due by December 8, 2020.

On October 19, 2020, Petitioners filed a motion for Pre-Hearing Summary Decision or, in the alternative, for Stay Put Relief. In a decision and order issued on November 3, 2020, I denied Petitioners' motion.

Due to the closing of the hearing rooms at the Office of Dispute Resolution in the wake of the COVID-19 virus outbreak, the due process hearing was held online and recorded, using the Microsoft Teams video conference platform. The hearing, which was closed to the public, was convened before the undersigned impartial hearing officer on November 30, 2020. FATHER appeared online for the hearing and the parents were represented by PETITIONERS' COUNSEL. Respondent DCPS was represented by LEA REPRESENTATIVE and by DCPS' COUNSEL.

Counsel for the respective parties made opening statements. Petitioners called as witnesses Father, AIDE A, and CLINICAL SUPERVISOR. DCPS called LEA REPRESENTATIVE as its only witness. Petitioners re-called Father as a rebuttal witness. Petitioners' Exhibits P-1 through P-16 and DCPS' Exhibits R-10, R-16 through R-19, R-23, R-26 through R-28 and R-31 were all admitted into evidence without

objection. DCPS did not offer into evidence the remaining exhibits it had provided with its 5-day disclosures.

At the conclusion of Petitioners' case-in-chief, DCPS' Counsel made an oral motion for a directed finding in its favor that Petitioners had not made a *prima facie* showing that DCPS has not provided Student a dedicated aide and that DCPS has not denied Student a FAPE. I denied the motion in part – that Petitioners' had not made a *prima facie* showing of DCPS' failure to provide the dedicated aide – and I took the remainder of the motion under advisement.

After the taking of the evidence, counsel for the respective parties made oral closing arguments. There was no request to file post-hearing briefs. On November 30, 2020, counsel for each party submitted by email citations to authority, which they deemed relevant.

JURISDICTION

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

ISSUES AND RELIEF SOUGHT

The issues for determination, as certified in the October 27, 2020 Second Amended Prehearing Order, are as follows:

1. Whether DCPS denied the student FAPE by failing to provide for an in-person dedicated aide in the 2020-2021 school year, consistent with Student's IEP, during the school closings due to the Coronavirus pandemic;
2. Whether DCPS is required to reimburse the parents for the cost of a dedicated

aide in the 2020-2021 school year for the duration of distance learning and until such time that Student returns to school with an in-person aide provided in the classroom, consistent with the IEP.

For relief, Petitioners request,

- A finding and Declaratory Judgment that DCPS denied the student a FAPE in the 2020-2021 school year for the reasons stated in the complaint;
- An order directing DCPS to reimburse the parents for the cost of all privately acquired dedicated aide services necessary to implement Student’s IEP for the 2020-2021 school year;
- An order directing DCPS to provide, fund or reimburse the cost of a dedicated aide for the 2020-2021 school year until such time that students return to in-school and in-class instruction and an aide is provided in the classroom setting.

FINDINGS OF FACT

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

1. Student, an AGE child, resides with parents in the District of Columbia.

Testimony of Father.

2. Student has been determined eligible for special education by DCPS under the Autism Spectrum Disorder (ASD) disability classification. With respect to how Student’s disability affects Student’s access to the general education curriculum, Student’s October 20, 2020 IEP states that Student presents with communication and social delays that impact Student’s ability to follow directions, attend, and be available for learning; that Student needs redirection to the task and to be taught specific strategies on how to show knowledge; that Student’s communication deficits prohibit

Student from progressing at the same rate as general education peers and that Student needs modifications of work in the form of visual models and reduced assignments.

Exhibit P-6. Student is considered a high-functioning autistic child. Student is able to function and to communicate. Student engages in a significant amount of self-stimulatory behaviors, as well as a lot of noncompliant behaviors such as running away and melt-downs. Testimony of Clinical Supervisor.

3. Student has been enrolled in CITY SCHOOL, a DCPS public school since the 2018-2019 school year. Student is currently in GRADE. Testimony of Father.

4. Student's November 12, 2019 City School IEP provided for Student to receive 3 hours per week of Specialized Instruction, outside general education, in reading and math, and 7 $\frac{1}{3}$ hours per month, total, of related services in Speech-Language Pathology, Occupational Therapy and Behavioral Support Services. Exhibit P-3.

5. The November 12, 2019 IEP provided that Student required the support of a dedicated aide for 7 hours per day in the general education setting. Exhibit P-3. The stated justification for the dedicated aide was that Student's autism causes Student to not be aware of safety concerns. Therefore, Student does not understand that running away is not safe and needs someone to watch Student to keep Student safe and that Student needs prompting and reminders of the daily schedule, classroom work and classroom rules. Exhibit P-4.

6. DCPS schools, including City School, have been closed since March 16,

2020 to help mitigate the spread of COVID-19 pandemic. Since spring 2020, DCPS has offered distance learning to DC resident children. Hearing Officer Notice. At the time schools closed, Student was progressing on all of Student's IEP annual goals, except for a behavioral goal which had not yet been introduced. Exhibit R-28.

7. Since the closing of DCPS schools, DCPS has not provided Student a dedicated aide. Beginning July 13, 2020, Mother communicated with City School by email to ask whether Student's dedicated aide would be able to come to the family's home for when Student was doing distance learning. City School staff responded that they were waiting for more information from DCPS' central office. On July 30, 2020, Mother wrote City School staff by email seeking to confirm that Student's dedicated aide would be able to come to the family's home for virtual learning. Mother wrote that she had spoken with Aide A and he was comfortable and willing to come to the parents' home. On September 10, 2020 Mother wrote City School staff to request that DCPS provide an in-person dedicated aide, as a "virtual aide" could not provide the services in a way that would allow Student to access classroom instruction. Mother wrote that Student required an adult's physical prompting directly next to Student or Student would simply leave the virtual school setting. Mother notified City School that the parents had placed Student in an ABA center for Student to access instruction and that the parents would seek reimbursement from DCPS for all out-of-pocket expenses that they incurred to provide the 1:1 dedicated aide support that Student required. On November 18, 2020, the special education coordinator at City School informed the

parents by email that DCPS' Central Office had assigned a new dedicated aide for Student and that the dedicated aide services would be provided virtually. Exhibit P-11.

8. On September 10, 2020, DCPS provided an Individualized Distance Learning Plan (IDL) for Student to communicate how the supports and services outlined in Student's IEP would be delivered during remote learning while schools were closed. The IDL purported to outline how Student's IEP specialized instruction and related services would be provided during the period of virtual learning. The IDL stated that Student requires dedicated aide support for IEP reading, math and cognitive or adaptive functioning goals. The IDL states that it is based on Student's current IEP and does not take the place of the annual IEP. Exhibit P-5.

9. On October 28, 2020, Student's City School IEP team conducted the annual review of Student's IEP. Annual IEP goals were updated. The October 28, 2020 IEP reduced Student's Specialized Instruction Services to 2 hours per week outside general education, and reduced related services to 5½ hours per month. The October 28, 2020 IEP continued to provide for Student to receive the support of a dedicated aide for 7 hours per day in the general education setting. Exhibit P-6. (The appropriateness of Student's DCPS IEP's is not at issue in this proceeding.)

10. Since the fall of 2018, AUTISM CENTER has provided 10 hours per week of Applied Behavior Analysis (ABA) therapy to Student, after school at Student's home. The cost for the ABA therapy is paid by the parents' insurance provider. Testimony of Father, Testimony of Clinical Supervisor.

11. Aide A has been working with Student for around 1½ years. Before the COVID-19 school closing, Aide A worked with Student in the classroom at City School. At that time, Aide A was not a DCPS employee but worked for a DCPS private contractor. Testimony of Aide A, Testimony of LEA Representative. Prior to the start of the 2020-2021 school year, the parents reached out to Autism Center for educational support for Student, specifically for a dedicated aide to support Student during virtual learning. Autism Center hired Aide A as a part-time employee and provided a room at Autism Center for Student to participate in DCPS' distance learning program, supported at all times by Aide A. Autism Center charges the parents \$50 per hour for this service Testimony of Clinical Supervisor. Aide A has worked with Student at Autism Center since the start of the 2020-2021 school year. Typically, Aide A is with Student from 9:00 a.m. to 3:15 p.m. on school days, 6.25 hours per day, including the lunch period. Testimony of Aide A.

12. Student needs direct adult support for virtual learning. If the dedicated aide were not there, Student would log off the school program and do other things. If the dedicated aide were not there, Student would try to run out of the services room. Testimony of Aide A, Testimony of Father, Testimony of Clinical Supervisor. In an observation conducted by Clinical Supervisor on September 16, 2020, Student was logged on to the DCPS virtual morning meeting at 9:00 a.m. by an adult, who then left the room but could still see what Student was doing. During the morning meeting, Student did not attend to the online teacher, but played with settings in the Zoom app,

constantly muting and un-muting the microphone and turned the computer camera on and off multiple times. Student logged off the Zoom platform for distance learning twice, after being directly told that the class would be staying on the platform. After logging off, Student went directly to another computer app and began playing games. Verbal directions made to Student to log back in were not effective and the adult had to return to the room herself, to log Student back in to the online class. During this observation, Student also left the room twice, which required the adult to redirect Student back to the room. Testimony of Clinical Supervisor, Exhibit P-14.

13. DCPS obtains dedicated aide services for some of its students through a private contractor. For these dedicated aide services, DCPS currently pays \$35.00 per hours. Testimony of LEA Representative.

CONCLUSIONS OF LAW

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

Burden of Proof

As provided in the D.C. Special Education Student Rights Act of 2014, the party who filed for the due process hearing, the Petitioners in this case, shall bear the burden of production and the burden of persuasion, except that where there is a dispute about the appropriateness of the student's IEP or placement, or of the program or placement proposed by the public agency, in this case DCPS, the agency shall hold the burden of persuasion on the appropriateness of the proposed placement; provided that the

Petitioners shall retain the burden of production and shall establish a *prima facie* case before the burden of persuasion falls on the agency. The burden of persuasion shall be met by a preponderance of the evidence. *See* D.C. Code § 38-2571.03(6). In the present case, the Petitioners have the burden of persuasion.

Discussion

1. Has DCPS denied Student a FAPE by failing to provide for an in-person dedicated aide in the 2020-2021 school year, consistent with Student's IEP, during the school closings due to the Coronavirus pandemic?
2. Is DCPS required to reimburse the parents for the cost of a dedicated aide in the 2020-2021 school year for the duration of distance learning and until such time that Student returns to school with an in-person aide provided in the classroom, consistent with the IEP?

Student is a high-functioning child with Autism Spectrum Disorder. Student's City School IEP provides that Student requires a dedicated aide for 7 hours per day in the general education setting. Since DCPS closed its schools in March 2020 due to the COVID-19 pandemic, DCPS has only offered students distance learning through online internet instruction, where students are physically separated from teachers and peers. Since the introduction of distance learning in spring 2020, DCPS has not provided Student a dedicated aide. On July 13, 2020, the parents made a written request to City School to provide a dedicated aide to support Student with distance learning at their home. At the time, DCPS had not determined how it would provide dedicated aides during distance learning. Eventually, on November 18, 2020, City School notified the parents that dedicated aide services would be provided for Student virtually.

In summer 2020, after DCPS would not confirm that it would provide an in-person dedicated aide to support Student's distance learning program, the parents reached out to Autism Center for help. Autism Center has provided in-home Applied Behavior Analysis (ABA) services to Student since 2018. The parents unilaterally arranged for Autism Center to provide an in-person dedicated aide to support Student with distance learning, in a separate room at the center. Autism Center was able to hire the same dedicated aide who had worked with Student at City School prior to the COVID-19 school closings. The dedicated aide has been working one-on-one with Student at Autism Center since the beginning of the 2020-2021 school year. In this proceeding, the parents seek reimbursement from DCPS for their payments to Autism Center to provide the dedicated aide.

1. Reimbursement under the IDEA for Non-School Education Expenses

In their complaint, the parents allege that DCPS has denied Student a FAPE by failing to implement the provision in Student's IEPs for an in-person dedicated aide and they seek reimbursement for their costs to obtain a dedicated aide for Student.

Under the IDEA, parents who unilaterally decide to place their disabled child in a private school, without obtaining the consent of local school officials, "do so at their own financial risk." *Florence County Sch. Dist. Four v. Carter*, 510 U.S. 7, 15, 114 S.Ct. 361, 126 L.Ed.2d 284 (1993) (quoting *Sch. Comm. of the Town of Burlington v. Dep't of Educ.*, 471 U.S. 359, 374, 105 S.Ct. 1996, 85 L.Ed.2d 385 (1985)). However, "[i]f a school system fails to provide a [disabled] student with an appropriate education and

such education is offered at a private school, the school system may be liable to reimburse the [parents] for the cost of private education.” *Z. B. v. District of Columbia*, 888 F.3d 515, 519 (D.C. Cir. 2018) (citing 20 U.S.C. § 1412(a)(10)(C)(ii); *Leggett v. District of Columbia*, 793 F.3d 59, 63 (D.C. Cir. 2015)).

In 2004, subsequent the Supreme Court’s decisions in the *Burlington* and *Carter* cases, the U.S. Congress amended the IDEA to address parental reimbursement for the costs of private school enrollment:

If the parents of a child with a disability, who previously received special education and related services under the authority of a public agency, enroll the child in a private elementary school or secondary school without the consent of or referral by the public agency, a court or a hearing officer may require the agency to reimburse the parents for the cost of that enrollment if the court or hearing officer finds that the agency had not made a free appropriate public education available to the child in a timely manner prior to that enrollment.

See 20 U.S.C. § 1412(a)(10)(C)(ii).

This case does not fit the *Burlington-Carter* paradigm or within the provisions of 20 U.S.C. § 1412(a)(10)(C)(ii). The parents have not enrolled Student in a private school. Student remains enrolled in City School and receives distance learning services from DCPS. Notwithstanding, for the reasons explained below, I find that under the IDEA, parents may be entitled to reimbursement for their expenses to procure a dedicated aide for their child, even if they have not enrolled their child in a private school.

In *R.L. v. Miami-Dade Cty. Sch. Bd.*, 757 F.3d 1173, 1182 (11th Cir. 2014), the

Eleventh Circuit Court of Appeals considered a related parental reimbursement issue. In *R.L.*, the student had been diagnosed with Asperger Syndrome, Autism Spectrum Disorder, Attention Deficit Hyperactivity Disorder, and gastroesophageal reflux disease (GERD). This combination of disorders caused the student to have serious trouble with anxiety, obsessive compulsive behavior, and sensory processing challenges. When the school division assigned the student to a large public high school, the student's symptoms and behaviors worsened. The parents asked the school division to place their son in a smaller high school. When the school division refused, and after the assigned high school placement proved unworkable, the parents withdrew their son from the public school system and arranged for him to receive one-on-one instruction outside the school setting. When the parents sought reimbursement from the school division for that instruction, the school division argued, *inter alia*, that because 20 U.S.C. § 1412(a)(10)(C)(ii) says that parents are entitled to tuition reimbursement when they unilaterally "enroll the child in a private elementary school or secondary school," the IDEA precludes reimbursement for private non-school placements.

In its decision in *R.L.*, the Eleventh Circuit, citing *Forest Grove Sch. Dist. v. T.A.*, 557 U.S. 230, 241-242, 129 S.Ct. 2484, 174 L.Ed.2d 168 (2009), explained that IDEA § 1412(a)(10)(C)(ii) does no more than "elaborat[e] on the general rule that courts may order reimbursement when a school district fails to provide a FAPE," and "does not foreclose reimbursement awards in other circumstances" not clearly covered by that section. *R.L.* at 1186. The Court rejected the school division's position that the IDEA

does not ever authorize District Courts to grant reimbursement relief for one-on-one instruction outside the school setting. *Id.* at 1186-87. *See, also, Madison Bd. of Educ. v. S.S.*, No. CV 19-14090 (MAH), 2020 WL 5269874, at *9 (D.N.J. Sept. 4, 2020) (Court’s authority to grant appropriate relief includes the right to order reimbursement for non-school placements because Section 1412(a)(10)(C)(ii)’s language is “elucidative rather than exhaustive” (citing *Forest Grove*, 557 U.S. at 242)).

I find the Eleventh Circuit’s reasoning in *R.L.* persuasive and I conclude that under the Supreme Court’s *Burlington-Carter* analysis, there is likewise no *per se* bar to the parents’ recovering reimbursement from DCPS for their dedicated aide expenses if they demonstrate that DCPS denied Student a FAPE by not providing an in-person aide and that the aide services they obtained for Student were “proper” under the IDEA. *See Leggett, supra* at 67.

2. Did DCPS Deny Student a FAPE?

The parents contend that DCPS’ failure to provide Student an in-person dedicated aide for the 2020-2021 school year was a denial of FAPE. DCPS responds that since the COVID-19 school closings, it has acted diligently to provide services, to the extent possible, to Student and to other school children in the District and its inability, during this national emergency, to implement the dedicated aide provision in Student’s IEPs should not be deemed a denial of FAPE. For the reasons explained below, I conclude that DCPS has denied Student a FAPE.

U.S. District Judge Rudolph Contreras explained in *Middleton v. District of*

Columbia, 312 F. Supp. 3d 113 (D.D.C. 2018), that a material failure to implement substantial or significant provisions of a child’s IEP may constitute a denial of FAPE.

A school district “must ensure that . . . special education and related services are made available to the child in accordance with the child’s IEP.” 34 C.F.R. § 300.323(c)(2). A material failure to implement a student’s IEP constitutes a denial of a FAPE. *Johnson v. District of Columbia*, 962 F.Supp.2d 263, 268–69 (D.D.C. 2013). To meet its burden, the moving party “must demonstrate that the school board or other authorities failed to implement substantial or significant provisions of the IEP.” *Beckwith v. District of Columbia*, 208 F.Supp.3d 34, 49 (D.D.C. 2016) (quoting *Hous. Indep. Sch. Dist. v. Bobby R.*, 200 F.3d 341, 349 (5th Cir. 2000)). “Generally, in analyzing whether a student was deprived of an educational benefit, ‘courts . . . have focused on the proportion of services mandated to those actually provided, and the goal and import (as articulated in the IEP) of the specific service that was withheld.’ “ *Id.* (quoting *Wilson v. District of Columbia*, 770 F. Supp. 2d 270, 275 (D.D.C. 2011)).

Middleton at 144.

Student’s November 12, 2019 and October 28, 2020 IEPs provide that Student requires the support of a dedicated aide for 7 hours per day in the school general education setting. This is a substantial provision of Student’s IEP, because, as the IEP team found, due to Student’s autism, Student needs someone to keep Student from running away and to provide prompting and reminders of the daily schedule, classroom work and classroom rules.

The parents have shown in this case that in the present virtual education setting, Student continues to need an in-person dedicated aide because Student is physically separated from the classroom teachers and Student will not follow the distance learning program on Student’s own. Father and Aide A testified credibly that unless an adult sits

with Student for online learning, Student would log off the distance learning platform and do other things, and try to run away from the room set up for distance learning.

DCPS does not dispute Student's need for a dedicated aide, but the District makes a strong case that during the COVID-19 emergency it has diligently attempted to continue Student's IEP services to the extent it is able, and it is constrained from providing in-person dedicated aide services by D.C. Department of Health guidance. *See, e.g.,* D.C. Department of Health, *Coronavirus 2019 (COVID-19): Guidance for Schools* (August 5, 2020).

The hearing officer recognizes the challenges faced by DCPS and other school divisions to continue to implement IEPs in the wake of COVID-19 school closings. In its latest COVID-19 guidance, the U.S. Department of Education's Office of Special Education Programs (OSEP) wrote that in the current COVID-19 environment, local education agencies (LEAs) may need to consider multiple options for delivering instruction, including special education and related services to children with disabilities. Those options could include remote/distance instruction, in-person attendance, or a combination of both remote/distance instruction and in-person attendance (hybrid model). OSEP emphasized that no matter what primary instructional delivery approach is chosen, LEAs and IEP Teams remain responsible for ensuring that a FAPE is provided to all children with disabilities and that if state and local decisions require schools to limit or not provide in-person instruction due to health and safety concerns, LEAs are not relieved of their obligation to provide FAPE to each child with a disability. *See* U.S.

Department of Education: *Questions and Answers on IDEA Part B Service Provision* (September 28, 2020).

Under OSEP’s guidance, DCPS remains obliged to ensure that Student is provided a FAPE. As the U.S. Supreme Court pronounced in *Endrew F. ex rel. Joseph F. v. Douglas Cty. Sch. Dist. RE-1*, 137 S. Ct. 988, 992, 197 L. Ed. 2d 335 (2017), “[o]ne component of a FAPE is ‘special education,’ defined as ‘specially designed instruction . . . to meet the unique needs of a child with a disability.’” *Id.*, 137 S.Ct. At 992 (citing 20 U.S.C. §§ 1401(9), (29)). The hearing evidence establishes that during the current period of distance learning, to meet Student’s unique needs resulting from Student’s autism disability, Student requires the support of an in-person dedicated aide. Without that support, Student could not be reasonably expected to receive educational benefits from distance learning. *Cf. Bd. of Educ. Hendrick Hudson Central Sch. Dist. v. Rowley*, 458 U.S. 176, 207, 102 S.Ct. 3034, 73 L.Ed.2d 690 (1982) (Courts review the IEP—including the child’s placement—to determine if it is reasonably calculated to enable the child to receive educational benefits.) I conclude that DCPS’ failure to provide an in-person dedicated aide to support Student with distance learning, by the beginning of the 2020-2021 school year, was a denial of FAPE.

3. Was the Parents’ Choice to Obtain the Dedicated Aide through Autism Center Proper under the IDEA?

To be entitled to reimbursement for their dedicated aide expenses, the parents must also show that their unilateral choice to obtain the aide through Autism Center was

proper under the IDEA and that the equities weigh in favor of reimbursement. *Cf. Leggett, supra*. (“As interpreted by the Supreme Court, IDEA requires school districts to reimburse parents for their private-school expenses if (1) school officials failed to offer the child a free appropriate public education in a public or private school; (2) the private-school placement chosen by the parents was otherwise “proper under the Act”; and (3) the equities weigh in favor of reimbursement—that is, the parents did not otherwise act “unreasonabl[y].” *Id.* at 66-67, (citing *Carter, supra*, 510 U.S. at 15–16, 114 S.Ct. 361; 20 U.S.C. § 1412(10)(C)(iii)).

To be “proper” under the IDEA the services obtained by the parents must satisfy the substantive IEP requirement, *i.e.*, the services must be “reasonably calculated to enable a child to make progress appropriate in light of the child’s circumstances.” *See Andrew F.*, 137 S.Ct. at 999; *L.H. v. Hamilton Cty. Dep’t of Educ.*, 900 F.3d 779, 791 (6th Cir. 2018). In this decision, I have found that due to Student’s autism disability, Student requires in-person adult support to access DCPS’ distance learning curriculum. When DCPS failed to commit to providing an in-person aide for Student for the 2020-2021 school year, the parents arranged to obtain dedicated aide services from Autism Center, which had provided Student ABA services since 2018. Autism Center hired Aide A, the same paraprofessional whom DCPS had retained to support Student at City School for the prior school year. The dedicated aide’s hours of service for Student, 6.25 hours per day, are close to the 7 hours per day of aide services specified in Student’s IEPs. On this evidence, I find that Petitioners have established that the dedicated aide

services they obtained for Student were proper, that is the services were reasonably calculated to enable Student to make progress appropriate in light of the child's circumstances.

I further find that the equities weigh in favor of reimbursement. Due to the COVID-19 school closings, DCPS stopped implementing Student's IEP requirement for a dedicated aide in March 2020. After DCPS instituted distance learning, in July 2020, the parents requested DCPS to provide a dedicated aide to come to their home to support Student to access on-line instruction. DCPS did not notify the parents that it would provide a dedicated aide for Student until November 18, 2020 and then, DCPS proposed to provide only a virtual aide, not an in-person aide. If Student was to benefit from the District's distance learning program, it fell to the parents to procure an in-person dedicated aide to support Student.

The parents have paid Autism Center \$50 per hour to provide the dedicated aide for Student. DCPS currently pays \$35 per hour for contract dedicated aides to work on site at DCPS schools. The higher fee charged by Autism Center includes the provision of the aide for Student as well as the use of a dedicated room at the center. I find that the parents did not act unreasonably in agreeing to the \$50 per hour rate.

For children unilaterally placed by their parents in public elementary or secondary schools, the IDEA provides that the hearing officer may deny or reduce reimbursement if, at least 10 business days before removing the child from public school, the parents did not give the local education agency (LEA) notice of their

concerns about the LEA's proposed placement and that they intended to enroll their child in a private school at public expenses. *See* 20 U.S.C. § 1412(10)(C)(iii); 34 C.F.R. § 300.148(d). In the present case, as explained above, the parents' entitlement to reimbursement derives not from 20 U.S.C. § 1412(10)(C)(iii), but from the Supreme Court's earlier *Burlington-Carter* decisions which provide that if the school division has denied a child a FAPE, the court is authorized to fashion discretionary equitable relief including an appropriate and reasonable level of reimbursement for the parents' private education expenses. *See Carter*, 510 U.S. at 15–16; 20 U.S.C. § 1415(i)(2)(c)(iii). I find that the 20 U.S.C. § 1412(10)(C)(iii) prior notice provision is not applicable in this case.

In summary, I conclude that the parents have met their burden of persuasion that DCPS denied Student a FAPE by not providing an in-person dedicated aide from the beginning of the 2020-2021 school year, that the dedicated aide services procured for Student by the parents were proper and that the equities weigh in favor of reimbursement. Therefore, the parents are entitled to reimbursement from DCPS for their expenses to obtain a dedicated aide for Student from the beginning of the 2020-2021 school year through the date of this decision.

4. Prospective Relief

The parents request that I order DCPS to provide, fund or reimburse the cost of a dedicated aide for Student for the 2020-2021 school year until such time that Student returns to City School and an aide is provided in the classroom setting. In this decision, I have found that in order to receive benefits from virtual learning during the COVID-19

school closings and to receive a FAPE, Student requires the support of an in-person dedicated aide for distance learning. Therefore, so long as DCPS only offers Student distance learning, DCPS must provide an in-person dedicated aide at a suitable location to support Student. Alternatively, DCPS may fund continued dedicated aide services for Student at the Autism Center.

In light of my findings and conclusions herein, DCPS' oral motion for a directed finding, made at the conclusion of Petitioners' case-in-chief, is denied.

ORDER

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

1. Upon receipt of documentation of payment by the parents, as may be reasonably required, DCPS shall, without undue delay, reimburse the parents their costs for Student to have a dedicated aide at Autism Center from the beginning of the DCPS 2020-2021 school year through the present;
2. For the remainder of the 2020-2021 school year, until such time as DCPS resumes providing in-person educational instruction to Student, DCPS shall fund the ongoing provision of a dedicated aide for Student by the Autism Center. Alternatively, DCPS may provide an in-person dedicated aide to support Student with distance learning at Student's home or at another suitable location, and
3. All other relief requested by the Petitioners herein is denied.

Date: December 4, 2020

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

NOTICE OF RIGHT TO APPEAL

This is the final administrative decision in this matter. Any party aggrieved by this Hearing Officer Determination may bring a civil action in any state court of competent jurisdiction or in a District Court of the United States without regard to the amount in controversy within ninety (90) days from the date of the Hearing Officer Determination in accordance with 20 U.S.C. § 1415(i).

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