

**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

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OSSE  
Office of Dispute Resolution  
February 15, 2019

PARENT,  
on behalf of STUDENT,<sup>1</sup>

Date Issued: February 15, 2019

Petitioner,

Hearing Officer: Peter B. Vaden

v.

Case No: 2018-0280

DISTRICT OF COLUMBIA  
PUBLIC SCHOOLS,

Hearing Dates: January 29-30, 2019

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

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 Petitioner (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 her due process complaint, Petitioner seeks funding from Respondent District of Columbia Public Schools (DCPS) for Student’s private school tuition on the grounds that DCPS allegedly failed to ensure that an appropriate Individualized Education Program (IEP) was developed for Student for the 2018-2019 school year.

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

Petitioner's Due Process Complaint, filed on October 30, 2018, named DCPS as Respondent. The undersigned hearing officer was appointed on October 31, 2018. On October 31, 2018, Petitioner filed a motion for enforcement of "Stay-Put," which I granted by order issued November 7, 2018. On November 9, 2018, I convened a telephone prehearing conference with counsel to discuss the issues to be determined, the hearing date and other matters. On November 19, 2018, the parties met for a resolution session and were unable to resolve the issues in dispute.

The due process hearing was initially scheduled for January 15-16, 2019. At the request of DCPS' counsel, which was not opposed by Petitioner, I continued the hearing date to January 29-30, 2019. By order issued December 20, 2018, in order to accommodate the January 2019 hearing dates, I granted DCPS' unopposed request to extend the final decision due date from January 13, 2019 to February 17, 2019.

The due process hearing was convened before the undersigned impartial hearing officer on January 29 and 30, 2019 at the Office of Dispute Resolution in Washington, D.C. The hearing, which was closed to the public, was recorded on an electronic audio recording device. The Petitioner appeared in person and was represented by PETITIONER'S COUNSEL. Respondent DCPS was represented by SPECIAL EDUCATION COORDINATOR (SEC) and by DCPS' COUNSEL.

At the beginning of the due process hearing, DCPS' Counsel made an oral motion to dismiss Petitioner's complaint on the grounds that DCPS' actions were allegedly in compliance with a prior Hearing Officer Determination issued on February 6, 2018 in Case No. 2017-0237. Following the opening statement of Petitioner's Counsel, DCPS renewed its motion. I denied DCPS' motion to dismiss on the record. On Day 2 of the hearing, after Petitioner presented her case-in-chief, DCPS made its opening statement.

Mother testified at the hearing and called as additional witnesses HEAD OF SCHOOL, NONPUBLIC SPEECH-LANGUAGE PATHOLOGIST (Nonpublic SLP), and EDUCATIONAL ADVOCATE. DCPS called as witnesses TEAM MANAGER, SPEECH-LANGUAGE PROGRAM MANAGER, DCPS SOCIAL WORKER and SEC. Petitioner's Exhibits P-1, P-2, P-5 through P-21, P-23 through P-29, P-31 through P-34, P-36 through P-40, P-43, P-45 through P-48 and P-50 were admitted into evidence. These included Exhibits P-1, P-2, P-17, P-23 through P-25, P-31 through P-33, P-38, P-39, P-43 and P-45 through P-47, which were admitted over DCPS' objections. DCPS' objections to Exhibits P-3, P-4, P-41, P-42 and P-49 were sustained. The Petitioner withdrew Exhibits P-22, P-30, P-35 and P-44. DCPS' Exhibits R-2 through R-14 were admitted into evidence without objection, except for Exhibit R-12 which was admitted over Petitioner's objection. Petitioner's objection to Exhibit R-1 was sustained. Counsel for the respective parties made oral closing statements.

### **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 November 9, 2018 Prehearing Order, are:

- i. Whether DCPS denied Student a FAPE by providing an inappropriate IEP (and corresponding educational placement) on May 10, 2018 because the IEP and placement:
  - a. Failed to reflect the prior hearing decisions of Hearing Officer Vaden and Hearing Officer Ruff regarding Student's IEP and placement needs, and instead provided an IEP that directly contradicted the hearing officers' findings of fact, conclusions of law and orders;

b. Failed to provide sufficient hours of specialized instruction outside of the general education setting for Student's electives, especially those that are "reading intensive," or "academically challenging" or "content-laden";

c. The placement of Student in the Specific Learning Support (SLS) program at CITY SCHOOL is inappropriate because the SLS program uses a large computerized learning/blended learning approach that is not appropriate for this student.

ii. Whether DCPS denied Student a FAPE by failing to provide an appropriate IEP and placement prior to the beginning of the 2018-2019 school year, as required by *Leggett v. District of Columbia*, 793 F.3d 59, 66–67 (D.C. Cir. 2015);

iii. Whether DCPS denied Student a FAPE by failing to include the parent in the educational placement decision, in violation of IDEA and also in contradiction to Hearing Officer Ruff's Hearing Officer Determination and in conflict with the language DCPS included in the IEP, in that the parent and representatives did not have the ability to discuss and determine which classes were "reading intensive or academically challenging," and DCPS chose a blended learning model with heavy individual/computerized learning components without a discussion and determination by the IEP team including the parent and those knowledgeable about the student about whether this would be appropriate for Student.

For relief, Petitioner requested in her due process complaint that DCPS be ordered to pay the tuition and transportation costs for Student to attend Nonpublic School for the 2018-2019 school year (including related services); that DCPS be ordered to reimburse the parent for all costs associated with the placement of Student, paid by her for Student to attend Nonpublic School in the 2018-2019 school year, including tuition, transportation, related services, and any other associated costs of educating Student at the private school and continuing until a decision is rendered in this case; that DCPS be ordered to place and fund Student at Nonpublic School prospectively for at a minimum, the remainder of the 2018-2019 school year and continuing until DCPS offers a FAPE to Student and pays for and provides transportation for Student from home to Nonpublic School during this time frame.

### PRIOR HEARING OFFICER DETERMINATIONS

In past two school years, there were two prior hearing officer determinations concerning this student which inform the present proceedings and upon which, in part, the Petitioner's claims are based. In Case No. 2017-0057, this hearing officer issued a Hearing Officer Determination on May 16, 2017, in which I found that DCPS failed to meet its burden of persuasion that its proposed March 1, 2016 IEP was appropriate, because the IEP did not specify that Student would receive Specialized Instruction outside of the general education setting for at least all classes that would be reading intensive or academically challenging. I ordered, *inter alia*, that DCPS reimburse the parent for her unilateral placement of Student at Nonpublic School for the 2016-2017 school year. Exhibit P-1.

The parent continued Student's unilateral enrollment at Nonpublic School for the 2017-2018 school year, for which also she sought funding from DCPS in a subsequent due process proceeding. In a Hearing Officer Determination issued February 6, 2018 in Case No. 2017-0327 (the February 6, 2018 HOD), Hearing Officer Coles B. Ruff found, *inter alia*, that DCPS had denied Student a FAPE by offering an IEP in June 2017 that reduced Student's specialized instruction outside the general education setting and by "not specifically including in Student's IEP a directive that Student [was] to receive specialized instruction outside general education for all classes that are reading intensive and academically challenging." Hearing Officer Ruff found that there was insufficient proof that additional speech language therapy services should have been included in Student's IEP. Hearing Officer Ruff ordered DCPS to reimburse the parent for her expenses for Student's enrollment at Nonpublic School for the 2017-2018 school year, not to include reimbursement for additional speech language services, and ordered

DCPS to amend Student's IEP, within 10 school days, "to prescribe 22 hours per week of specialized instruction outside general education and include the following statement on the [Least Restrictive Environment (LRE)] page of Student's IEP: 'Student is to be provided specialized instruction outside general education for all classes that are reading intensive or academically challenging. Student's IEP team must determine what classes meet this requirement and which do not.'" Hearing Officer Ruff also ordered DCPS to convene a meeting of Student's IEP team before the end of the 2017-2018 school year to determine an appropriate placement and location of services for Student for the 2018-2019 school year. Exhibit P-2.

### **FINDINGS OF FACT**

After considering all of the evidence received at the January 29-30, 2019 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 in the District of Columbia with Mother. Testimony of Mother.
2. Student is eligible for special education under the IDEA disability classification Multiple Disabilities, comprising Specific Learning Disability (SLD) and Other Health Impairment (OHI). Exhibit R-6.
3. Student has attended Nonpublic School since the 2016-2017 school year, where Student is now in GRADE. Testimony of Mother.
4. On May 10, 2018, Student's DCPS IEP team met at the DCPS central office for the annual revision of Student's IEP and to determine an appropriate educational placement and location of services for Student for the 2018-2019 school year. Mother

and Educational Advocate attended the meeting. Several of Student's educators from Nonpublic School participated by telephone. Exhibit R-7.

5. For the May 10, 2018 IEP, the IEP team agreed on Student's present levels of performance and annual goals. Student's weaknesses in study and organizational skills, math vocabulary, problem solving, and self-correction and monitoring were reported to impede overall progress in Mathematics. Student was reported to clarify instructions by consulting with teacher after class, to often require additional time to complete homework, and to need assistance honing strategies to generalize example problems to assignments. Student was reported to continue to need improvement in organization, putting effort in class work, turning in work on time and exhibiting appropriate behavior in class. Student was reported to require targeted intervention and direct instruction to address Reading deficits. Student's difficulties with reading fluency, analysis of grade level texts, and overall comprehension impeded the ability to access instruction and hindered classroom performance. Student's teacher reported that Student had difficulty generating, formulating and organizing ideas for writing, which often resulted in task avoidance until assignments were late and incomplete. Student was reported to demonstrate below grade level ability in the area of written expression. The writing process for Student could be labored and slow, leading to task avoidance and to turning in late or incomplete assignments. Those deficits were significant and limited Student's ability to make progress. In the speech-language area Student's weaknesses were reported to include relative weaknesses in auditory memory, expressive vocabulary inventories, higher order comprehension skills, semantic relations, and higher order verbal reasoning skills. Student was reported to have identified oral language needs in the areas of receptive and expressive language,

contextual language, using strategies to enhance understanding of vocabulary, identifying and using auditory memory strategies to improve comprehension of paragraph-length information, and making inferences. Exhibit R-6.

6. DCPS' proposed May 10, 2018 IEP provided for Student to receive 27 hours per week of Specialized Instruction, including 22 hours per week outside general education and 5 hours per week in general education, 45 minutes per month of Behavioral Support Services and 240 minutes per month of Speech-Language Pathology. The related services were to be provided outside general education. In the LRE section of the IEP, the IEP stated that Student is to be provided specialized instruction outside general education for all classes that are reading intensive or academically challenging and that Student's IEP team must determine which classes meet this requirement. Exhibit R-6.

7. DCPS issued a location of services letter after the May 10, 2018 meeting, identifying City School, a DCPS public school, as the location of services for Student for the 2018-2019 school year. Testimony of SEC, Exhibit R-9.

8. Educational Advocate objected to the proposed May 10, 2018 IEP for the reasons, *inter alia*, that in her and Mother's view, Student required all classes, as well as lunch, in a small education setting and because Student would not be able to access the curriculum in any general education class at City School. Educational Advocate reiterated these concerns in a May 24, 2018 email to DCPS' resolution specialist. Exhibit P-8.

9. On August 3, 2018, Petitioner's Counsel wrote DCPS that the parent rejected the proposed May 10, 2018 IEP and DCPS' proposed City School location for Student because Student required specialized instruction for all electives and core



classes, in addition to a small structured school environment and small class size.

Petitioner's Counsel gave notice that the parent would unilaterally place Student at Nonpublic School for the 2018-2019 school year and seek reimbursement from DCPS of the private school costs. DCPS responded by letter of August 10, 2018 that it had made a FAPE available to Student for the 2018-2019 school year at the City School SLS classroom and that the District would not agree to bear the cost of Student's ongoing private placement. Exhibit P-10.

10. Nonpublic School is a private school in the District which serves students with disabilities, including learning disabilities, Attention Deficit-Hyperactivity Disorder, executive functioning challenges and Speech-Language deficits. Nonpublic School holds a current certificate of approval (COA) from the D.C. Office of the State Superintendent of Education (OSSE). At Nonpublic School, students in Student's grade ranges are served in a separate building. Class size averages 8 students, with a maximum of 12 students, served by one teacher. The tuition charge is approximately \$256 per day, plus the cost of related services. Testimony of Head of School.

11. At Nonpublic School, all students have i-Pad tablet computers and use i-Pad applications for work. Instruction is not on computers, but most teachers ask for assignments to be typed on computers. Most of Student's work is through the computer. Student has difficulty with this aspect of instruction and the Nonpublic SLP works with Student on the use of the computer. Testimony of Nonpublic SLP.

12. Student has made significant academic growth at Nonpublic School especially in Reading. Student has shown less growth in Mathematics. Testimony of Head of School. Student's Reading has improved to the point that Student no longer needs one-on-one reading instruction. Testimony of Nonpublic SLP. At Nonpublic

School, Student's self-esteem has improved. Student is working to get good grades and wants to go to college after secondary school. Testimony of Mother.

13. During parts of the 2018-2019 school year, Mother has paid for school transportation to get Student to and from Nonpublic School. Mother has also paid for Speech-Language related services provided by a Nonpublic SLP. Testimony of Mother.

14. City School serves approximately 300 students total, including 120 special education students. Within City School, there is the Self-Contained Academy serving some 100 full- or part-time special education students. The average self-contained class size in Student's grade is 10 students taught by a special education teacher and an instructional aide. The maximum class size for both self-contained and inclusion classrooms is 15 students. Inclusion elective classes are taught by a general education teacher and a special education teacher. City School is able to provide self-contained classes for all courses, including electives, if required by a student's IEP. Testimony of SEC.

15. The SLS classroom uses a blended learning approach focusing on cognitive skill development, content skills and mentoring. The classroom uses the Summit Learning program as part of its programming. Summit Learning is like an on-line binder which helps a student with organization. Summit Learning enables the teacher to identify the respective student's needs and to be able to provide much more individualized attention. Students do not get direct instruction from the Summit Learning program. Testimony of SEC.

16. Educational Advocate, a non-attorney, is a 50% owner of Petitioner's Counsel's law firm (LAW FIRM) and receives the same "salary" from Law Firm as Petitioner's Counsel. If Law Firm's income from attorney's fee awards is not sufficient,

Educational Advocate, like Petitioner's Counsel, foregoes remuneration. Testimony of Educational Advocate.

### **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 local education agency, in this case DCPS, the agency shall hold the burden of persuasion on the appropriateness of the existing or proposed program or placement; provided that the 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**

- i. Did DCPS deny Student a FAPE by providing an inappropriate IEP (and corresponding educational placement) on May 10, 2018 because the IEP and placement –
  - a. Failed to reflect the prior hearing decisions of Hearing Officer Vaden and Hearing Officer Ruff regarding Student's IEP and placement needs, and instead provided an IEP that directly contradicted the hearing officers' findings of fact, conclusions of law and orders;
  - b. Failed to provide sufficient hours of specialized instruction outside of the general education setting for Student's electives, especially those that are "reading intensive," or "academically challenging" or "content-laden";

c. The placement of Student in the Specific Learning Support (SLS) program at City School is inappropriate because the SLS program uses a large computerized learning/blended learning approach that is not appropriate for this student?

ii. Did DCPS deny Student a FAPE by failing to provide an appropriate IEP and placement prior to the beginning of the 2018-2019 school year, as required by *Leggett v. District of Columbia*, 793 F.3d 59, 66–67 (D.C. Cir. 2015)?

iii. Did DCPS deny Student a FAPE by failing to include the parent in the educational placement decision, in violation of IDEA and also in contradiction to Hearing Officer Ruff's Hearing Officer Determination and in conflict with the language DCPS included in the IEP, in that the parent and representatives not have the ability to discuss and determine which classes were "reading intensive or academically challenging," and DCPS chose a blended learning model with heavy individual/computerized learning components without a discussion and determination by the IEP team, including the parent and those knowledgeable about the student, about whether this would be appropriate for Student?

As ordered in the prior Hearing Officer Determinations in Case No. 2017-0057 and Case No. 2017-0237, DCPS funded Student's enrollment at Nonpublic School for the 2016-2017 and 2017-2018 school years. In the present proceeding, the parent seeks DCPS funding for her continued unilateral placement of Student at City School for the 2018-2019 school year.<sup>2</sup> 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

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<sup>2</sup> For the duration of these administrative due process proceedings, DCPS is funding Student's enrollment at Nonpublic School pursuant to my November 7, 2018 "stay-put" order.

liable to reimburse the student for the cost of private education.” *Z. B. v. District of Columbia*, 888 F.3d 515, 519 (D.C. Cir. 2018) (citing 20 U.S.C. § 1412(a)(10)(C)(ii); *Leggett v. District of Columbia*, 793 F.3d 59 (D.C. Cir. 2015)). “As interpreted by the Supreme Court, IDEA requires school districts to reimburse parents for their private-school expenses if (1) school officials failed to offer the child a free appropriate public education in a public or private school; (2) the private-school placement chosen by the parents was otherwise “proper under the Act”; and (3) the equities weigh in favor of reimbursement—that is, the parents did not otherwise act “unreasonabl[y].” *Leggett, supra*, at 66-67, (citing *Carter, supra*, 510 U.S. at 15–16, 114 S.Ct. 361; 20 U.S.C. § 1412(10)(C)(iii)(III)).

The indispensable condition for private school reimbursement from the *Z. B.* and *Leggett* decisions is that the public school officials failed to offer the child a FAPE. That leads to the principle query in this case: Was the May 10, 2018 IEP proposed by DCPS, and the educational placement offered at City School, appropriate for Student for the 2018-2019 school year? In *Moradnejad v. District of Columbia*, 177 F. Supp. 3d 260 (D.D.C. 2016), the Court adopted the Report and Recommendation of U.S. Magistrate Judge G. Michael Harvey, which explained how a court or a hearing officer must assess an IEP:

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

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

*Moradnejad* at 274-75. Before reaching the substantive issue in this case – whether the May 10, 2018 proposed IEP was appropriate – I consider the procedural claim alleged by the parent, namely, whether the parent was effectively excluded from Student’s educational placement decision (1) because the parent and her representatives did not have the opportunity to discuss and determine which classes at City School would be “reading intensive or academically challenging,” and (2) because the SLS Program at City School uses a “blended learning model” with heavy individual/computerized learning components, which was not discussed by Student’s IEP team. The parent has the burden of persuasion on these procedural issues. (Petitioner also alleged that DCPS failed to provide an appropriate IEP and placement for Student prior to the beginning of the 2018-2019 school year, as required by *Leggett v. District of Columbia, supra*. At the due process hearing, Petitioner’s Counsel clarified that this was not a procedural timeliness issue, but rather a restatement of the substantive inappropriate IEP allegation.)

Petitioner’s first procedural claim, that she and her representatives did not have the opportunity to discuss and determine which classes at City School would be reading intensive or academically challenging is founded on the February 6, 2018 HOD, in which Hearing Officer Ruff ordered that DCPS amend Student’s IEP, within 10 school days, to specify that Student would be provided “specialized instruction outside general education for all classes that are reading intensive or academically challenging” and for Student’s IEP team to determine which classes met the “reading intensive” and “academically challenging” criteria. This order, on its face, applied only to the amendment ordered by Hearing Officer Ruff to Student’s June 14, 2017 IEP, not to the proposed May 10, 2018 IEP or subsequent future IEPs. Notwithstanding, DCPS’

proposed May 10, 2018 IEP did include the LRE provision for “specialized instruction outside general education for all classes that are reading intensive or academically challenging,” consistent with the February 6, 2018 HOD.

If Student had enrolled in any classes at City School, the City School IEP team, including the parent, would have been obliged to determine which of those classes would be reading intensive or academically challenging for Student. However, as SEC explained in her testimony, because the parent elected not to enroll Student in City School, a class schedule was never created. Without knowing what classes Student would be in at City School, Student’s IEP team could not determine which of those classes would be reading intensive or academically challenging. Under these circumstances, I find that DCPS did not deny Student a FAPE by not ensuring that the parent and her representatives had the opportunity to discuss and determine which classes at City School would be reading intensive or academically challenging for Student.

The parent also argues that Student was denied a FAPE because the May 10, 2018 IEP team did not discuss whether Student would be taught using the blended learning model. City School uses a blended learning program, which, at City School, combines the use of direct class instruction, computer time, one-one-one instruction and small group instruction. Blended learning would have included the Summit Learning computer program. According to the non-rebutted testimony of SEC, Summit Learning is like an on-line binder which helps a student with organization. Summit Learning enables the teacher to identify the respective student’s needs and to be able to provide much more individualized attention. Students in the SLS program do not receive direct instruction from the Summit Learning program.

The parent argues that it was up to the May 10, 2018 IEP team, including the parent and her representatives, to decide whether Summit Learning and blended instruction would be part of Student's program at DCPS. I disagree. The IDEA does not require that an IEP to include specific instructional methodologies. *See* U.S. Department of Education, *Assistance to States for the Education of Children with Disabilities*, 71 Fed. Reg. 46579, 46665 (August 14, 2006) ("[W]e cannot interpret section 614 of the [IDEA] to require that all elements of a program provided to a child be included in an IEP. The Department's longstanding position on including instructional methodologies in a child's IEP is that it is an IEP Team's decision. Therefore, if an IEP Team determines that specific instructional methods are necessary for the child to receive FAPE, the instructional methods may be addressed.") *See, also, W.H. v. Schuylkill Valley School Dist.*, 2013 WL 3153785, 6 (E.D.Pa. 2013) (Parents do not have a right to compel a school district to provide a specific program or employ a specific methodology in educating a student.) It is undisputed that the parent and Educational Advocate, as well as the Nonpublic School representatives, were active participants in the May 10, 2018 IEP team meeting. However, the evidence establishes that the blended learning approach used in the SLS program is an instructional methodology, which the IDEA does not require to be included in a student's IEP or to be agreed to by the IEP team.<sup>3</sup>

In sum, I conclude that Petitioner has not met her burden of persuasion that DCPS violated the procedures set forth in the IDEA, either by not ensuring that the May

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<sup>3</sup> Student is accustomed to using a computer in the classroom. Nonpublic School also uses this instructional methodology. At Nonpublic School, all students have i-Pad tablet computers and use i-Pad applications for school work. According to Nonpublic SLP, most of Student's work there is through the computer.



10, 2018 IEP team discussed the use of the City School blended learning model or by not ensuring that the IEP team discussed which classes at City School would be reading intensive or academically challenging prior to Student's being enrolled in classes there.

Turning to the second, substantive, prong of the *Rowley* inquiry, was DCPS' proposed May 10, 2018 IEP appropriate for Student? In *Endrew F. ex rel. Joseph F. v. Douglas Cty. Sch. Dist. RE-1*, ——— U.S. ———, 137 S.Ct. 988, 197 L.Ed.2d 335 (2017), the U.S. Supreme Court elaborated on the standard, first enunciated in *Rowley*, for what constitutes an appropriate IEP under the IDEA. Discussing these decisions in *Z. B. v. District of Columbia*, 888 F.3d 515 (D.C. Cir. 2018), the D.C. Circuit Court of Appeals explained that in *Endrew F.*, the Supreme Court,

raised the bar on what counts as an adequate education under the IDEA. *Endrew F.* held that the Act requires education “reasonably calculated to enable a child to make progress in light of the child’s circumstances”—a standard that the Court described as “markedly more demanding than the ‘merely more than *de minimis*’ standard the Tenth Circuit had applied. . . . In requiring more than merely some “educational benefits,” *id.* at 77 (quoting *Bd. of Educ. v. Rowley*, 458 U.S. 176, 207, 102 S.Ct. 3034, 73 L.Ed.2d 690 (1982) ), the Court in *Endrew F.* stressed that “every child should have the chance to meet challenging objectives,” and that a student’s “educational program must be appropriately ambitious in light of his circumstances.” 137 S.Ct. at 1000.

*Z. B.*, 888 F.3d at 517.

Substantively, the IDEA “requires an educational program reasonably calculated to enable a child to make progress appropriate in light of the child’s circumstances,” *Endrew F.*, 137 S.Ct. at 1001, even as it stops short of requiring public schools to provide the best possible education for the individual child, *Rowley*, 458 U.S. at 200, 102 S.Ct. 3034, or an education “equal” to that of non-disabled peers, *Endrew F.*, 137 S.Ct. at 1001; *Rowley*, 458 U.S. at 198-99, 102 S.Ct. 3034.

*Z. B.*, 888 F.3d at 519.

The IDEA calls on public schools throughout the United States to provide a free, appropriate education. Congress has not committed to educational perfection: “Any review of an IEP must appreciate that the question is whether the IEP is *reasonable*, not whether the court regards it as ideal.” *Endrew F.*, 137 S.Ct. at 999

(emphasis in original). If there is a gap between the best education that money can buy at a private school for a student with disabilities and the free and appropriate education at a public school that the IDEA promises, one might justly hope to close that gap for all students. Meanwhile, what Congress has required is that public schools be “ambitious” for every child, giving each the opportunity to “meet challenging objectives.” *Id.* at 1000. Disabilities can be subtle and complex. They may require expertise to identify accurately.

*Z. B.*, 888 F.3d at 528.

Understanding the particulars of a child’s current skills and needs is critical to developing an “individualized” educational plan: “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.” *Endrew F.*, 137 S.Ct. at 999 (citing 20 U.S.C. §§ 1414(d)(1)(A)(i)(I)-(IV), (d)(3)(A)(i)-(iv) ).

*Z. B.*, 888 F.3d at 522.

Applying the IDEA as interpreted in *Endrew F.*, we must ask whether, in developing the [contested IEP], the [education agency] adequately evaluated [the student’s] particular needs and offered her an IEP tailored to what it knew or reasonably should have known of her disabilities at the time. *See Endrew F.*, 137 S.Ct. at 999.

*Z. B.*, 888 F.3d at 524.

The key inquiry regarding an IEP’s substantive adequacy is whether, taking account of what the school knew or reasonably should have known of a student’s needs at the time, the IEP it offered was reasonably calculated to enable the specific student’s progress. *See Endrew F.*, 137 S.Ct. at 999. . . . [T]hat standard calls for evaluating an IEP as of “the time each IEP was created” rather than with the benefit of hindsight. . . . At the same time, . . . evidence that post-dates the creation of an IEP is relevant to the inquiry to whatever extent it sheds light on whether the IEP was objectively reasonable at the time it was promulgated.

*Z. B.*, 888 F.3d at 524 (internal quotations and citations omitted.) DCPS has the burden of persuasion as to the appropriateness of DCPS’ May 10, 2018 IEP and the City School school location proposed for Student.

Petitioner’s primary contention in this case is that the May 10, 2018 IEP was inadequate because the IEP provided for less than full-time specialized instruction outside the general education setting. The proposed IEP provided for full-time, 27

hours per week, specialized instruction, of which 22 hours would be outside general education and 5 hours would be in the general education setting. The special education provision for 22 hours per week of specialized instruction outside general education tracked Hearing Officer Ruff's order in the February 6, 2018 HOD. In that decision, while finding there was no evidence that Student required a placement *totally* removed from nondisabled peers, Hearing Officer Ruff ordered DCPS to amend Student's IEP to prescribe 22 hours per week of specialized instruction outside general education. While Hearing Officer Ruff's order did not dictate the content of the May 10, 2018 IEP, DCPS cannot be faulted for using this formulation as its touchstone for developing the May 10, 2018 IEP only three months later. Ultimately, however, the adequacy of the May 10, 2018 IEP requires an evaluation of what DCPS knew or reasonably should have known of Student's needs at the time at the time of the IEP meeting and whether the IEP offered by DCPS was reasonably calculated to enable Student's progress. *See Z. B., supra*, 888 F.3d at 524.

At the due process hearing, the parent's experts recalled that at the May 10, 2018 IEP meeting, they had argued that Student needed an outside of general education setting for all classes, including electives. In their testimony, DCPS' experts did not dispute that Student needed special education outside general education for most of the school day. But they opined that Student would benefit from taking electives classes for 5 hours per week in the general education setting, with the special education teacher there to provide support, including the accommodations and modifications specified in the May 10, 2018 IEP. SEC, who manages the special education program at City School, testified that at City School, the inclusion elective classes are capped at 15 students, taught by a general education teacher and a special education teacher. She opined that

Student would have benefitted from the program in the proposed May 10, 2018 IEP. DCPS Social Worker observed Student at Nonpublic School in spring 2018. She observed that Student was able to interact with peers, was respectful to the teacher and was able to access the teacher when needing assistance. Program Manager similarly opined that Student would benefit from the program proposed in the May 10, 2018 IEP. But I found his opinion less credible because he showed less knowledge about the special education program at City School.

The evidence for Student's requiring 100 percent of instruction outside of general education to make appropriate progress was less persuasive. Nonpublic SLP opined credibly that Student's SLD affected Student in all areas and consequently Student needed consistent help and extra support in all areas. However this expert was not familiar with the SLS program at City School and she did not explain why, for the 5 hours per week that Student would be in general education classes at City School, the extra support Student needs could not be provided by the inclusion special education teacher. Head of School testified similarly that Student needed specialized instruction throughout the school day, but he did not opine that those services could not be provided by the inclusion special education teacher in electives classes.

Educational Advocate focused her testimony on Hearing Officer Ruff's guidance in the February 6, 2018 HOD, that Student should be provided specialized instruction outside general education for all classes that are reading intensive or academically challenging. She opined that *all* electives classes are academically challenging and, accordingly, all of Student's classes, whether core or elective classes, must be provided outside of general education. I did not find this opinion to be credible. If Hearing Officer Ruff's intent had been for all of Student's classes to be delivered outside of

general education, why would he have only ordered that Student be provided 22 hours per week of specialized instruction outside the general education setting? In any case, as I have explained, Hearing Officer Ruff did not prescribe the content of the May 10, 2018 IEP. I am also mindful that Educational Advocate's financial interest in this case, as a 50% co-owner of the law firm which represents Petitioner, raises concerns about her impartiality.

Petitioner also contends that Student's proposed placement in the SLS program at City School was inappropriate because the SLS program uses a "large computerized learning/blended learning approach." As discussed above in this decision, SEC explained that in the SLS program at City School, computers are used as an organizational tool, but not for direct instruction. Petitioner's expert, Nonpublic SLP, testified that Student regularly uses an i-Pad tablet computer for class work at Nonpublic School and is benefitting from the program. Nonpublic SLP testified that Student requires assistance with the use of the classroom computer, but there is no reason to believe that such assistance would not be available in the City School SLS classroom, which has small class size and a low student-to-teacher ratio. I find there was no convincing evidence that Student would not benefit from the use of computers at Nonpublic School.

In sum, I find that DCPS has met its burden of persuasion that the May 10, 2018 IEP's provision of 27 hours per week of specialized instruction, including 5 hours per week in the general education setting, along with Student's placement in the SLS program at City School, were reasonably calculated to enable Student to make progress appropriate in light of Student's circumstances. *See Endrew F., supra*. Hence, I find that DCPS offered Student a FAPE for the 2018-2019 school year. I conclude, therefore

that under the D.C. Circuit's decisions in *Leggett* and *Z. B., supra*, DCPS cannot be required to reimburse Petitioner for her expenses for Student to attend Nonpublic School in th 2018-2019 school year.

**ORDER**

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

All relief requested by the Petitioner herein is denied.

Date: February 15, 2019

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

**NOTICE OF RIGHT TO APPEAL**

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

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