

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

OSSE
Office of Dispute Resolution
February 22, 2024

PARENTS, on behalf of STUDENT, ¹)	Date Issued: February 22, 2024
)	
Petitioners,)	Hearing Officer: Peter B. Vaden
)	
v.)	Case No: 2023-0168
)	
DISTRICT OF COLUMBIA)	Online Videoconference Hearing
PUBLIC SCHOOLS,)	
)	Hearing Dates:
Respondent.)	February 6, 7 and 9, 2024
)	
)	

HEARING OFFICER DETERMINATION

INTRODUCTION AND PROCEDURAL HISTORY

This matter came to be heard upon the Administrative Due Process Complaint Notice filed by Petitioner parents under the Individuals with Disabilities Education Act, as amended (the IDEA), 20 U.S.C. § 1400, *et seq.*, and Title 5-A, Chapter 5-A30 of the District of Columbia Municipal Regulations (DCMR). In this administrative due process proceeding, the parents seek private school funding from Respondent District of Columbia Public Schools (DCPS) on the grounds that DCPS allegedly denied their child a free appropriate public education (FAPE) by failing to offer him/her an appropriate Individualized Education Program (IEP) and educational placement for the beginning of the 2023-2024 school year.

¹ Personal identification information is provided in Appendix A.

Petitioners' Due Process Complaint, filed on August 29, 2023, named DCPS as Respondent. The undersigned hearing officer was appointed on August 30, 2023. The parties met for a Resolution Session Meeting on September 12, 2023 and did not resolve the issues in dispute.

On September 26, 2023, I convened a telephone prehearing conference with counsel to discuss the issues to be determined, the hearing date and other matters. On October 26, 2023, Petitioners, by counsel, filed a motion for leave to amend their complaint. On November 1, 2023, over DCPS's opposition, I granted Petitioners' motion to amend. On December 29, 2023, I granted Petitioners' motion, opposed by DCPS, to extend the final decision due date in this case to February 23, 2024.

With the parents' consent, the due process hearing was held online and recorded by the hearing officer, using the Microsoft Teams videoconference platform. The hearing, which was closed to the public, was convened before the undersigned impartial hearing officer on February 6, 7 and 9, 2024. MOTHER and FATHER appeared online for the hearing and were represented by PETITIONERS' COUNSEL. Respondent DCPS was represented by PROGRAM SPECIALIST and by DCPS' COUNSEL. Petitioners' Counsel made an opening statement.

Petitioners called as witnesses EDUCATIONAL ADVOCATE, PRIVATE SCHOOL DIRECTOR and Mother. DCPS called as witnesses RESOLUTION SPECIALIST, CENTRAL LEA REPRESENTATIVE, CIEP OCCUPATIONAL THERAPIST, CIEP

SOCIAL WORKER and Program Specialist. Petitioners' Exhibits P-1, P-2, P-4 through P-7, P-9 through P-17, P-19, P-20, P-21, P-24, P-25, P-27, P-28, P-30 and P-31 were admitted into evidence, including Exhibits P-2, P-5, P-9 through P-12, P-20, P-21, P-25 and P-27 admitted over DCPS' objections. DCPS' Exhibits R-1 (Parts A, B, C and D) R-3, R-11, R-21, R-26, R-28, R-30 through R-35, R-35A, R-37, R-41, R-44, R-46, R-48 and R-52 through R-63 were admitted into evidence, including Exhibits R-1 (Parts B, C and D), R-26, R-28, R-30, R-35 and R-35A admitted over Petitioners' objections.

At the close of Petitioners' evidence on February 6, 2024, DCPS' Counsel made an oral motion for a directed finding in the District's favor, which I denied, except to find that Petitioners had not made a *prima facie* showing that DCPS' proposed IEP offered insufficient occupational therapy services. On February 9, 2024, after the close of all evidence, Petitioners' Counsel and DCPS' Counsel made oral closing arguments. There was no request to file written closings but with leave of the hearing officer, both parties submitted written citations to authorities.

JURISDICTION

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

ISSUES AND RELIEF SOUGHT

The issues raised by the parents against DCPS in the October 26, 2023 Amended Complaint are as follows:

A. Did DCPS deny Student a FAPE by failing to have an IEP in place prior to the start of the 2023-2024 school year?

B. Is the DCPS proposal for the 2023-2024 school year a denial of FAPE due to its lack of a “specific learning disability” code, insufficient occupational therapy services, lack of reading goals, and insufficient goals and supports to meet Student’s executive functioning needs.

C. Did DCPS deny Student a FAPE by failing to issue a location of services for the 2023-2024 school year and by failing to provide the family with a final copy of the IEP?

D. Did DCPS deny Student a FAPE by proposing that he/she change schools in the middle of the school year and without a sufficient transition plan?

E. Is NONPUBLIC SCHOOL a proper placement for Student?

For relief, Petitioners request that the hearing officer order DCPS to continue funding Student’s placement at Nonpublic School for the 2023-2024 school year or until another placement is proposed and all appeals have been exhausted.

In responding to DCPS’ motion for a directed finding on February 6, 2024, Petitioners’ Counsel clarified that the parents do not contend that the provisions in DCPS’ proposed October 5, 2023 IEP for 20 hours per week of Specialized Instruction Services and 120 minutes per month of occupational therapy (OT) services were inappropriate. In closing argument, Petitioners’ Counsel also stated that the parents do not claim that the proposed location of services at CITY SCHOOL was not appropriate.

Prior Administrative Due Process Proceedings

The parents have brought two prior due process complaints against DCPS on

behalf of Student. The first case (Case No. 2021-0002) was assigned to this hearing officer and, following a due process hearing in March and April 2021, I issued a hearing officer determination on April 30, 2021 (the April 30, 2021 HOD). The second case, Case No. 2022-0148, was assigned to Impartial Hearing Officer Terry Michael Banks. Following a 4-day due process hearing in April 2023, Hearing Officer Banks issued a hearing officer determination on May 19, 2023 (the May 19, 2023 HOD.) The parties have agreed that I may adopt findings of fact from the May 19, 2023 HOD, which I deem relevant to this proceeding.

FINDINGS OF FACT

After considering all of the evidence received at the due process hearing in this case on February 6, 7 and 9, 2024, as well as the argument of counsel, my findings of fact are as follows:

1. Student, an AGE youth, resides with the parents in the District of Columbia. Testimony of Mother.
2. Student is eligible for special education as a student with an Other Health Impairment/Attention Deficit Disorder or Attention Deficit Hyperactivity Disorder disability (OHI-ADHD). Exhibit P-13.
3. Student is in CURRENT GRADE at Nonpublic School, a special education day school in Washington, D.C. Exhibit P-16, Testimony of Private School Director. Student was originally unilaterally placed by the parents at Nonpublic School in the

2015-2016 school year when Student was in STARTING GRADE. He/she has continued to be enrolled at Nonpublic School ever since. May 19, 2023 HOD.

4. In Case No. 2021-0002, this hearing officer concluded that DCPS had failed to offer Student a FAPE with the full-time placement in the general education setting proposed in DCPS' May 14, 2020 IEP. I ordered DCPS to reimburse the parents for their 2020-2021 school year expenses at Nonpublic School and to fund Student's placement at the private school through the end of the school year. Exhibit R-1a.

5. For special education services for Student in DCPS' June 21, 2022 IEP, the IEP team prescribed ten hours per week of specialized instruction inside general education and five hours per week outside general education. In Case No. 2022-0148, Hearing Officer Banks concluded that DCPS had failed to meet its burden of proving that its offer of five hours per week of specialized instruction outside general education was an appropriate level of services or constituted Student's least restrictive environment. Hearing Officer Banks ordered DCPS to reimburse the Parents for Student's Nonpublic School expenses for the 2022-2023 school year. Hearing Officer Banks specified that DCPS was not responsible for any related services expenses for Student incurred by the parents. May 19, 2023 HOD.

6. In the current, 2023-2024, school year, DCPS is funding Student's placement at Nonpublic School pursuant to the IDEA's "stay-put" provision, *see* 20 U.S.C. § 1415(j). Representation of Petitioners' Counsel.

7. In April and May 2023, DCPS PSYCHOLOGIST conducted a comprehensive psychological reevaluation of Student as part of his/her triennial reevaluation. In her May 15, 2023 report, DCPS Psychologist summarized that Student's overall cognitive functioning fell within the Average range. On academic testing, Student's overall reading skills and writing skills fell within the Average range. Student's overall math skills fell within the Below Average range. Overall writing skills also fell within the Average range, but the spontaneous writing composite fell within the Poor range. Teacher ratings on the Behavior Assessment System for Children 3rd Ed (BASC-3) indicated At-Risk elevation on the Internalizing Problems and School Problems composite scales. Within the Internalizing Problems subscale, Student's teacher rated At-Risk elevations on Anxiety and Depression subscales. However, parent and self-ratings on the Anxiety and Depression subscales were within the normal range. These ratings were significantly less elevated than the last time Student was evaluated by DCPS Psychologist in February 2020. Student no longer self-reported significant levels of anxiety or depression. DCPS Psychologist noted that Student had been diagnosed with ADHD and Anxiety Disorder and was being treated with psychotropic medication. The Conners 4th Edition (Conners-4) assessment for ADHD and the Behavior Rating Inventory of Executive Function, Second Edition (BRIEF-2) parent and teacher ratings also indicated significant concerns related to inattention and executive functioning. School Psychologist concluded in her report that given the test results,

Student met the criteria for special education services as a student with an Other Health Impairment. Exhibit P-6.

8. By early June 2023, the parents signed a financial commitment with Nonpublic School to enroll Student in the private school for the 2023-2024 school year. This was a requirement of Nonpublic School to hold the student's place. Testimony of Mother.

9. On July 10, 2023, DCPS sent the parents a Letter of Invitation for an annual IEP review meeting for Student scheduled for July 17, 2024. Exhibit R-53. DCPS sent the Parents a draft IEP to be discussed at the meeting. Educational Advocate sent DCPS his comments on the draft IEP prior to the meeting. Exhibit R-54. When the meeting convened on July 17, 2024, all of the time allotted for the meeting was consumed in the discussion of Student's special education eligibility category. The DCPS representatives supported OHI classification in the areas of Math and Writing to include behavioral support services. The parents and their representatives disagreed with eligibility for Student under OHI only and wanted to include the category of Specific Learning Disability (SLD) as well as eligibility in the area of Reading. Due to time constraints, the IEP team did not get to review of the draft IEP. Program Specialist stated at the meeting that the IEP team would have to reconvene to discuss the IEP for the 2023-2024 school year. Exhibit R-57; Testimony of Educational Advocate. At the July 17, 2023 meeting, the participants did not talk about when they would return to

review the proposed IEP. Testimony of Educational Advocate.

10. On July 28, 2023, DCPS issued a Final Eligibility Determination notice for Student. This notice stated that Student's Disability was Other Health Impairment/ Attention Deficit Disorder or Attention Deficit Hyperactivity Disorder, which affected Student's participation in the general education curriculum in the areas of Mathematics, Written Expression and Emotional, Social, and Behavioral Development. Exhibit P-13.

11. By letter of August 4, 2023, Petitioners' Counsel notified DCPS that Student would attend Nonpublic School for the 2023-2024 because "[w]e do not believe that an appropriate special education program has been identified or offered by DCPS for the upcoming year, despite our best efforts and intentions to procure such a program and placement." The parents' attorney requested that DCPS place and fund Student at Nonpublic School and gave notice that if DCPS refused this request for funding, the Parents reserved the right to seek funding for that placement. Exhibit P-15.

12. The Director of DCPS' Resolution Team (RESOLUTION TEAM DIRECTOR) responded to the parents' notice by letter of August 24, 2023. In that letter, he asserted that DCPS held an eligibility and IEP meeting on July 17, 2023 and that while DCPS was able to finish the eligibility portion of the meeting, the District was unable to finish the IEP update due to time constraints and "frequent disruptions throughout the meeting." He wrote that in the interim, Student's educational needs may be met at City School. Exhibit P-15.

13. In the summer of 2023, the Office of the State Superintendent of Education (OSSE) adopted new software for developing IEPs. There were glitches with the new system. Notably, the new software was supposed to automatically send the finalized IEP to parents for review and signature. However, the computer-generated emails were found to sometimes go directly into addressees' spam folders and were not always read by the parents. Testimony of Educational Advocate.

14. After the July 17, 2023 IEP team meeting, the next IEP team meeting for Student was set for October 5, 2023. The DCPS Central IEP (CIEP) team generally schedules IEP meetings 30 days in advance. Testimony of Educational Advocate.

15. Student's IEP team met to review Student's IEP for the 2023-2024 school year on October 5, 2023. In the October 5, 2023, Student's disability was identified as OHI. The IEP identified Mathematics, Written Expression, Emotional, Social and Behavioral Development and Motor Skills/Physical Development as IEP areas of concern for Student. For Special Education and Related Services, the IEP team prescribed 20 hours per week of Specialized Instruction Services and 120 minutes per month of OT. The setting for these services would be outside general education. The IEP also provided for Consultation Services in OT, Behavioral Support and Specialized Instruction. Exhibit R-58.

16. The October 5, 2023 IEP also provided a host of classroom aids and services, including for Written Expression: Structure and preparation prior to writing

tasks, Provide writing rubrics as a tool to independent writing and editing, Use technology to complete written assignments for spelling; proofreading and editing/manipulating text; Provide models and examples of steps in a process and final products; Extra processing time to formulate oral and written responses; Frequent monitoring of attention; Small group instruction; Organizers and color-coding strategies to help generate and organize ideas prior to writing; Begin writing assignments in class to model and make sure writing is proceeding in the proper direction; Allow extended time for written assignments; Use of sentence starters to prompt and organize ideas in writing; Spellcheck and grammar check; Repetition and classification of oral and written instructions. For Math: Students are able to use calculators in class, on homework, and on all assessments; Small class size allows the instructor to monitor progress and help when challenged or disengaged; Manipulatives and technology are used when appropriate to assist in understanding and making real world applications and connections; A quiet environment free of distractions is provided to students as needed and requested; All assessments are announced in advance of assessment day (typically several days prior to the assessment); Extra processing time is built into classwork and instructional time; Quizzes are given in an open note and open book format; Students may audio record the lesson and/or take pictures of problems worked out on the board to aid to their understanding of the material; Small class size allows for individualized remediation and extension of mathematical concepts as needed per student, per lesson,

as appropriate; Extended time is given to take all exam and quizzes; Clear policies are put in place and explained in detail to reduce anxiety on class expectations; Graph paper is allowed for use with homework, quizzes or exams; Exam and quizzes are modified to give extra space to work out problems; Students are provided with guided notes/foldable. For OT: Teacher provided written directions and rubrics; Visual examples of end product; Mylab to monitor and track grades/assignments; Keyboarding Kami; Annotating program; Prioritizing skills training; Attention management strategies; Use of reminder system (alarms, reminders app); Extended time for completion; Digital calendar to plan and track assignments; Notetaking template (*e.g.* Cornell); Use of Chromebook to complete written tasks; Time management skills training; Multisensory study skills training; Visual cues/reminders. Exhibit R-58.

17. The October 5, 2023 IEP included goals to address Student's challenges with anxiety, sensory processing, self-management, self-regulation. Exhibit R-58.

18. The parents and their representatives at the October 5, 2023 IEP team meeting stated, *inter alia*, that Student should be classified as Multiple Disabilities (Learning Disability and OHI); that Student should be eligible for special education Reading services, that Student should have a full time IEP and that the IEP should have executive functioning goals. At the meeting, the DCPS representative stated that the next steps would be for DCPS to finalize the IEP and make a location of services (LOS) referral. Once the location would be determined, DCPS would set up a transition

meeting for the parents and the school representatives. Exhibit R-59.

19. A few days before the start of the due process hearing on February 6, 2024, Mother discovered in her email spam folder an email from DCPS, sent on or about October 6, 2023, which apparently included the final October 5, 2023 IEP and accompanying Prior Written Notice. The DCPS email was sent soon after the October 5, 2023 IEP meeting, but had not been noticed or read by the parents because DCPS' email went directly into the spam folder. Testimony of Mother. DCPS did not follow up with the parents about the finalized October 5, 2023 IEP until October 25, 2023, when DCPS sent an LOS letter to parents identifying City School as Student's location of services. Testimony of Program Specialist, Exhibit R-61.

20. On October 26, 2023, the parents, by counsel, filed an amended due process complaint notice. In the amended complaint, the parents alleged, regarding the October 5, 2023 meeting, that at the meeting, the parents continued to express their disagreement with several aspects of the IEP including the lack of a "specific learning disability" code, insufficient OT services, lack of reading goals, and insufficient goals and supports to meet Student's executive functioning needs. The parents alleged that the IEP team proposed twenty hours of specialized instruction to be provided Student in a self-contained setting and DCPS informed the parents that it would send a Location of Services letter notifying the family of Student's school placement. The parents alleged that DCPS had failed to send the location of services letter or otherwise inform the

parents of Student's school placement and that DCPS had also failed to provide the final IEP. Exhibit P-1.

21. Nonpublic School is an independent private day school in Washington, D.C., for children, Grades 1 through 12, with language based learning differences. The total enrollment is around 390 student. Nonpublic School issues high school graduation diplomas. There are no children at the school who do not have language-based learning differences. Most of Student's teachers at Nonpublic School do not hold certifications in special education. Student's current class size is 8 to 11 students. The school holds a current certificate of approval (COA), issued by OSSE on October 10, 2023, to govern and operate a nonpublic special education school or program for students with: Multiple Disabilities, Other Health Impairment, Specific Learning Disability and Speech or Language Impairment. Testimony of Private School Director, Exhibit P-28.

22. Student is making progress academically and socially at Nonpublic School and is progressing with executive functioning. Testimony of Private School Director. Student has grown tremendously at Nonpublic School. He/she is taking for responsibility for his/her learning, motivated, responsive to small classes, accommodations and multi-sensory approach and seeks out teachers for help when needed. Testimony of Educational Advocate. Student's grades for the first quarter of the 2023-2024 school year at Nonpublic School were 5 A's and 1 B. Exhibit P-21.

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 parents in this case, shall bear the burden of production and the burden of persuasion, except that where there is a dispute about the appropriateness of the child's IEP or placement, or of the program or placement proposed by the public agency, the public agency shall hold the burden of persuasion on the appropriateness of the existing or proposed program or placement; provided, that the party requesting the due process hearing shall retain the burden of production and shall establish a *prima facie* case before the burden of persuasion falls on the public agency. The burden of persuasion shall be met by a preponderance of the evidence. *See* D.C. Code § 38-2571.03(6).

ANALYSIS

Payment of Private School Expenses

Through the date of the due process hearing in this case, DCPS has funded Student's 2023-2024 school year placement at Nonpublic School pursuant to the IDEA's "stay-put" provision, *see* 20 U.S.C. § 1415(j). In this proceeding, the parents seek an order for DCPS to continue funding Student's placement at Nonpublic School for the

remainder of the 2023-2024 school year. As grounds for this relief, the parents allege that DCPS denied Student a FAPE by not having an IEP in place prior to the start of the current school year and by later offering an inappropriate IEP and proposing that Student move from Nonpublic School to City School in the middle of the school year.

The first question to be addressed is whether this case should be analyzed under judicial precedents for private school reimbursement or precedents for prospective placements. Under IDEA case law, to obtain reimbursement for private school tuition, parents must demonstrate that: (1) the school district failed to provide a FAPE; (2) the parents' private placement was suitable; and (3) the equities warrant reimbursement for some or all of the cost of the child's private education. *See E.W.-G. v. District of Columbia*, No. CV 20-2806 (CKK), 2023 WL 2598680, *2 (D.D.C. Mar. 22, 2023), (citing *Forest Grove Sch. Dist. v. T.A.*, 557 U.S. 230, 247 (2009)). *See, also, Leggett v. District of Columbia*, 793 F.3d 59, 66-67 (D.C. Cir. 2015). To evaluate prospective private school placement requests, "[c]ourts have identified a set of considerations 'relevant' to determining whether a particular placement is appropriate for a particular student, including the nature and severity of the student's disability, the student's specialized educational needs, the link between those needs and the services offered by the school, . . . and the extent to which the placement represents the least restrictive educational environment." *R.B. v. District of Columbia*, No. CV 18-662 (RMC), 2019 WL 4750410, at *12 (D.D.C. Sept. 30, 2019), quoting *Branham v. District of Columbia*, 427

F.3d 7, 12 (D.C. Cir. 2005).

DCPS argues that because the District has paid for Student's private school expenses this school year under its stay-put obligation, this is not a tuition reimbursement case and the *Branham* considerations must be met. I disagree. Parents who "unilaterally" place a child with a disability in a private school, without consent of the school system, "do so at their own financial risk." *E.W.-G., supra*, 2023 WL 2598680, at *3 (quoting *Florence Cty. Sch. Distr. Four v. Carter*, 510 U.S. 7, 15 (1993) (quoting *School Comm. of Town of Burlington, Mass. v. Dep't of Educ. of Mass.*, 471 U.S. 359, 373-74 (1996))). It is correct that to the extent the District has already paid for Student's 2023-2024 school year private school expenses, the parents' reimbursement claim is moot. *See, e.g., Derek H. ex rel. Ritako H. v. Department of Educ., State of Haw.*, Civ. No. 14-00143 ACK-KSC, 2015 WL 9478231, at *3 (D. Haw. Dec. 29, 2015). ("[F]ederal courts . . . have found IDEA claims to be mooted where the operation of stay-put secures for students the same relief that they request as a remedy in litigation.") But in this case, the parents have committed to pay for Student's tuition at Nonpublic School through the end of the 2023-2024 school year. DCPS' stay-put funding obligation only continues during the pendency of this administrative proceeding, which ends upon the issuance of my Hearing Officer Determination. *See* 34 C.F.R. §300.518(a). I conclude that the parents' reimbursement claim is not moot because the "financial risk" from their unilateral placement of Student at Nonpublic School for the

2023-2024 school year extends some four months beyond DCPS' stay-put obligation. Therefore, I find that this due process proceeding is best viewed as a tuition reimbursement case, rather than a prospective placement case which would implicate the *Branham* decision considerations.

IEP for the Beginning of the 2023-2024 School Year

The parents contend that DCPS denied Student a FAPE because it did not have an IEP in place for him/her at the start of the 2023-2024 school year. In light of the evidence in this case, I agree. The timeline is informative. On May 19, 2023, Hearing Officer Banks issued his hearing officer determination that DCPS failed to establish that the June 21, 2022 IEP, which prescribed five hours per week of Specialized Instruction, outside general education, was appropriate for Student. DCPS then had a duty to ensure that Student's IEP was timely and appropriately revised for the 2023-2024 school year. DCPS conducted a triennial reevaluation of Student, including a psychological reevaluation completed May 13, 2023. However, DCPS did not convene an IEP team meeting for Student until July 17, 2023. When the team met on July 17, 2023, there was disagreement over Student's disability classification and the team members did not have time to review DCPS' proposed IEP. DCPS did not attempt to schedule a follow-up IEP meeting before the start of the next school year. On August 4, 2023, Petitioners' Counsel notified DCPS that Student would attend Nonpublic School for the 2023-2024 school year because DCPS had not identified or offered an appropriate special education

program for the upcoming school year. When DCPS' Resolution Team Director responded on August 24, 2023, the official acknowledged that DCPS had been unable to finish the IEP update at the July 17, 2023 meeting. Notwithstanding, DCPS did not reconvene Student's IEP team until October 5, 2023. A final IEP was completed that day, but DCPS did not provide a location of services for Student until October 25, 2023.

In his August 24, 2023 letter, Resolution Team Director implied that the parents were at fault for not finishing the IEP review on July 17, 2023 because there were "frequent disruptions throughout the meeting." However the evidence at the hearing was that there was a good faith disagreement at that meeting about the appropriate disability classification for Student. I do not find that the parents were obstructive, uncooperative or otherwise caused the IEP to be untimely. *Compare, e.g., A.R. v. Hawaii*, No. CIV. 10-00174 SOM RL, 2011 WL 1230403, at *10 (D. Haw. Mar. 31, 2011) (Parent was uncooperative when agency attempted to schedule meetings at which the IEP could be developed.)

In *Leggett, supra*, the D.C. Circuit observed "the IEP is the vehicle through which school districts typically fulfill their statutory obligation to provide a free appropriate public education and that officials must have an IEP in place for each student with a disability '[a]t the beginning of each school year.'" *Id.*, 793 F.3d at 67 (*citing* 20 U.S.C. § 1414(d)(2)(A)). "[W]hen a child requires special-education services, a school district's failure to propose an IEP of any kind is at least as serious a violation of its

responsibilities under IDEA as a failure to provide an adequate IEP.” *Forest Grove Sch. Dist. v. T.A.*, 557 U.S. 230, 238–39, 129 S. Ct. 2484, 2491, 174 L. Ed. 2d 168 (2009). As the Second Circuit Court of Appeals has explained, “[i]n order for this system to function properly, parents must have sufficient information about the IEP to make an informed decision as to its adequacy prior to making a placement decision. At the time the parents must choose whether to accept the school district recommendation or to place the child elsewhere, they have only the IEP to rely on, and therefore the adequacy of the IEP itself creates considerable reliance interests for the parents.” *R.E. v. New York City Dep’t of Educ.*, 694 F.3d 167, 186 (2d Cir. 2012).

DCPS did not ensure that an IEP was in place for Student for the start of the 2023-2024 school year. An LEA’s failure to have an IEP in place at the beginning of the school year for a student with a disability is a procedural violation of the IDEA. *See Leggett*, 793 F.3d at 67. A procedural violation of the IDEA requires a separate showing of substantive harm in order to be deemed a denial of FAPE. *Id. See, also*, 34 C.F.R. § 300.513(a)(2).² In *Leggett, supra*, the D.C. Circuit found the two-week to one-month

² Procedural violations of the IDEA may only be deemed a denial of FAPE if the procedural inadequacies—

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

period in which a student was left without an IEP to be a substantive violation of the student's rights under the IDEA. *See Leggett*, 793 F.3d at 67–68. In the present case, the DCPS CIEP team did not complete Student's IEP until October 5, 2023 – and did not offer a placement location until October 25, 2023 -- long after the August 28, 2023 first day of school. Student was left without an appropriate IEP for some six weeks after the start of the 2023-2024 school year. Following the D.C. Circuit's precedent in *Leggett*, I find that this six-weeks lapse in providing an IEP was a substantive violation of Student's IDEA rights. I also find that the procedural violation impeded Student's right to a FAPE and significantly impeded the parents' opportunity to participate in the decision-making process. I conclude that the parents have established that DCPS' failure to develop a revised IEP for Student for the beginning of the 2023-2024 school year was a denial of FAPE.

Because I determine that DCPS denied Student a FAPE by not having an appropriate IEP in place for the beginning of 2023-2024 school year, I do not reach Petitioners' separate claims in the amended due process complaint – that the IEP developed for Student on October 5, 2023 was inappropriate for lack of a SLD disability classification, lack of reading goals and insufficient goals and supports for executive functioning; that DCPS denied Student a FAPE by not timely identifying a location of services to implement that IEP and that DCPS denied Student a FAPE by proposing that

34 C.F.R. § 300.513(a)(2).

he/she move school in the middle of the school year without a transition plan. *Cf. N.B. v. Hellgate Elementary Sch. Dist., ex rel. Bd. of Directors, Missoula Cnty., Mont.*, 541 F.3d 1202, 1207 (9th Cir. 2008) (Court need not reach the question of substantive compliance if the court finds procedural inadequacies that result in the loss of educational opportunity, or seriously infringe the parents' opportunity to participate in the IEP formulation process, or that caused a deprivation of educational benefits.)

Other Reimbursement Requirements

Having found that DCPS denied Student a FAPE by failing to ensure he/she had an appropriate IEP for the start of the 2023-2024 school year, I consider the other two requirements for tuition reimbursement pronounced in the D.C. Circuit's *Leggett* decision – that the private school chosen by the parents, Nonpublic School, was proper and that the parents did not otherwise act unreasonably.

When evaluating whether a unilateral private placement was proper, the hearing officer is to employ the same standard used in evaluating the education offered by a public school district. *See M.G. v. Dist. of Columbia*, 246 F. Supp. 3d 1, 12 (D.D.C. 2017). All that is required of the parents is that the private school be reasonably calculated to enable a child to make progress appropriate in light of the child's circumstances. *See Leggett, supra* at 70; *Andrew F. ex rel. Joseph F. v. Douglas Cnty. Sch. Dist. RE-1*, 580 U.S. 386, 399, 137 S. Ct. 988, 999, 197 L. Ed. 2d 335 (2017).

Nonpublic School is an independent private day school in Washington, D.C., for

children in grades 1 through 12, with language-based learning differences. Nonpublic School holds a current Certificate of Approval from OSSE to serve children, like Student, with OHI disabilities. Student has attended Nonpublic School for many years and it is undisputed that he/she has grown tremendously at the private school. DCPS' experts, Central LEA Representative and Program Specialist, opined in their testimony that Nonpublic School was not proper for Student because most of its teachers are not certified in special education and the school does not have licensed related services providers. However, DCPS' argument that Nonpublic School is inappropriate for Student for these reasons seeks to impose a higher standard than that articulated in *Leggett*. Cf. *M.G.*, *supra*, 246 F. Supp. 3d at 12. I find that because Nonpublic School was necessary to Student's education and because the parents' choice of the private school was reasonably calculated to provide educational benefit, Nonpublic School was proper for Student under the IDEA. See *Leggett*, 793 F.3d at 72.

Lastly, the *Leggett* decision requires that the "equities weigh in favor of reimbursement — that is, the parents did not otherwise act 'unreasonabl[y]." *Leggett*, 793 F.3d at 67. Reimbursement may be "reduced or denied" if the parents failed to notify school officials of their intent to withdraw the child or otherwise acted unreasonably. *Leggett*, *supra*, at 63; 34 C.F.R. § 300.148(d). Here the parents did not act unreasonably. At the July 17, 2023 MDT meeting, the IEP team did not have time to discuss Student's IEP for the 2023-2024 school year. By email letter of August 4, 2023,

Petitioners' Counsel provided written notice to DCPS that Student would attend Nonpublic School for the 2023-2024 because DCPS had not identified or offered an appropriate special education program for the student. Unfortunately, DCPS did not react by ensuring that its employees fulfilled the District's obligations under IDEA—to provide a FAPE and to do so in a timely manner. *See Leggett, supra*, 793 F.3d at 75. Under those circumstances, I find that there has been no showing that the parents acted unreasonably in continuing Student's unilateral placement at Nonpublic School for the 2023-2024 school year.

In this proceeding, the parents have met the three requirements for reimbursement of private school expenses pronounced by the D.C. Circuit in its *Leggett* decision. At this point in time, there are only some 15 weeks remaining in the school year. Assuming, without deciding, that DCPS had offered Student an appropriate special education program with the October 5, 2023 IEP and the October 25, 2023 identification of City School for Student's location of services, I find that it would be unduly disruptive to require Student to transfer from Nonpublic School to the proposed DCPS school in the middle of the current spring semester. *Cf. Branham v. Government of the Dist. of Columbia*, 427 F.3d 7, 12-13 (D.C. Cir. 2005) (Asking whether setting aside placement order might disrupt child's education.) I conclude that the parents are entitled to funding from DCPS for tuition and related expenses for Student's continued enrollment at Nonpublic School for the remainder of the 2023-2024 school year.

ORDER

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

ORDERED:

1. DCPS shall fund, or reimburse the parents for, covered tuition and related expenses, not heretofore paid by DCPS, for Student to attend Nonpublic School for the remainder of the private school's 2023-2024 regular school year;
2. All other relief requested by the Petitioners herein is denied.

Date: Date in Case Heading

 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