

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

OSSE  
Office of Dispute Resolution  
February 28, 2024

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PARENTS, on behalf of STUDENT, <sup>1</sup>	)	Date Issued: February 28, 2024
	)	
Petitioners,	)	Hearing Officer: Peter B. Vaden
	)	
v.	)	Case No: 2023-0111
	)	
DISTRICT OF COLUMBIA	)	Online Videoconference Hearing
PUBLIC SCHOOLS,	)	
	)	Hearing Dates:
Respondent.	)	February 13, 14 and 15, 2024
	)	
	)	

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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 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 tuition reimbursement 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) for the 2022-2023 school year.

Petitioners' Due Process Complaint, filed on June 7, 2023, named DCPS as Respondent. The undersigned hearing officer was appointed on June 8, 2023. The

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

parties met for a Resolution Session Meeting on June 26, 2023 and did not resolve the issues in dispute.

On June 22, 2023, I convened a videoconference prehearing conference with counsel to discuss the issues to be determined, the hearing date and other matters. The due process hearing in this case was originally scheduled for August 22-23, 2023. Due to unavailability of witnesses and illnesses of the parents and counsel, the hearing was postponed several times. Most recently, on December 29, 2023, I granted Petitioners' unopposed request to continue the hearing date to February 13 through 15, 2024 and to extend the final decision due date to March 8, 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 13, 14 and 15, 2024. MOTHER and FATHER appeared online for the hearing and were represented by PETITIONERS' COUNSEL and PETITIONERS' CO-COUNSEL. Respondent DCPS was represented by PROGRAM SPECIALIST and by DCPS' COUNSEL. Petitioners' Counsel made an opening statement. Petitioners called as witnesses EDUCATIONAL ADVOCATE, Mother, and PROGRAM DIRECTOR. DCPS called as witnesses SCHOOL SOCIAL WORKER and Program Specialist.

Petitioners' Exhibits P-1 through P-13, P-17 through P-23, and P-28 through P-40 were admitted into evidence, including Exhibits P-2, P-4, P-8 through P-10, P-13, P-21 through P-23, and P-35 admitted over DCPS' objections. DCPS' Exhibits R-1 through R-24 were all admitted into evidence without objection. Following completion of Petitioners' case-in-chief, DCPS' counsel made an oral motion for a directed finding which I granted in part, denied in part and took in part under advisement.<sup>2</sup> After completion of the evidence on February 15, 2024, Petitioners' Counsel and DCPS' Counsel made oral closing arguments. There was no request to file written closings, but counsel for both parties submitted, by email, citations to relevant 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 for determination in this case, as set out in the July 5, 2023 Amended Prehearing Order, are:

- (1) Whether DCPS denied Student a FAPE by failing to provide Student with an appropriate IEP and placement in advance of the 2022-2023 school year, justifying the parents' unilateral placement at NONPUBLIC SCHOOL 2; and/or
- (2) Whether DCPS denied Student a FAPE by placing Student for the 2022-2023 school year at a school/placement incapable of implementing his/her April 4, 2022 IEP, therefore justifying the parents' unilateral placement at Nonpublic

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<sup>2</sup> The Motion for Directed Finding was granted as to Issue 2, denied as to Issues 1 and 3(ii) and taken under advisement as to Issue 3(iii).

School 2;

(3) Whether DCPS denied Student a FAPE through the development of the April 4, 2022 IEP (and the corresponding educational placement) because the IEP is inappropriate/inadequate for the following reasons:

- i. DCPS did not properly update the goals, baselines, present levels of performance, and other classroom aids and services in order to draft a plan appropriate to be used from April 4, 2022 through April 3, 2023;
- ii. The IEP contained inappropriate hours of specialized instruction and related services that were randomly chosen, were not based on the individual needs and most recent data regarding the student, and were not designed to meet his/her unique needs (Student required pull-out support daily and did not need any inclusion support or in school behavioral support); and/ or
- iii. No reasoned and/ or cogent explanation was given, or could be given, to justify the combination of the goals and objectives and “other classroom aids and services” and accommodations included specialized instruction hours, setting, and placement described in the IEP.

For relief, Petitioners request that the hearing officer order as follows:

- Order DCPS to reimburse the parents for all costs associated with the unilateral placement of Student at Nonpublic School 2 for the 2022-2023 school year, including tuition, transportation, related services, and any other associated costs of educating the student at the school including any deposits or advance payments made for the school year; and
- That the Hearing Officer order any and all other relief which the Hearing Officer deems equitable, just, and appropriate to remedy the denials of FAPE in this case.

### **FINDINGS OF FACT**

Prior Proceedings in Case No. 2022-0085

This case follows a prior due process complaint, filed the parents on behalf of

Student (Case No. 2022-0085) decided by Impartial Hearing Officer Michael Lazan on December 27, 2022. The parties have agreed that I may adopt relevant findings of fact made by Hearing Officer Lazan in the December 27, 2022 HOD. I adopt the following findings of fact made by Hearing Officer Lazan:

– In or about the 2015-2016 school year, Petitioners placed the Student at Nonpublic School 1, a private school for students of average to above-average cognitive ability who have learning issues. At that time, the Student had significant issues with written expression and math.

– DCPS conducted a psychological evaluation of the Student in the summer of 2018. A corresponding report was issued in August 1, 2018. Behavior Assessment Scale for Children, Third Edition (“BASC-3”) testing was administered to evaluate the Student’s general social-emotional functioning across settings. Overall, few concerns were noted in the areas of externalizing problems, but several areas of clinically significant concern were endorsed by both the Student and the Mother, including anxiety, hyperactivity, and attention problems. Teacher-reported data suggested the impact of anxiety, executive functioning deficits, and symptoms of ADHD, and concerns were noted regarding depression. The Student reported that s/he was easily distracted, struggled to complete hard tasks, often lost track of his/her place during work, and had difficulty finishing things. Academically, the Student demonstrated a variable cognitive profile with notable strengths in verbal comprehension, solving novel problems, and

visual spatial reasoning, with relative weaknesses in working memory and processing speed. The Student earned low-average overall achievement scores, with particular deficits in mathematics (5th percentile). The Student was deemed to be underperforming in written expression (low-average range), compared to his/her verbal comprehension score.

– The Student continued to attend Nonpublic School 1 for the 2018-2019 and 2019-2020 school years, with DCPS agreeing to fund the placement at public expense. During the Student’s August 7, 2019, IEP meeting for the 2019-2020 school year, DCPS proposed that the Student be transitioned to a general education public school environment and offered corresponding suggestions to Petitioners. DCPS also spent some time reviewing the Student’s Measures of Academic Progress (“MAP”) scores across time. DCPS pointed out that the Student was in the high-average range in reading and had consistently outperformed his/her Nonpublic School 1 peers and national data. The IEP team recommended “Area of Concern” sections for math, written expression, and emotional, social and behavioral development, but not for reading. Similar to prior recommendations, the IEP team recommended twenty hours of specialized instruction per week outside general education, with 240 minutes per month of behavioral support services.

– On February 3, 2020, Petitioners filed a due process complaint against DCPS, alleging that the Student was denied a FAPE through the IEP of August 2019, and

requesting tuition for Nonpublic School 1. This due process complaint was withdrawn without prejudice.

– An IEP meeting was held for the Student on May 20, 2020. The IEP based on the May 20, 2020 IEP meeting again recommended twenty hours of specialized instruction per week outside general education for the Student, with 120 minutes per month (a fifty percent reduction) of behavioral support services. The “Area of Concern” sections of the IEP, including present levels of performance and goals, continued to include math, written expression, and emotional, social and behavioral development. Goals in this IEP were adopted from a Nonpublic School 1 IEP. The reasons for the recommended twenty hours of specialized instruction per week and the reduction in monthly behavioral support services were not made clear to Petitioners during the IEP meeting.

– On June 29, 2020, the Student’s DCPS school assignment (“location of services”) for the 2020-2021 school year was designated as the Specific Learning Support (SLS) program at CITY SCHOOL, a DCPS public school.

– On or about July 31, 2020, Petitioners sent a letter to DCPS indicating that Petitioners were unilaterally placing the Student in Nonpublic School 2's SPECIAL PROGRAM, which “is specifically designed for high aptitude students with learning disabilities.” This program offered the Student special education support and the opportunity to be educated alongside his/her peers who did not have disabilities.

– On or about July 31, 2020, Petitioners’ then-advocate sent a letter to DCPS through counsel indicating that Petitioners unilaterally planned to place the Student in the Special Program at Nonpublic School 2 unless DCPS reconsidered its offer. On August 3, 2020, Petitioners notified DCPS that they sought tuition costs for Nonpublic School 2.

– For the 2020-2021 school year, the Student attended the Special Program at Nonpublic School 2. The Student tested to get into Nonpublic School 2, which has a competitive program with no “slower” tracks. The school is based on a philosophy that students are “met where they are” emotionally. The school serves about 1,200 children. Class sizes at Nonpublic School 2 range from fifteen to twenty students per class, but children in the Special Program get their own ungraded class with less than ten students. This class, led by one teacher with special education training, lasts forty minutes per day, five days per week. The class concentrates on reading, written language, and verbal communication. The teacher works on, among other things, standardized test questions, test strategies, writing emails well, spelling words out, missed assignments, trying new strategies, monitoring, and check-ins. Students in the Special Program must fulfill the academic requirements of the school, but they do not have to take a full load of academic classes during their first year. The Special Program provides its own language class, as well as accommodations and modifications of the general curriculum, though students are expected to do all of the work. Special Program



students can take history or social studies over the summer, they must be able to handle the school's hallways and lunch rooms, and they should not have issues that could be characterized as emotional disturbance. Annual tuition at Nonpublic School 2 is approximately \$23,000, plus \$3,500 for the Special Program.

– DCPS held an Analysis of Existing Data (AED) meeting for the Student on March 25, 2021. The team was told that the Student was by then being educated in a “hybrid” model at Nonpublic School 2 and that his/her grades were improving, but that s/he still had trouble attending. The Student's sleep issues had improved and s/he no longer needed naps. Petitioners told DCPS at this meeting that they wanted a less restrictive setting.

– A Strengths and Difficulties Questionnaire (SDQ), which is a brief behavioral questionnaire, was administered to the Student, the Mother, and two of the Student's teachers in or about spring 2021. Teacher A, a biology teacher, found that the Student's overall stress level, behavioral difficulties, hyperactivity, concentration, and relations with others were average, but that the Student had high emotional distress. Teacher B, an English teacher, found that the Student's overall stress was very high, that his/her emotional distress was high, and that s/he had difficulties getting along with other people, but that the Student had average behavioral difficulties.

– An IEP meeting was held for the Student on May 18, 2021. DCPS sought to adjourn the meeting to update the IEP with data from Nonpublic School 2.

– In spring 2021, a school psychologist conducted a psychoeducational evaluation of the Student and issued a corresponding report on May 18, 2021. The Student’s full-scale IQ score was 117, in the high-average range. Academic testing showed that the Student was in the average range in written expression, reading, and writing, and in the low-average range in math. The evaluator conducted behavioral testing, including Conners, Third Edition (“Conners-3”), and BASC-3. Teacher B, the Student’s English teacher, described him/her as “unfocused, aloof, and reserved,” though the Student accepted help quite well. Through Conners-3 testing, Teacher B indicated “very elevated” concerns about the Student’s inattention, learning problems, and executive functioning. Parent and teacher ratings also indicated “very elevated” concerns about peer relations.

– At the Student’s June 1, 2021, IEP meeting, the team had access to the comprehensive psychological evaluation that had just been conducted, and Petitioners had an opportunity to speak and participate. No objections were made to the “Other Classroom Aids and Services” section of the IEP. There was no clear discussion about why DCPS recommended twenty hours of specialized instruction per week for the Student. It was reported that the Student was sometimes late for Nonpublic School 2 Because s/he overslept. R-11-2. Petitioners asked the DCPS team to explain the proposed setting. The Mother said that at Nonpublic School 2, the Student was with typically developing peers and received support in the Special Program, with a one-

to-one executive functioning coach for daily check-in and check-out.

– The June 1, 2022, IEP recommended that the Student receive twenty hours of specialized instruction per week outside general education, with 180 minutes (an increase of sixty minutes) per month of behavioral support services. “Other Classroom Aids and Services” were left unchanged. The “Area of Concern” sections of the IEP, including present levels of performance and goals, continued to include math, written expression, and emotional, social and behavioral development. Another “Area of Concern” section, with goals, was added for reading.

– The Student’s final grades for the 2020-2021 school year were an “F” in math, “C+” in biology, “A” in chorus, a “B” in English, “D” for art, and “B” in scripture.

– The Student’s proposed DCPS School Assignment for the 2021-2022 school year was again the SLS program at City School, a DCPS public school.

– For the 2021-2022 school year, the Student continued in the Special Program at Nonpublic School 2, where instruction was in-person (subsequent to the COVID-19 school closings). The Student’s academic performance improved during in-person instruction. The Student’s grades improved, especially in math. For the 2021-2022 school year, the Student’s year-end grades were a “C+” in English, “B” in geometry, “C+” in chemistry, “B” in Spanish, “B” in a religion class, and “A” in chorus.

In the December 22, 2022 HOD, Hearing Officer Lazan determined that DCPS had denied Student a FAPE when it proposed, for the 2020-2021 and 2021-2022 school

years, to place Student in an overly restrictive SLS program classroom, outside of general education, for twenty hours per week. For relief, Hearing Officer Lazan ordered DCPS to reimburse the parents for all of the Student's tuition, transportation, related services, and other expenses incurred for Nonpublic School 2 for the 2020-2021 and 2021-2022 school years, less deduction for religious instruction at the school (estimated by Hearing Officer Lazan to be 10 percent of school tuition). Exhibit R-22.

Hearing Officer's Additional Findings of Fact

After considering all of the evidence received at the due process hearing in this Case No. 2023-0111 on February 13, 14 and 15, 2024, as well as the argument of counsel, my additional 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 Multiple Disabilities, based on concomitant Specific Learning Disability (SLD) and Other Health Impairment (OH) impairments. Exhibit R-17.
3. For the spring 2022 annual IEP review meeting, a member of the DCPS Cental IEP (CIEP) team, CASE MANAGER, requested additional data on Student from Nonpublic School 2, but no written data was received. Testimony of Program Specialist.
4. On March 28, 2022, Case Manager sent the parents a draft annual IEP for Student, a letter of invitation for the April 4, 2022 IEP team meeting and a student

input form. Exhibit P-3. The same day, for the social-emotional section of the IEP, School Social Worker sent the parents a Strengths and Difficulties Questionnaires (SDQ) to be completed by the parent, Student, and at least two staff members from Nonpublic School 2 who were familiar with Student's social-emotional needs. School Social Worker also wrote that she would like to schedule an observation of Student in his/her academic environment in two core content area classes. Exhibit P-2.

5. Also, on March 28, 2022, Petitioners' Co-Counsel responded to School Social Worker to ask why the observation request and the parents' SDQ were being requested on the same day that DCPS was sending the draft IEP. Petitioners' Co-Counsel wrote that the information was needed "before you create the draft IEP and should be done well in advance of the draft so that anything that comes from the questionnaires and the observation would be considered fully by the IEP team and incorporated into the draft." Counsel wrote that this gives the parents a meaningful draft to consider and allows DCPS to have a full set of data to use in the drafting of the IEP. Petitioners' Co-Counsel offered that if School Social Worker would like to push back the IEP meeting in order to accommodate obtaining this additional documentation and observation, the parents were happy to do so. School Social Worker responded the same day that SDQ data points were just supplements to what DCPS already had and the IEP meeting date did not have to be rescheduled. Exhibit P-2, Testimony of School Social Worker.

6. DCPS convened the virtual annual IEP review meeting for Student on April 4, 2022. At the time, Student continued to be enrolled at Nonpublic School 2. Both parents and Program Director from Nonpublic School 2 attended the meeting. The team considered parental input, school input, a “thorough description” by Program Director of the Special Program at Nonpublic School 2, as well as Student’s current progress and grades. Exhibit R-15.

7. DCPS did not update Student’s annual goals from the prior year IEP because DCPS did not have new data. DCPS’ expert, Program Specialist, asserted in her hearing testimony that if the private school and parents do not provide current educational data on the student, “it’s on them.” At the April 4, 2022 IEP team meeting, Case Manager asked for more data and stated that the IEP team did not have enough data on Student. Testimony of Program Specialist.

8. The April 4, 2022 IEP team identified Mathematics, Reading, Written Expression and Emotional, Social & Behavioral Development as areas of concern for Student. For the academic areas, Mathematics, Reading and Written Expression, the April 4, 2022 IEP team copied, close to verbatim, the Annual Goals and Present Levels of Performance from the prior year, June 1, 2021, IEP. Exhibit R-14.

9. For Special Education and Related Services for the April 4, 2022 IEP, the DCPS IEP team proposed 15 hours per week of Specialized Instruction in the General Education setting and 180 minutes per month of Behavioral Support Services.

Exhibit R-14.

10. The April 4, 2022 IEP duplicated the Other Classroom Aids and Services from the June 1, 2021 IEP, even though the April 4, 2022 IEP changed Student's least restrictive environment from 20 hours per week outside general education to a full-time placement in the general education classroom. Exhibit R-14.

11. The final draft of the April 4, 2022 IEP was not completed at the IEP meeting. The parents stated that because they did not have the updated draft, they would reserve their comments. Testimony of School Social Worker.

12. By an April 20, 2022 Prior Written Notice (PWN) sent to the parents, DCPS gave notice of development of the April 4, 2022 IEP for Student. The PWN stated that at the IEP meeting, the IEP team reviewed qualitative and quantitative data and synthesized all available data sources – specifically, Psychological Assessment 2021, report card, parents' input, and Nonpublic School 2 staff input – to develop present levels of performance, goals, accommodations for Student's IEP, and to identify appropriate classroom aides/supports services. Exhibit R-16.

13. By email of April 22, 2022 to the parents, School Social Worker wrote that it would be a value add to include teacher and Student's SDQ results in the PLOP and baseline of Student's IEP. School Social Worker noted that the SDQ data would be added to "the amended IEP." At some point after the April 4, 2022 IEP team meeting, School Social Worker conducted a classroom observation at Nonpublic School 2. It does

not appear that Student's IEP was revised with updated SDQ data until the May 23, 2023 IEP annual review meeting. See Exhibit R-17.

14. On April 27, 2022, Petitioners' Co-Counsel write School Social Worker by email that prior to the April 4, 2022 IEP team meeting, parents' counsel had raised concerns that DCPS did not have enough updated data to create an IEP, that she had offered time for DCPS to gather the data before having the meeting and DCPS declined. Petitioners' Co-Counsel wrote that if DCPS needed data, the District should gather it, but this should have been done in advance of the IEP meeting. She wrote that if the District did not have the data it needed, it should obtain it. School Social Worker responded the same day. She wrote that the IEP team had the April 4, 2022 IEP meeting and the IEP social-emotional goals would remain the same. Exhibit P-9.

15. By email letter of August 12, 2022, Petitioners' Counsel and Petitioners' Co-Counsel, provided written notice to DCPS that the parents intended to unilaterally place Student at Nonpublic School 2 for the 2022-2023 school year and to pursue reimbursement from DCPS for their costs for the private school placement. In their notice letter, counsel asserted that DCPS' proposed April 4, 2022 IEP was inappropriate because, *inter alia*, DCPS failed to take adequate time and care to gather the data needed to properly update Student's IEP; some portions of the IEP were outdated and not based on the most recent data; the emotional/social/ behavioral goals in the April 4, 2022 IEP remained the same as in the prior IEP due to DCPS' claiming it did have data



proving that Student had made progress; the IEP goals were developed prior to having updated information and contained outdated/inappropriate baselines; the other classroom aids and services were outdated and not appropriate and the accommodations were not inclusive of everything that Student needed to access the curriculum. Exhibit P-11.

16. On August 15, 2022, DCPS' RESOLUTION TEAM DIRECTOR responded to Petitioners' Counsel's unilateral notice letter. Resolution Team Director wrote, *inter alia*, that DCPS did not agree to bear the cost of the private placement for Student. He noted that Nonpublic School 2 is a private religious school and did not have a certificate of approval with the OSSE. Resolution Team Director asserted DCPS' position that the District had made a FAPE available to Student, offering a placement in the least restrictive environment at City School. Resolution Team Director gave notice that if the parents chose not to enroll Student at City School, DCPS would consider Student to be a parentally-placed private school student. Exhibit P-12.

17. Student attended Nonpublic School 2 for the 2022-2023 school year and is currently attending Nonpublic School 2. Student has grown tremendously as a student at the private school. In the current 2023-2024 school year, everything has improved dramatically. Student is very focused and has matured. Student gets his/her work turned in on time and is on top of studies and other activities. Student's math skills have grown. For executive functioning challenges, Student now uses a system, including

i-Pad technology, and calendar planning. Testimony of Program Director.

18. Student's final grades for the 2022-2023 school year at Nonpublic School 2 were "C+" in Spanish, "C" in English and "B's" in Algebra and Physics. Exhibit P-22.

19. Nonpublic School 2 is a private parochial college preparatory school in the District of Columbia. There are a total of around 1,250 students in Grades 9-12. Students in grades 9-12 are required to take religion classes each year. The student to faculty ration is 12:1. Classes typically range from 25 to 30 students. Behavior supports are not offered in the Nonpublic School 2 program. There are no related services providers allowed in the school. Testimony of Program Director.

20. In the 2022-2023 school year, the course curriculum for Student's grade at Nonpublic School 2 were English, Religion, Math, Science, Foreign Language and History. Class periods were 40 minutes long. Testimony of Program Director.

21. Nonpublic School 2 offers Special Program which offers support for students with learning differences, executive functioning challenges and ADHD to be successful in the college preparatory curriculum. Special Program students must have diagnosed learning differences, and also be competent and capable of handling college preparatory activities. The Special Program meets for one period per day and is focused on teaching study strategies and alternate ways to attack content and curriculum. Testimony of Program Director.

22. There are 150 students total in Special Program. There are 4 full-time and 1

part-time teachers for the program. Average class size in the Special Program is 5-8 students. All teachers in the program has Masters degrees. Students in the Special Program may pick up a course over the summer to make up for the missed regular class periods during the regular school year. Program Director has created an minimal accommodation plan – mostly testing accommodations -- for each student in the Special Program based on the student’s psychoeducational evaluation and what the school is able to provide. The Special Program offers Spanish 1 and Spanish 2 courses within the program as an option for its students. Testimony of Program Director.

### **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

#### Reimbursement for Private School Expenses

In this proceeding, the parents seek tuition reimbursement from DCPS for their private school expenses for Student to attend Nonpublic School 2 for the 2022-2023 school year, on the grounds that DCPS allegedly failed to offer Student a free appropriate public education (FAPE) with the District's proposed April 4, 2022 IEP.

In *E.W.-G. v. District of Columbia*, No. CV 20-2806 (CKK), 2023 WL 2598680 (D.D.C. Mar. 22, 2023), U.S. District Judge Colleen Kollar-Kotelly explained the private school reimbursement remedy under the IDEA:

[P]arents 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.” *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)). To qualify for tuition reimbursement under the IDEA, a plaintiff must demonstrate that: (1) the school district failed to provide a FAPE; (2) the plaintiff's private placement was suitable; and (3) the equities warrant reimbursement for some or all of the cost of the child's private education. *Forest Grove Sch. Dist. v. T.A.*, 557 U.S. 230, 247 (2009).

*E.W.-G.* at \*2 (D.D.C. Mar. 22, 2023). *See, also, Leggett v. District of Columbia*, 793 F.3d 59, 66-67 (D.C. Cir. 2015). (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 unreasonably.)

This case follows Hearing Officer Lazan’s December 22, 2022 decision in Case No. 2022-0085, in which the hearing officer ordered DCPS to reimburse the parents for Student’s tuition at Nonpublic School 2 for the 2020-2021 and 2021-2022 school years after determining that DCPS had denied Student a FAPE when it proposed to place him/her in an overly restrictive Specific Learning Support (SLS) program classroom. For the April 4, 2022 IEP at issue here, DCPS proposed to change Student’s educational placement to a regular classroom setting, supported with 15 hours per week of inclusion specialized instruction. The parents allege that DCPS failed to offer Student a FAPE with the April 4, 2022 IEP because,

- The DCPS IEP team representatives did not properly update the goals, baselines, present levels of performance, and other classroom aids and services;
- The IEP contained inappropriate hours of specialized instruction and related services that were randomly chosen, were not based on the individual needs and most recent data regarding the student, and were not designed to meet his/her unique needs (Student required pull-out support daily and did not need any inclusion support or in school behavioral support) and
- No reasoned and/or cogent explanation was given to justify the combination of the goals and objectives and “other classroom aids and services”

and accommodations including specialized instruction hours, setting, and placement described in the IEP.

For the reasons explained below, I find that DCPS did not comply with IDEA procedures in developing the April 4, 2022 IEP, which resulted in denial of FAPE. I conclude that DCPS must reimburse the parents for Student's 2022-2023 school year private school expenses.

#### The April 4, 2022 IEP

U.S. District Judge Rudolph Contreras explained in *Middleton v. District of Columbia*, 312 F. Supp. 3d 113 (D.D.C. 2018), how a court or a hearing officer must assess an IEP:

In reviewing a challenge under the IDEA, courts conduct a two-part inquiry: "First, has the State complied with the procedures set forth in the Act? And second, is the individualized educational program developed through the Act's procedures reasonably calculated to enable the child to receive educational benefits?" *Bd. of Educ. of Hendrick Hudson Cent. Sch. Dist. v. Rowley*, 458 U.S. 176, 206-07, 102 S.Ct. 3034, 73 L.Ed.2d 690 (1982) (footnotes omitted).

*Middleton* at 128.

#### Procedural Compliance

Under IDEA, "states and territories, including the District of Columbia, that receive federal educational assistance must establish 'policies and procedures to ensure,' among other things, that 'free appropriate public education' . . . is available to disabled children." *Reid ex rel. Reid v. District of Columbia*, 401 F.3d 516, 518 (D.C. Cir. 2005)

(quoting 20 U.S.C. § 1412(a)(1)(A)). A “free and appropriate public education,” or “FAPE,” is delivered by local education authorities through a uniquely tailored “‘individualized education program,’” or “IEP.” *Endrew F. ex rel. Joseph F. v. Douglas Cty. Sch. Dist.*, 137 S. Ct. 988, 993-994 (2017); *see also* 20 U.S.C. §§ 1401(9)(D), 1412(a)(1). “An IEP operationalizes a specific student’s appropriate educational plan.” *Z. B. v. District of Columbia*, 888 F.3d 515, 519 (D.C. Cir. 2018). “An IEP is not a form document,’ but rather, ‘is constructed only after careful consideration of the child’s present levels of achievement, disability, and potential for growth.” *A.D. v. Creative Minds Int’l Pub. Charter Sch.*, No. 18CV2430CRCDAR, 2020 WL 6373329, at \*5 (D.D.C. Sept. 28, 2020) (quoting *Endrew F.*, 137 S. Ct. at 999.) “By statute, the IEP must include an assessment of the student’s current levels of academic and functional performance; a description of how the child’s disability affects the child’s involvement and progress in the educational curriculum; measurable annual goals for the child’s academic and functional progress; and an outline of the specially designed instruction and support services necessary to allow the child to achieve the annual goals.” *Pavelko v. District of Columbia*, 288 F. Supp. 3d 301, 307 (D.D.C. 2018). To be IDEA-compliant, an IEP requires “careful consideration of the child’s individual circumstances.” and must be “reasonably calculated to enable the child to receive educational benefits.” *Z.B.*, 888 F.3d at 519. “Failure to follow those procedures is actionable where it denies the child an appropriate education.” *Id.*, citing 20 U.S.C. §

1415(f)(3)(E)(ii)(I).

The parents' expert witness, Educational Advocate, opined that the April 4, 2022 IEP was not appropriate for Student because, among other reasons, the IEP team did not have new data, but used the same present levels of performance (PLOPs) stated in the June 1, 2021 IEP. I agree. For the April 4, 2022 IEP, the DCPS IEP team did not comply with its procedural obligation to update Student's current levels of academic and functional performance or annual goals.

DCPS' witness, School Social Worker, testified that Student's IEP goals were not updated in the April 4, 2022 IEP because the IEP team did not have data on Student's progress on the prior year IEP annual goals. DCPS' special education expert, Program Specialist, testified that before the April 4, 2022 IEP meeting, DCPS had only received report cards and 1 or 2 of Student's works samples from Nonpublic School 2. She explained that when the CIEP team does not have data for a student, DCPS has to move ahead because of deadlines to complete the annual IEP. Program Specialist asserted that if the private school and parents do not provide data on the student, "it's on them."

DCPS' justification for not assessing Student's current levels of academic and functional performance for the April 4, 2022 IEP, and for not updating the annual goals, is unavailing. In *Aaron P. v. Hawaii, Dep't of Educ.*, 897 F. Supp. 2d 1004 (D. Haw. 2012), the Hawaii education agency similarly sought to blame the parents for not having the data it needed to update the child's IEP. The U.S. District Court rejected that



argument:

The IDEA places the burden on agency – not the parents – to ensure that the IEP team has the data it needs to develop an appropriate IEP. . . . [20 U.S.C.] Section 1414(c) provides that as part of an initial evaluation or any reevaluation, the IEP team shall review existing evaluation data, and on the basis of that review and input from the parents, identify what additional data, if any, are needed to determine, *inter alia*, “the present levels of academic achievement and related developmental needs of the child.” If the DOE was unable to determine Student’s needs from the data, it should have conducted further assessments.

*Id.* 897 F. Supp. 2d at 1020–21 *Cf., also, Damarcus S. v. District of Columbia*, 190 F. Supp. 3d 35, 50 (D.D.C. 2016) (Responsibility of the IEP team (not the evaluator) to analyze the data and determine the appropriate course of action. (*citing* 20 U.S.C. § 1414(c)(1), (4) (the IEP Team shall “review existing evaluation data . . . [and] on the basis of that review” decide if more data are needed before it can “determine the child’s educational needs”))).

In the present case, I likewise find that when DCPS did not have enough data to determine Student’s needs for the April 4, 2022 IEP, it was obliged to conduct further assessments. There is no indication that DCPS appropriately assessed Student at any time during 2021-2022 school year, but instead, elected to repeat the academic PLOPs and Annual Goals from the June 1, 2021 IEP. As a result, in developing the April 4, 2022 IEP, DCPS failed to comply with the IDEA procedural requirement to assess Student’s current levels of academic and functional performance, develop appropriate annual goals and design appropriate instruction and support services to allow Student

to achieve those goals.

An LEA's failure to ensure that an annual IEP includes updated PLOPs and appropriate annual goals is a procedural violation of the IDEA. *See, e.g., Alfano v. District of Columbia*, 422 F. Supp. 2d 1, 7–8 (D.D.C. 2006). 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.

*See* 34 C.F.R. § 300.513(a)(2). The Petitioners bear the burden of establishing that such a procedural defect violated the student's substantive rights. *Herrion v. District of Columbia*, No. CV 20-3470 (RDM), 2023 WL 2643881, at \*9 (D.D.C. Mar. 27, 2023).

In order for parents to decide whether to accept an IEP proposed by the District, they must have sufficient information to make an informed decision. *See, e.g., R.E. v. New York City Dep't of Educ.*, 694 F.3d 167, 186 (2d Cir. 2012) (“In 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.”) In

this case, the lack of any current data on the student’s current levels of academic and functional performance and the repeated annual goals from the prior IEP made it not practicable for the parents to evaluate whether the special education services proposed in the April 4, 2022 IEP – 15 hours per week of Specialized Instruction in the general education classroom – were appropriate. I conclude that DCPS’ failure to comply with the IDEA’s procedural requirement to include Student’s current levels of academic and functional performance, and to update his/her annual goals, in the proposed April 4, 2022 IEP impeded Student’s right to a FAPE and significantly impeded the parents’ opportunity to participate in the decision-making process. This was a denial of FAPE.

In light of my conclusion that Student was denied a FAPE by DCPS’ failure to comply with IDEA procedures in developing the April 4, 2022 IEP, I do not reach Petitioners’ substantive claims that the IEP contained inappropriate hours of specialized instruction, related services and other classroom aids and services. *See Adams v. District of Columbia*, 285 F. Supp. 3d 381 (D.D.C. 2018) (“[W]hen an HOD finds an IDEA violation, [w]hether the Hearing Officer based such a finding on one, or two, or three alleged violations is irrelevant—the result would be the same.” *Id.* at 391 (quoting *Green v. District of Columbia*, 2006 WL 1193866, at 9 (D.D.C. May 2, 2006))). To be clear, I make no determination as to whether the educational placement for Student proposed in the April 4, 2022 IEP – 15 hours of inclusion support in the general education classroom – was, or was not, appropriate for Student.

Other Reimbursement Requirements

Having found that DCPS failed to offer Student a FAPE for the 2022-2023 school year, I turn, next, to 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 2, 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.

Nonpublic School 2 is a college preparatory parochial school in Washington, D.C. It is not a special education school, although it offers the daily 40-minute Special Program to assist students, like Student, who have diagnosed learning differences, executive functioning challenges and ADHD. The tuition charge for Student at Nonpublic School 2, including the Special Program fee, was around \$26,500 for the school year. DCPS' expert, Program Specialist, opined that Nonpublic School 2 was not proper for Student because it is not a special education school. The District made a similar argument in the *Leggett* appeal that the private school chosen by the parent

offered little if any specialized instruction for children with learning or emotional disabilities. The D.C. Circuit pronounced that the fact that the private school was designed to help the child thrive educationally in a normal classroom environment “could [not] possibly be a strike against it.” *Leggett, supra*, 793 F.3d at 73–74. Here, I likewise find that Nonpublic School 2’s primarily general education orientation does not make the school less proper for Student.

Student has attended Nonpublic School 2 since the 2020-2021 school year. According to Program Director, Student has grown tremendously at the private school. Mother testified that Student did well in the 2022-2023 school year, worked hard and earned satisfactory grades. In its decision in *Leggett*, the D.C. Circuit held that because the private school chosen by the parent in that case was necessary to the child’s education and because it was reasonably calculated to provide educational benefit, it was proper under the IDEA. *Id.*, 793 F.3d at 72. In the present case, I find that because DCPS failed to offer Student an appropriate IEP for the 2022-2023 school year, Nonpublic School 2 was necessary to Student’s education. I further find that the parents’ enrolling Student at Nonpublic School 2 for the 2022-2023 school year was reasonably calculated to provide Student educational benefit. The parents’ choice of Nonpublic School 2 for Student was, therefore, proper under the IDEA.

Lastly, the D.C. Circuit’s *Leggett* decision requires that the “equities weigh in favor of reimbursement — that is, the parents did not otherwise act ‘unreasonabl[y].” *Leggett*, 793 F.3d at 67. Reimbursement may be “reduced or denied” if the parents failed to notify school officials of their intent to withdraw the child or otherwise acted unreasonably. *Leggett, supra*, at 63; 34 C.F.R. § 300.148(d).

By email letter of August 12, 2022, Petitioners’ Counsel provided written notice to DCPS that the parents believed that DCPS’ proposed April 4, 2022 IEP was inappropriate for Student for the reasons later set out in their due process complaint. Petitioners’ Counsel gave notice that the parents intended to unilaterally place Student at Nonpublic School 2 for the 2022-2023 school year and to pursue reimbursement from DCPS for their costs for the private school placement. In response, DCPS affirmed its position that the District had made a FAPE available to Student, offering a placement in the least restrictive environment at City School. I find that there has been no showing that the parents acted unreasonably in continuing Student’s unilateral placement at Nonpublic School 2 for the 2022-2023 school year.

Having found that the parents have met the three requirements for reimbursement of private school expenses pronounced by the D.C. Circuit in its *Leggett* decision. I conclude that the parents are entitled to reimbursement from DCPS for their tuition and related expenses incurred for Student’s enrollment at Nonpublic School 2 for the 2022-2023 school year.

Reimbursement Reduction for Religion Class

In Case No. 2022-0085 concerning this student, Hearing Officer Lazan granted DCPS' request in oral argument that the District not be required to pay for religious instruction received by Student at Nonpublic School 2. Petitioners apparently did not rebut DCPS' argument on that issue. Hearing Office Lazan found that Student received one class daily that was religious in nature, representing approximately ten percent of the Student's total instruction at the parochial school, and the hearing officer, accordingly, reduced the tuition reimbursement award by ten percent.

In the present case, Petitioners argue that although Student had one religion class daily during the 2022-2023 school year, that is not a basis for reducing reimbursement to the parents. I agree. The question of reimbursing parents who unilaterally place their child in a sectarian or parochial school has been considered by several courts. In a recent decision, *Williams S. Hart Sch. Dist. v. Antillon*, No. CV 19-8328 CBM(GJSX), 2021 WL 3086146, at \*4-5 (C.D. Cal. July 1, 2021), the U.S. District Court for the Central District of California explained the interplay between the U.S. Constitution's Establishment Clause, U.S. Const. amend 1, and tuition reimbursement under the IDEA.

In *Zobrest v. Catalina Foothills Sch. Dist.*, 509 U.S. 1, 113 S.Ct. 2462, 125 L.Ed.2d 1 (1993). the Supreme Court held that a deaf student was entitled to a district-funded interpreter at his private Catholic school. 509 U.S. at 10. The Court reasoned "because the IDEA creates no financial incentive for parents to choose a sectarian school, an interpreter's presence there

cannot be attributed to state decision making.” *Id.* The court in *Zobrest* held that “[w]hen the government offers a neutral service on the premises of a sectarian school as part of a general program that ‘is in no way skewed towards religion,’ ... it follows under our prior decisions that provision of that service does not offend the Establishment Clause.” *Id.*

*Courts have extended this reasoning to allow for tuition reimbursement in cases where the school district failed to provide FAPE and the parents subsequently enrolled students in a parochial school. See Matthew J. v. Massachusetts Dep’t of Educ., 989 F. Supp. 380, 392 (D. Mass. 1998) (finding reimbursement to parochial school permissible under First Amendment); Christen G. by Louise G. v. Lower Merion Sch. Dist., 919 F. Supp. 793, 820 (E.D. Pa. 1996) (same). The Ninth Circuit also affirmed an ALJ’s decision to award tuition reimbursement to parochial schools. See Bellflower Unified Sch. Dist. v. Lua, 832 F. App’x 493, 496 (9th Cir. 2020) (awarding tuition reimbursement and holding that “[t]he fact that [school] is a parochial school does not change this analysis); S.L. ex rel. Loof v. Upland Unified Sch. Dist., 747 F.3d 1155, 1160 (9th Cir. 2014) (awarding tuition reimbursement for tuition at parochial school when districts had denied FAPE).*

*Antillon*, 2021 WL 3086146, at \*4–5 (emphasis supplied.) I find the reasoning of the courts in *Antillon* and in *Matthew J.* persuasive and I conclude that there is no basis for reducing reimbursement to the parents because Student had a daily religion class at Nonpublic School 2.

In light of my conclusions in this decision, I deny DCPS’ motion, made orally at the due process hearing, for a directed finding as to Issue 3(iii) in the Issues to Be Determined.



**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, within 30 business days, reimburse the parents their expenses heretofore paid for covered tuition and related expenses, including covered privately-owned vehicle transportation expenses, incurred for Student's enrollment at Nonpublic School 2 for the private school's 2022-2023 regular school year and
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