

**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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Office of Dispute Resolution  
January 19, 2024

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PARENTS, on behalf of STUDENT, <sup>1</sup>	)	Date Issued: January 19, 2024
	)	
Petitioners,	)	Hearing Officer: Peter B. Vaden
	)	
v.	)	Case No: 2023-0136
	)	
DISTRICT OF COLUMBIA	)	Online Videoconference Hearing
PUBLIC SCHOOLS,	)	
	)	Hearing Dates:
Respondent.	)	January 9, 10, 11 and 12, 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 appropriate special education programs and educational placements for the 2021-2022 and 2022-2023 school years.

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

Petitioners' Due Process Complaint, filed on July 17, 2023, named DCPS as Respondent. The undersigned hearing officer was appointed on July 18, 2023. The parties met for a Resolution Session Meeting on August 1, 2023 and did not resolve the issues in dispute.

On July 31, 2023, I convened a videoconference prehearing conference with counsel to discuss the issues to be determined, the hearing date and other matters. It was discussed at the due process hearing that this case followed a prior due process complaint, filed on behalf of Student, decided by Impartial Hearing Officer Terry Banks on July 19, 2021 (Case No. 2021-0013). In Case No. 2021-0013, Hearing Officer Banks found no denials of FAPE and dismissed the parents' complaint. At the time of the July 31, 2023 prehearing conference, Hearing Officer Banks' decision was on appeal by the parents to the U.S. District Court for the District of Columbia and the parties were awaiting the District Court's decision. Because I found that the District Court's decision on the appeal of Case No. 2021-0013 would likely have an impact on the new case before me, I deferred the due process hearing date in the present case to January 9-12, 2024. On September 7, 2023, I granted Petitioners' continuance request, opposed by DCPS, to extend the final decision due date in this case to January 26, 2024.

On September 12, 2023, U.S. District Judge Trevor McFadden issued a final order on the parents' appeal of the hearing officer determination in Case No. 2021-0013. Adopting U.S. Magistrate Judge Robin Meriweather's Report and

Recommendation, Judge McFadden remanded the decision in Case No. 2021-0013 to the hearing officer to determine whether Student had been denied a FAPE by DCPS' not providing adequate IEPs for April 2019, May 2019 and December 2019 and whether the parents were entitled to private school tuition reimbursement. *See A.U. v. District of Columbia*, Case No. 1:21-cv-2662 (TNM) (D.D.C. Sept. 12, 2023). I discuss, *infra*, the Court's decision on the parents' appeal, and subsequent administrative proceedings on remand.

On September 27, 2023, Petitioners' Counsel filed a motion to consolidate before this hearing officer the remanded case (Case No. 2021-0012) with the instant Case No. 2023-0136. By order issued September 29, 2023, I denied the consolidation motion.

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 January 9, 10, 11 and 12, 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, Father, Student, EXECUTIVE FUNCTIONING COACH and HEAD OF SCHOOL. DCPS called as witnesses SCHOOL SOCIAL WORKER, SPECIAL EDUCATION TEACHER 2,

SPECIAL EDUCATION DIRECTOR and Program Specialist.

Petitioners' Exhibits P-1, P-2, P-11 through P-16, P-20, P-24, P-26 through P-28, P-33, P-34, P-34(a), P-35, P-37, P-40 through P-114, and P-118 through P-120 were admitted into evidence, including Exhibits P-2, P-11, P-15, P-16, P-20, P-24, P-26 through P-28, P-33, P-34, and P-37 admitted over DCPS' objections. DCPS' Exhibits R-2, R-11 through R-17, R-25, R-27, R-29, R-34, R-42, R-45, R-46, R-49, R-54, R-63, R-67, R-75, R-77, R-79, and R-84 were admitted into evidence, including Exhibits R-2 and R-75 admitted over Petitioners' objections. After completion of the evidence phase on January 12, 2024, Petitioners' Counsel and DCPS' Counsel made oral closing arguments. There was no request to file written closings.

### **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 31, 2023 Prehearing Order, are:

- Did DCPS deny the child a FAPE by failing to provide an appropriate IEP for the start of the 2021-2022 school year<sup>2</sup> in that the IEP was not properly updated

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<sup>2</sup> The text of the prehearing order stated this issue as whether DCPS denied the child a FAPE by failing to provide an appropriate IEP for the start of the "2020-2021" school year. At the start of the due process hearing, Petitioners' Counsel clarified that the Petitioners intended that this claim be for the start of the 2021-2022 school year – not the prior school year.

or amended prior to the beginning of the school year to incorporate at least four new assessment reports that had been written since the prior IEP, DCPS improperly relied on a July 19, 2021 HOD and indicated that the FAPE offer would not be reconsidered; and DCPS created an amended IEP on October 12, 2021 which was inadequate?

Did DCPS deny the student a FAPE by failing to comprehensively evaluate the student in all areas of suspected disability because: a) other than the partial mathematics and OT reevaluations, there was no triennial reevaluation of the student in reading, written expression, social/emotional, adaptive/executive functioning, or any other area of concern despite the last comprehensive evaluation being done in 2019; b) the student was not comprehensively evaluated in the area of mathematics because the DCPS math evaluation done in 2022 was not comprehensive/complete and was not sufficient to make a determination that the student was not eligible for specialized instruction in mathematics?

Did DCPS fail to provide a FAPE prior to August 29, 2022 for the 2022-2023 school year because the IEP in place at the time (July 15, 2022 IEP) did not offer FAPE?

Did DCPS deny the student a FAPE by failing to provide appropriate IEPs on both October 12, 2021 and on July 15, 2022 because these IEPs:

- a. Were not updated with significant portions of newer data the Local Education Agency (LEA) had at the time that should have led to an increase in supports offered;
- b. Provided insufficient specialized instruction hours;
- c. Did not contain sufficient/comprehensive/appropriate goals and related baselines based on the nature and extent of the disability known at the time and the present levels of performance as described in the IEP;
- d. Failed to provide for specialized instruction in all areas of academic need;
- e. Failed to provide for Occupational Therapy services despite data showing it was necessary;
- f. Failed to provide for sufficient behavioral support services;
- g. Failed to provide for the student to receive an appropriate educational placement;
- h. Failed to provide appropriate other classroom aids and services given the placement and hours of specialized instruction offered;
- i. Failed to provide appropriate modifications, accommodations, and

interventions based on Student's known deficits at the time, including but not limited to: i. mathematics specialized instruction (goals and services); ii. an appropriate reading program to address the needs of the student; and/or iii. smaller class sizes; and/or j. that the accommodations, modifications, and other classroom services described in the IEP were unable to be appropriately provided in the setting and with the limited special education services contained in the student's IEP.

For relief in this case, Petitioners request that the hearing officer order DCPS to reimburse them for all costs related to sending Student to NONPUBLIC SCHOOL for the 2021-2022 and 2022-2023 school years, including tuition, transportation, and related services (including payments/deposits paid in advance of those school years); order DCPS to conduct a comprehensive psychological evaluation of Student within 60 calendar days that includes all areas of academic concern (math, reading, written expression), ADHD measures, executive function testing, and social/emotional testing, at minimum; that the hearing officer grant any and all other relief which the hearing officer deems equitable, just, and appropriate to remedy the alleged denials of FAPE in this case.

### **FINDINGS OF FACT**

#### **Prior Proceedings in Case No. 2021-0012 and U.S. District Court Appeal**

On January 27, 2021, the Parents brought a prior due process complaint against DCPS on behalf of Student, Case No. 2021-0012, in which they sought, *inter alia*, reimbursement or funding from DCPS for Student's private school expenses at Nonpublic School incurred for the 2020-2021 school year. DCPS prevailed in the

administrative proceeding and the parents appealed the Hearing Officer Determination (HOD) to the U.S. District Court for the District of Columbia. *See A.U. v. District of Columbia*, Case No. 1:21-cv-2662 (TNM) (D.D.C. Sept. 12, 2023). The respective parties filed motions for summary judgment, which motions were referred to U.S. Magistrate Judge Robin Meriweather to issue a report and recommendation to the Court. As explained by Magistrate Judge Meriweather in her August 28, 2023 Report and Recommendation (the R&R), the hearing officer in Case No. 2021-0012, denied the parents' reimbursement claim, reasoning that DCPS' December 2019 IEP for Student was reasonably calculated to enable Student to make academic progress, so that the child had an appropriate IEP to begin the 2020-2021 school year. R&R, p. 11.

In the R&R, Magistrate Judge Meriweather recommended that the respective parties' summary judgment motions be granted in-part and denied in-part. Specifically, Magistrate Judge Meriweather recommended, *inter alia*, a finding that, as pertains to the December 2019 IEP, the hearing officer failed to engage with the record evidence demonstrating Student's regression in reading and other areas, misconstrued testimony, and failed to address many of the parents' arguments. Magistrate Judge Meriweather recommended that the Court reverse the hearing officer's resolution of the dispute regarding the adequacy of the December 2019 IEP and remand for further proceedings. R&R, p. 32. By order entered September 29, 2023, the U.S. District Court adopted in full the Magistrate Judge's Report and Recommendation and remanded the case for

further administrative proceedings. Exhibit P-107.

Following the remand order, Hearing Officer Banks reviewed the evidence from the May-June 2019 due process hearing in Case No. 2021-0013 and issued a remand decision on December 7, 2023. In his Hearing Officer Determination on Remand (the Remand Decision), Hearing Officer Banks concluded, *inter alia*, that DCPS had met its burden of proving that it is more likely than not that the IEP it developed for Student on December 17, 2019 was reasonably calculated to enable Student to make progress appropriate in light of his/her circumstances and that therefore, DCPS had provided Student an appropriate IEP to begin the 2020-2021 school year. Hearing Officer Banks again dismissed the parents' complaint. The parents have appealed the Remand Decision to the U.S. District Court. Representation of Counsel.

#### Hearing Officer's Additional Findings of Fact

After considering all of the evidence received at the due process hearing in this Case No. 2023-0136 on January 9 through 12, 2024, as well as the argument of counsel, my additional findings of fact are as follows:

1. Student, an AGE youth, resides with Father in the District of Columbia.

The parents are divorced and Student lives from time to time with each parent.

#### Testimony of Father.

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 P-8.

3. In the winter of 2019, the parents engaged LICENSED CLINICAL PSYCHOLOGIST (LCP) to conduct a comprehensive psychological evaluation of Student. In her March 14, 2019 evaluation report, LCP summarized that while Student possessed robust reasoning abilities, he/she had shown some mild difficulties with attention and focus at school and maintained a tenuous hold of grade level reading and writing skills, sometimes falling just short of expectations. Results of the assessment revealed a combination of cognitive processing weaknesses, decreased reading fluency, and emotional and relational factors that together were hindering Student's ability to perform to his/her full potential at school and were negatively impacting his/her overall well-being. LCP reported that Student may at times be overly sensitive to potential risks, misperceiving people or situations as threatening when, in fact, they are not. These worrisome thoughts and Student's hypervigilance appeared to be producing feelings of restlessness and were likely to interfere at times with his/her ability to concentrate and attend to matters in front of him/her. LCP reported that given these symptoms, Student met criteria for Generalized Anxiety Disorder. Additionally, Student reported experiencing notable feelings of sadness and inadequacy, and tended towards a negative explanatory style in which bad events or setbacks were viewed as personal, permanent and pervasive. LCP reported that Student was uncomfortable expressing his/her feelings, and as a result, he/she tried to hold them in, which produced additional

distress. A diagnosis of Other Specified Depressive Disorder, Depressive episode with insufficient symptoms, was being given to capture his/her increasingly negative view of him/herself and to alert those around him/her that he/she was at risk of developing more serious depressive symptoms due to his/her negative thought patterns, anxiety, situational stress, and learning challenges. LCP reported that Student was also facing challenges related to his/her variable cognitive profile. Testing revealed a significant and unusual discrepancy between his/her general intellectual ability (GAI=112, 79th percentile) and the efficiency of his/her cognitive processing (CPI=79, 8th percentile). Specifically, while Student demonstrated robust verbal reasoning and expressive abilities (VCI=111) and very strong visual spatial reasoning (VSI=119), his/her working memory capacity (WMI=79) and speed of processing (PSI=86) emerged as pronounced areas of weakness. Because Student's cognitive processing was less efficient, he/she would end up expending more energy and effort than others on academic tasks, and may be slower in his/her mastery and execution of them. This may lead Student to fatigue more easily than his/her peers when engaged in complex tasks, manifesting as decreased stamina. These experiences may in turn produce significant feelings of frustration for Student, and given his/her tendency towards anxiety and negative thinking, result in worry and self-doubt as he/she struggled to meet academic expectations. Student's low scores on the VMI suggested difficulties with motor control and visual-motor integration that could decrease his/her rate of graphomotor output.

Analysis of his/her working memory abilities suggested that Student was able to adequately register and retain auditory input, but that he/she at times had difficulty mentally manipulating this information. This area of weakness may have been contributing to his/her difficulties initiating and completing written work. In terms of attentional functioning, direct assessment showed Student was demonstrating abilities within normal limits, though his/her attention was somewhat more variable when the task was more stimulating and required a higher rate of response. Symptoms of inattention and hyperactivity were reported primarily by Student's reading and writing teachers, but not the science teacher, mirroring results from surveys conducted with his/her teachers the prior year. LCP reported that given that these concerns were most prominent in subjects in which Student was experiencing learning problems, these observations of inattentive behaviors may reflect attempts at avoidance, mental fatigue, or distress. Additionally, anxiety can greatly impact an individual's ability to focus and concentrate, and can lead to feelings of restlessness that may look similar to symptoms of attention problems. LCP wrote that as a result, a diagnosis of Attention-Deficit/Hyperactivity Disorder (ADHD) did not seem prudent. LCP recommended that Student receive treatment for anxiety and support for his/her learning disability and slow processing speed. Assessment of Student's academic skills using The Woodcock-Johnson IV Tests of Achievement (WJ-IV) revealed relatively reduced fluency for academic tasks, especially as compared to his/her high average general intellectual

abilities. This suggested that Student was not able to employ basic academic skills with the expected level of automaticity, causing him/her to work at a slower pace and to put forth more effort when engaging in more complex academic work. Student's understanding of math concepts and execution of arithmetic operations emerged as a relative strength, with his/her skills placing in the High Average range. Student's performance on tasks of written language showed adequate understanding of grammar and syntax, though he/she required ample time to think before creating sentences. He/she demonstrated notable difficulties with spelling, scoring below grade level and making many orthographical spelling errors across tasks. Although Student's overall Written Language score placed in the Average range, LCP noted that the functional impact of Student's reduced processing speed and uneven working memory abilities were likely to be more prominent on longer, more open ended, or more complex writing tasks, and there was ample evidence of such impairment of performance in school reports. Additionally, Student's below average performance on the Visual-Motor Integration (VMI) assessment raised real questions as to whether he/she may have been experiencing difficulties with motor control and visual-motor integration that make the act of writing quite difficult and effortful, leading to a strong dislike of writing and attempts at avoidance. Results of the WJ-IV and the Feifer Assessment of Reading (FAR) indicated that Student possessed solid phonological awareness and processing, but exhibited significant difficulties rapidly and automatically recognizing words in

print, which results in low reading fluency. These deficits in conjunction with Student's poor spelling abilities indicated to LCP the presence of a Specific Learning Disability with impairment in reading. Deficits in Student's orthographic processing contributed to a slower and more effortful reading process that had the potential to negatively impact reading comprehension. Student managed Average comprehension scores during assessment, and may often have been able to draw on his/her well-developed verbal reasoning abilities to augment his/her comprehension of texts when needed. However, Student may experience greater difficulties with comprehension when reading more complicated or extended texts. LCP recommended, *inter alia*, that the school multidisciplinary team (MDT) should consider finding Student eligible for specialized services based on IDEA criteria, due to functional impact associated with a specific learning disability in reading. LCP added that Student's ability to access educational opportunities was further hampered by slow processing speed and symptoms of Generalized Anxiety Disorder. Exhibit P-91.

4. In May 2019, LCP referred Student to PRIVATE OT for an occupational therapy evaluation. In her May 26, 2019 evaluation report, Private OT reported *inter alia*, that Student's weaknesses included deficits with interpreting, remembering, and organizing auditory sequences, tactile inputs, and visual designs in order to reproduce them without visual cues; difficulties with other skills that impact his/her visual-motor and fine-motor performance; mild difficulties with maintaining a sense of the position

of his/her body in space without vision; mildly deficient fine-motor skills; somewhat variable and taxing visual-motor coordination and visual-motor integration skills and noted that Student may notice sensation more than others. Private OT recommended that Student receive occupational therapy weekly for at least eight weeks to strengthen visual-motor and postural endurance and visual-motor coordination, directionality, visualization skills, hand function, planning and sequencing, written communication strategies, and for the OT provider to work collaboratively with other professionals working with Student on self-regulation. Exhibit R-22.

5. On December 17, 2019, Student's IEP team at City School 2 met to review Student's IEP. The December 17, 2019 IEP included three reading goals; three written expression goals; one adaptive/daily living skills goal; and three behavioral development goals. The IEP also included two hours per week of reading services inside the general education setting; two hours per week of written expression services inside general education; and two hours per week of reading services outside general education. The IEP also prescribed 120 minutes per month of Behavioral Support Services (BSS) outside general education and thirty minutes per month inside general education. Exhibit P-106. In his December 27, 2023 Remand Decision, currently on appeal to the U.S. District Court, Hearing Officer Banks concluded, *inter alia*, that DCPS had met its burden of proving that it is more likely than not that the December 17, 2019 IEP was appropriate, that is, that the IEP was reasonably calculated to enable Student to make

progress appropriate in light of his/her circumstances. Exhibit P-108.

6. For the 2020-2021 school year, Student attended City School 2. Student started off strong at City School 2. Testimony of Mother.

7. At City School 2, each class had 25-30 children. SPECIAL EDUCATION TEACHER 1 co-taught Student daily in English Language Arts (ELA) and math classes. Both classes were 50 minute classes. For other classes, without the support of an inclusion special education teacher, Student sat in the back of the classroom, not paying attention. Testimony of Student.

8. In March 2020, City School 2 closed to in-person classes in response to the COVID-19 pandemic. Hearing Officer Notice. Student completed the 2019-2020 school year, online, under DCPS' distance learning plan. During the distance learning period, Student failed to turn in a number of assignments, but because he/she was only graded on assignments completed and turned-in, Student received mostly A's and B's for final grades. Testimony of Student, Exhibit R-29.

9. For the 2020-2021 school year, the parents unilaterally enrolled Student in Nonpublic School. In Case No. 2021-0013, the parents sought reimbursement from DCPS for Student's 2020-2021 school year private school expenses Exhibit P-105.

10. On November 29, 2020, DEAN OF STUDENTS wrote RESOLUTION SPECIALIST at DCPS and Petitioners' Counsel by email to convey information from Student's science teacher at Nonpublic School from the first quarter:

[Student] has a lot of trouble completing work . . . [His/her] accommodation needs include: working in very small groups (even our class of 7 is large for his/her ability/pacing), text to speech technology ([his/her] challenges with reading fluency impact [his/her] ability to process information as [he/she] reads out loud to [him/herself]), explicit executive functioning instruction (only receiving one instruction at a time, and chunking out pieces of larger projects to complete on different days), LOTS of processing time, Verbal repetition (of teacher directions, and when asking [him/her] to restate information or a task).

Exhibit p-53.

11. In December 2020, DCPS began the process of developing an updated annual IEP for Student. The parents, Educational Advocate and Petitioners' attorney participated in the IEP review and development process. This culminated in a virtual IEP team meeting at DCPS' Resolution Office on February 18, 2021. The IEP team agreed that Student met criteria as a student with Multiple Disabilities. The February 18, 2021 IEP identified Reading, Written Expression, Adaptive/Daily Living Skills and Emotional, Social and Behavioral Development as areas of concern for Student. For Special Education and Related Services, the IEP provided for Student to receive Special Education Services in the general education setting for 5 hours per week for Written Expression and 2 hours per week for Specialized Instruction, and 5 hours per week outside general education for Reading. For Behavioral Support Services, the IEP provided for Student to receive 60 minutes per month outside general education, 60 minutes per month within general education, and 30 minutes per month of consultation services. The IEP also provided for Student to receive a plethora of Other Classroom



Aids and Services intended to address Student's executive functioning and other classroom challenges. Exhibit P-34a.

12. Relying primarily on updated data from Student's experience at Nonpublic School in the 2020-2021 school year, the February 18, 2021 IEP team reported that, based on reports from Nonpublic School teachers and Student's family, Student's anxiety, attention, executive functioning and slow reading speed impacted him/her throughout the school day and with task completion. The IEP team wrote that Nonpublic School reports indicated that Student's challenges impacted his/her ability to access the general education curriculum. The team noted that Student frequently became overwhelmed or appeared frustrated with academic expectations; that Student underperformed and often failed to perform by passively disengaging in an assignment; that Student had difficulty decoding simple words and read at a slow pace which hindered his/her access to curricula across all subjects; that the presence of anxiety and lack of self confidence appeared to impair Student's ability to sustain the effort needed for reading, when reading becomes complex or lengthy; that Student required a graphic organizer and one-on-one teacher attention in order to prepare and compose writing assignments; that the presence of anxiety and lack of self confidence, combined with Student's executive function deficits, appeared to impair his/her ability to initiate, organize and plan, and sustain effort needed for writing; that Student struggled to independently begin an initial warm-up activity without direct prompting as well as to

begin other class work; that Student could grow frustrated quickly if he/she did not understand directions the first time; that Student struggled with basic routines of turning in completed class work and homework; that in science class, Student was often behind because of unexcused absences, not completing homework, and being distracted in class and that if Student did not understand something, he/she tended to just stop working; that in English class, Student struggled with independent and group work, staying focused, and completing work on time; and that Student struggled with independently deciphering directions for an assignment and following class routines; that Student's teachers at Nonpublic School reported that Student was often distracted, but when provided with redirection, responded positively and that Student responded well to one to one clarification of assignments, directions, and expectations as well as positive encouragement and incentives to maintain effort. Exhibit P-34a.

13. DCPS' Occupational Therapist stated at the February 18, 2021 IEP team meeting that Student did not qualify for OT services. The parents requested an Independent Educational Evaluation (IEE) OT reevaluation. On March 2, 2021, DCPS issued funding authorization to the parents to obtain an independent OT evaluation of Student. Exhibits R-15, P-38.

14. At the February 18, 2021 IEP team meeting, the parents stated their disagreement with DCPS' proposed IEP. Educational Advocate stated that Student needed special education support in all classes throughout the day at a smaller, special,

school; that math should also be addressed as an area of concern in the IEP and that Student needed more social-emotional services. The parents also objected to the large size of City School 2 and stated their belief that a larger school building impeded Student's ability to access the curriculum. DCPS responded that Student's classes at City School 2 were all next to each other and dismissed the building size concern. Exhibits R-15, P-35.

15. On April 6, 2021, IEE OCCUPATIONAL THERAPIST (IEE OT) conducted an IEE Occupational Therapy evaluation of Student. In her April 14, 2021 evaluation report, IEE OT reported, *inter alia*, that her testing indicated needs for Student in the areas of fine motor precision and integration, manual dexterity, eye-hand coordination, balance and running speed; that Student would benefit from support to work on visual closure activities together with drawing in mazes, working on handwriting to improve the quality of his/her eye-hand coordination, and his/her visual motor control skills; that results indicated significant challenges in the areas of executive functioning including shifting attention, emotional control, initiation of tasks, working memory, planning and organizing, task monitoring and organization of materials; that results of the sensory profile indicated significant difficulty processing sensory information in his/her school work and daily routines; that Student especially had difficulty processing visual information and needed low lighting to help keep him/her calm; that Student did not like to be touched and had difficulty processing touch information; that Student had

difficulty regulating his/her emotions, especially frustrations with school work and issues with his/her family; that Student's difficulty with emotional regulation was also affected by his/her executive functioning difficulties; and that Student had difficulty attending to his/her school work and was distracted by noise and people moving in the room. IEE OT recommended that goal areas to be addressed for Student were executive functioning, sensory processing, emotional regulation, visual-perceptual, motor and handwriting. She recommended that Student receive Occupational Therapy 1 to 2 time(s) a week for 30 to 60 minute sessions and that Student's educational and therapeutic programming should focus on Executive Functioning – primarily planning, organizing and working memory. Exhibit P-101. On August 5, 2021, a DCPS occupational therapist issued a review report of IEE OT's assessment of Student. In her report, the DCPS occupational therapist did not indicate any disagreement with IEE OT's assessment or interpretation of results. Exhibit P-104.

16. Student's grades in academic classes for the 2020-2021 school year at Nonpublic School were mixed: English C-, Math D+, Science C- and Social Studies C-. The art teacher reported that Student did not fully complete any projects assigned in the semester. The English teacher reported that Student participated with increasing frequency throughout Quarter 4; that Student shared his/her ideas with more confidence, voluntarily contributing to discussions and that he/she worked well independently and in certain groupings. She added that Student, however, benefitted

from frequent check-ins for accountability as he/she was often distracted. The math teacher reported that Student earned a 100% on the Combining Integers exit ticket; that his/her work on the Compound Probabilities exit ticket (60%) illustrated his/her difficulty with calculating compound probabilities and that he/she was unable to accurately identify the probability ratio of multiple consecutive events and find a product. The Social Studies teacher reported that Student could not consistently produce work without significant teacher support. Exhibit P-43.

17. On June 9, 2021, DCPS PSYCHOLOGIST conducted, virtually, a supplemental mathematics assessment of Student. She administered the Math Calculations and Applied Problems subtests from the Woodcock-Johnson Test of Academic Achievement-Fourth Edition (WJ-IV). Student's scores fell within the Average range for both subtests. In her June 20, 2021 written report, DCPS Psychologist reported that these scores were consistent with Student's math scores in the Average range on previous assessments. DCPS Psychologist also observed Student in his/her online math class at Nonpublic School. During instruction, Student was observed to listen to and engage with his/her teacher. Student appeared to enjoy the lesson as evidenced by his/her laughter, peer engagement and overall participation. Student was observed to blurt out answers twice while students were engaging in a math game. Student appeared to be very motivated during the math lesson and there was excellent teacher/student engagement. Exhibit P-103.

18. From July 12 through 23, 2021, Student participated in the summer academic program at Nonpublic School. Exhibit P-62. On July 30, 2021, Educational Advocate sent DCPS a summer report on Student from Nonpublic School for discussion at the next IEP team meeting. Exhibit P-45.

19. By email letter of August 11, 2021, Petitioners' Counsel gave notice to DCPS that the parents intended to unilaterally place Student at Nonpublic School for the 2021-2022 school year and that the parents would seek reimbursement and ongoing funding from DCPS for Student to attend the private school. Petitioners' Counsel asserted in the letter that DCPS' proposed February 18, 2021 IEP was inadequate for Student based on his/her needs; that the parents did not believe the proposed IEP service hours met Student's needs throughout his/her entire day; that Student required direct instruction for social-emotional-behavioral as well as support embedded throughout his/her day and that Student needed a separate school that could provide small classroom sizes and intensive supports, and at the very least, Student needed an increase in specialized instruction and emotional support. Exhibit P-46.

20. By email letter of August 16, 2021, DCPS' RESOLUTION TEAM DIRECTOR responded that DCPS did not agree to pay for Student's private school placement and that it was DCPS' position that the District had made a FAPE available to Student with an appropriate IEP and placement at City School 2, and that a July 19, 2021 Hearing Officer Determination "agreed that DCPS' offer of FAPE was appropriate."

Exhibit P-47.

21. The parents continued Student's unilateral enrollment in Nonpublic School for the 2021-2022 school year. Testimony of Father.

22. On September 27, 2021, Special Education Teacher 2 sent the parents, by email, a draft IEP amendment for Student. The draft amendment included an addition to the Other Classroom Aids and Services section of the IEP in response to IEE OT's April 14, 2021 report. These additional OT accommodations were preferential seating; provide Student with visual reminders or color coded steps for multi-step assignments and allow Student to use adaptive highlighted paper/graph paper to work on his/her letter sizing legibility when he/she is writing multiple sentences. The annual goals and special education and related services sections in the February 18, 2021 IEP were not proposed to be revised. Exhibit P-49, Testimony of Special Education Teacher 2.

23. On October 12, 2021, DCPS convened a virtual IEP team meeting to review DCPS' June 2021 math reevaluation of Student and IEE OT's occupational therapy evaluation. Educational Consultant shared the parents' request for the IEP to be fully updated to include all available data. The DCPS representative stated that the math reevaluation report communicated that Student's math skills were age appropriate and met grade expectations. Educational Advocate and the parents disagreed with the math assessment summary and stated that Student should receive special education services in math. The parents also stated that Student should receive direct OT services. The

meeting ended with the school team members agreeing to add only the proposed OT accommodations to the IEP. The parents and Educational Advocate continued to disagree with the revised IEP. Exhibits R-51, P-52.

24. On March 25, 2022, Educational Advocate emailed to DCPS a February 1, 2022 letter from Student's prescribing psychiatrist, updating Student's mental health diagnoses to generalized anxiety disorder, dyslexia and alexia and attention-deficit hyperactivity disorder (ADHD), combined type. Exhibit P-58.

25. In the summer of 2022 the parents engaged Executive Functioning Coach who worked with Student, virtually, until the spring of 2023. As of the summer of 2022, Student struggled with organization, accessing work, not fully completing and turning in assignments, anxiety about work piling up and avoiding school when his/her work was not completed. In the spring of 2023, staff at Nonpublic School provided executive functioning support in-house. Testimony of Executive Functioning Coach.

26. On April 27, 2022, DCPS contacted the parents and their representative by email to schedule an Analysis of Existing Data (AED) and IEP team meeting for Student. The meeting was scheduled for July 15, 2022. Exhibit P-60.

27. At the July 15, 2022 meeting, the MDT confirmed Student's eligibility for special education under the Multiple Disabilities (SLD and OHI) category and determined that Student was a student with a specific learning disability in the areas of Reading and Writing. The team reported that Student's disability impacted his/her



participation in the general education curriculum in the areas of Academic-Reading, Emotional, Social, and Behavioral Development, Academic-Written Expression, and Adaptive-Daily Living Skills. The MDT team reviewed academic testing for mathematics and determined that Student was not eligible for specialized instruction in the area of Math. The team also determined that Student did not qualify for occupational therapy services due, allegedly, to no educational impact from Student's OT deficits. The parents attended the meeting and disagreed with the eligibility determination because the DCPS team did not recognize that Student's disability impacted him/her in mathematics or that Student needed OT related services. Exhibits R-54, R-56.

28. At the July 15, 2022 meeting, the MDT team reviewed and revised Student's DCPS IEP. The resulting July 15, 2021 IEP identified Reading, Written Expression, Adaptive/Daily Living Skills and Emotional, Social and Behavioral Development as areas of concern for Student. For Special Education and Related Services, the IEP provided for Student to receive Special Education Services in the general education setting for 5 hours per week for Written Expression and 2 hours per week for Specialized Instruction, and 5 hours per week for Reading outside general education. For Behavioral Support Services, the IEP provided for Student to receive 120 minutes per month of services outside general education. The IEP also provided for Student to receive a plethora of Other Classroom Aids and Services intended to address Student's executive functioning and other classroom challenges. Exhibit P-71. The July

15, 2022 IEP would have been implemented a CITY SCHOOL 3. Testimony of Special Education Director.

29. By email letter of August 12, 2022, Petitioners' Counsel gave notice to DCPS that the parents intended to unilaterally place Student at Nonpublic School for the 2022-2023 school year and would seek reimbursement from DCPS for private school costs, including tuition, related services, and transportation, in addition to placement for the remainder of the school year. In the letter, Petitioners' Counsel alleged that DCPS had failed to provide Student with a FAPE because DCPS' proposed July 15, 2022 IEP was not appropriate, because due to Student's ADHD and executive functioning needs, in addition to difficulties with reading fluency, Student required supports in all classes, not just for reading, especially in core academic classes, in addition to a research-based reading intervention. Petitioners' Counsel asserted that the July 15, 2022 IEP did not provide for all of these supports. Exhibit P-73.

30. By email letter of August 18, 2022, Resolution Team Director responded that DCPS did not agree to bear the cost of a private placement for Student and that it was DCPS' position that the District had made a FAPE available with an appropriate IEP and placement at City School 3. Resolution Team Director also asserted that a Hearing Officer Determination dated July 19, 2021 agreed that DCPS' offer of FAPE was appropriate. Exhibit P-74.

31. The parents continued Student's unilateral enrollment in Nonpublic

School for the 2022-2023 school year. Testimony of Father.

32. At the end of the 2022-2023 school year, Nonpublic School teacher report card comments included that Student had high participation for the quarter and improved his/her executive functioning skills. An area for growth would be to check his/her planner consistently to stay on top of homework assignments and their due dates. Student missed a few assignments at the end of the quarter and needed reminders to write down his/her work. When prompted to write down assignments and meet with the teacher at the end of class, he/she submitted his/her work on time. Student would benefit from taking the time to double-check his/her work and reach out for individual support. While following through with his/her homework and out-of-class assignments was a growth area in previous quarters, Student showed improvement in this area and completed all of his/her assignments on time. Many of his/her assignments were rushed and not fully completed, which detracted from the overall quality of his/her submitted work. Student continued to need reminders to stay on task but he/she also demonstrated natural talent and ability when he/she set his/her mind to it. Exhibit P-86.

33. There has been a “night and day” change for Student since attending Nonpublic School. Student feels at home at the school and is no longer so anxious about going to school. Testimony of Father. Student’s grades for the 2022-2023 school year were mostly A’s and B’s. Testimony of Student.

34. The student population at City School 3 exceeds 2,300 pupils. The maximum general education class size is 25 students with one teacher. City School 3 operates on an A/B block schedule with classes which are 82 minutes long. Students will generally have 4 classes on A-Day and 4 classes on B-Day. Testimony of Special Education Director.

35. Nonpublic School is an independent day school in suburban Maryland for children who have language-based learning differences. The school's current enrollment is 143 pupils. All students are college bound. All children at the school have disabilities and have Average to High Average cognitive abilities. Maximum class size for academic classes is 10 students with 1 teacher. Nonpublic School is not certified as a special education school and does not hold a Certificate of Approval (COA) from the D.C. Office of the State Superintendent of Education (OSSE). The tuition is around \$49 thousand per school year. Nonpublic School does not offer related support services. Support for executive functioning challenges is embedded in the program for all students, with small class sizes, 1:1 advisors, directed teaching methods and strategies, chunking of work and assistance with planning long term projects. Testimony of Head of School.

### 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 in school years 2021-2022 and 2022-2023, on the grounds that DCPS allegedly denied Student a free appropriate public education (FAPE) with the District's proposed February 18, 2021 IEP

(amended October 12, 2021) and proposed July 15, 2022 IEP. In the Court’s decision 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:

The IDEA requires that a school system “offer an IEP that is reasonably calculated to enable a [disabled student] to make progress in light of the child's circumstances.” [*Andrew F. v. Douglas Cty. Sch. Dist. RE-1*, 580 U.S. 386, 399 (2017)]. To achieve this benchmark, an IEP must include a variety of information, including the child's current levels of academic achievement and functional performance, measurable annual goals, how the child's progress towards the goals will be measured, and the special education and related services to be provided to the child. 20 U.S.C. § 1414 (d)(1)(A). The IEP must be formulated in accordance with statutory requirements that not only require consideration of the child's individual circumstances but also emphasize collaboration among parents and educators. 20 U.S.C. § 1414 (d)(1)(B); *see also* 20 U.S.C. § 1415 (b)(1) (the IDEA guarantees parents of disabled children the opportunity to participate in the evaluation and educational placement process).

Once the IEP is developed, the school system must provide “an appropriate educational placement that comports with the IEP.” *Alston v. District of Columbia*, 439 F. Supp. 2d 86, 90 (D.D.C. 2006). “If no suitable public school is available, the school system must pay the costs of sending the child to an appropriate private school.” *District of Columbia v. Vinyard*, 901 F. Supp. 2d 77, 80-81 (D.D.C. 2012) (Kollar-Kotelly, J.) (*quoting Reid v. District of Columbia*, 401 F.3d 516, 519 (D.C. Cir. 2005)). However, 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.” *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.) However, 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.” *B.B. v. District of Columbia*, No. CV 20-2467 (CKK), 2022 WL 834146, at \*2 (D.D.C. Mar. 21, 2022), citing *Florence Cty. Sch. Dist. 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)).

#### IEP Appropriateness

– Did DCPS deny the student a FAPE by failing to provide appropriate IEPs on February 18, 2021 IEP (amended October 12, 2021) and on July 15, 2022 because these IEPs:

- a. Were not updated with significant portions of newer data the LEA had at the time that should have led to an increase in supports offered;
- b. Provided insufficient specialized instruction hours;
- c. Did not contain sufficient/comprehensive/appropriate goals and related baselines based on the nature and extent of the disability known at the time and the present levels of performance as described in the IEP;
- d. Failed to provide for specialized instruction in all areas of academic need;

- e. Failed to provide for Occupational Therapy services despite data showing it was necessary;
  - f. Failed to provide for sufficient behavioral support services;
  - g. Failed to provide for the student to receive an appropriate educational placement;
  - h. Failed to provide appropriate other classroom aids and services given the placement and hours of specialized instruction offered;
  - i. Failed to provide appropriate modifications, accommodations, and interventions based on Student's known deficits at the time, including but not limited to: i. mathematics specialized instruction (goals and services); ii. an appropriate reading program to address the needs of the student; and/or iii. smaller class sizes; and/or
  - j. that the accommodations, modifications, and other classroom services described in the IEP were unable to be appropriately provided in the setting and with the limited special education services contained in the student's IEP.
- Did DCPS deny the child a FAPE by failing to provide an appropriate IEP for the start of the 2021-2022 school year in that the IEP was not properly updated or amended prior to the beginning of the school year to incorporate new assessment reports that had been written since the prior February 18, 2021 IEP, DCPS improperly relied on the July 19, 2021 HOD and indicated that the FAPE offer would not be reconsidered; and DCPS created an amended IEP on October 12, 2021 which was inadequate?

The IDEA requires that school officials must have an appropriate IEP in place for each student with a disability at the beginning of each school year. *See Leggett, supra*, 793 F.3d at 67. Prior to the start of the 2021-2022 school year, DCPS last updated Student's IEP on February 18, 2021. The February 18, 2021 IEP identified Reading, Written Expression, Adaptive/Daily Living Skills and, Emotional, Social and Behavioral Development as areas of concern for Student. For Special Education and Related Services, the IEP provided for Student to receive Special Education Services in the regular classroom for 5 hours per week for Written Expression and 2 hours per week for



Specialized Instruction, and to receive 5 hours per week of special education for Reading outside general education. For Behavioral Support Services, the IEP provided for Student to receive 60 minutes per month of services outside general education, 60 minutes per month within general education and 30 minutes per month of consultation. The IEP also provided for Student to receive a plethora of Other Classroom Aids and Services intended to address Student's executive functioning and other classroom challenges. The parents disagreed with the February 18, 2021 IEP. Notably, their advisor, Educational Advocate, stated at the IEP meeting that Student needed special education support in all classes throughout the day at a smaller special school; that math should be addressed as an IEP area of concern and that Student needed more social-emotional services.

In an August 11, 2021 email letter, Petitioners' Counsel gave notice to DCPS that the parents intended to continue Student's unilateral placement at Nonpublic School for the 2021-2022 school year and that the parents would seek reimbursement and ongoing funding from DCPS for Student to attend the private school. In the notice letter, Petitioners' Counsel asserted, *inter alia*, that DCPS' proposed February 18, 2021 IEP was inadequate based on Student's needs; that the parents did not believe the proposed IEP service hours met Student's needs throughout his/her entire day; that Student required direct instruction for social-emotional-behavioral as well as support embedded throughout his/her day and that Student needed a separate school that could provide

small classroom sizes and intensive supports. DCPS did not agree to change the February 18, 2021 IEP, except to amend the IEP on October 12, 2021 to add occupational therapy (OT) accommodations as additional Other Classroom Aids and Services to the IEP.

The parents contend DCPS denied Student a FAPE because the February 18, 2021 IEP, which was the proposed IEP in place for Student at the start of the 2021-2022 school year, was inappropriate. DCPS maintains that it offered Student a FAPE with the 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

Petitioners allege that DCPS violated IDEA procedures by not updating the proposed February 18, 2021 IEP in summer 2021, based on new data obtained for Student after the February IEP team meeting. The parents have the burden of persuasion for this claim. The alleged new data includes reports from Nonpublic

School, including a “summer report” sent July 30, 2021. DCPS was also provided the IEE OT assessment report for Student completed on April 14, 2021 and a DCPS psychologist’s WJ-IV mathematics assessment completed on June 20, 2021. DCPS convened Student’s IEP team to review the new assessments on October 12, 2021.

The IDEA mandates that an LEA must ensure that the IEP team reviews the child’s IEP periodically, but not less than annually, to determine whether the annual goals for the child are being achieved and revises the IEP, as appropriate. *See* 34 CFR § 300.324(b). *See, also, D.S. v. District of Columbia*, 699 F. Supp. 2d 229 (D.D.C. 2010) (“Because the IEP must be ‘tailored to the unique needs’ of each child, *Bd. of Educ. v. Rowley*, 458 U.S. 176, 181, 102 S.Ct. 3034, 73 L.Ed.2d 690 (1982), it must be regularly revised in response to new information regarding the child’s performance, behavior, and disabilities.” *Id.* at 234 (*citing* 20 U.S.C. §§ 1414(b)-(c).) The IDEA does not set a time frame for revising a child’s IEP, except that the IEP must be reviewed at least annually. *See* 34 CFR § 300.324(b)(1).

In an analogous analysis of the timeliness for a parent-requested special education reevaluation, the U.S. District Court for the District of Columbia decided that in light of the lack of statutory guidance, a local education agency (LEA) must conduct a special education reevaluation, when requested by a parent, in a “reasonable period of time,” or “without undue delay,” as determined in each individual case. *See Herbin ex rel. Herbin v. District of Columbia*, 362 F.Supp.2d 254, 259 (D.D.C.2005). Because the

IDEA does not specify a time period within which an IEP team must review an IEP based on additional data (outside of the annual review), I conclude that, in response to new information about the child's needs, an LEA must likewise ensure that the child's IEP is reviewed, and revised when appropriate, within a reasonable period of time or without undue delay.

In this case, DCPS convened Student's IEP team to review the February 18, 2021 IEP, including the new assessments and other information provided about Student in the summer of 2021, within a few weeks of the start of the 2021-2022 school year. I find that the Petitioners have not established that this lapse of time in reviewing the new information was unreasonable or constituted undue delay.

#### Substantive Compliance

Turning to the second prong of the *Rowley* inquiry, the substantive issues in this case are whether the February 18, 2021 IEP and the July 15, 2022 IEPs were appropriate for Student. In *E.W. v. District of Columbia*, No. 21-CV-1598 (FYP/GMH), 2022 WL 2070869 (D.D.C. May 11, 2022), *report and recommendation adopted*, No. 21-CV-1598 (FYP), 2022 WL 2070858 (D.D.C. June 1, 2022), U.S. Magistrate Judge G. Michael Harvey set forth the legal standard for evaluating IEPs.

The IDEA guarantees children with disabilities the right to a FAPE, which is defined as "special education and related services" provided at public expense that "conform[ ] with the [student's] individual education program," also known as an IEP. 20 U.S.C. §§ 1400(d)(1)(A); 1401(9); 1412(a)(1). Thus, the primary vehicle for ensuring that students identified

as disabled receive a FAPE is the creation and implementation of an IEP setting forth the services to be provided to meet that student's needs. 20 U.S.C. § 1414(d)(1)(A)–(2)(A); *Sch. Comm. of Burlington v. Dep't of Educ. of Mass.*, 471 U.S. 359, 368, 105 S.Ct. 1996, 85 L.Ed.2d 385 (1985) (describing the IEP as the “*modus operandi*” of the IDEA). The plan is developed by the student's IEP team, which includes the student's parents, teachers, and other educational specialists. 20 U.S.C. § 1414(d)(1)(B). An IEP contains assessments of the student's needs, strategies to meet those needs, and goals used to measure the effectiveness of the plan. 20 U.S.C. § 1414(d)(1)(A). The IEP team must develop an IEP that is “reasonably calculated to enable a child to make progress appropriate in light of the child's circumstances.” *Andrew F. ex rel. Joseph F. v. Douglas Cty. Sch. Dist. RE-1*, 580 U.S. ----, ----, 137 S. Ct. 988, 999, 197 L.Ed.2d 335 (2017). The IDEA also requires that children with disabilities be placed in the “least restrictive environment” so that they can be educated in an integrated setting with children who do not have disabilities to the maximum extent appropriate. *See* 20 U.S.C. § 1412(a)(5)(A).

*E.W.*, 2022 WL 2070869, at \*3. “[A]n IEP's adequacy thus ‘turns on the unique circumstances of the child for whom it was created,’ and a reviewing court should defer to school authorities when they ‘offer a cogent and responsive explanation’ showing that an IEP ‘is reasonably calculated to enable the child to make progress appropriate in light of [her] circumstances.’” *A.D. v. Dist. of Columbia*, No. 20-CV-2765 (BAH), 2022 WL 683570, at \*7 (D.D.C. Mar. 8, 2022).

I find that Petitioners, through the testimony of the parents and their expert witnesses, established a *prima facie* case that the program and educational placement proposed in the February 18, 2021 and July 15, 2022 IEPs were inappropriate for Student. Therefore, the burden of persuasion on the appropriateness of the proposed IEPs and placements shifts to DCPS. I find that DCPS has not met that burden.

February 18, 2021 IEP

In the February 18, 2021 IEP, Student's IEP team reported that, based on reports from Nonpublic School teachers and family, Student's anxiety, attention, executive functioning and slow reading speed impacted him/her throughout the school day and with task completion. As services to meet those need, the IEP team provided for Student to receive 7 hours per week of special education for Written Expression and Reading in the general education setting, 5 hours per week for Reading outside general education and 120 minutes per month of direct Behavioral Support Services.

The parents' expert witness, Educational Advocate, opined in her hearing testimony that the February 18, 2021 IEP was not appropriate and did not offer Student a FAPE because, among other reasons, the service hours and location were not appropriate. She opined that Student needed small class size, with integrated 1:1 support for executive functioning, reading and written expression as well as a service location in a smaller school building than City School 2. Similarly, Head of School, who qualified as an expert in special education programming and placement, opined that Student needed support in all classes across the school day, and, specifically, support for his/her executive functioning challenges in both core academic and elective classes. Head of School also opined that Student benefits from small class size and could easily get lost in larger settings.

DCPS' expert, Special Education Teacher 2, opined that, as of October 12, 2021

when the February 18, 2021 IEP was amended, the IEP proposed for Student was appropriate. Special Education Teacher 2 has never met Student and was not present for the February 18, 2021 IEP team meeting. I found her opinion less credible than that of Educational Advocate who had worked with the family since September 2019 and attended the IEP meeting. More importantly, neither Special Education Teacher 2 nor DCPS' other witnesses provided a "cogent and responsive explanation" for the IEP team's decision to provide only 7 hours per week of special education in the general education setting, when the IEP team acknowledged that Student's anxiety, attention, executive functioning and slow reading speed impacted him/her throughout the school day. *See Findings of Fact, supra*, ¶ 12. (As a separate service, the IEP team provided for 5 hours per week of pull-out reading instruction.)

July 15, 2022 IEP

DCPS convened an IEP meeting to review and revise Student's DCPS IEP on July 15, 2022. This IEP identified Reading, Written Expression, Adaptive/ Daily Living Skills and Emotional, Social and Behavioral Development as areas of concern for Student. The IEP continued the February 18, 2021 IEP's provision for Student to receive Special Education Services for 5 hours per week for Written Expression and 2 hours per week for Specialized Instruction within general education, and 5 hours per week of Reading outside general education. For Behavioral Support Services, the IEP provided for Student to receive 120 minutes per month of services outside general education. The

July 15, 2022 IEP would have been implemented at City School 2. The parents disagreed with the proposed IEP and by email letter of August 12, 2022, Petitioners' Counsel gave notice to DCPS that the parents intended to continue Student's unilateral placement at Nonpublic School for the 2022-2023 school year and to seek reimbursement from DCPS for their private school expenses. Petitioners' Counsel alleged in her letter that the proposed July 15, 2022 IEP was not appropriate because Student required supports in all classes, not just for reading.

In her hearing testimony, the parents' expert, Educational Advocate, opined that the July 15, 2022 IEP was not appropriate and did not provide a FAPE because the IEP special education service hours and school location at City School 3 were inappropriate. DCPS' expert, Program Specialist, opined in her testimony that the July 15, 2022 IEP was appropriate and consistent with the data then available on Student.

In the July 15, 2022 IEP, the IEP team noted that Student had been diagnosed with Generalized Anxiety Disorder and ADHD. The IEP team repeated most of the information from Student's February 18, 2021 IEP regarding how Student's anxiety, attention, executive functioning and slow reading speed impacted him/her throughout the school day and affirmed that those challenges impacted Student's ability to access the general education curriculum. In addition, the July 15, 2022 IEP team reported that areas of concern for Student would be his/her lack of focus, attention to detail, and tendency to be easily distracted. As with the February 18, 2021 IEP, I find that DCPS'



witnesses and other evidence failed to provide a “cogent and responsive explanation” for the July 15, 2022 IEP team’s decision to provide only 7 hours per week of special education in the general education setting when the IEP team acknowledged that Student’s anxiety, attention, executive functioning and slow reading speed impacted him/her throughout the school day.<sup>3</sup>

#### Need for IEP Services in Mathematics

In the 2019-2020 school year at City School 2, Special Education Teacher 1 had provided Student 50 minutes per day of Specialized Instruction in mathematics, even though there was no provision for math services in Student’s IEP. For both the February 18, 2021 IEP and the July 15, 2022 IEP, the parents and Educational Advocate sought to have mathematics recognized as an IEP academic area of concern for Student. DCPS refused this request. The parents assert that this was a denial of FAPE. However, in the June 9, 2021 WJ-IV mathematics assessment of Student, conducted online, the DCPS Psychologist found that Student’s math scores fell within the Average range, which she wrote was consistent with Student’s math scores in the Average range on previous standardized assessments. At the October 12, 2021 IEP team meeting, another DCPS psychologist reviewed the June 2021 WJ-IV mathematics assessment and advised the team that the report communicated that Student’s math skills were age appropriate

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<sup>3</sup> To be clear, I find only that DCPS has not met its burden of persuasion on the appropriateness of its proposed February 18, 2021 and July 15, 2022 IEPs for Student. I make no finding as to whether Student requires special education supports in all classes or placement in a special school.

and met grade expectations. She stated that the June 2021 testing aligned with the previous math evaluations of Student done in person. Notably, LCP reported in her March 2019 psychological evaluation report that Student's understanding of math concepts and execution of arithmetic operations emerged as a relative strength, with his/her skills placing in the High Average range.

Educational Advocate was critical of the conclusions reached by the DCPS psychologists. However, Educational Advocate did not qualify as an expert in educational testing and I discount that opinion. I conclude that DCPS established that based on the information available to the IEP team at the October 12, 2021 meeting, the decision not to add mathematics as an IEP area of concern for Student was appropriate. *See, e.g., A.B. by Holmes-Ramsey v. District of Columbia*, No. CV 10-1283 (ABJ/JMF), 2012 WL 13041578, at \*8 (D.D.C. Feb. 14, 2012). (Appropriateness of IEP must be judged prospectively based on the information available to Student's IEP team at the time of its development.)

#### Behavioral Support Services

The February 18, 2021 and July 15, 2022 IEPs provided for Student to receive 120 minutes per month of direct Behavioral Support Services. In their due process complaint, the parents alleged that these services were not sufficient for Student. However, Petitioners did not call an expert in psychology or social work social work to testify at the due process hearing. DCPS' expert witness, School Social Worker, opined

in her testimony that, at least as of the July 15, 2022 IEP team meeting, 120 minutes per month of Behavioral Support Services was appropriate for Student. I find that DCPS met its burden of persuasion that the provision of 120 minutes per month of Behavioral Support Services in its proposed February 18, 2021 and the July 15, 2022 IEPs was appropriate to meet Student's needs.

#### Occupational Therapy Services

At the October 12, 2021 IEP amendment meeting, the IEP team reviewed IEE OT's April 14, 2021 report recommending OT services for Student, namely services 1 to 2 times a week to address Executive Functioning, Sensory Processing, Emotional Regulation, Visual Perceptua,l Motor and Handwriting. The DCPS representatives refused to add direct OT related services to Student's IEP. DCPS' Occupational Therapist at the October 12, 2021 meeting felt that Student needed accommodations for OT concerns, but not direct OT related services. At Nonpublic School, Student likewise does not receive direct OT services. Neither Petitioners nor DCPS called an Occupational Therapist to testify at the due process hearing regarding Student's alleged need for direct OT services. DCPS' expert, Program Specialist, explained in her testimony that Student did not qualify for OT direct services because there was allegedly no educational impact resulting from Student's OT deficits. On this limited evidence, I find that DCPS met its burden of persuasion that, at the time of the October 12, 2021 IEP amendment meeting and the July 15, 2022 IEP team meeting, the IEP teams'

decisions to provide accommodations for Student’s OT deficits, instead of direct OT services, were appropriate.

Other IEP Claims

In their 56-page due process complaint, the Petitioners assert a number of other claims about why the February 18, 2021 and July 15, 2022 IEPs were allegedly inadequate, *e.g.*, IEPs did not contain sufficient/comprehensive/appropriate goals and related baselines, the IEPs failed to provide appropriate other classroom aids and services and the IEPs failed to provide appropriate modifications, accommodations, and interventions. In light of my conclusion that DCPS did not meet its burden of persuasion that the hours of special education services in the February 18, 2021 and July 15, 2022 IEPs were appropriate, it is not necessary to reach Petitioners’ additional claims about why these proposed IEPs were inadequate for Student. *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)).

In conclusion, I find that DCPS has not met its burden of persuasion that either its proposed February 18, 2021 IEP, including the October 12, 2021 amendment, or its proposed July 15, 2022 IEP was appropriate for Student, that is, “reasonably calculated to enable [Student] to make progress appropriate in light of the child’s circumstances.”

*See Andrew F., supra* at 999. I conclude, therefore, that Petitioners established that DCPS failed to offer Student a FAPE for the 2021-2022 or for the 2022-2023 school years.

#### Other Reimbursement Requirements

Having found that DCPS failed to offer Student a FAPE for the 2021-2022 and the 2022-2023 school years, 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, 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 is a private day school in suburban Maryland which serves college bound students with language-based learning differences. The school is approved by the Maryland state educational agency and uses “common core” standards to develop grade-level curricula. The school has an enrollment of approximately 140 students. The school provides all small group instruction, with no more than 10

students in the academic classrooms. To address executive functioning deficits, each student uses a planner designed by the school. Nonpublic School provides students with at least daily “check-ins.” The tuition charge at Nonpublic School is around \$49 thousand per school year.

Student has attended Nonpublic School since fall 2020. By all accounts, Student has made progress. Student testified that he/she received A’s or B’s in all classes for the 2022-2023 school year. Nonpublic School teacher comments at the end of the 2022-2023 school year included that Student had high participation for the quarter and improved his/her executive functioning skills. Father testified that the difference in Student’s attitude at Nonpublic School after City School 2 was “like night and day.”

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 2021-2022 or 2022-2023 school years, Nonpublic School was necessary to Student’s education. I further find that the parents’ enrolling Student at Nonpublic School for the 2021-2022 and 2022-2023 school years was reasonably calculated to provide Student educational benefit. The parents’ choice of Nonpublic School 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 letters of August 11, 2021 and August 12, 2022, Petitioners’ Counsel provided written notice to DCPS that the parents did not believe that the proposed programs at DCPS for the respective 2021-2022 and 2022-2023 school years were appropriate to meet Student’s needs and that the parents intended to unilaterally place Student at Nonpublic School and would pursue reimbursement from DCPS for private school tuition and related costs. In response, DCPS affirmed its position that its proposed IEPs offered Student a FAPE and DCPS did not offer to reconvene Student’s IEP team to address the parents’ concerns. I find that there has been no showing that the parents acted unreasonably in continuing Student’s unilateral placement at Nonpublic School for the 2021-2022 and 2022-2023 school years.

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. 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 for the 2021-2022 and 2022-2023 school years.

Special Education Reevaluation

– Did DCPS deny the Student a FAPE by failing to comprehensively evaluate him/her in all areas of suspected disability because: a) other than the partial mathematics and OT reevaluations, there was no triennial reevaluation of the student in reading, written expression, social/emotional, adaptive/executive functioning, or any other area of concern despite the last comprehensive evaluation being done in 2019; b) the student was not comprehensively evaluated in the area of mathematics because the DCPS math evaluation done in 2022 was not comprehensive/complete and was not sufficient to make a determination that the student was not eligible for specialized instruction in mathematics?

The Petitioners contend that DCPS' July 2022 special education reevaluation of Student was not sufficiently comprehensive. The parents have the burden of persuasion for this claim. Student was initially evaluated and determined eligible for special education at City School 1 on April 10, 2019. The IDEA mandates that special education reevaluations must be conducted at least every three years. It is up to the child's MDT team to first review existing data and then identify what additional data are needed for the triennial assessment. *See* Department of Education, *Assistance to States for the Education of Children with Disabilities*, 71 Fed. Reg. 46540 at -641. (August 14, 2006) ("The review of existing data is part of the reevaluation process. The IEP Team and other qualified professionals, as appropriate, must review existing evaluation data, and on the basis of that review, and input from the child's parents, identify what additional data, if any, are needed to determine whether the child continues to have a disability, and the educational needs of the child." *Id.* at 641.)

In this case, in May 2022 DCPS scheduled an Analysis of Existing Data (AED)



meeting for Student for July 15, 2022. In preparation for the meeting, Father emailed to DCPS Student's Nonpublic School report cards & progress reports for the 2021-2022 school year and a November 2021 ADHD diagnosis. In a prior written notice to the Parents, DCPS advised that it had considered a current progress report from Nonpublic School and the August 5, 2021 IEE OT assessment. At the July 15, 2022 meeting, a DCPS School Psychologist reviewed her virtual observation/assessment of Student for mathematics completed May 18, 2021 and her June 2021 report. At the meeting on July 15, 2022, DCPS confirmed Student's continued eligibility for special education under the MD classification. In a July 27, 2022 Prior Written Notice confirming Student's special education eligibility, DCPS notified the parents that the team had utilized input from Nonpublic School, the parents, an occupational therapy report and psychoeducational testing.

While the parents stated their belief at the July 15, 2022 eligibility meeting that Student should have been determined eligible to receive services for mathematics, there is no indication that the parents or their representatives requested additional evaluations by DCPS or an Independent Educational Evaluation of Student. DCPS' expert, Program Specialist, opined in her hearing testimony that DCPS had sufficient data to develop Student's IEP in July 2022. Testimony of Program Specialist. On this evidence, I find that the parents have not met their burden of persuasion that the July 15, 2022 triennial reevaluation of Student was not sufficiently comprehensive.

**ORDER**

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

ORDERED:

1. Upon receipt of documentation of payment by the parents as may be reasonably required, DCPS shall, without undue delay, reimburse the parents their expenses heretofore paid for covered tuition and related expenses, including covered privately-owned vehicle transportation expenses, incurred for Student's enrollment at Nonpublic School for the private school's 2021-2022 and 2022-2023 regular school years 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