

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

OSSE
Office of Dispute Resolution
July 22, 2023

PARENTS, on behalf of STUDENT, ¹)	Date Issued: July 22, 2023
)	
Petitioners,)	Hearing Officer: Peter B. Vaden
)	
v.)	Case No: 2023-0072
)	
DISTRICT OF COLUMBIA)	Online Videoconference Hearing
PUBLIC SCHOOLS,)	
)	Hearing Dates:
Respondents.)	June 28, 29 and 30, 2023
)	July 10, 2023
)	

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 Student an appropriate special education program and educational placement with the District's proposed April 1, 2022 Individualized Education Program (IEP).

¹ Personal identification information is provided in Appendix A.

Petitioners' Due Process Complaint, filed on April 24, 2023, named DCPS as Respondent. The undersigned hearing officer was appointed on April 25, 2023. The parties met for a Resolution Session Meeting on May 3, 2023 and did not resolve the issues in dispute. On May 4, 2023, I convened a videoconference prehearing conference with counsel to discuss the issues to be determined, the hearing date and other matters. The hearing dates were set for June 28, 29 and 30, 2023. I granted DCPS' subsequent request to add an additional hearing day, July 10, 2023, to accommodate witness availability. On June 22, 2023, I granted DCPS' unopposed continuance request to extend the final decision due date to July 28, 2023.

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 June 28 through 30 and July 10, 2023. The parents appeared online for the hearing and were represented by PETITIONERS' COUNSEL and PETITIONERS' CO-COUNSEL. Respondent DCPS was represented by DCPS' COUNSEL. Petitioners' Counsel and DCPS' Counsel made opening statements. Petitioners called as witnesses MOTHER, FATHER, Student, EDUCATIONAL ADVOCATE and HEAD OF SCHOOL. DCPS called as witnesses CENTRAL IEP SPECIALIST, SCHOOL SOCIAL WORKER, and DIRECTOR OF SPECIALIZED INSTRUCTION.

Petitioners' Exhibits P-1 through P-18, P-21 through P-27, P-30, P-39 through P-41, P-43, P-45 through P-47, and P-49 through P-59 were admitted into evidence, including Exhibits P-4, P-41, P-43, and P-59 admitted over DCPS' objections. I sustained DCPS' objections to Exhibits P-37 and P-38. DCPS' Exhibits R-1 through R-13 and R-15 through R-24 were admitted into evidence, including Exhibit R-15 admitted over DCPS' objection. Following completion of the presentation of evidence on July 10, 2023, 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 May 4, 2023 Prehearing Order are:

1. Whether DCPS denied Student a FAPE by creating an inappropriate IEP on April 1, 2022 (justifying the unilateral placement at Nonpublic School for the 2022-2023 school year and reimbursement);

DCPS did not offer an appropriate IEP based on the information and data they had available at the time the April 1, 2022, IEP was developed because:

- a. DCPS contemplated returning the student to a public school setting even larger than what he/she had been in at CITY SCHOOL 1 without assessing whether Student was ready to go back to that environment and/or planning accordingly and consequently put him/her back in the

same type of classes and environment as he/she had been in when he/she had been denied a FAPE;

b. The IEP contains insufficient hours and type of specialized instruction based on the data available to the team at the time;

c. The IEP fails to specify the student requires small class sizes;

d. The IEP fails to offer twice daily check-ins as the data suggests Student needed and instead offers vague/unstructured/discretionary and therefore inconsistent or not guaranteed supports that did not constitute a FAPE;

e. The IEP contains inappropriate, inadequate, and/ or outdated goals, objectives, and related baselines not designed to address the individual needs of the student;

f. The IEP contains vague other classroom aids and services that do not provide for Student's needs adequately;

g. The IEP provides classroom aids and services incompatible with the proposed hours of specialized instruction (cannot be provided with the hours/setting offered);

h. The IEP contains inadequate other classroom aids and services because they did not include an evidence-based reading intervention, writing intervention, and twice daily check-ins with an adult for academic, executive functioning, and social-emotional support in the morning and afternoon and/ or

i. The IEP failed to properly address or program for known social-emotional challenges (anxiety) known to impact the student's ability to access general education including failing to offer any direct behavioral support services despite contemplating returning Student to a large public school setting with minimal supports.

INAPPROPRIATE PLACEMENT - LOCATION OF SERVICES

2. DCPS denied Student a FAPE by placing him/her in a school (CITY SCHOOL 2) for the 2022-2023 school year that was/is incapable of implementing his/her IEP as written (due to its block scheduling), and therefore, the student did not

have an appropriate placement prior to the 2022-2023 school year and parents were justified in unilaterally placing Student at NONPUBLIC SCHOOL again.

In the May 4, 2023 prehearing order, I included in the issues for determination contentions pleaded in the Petitioners' due process complaint under the heading "Collateral Estoppel." In the prehearing order, I stated that Petitioners' offensive collateral estoppel claims should be raised by a prehearing motion, rather than left for determination at the due process hearing. Petitioners did not file a motion concerning collateral estoppel or assert collateral estoppel as a bar during the presentation of DCPS' evidence at the due process hearing. I do not deem collateral estoppel to be an issue for determination in this matter.

For relief, Petitioners request that the hearing officer order the following relief:

The Hearing Officer will order DCPS to reimburse the parents for the costs associated with the unilateral placement of Student during the 2022-2023 school year, including any and all related services (including any payments made prior to the first day of school for the 2022-2023 school year and transportation); the Hearing Officer will order DCPS to reimburse any payments made by the parents that are not covered by stay-put or remain out of pocket, upon proof that such payments were made and the Hearing Officer will order 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 Hearing Officer Determinations

The parents have brought at least two prior due process complaints seeking reimbursement for their private school expenses for Student. In Case No. 2020-0213, decided March 8, 2021 (the March 8, 2021 HOD), Impartial Hearing Officer Coles Ruff

determined that DCPS had denied Student a FAPE in its development of Student's December 18, 2018, May 29, 2019, and August 13, 2020 IEPs. In the March 8, 2021 HOD, Hearing Officer Ruff ordered, *inter alia*, that DCPS reimburse the parents their costs for Student's attendance at Nonpublic School for the second half of the 2019-2020 school year and fund Student's enrollment at Nonpublic School for the entire 2020-2021 school year.

In Case No. 2021-0159, Impartial Hearing Officer Michael Lazan determined in a April 8, 2022 hearing officer determination (the April 8, 2022 HOD) that DCPS had denied Student FAPE through its May 25, 2021 IEP. Hearing Officer Lazan ordered DCPS to reimburse the parents for Student's enrollment at Nonpublic School for the 2021-2022 school year. In the prehearing conference in the present case, counsel for both parties agreed that the hearing officer may adopt relevant findings of fact from the April 8, 2022 HOD.

Relevant Findings of Fact from the April 8, 2022 HOD

I adopt the following findings of fact made by Hearing Officer Lazan in the April 8, 2022 HOD:

A. Student has average cognitive ability. For the 2017-2018 school year, the Student attended City School 1, a DCPS public school. Student was often pulled out of classes, which caused him/her to miss instruction and made him/her feel "dumb and insecure." The Student's most difficult subject was mathematics. Student experienced a

heightened level stress at City School 1.

B. A psychological assessment of the Student was conducted by a DCPS psychologist in November and December, 2017, with a report issued on December 10, 2017. The evaluator concluded that the Student had a psychological processing weakness in long-term retrieval, including word retrieval. Academic testing using the WIAT-III revealed below-age and grade-level scores in the areas of word reading, oral reading fluency, spelling, math fluency for multiplication, oral discourse comprehension and theme development and text organization. Behavior and social-emotional functioning data gathered via interviews, observations, reviews of previous evaluations, and standardized rating scales suggested that the Student demonstrated symptoms consistent with anxiety.

C. For the 2018-2019 school year, the Student again attended City School 1. The Student's amended IEP, dated February 14, 2019, recommended that the Student receive forty-five minutes of specialized instruction per week inside general education (for reading, written expression, and mathematics); 150 minutes of specialized instruction per week outside general education (ninety minutes for reading and sixty minutes for mathematics); and "Other Classroom Aids and Services."

D. The Student's subsequent IEP, dated May 29, 2019, recommended that the Student receive two hours of specialized instruction per week inside general education for reading, written expression, and mathematics, with "Other Classroom Aids and

Services.”

E. For the 2019-2020 school year, the Student attended City School 1. The Student’s August 13, 2020 IEP recommended that the Student receive ten hours of specialized instruction per week outside general education (three hours for reading, four hours for written expression, and three hours for mathematics) and 2.5 hours of specialized instruction per week inside general education, with no specific subject matter assigned. The IEP also recommended behavioral support services for thirty minutes per month, with “Other Classroom Aids and Services.”

F. At City School 1, notwithstanding the requirements of the IEP, the Student received instruction through daily “inclusion” classes in English language arts and mathematics. Much of this instruction was language-based. The classes at City School 1 had about twenty to thirty children. The Student did not want to be pulled out of class for instruction and was upset when this happened. The Student also felt that classes were “really hard,” with a lot of homework, which s/he “barely” did. The Student often did not understand what teachers were trying to do and found reading assignments very difficult. The Student felt that s/he didn’t get enough help, and that the help that was provided to him/her was not useful. The Student’s anxiety did not explicitly manifest itself at school, but at home s/he would “have a breakdown.” The Student was not comfortable asking teachers for help at City School 1, at least in part because the Student did not want to make the teachers think of him/her as unintelligent. The Student also

had difficulty with self-organization. In response, teachers at the school sometimes told the Student to skip assignments.

G. In about January, 2020, the Student began attending Nonpublic School, a private school for college-bound students with mild to moderate language-based learning differences. The school does not accept students who are cognitively impaired or whose main disability is Attention Deficit Hyperactivity Disorder (“ADHD”). The school is approved by the Maryland state educational agency and uses “common core” standards to develop grade-level curricula. Nonpublic School has approximately 150 students and arts are infused throughout every class. Students have average to above-average cognitive abilities. The majority of students in the school have dyslexia, specific learning disability in reading and/or written expression, mixed expressive and receptive language disorder, and/or central auditory processing disorder. Some students have secondary disabilities of dysgraphia, attentional difficulties, executive functioning, and/or mild anxiety. Nonpublic School has approximately forty-two full-time teachers who must be certified in at least one evidence-based reading intervention. A “few” teachers hold special education certification. The student-to-adult ratio in classes at Nonpublic School was approximately ten-to-one, though some classes may have lower ratios. Lessons tend to reduce reliance on language and use auditory, visual, and kinesthetic approaches to reduce anxiety. There are no individualized learning plans at the school, which uses a variety of programs to target reading issues. To address

executive functioning deficits, each student uses a planner designed by the school.

Teachers check the planner every period.

H. Nonpublic School had a thirty-minute reading class and a separate class for English language arts. All students receive daily reading instruction. The reading methodology is based on the Orton-Gillingham approach to instruction. Classes are broken up into groups by areas of need. Information is placed on the “board” in obvious ways so that students know what to expect during the day. The school does not offer related services such as speech and language therapy or occupational therapy.

Nonpublic School provided students with “check-ins” twice each day. Classroom and testing accommodations are decided by teachers. Breakout rooms are often used during virtual instruction.

I. Nonpublic School provided additional accommodations for the Student, including: extended time for assignments and exams; answers marked directly on tests; assistive technology; text-to-speech software or a reader during testing situations; a computer with spell-check for written work; small class and group testing; breaks; access to “fidgets”; permission to stand as needed; scrap paper for tests; a calculator and manipulatives for mathematics; a reading rod or ruler; access to a highlighter and graph paper; use of large-font printed materials; reduced-length written assignments; checklists for editing, proofreading, and grammar; reduced copying for assignments; broken-down instructions; chunked assignments; repeated directions and checks for

understanding; and use of graphic organizers.

J. The Student continued at Nonpublic School for the 2020-2021 school year. MAP testing in reading in or about October, 2020, found that the Student was reading below grade-level. The Student continued to have trouble in mathematics and required direct teacher supports, checklists, and graphic organizers, among other things. The Student did not experience much anxiety at Nonpublic School, except during major tests.

K. A DCPS school psychologist conducted a Confidential Psychological Triennial Reevaluation of the Student on January 26, 2021, and January 27, 2021. The Student earned a composite intelligence index score of 90 on the RIAS test, in the average range, at the 25th percentile. The Student scored higher on non-verbal intelligence subtests than verbal intelligence subtests. The Student's cognitive memory score was in the average range. On the W-J IV, the Student scored in the average range in passage comprehension and word attack, and in the low average range in letter-word identification and oral reading. The Student's overall mathematics score was in the low range, while the Student scored in the high average range for written language. The Student also scored in the low range for "brief achievement" and academic skills, but in the average range for academic applications. On the BASC-3, parent scale, the Student did not score in the "clinically significant" range but scored in the "at-risk" range for withdrawal. The school psychologist concluded that the Student should be identified as

a student with a specific learning disability and recommended a variety of accommodations and services for the Student.

L. The DCPS School Psychologist's interview with the Student's advisor dated January 21, 2022 indicated that the Student had made "huge" progress academically at Nonpublic School, asserting that he/she had come to the school sad and barely talking but was now bouncing around the school, bringing life to everyone else. The Student met with his/her advisor two times each day, five days per week. The advisor indicated that the Student was on grade-level, though s/he needed prompts to use his/her tools, and that the Student would be lost in a larger school.

Hearing Officer's Additional Findings of Fact

After considering all of the evidence received at the due process hearing in this case on June 28 through 30 and July 10, 2023, as well as the argument of counsel, my findings of fact are as follows:

1. Student, an AGE youth, resides with the parents in the District of Columbia. Testimony of Mother.
2. Student is eligible for special education as a student with a Specific Learning Disability (SLD). Exhibit R-4.
3. In the May 25, 2021 IEP (finalized on June 1, 2021), DCPS proposed for Student to receive 10 hours per week of Specialized Instruction in the general education setting and 5 hours per week outside of general education. The IEP also provided for

120 minutes per month of consultation (not direct) Behavioral Support Services.

Exhibit P-43. The proposed IEP would be implemented at City School 1. Testimony of Mother.

4. On January 24, 2022, Nonpublic School's Dean of Students conducted an observation of Student in English class. He reported, *inter alia*, that Student could accommodate a sophisticated and intellectually challenging curriculum with the appropriate accommodations. He recommended for Student a clearly structured class timeline that was consistent day to day; small class size and proximity to the teacher so Student would have the opportunity to be seen and heard; a challenging, engaging, multisensory curriculum; adequate processing time whether through pre-teaching or some warmup time at the start of class; organizational and prioritization strategies to help structure the sequence of Student's work; checklists; tables/notes that can be filled in; well organized worksheets/rubrics; adequate distancing of seating from peers to minimize distraction and seating at or near the front of class; creative strategies for learning, journaling, and breaking down assignments and chunking. Exhibit P-1.

5. In his decision in Case No. 2021-0159, Hearing Officer Lazan found that the parents had presented substantial evidence, unrebutted by DCPS, that Student required small classes with a modified instructional approach in academic subjects; that Student struggled with the pace of instruction and difficulty of work in the large general education classes at City School 1; that even with a special education teacher in the

room, Student did not understand much of the general education material and would come home anxious and upset; that the May 25, 2021 IEP had been developed without consideration of the Student's performance in a similar program, also at City School 1, less than eighteen months earlier. Hearing Officer Lazan found that DCPS had not offered a cogent and responsive explanation for its May 25, 2021 proposed IEP which offered Student the same kind of classes that he/she had been unsuccessful in before. Hearing Officer Lazan concluded that DCPS denied Student an educational benefit, and therefore a FAPE, with the proposed May 25, 2021 IEP. Hearing Officer Lazan ordered DCPS to reimburse the parents for their private school costs for Student's enrollment at Nonpublic School for the 2021-2022 school year. The Hearing Officer Determination in Case No. 2021-0159 was issued on April 8, 2022. Exhibit P-39.

6. The due process hearing in Case No. 2021-0159 concluded on March 18, 2022. On April 1, 2022, prior to the issuance of the hearing officer determination in that case, DCPS convened an IEP annual review meeting at its Central Office. At that meeting, the DCPS representative stated that DCPS had requested additional information from Nonpublic School, which was not received. DCPS proposed for Student to receive specialized instruction for 10 hours per week inside and 5 hours per week outside of general education. The DCPS representative stated that inside hours means a special educator would be inside general education to ensure accommodations are being administered and Student had support to access the curriculum. The 5 hours

outside would look like a special education teacher with a small group of students. The hours of specialized instruction would cover all areas of goals: reading, writing and math. The proposed April 1, 2022 IEP also provided for 120 minutes per month of behavioral support consultation services among the school social worker and Student's teachers. DCPS proposed that the IEP would be implemented at City School 1 for the rest of the 2021-2022 school year and at City School 2 for the 2022-2023 school year. The parents and Educational Advocate stated their disagreement with, *inter alia*, the proposed service hours. Exhibits P-8, P-9.

7. After the April 8, 2022 HOD was issued, DCPS did not convene another IEP team meeting for Student until February 2023. Testimony of Educational Advocate. (DCPS IEPs developed for Student subsequent to the April 1, 2022 IEP are not at issue in this proceeding.)

8. By email letter of August 12, 2023, Petitioners' Counsel provided written notice to DCPS that the parents intended to unilaterally place Student at Nonpublic School after at least ten business days, if DCPS failed to take appropriate actions to remedy alleged denials of FAPE to Student, specifically, because DCPS had allegedly failed to provide the student, with a FAPE in that the proposed April 1, 2022 IEP was inappropriate and inadequate and in contradiction to the April 8, 2022 HOD. In the letter, Petitioners' Counsel gave notice that the parents would take appropriate legal action to pursue reimbursement from DCPS for tuition and other costs associated with

educating Student at Nonpublic School for the remainder of the 2022-2023 school year or until such time was FAPE was offered. Exhibit P-14.

9. By letter of August 15, 2022, the Director of the DCPS Resolution Team confirmed receipt of Petitioners' Counsel's August 12, 2022 letter. The DCPS official wrote that DCPS did not agree to bear the cost of a private placement for Student and stated that it was DCPS' position that the District had made a FAPE available to the student with an appropriate IEP and placement at City School 2. Exhibit P-17.

10. Student has attended Nonpublic School since January 2020 as a child unilaterally placed by his/her parents. For the 2022-2023 school year, Student was in GRADE. Student is doing well academically. Student has made great progress. This past school year, he/she was co-captain of the school volleyball team and was one of four students from the school invited to attend a leadership class in California. Student has dyslexia. Student still has weaknesses in reading and needs teacher check-ins.

Testimony of Educational Advocate. It is hard for Student to sound out longer words or to understand unless someone reads the text for him/her. Testimony of Student.

11. The parents paid \$47,473.71 for tuition for Student at Nonpublic School for the 2022-2023 school year. The parents also drove Student back and forth to school each day, a distance of 12 miles each way. Testimony of Father.

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

IS DCPS OBLIGED TO REIMBURSE THE PARENTS FOR STUDENT'S PRIVATE SCHOOL EXPENSES FOR THE 2022-2023 SCHOOL YEAR?

Student has been unilaterally placed by the parents at Nonpublic School since January 2020. In two prior due process proceedings, the respective assigned Impartial Hearing Officers ordered DCPS to fund, or reimburse the parents for, Student's Nonpublic School expenses for part of the 2019-2020 school year and for the 2020-2021

and 2021-2022 school years. In the present proceeding, the parents seek reimbursement from DCPS for their expenses for Student's continued enrollment at Nonpublic School for the 2022-2023 school year. For the reasons explained below, I find that the parents are entitled to reimbursement from DCPS for their 2022-2023 school year private school expenses for Student.

Reimbursement for Private School Tuition

In *A.D. v. Creative Minds Int'l Pub. Charter Sch.*, No. CV 18-2430 CRC/DAR, 2020 WL 12654618 (D.D.C. Aug. 14, 2020)², U.S. Magistrate Judge Deborah Robinson explained the standards, in this judicial circuit, for public reimbursement of parents who place their child with a disability in a private school:

The IDEA requires the school district to reimburse parents for the expenses for private school if “(1) the school officials failed to offer the child a [FAPE] in a public or private school . . . ; (2) the private school placement chosen by Plaintiffs was otherwise ‘proper under the Act’; and (3) . . . Plaintiffs did not otherwise act unreasonably.” *Leggett v. Dist. of Columbia*, 793 F.3d 59, 66 (D.C. Cir. 2015) (citing [*Florence County Sch. Dist. Four v. Carter*, 510 U.S. 7, 15-16 (1993)]; 20 U.S.C. § 1412(10)(c)(iii)(III)). (internal quotation marks omitted). “Reimbursement, moreover, may be ‘reduced or denied’ if the parents fail to notify school officials of their intent to withdraw the child, . . . deny them a chance to evaluate a student, . . . or otherwise act ‘unreasonably[.]’” *Id.* at 63 (citation omitted).

A.D. at *19. See, also, *School Committee of Town of Burlington v. Department of Education of Massachusetts*, 471 U.S. 359, 369, 105 S.Ct. 1996, 85 L.Ed.2d 385 (1985).

² *A.D. v. Creative Minds Int'l Pub. Charter Sch.*, No. CV 18-2430 CRC/DAR, 2020 WL 12654618 (D.D.C. Aug. 14, 2020), *report and recommendation adopted*, No. 18CV2430CRCDAR, 2020 WL 6373329 (D.D.C. Sept. 28, 2020), *appeal dismissed sub nom. A. D. by E.D. v. Creative Minds Int'l Pub. Charter Sch.*, No. 20-7106, 2021 WL 1654481 (D.C. Cir. Mar. 31, 2021).

Did DCPS fail to offer Student a FAPE?

The first factor in deciding whether the District must reimburse the parents is whether DCPS failed to offer Student a FAPE with an appropriate IEP for the 2022-2023 school year. I find that the parents made a *prima facie* showing, through their expert witness' testimony, that DCPS' proposed April 1, 2022 IEP, which would have returned Student primarily to the general education setting at DCPS public schools, was not appropriate. Therefore, DCPS must bear the burden of persuasion on the appropriateness of its proposed April 1, 2022 IEP.

In *A.D. v. Dist. of Columbia*, No. 20-CV-2765 (BAH), 2022 WL 683570, (D.D.C. Mar. 8, 2022), U.S. District Judge Beryl Howell explained the IDEA's FAPE requirement:

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). To be IDEA-compliant, an IEP must reflect "careful consideration of the child's individual circumstances" and be "reasonably calculated to enable the child to receive educational benefits," *Endrew F.*, 137 S. Ct. at 994, 996 (cleaned up), "even as it stops short of requiring public schools to provide the best possible education for the individual child," *Z.B. v. District of Columbia*, 888 F.3d 515, 519 (D.C. Cir. 2018). . . . Moreover, it is "imperative that, to 'the maximum extent appropriate,' public schools provide students with disabilities an education in the 'least restrictive environment,' " *id.* at 528 (*quoting* 20 U.S.C. § 1412(a)(5)(A)), which, as recently emphasized by the Supreme Court, "requires that children with disabilities receive education in the regular classroom whenever possible," *Endrew F.*, 137 S. Ct. at 999. An IEP failing to satisfy these statutory directives may be remedied through an IDEA claim to the extent the IEP "denies the child an appropriate education."

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

A.D., 2022 WL 683570 at *1. “[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.* at *7, quoting *Endrew F.*, *supra*, 137 S. Ct. at 1001-02.

In the April 1, 2022 IEP, DCPS proposed for Student to attend City School 1 for the remainder of the 2021-2022 school year and City School 2 for the 2022-2023 school year. Both schools are large District of Columbia public schools. Student’s educational placement would have been primarily in the general education classroom at the respective DCPS schools, where he/she would receive specialized instruction for 10 hours per week. The IEP also provided for Student to receive small group specialized instruction for 5 hours per week. The special education services and setting in this IEP were identical to what DCPS had proposed for Student in the May 25, 2021 IEP, which was at issue in Case No. 2021-0159.

In his April 8, 2022 decision in Case No. 2021-0159, Hearing Officer Lazan found, *inter alia*, that Student required small classes with a modified instructional approach in academic subjects; that Student struggled with the pace of instruction and difficulty of work in large general education classes and that in the large classes setting, Student did not understand much of the general education material and would come

home anxious and upset. Hearing Officer Lazan found that DCPS' proposed May 25, 2021 IEP did not offer Student a FAPE, because DCPS had proposed for Student the same kind of classes that he/she had been unsuccessful in before when Student attended City School 1 and the District had not offered a cogent and responsive explanation for this IEP decision.

The April 1, 2022 proposed IEP, at issue in the present case, was completed shortly before Hearing Officer Lazan issued the April 8, 2022 HOD finding against DCPS. After the April 8, 2022 HOD was issued, DCPS did not reconvene Student's IEP team to consider the HOD findings and make appropriate revisions to the recently completed IEP – even though the April 1, 2022 IEP proposed the same special education services and setting which Hearing Officer Lazan determined was inappropriate for Student in the April 8, 2022 HOD. In fact, in a letter dated August 15, 2022, the Director of DCPS' Resolution Team reasserted DCPS' position that the District had made a FAPE available to Student with the April 1, 2022 IEP.

At the due process hearing in the present case, Petitioners' expert, Educational Advocate, opined that, with Student's anxiety issues and executive functioning weaknesses, Student would not have done well in the educational setting proposed in the April 1, 2022 IEP because the IEP did not provide for small classes and support which Student needed. DCPS' expert, Central IEP Specialist, opined, summarily, that the District had made a FAPE available to Student with the April 1, 2022 IEP. However,

the DCPS expert did not credibly explain how the IEP reflected “careful consideration of the child’s individual circumstances,” *see Endrew F., supra* at 994, specifically Student’s need for small classes with a modified instructional approach discussed by Hearing Officer Lazan in the April 8, 2022 HOD. On the primary issue of IEP appropriateness, I found Educational Advocate’s opinion more persuasive than that of Central IEP Specialist.

I find, therefore, that DCPS has not met its burden of persuasion that its proposed April 1, 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 Endrew F., supra* at 999, and I conclude that DCPS did not offer Student a FAPE for the 2022-2023 school year.

Nonpublic School was proper.

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, 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 the same private school which was found to be proper for Student in the two prior hearing officer decisions. It is a private day school in suburban Maryland which serves college-bound students with mild to moderate 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 150 students. The school provides all small group instruction, with no more than 10 students in the classroom. To address executive functioning deficits, each student uses a planner designed by the school. Teachers check the planner every period. Nonpublic School provided students with at least daily "check-ins." Classroom and testing accommodations are decided by teachers. The tuition charge at Nonpublic School is around \$47,500 per year.

Student has attended Nonpublic School since January 2020. By all accounts, Student has done well academically and has made great progress. This past school year, he/she was co-captain of the school volleyball team and was one of four students from the school invited to attend a leadership class in California. Student testified that he/she is very happy and proud of his/her accomplishments in the 2022-2023 school year and that he/she received A's or B's in all classes.

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 was necessary to Student's education. I further find that the parents' re-enrolling Student at Nonpublic School for the 2022-2023 school year was reasonably calculated to provide Student educational benefit. The parents' choice of Nonpublic School for Student was, therefore, proper under the IDEA.

Parents did not act unreasonably.

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).³

³

Limitation on reimbursement. The cost of reimbursement described in paragraph (c) of this section may be reduced or denied—

(1) If—

- (i) At the most recent IEP Team meeting that the parents attended prior to removal of the child from the public school, the parents did not inform the IEP Team that they were rejecting the placement proposed by the public agency to provide FAPE to their child, including stating their concerns and their intent to enroll their child in a private school at public expense; or
- (ii) At least ten (10) business days (including any holidays that occur on a business day) prior to the removal of the child from the public school, the parents did not give written notice to the public agency of the information described in paragraph (d)(1)(i) of this

By email letter of August 17, 2022, Petitioners' Counsel provided written notice to DCPS that the parents did not believe that the proposed program at DCPS for the 2022-2023 school year was 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 that its April 1, 2022 IEP offered Student a FAPE and DCPS did not convene another IEP meeting to consider the parent's concerns at least until February 2023. I find that there has been no showing that the parents acted unreasonably in continuing Student's unilateral placement at Nonpublic School.

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. The parents are entitled to reimbursement from DCPS for their tuition and related expenses incurred for Student's enrollment at Nonpublic School for the 2022-2023 school year.

In light of my determination that the parents are entitled to reimbursement for

section;

(2) If, prior to the parents' removal of the child from the public school, the public agency informed the parents, through the notice requirements described in §300.503(a)(1), of its intent to evaluate the child (including a statement of the purpose of the evaluation that was appropriate and reasonable), but the parents did not make the child available for the evaluation; or

(3) Upon a judicial finding of unreasonableness with respect to actions taken by the parents.

34 C.F.R. § 300.148(d)

their 2022-2023 school year private school expenses for Student, I do not reach Petitioners' claims concerning other alleged inadequacies of the April 1, 2022 IEP or their claim that City School 2 was incapable of implementing the proposed IEP. *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)).

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 2022-2023 regular school year and
2. All other relief requested by the Petitioners herein is denied.

Date: July 22, 2023

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