

DISTRICT OF COLUMBIA
OFFICE OF THE STATE SUPERINTENDENT OF EDUCATION
Office of Dispute Resolution
810 First Street, NE, 2nd Floor
Washington, DC 20002

PETITIONER,
on behalf of STUDENT,¹

Petitioner,

v.

DISTRICT OF COLUMBIA
PUBLIC SCHOOLS,

Respondent.

Date Issued: June 13, 2017

Hearing Officer: Peter B. Vaden

Case No: 2017-0044

Hearing Dates: May 23 and 26, 2017
June 2, 2017

Office of Dispute Resolution
Washington, D.C.
Rooms 2006, 2003

HEARING OFFICER DETERMINATION

INTRODUCTION AND PROCEDURAL HISTORY

This matter came to be heard upon the Administrative Due Process Complaint Notice filed by Petitioner (the Petitioner or MOTHER), under the Individuals with Disabilities Education Act, as amended (the IDEA), 20 U.S.C. § 1400, *et seq.*, and Title 5-E, Chapter 5-E30 of the District of Columbia Municipal Regulations (“D.C. Regs.”). In her due process complaint, Petitioner seeks reimbursement from Respondent District of Columbia Public Schools (DCPS) for her unilateral placement of Student at NONPUBLIC SCHOOL for the 2016-2017 school year.

Student, an AGE youth, is a resident of the District of Columbia. Petitioner’s original Due Process Complaint, filed on February 9, 2017, named DCPS as respondent.

¹ Personal identification information is provided in Appendix A.

The undersigned hearing officer was appointed on February 10, 2017. On March 20, 2017, with leave of the hearing officer, Petitioner filed an amended complaint which resulted in restarting all of the due process hearing timelines. The parties met for a resolution session on April 26, 2017 and were unable to reach an agreement. My final decision in this case was originally due by June 3, 2017. On May 30, 2017, due to the need to convene for an additional day to complete the due process hearing, I granted the Petitioner's consent request to extend the due date for the final decision to June 16, 2017. On March 27, 2017, I convened a telephone prehearing conference with counsel to discuss the hearing date, issues to be determined and other matters.

The due process hearing was held before the undersigned impartial hearing officer on May 23, May 26 and June 2, 2017 at the Office of Dispute Resolution in Washington, D.C. The hearing, which was closed to the public, was recorded on an electronic audio recording device. The Petitioner appeared in person and was represented by PETITIONER'S COUNSEL and PETITIONER'S CO-COUNSEL. Respondent DCPS was represented by SPECIAL EDUCATION COORDINATOR and by DCPS' COUNSEL.

The Petitioner testified and called as additional witnesses EDUCATIONAL ADVOCATE, OT CONSULTANT, S-L DIRECTOR, and CURRICULUM COORDINATOR. DCPS called as witnesses PRINCIPAL, DCPS SLP, 2nd GRADE TEACHER, SCHOOL PSYCHOLOGIST, DCPS MONITOR and SPECIAL EDUCATION COORDINATOR (SEC). Petitioner's Exhibits P-1A and P-2 through P-44 were admitted into evidence, with the exceptions of Exhibits P-4 and P-10, which were withdrawn. Exhibits P-1A, P-2, P-7, P-11, P-17 and P-39 were admitted over DCPS' objections. I sustained DCPS' objection to Exhibit P-1. DCPS' Exhibits R-1 through R-10 were

admitted into evidence, including Exhibit R-6 admitted over Petitioner's objection. Counsel for Petitioner made an opening statement. DCPS' Counsel waived opening argument. Counsel for Petitioner submitted a written closing and made additional oral argument. Counsel for DCPS made a closing argument. DCPS' Counsel initially requested leave to file a written closing, but withdrew his request after a discussion of the need for a second extension of the final decision due date to allow time for post-hearing written submissions.

JURISDICTION

The hearing officer has jurisdiction under 20 U.S.C. § 1415(f) and D.C. Regs. tit. 5-E, § 3029.

ISSUES AND RELIEF SOUGHT

The following issues for determination were certified in the March 27, 2017

Prehearing Order:

A. Did DCPS deny Student a FAPE by failing to propose an appropriate IEP for ■ in March 2016 in that the DCPS IEP offered insufficient specialized instruction services?

B. Did DCPS deny Student a FAPE by failing to propose an appropriate revised IEP and educational placement prior to the start of the 2016-2017 school year?

C. Has DCPS denied Student a FAPE during the 2016-2017 school year, including at an IEP team meeting in March 2017, by failing to offer an appropriate IEP and educational placement, that provided for full-time special education services?

For relief, the parent requests that the hearing officer order DCPS to reimburse the parent for Student's enrollment at Nonpublic School for the 2016-2017 school year, order DCPS to fund Student's enrollment at Nonpublic School for the remainder of the school year and declare Nonpublic School to be Student's educational placement.

FINDINGS OF FACT

After considering all of the evidence, as well as the argument of counsel, this hearing officer's findings of fact are as follows:

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

Testimony of Mother. Student is eligible for special education under the IDEA disability classification Specific Learning Disability (SLD). Exhibit R-7.

2. Student is a native of [REDACTED]. Student was adopted by Mother, a Washington, D.C. attorney, and immigrated to the United States in [REDACTED] 2013. In [REDACTED] home country prior to emigrating, Student experienced a harsh life as an infant, having been placed with foster families in reportedly inhumane and poverty-stricken conditions. Student was initially adopted at age two by a woman in the home country, who soon died. Until Student immigrated to the United States, [REDACTED] adoptive grandparents cared for [REDACTED] in the home country. When Student arrived in the United States, after being adopted by Mother, [REDACTED] did not speak English. Testimony of Mother. Exhibit P-2.

3. For the last part of the 2012-2013 school year, Mother placed Student at a Montessori day school. In the fall of 2013, Mother enrolled Student in City School for STARTING GRADE. The next school year, Student repeated Starting Grade at City School. For the 2015-2016 school year, Student was promoted to NEXT GRADE at City School. Testimony of Mother.

4. In November 2014, Mother had PRIVATE PSYCHOLOGISTS conduct a neuropsychological evaluation of Student. Mother was reported to hope that an assessment would help guide decisions about Student's education and identify any concerns with learning that could be related to [REDACTED] early history and adoption. On

cognitive testing, Student's scores all fell within the average range. On an assessment of academic readiness, Student tested generally average, except with tests of "rapid naming," where ■■■ attained very low scores. The evaluators attributed ■■■ poor scores on rapid naming as a function of problems with retrieval and reflective of the lack of automaticity of this foundational knowledge, which was not unexpected given Student's stage of language and academic skill acquisition and ■■■ insecurity about ■■■ abilities. Student's math achievement scores were low average and average. The assessors reported that Student had attention-related concerns, but asserted that ■■■ difficulty focusing in the classroom was almost certainly due in large measure to ■■■ limited exposure to the English language and to academic learning. The assessors stated their belief that Student's emotional well-being should be the primary focus of concern because, although ■■■ was not displaying emotional/behavioral dysregulation, ■■■ was a vulnerable little ■■■ who had suffered a number of losses prior to immigrating to the United States. The assessors reported that although Student had developed a conversational command of English, ■■■ understanding of the language was not deep and ■■■ was easily overwhelmed by language that was overly long or complex. They recommended that any discussion of Student's academic skills take into account these language issues. They recommended that Student receive the maximum level of support available for English as a Second Language (ESL), describing Student as a child who was not yet fluent in English, but no longer had access to ■■■ primary birth language. The assessors recommended that Student would function best in a classroom environment that was flexible and nurturing, while providing appropriate structure for ■■■ learning.

Exhibit P-2.

5. During this school year, City School was pulling Student out of class for

ESL instruction and providing ■■■ 1:1 reading and math instruction and small group counseling. In early 2015, Mother provided the neuropsychological evaluation report on Student to the staff at City School. Testimony of Mother.

6. By the end of the 2014-2015 school year, Student was still having a lot of problems at school. Mother considered sending ■■■ to a private school that serves children with learning difficulties, but decided that Student would remain at City School for Next Grade. In Next Grade, Mother recalls that, prior to being determined eligible for special education, Student was receiving 6 hours per week of push-in or pull-out services and extra math and reading instruction in a small group setting.

Testimony of Mother.

7. On January 7, 2016, Mother met with TEACHER and VICE PRINCIPAL at City School to discuss Mother's concerns about Student's progress in school. Teacher and Vice Principal told Mother that while they had concerns about Student, Student was progressing and seemed to have made great strides in the first semester of Next Grade.

Exhibit P-5.

8. Around January 2017, Mother had an educational advocate make an observation of Student. This educational advocate recommended a private school for Student. Mother decided to apply to Nonpublic School and had Teacher and Vice Principal complete Teacher Evaluations of Student for Nonpublic School. Testimony of Mother, Exhibit P-6.

9. Mother also had NEUROPSYCHOLOGIST conduct cognitive and educational testing of Student as part of the application process for private school. The results of testing administered on January 29, 2016 and February 5, 2016 indicated that Student showed solid verbal skills, visuospatial abilities and nonverbal reasoning.

Student obtained lower scores on measures of working memory and processing speed. Neuropsychologist noted in her February 2016 report that Student's scores on processing speed tasks were lower than when ■■■ was evaluated in 2014, which Neuropsychologist described as "an unsurprising finding given the higher demands on these skills at ■■■ age." Neuropsychologist reported that Student performed inconsistently on the academic tasks. Student demonstrated good math skills and solved most calculations and word problems, yet needed more support than others ■■■ age to solve these tasks. Student obtained lower scores on the reading and writing tasks. ■■■ was able to sound out many of the words, but showed limited sight vocabulary and had trouble reading and writing simple sentences. Discussing Student's behavior during the assessment, Neuropsychologist reported that Student was distracted by formal procedures and needed extra guidance on many assessment tasks and that ■■■ tired easily. However Student seemed to benefit from the individualized nature of the assessment and was always easily redirected. Neuropsychologist wrote that she and her psychology associate colleague agreed with Mother that Student would do better in a smaller classroom setting geared toward students with learning differences where ■■■ could get individualized attention and intensive support. Exhibit P-7.

10. On February 19, 2016, Student was referred for an initial DCPS special education eligibility evaluation. SEC was the case manager. School staff prepared an Analysis of Existing Data including classroom-based assessments, formal assessments by the school and Neuropsychologist's February 2016 report. City School convened an initial eligibility meeting on March 17, 2016. Mother attended the meeting. The edibility team identified, as a summary of concerns for Student, the following: Student was scoring a two in math and needed the math test read aloud to ■■■ Student was

more than half a grade level below in ■■■ reading level. ■■■ was not meeting grade level standards on ■■■ word fluency, word accuracy, Dolch words or phonics; Student was having difficulty writing complete sentences without prompting from the teacher. ■■■ could at times have trouble using the lines on the Foundations board. The eligibility team determined that Student's performance affected ■■■ ability to perform on grade level tasks independently. The team determined that Student met IDEA eligibility criteria for a Specific Learning Disability in Mathematics, Written Expression and Reading. Mother and the school team members all agreed with the eligibility determination. Exhibit P-8.

11. On March 24, 2016, City School convened a meeting to develop Student's initial IEP. Mother, SEC and Teacher attended the meeting. The IEP team identified Mathematics, Written Expression and Reading as areas of concern. For Special Education Services, the March 24, 2016 IEP provided 90 minutes per week in general education for Mathematics, 3 hours per week in general education for Reading and 90 minutes per week outside general education for Specialized Instruction. The IEP noted that Student also received 45 minutes per week of services from an English language learner (ELL) instructor. Exhibit R-2. At the IEP meeting, Mother did not voice any objection to the initial IEP or express any concerns about the proposed program. Testimony of Mother, Testimony of SEC. Mother did not request that DCPS place Student at a nonpublic school until Petitioner's Counsel sent a written request to DCPS on August 5, 2016. Until then, Mother gave no indication to City School that she did not believe that DCPS had offered Student a free appropriate public education (FAPE). Testimony of SEC.

12. City School 1 immediately implemented the March 24, 2016 IEP. SEC provided Student's IEP special education services. By the end of the 2015-2016 school

year, after implementation of the IEP, Student's Fountas and Pinnell reading level improved from B (Mid-Kindergarten) to D (Beginning 1st Grade). ■ Word Their Way spelling assessment improved from Short Vowels to Diagraphs. ■ DIBELS Nonsense Word Fluency (NWF) increased from 19 to 25. ■ DIBELS Oral Reading Fluency (ORF) increased from 7 to 12. ■ Writing Prompts Personal Narrative score increased to 59% from 38% when tested in October 2016. Student's knowledge of math vocabulary words improved from zero to 60% at the end of the school year. Testimony of SEC. Student's June 16, 2016 IEP Progress Report, completed by SEC, indicated ■ was progressing on most goals. ■ made no progress on three-digit number understanding and a goal to write a 6 sentence paragraph had just been introduced. Exhibit P-14.

13. During the IEP development process, Mother consulted with Petitioner's Counsel. Around April 2016, on the recommendation of Petitioner's Counsel, Mother engaged Educational Advocate to evaluate Student. On the recommendation of Petitioner's Counsel, Mother did not tell DCPS that she had engaged Educational Advocate until Education Advocate scheduled a classroom observation of Student at City School. Testimony of Mother. Educational Advocate conducted classroom observations of Student at City School on May 13, 2016 and June 6, 2016. Exhibit P-16. Neither Mother nor Educational Advocate disclosed to City School staff that Educational Advocate had been retained to prepare a written educational evaluation of Student. Testimony of SEC, Stipulation of Petitioner's Counsel. On May 14, 2016, Educational Advocate saw Student at her home office for a testing session. Educational Advocate administered the Woodcock-Johnson Tests of Achievement, Fourth Edition (WJ-4), the Peabody Picture Vocabulary Test, Fourth Edition (PPVT-4) the Dolch Sight Word Lists,

Code Knowledge subtest from the Phono-Graphix Screening, and Achenbach Child Behavior Checklist. Educational Advocate also had Mother complete the Behavior Rating Inventory of Executive Functions, Second Edition (BRIEF-2) rating scales. Exhibit P-16. Educational Advocate did not seek input from Student's City School teachers for the BRIEF-2 or Achenbach Teacher's Report Form. Testimony of SEC. Educational Advocate immediately provided her May 14, 2016 test results to Nonpublic School, but did not disclose to DCPS that she had tested Student or share her findings with DCPS until Petitioner's Counsel forwarded her Diagnostic Educational Evaluation report on August 30, 2016. Exhibits P-11, P-18, Testimony of SEC.

14. In spring of 2016, around the time when City School began to implement Student's March 24, 2016 IEP, Student was accepted by Nonpublic School to enroll for the 2016-2017 school year. Testimony of Mother. On May 15, 2016, SPEECH-LANGUAGE PATHOLOGIST (SLP) from Nonpublic School conducted a speech and language assessment of Student. In her May 2016 written report, SLP reported that Student presented with an atypical background and mode of language acquisition; that Student's weaknesses following directions in a variety of contexts, specifically when they contain embedded concepts, impacted [REDACTED] ability to accurately complete oral and written tasks; that resulting from [REDACTED] weak comprehension of several aspects of the directions (*e.g.*, vocabulary, concepts, sentence structure), Student may be unable to ask for necessary, specific assistance as [REDACTED] may not know which part is causing the confusion; that Student had difficulties retelling aspects from a story [REDACTED] heard and organizing [REDACTED] own narrative impacted [REDACTED] ability to understand/identify the main idea in a story, recall details, or share [REDACTED] experiences in a clear way and that this would impact [REDACTED] ability to follow along and participate in the classroom as well as [REDACTED]

interaction with ■ peers and performance in the classroom; that Student's weaknesses making inferences from information ■ hears affected ■ ability to quickly make and apply connections in the classroom and in conversation; that difficulties decoding words and a reduced reading rate affected Student's ability to read and understand grade-level material; that weaknesses in written expression, specifically letter formation, spelling, capitalization, and punctuation, impacted Student's ability to produce legible work; that reading and writing require a significant investment in time and were very effortful processes for Student; and that these deficits significantly impacted Student's ability to participate meaningfully in a standard curriculum or typically-sized classroom. Exhibit P-11.

15. SLP noted that unlike most children who learn reading and writing after having at least five years of exposure to oral language, since Student arrived in the United States when ■ was over the age of ■ ■ only received approximately one year of oral English exposure before learning reading and writing. Therefore, ■ was then learning more nuanced aspects of comprehension and expression in English nearly simultaneously as ■ was learning how to read and write. SLP noted that it was not surprising that there was a discrepancy between Student's oral and written language skills in light of ■ language acquisition background, but that the extent of Student's deficits in reading and writing could not be solely attributed to ■ language acquisition profile. Exhibit P-11. Although SLP completed her report in May 2016, Mother did not provide a copy to DCPS, or notify DCPS of the speech-language assessment, until Petitioner's Counsel forwarded a copy of the report on August 30, 2016. Exhibit P-16, Testimony of SEC.

16. A Nonpublic School Occupational Therapist conducted a comprehensive

Occupational Therapy (OT) evaluation of Student on August 16-17, 2017, after Student was enrolled in Nonpublic School. In her September 5, 2016 report, this evaluator reported, *inter alia*, that difficulties for Student with vestibular, tactile, and auditory processing, and sensory seeking behaviors were identified; that Student struggled with attention and impulsivity during the evaluation, and these difficulties were also reported at home; that formal testing and observations indicated difficulty with motor skills that seem to have some basis in problems with understanding verbal directions, unclear ideation of a specific motor plan, and inconsistent perception of correct directionality; that there were areas of concerns with Student's anxiety with being timed and ■■■ distraction while working in settings with visual distractions or limited structure. This evaluator recommended, *inter alia*, that Student be afforded structure, small class size, individual attention, limited external distractions, and untimed work. The evaluator also recommended that Student receive direct occupational therapy services twice a week in school. Exhibit P-17.

17. Student began attending Nonpublic School around August 29, 2016 as a student unilaterally placed by ■■■ parent. Nonpublic School is a private special education day school in the District of Columbia primarily serving children with learning disabilities and Attention Deficit-Hyperactivity Disorder. The campus where Student is enrolled serves 78 students, mainly in grades 1 through 4. The school offers small classrooms with a low student-to-teacher ratio. Student receives specialized instruction throughout the school day. At Nonpublic School, the students have no interaction with nondisabled peers. Nonpublic School holds a current certificate of approval issued by the D.C. Office of the State Superintendent of Education. Nonpublic School does not offer ELL or ESL services. Testimony of Curriculum Coordinator.

Mother has paid the entire annual tuition cost for Student to attend Nonpublic School for the 2016-2017 school year. Testimony of Mother.

18. Over the 2016-2017 school year at Nonpublic School, Student's formal assessments show limited improvement from ■■■ end of 2015-2016 school year testing scores at City School. Testing showed little or no growth in reading for Student, having remained at a PP-1 (PrePrimer 1) reading level for the year. Testimony of Curriculum Director. Student had tested at a higher, independent, reading level at the end of the 2015-2016 school year at City School. Testing of written language skills showed one-half school year improvement over the period at Nonpublic School, but Student's writing samples remained about where Student was when ■■■ left City School. Nor did ■■■ math scores show improvement from end of 2015-2016 school year testing. Testimony of SEC. Student has made a lot of progress socially and emotionally at Nonpublic School. Testimony of Curriculum Director.

19. At an MDT meeting on November 28, 2016 at DCPS, Student's eligibility for special education under the SLD disability category was confirmed. Mother and Educational Advocate attended the meeting and agreed with this determination. Exhibit P-23.

20. Beginning in November 2016, Student's DCPS IEP team, including Mother and Educational Advocate collaborated to develop an updated IEP for Student. Testimony of Educational Advocate. Petitioner's Counsel and educators from Nonpublic School participated in this effort. A final IEP was completed at an IEP meeting on March 20, 2017. This IEP identified Mathematics, Reading, Written Expression, Cognitive, Communication/ Speech and Language and Motor Skills/Physical Development as areas of concern. For Special Education Services, the proposed March

20, 2017 provides 2.5 hours per week of Mathematics in general education, 2.5 hours per week of Reading in general education, 2 hours per week of Reading outside general education, 2 hours per week of Written Expression in general education, and 1 hour per week of Mathematics outside general education (Total of 7 hours per week in general education, 3 hours per week outside general education). For Related Services, the proposed IEP provided 240 minutes per month of OT and 4 hours per month of Speech-Language Pathology outside general education and 120 minutes per month of OT in general education. Exhibit R-7. Mother and her representatives were in agreement with the IEP Present Levels of Performance and Annual Goals, but disagreed with the number of hours of Specialized Instruction and the failure to provide all services outside general education. Testimony of Mother, Testimony of Educational Advocate.

CONCLUSIONS OF LAW

Based upon the above findings of fact and argument and legal memorandum of counsel, as well as this hearing officer's own legal research, the conclusions of law of this hearing officer are as follows:

Burden of Proof

As provided in the D.C. Special Education Student Rights Act of 2014, the party who filed for the due process hearing, the Petitioner in this case, shall bear the burden of production and the burden of persuasion, except that where there is a dispute about the appropriateness of the student's IEP or placement, or of the program or placement proposed by DCPS, the District shall hold the burden of persuasion on the appropriateness of the existing or proposed program or placement; provided that the Petitioner shall retain the burden of production and shall establish a *prima facie* case before the burden of persuasion falls on the District. The burden of persuasion shall be

met by a preponderance of the evidence. *See* D.C. Code § 38-2571.03(6).

Analysis

A.

– Did DCPS deny Student a FAPE by failing to propose an appropriate IEP for ■■■ in March 2016 in that the DCPS IEP offered insufficient specialized instruction services?

– Did DCPS deny Student a FAPE by failing to propose an appropriate revised IEP and educational placement prior to the start of the 2016-2017 school year?

As justification for her claim for reimbursement for her unilateral placement of Student at Nonpublic School for the 2016-2017 school year, the parent alleges first that DCPS' initial March 24, 2016 IEP was inadequate because it offered insufficient specialized instruction services. Under the IDEA, parents who unilaterally decide to place their disabled child in a private school, without obtaining the consent of local school officials, "do so at their own financial risk." *Florence County Sch. Dist. Four v. Carter*, 510 U.S. 7, 15, 114 S.Ct. 361, 126 L.Ed.2d 284 (1993) (quoting *Sch. Comm. of the Town of Burlington v. Dep't of Educ.*, 471 U.S. 359, 374, 105 S.Ct. 1996, 85 L.Ed.2d 385 (1985)). "As interpreted by the Supreme Court, IDEA requires school districts to reimburse parents for their private-school expenses if (1) school officials failed to offer the child a free appropriate public education in a public or private school; (2) the private-school placement chosen by the parents was otherwise "proper under the Act"; and (3) the equities weigh in favor of reimbursement—that is, the parents did not otherwise act "unreasonabl[y]." *Leggett v. District of Columbia*, 793 F.3d 59, 66–67 (D.C. Cir. 2015) (citing *Carter, supra*, 510 U.S. at 15–16, 114 S.Ct. 361; 20 U.S.C. § 1412(10)(C)(iii)(III)).

The indispensable condition for private school reimbursement from the *Leggett*

decision is that the District failed to offer the child a FAPE. That leads to the first query in this case: Did DCPS meet its obligations to Student in developing the March 24, 2016 IEP? In *Moradnejad v. District of Columbia*, 177 F. Supp. 3d 260 (D.D.C. 2016), the Court adopted the Report and Recommendation of U.S. Magistrate Judge G. Michael Harvey, which explained how a court or a hearing officer must assess an IEP:

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

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

Moradnejad at 274-75. In *Andrew F. ex rel. Joseph F. v. Douglas Cty. Sch. Dist. RE-1*, 137 S. Ct. 988 (2017), the U.S. Supreme Court elaborated on the “educational benefits” requirement pronounced in *Rowley*:

To meet its substantive obligation under the IDEA, a school must offer an IEP reasonably calculated to enable a child to make progress appropriate in light of the child’s circumstances. . . . Any review of an IEP must appreciate that the question is whether the IEP is reasonable, not whether the court regards it as ideal. . . . When a child is fully integrated in the regular classroom, as the Act prefers, what that typically means is providing a level of instruction reasonably calculated to permit advancement through the general curriculum. . . . If that is not a reasonable prospect for a child, his IEP need not aim for grade-level advancement. But his educational program must be appropriately ambitious in light of his circumstances, just as advancement from grade to grade is appropriately ambitious for most children in the regular classroom. The goals may differ, but every child should have the chance to meet challenging objectives.

Andrew F., *supra*, 137 S. Ct. at 999–1000 (citations omitted).

The Petitioner has not alleged that DCPS failed to comply with the IDEA’s procedural requirements. Therefore, I turn to the second, substantive, prong of the

Rowley/Andrew F. inquiry: Was the March 24, 2016 IEP reasonably calculated to enable Student to make progress appropriate in light of [REDACTED] individual circumstances? “To achieve a meaningful benefit, the school district must fashion a uniquely tailored individualized education program, or IEP, for the child. *Andrew F.*, 137 S.Ct. at 991 (citing 20 U.S.C. §§ 1401(9)(D), 1412(a)(1)). The IEP is the roadmap for the child’s educational progress. It must be reasonably calculated to enable the child to make progress “appropriate in light of the child’s circumstances.” *Id.* at 999. It must “set out a plan for pursuing academic and functional advancement.” *Id.* (citing 20 U.S.C. § 1414(d)(1)(A)(i)(I)–(IV)). The core of the IDEA is the collaborative process between the parents and the school officials to fashion the IEP. *Id.* at 994 (citing 20 U.S.C. § 1414). This collaboration among the parents and educators ensures careful consideration of the child’s individual circumstances. *Id.*” *T.M. v. Quakertown Cmty. Sch. Dist.*, No. CV 16-3915, 2017 WL 1406581 (E.D. Pa. Apr. 19, 2017). The appropriateness of the March 24, 2016 IEP must be evaluated as of when it was offered to Student. “The adequacy of an IEP can be measured only at the time it is formulated, not in hindsight.” *District of Columbia v. Walker*, 109 F. Supp. 3d 58, 66 (D.D.C. 2015) (citing *S.S. ex rel. Shank v. Howard Road Academy*, 585 F.Supp.2d 56, 66 (D.D.C.2008)). Under the Special Education Student’s Rights Act, DCPS holds the burden of persuasion on the appropriateness of the proposed IEP.

DCPS’ expert, SEC, testified in detail about what went into developing Student’s initial IEP. The IEP team used a Response to Intervention (RTI) approach to consider what had been tried for Student in general education including 1:1 and small group teaching strategies, the Foundations literacy program, Phono-Graphix reading instruction, ACCESS for English language learners and 1:1 and group English language

learner (ELL) instruction. The team considered Neuropsychologist's independent assessment of Student and Student's scores and class performance. The team was aware that there had been no concerns from City School teachers about Student's accessing lunch, recess, art, music, science lab and physical education. Importantly, with respect to this child's individual circumstances, the IEP team took account of the impact of Student's limited English language proficiency on ■ learning. The team also focused on Student's least restrictive environment. *See Smith v. District of Columbia*, 846 F. Supp. 2d 197, 200 (D.D.C. 2012) (IDEA 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 are not disabled to the maximum extent appropriate.)

After considering this information, the IEP team decided, without dissent, that the appropriate special education program for Student was 6 hours per week of Specialized Instruction, including 90 minutes per week outside general education. Mother attended both the March 17, 2016 eligibility meeting and the March 24, 2016 IEP meeting and she did not express any concern about the initial IEP or the special education services proposed for Student. Mother did not request at the IEP meeting, or anytime before August 2017, that DCPS place Student at a private school.

City School immediately implemented the March 24, 2016 IEP. From March until the end of the school year, SEC provided Student the special education services, both inside and outside the regular classroom, specified in Student's IEP. By the end of the 2015-2016 school year, after implementation of the IEP, Student had made academic progress, including reaching a higher Fountas and Pinnell reading level, improved spelling competence, improved DIBELS Nonsense Word Fluency and Oral Reading Fluency and improved math vocabulary. SEC opined in her testimony that

Student was making “big gains” under the March 24, 2016 IEP. Second Grade Teacher, who qualified as an expert reading specialist, also opined that Student had made tremendous progress in every area.

Petitioner’s expert, Educational Advocate, opined that, with the March 24, 2016 IEP, Student could not be expected to reach grade level by the end of the 2015-2016 school year. I discount this opinion because the IDEA does not require that an IEP “aim for grade level advancement,” but rather the IEP must be reasonably calculated to enable Student to make progress appropriate in light of ■ individual circumstances. *Andrew F., supra*. Moreover, Educational Advocate’s opinion was informed by the results of her May 2016 formal assessment of Student, including extensive testing and in-school observations, which Petitioner’s Counsel did not provide to DCPS until August 30, 2016 – five months after the IEP was completed.² See *Jefferson Cty. Bd. of Educ. v. Lolita S.*, 977 F. Supp. 2d 1091, 1112 (N.D. Ala. 2013), *aff’d*, 581 F. App’x 760 (11th Cir. 2014) (“The IDEA does not call for judging the actions of the district based on hindsight or based on testing and expert evaluations that were not available to the district at the time of the IEPs’ formulation.” (citing *Susan N. v. Wilson School District*, 70 F.3d 751, 762 (3rd Cir.1995); *Roland M. v. Concord School Committee*, 910 F.2d 983, 992 (1st Cir.1990))).

Curriculum Coordinator from Nonpublic School also opined that the special education services in the March 24, 2016 IEP were not adequate to address Student’s needs. However, her opinion was based on her hindsight observation that Student struggled to concentrate in large group settings at Nonpublic School in the 2016-2017

² Educational Advocate completed her formal testing of Student on May 14, 2016 and immediately provided the results to Nonpublic School, but not to DCPS at that time. She did not complete her written evaluation report until August 2016.

school year. Curriculum Coordinator did not observe Student at City School and her information about how Student performed at Nonpublic School was likewise not available to the City School IEP team at the time the March 24, 2016 IEP was developed.

Petitioner's Counsel recognized in his closing argument that SEC is an experienced special educator, although counsel contested the validity of her opinions. I was impressed by SEC's background and experience as well as her knowledge of Student's special education needs from having worked with Student at City School. I found her opinions on the appropriateness of Student's initial IEP to be credible. Petitioner's experts also have impressive backgrounds in special education. However, as noted, their opinions were based, in part, on assessments and other information not available to the IEP team in March 2016. I conclude that DCPS has met its burden of persuasion that when the March 24, 2016 IEP was offered, it was reasonably calculated to enable Student to make progress "appropriate in light of the child's circumstances." *See Andrew F., supra.*

With regard to Petitioner's claim that DCPS should have proposed a revised IEP prior to the start of the 2016-2017 school year, the IDEA regulations require that a child's IEP team revises an IEP, as appropriate, to address, *inter alia*, the results of any reevaluation of the child's anticipated needs and information about the child provided by the parent. *See* 34 CFR § 300.324(b). In this case, Petitioner's Counsel did not provide DCPS the Nonpublic School Speech and Language Assessment or Educational Advocate's Diagnostic Educational Evaluation of Student until August 30, 2016, even though both evaluators had completed their formal testing of Student by mid-May 2016 – some four weeks before the end of the 2015-2016 school year. Moreover, by April 2016, Mother had retained Petitioner's Counsel to advise her on Student's special

education rights. Yet, neither Mother nor anyone else on her behalf advised the City School staff of any concern about the initial IEP until August 2016. Under these facts, I find that DCPS did not deny Student a FAPE by failing to propose a revision to the March 24, 2016 IEP and educational placement prior to the start of the 2016-2017 school year.

B.

Has DCPS denied Student a FAPE during the 2016-2017 school year, including at an IEP team meeting in March 2017, by failing to offer an appropriate IEP and educational placement, that provided for full-time special education services?

Student began attending Nonpublic School in late August 2016. Beginning in November 2016, Student's DCPS IEP team, including Mother and Educational Advocate, collaborated to develop an updated IEP for Student. Testimony of Educational Advocate. Over several meetings in 2016 and 2017, the revised IEP was completed. Staff from Nonpublic School participated in the meetings and the IEP team had the benefit of Educational Advocate's Diagnostic Educational Evaluation of Student, Nonpublic School's Speech and Language and OT evaluations and the Individualized Education Program developed for Student by Nonpublic School. DCPS educators were also able to observe Student in ■■■ classroom at Nonpublic School. Informed by these additional assessments, information and data, Student's DCPS IEP team completed a revised IEP for Student on March 20, 2017. The revised IEP identified Mathematics, Reading, Written Expression, Cognitive, Communication/ Speech and Language and Motor Skills/Physical Development as areas of concern and included annual goals and present levels of performance based on Student's performance at Nonpublic School and the private school's education program for Student. The proposed March 20, 2017 IEP

offered Student 10 hours per week of Special Education, including 3 hours outside general education. For Related Services, the proposed IEP included 240 minutes per month of Occupational Therapy (OT) outside general education, 4 hours per month of Speech-Language Pathology outside general education and 120 minutes per month of OT in general education.

Petitioner's experts, Educational Advocate and Curriculum Director, were in agreement with the Goals and Present Levels of Performance in the March 20, 2017 IEP. However they both opined that the hours of Specialized Instruction were insufficient and that Student should receive all special education services outside general education. DCPS' expert, SEC, opined that it would be beneficial for Student to receive most of ■■■ Specialized Instruction within the general education classroom in a small group setting, where ■■■ would have interaction with typically developing peers. School Psychologist opined that there was not enough evidence that Student could not attend electives and specials classes with non-disabled peers. However, in her testimony, this expert did not endorse the March 20, 2017 IEP team's decision for Student to receive all but 3 hours per week of Special Education services in the general education setting. Both of DCPS' experts opined that Student continued to require ELL services, which ■■■ does not receive at Nonpublic School.

I find that the evidence does not support the opinions of the Petitioner's experts that Student requires segregation from ■■■ nondisabled peers for the entire school day. As noted, School Psychologist opined that there was not enough evidence that Student could not attend electives and specials classes with nondisabled peers. Second Grade Teacher testified that in the 2015-2016 school year, Student did fine on the playground and at lunch at City School with typically developing peers. Mother agreed that Student

enjoyed recess at City School playing with the other children.

With respect to the amount of, and setting for, special education services in the proposed March 20, 2017 IEP, Petitioner's experts, especially SLP and Curriculum Director who observed Student regularly at Nonpublic School, were persuasive that Student needs to be in a small classroom setting for at least ■ academic subjects, where ■ is less distracted and can be assured individualized support. Only Second Grade Teacher and SEC explicitly agreed with the IEP plan for Student to receive 10 hours per week of Special Education, only 3 hours of which would be provided outside general education. As noted, School Psychologist, who testified as an expert for DCPS, only opined that there was not enough evidence that Student could not attend electives and specials classes with non-disabled peers. Weighing the opinions of the respective parties' experts, I conclude that DCPS has not met its burden of persuasion that the March 20, 2017 IEP provision for 10 hours per week of Special Education, including 3 hours outside general education, was reasonably calculated to enable Student to make progress "appropriate in light of the ■ circumstances," *See Andrew F., supra*. I find that in this proposed IEP, DCPS failed to offer Student a FAPE.

As explained above, the D.C. Circuit held in its *Leggett* decision that a school district must reimburse parents for private-school expenses if the LEA failed to offer the child a FAPE, the private school chosen by the parent was proper under the IDEA and the equities weigh in favor of reimbursement. Having found that DCPS failed to offer Student a FAPE with the March 20, 2017 IEP, I turn next to the other requirements for reimbursement pronounced in *Leggett*.

For the private school chosen by the parents to be proper, it need only be "reasonably calculated to enable the child to receive educational benefits." *Leggett*,

supra, at 71. SEC expressed concern that Student's formal test scores for reading and math had not improved or had declined during Student's 2016-2017 school year at Nonpublic School. The evidence also establishes that Nonpublic School's lack of ELL programming for Student is a major shortcoming and is probably slowing Student's academic progress. Notwithstanding, I found persuasive the testimony of Mother, Educational Advocate and Curriculum Director that Student has made received educational benefits at Nonpublic School. Mother noted that Student can now read "simple stuff," can do math problems and is able to do homework by [REDACTED]. Educational Advocate opined that Student is doing very well at Nonpublic School and has mastered some of [REDACTED] IEP goals. Curriculum director testified that Student is benefitting from Nonpublic School and showing slow, positive, growth. I conclude that the parent has met her burden of persuasion that her choice of Nonpublic School for Student was proper under the IDEA.

I also find that from the date of the proposed March 20, 2017 IEP, the equities weigh in favor of reimbursement of the parent in that Mother did not act unreasonably in rejecting this IEP and keeping her child at Nonpublic School. Unlike in March 2016 when Mother did not disclose any concerns about Student's initial IEP, at the March 20, 2017 IEP meeting, Mother and her representatives made known to DCPS their objections to the proposed IEP, notably that it was not a "full time IEP." Compare *C.H. v. Cape Henlopen School Dist.*, 606 F.3d 59, 72 (3rd Cir. 2010) ("[T]he IDEA was not intended to fund private school tuition for the children of parents who have not first given the public school a good faith opportunity to meet its obligations.") Moreover, the evidence establishes that in the current school year, the parent's representative, Educational Advocate, worked collaboratively with SEC at City School to develop the

March 20, 2017 IEP and that Mother gave DCPS a real opportunity to propose an appropriate IEP for Student.

Therefore, under the criteria pronounced by the D.C. Circuit in the *Leggett* decision, DCPS must reimburse the parent for her private school expenses incurred for Student after the parent rejected DCPS' proposed March 20, 2017 IEP. I will also order DCPS to reconvene Student's DCPS IEP team to develop an appropriate revised IEP for Student. The parent has also requested that I declare Nonpublic School to be Student's educational placement. However, if there is a suitable public school program available, DCPS will not be required to continue to pay for a private placement, even though a private school might be more appropriate or better able to serve the child. *See N.T. v. District of Columbia*, 839 F.Supp.2d 29, 34 (D.D.C.2012); *Jenkins v. Squillacote*, 935 F.2d 303, 305 (D.C.Cir.1991). DCPS must have the opportunity to ensure that an appropriate IEP is developed for Student for the 2017-2018 school year and to propose a suitable public or nonpublic school program to implement that IEP.

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 parent, as may be reasonably required, DCPS shall, without undue delay, reimburse the parent her actual costs for tuition and related covered expenses for Student's enrollment at Nonpublic School for the period March 21, 2017 through the end of the private school's 2016-2017 regular school year;
2. As soon as practicable and not later than July 14, 2017, DCPS shall convene Student's DCPS IEP team, including the parent and her representatives, to review and revise Student's DCPS IEP for the 2017-2018 school year in conformity with 34 CFR § 300.320, *et seq.* and with this decision. DCPS shall make a good faith effort to schedule the IEP team meeting on a date when Nonpublic School representatives are available to participate. The revised IEP shall include provision, at minimum, for all of Student's academic courses, with

the exception of specials classes such as art and music, to be provided in a small classroom setting, outside general education. DCPS shall also ensure that appropriate ELL services are included as part of Student's proposed educational program and

3. All other relief requested by the Petitioner herein is denied.

Date: June 13, 2017

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

NOTICE OF RIGHT TO APPEAL

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

cc: Counsel of Record
Office of Dispute Resolution
OSSE Division of Specialized Education
DCPS Resolution Team