

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

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PETITIONERS,  
on behalf of STUDENT,<sup>1</sup>

Petitioners,

v.

DISTRICT OF COLUMBIA  
PUBLIC SCHOOLS,

Respondent.

Date Issued: June 9, 2018

Hearing Officer: Peter B. Vaden

Case No: 2017-0327

Hearing Dates: May 8, 9 and 10, 2018

Office of Dispute Resolution  
Rooms 523 and 209  
Washington, D.C.

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**HEARING OFFICER DETERMINATION<sup>2</sup>**

**INTRODUCTION AND PROCEDURAL HISTORY**

This matter came to be heard upon the Administrative Due Process Complaint Notice filed by Petitioners (the PARENTS), 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 their due process complaint, Petitioners seek reimbursement from Respondent District of Columbia Public Schools (DCPS) for their unilateral placement of Student at NONPUBLIC SCHOOL for the 2016-2017 and 2017-2018 school years.

Student, an AGE child, is a resident of the District of Columbia. Petitioners’ Due Process Complaint, filed on December 8, 2017, named DCPS as respondent. The

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

<sup>2</sup> Corrected on June 25, 2018 for typographical errors.

undersigned hearing officer was appointed on December 11, 2017. On January 9, 2018, 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 originally set for March 1-2, 2018. As a result of multiple scheduling issues, the hearing dates were continued and the final decision due date was extended several times. On May 4, 2018, I denied DCPS' motion to continue the hearing date to allow additional time for DCPS to review recent evaluations of Student obtained by the parents. Following completion of the due process hearing on May 10, 2018, to allow time for counsel to file post-hearing briefs, I granted DCPS' unopposed motion to extend the final decision due date to June 15, 2018.

The due process hearing was held before the undersigned impartial hearing officer on May 8, 9 and 10 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 Petitioners appeared in person and were represented by PETITIONERS' COUNSEL. Respondent DCPS was represented by DCPS' COUNSEL 1 and DCPS' COUNSEL 2. A [REDACTED] language interpreter was present for the entire hearing to interpret the proceedings as needed for the parents.

Petitioners' Counsel made an opening statement. DCPS waived opening argument. MOTHER and FATHER both testified in English, without the use of the interpreter. The parents called as additional witnesses, PEDIATRICIAN, S-L PATHOLOGIST, DEAN OF STUDENTS, SOCIAL LEARNING SPECIALIST and EDUCATIONAL ADVOCATE. DCPS called as witnesses SCHOOL SOCIAL WORKER, DCPS PROGRAM MANAGER, CES SPECIALIST 1, ASSISTANT PRINCIPAL, PARAPROFESSIONAL MANAGER, CES SPECIALIST 2, LEA REPRESENTATIVE and

EDUCATIONAL SPECIALIST. Petitioners' Exhibits P-1 through P-62 and P-64 through P-93 were admitted into evidence, including Exhibits P-23, P-47 through P-50, P-53 through P-57, P-60 through P-62, P-64 through P-66 and P-84 which were admitted over DCPS' objections. DCPS' objection to Exhibit P-63 was sustained. DCPS' Exhibits R-1 through R-32 were admitted into evidence without objection, except for Exhibit R-4 to which Petitioners' objection was sustained.

On May 10, 2018, DCPS made an oral motion for a directed finding against the Petitioners on the grounds that the Petitioners had withdrawn their claim that DCPS had denied Student a free appropriate public education (FAPE) by not providing for a dedicated aide in the proposed August 2017 IEP for Student. I denied the motion for the reasons explained on the record. In lieu of receiving oral closing arguments, I granted DCPS' request for leave to file post-hearing written briefs. On May 29, 2018, Counsel for the respective parties filed written closings. On June 1, 2018, Petitioners, by counsel, filed a motion to strike DCPS' written closing. I deny that motion.

### **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 issues for determination, as originally raised by the Petitioners against DCPS and certified in the January 9 2018 Prehearing Order, were:

1. Whether DCPS denied Student a FAPE by failing to create an appropriate IEP for Student at IEP meetings held in August 2016 and August 2017:
  - A. Whether DCPS failed to discuss, determine, and properly indicate on Student's IEP what the appropriate LRE was for Student and the type of placement Student needed along the continuum of alternative placements at each of the above IEP meetings;

B. Whether DCPS denied Student a FAPE by failing to discuss and determine Student's placement at each of the above IEP meetings;

C. Whether DCPS denied Student a FAPE by delegating the placement and LRE determination/decision to a team that did not include Petitioners or individuals knowledgeable about Student.

2. Whether DCPS denied Student a FAPE by failing to develop an appropriate IEP and offer Student placement in a program that could provide Student with FAPE for school year 2016-2017 and school year 2017-2018.
3. Whether DCPS denied Student a FAPE for school year 2016-2017 and school year 2017-2018 by failing to issue a prior written notice informing Petitioners of, *inter alia*, the placement and actual location of the placement for Student in an appropriate program, the basis for this placement, and a description of what options had been considered – thereby depriving Petitioners of the ability to meaningfully participate and make meaningful decisions concerning Student's education.
4. Whether DCPS denied Student a FAPE by failing and refusing to include the Petitioners in the final development of Student's IEP in August 2016.
5. Whether DCPS denied Student a FAPE by failing and refusing to include the Petitioners in the final development of Student's IEP in August 2017.
6. Whether DCPS denied Student a FAPE by failing to have in place an appropriate/valid/viable IEP at the start of school year 2016-2017.
7. Whether DCPS denied Student a FAPE by failing to have in place an appropriate/valid/viable IEP at the start of school year 2017-2018.
8. Whether DCPS denied Student a FAPE by failing to offer Applied Behavior Analysis (ABA) therapy to Student and include goals reflecting this on Student's IEP.
9. Whether DCPS denied Student a FAPE by failing to conduct a functional behavioral assessment (FBA), develop a behavior intervention plan (BIP), and address Student's behavioral issues.
10. Whether DCPS denied Student a FAPE by failing to: a) inform Petitioners of the availability of extended school year programs; b) discuss and determine Student's need for extended school year services; and c) offer Student an appropriate placement in an extended school year program during the summers of 2016 and 2017.
11. Whether DCPS denied Student a FAPE by failing to provide a one-on-one

aide for the Student.

During the course of the due process hearing, Petitioners, by counsel, withdrew Issue No. 9 (failure to conduct an FBA and develop a BIP) and Issue No. 11 (failure to provide for a one-on-one aide in Student's IEPs).

For relief, the parents originally requested that the hearing officer find that Nonpublic School can provide and is providing educational benefit to Student; find that DCPS denied Student a FAPE; order DCPS to immediately reimburse Petitioners for tuition and related costs for Student's placement at Nonpublic School for school year 2016-2017, including transportation costs, related services costs, application fees and any other costs reasonably related to the placement at Nonpublic School; order DCPS to immediately reimburse Petitioners for the tuition and related costs they have incurred for Student's placement at Nonpublic School for school year 2017-2018, including transportation costs, related services costs, application fees and any other costs reasonably related to the placement at Nonpublic School; order DCPS to place and fund Student at Nonpublic School for the remainder of school year 2017-2018, with transportation and all related services; order DCPS to reimburse Petitioners for the cost of the summer program paid for by Petitioners during the summer of 2016; order DCPS to fund an independent FBA and the development of an independent BIP; order DCPS to convene an IEP meeting to review and revise Student's IEP to reflect the need for ABA and goals reflecting this; order DCPS, within 10 days of the receipt of the report from the independent FBA and the independent behavior intervention plan (BIP), to convene an IEP meeting to review the independent FBA and independent BIP; and order DCPS to fund the fee of the independent evaluator or their designee to attend this IEP meeting to present a review of the FBA and the BIP. The Petitioners also sought an

award of compensatory education to compensate Student for the denials of FAPE alleged in the complaint.

### **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 child, resides in the District of Columbia with Student's parents. Testimony of Mother.
2. Student is eligible for special education under the IDEA disability classification Autism Spectrum Disorder (ASD). Exhibit R-23. Student was initially evaluated by DCPS' Early Stages in April 2011 and determined then to have a disability due to Developmental Delay. Exhibit P-34.
3. In May 2015, NEUROPSYCHOLOGIST and two colleagues completed an Independent Educational Evaluation (IEE) neuropsychological evaluation of Student. They diagnosed Student with ASD - Level 2, requiring substantial support, without accompanying intellectual impairment and with language impairment. They noted that Student's presentation also included difficulties in attention and executive functioning as well as challenges in sensory and motor processing and self-regulation. They recommended, *inter alia*, that Applied Behavior Analysis (ABA) therapy be "reinstated" for Student for the 2014-2015 school year and that for the 2015-2016 school year Student transfer to a more structured, full-time academic environment ("*i.e.*, a self-contained classroom with a small student-to-teacher ratio.") Exhibit P-53.
4. The parents unilaterally enrolled Student in Nonpublic School at the beginning of the 2015-2016 school year. Testimony of Mother.
5. On April 27, 2016, the parents filed a prior due process complaint on

behalf of Student, which was assigned to this hearing officer (Case No. 2106-0104). Following a three-day due process hearing in June 2016, I issued a Hearing Officer Determination on July 26, 2016 (corrected on August 3, 2016) in which I found, *inter alia*, that DCPS failed to offer FAPE to Student with its December 4, 2014 IEP which did not provide for a dedicated aide and further, that the denial of FAPE continued after a June 18, 2015 IEP amendment, because the new classroom proposed by DCPS was “only a project in the works” and the parents did not know the exact services to be provided to Student, the quality of the instruction staff or the educational model that would be used. I determined, as a result, that the parents were entitled to reimbursement from DCPS for their costs for Student to attend Nonpublic School for the 2015-2016 school year. Exhibit P-93.

6. In mid-May 2016, DCPS scheduled an IEP team meeting for Student for June 6, 2016. Several days before the scheduled meeting date, DCPS canceled the IEP meeting because its staff had not yet reviewed Student’s data. The meeting was rescheduled for July 8, 2016. Testimony of Father.

7. DCPS convened an IEP team meeting for Student on July 8, 2016. Both parents, Petitioners’ Counsel and Dean of Students from Nonpublic School attended this meeting. The DCPS LEA Representative explained that the purpose of the meeting was to develop an updated IEP for Student and to determine Student’s educational placement. Dean of Students told the team that Student’s behavior continued to be a concern at Nonpublic School, but that Student was improving. She reported that due to social deficits, Student still struggled with playing with other children. During the IEP team’s discussion, it was learned that the DCPS team has not yet reviewed Neuropsychologist’s spring 2015 IEE neuropsychological evaluation of Student. At the

suggestion of the DCPS school psychologist, the IEP team agreed to reconvene in August 2016 to allow time for DCPS staff to review the 2015 IEE neuropsychological report.

Exhibit P-20.

8. Student's IEP team reconvened on August 10, 2016. Both parents, Petitioners' Counsel and Dean of Students also attended this meeting. The DCPS school psychologist's report on the spring 2015 IEE neuropsychological evaluation was reviewed for the team. After some discussion of additional disability classifications, the team agreed that Student's disability classification would remain ASD. The school representatives on the IEP team turned down the parents' request that the IEP specify that Student would be provided a dedicated aide except when in the self-contained classroom setting. DCPS' Communication and Education Support (CES) Program Manager stated that she would recommend that Student be placed in the CES Program at CITY SCHOOL 1, a 20 hour per week program. For the rest of the school week – lunch, recess and Specials classes – Student would be in the general education setting. Petitioners' Counsel stated that Student did better with small class size for the entire school day. Father stated that the parents would agree with 20 hours per week of Specialized Instruction, if Student were provided a dedicated aide. Petitioners' Counsel requested an updated functional behavioral assessment (FBA) and behavior intervention plan (BIP). The IEP team did not find Student eligible for Extended School Year (ESY) services, but proposed to reconvene during the school year to analyze data to determine the impact of a break in service on Student's critical skills. Petitioners' Counsel stated that the parents would not sign the IEP cover page until they were provided an updated draft to review. Exhibit P-19.

9. On August 12, 2016, without providing an advance draft for the parents to

review, DCPS issued its final IEP for Student. The IEP provided for 20 hours per week of Specialized Instruction, 240 minute per month of Speech-Language Pathology, 240 minutes per month of Occupational Therapy (OT) and 240 minutes per month of Behavioral Support Services. All Specialized Instruction and Related Services would be provided outside general education. The IEP provided also for Consultation Services in Physical Therapy (15 minutes per month), Speech-Language Pathology (30 minutes per month) and Behavioral Support Services (30 minutes per month). Exhibit P-18.

10. The August 12, 2016 IEP states that Student's disability had a negative impact on Student's ability to make progress within the general education curriculum and that Student continued to need highly-structured support and benefits from consistent support from an adult who can redirect and provide prompts and reminders for replacement behaviors when Student becomes upset. The IEP provided that Student responds positively to specific language, motivational charts and signals to indicate when a break is needed throughout the day and specified that Student exhibits language, adaptive and motor delays that require intervention/support, which was best partially delivered outside the general education setting. Exhibit P-18.

11. The parents unilaterally re-enrolled Student in Nonpublic School for the 2016-2017 school year. Testimony of Father.

12. On August 22, 2016, DCPS sent the parents and Petitioners' Counsel a letter, by email, identifying the CES classroom at City School 1 as the location of services for Student for the 2016-2017 school year. Exhibit P-16.

13. The CES classroom is a self-contained classroom, within a regular public school, for students with developmental disabilities, most of whom have ASD. ABA strategies are embedded throughout the day in the CES program. There are a maximum

of 8 students in the CES classroom, taught by a minimum of one teacher and two paraprofessionals. The classroom initially proposed for student for the 2016-2017 school year was a mixed grade class, with a total of 3 to 5 students. At lunch, recess and in Specials classes (*i.e.*, art, music and physical education), the children in the CES program join typically developing peers in the cafeteria, on the playground and in the Specials classrooms. The CES classroom teacher or a paraprofessional accompanies the CES students to these activities. Testimony of DCPS Program Manager.

14. On September 7, 2016, the parents emailed ANALYST at DCPS' Office of Specialized Instruction that Mother had visited the proposed classroom at City School 1 and observed that Student was functioning at a much higher level than the children in the proposed CES classroom. The parents also expressed concern that, without a dedicated aide, Student would not be able to function for part of the day in the general education setting. Exhibit P-15.

15. DCPS responded by offering the CES program at CITY SCHOOL 2 as the location of services for Student. Mother visited that school in September and October 2016 to observe the program. Mother observed that the cafeteria was a huge, open space, that there were a lot of children running around during transitions and that the setting was noisy. She was concerned that Student would be not be able to handle this "chaos." Mother was also concerned that the 1:00 p.m. lunch time for the CES class would be too late for Student. Testimony of Mother.

16. On September 12, 2016, Petitioners' Counsel wrote Analyst that the parents were concerned that the August 12, 2016 IEP was inadequate for the reasons, *inter alia*, that the IEP did not provide for a dedicated aide for the portion of the day that Student would be in a general education setting, that the IEP did not provide for

ABA therapy as a related service and that the IEP did not provide for ESY services.

Petitioners' Counsel passed on the parents' request that the IEP team reconvene to make the parents' requested revisions to the IEP. Exhibit P-14.

17. On October 3, 2016, after no response was received from DCPS to her September 12, 2016 letter, Petitioners' Counsel gave notice by email to DCPS' Office of Specialized Instruction that, in light of DCPS' not being willing to amend its August 12, 2016 IEP to address the parents' concerns, the parents would look to DCPS for reimbursement for the cost of Student's tuition at Nonpublic School for the 2016-2017 school year. Exhibit P-13. This letter led to an exchange of emails between Analyst and Petitioners' Counsel to set an IEP team meeting to review the parents' concerns. They eventually agreed upon December 7, 2016 as the meeting date. Exhibit P-12.

18. At the December 7, 2016 IEP team meeting, DCPS did not agree to make the Parents' requested changes to Student's IEP. The IEP team did agree that DCPS would conduct an updated comprehensive psychological evaluation of Student, an Occupational Therapy (OT) assessment and an adaptive Physical Education assessment. The team would also review an Speech-Language Pathology (SLP) assessment obtained by the parents to decide whether an SLP reevaluation of Student was needed. Exhibit P-10.

19. By letter of January 4, 2017, Petitioners' Counsel wrote Analyst and DCPS' attorney that the parents continued to believe that it was unsafe to place Student, as proposed, in a general education classroom for approximately 1/3 of the school week, without supports including a dedicated aide and ABA therapy, and that the proposed locations at City School 1 and City School 2 were inappropriate to meet Student's needs. Petitioners' Counsel gave notice that the parents intended to keep Student at Nonpublic

School for the 2016-2017 school year and to seek funding from DCPS for their costs for this unilateral placement. Exhibit P-9.

20. Over three days in March 2017, psychologists contracted for by DCPS (CONTRACTOR PSYCHOLOGISTS) conducted a Comprehensive Psychological Evaluation of Student. In their report, Contractor Psychologists reported, *inter alia*, that on behavior ratings scales, Student's Nonpublic School teachers' ratings indicated marked difficulties with Student's ability to regulate attention, hyperactivity and impulsivity within the classroom setting; that Student had difficulty using appropriate verbal and nonverbal communications for social contact, engaged in unusual behaviors, had problems with inattention and/or motor impulse control, had difficulty relating to children, had difficulty relating to adults, had difficulty providing appropriate emotional responses to people in social situations, used language in an atypical manner, engaged in stereotypical behaviors, had difficulty tolerating change in routine, overreacted to sensory stimulation and had difficulty focusing attention. Contractor Psychologists reported that Student's struggles with peer relationships undoubtedly created feelings of rejection and sadness, which in turn likely contributed to increase frustration and anxiety at not being able to connect with people, further fueling poor emotional control. Contractor Psychologists recommended, *inter alia*, that Student would benefit from a highly-structured, routine-based, classroom setting, where there are clear expectations for behaviors, and rules that are explicitly stated and reinforced in a nurturing but consistent manner; that in cooperative learning activities, Student be placed in activity-focused small groups with well-controlled peers and close adult monitoring to deter any potential negative peer interactions which could lead to shutting down and/or loss of emotional control; and that Student needed a safe and nonthreatening place in the

school setting to process situations that had led to emotional outbursts. Exhibit R-19.

21. In the spring of 2017, Educational Advocate conducted an observation at City School 1 on behalf of the parents. She observed the SEC classroom proposed for Student, the cafeteria at lunchtime and the playground at recess. Educational Advocate also conducted observations at City School 2 in May 2017 and in fall 2017. She observed the CES classroom at City School 2 proposed for Student, the Specials classes in the general education setting, the cafeteria at lunchtime and the playground at recess. Educational Advocate has not conducted an observation of Student at Nonpublic School. Testimony of Educational Advocate.

22. DCPS convened an IEP team meeting for Student on August 2, 2017 to conduct an evaluation review, redetermine Student's special education eligibility and hold an IEP annual review. Father attended part of the meeting. Petitioners' Counsel attended the entire meeting. The IEP team determined that Student continued to be eligible for special education and related services as a child with ASD and Student had needs in the areas of Reading, Math and Written Expression, Communications, Behavior and OT. The IEP team agreed that DCPS would complete a vision evaluation of Student. The team proceeded to review DCPS' proposed IEP for Student. The IEP team agreed to increase Student's Specialized Instruction hours to 24.5 hours per week and to provide 240 minutes per month of OT, 240 minutes per month of Speech and Language and 240 minutes per month of Behavioral Support Services. All services would be provided outside general education. The only part of the school day Student would interact with nondisabled peers would be at lunch and at recess. The team determined that Student did not need a dedicated aide because Student would not be in a general education classroom. Petitioners' Counsel objected that Student could not

function independently in a general education setting. ESY was added to Student's IEP. Exhibit P-3. Petitioners' Counsel advised the IEP team that she had to review the proposed IEP with the parents. Exhibit P-7, Testimony of Father.

23. On August 4, 2017, Petitioners' Counsel wrote DCPS' attorney and Advisor that the parents were rejecting the August 2, 2017 IEP for Student and intended to continue to place Student at Nonpublic School and seek reimbursement from DCPS for their private school costs. The parents' specific objections to the proposed IEP were the failure to provide for a dedicated aide when Student would be in the general education setting, the failure to obtain input from Nonpublic School staff on the IEP annual goals, the failure to provide for ABA therapy in the IEP, the failure to provide for ESY services, and the IEP team's failure to specify Student's least restrictive environment in terms of class size, student/teacher ratio and Student's time in the general education setting. Exhibit P-2. By letter of August 11, 2017, DCPS responded that it had made a FAPE available to Student and that it would not bear the cost of Student's private placement for the 2017-2018 school year. Exhibit P-1.

24. Nonpublic School is a small private school in suburban Maryland that serves bright students with social and emotional challenges. The school's enrollment is 59 students in Kindergarten through 8<sup>th</sup> Grade. The average classroom size is 10 students with one lead teacher and one assistant teacher. The school employs Applied Behavior Analysis (ABA) and Social Learning principles throughout the day. OT services are embedded in the classes. The annual tuition is approximately \$40,000. The school does not have a Certificate of Approval (COA) issued by the D.C. Office of the State Superintendent of Education (OSSE). Testimony of Dean of Students.

25. Student has attended Nonpublic School since the 2015-2016 school year.

When Student first enrolled, Student was in a very dysregulated state and unable to express what Student was feeling. In the 2016-2017 school year. Student made significant progress with writing and lesser progress with language challenges and social challenges. Testimony of Dean of Students. Over the 2016-2017 school year, Student's behavior varied. At the beginning of the year, Student was resistant to parts of the learning process, especially writing, and had difficulty understanding what was being requested. Student had frequent outbursts and had difficulty explaining what was bothering Student. Over the school year, Student made social-emotional progress, improved in the ability to engage with peers, and in identifying preferred activities. Student still struggled with novel situations and needed to be alerted in advance to upcoming changes in routine. Testimony of Classroom Teacher. Student's behavior improved in the 2016-2017 school year with a lot less screaming, more understanding of social dynamics and being more able to access the curriculum. In the current, 2017-2018, school year, Student has continued to progress. Student is at, or close to, grade level in both reading and math. Student is in a better position with relations with peers, but continues to have challenges with misreading situations and still needs a lot of guidance. Student is working on developing good friendships and is developing both academically and socially. Testimony of Dean of Students.

### **CONCLUSIONS OF LAW**

Based upon the above findings of fact and argument and legal memoranda 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 Petitioners 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 Petitioners 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

1. Whether the parents are entitled to reimbursement from DCPS for their unilateral placement of Student at Nonpublic School for the 2016-2017 and 2017-2018 school years.

The parents unilaterally placed Student at Nonpublic School for the 2015-2016, 2016-2017 and 2017-2018 school years. In my August 3, 2016 Hearing Officer Determination, I ordered DCPS to reimburse the parents for Student's private school expenses for the 2015-2016 school year. In this new proceeding, the parents seek reimbursement for Student's Nonpublic School expenses for the 2016-2017 and 2017-2018 school years. In support of their reimbursement claim, the parents allege a host of substantive and procedural violations of the IDEA by DCPS. The core of the parents' complaint is that DCPS' proposed August 12, 2016 and August 2, 2017 IEPs for Student were both inappropriate because neither IEP met Student's alleged need for a full-time placement in a special school for children impaired by Autism Spectrum Disorder (ASD) and related neurological disabilities. DCPS responds that the proposed IEPs were both

appropriate to meet Student's needs.

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)). However, “[i]f a school system fails to provide a [disabled] student with an appropriate education and such education is offered at a private school, the school system may be liable to reimburse the student for the cost of private education.” *Z. B. v. District of Columbia*, No. 16-7113, 2018 WL 2011461 (D.C. Cir. May 1, 2018) (citing 20 U.S.C. § 1412(a)(10)(C)(ii); *Leggett v. District of Columbia*, 793 F.3d 59 (D.C. Cir. 2015)). “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, supra*, at 66-67, (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 reimbursement from the *Z. B.* and *Leggett* decisions is that the public school officials failed to offer the child a FAPE. That leads to the principle query in this case: With respect to its proposed August 12, 2016 and August 2, 2017 IEPs, did DCPS offer Student a FAPE? Under the District's Special Education Student Rights Act, the burden of persuasion falls on DCPS.

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 standard, first enunciated in *Bd. of Educ. v. Rowley*, 458 U.S. 176, 102 S.Ct. 3034, 73 L.Ed.2d 690 (1982), for what constitutes an appropriate IEP:

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. *Endrew F.*, 137 S.Ct. at 999. . . . The "reasonably calculated" qualification reflects a recognition that crafting an appropriate program of education requires a prospective judgment by school officials. *Id.* . . . Any review of an IEP must appreciate that the question is whether the IEP is *reasonable*, not whether the court regards it as ideal. *Id.* (emphasis in original.) . . . The IEP must aim to enable the child to make progress. . . . [T]he essential function of an IEP is to set out a plan for pursuing academic and functional advancement. *Id.* . . . A focus on the particular child is at the core of the IDEA. The instruction offered must be "*pecially designed*" to meet a child's "*unique needs*" through an "*individualized education program.*" An IEP is not a form document. It is constructed only after careful consideration of the child's present levels of achievement, disability and potential for growth. *Id.* (emphasis in original.) . . . 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. *Id.*, 137 S.Ct. at 1000. . . . [For a child who is not fully integrated in the regular classroom and not able to make grade-level advancement] 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. *Id.* . . . A reviewing court may fairly expect [school] authorities to be able to offer a cogent and responsive explanation for their decisions that shows the IEP is reasonably calculated to enable the child to make progress appropriate in light of his circumstances. *Id.*, 137 S.Ct. at 1002.

*Endrew F.*, *supra* (emphasis in original). Citing the *Endrew F.* decision, the D.C. Circuit instructed in *Z.B.* that the hearing officer "must ask whether, in developing the [proposed IEPs], DCPS adequately evaluated [Student's] particular needs and offered [Student] an IEP tailored to what it knew or reasonably should have known of [Student's] disabilities at the time." *Z.B.*, *supra*.

In my prior, August 3, 2016, Hearing Officer Determination concerning this

child, I held, *inter alia*, that the parents were entitled to private school reimbursement for the 2015-2016 school year because the public school classroom proposed for Student in a June 18, 2015 amended IEP was “only a project in the works” and the parents did not know the exact services to be provided to Student, the quality of the instruction staff or the educational model that would be used. On August 12, 2016, DCPS offered Student a revised IEP for the 2016-2017 school year. This IEP provided for Student’s placement in a Communication and Education Support (CES) classroom at a regular DCPS public school for most of the school day. For Specials classes, lunch and recess, the children in Student’s CES classroom would join their typically developing peers under the supervision of CES classroom staff. DCPS’ proposed August 2, 2017 IEP provided for all of Student’s academic instruction (including Specials) to be outside of the general education setting, but Student would still be with nondisabled peers at lunch and at recess.

The parents’ experts opined that the proposed August 12, 2016 and August 2, 2017 IEPs were not appropriate for Student because, due to Student’s neurological disability, it would have been detrimental for Student to be placed with typically developing peers with Student for even part of the school day. Social Learning Specialist interacts with Student daily at Nonpublic School. She testified that Student needs a lot of support in unstructured times because Student has difficulty interpreting more complex facial expressions and it is hard for Student to express complicated feeling and emotions. She stated that even at Nonpublic School, it is really hard for Student to “process” in a cafeteria or at indoor recess with 30 students. Social Learning Specialist testified that Student is more successful with recess outdoors, but still needs a lot of coaching. Dean of Students testified that after two years at Nonpublic School, Student

remains fragile. She opined that Student would become lost, frustrated and very dysregulated in a big school setting. She opined that it would be very detrimental for Student to be in a mainstream setting even for lunch and recess.

S-L Pathologist has worked with Student since 2011. She opined that in a mainstream setting at lunch or recess, due to the noise and movement in that environment, Student would be overwhelmed by the sensory input. S-L Pathologist opined that Student was unable to participate with nondisabled peers at lunch and recess because Student would not be able to communicate socially with them.

Pediatrician, an expert in developmental and behavioral pediatrics, evaluated Student in late 2017 and conducted a classroom observation at Nonpublic School. Pediatrician opined that Student would be unable to navigate the environment at a regular public school because of the number of children, the noise and the unpredictability. She testified that even in the controlled setting at Nonpublic School, she observed that at recess, Student experienced distress, agitation and withdrawal. Pediatrician asserted that Student needs a special school environment in which all aspects of the school day are catered to children with social-communication needs and autism. She opined that due to Student's fragilities, the level of stress Student would feel in a mainstream classroom would be highly negative and would undermine Student's academic and social development. She opined that placing Student in a mainstream setting would completely usurp Student's abilities. Pediatrician testified that Student needs facilitation in social situations and that at unstructured times, Student is most vulnerable. She opined that it would be highly disadvantageous for Student to be in a mainstream setting with general education peers at lunch and recess.

DCPS' experts testified in support of the appropriateness of DCPS' proposed IEPs

for Student. School Social Worker, who observed Student on two occasions at Nonpublic School, discussed the benefits to Student of interacting with same-aged peers in the general education setting, including promoting communication skills and real social play. CES Specialist 1 testified that she thought Student would have benefitted from the IEP program at City School 2, in part because Student would have had the opportunity of access with typically developing peers at recess. Paraprofessional Manager observed Student at Nonpublic School in May 2017. She noted that Student had been very well behaved, followed directions and worked well independently. She observed that when Student had a “melt-down” at Nonpublic School, Student was able to calm down after the classroom teacher took Student for a break. Paraprofessional Manager opined that DCPS is able to provide an appropriate education for Student in a CES classroom and that Student would benefit from interaction with nondisabled peers at lunch, recess and for Specials classes. CES Specialist 2 observed Student at Nonpublic School in May 2018. She testified that during her observation, Student did not exhibit challenging behaviors and was able to remain focused. She opined that DCPS’ proposed August 2016 and August 2017 IEPs for Student were both appropriate and that Student would have benefitted from interaction with nondisabled peers, including the opportunities for peer modeling and to practice social skills.

In this “battle of the experts,” the parents have the upper hand. While I found DCPS’ witnesses to be extremely credible and was impressed that several of them had observed Student at Nonpublic School, their knowledge of Student is necessarily more limited than that of Student’s instructors at Nonpublic School, which Student has attended since fall 2015, and of S-L Pathologist who has worked with Student since 2011. Moreover, Pediatrician, an expert in developmental and behavioral pediatrics,

was able to offer a perspective on Student's limited toleration level for interaction with nondisabled peers in a general education milieu, that was not matched by DCPS' witnesses.

Contractor Psychologists, who evaluated Student for DCPS in spring 2017, did not explicitly recommend a special school setting, but their report on Student's behavioral needs tended to buttress the opinions of the parents' experts. Contractor Psychologists recommended that Student would benefit from a highly-structured, routine-based, classroom setting, where there are clear expectations for behaviors, and rules that are explicitly stated and reinforced in a nurturing but consistent manner and that in cooperative learning activities, Student needed small groups with well-controlled peers and close adult monitoring to deter any potential negative peer interactions which could lead to shutting down and/or loss of emotional control. They expressed concern that Student's emotional dysregulation further deterred other children from interacting, which could then create an ongoing cycle of rejection, low self-esteem and alienation.

In light of the credible testimony of the parents' experts that at the time of the August 2016 and August 2017 IEP review meetings, due to Student's neurological impairments including ASD and communication challenges, Student was unable to handle any part of the school day with typically developing peers, I find that DCPS has not met its burden of persuasion that either the August 12, 2016 IEP or the August 2, 2017 IEP provided an educational setting for Student that was reasonably calculated to enable Student to make progress appropriate in light of this child's circumstances. *See Andrew F., supra.* Therefore, I find that with respect to these IEPs, DCPS failed to offer Student a FAPE. *See Leggett, supra.*

Having found that DCPS failed to offer Student a FAPE with its proposed IEPs for

the 2016-2017 and 2017-2018 school years, I turn next to the other two requirements for reimbursement pronounced in the *Leggett* decision – that the private school chosen by the parents was proper and that the parents did not otherwise act unreasonably. In *Leggett*, analogizing to the standard for IEP appropriateness from the U.S. Supreme Court’s *Rowley* decision, the D.C. Circuit held that for the private school chosen by the parents to be proper, it need be “reasonably calculated to enable the child to receive educational benefits.” *Leggett, supra*, at 71. That standard must be updated to reflect the Supreme Court’s more recent holding in *Endrew F.* that an IEP must be “reasonably calculated to enable a child to make progress appropriate in light of the child’s circumstances.” *See Endrew F.*, 137 S.Ct. at 999. Therefore, it follows that for the private school chosen by the parents to be “proper,” it must be reasonably calculated to enable the child to make progress appropriate in light of the child’s circumstances.

Student has attended Nonpublic School for three years. Nonpublic School’s focus is to serve children, like Student, who are bright, but have social and emotional challenges. The school uses Applied Behavior Analysis (ABA) therapy throughout the school day. When Student started at Nonpublic School in the 2015-2016 school year, Student was in a very dysregulated state and not able to express what Student was feeling. In the 2016-2017 school year, Student continued to have similar challenges but to a lesser degree. By the 2017-2018 school year, Student was reported to be responding “beautifully” in the classroom, and developing academically, as well as socially. At the time of the due process hearing, Student had reached grade level in math and was close to grade level in reading. In light of Student’s undisputed academic and behavioral progress at the private school since the 2015-2016 school year, I find that the parents’ choice of Nonpublic School for Student’s 2016-2017 and 2017-2018 school years was

reasonably calculated to enable Student to make progress appropriate in light of Student’s circumstances and was, therefore, proper under the *Leggett* standard.

Lastly, the *Leggett* decision requires that the “equities weigh in favor of reimbursement—that is, the parents did not otherwise act ‘unreasonabl[y].” *Id.*, 793 F.3d at 67. In DCPS’ closing brief, DCPS’ Counsel, citing 20 USC § 1412(a)(10)(C) and 34 CFR § 300.148, argues that the parents acted unreasonably by not timely notifying DCPS of their disagreement with the August 12, 2016 and August 2, 2017 IEPs.

The IDEA provides that the cost of reimbursement for private school may be reduced or denied 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 section.

34 CFR § 300.148(d). As the U.S. Department of Education explained in *Letter to Miller*, 55 IDELR 293, 110 LRP 73646 (OSEP May 5, 2010), the limitation in Section 300.148(d) “focuses on the child’s removal from public school. Specifically, the above-cited provision refers to ‘the most recent IEP Team meeting that the parent attended prior to *removal* of the child from the public school’ and ‘at least ten (10) business days . . . prior to the removal of the child from the public school’ (emphasis added). Thus, removal and not enrollment, establishes the regulatory benchmark when determining compliance with the parental notice provision.” In the present case, Student was “removed” from the DCPS public school before the 2015-2016 school year.

Therefore, the limitation in 34 CFR § 300.148(d) does not apply to the parents' actions after the IEP meetings in August 2016 and August 2017.

Moreover, the parents did alert DCPS to their disagreement with the August 12, 2016 and August 2, 2017 IEPs. At the August 10, 2016 IEP team meeting, Father stated explicitly that the parents would agree to the hours of specialized instruction services proposed for Student, if Student were provided a dedicated aide – but a dedicated aide was not provided in the final IEP. By letter of September 12, 2016, Petitioners' Counsel detailed numerous concerns which the parents had with the August 12, 2016 IEP, including the failure to provide for a dedicated aide. Similarly, by letter of August 4, 2017, Petitioners' Counsel gave notice to DCPS that the parents disagreed with the August 2, 2017 IEP proposed for Student and that they would seek reimbursement from DCPS for Student's placement at Nonpublic School for the 2017-2018 school year. I find that the parents did not act unreasonably in unilaterally placing Student at Nonpublic School for the 2016-2017 and 2017-2018 school years. It follows that under the D.C. Circuit's holding in *Leggett*, the IDEA requires DCPS to reimburse the parents for their private school expenses for Student to attend Nonpublic School for the 2016-2017 and 2017-2018 regular school years.

In light of my determination that the parents are entitled to reimbursement for their private school expenses for Student, I do not reach Petitioners' remaining claims concerning the alleged substantive inadequacies of the August 12, 2016 and August 2, 2017 IEPs – except for the failure to offer extended school year (ESY) services (Issue 10), which I consider next – or DCPS' alleged failure to comply with the procedures set forth in the IDEA. 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)).

2. Whether DCPS denied Student a FAPE by failing to: a) inform Petitioners of the availability of extended school year programs; b) discuss and determine Student’s need for extended school year services; and c) offer Student an appropriate placement in an extended school year program during the summers of 2016 and 2017.

Petitioners’ claim that DCPS did not inform them about the availability of extended school year (ESY) programs or discuss Student’s ESY needs at the IEP team meetings mirrors a similar claim from their April 2016 due process complaint in Case No. 2016-0104. In my August 3, 2016 corrected decision in that case, I found that the parents did not establish that Student was denied a FAPE by the IEP team’s decision that Student did not require ESY services. *See Exhibit R-3.* The parents may not now relitigate the question of whether DCPS should have offered Student ESY services for the summer of 2016. *See McLaughlin v. Bradlee*, 803 F.2d 1197, 1201 (D.C.Cir.1986). (“[O]nce a court has decided an issue of fact or law necessary to its judgment, that decision may preclude relitigation of the issue in a suit on a different cause of action involving a party to the first case.” *Id.* at 1201 (quoting *Allen v. McCurry*, 449 U.S. 90, 94, 101 S.Ct. 411, 66 L.Ed.2d 308 (1980))).

I further find that Student’s ESY needs were, in fact, discussed at the IEP team meetings in August 2016 and August 2017. At the August 10, 2016 IEP team meeting, Petitioners’ Counsel stated that Student had regressed over the prior winter break, and, apparently, again requested ESY services for Student. The DCPS representatives decided that the IEP team could not then find Student eligible for ESY services, but that the team should reconvene during the 2016-2017 school year to determine the impact of

a break in service on Student's critical skills. At an IEP team meeting on December 7, 2016, the DCPS representative stated that more data collection was required before ESY services could be provided. On May 25, 2017, Petitioners' Counsel informed DCPS by email that the parents (and presumably Student) would be out of the United States from June 8 until mid-August 2017. Apparently, Student was unavailable for summer school because the family was out of the country for most of the summer. I conclude that DCPS did not deny Student a FAPE by failing to provide ESY services in summer 2017.<sup>3</sup>

**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 costs for tuition and related covered expenses, including transportation, for Student's enrollment at Nonpublic School for the private school's 2016-2017 and 2017-2018 regular school years and
2. All other relief requested by the Petitioners herein is denied.

Date: June 9, 2018

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

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<sup>3</sup> The parents did not request reimbursement for summer 2017 ESY services for Student. In the August 2, 2017 IEP, Student was determined to require ESY services.

**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