

OSSE  
Office of Dispute Resolution  
June 19, 2023

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

Petitioners' original Due Process Complaint, filed on August 29, 2022, named DCPS as Respondent. The undersigned hearing officer was appointed on August 30, 2022. On September 6, 2022, I convened a telephone prehearing conference with counsel to discuss the issues to be determined, the hearing date and other matters. On September 22, 2022, the parties met for a resolution session and were unable to resolve the issues in dispute. The original final decision due date was November 12, 2022. On February 13, 2023, with leave of the hearing officer, Petitioners filed an amended complaint, which restarted the timelines for the matter. Over the course of this proceeding, Petitioners requested and were granted multiple continuances of the hearing date and the final decision due date. The final decision in this case is now due by June 23, 2023.

With the parents' consent, the due process hearing was held online and recorded by the hearing officer, using the Microsoft Teams videoconference platform. The hearing, which was closed to the public, was convened before the undersigned impartial hearing officer on May 18, 19 and 24, 2023. The parents appeared online for the hearing and were represented by PETITIONERS' COUNSEL and PETITIONERS' CO-COUNSEL. Respondent DCPS was represented by PROGRAM SPECIALIST and by DCPS' COUNSEL. Petitioners' Counsel made an opening statement. Petitioners called as witnesses FATHER, EDUCATIONAL ADVOCATE, EDUCATIONAL CONSULTANT and READING SPECIALIST. DCPS called as witnesses SPECIAL EDUCATION

TEACHER, PRINCIPAL, SPEECH-LANGUAGE PATHOLOGIST, LEA  
REPRESENTATIVE, NEUROPSYCHOLOGIST and Program Specialist.

Petitioners' Exhibits P-1 through P-66 were admitted into evidence, excluding Exhibits P-24, PP-33, P-53, P-55, P-58, P-60, P-62 and P-63 which were withdrawn and Exhibit P-41 to which I sustained DCPS' objection. Exhibits P-2, P-15, P-19, P-43, P-44, P-54, P-56, P-57, P-59 and P-61 were admitted over DCPS' objections. DCPS' Exhibits R-6, R-11 through R-14, R-16 through R-18, R-22 through R-24, R-26, R-28, R-29, R-32 through R-34, R-37 through R-40, R-46, R-48, R-49, and R-51 through R-53, R-68 through R-72, R-74, R-77 through R-79, R-82 through R-85, R-87, R-89, R-90, R-92, R-98 and R-99 were admitted into evidence, including Exhibit R-52 admitted over Petitioners' objection. Exhibit R-31 was admitted as a Petitioners' exhibit over DCPS' objection.

At the conclusion of Petitioners' case in chief, DCPS made an oral motion for a partial directed finding against the Petitioners, which I denied.

In lieu of making oral closing arguments, counsel jointly requested leave to file written closings. Each of the parties, by counsel, timely filed a written closing memorandum.

### **JURISDICTION**

The hearing officer has jurisdiction under 20 U.S.C. § 1415(f) and 5A DCMR § 3049.1.

### **ISSUES AND RELIEF SOUGHT**

The issues for determination in this case, as set forth in the March 22, 2023 Revised Supplemental Prehearing Order, are:

- A. Did DCPS deny Student a FAPE by failing to provide an appropriate program or placement for the 2020-2021, 2021-2022, and 2022-2023 school years?
- B. Did DCPS deny Student a FAPE by failing to find him/her eligible for special education services related to his/her reading disability?
- C. Did DCPS deny Student a FAPE by failing to find him/her eligible for special education services related to his/her written language disability?
- E. Is Nonpublic School an appropriate placement?

For relief, the parents seek reimbursement from DCPS for their costs of tuition and covered services paid to Nonpublic School for the 2020-2021, 2021-2022 and the 2022-2023 school years.<sup>2</sup>

### **FINDINGS OF FACT**

After considering all of the evidence received at the due process hearing in this case, as well as the argument of counsel, my findings of fact are as follows:

- 1. Student, an AGE youth, resides with the parents in the District of Columbia. Testimony of Father.
- 2. Student is eligible for special education as a student with Multiple

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<sup>2</sup> In their revised complaint, the parents also sought an order for DCPS to fund Student's placement at Nonpublic School for the remainder of the 2022-2023 school year. Because the 2022-2023 regular school year is at an end, I will treat the parents' prayer for relief as a request for tuition reimbursement for all three school years.

Disabilities - Specific Learning Disability and Other Health Impairment. Exhibit P-31.

3. At one week old, Student had a choking incident at home and was treated at the hospital, where he/she was subsequently diagnosed with tracheomalacia (an abnormal collapse of the tracheal walls), tracheal vascular ring, and 22Q Deletion Syndrome (also called DiGeorge Syndrome), a chromosomal disorder. Student had surgery to remove the vascular ring on his/her trachea but continued to have tracheomalacia, which makes him/her susceptible to respiratory illness. Student also has a history of asthma and reflux disorder. In a fall 2021 DCPS Comprehensive Psychological Reevaluation Report, DCPS SCHOOL PSYCHOLOGIST found that Student met IDEA disability criteria for a Specific Learning Disability, based on test results indicating that Student was performing significantly below grade level in the area of math and that his/her academic abilities were not then commensurate with his/her cognitive abilities. DCPS School Psychologist also reported that Student met IDEA criteria for an Other Health Impairment based upon having been diagnosed with Attention Deficit-Hyperactivity Disorder (ADHD) and upon rating scales responses from Student's parent and teacher which indicated elevated or very elevated ratings on the Inattention and Hyperactivity/Impulsivity subscales. Exhibit P-28.

4. Student was first determined eligible for special education at ELIGIBILITY AGE by DCPS' Early Stages Diagnostic Center. At the time, Student was attending DCPS' CITY SCHOOL 1, where he/she remained enrolled through the 2019-2020 school

year. Testimony of Father.

5. In January 2019, Educational Advocate, who as a special education consultant had followed Student since 2017, evaluated Student with standardized and informal measures of academic achievement. In her March 16, 2019 report, Educational Advocate summarized that Student's underlying phonemic awareness skills in blending and sound position isolation had improved. Student's word attack, single-word spelling, and single-word reading skills were also better than when tested in 2016. She reported that other important and expected skills had not developed or improved. Those included all areas of math, reading comprehension and reading and writing fluency. Educational Advocate wrote that for these areas and all areas associated with behavior, attention, executive functioning Student continued to require specialized instruction across the school day. Educational Advocate wrote that there was a widening gap between Student's skills and those expected at Student's age and grade, despite personal progress in some areas and that while Student had made some progress in discrete areas, he/she remained significantly behind his/her peers in many areas and the gap was widening, not narrowing. Educational Advocate also cited Student's observed lack of social and instructional engagement in general education. Educational Advocate recommended that Student needed more specialized instruction than provided in his/her then-current IEP, which was 8 hours per week outside of general education and 10 hours inside general education. Educational Advocate wrote that a more restrictive

setting must be considered going forward if Student's progress remained at "this lackluster pace." Exhibit P-2. At the IEP meetings at City School 1, Educational Advocate stated her view that Student's needs were not being met. Testimony of Educational Advocate.

6. On Student's report card for the end of the 2018-2019 school year, the teacher reported that the child had made good progress in his/her grade. Student was reading grade level texts with good comprehension, but needed more practice reading fluently to increase speed and accuracy. She also wrote that Student needed more practice with phonics. In Math, Student was working on adding and subtracting mentally and fluently with numbers up to 20. Student obtained Proficient (3) grades for the final quarter in all core subjects. Exhibit P-4. Student was also reported to have mastered, or to be progressing on, almost all academic goals from his/her April 22, 2019 IEP. Exhibit P-5.

7. In the summer of 2019, the parents unilaterally enrolled Student in WASHINGTON PRIVATE SCHOOL's summer program. Testimony of Father.

8. The parents obtained private reading tutoring for Student from August 28, 2019 to January 20, 2020 because Student's reading comprehension was weak. Testimony of Reading Specialist.

9. On December 13, 2019, the parents engaged INDEPENDENT PSYCHOLOGIST to conduct a brief psychological evaluation of student, consisting of

cognitive and academic achievement testing. Independent Psychologist did not testify at the due process hearing. Exhibit P-11. This assessor's analysis of Student's academic achievement scores (WJ-Ach-IV) was unreliable because the test scores reported in her narrative were inconsistent with the Result print-out attached to her report. Exhibit R-27, Testimony of Neuropsychologist. Because of this inconsistency, I do not deem Independent Psychologist's report to be reliable evidence.

10. The City School 1 IEP team convened for the annual review of Student's IEP on February 26, 2020. Both parents and Educational Advocate participated in the meeting. The February 26, 2020 IEP identified Mathematics, Reading, Written Expression, Communication/Speech and Language, Emotional, Social and Behavioral Development and Motor Skills/Physical Development as areas of concern for Student. For special education, the school team members reduced Student's Specialized Instruction Services by one-third from 18 hours per week total to 8 hours per week outside of General Education and 4 hours per week in General Education. For related services, the February 26, 2020 IEP provided for 120 minutes per month of Occupational Therapy (OT), 2 hours per month of Speech-Language Pathology, and 180 minutes per month of Behavioral Support Services. In addition, the IEP team provided for a host of Other Classroom Aids and Services and for Assistive Technology. The IEP team school representatives denied the request of the parents and Educational Advocate for Student's Specialized Instruction Services to continue at 18 hours per week as



provided in Student's prior, April 22, 2019, IEP. Exhibit P-12, Testimony of Educational Advocate.

11. In January or February 2020, the parents applied for Student's admission to Nonpublic School. Student was accepted by Nonpublic School in March 2020. The parents also applied to Washington Private School, but Student was not accepted at that school. The parents decided by June 2020 to unilaterally enroll Student at Nonpublic School for the 2020-2021 school year. Testimony of Father.

12. On or about March 9, 2020, City School 1 convened another IEP team meeting for Student. Student was reported to be making progress in mathematics, including with an adding/subtracting goal, mastery of the multiplication factors, a division goal and word problems. Student was reported to be reading above the expected grade level benchmark and to still need continued direct reading instruction to strengthen literacy skills, oral reading fluency, and comprehension. Student was reported to have made great progress with writing, but was still below grade level and continued to require one-on-one support for writing tasks. Student's weak executive functioning skills were reported to contribute to his/her difficulty in planning and carrying out problem-solving activities and assignments. Exhibit R-31.

13. At the March 9, 2020 IEP team meeting, there was an impasse between the parents and the school representatives on the school officials' proposal to reduce Specialized Instruction Services for Student. When asked why they proposed to reduce

Student's specialized instruction hours from 18 hours to 12 hours per week, the school representatives stated that they could not provide 18 hours. Testimony of Educational Advocate. The School team asserted that 12 hours of specialized instruction per week was sufficient. The parents did not agree to the reduction from 18 hours to 12 hours per week. Exhibit R-24.

14. On March 9, 2020, the parents gave written consent for Student to be reevaluated by DCPS for continued eligibility for special education. Exhibit R-26.

15. On March 13, 2020, City School 1 closed for in-person learning in response to the COVID-19 pandemic. Testimony of Educational Advocate. Student did not return to City School 1 after the COVID-19 closings. Testimony of LEA Representative. During the spring 2020 school closure period, Student was provided home-based virtual learning. Distance learning was extremely challenging for Student. He/she required Father's attention for the entire school day. Testimony of Father. Father sat next to Student for the online math and ELA classes. Testimony of Special Education Teacher. Student's engagement was not as high on the computer as in person. Testimony of Special Education Teacher. At the time, Father stated that unless he sat with Student the entire time, Student would not be engaged. Testimony of Educational Advocate.

16. By letter of August 17, 2020, Petitioners' Co-Counsel notified DCPS that Student would attend Nonpublic School for the 2020-2021 school year and she requested that DCPS place and fund Student at the private school. The attorney wrote

that they did not believe that an appropriate special education program had been identified or offered by DCPS for Student for the 2020-2021 school year. Counsel gave notice that should DCPS refuse the parents' request for funding, they reserved the due process right to seek funding for their unilateral placement. Exhibit P-18.

17. By letter of August 26, 2020, DCPS' Director, Resolution Team responded that it was DCPS' position that the District had made a FAPE available to Student with an appropriate IEP and a placement in the least restrictive environment at City School 1. The DCPS director wrote that if the parents chose not to enroll Student at City School 1, DCPS would consider the student a parentally-placed private school student. Exhibit P-18.

18. By email of August 31, 2020, Petitioners' Counsel wrote LEA Representative at City School 1 to forward a completed DCPS withdrawal form for Student. The attorney wrote that the parents did not believe that City School 1 had offered Student a FAPE and that the parents did not intend for the withdrawal form to impact their right to seek reimbursement from DCPS for Student's tuition at Nonpublic School. Exhibit P-20.

19. The parents unilaterally enrolled Student at Nonpublic School for the 2020-2021 school year. Student has remained enrolled at Nonpublic School, under the parents' unilateral placement, for the 2021-2022 and 2022-2023 school years.  
Testimony of Father.

20. On September 10, 2020, City School 1 convened an IEP team telephone meeting for Student. The parents and Educational Advocate participated. The September 10, 2020 IEP team made no changes to the March 2020 IEP provisions for special education and related services for Student. For special education, the September 10, 2020 IEP provided for Student to receive 8 hours per week of Specialized Instruction Services outside General Education and 4 hours per week of Specialized Instruction in General Education. Exhibit R-31.

21. By letter of August 4, 2021, Petitioners' Co-Counsel notified DCPS that Student would attend Nonpublic School for the 2021-2022 school year and requested that DCPS place and fund Student at the private school. The attorney wrote that they did not believe that an appropriate special education program has been identified or offered by DCPS for Student for the 2021-2022 school year. The attorney gave notice that should DCPS refuse the parents' request for funding, they reserved the due process right to seek funding for their unilateral placement. Exhibit P-27.

22. By letter of August 20, 2021, DCPS' Director, Resolution Team responded that it was DCPS' position that the District had made a FAPE available to Student with an appropriate IEP and a placement in the least restrictive environment at CITY SCHOOL 2.<sup>3</sup> The DCPS director wrote that if the parents chose not to enroll Student at

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<sup>3</sup> This was apparently a scrivener's error by the DCPS official. If the parents had re-enrolled Student in DCPS for the 2021-2022 school year, Student's school location would have been City School 1. See Testimony of Principal.

City School 2, DCPS would consider the student a parentally-placed private school student. Exhibit P-27.

23. On August 3, 2021, the parents signed written consent for DCPS to reevaluate Student for continued special education eligibility. DCPS proceeded to conduct a psychological assessment, a speech assessment, an OT assessment and observations. On August 19 and September 17, 2021, DCPS School Psychologist conducted a comprehensive psychological reevaluation of Student. This assessor reported, *inter alia*, that Student's overall cognitive functioning fell within the Average range (FSIQ = 106). On some subtests, Student scored less than Average. Student's sentence reading fluency skills (SS = 80) fell within the Low Average range. Student's basic calculation skills (SS = 89) fell within the Low Average range while his/her applied math reasoning skills (SS = 79) and math facts fluency skills (SS = 71) fell within the Low range. Student's sentence writing fluency skills fell within the Low Average range (SS = 81). On the Gray Oral Reading Test, Fifth Edition (GORT-5), Student's overall oral reading skills fell within the Below Average range (ORI = 86), with his/her comprehension and reading rate falling within the Average range and accuracy and fluency within the Below Average range. On the Conners-3 rating scales for ADHD, parent and teacher responses indicated elevated or very elevated ratings on the Inattention and Hyperactivity/Impulsivity subscales. DCPS School Psychologist concluded that Student met criteria for special education services as a student with

Multiple Disabilities (MD) based upon concomitant Specific Learning Disability (SLD) and Other Health Impairment (OHI) for ADHD. Exhibit P-28.

24. On October 25, 2021, the DCPS eligibility team determined that Student continued to meet disability criteria for MD based upon SLD and OHI-ADHD and that the academic area of impact was math calculation. Educational Advocate attended the meeting and she contended that Reading and Written Language should have continued to be identified as additional academic areas of need for Student. Student was also found eligible for speech-language, OT and Behavior Support Services. Exhibits P-31, P-32.

25. On January 14, 2022, the DCPS Central Office convened an IEP annual review meeting for Student. Both parents, Educational Advocate and Petitioners' Counsel attended the meeting. The January 14, 2022 IEP identified Mathematics, Communication/Speech and Language and Emotional, Social and Behavioral Development and Motor Skills/Physical Development as areas of concern for Student. The proposed IEP discontinued Reading and Written Expression as areas of concern. The DCPS IEP team decided, over the parents' objection, to reduce Student's Specialized Instruction Services to 5 hours per week. For Related Services, the proposed January 14, 2021 IEP provided 180 minutes per month of OT, 180 minutes per month of Speech-Language Therapy and 180 minutes per month of Behavioral Support Services. Exhibit P-36.

26. On March 14, 2022, DCPS' Central Office convened a teleconference MDT meeting to discuss Student's current eligibility classification and areas of academic impact. During the meeting, DCPS School Psychologist reviewed the results of her fall 2021 psychological assessment of Student. The psychologist stated that Student's reading scores were solidly average across the board and that Student's teacher at Nonpublic School indicated that Student was reading slightly above grade expectations. Educational Advocate and Father insisted that Student had severe weaknesses in reading and writing. DCPS countered that the information from Nonpublic School and the results of the psychological assessment suggested that Student had strengths in reading and writing. School Psychologist stated that on the GORT-5, Student had made minor mistakes that impacted accuracy, but not reading comprehension. Father stated that Nonpublic School teachers said Student was struggling with comprehension, and that Student's writing lacked details and he/she struggled with language. Exhibits R-78, R-79. Nonpublic School personnel were invited to Student's IEP meetings, but did not attend. Testimony of Program Specialist.

27. By letter of July 18, 2022, Petitioners' Counsel notified DCPS that Student would attend Nonpublic School for the 2022-2023 school year and requested that DCPS place and fund Student at the private school. The attorney wrote that they did not believe that an appropriate special education program has been identified or offered by DCPS for Student for the 2022-2023 school year. Counsel gave notice that should DCPS

refuse the parents' request for funding, they reserved the due process right to seek funding for their unilateral placement. Exhibit P-27.

28. By letter of July 25, 2022, DCPS' Director, Resolution Team responded that it was DCPS' position that the District had made a FAPE available to Student with an appropriate IEP and a placement in the least restrictive environment at City School 2. The DCPS director wrote that if the parents chose not to enroll Student at City School 2, DCPS would consider the student a parentally-placed private school student. Exhibit P-42.

29. On December 19, 2022, DCPS' Central Office convened a virtual IEP meeting to review and update Student's IEP. The parents, Educational Advocate and Petitioners' Counsel participated. IEP development was hampered by Nonpublic School's not providing updated information on Student. The DCPS team members identified only Mathematics as an academic area of concern and decided to continue Student's Specialized Instruction Services at 5 hours per week. Educational Advocate asserted that the parents believed that DCPS should fund Student's full-time private school placement at Nonpublic School. The DCPS team members disagreed that Student needed a full time special education setting and maintained that 5 hours per week of specialized instruction outside of general education would support Student's academic weakness in mathematics. Exhibit R-90, R-92, P-49.

30. At the December 19, 2022 IEP meeting, Educational Advocate stated her



belief that Student needed Specialized Instruction in Reading and Written Language as well as in Mathematics. Testimony of Educational Advocate.

31. DCPS proposed to implement Student's 2022-2023 school year IEPs at City School 2. City School 2 is a DCPS public school. The total student population is around 1,500 children. On average, class size for general education classes is 25-30 students. For core academics, class size is 20-25 students. Testimony of Principal.

32. Nonpublic School is a private day school in suburban Maryland which provides specialized instruction in the context of the general education setting. Some children at Nonpublic School have IEPs. Some children do not. Testimony of Educational Advocate.

33. At Nonpublic School, Student is in small classes and receives individualized instruction. Student receives specialized instruction, with the infusion of executive functioning support, in all classes throughout the school day. Testimony of Educational Advocate, Testimony of Reading Specialist. Class sizes were around 6 students in the 2020-2021 school year and 10-12 students in the 2021-2022 school year. Testimony of Educational Advocate. In the current, 2022-2023 school year, there are around 30 children in Student's grade. No classes have more than 14 children. Testimony of Father.

34. Teachers at Nonpublic School are not certified in special education. Testimony of Educational Advocate. Nonpublic School does not hold a Certificate of

Approval (COA) issued by the D.C. Office of the State Superintendent of Education (OSSE). Hearing Officer Notice.

35. At Nonpublic School, Student is receiving speech-language services once per week. OT services are integrated into Student's program, but Student is not receiving direct OT services outside of the classroom. Student does not receive direct behavioral support services at Nonpublic School. Student is receiving outside clinical services from Independent Psychologist, funded by the parents. Testimony of Father.

36. Student has shown progress at Nonpublic School. He/she has a better attitude. His/her executive functioning has improved. He/she is much better able to ask for help and has made skill-based progress. Testimony of Educational Advocate.

37. Student is responding positively at Nonpublic School. Student is more out of his/her shell and less withdrawn. The class size is supportive for Student's executive functioning needs and keeping Student on task. Testimony of Reading Specialist.

38. Student has made academic progress at Nonpublic School. At City School, Student's academic gap was affecting his/her self-confidence and demeanor. Student stopped wanting to read. Student now loves reading. Student is now a happier child and feels better about him/herself. He/she has made a lot of friends and is more a part of the community. Testimony of Father.

### **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, my Conclusions of Law are as follows:

#### **Burden of Proof**

As provided in the D.C. Special Education Student Rights Act of 2014, the party who filed for the due process hearing, the parents in this case, shall bear the burden of production and the burden of persuasion, except that where there is a dispute about the appropriateness of the child's IEP or placement, or of the program or placement proposed by the public agency, the public agency shall hold the burden of persuasion on the appropriateness of the existing or proposed program or placement; provided, that the party requesting the due process hearing shall retain the burden of production and shall establish a *prima facie* case before the burden of persuasion falls on the public agency. The burden of persuasion shall be met by a preponderance of the evidence. *See* D.C. Code § 38-2571.03(6).

#### **ANALYSIS**

**IS DCPS REQUIRED TO REIMBURSE THE PARENTS FOR STUDENT'S PRIVATE SCHOOL EXPENSES FOR SCHOOL YEARS 2020-2021, 2021-2022 AND 2022-2023?**

In this due process proceeding, the parents seek reimbursement from DCPS for their private school expenses for Student to attend Nonpublic School for the last three

school years. In *A.D. v. Creative Minds Int’l Pub. Charter Sch.*, No. CV 18-2430 CRC/DAR, 2020 WL 12654618 (D.D.C. Aug. 14, 2020)<sup>4</sup>, U.S. Magistrate Judge Deborah Robinson explained the standards, in the D.C. Circuit, for public reimbursement of parents who unilaterally place their child with a disability in a private school.

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

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

In this proceeding, the parents allege that DCPS failed to offer Student a FAPE by not proposing appropriate educational programs or placements for Student for the 2020-2021, 2021-2022 and 2022-2023 school years. Over these three school years, the DCPS IEP teams developed four IEPs for Student: the February 26, 2020 IEP, the September 10, 2020 IEP, the January 14, 2022 IEP and the December 19, 2022 IEP.

Through the testimony of expert witnesses, Educational Advocate and Reading

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<sup>4</sup> *A.D. v. Creative Minds Int’l Pub. Charter Sch.*, No. CV 18-2430 CRC/DAR, 2020 WL 12654618 (D.D.C. Aug. 14, 2020), *report and recommendation adopted*, No. 18CV2430CRCDAR, 2020 WL 6373329 (D.D.C. Sept. 28, 2020), *appeal dismissed sub nom. A. D. by E.D. v. Creative Minds Int’l Pub. Charter Sch.*, No. 20-7106, 2021 WL 1654481 (D.C. Cir. Mar. 31, 2021).

Specialist, the parents made a *prima facie* showing that none of these IEPs was adequate for Student. Therefore, the burden of persuasion on the appropriateness of these proposed programs and placements falls on DCPS.

U.S. Magistrate Judge Zia Faruqui explained how a hearing officer must evaluate an IEP in *N.G. v. District of Columbia*, No. 20-CV-2777-TJK-ZMF, 2022 WL 188403 (D.D.C. Jan. 20, 2022), report and recommendation adopted, No. CV202777TJKZMF, 2022 WL 969964 (D.D.C. Mar. 31, 2022):

When evaluating an IEP, a [hearing officer] must determine whether: (1) “the State complied with the procedures set forth in the [IDEA],” [*Bd. of Educ. of Hendrick Hudson Cent. Sch. Dist. v. Rowley*, 458 U.S. 176, 206, 102 S.Ct. 3034, 73 L.Ed.2d 690 (1982)], and (2) the IEP was “reasonably calculated to enable a child to make progress appropriate in light of the child’s circumstances,” [*Endrew F. ex rel. Joseph F. v. Douglas Cty. Sch. Dist. RE-1*, 137 S. Ct. 988, 999 (2017)]. “An IEP must be likely to produce progress, not regression or trivial educational advancement”; the IDEA does not guarantee “the best possible education, nor one that will maximize the student’s educational potential,” but rather, “provides a ‘basic floor of opportunity for students.’” *K.S. v. Dist. of Columbia*, 962 F. Supp. 2d 216, 220–21 (D.D.C. 2013) (citations omitted).

*N.G.*, 2022 WL 188403 at \*1.

In the present case, the parents have not alleged that DCPS failed to comply with the IDEA’s procedural requirements. Therefore I turn to the second prong of the *Rowley/Endrew F.* inquiry: Were DCPS’ proposed IEPs for the 2020-2021, 2021-2022 and 2022-2023 school years reasonably calculated to enable Student to make progress appropriate in light of the child’s circumstances? It is the burden of the local education

agency (LEA) to offer a cogent and responsive explanation for their decisions that shows the IEPs were reasonably calculated to enable the child to make appropriate progress. *See Endrew F., supra*, 137 S.Ct. at 1002. I conclude that DCPS has not met this burden.

The February 26, 2020 and the September 10, 2020 IEPs

On August 17, 2020, the parents requested DCPS to place and fund Student at Nonpublic School for the 2020-2021 school year. Their attorney wrote DCPS that the parents did not believe that the District had offered an appropriate special education program for Student for the upcoming school year. At the February 26, 2020 IEP team meeting, the school team members, over the objection of the parents and Educational Advocate reduced Student's Specialized Instruction Services by one-third, to 12 hours per week. Student's prior DCPS IEP had provided for 18 hours per week of Specialized Instruction Services. Educational Advocate told the IEP team that this reduction was not appropriate because Student was allegedly already slipping behind age-level expectations. At the due process hearing, Educational Advocate testified, without rebuttal, that the City School representative said that 12 hours per week of special education was the level of services City School was able to provide. After the parents notified DCPS in writing in August 2020 that they did not believe the District had offered Student an appropriate IEP, DCPS reconvened Student's IEP team on September 10, 2020. At that meeting, DCPS continued to offer Student only 12 hours per week of Specialized Instruction.

At the February 2020 IEP meeting and in her hearing testimony, Educational Advocate opined that at the time the February 26, 2020 IEP was developed, Student needed 18 hours per week of Specialized Instruction. Educational Advocate explained in her testimony that in the 2019-2020 school year, the gap for Student in Reading, Written Language and Math was continuing to widen and Student was increasingly not on grade level. According to Educational Advocate, attention and engagement challenges were then still very much issues for Student.

DCPS' expert, LEA Representative, testified that the February 26, 2020 meeting, team members said that Student had shown some great progress. He stated that IEP team had reasonably considered Educational Advocate's input, but that the school team members felt that the IEP, with reduced Specialized Instruction Services, was sufficient for Student. However, LEA Representative did not rebut Educational Advocate's testimony that in February 2020, the academic gap for Student was widening or that City School 1 staff stated that 12 hours per week of special education was the level of services City School 1 was able to provide.

On this evidence, I find that DCPS failed to offer cogent or responsive explanations for the February 26, 2020 IEP team's decision to reduce Student's Specialized Instruction Services or the September 10, 2020 IEP team's decision not to restore those services. I conclude that DCPS has not met its burden of persuasion to show that its February 26, 2020 IEP or its proposed September 10, 2020 IEP was

reasonably calculated to enable Student to make appropriate progress.

January 14, 2022 IEP

Student remained at Nonpublic School, unilaterally placed by the parents, for the 2021-2022 school year. DCPS conducted an eligibility reevaluation of Student in fall 2021. On October 15, 2021, DCPS confirmed Student's eligibility for special education under the MD category. At the eligibility team meeting, the DCPS members of the team determined that for academics, Student's disability impacted his/her participation in the general education curriculum only in Mathematics. Educational Advocate attended the meeting and she contended that Reading and Written Language should have continued to be identified as additional academic areas of need for Student.

On January 14, 2022, DCPS' Central Office convened an IEP team meeting to develop an updated IEP for Student. The DCPS IEP team members discontinued Reading and Written Expression as areas of concern for Student and over the parents' objection, proposed to reduce Student's IEP Specialized Instruction Services to 5 hours per week.

At a March 14, 2022 multidisciplinary team (MDT) meeting, DCPS School Psychologist reviewed the results of her fall 2021 psychological assessment of Student. She stated that Student's reading scores were solidly average across the board and that Student's teacher at Nonpublic School had indicated that Student was reading slightly above grade expectations. Educational Advocate and Father insisted that Student had



severe weaknesses in reading and writing. DCPS countered that the information from Nonpublic School and the results of School Psychologist's assessment suggested that Student had strengths in reading and writing.

At the due process hearing, the parents' expert, Educational Advocate, opined that in January 2022, Reading and Written Expression remained areas of concern for Student for which he/she needed Specialized Instruction. This was based in part on her classroom observation of Student at Nonpublic School on December 13, 2021. On that occasion, Student's teacher said that Student's decoding was okay but his/her comprehension was lower. Another expert for the parents, Reading Specialist, opined in her hearing testimony that based on School Psychologist's fall 2021 psychological reevaluation results, Student should have had Reading and Written Expression identified as an area of need on his/her IEP. She cited specifically Student's Low Average scores on the Woodcock-Johnson Test of Academic Achievement-Fourth Edition (WJ-IV) for Broad Reading, sentence writing fluency assessment and below average scores for accuracy and fluency on the GORT-5.

DCPS' expert witness, Neuropsychologist, concurred in her testimony that reading fluency remained an area of concern for Student based on School Psychologist's fall 2021 reevaluation, but Neuropsychologist did not characterize this as an "academic concern." Neuropsychologist stated that she would have liked to see evidence-based interventions for academic fluency for Student, including extra time, comprehension

checks and executive functioning support in the classroom.

Although School Psychologist's findings in her fall 2021 comprehensive reevaluation of Student definitely put into question whether the child continued to need special education services for Reading and Written Expression, this expert did not testify at the hearing and was not available to be cross-examined. Of the expert witnesses who did testify, Educational Advocate was far more familiar with Student's medical diagnoses, special education history and current needs than either Reading Specialist or Neuropsychologist, neither of whom had met Student or assessed him/her for Reading or Written Expression needs. On balance, I find more persuasive Educational Advocate's opinion that as of January 2022, Student continued to need Specialized Instruction for Reading and Written Expression. I conclude that DCPS has not met its burden of persuasion that its IEP team's decisions to omit Reading and Written Expression as areas of concern for Student and to reduce Specialized Instruction Services to 5 hours per week in its proposed January 14, 2022 IEP was appropriate.

December 19, 2022 IEP

At the December 19, 2022 IEP team meeting, the parents and their representatives continued to seek recognition of Reading and Written Expression as areas of need for Student. However, the DCPS team members were willing to identify only Mathematics as an academic area of concern for Student and they continued the

IEP services provision for Student to receive 5 hours per week of Specialized Instruction. For the reasons explained above in my discussion of the January 14, 2022 IEP, I conclude that DCPS did not meet its burden of persuasion that its proposed December 19, 2022 IEP, omitting Reading and Written Expression as areas of concern and providing only 5 hours per week of special education, was appropriate for Student.

For the 2022-2023 school year, DCPS proposed City School 2 as the location of services for Student. Educational Advocate opined in her testimony that this proposed school location was inappropriate for Student because it is a “huge” school that would not be suitable for a child with Student’s visual-perceptual and attentional needs. Father testified that Student does not do well in large groups and that when his child has to walk into a room full of people, he/she shuts down. Father was concerned that in a large school setting, Student would withdraw or be lost. Because I have determined that DCPS did not show that the District’s proposed IEPs for the 2022-2023 school year were appropriate for Student, it is unnecessary for me to reach the suitability of the offered City School 2 school location.

#### Nonpublic School was Proper

In the foregoing discussion, I concluded that DCPS did not meet its burden of persuasion that it offered Student a FAPE with appropriate IEPs for the 2020-2021, 2021-2022 or 2022-2023 school years. I turn, next, to the other two requirements for tuition reimbursement pronounced by the D.C. Circuit in its *Leggett* decision – that the

private school chosen by the parents, Nonpublic School, was proper and that the parents did not otherwise act unreasonably. When evaluating whether a unilateral private placement was proper, the hearing officer is to employ the same standard used in evaluating the education offered by a public school district. *See M.G. v. Dist. of Columbia*, 246 F. Supp. 3d 1, 12 (D.D.C. 2017). All that is required of the parents is that the private school be reasonably calculated to enable a child to make progress appropriate in light of the child's circumstances. *See Leggett, supra* at 70; *Andrew F. ex rel. Joseph F. v. Douglas Cnty. Sch. Dist. RE-1*, 580 U.S. 386, 399 (2017).

Nonpublic School is a private day school in suburban Maryland, which provides specialized instruction to children in the context of the general education setting. At Nonpublic School, Student is in small classes and receives individualized instruction, with the infusion of executive functioning support, in all classes throughout the school day. By the accounts of the parents, Educational Advocate and DCPS' experts, Student has made substantial academic progress at Nonpublic School – to the extent that DCPS' School Psychologist concluded in fall 2021 that Student no longer required special education support for Reading or Written Expression. The parent testified that Student now loves reading, is a happier child and feels better about him/herself.

Nonpublic School has not been issued a COA by OSSE and teachers there are not certified in special education. However, the District's special education requirements do not apply to private parental placements. *See N.G. v. District of Columbia*, 556 F. Supp.

2d 11, 38 (D.D.C. 2008); 5A DCMR § 3039.3. I conclude that the parents have established that their choice of Nonpublic School for Student was reasonably calculated to enable their child to receive educational benefits and was therefore an appropriate placement for the child. *See N.G., supra* at 38–39.

Lastly, for private school reimbursement claims, IDEA requires that the “equities weigh in favor of reimbursement — that is, the parents did not otherwise act ‘unreasonabl[y].” *See Leggett, supra*, 793 F.3d at 66–67 (quoting *Florence County Sch. Dist. Four v. Carter*, 510 U.S. 7, 15-16; 20 U.S.C. § 1412(10)(C)(iii)(III)). In this proceeding, DCPS has not claimed that the parents acted unreasonably, or failed to provide timely notice, in withdrawing Student from City School or in placing him/her at Nonpublic School.

I conclude that the parents have met the three conditions pronounced in *Leggett* for private school reimbursement – DCPS failed to offer Student a FAPE, Nonpublic School was proper and the parents did not act unreasonably. Therefore, the parents are entitled to tuition reimbursement from DCPS for their unilateral placement of Student at Nonpublic School for the 2020-2021, 2021-2022 and 2022-2023 school years.

### **ORDER**

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

Upon receipt of documentation of payment by the parents as may be reasonably

required, DCPS shall, without undue delay, reimburse the parents their expenses heretofore paid for covered tuition and related expenses incurred for Student's enrollment at Nonpublic School for the 2020-2021, 2021-2022 and 2022-2023 regular school years. DCPS shall also fund Student's covered enrollment expenses at Nonpublic School, not yet paid, for the remainder of the private school's 2022-2023 regular school year.

Date: June 19, 2023

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

**NOTICE OF RIGHT TO APPEAL**

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

cc: Counsel of Record  
Office of Dispute Resolution