

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

OSSE  
Office of Dispute Resolution  
June 21, 2024

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| PARENTS, on behalf of STUDENT, <sup>1</sup> | ) | Date Issued: June 21, 2024      |
|   | ) |                                 |
| Petitioners,                                | ) | Hearing Officer: Peter B. Vaden |
|   | ) |                                 |
| v.  | ) | Case No: 2023-0255              |
|   | ) |                                 |
| DISTRICT OF COLUMBIA                        | ) | Online Videoconference Hearing  |
| PUBLIC SCHOOLS,                             | ) |                                 |
|   | ) | Hearing Dates:                  |
| Respondent.                                 | ) | April 24 and 25, 2024           |
|   | ) | June 5 and 6, 2024              |
|   | ) |                                 |

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**HEARING OFFICER DETERMINATION**

**INTRODUCTION AND PROCEDURAL HISTORY**

This matter came to be heard upon the Administrative Due Process Complaint Notice filed by Petitioner parents under the Individuals with Disabilities Education Act, as amended (the IDEA), 20 U.S.C. § 1400, *et seq.*, and Title 5-A, Chapter 5-A30 of the District of Columbia Municipal Regulations (DCMR). In this administrative due process proceeding, the parents seek private school reimbursement from Respondent District of Columbia Public Schools (DCPS) on the grounds that DCPS allegedly denied their child a free appropriate public education (FAPE) by failing to offer him/her appropriate Individualized Education Programs (IEPs) and educational placements for the 2022-2023 and 2023-2024 school years.

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

Petitioners' Due Process Complaint, filed on December 20, 2023, named DCPS as Respondent. The undersigned hearing officer was appointed on December 21, 2023. The parties met for a Resolution Session Meeting on January 3, 2024 and did not resolve the issues in dispute.

On March 18, 2024, I convened a telephone prehearing conference with counsel to discuss the issues to be determined, the hearing date and other matters. On February 20, 2024, I granted the Petitioners' continuance motion to extend the final decision due date to May 17, 2024 to accommodate the parties' first mutually available dates to hold the due process hearing – April 24, 25, and 29, 2024 – to which both parties had agreed.

The videoconference due process hearing convened on April 24 and 25, 2024. Due to an unexpected conflict for Petitioners' expert witness, the hearing could not be completed on the scheduled hearing dates and additional hearing days, June 5 and 6, 2024, were scheduled. To accommodate these new dates, by order of May 11, 2024, I granted DCPS' unopposed motion to extend the final decision due date to June 21, 2024.

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 April 24 and 25 and June 5 and 6, 2024. MOTHER and FATHER appeared online for the hearing and were represented by PETITIONERS' COUNSEL. Respondent DCPS was represented by PROGRAM SPECIALIST and by DCPS'

COUNSEL. Counsel for the respective parties made opening statements.

Petitioners called as witnesses EDUCATIONAL CONSULTANT, DEAN OF STUDENTS, and Mother. DCPS called as witnesses SCHOOL PSYCHOLOGIST 2, SCHOOL SOCIAL WORKER, RESOLUTION SPECIALIST, SPECIAL EDUCATION DIRECTOR, and Program Specialist. Petitioners' Exhibits P-1 through P-8, P-10 through P-20, P-22 and P-24 through P-26 were admitted into evidence, including Exhibits P-3, P-5, P-8, P-10, P-13 through P-17, P-20, P-22 and P-24 admitted over DCPS' objections. I sustained DCPS' objection to Exhibit P-9. Exhibits P-21 and P-23 were withdrawn. DCPS Exhibits R-1 through R-17, including Exhibits R-1A and R-8A, were all admitted without objection.

At the close of Petitioners' case-in-chief on April 25, 2024, DCPS' Counsel made an oral motion for a directed finding in the District's favor on all issues. For the reasons explained on the record, I granted DCPS' motion as to Issues A and C (failing to find Student eligible for special education as a student with a Specific Learning Disability). I denied the directed findings motion as to the remaining issues. On June 6, 2024, after the close of all the evidence, Petitioners' Counsel and DCPS' Counsel made oral closing arguments. There was no request to file written closings but with leave of the hearing officer, both parties submitted written citations to authorities.

### **JURISDICTION**

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

**ISSUES AND RELIEF SOUGHT**

The issues originally raised by Petitioners against DCPS were as follows:

A. Did DCPS deny Student a FAPE by failing to find him/her eligible for special education services as a student with a Specific Learning Disability for the 2022-2023 school year?

B. Did DCPS deny Student a FAPE by failing to provide an appropriate IEP and placement/location of services for the 2022-2023 school year?

C. Did DCPS deny Student a FAPE by failing to find him/her eligible for special education services as a student with a Specific Learning Disability for the 2023-2024 school year?

D. Did DCPS deny Student a FAPE by failing to provide an appropriate IEP and placement/location of services for the 2023-2024 school year?

E. Is PRIVATE SCHOOL a proper placement for Student?

On April 25, 2024, I granted, in part, DCPS motion for a directed finding and dismissed the parents' claims as to Issues A and C.

For relief, Petitioners request that the hearing officer order DCPS to reimburse them for tuition and related services expenses for their unilateral placement of Student at Private School for the 2022-2023 and 2023-2024 school years, and place and fund him/her there for the remainder of the 2023-2024 school year.

**FINDINGS OF FACT**

After considering all of the evidence received at the due process hearing in this case on April 24 and 25 and June 5 and 6, 2024, as well as the argument of counsel, my findings of fact are as follows:

1. Student, an AGE youth, resides with the parents in the District of Columbia. Testimony of Mother.
2. Student is eligible for special education as a student with an Other Health Impairment/Attention Deficit Disorder or Attention Deficit Hyperactivity Disorder disability (OHI-ADHD). Exhibit R-10.
3. For the 2023-2024 school year, Student was in CURRENT GRADE at Private School, a private day school in Washington, D.C. Testimony of Dean of Students. Student was originally unilaterally placed by the parents at Private School at the beginning of the 2022-2023 school year when Student was in STARTING GRADE. Testimony of Mother. Student skipped a grade when he/she enrolled at Private School. Testimony of Dean of Students.
4. At the end of Student's kindergarten year at a public charter school in Washington, D.C., the parents were first alerted that Student might be learning challenged. Testimony of Mother. In a psychological evaluation of Student conducted in March 2018, symptoms of ADHD were revealed. Following a neurological evaluation in August 2018, Student was given the diagnosis of ADHD, combined presentation. Exhibit P-2. At the public charter school, on June 1, 2018, Student was provided an Individualized Education Program (IEP) due to his/her ADHD diagnosis. Exhibit P-2.
5. For the 2019-2020 school year, the parents enrolled Student in CITY SCHOOL 1, a DCPS English-Spanish bilingual public School. Testimony of Mother.

6. In March 2020, upon request of the parents, Student was referred for a DCPS psychoeducational evaluation for a suspected learning disability based on the child's educational performance at City School 1. SCHOOL PSYCHOLOGIST 1 conducted a battery of cognitive, academic and behavioral testing. In his March 29, 2020 Comprehensive Psychological Evaluation report, School Psychologist 1 concluded that ADHD symptomology seemed to continue to be the root cause of Student's inconsistent academic progress and that the child's continued academic struggles were closely related to his/her challenges with executive functioning. School Psychologist 1 recommended that the City School 1 multidisciplinary team (MDT) continue Student's special education services under the OHI-ADHD category and that supports for reading and writing be added to supports for math on his/her IEP. Exhibit P-2.

7. In the 2019-2020 school year at City School 1, Student had difficulties in class with students and teachers. Student's anxiety went "through the roof." The parents were at City School "constantly" to attempt to come up with a plan to make Student more comfortable there. When DCPS schools closed to in-person learning in March 2020 due to the COVID-19 pandemic, Student was not doing great. Testimony of Mother.

8. On May 14, 2020, the City School 1 eligibility team, including the parents and Petitioners' Counsel, determined that Student remained eligible for special education under the OHI-ADHD disability classification. The team concurred that Student's challenges with ADHD - inattention, difficulties with self-regulation and

focus, anxiety - continued to adversely impact upon his/her educational performance. The team reported that Student's disability impacted his/her participation in the general education curriculum in Academic-Mathematics, Emotional, Social and Behavioral Development, Academics-Reading, Motor Skills/Physical Development and Academics-Written Expression. The team determined that Student did not exhibit characteristics of a specific learning disability. All of the meeting participants were reported to have indicated agreement with this eligibility determination. Exhibit R-4.

9. For the 2020-2021 and 2021-2022 school years, the parents provided a home school program for Student with 1:1 instruction by a HOME SCHOOL TEACHER. Student flourished in the home-based program and did really well. The parents decided that after two years of home schooling, Student was ready be with other children and they started to look at schools that would offer a smaller educational community. By May of 2022, the parents were looking for a school with a smaller environment that would offer more support for Student. Testimony of Mother. In December 2021, the parents had begun working with Educational Consultant regarding Student's educational needs. Testimony of Educational Consultant.

10. On or about January 15, 2021, the parents brought a prior due process complaint against DCPS concerning Student (Case No. 2021-0005). That case was resolved with a settlement agreement concluded on or about March 1, 2021 (the Settlement Agreement). In the Settlement Agreement, the parents released DCPS from

all claims that could have been asserted against the District as of March 1, 2021. Exhibit R-1A.

11. In spring 2021, the parents obtained funding from DCPS for an Independent Educational Evaluation (IEE) psychological assessment of Student. The IEE psychological was conducted by INDEPENDENT PSYCHOLOGIST in June 2021 with an addendum added in January 2022. Independent Psychologist conducted a battery of psychological and academic assessments. In her June 3, 2021 report, Independent Psychologist reported, *inter alia*, that previous intellectual testing of Student noted the presence of exceptional verbal comprehension and strong visual spatial skills, fluid reasoning, and working memory and that her own evaluation highlighted Student's well-developed visual motor integration, verbal memory, verbal fluency, and inductive reasoning; that Student's City School 1 teacher noted that Student responded well to project-based and experiential learning which likely stimulated his/her creativity and increased his/her focus; that academically, Student demonstrated strong phonological processing skills and reading comprehension, which revealed an improvement compared to previous test results; that visual motor integration was also strong, especially in light of his/her history of fine motor difficulties and that Student also showed grade-appropriate progress in the areas of sight word recognition, reading fluency, and math computation. As vulnerabilities, Independent Psychologist reported that Student showed significant discrepancies in previous testing between strong verbal and nonverbal skills and weaker processing speed, and that her evaluation also showed

difficulty for Student on tasks of sustained visual attention, verbal set shifting, and deductive reasoning; that Student showed limited insight into his/her own emotions and social relationships, responded inconsistently to social bids, used non-specific language, and had difficulty engaging in reciprocal and imaginative play; that despite his/her improved phonological skills and reading comprehension, Student continued to demonstrate milder weaknesses in spelling and written expression, with a significant weakness in writing fluency. Independent Psychologist noted this was indicative of a diagnosis of mild Specific Learning Disorder with impairment in written expression; that Student also showed a mild weakness on a task of math fluency, but performed well on a measure of math calculation and previous measures of math problem-solving. Independent Psychologist concluded that Student's difficulty in math appeared related to slow processing speed and was not indicative of a separate learning disability in math; that background information and test data indicated that Student also had significant difficulty sustaining attention for non-preferred tasks and regulating his/her behavior; that Student's problems with attentional control, distractibility, and self-monitoring were characteristic of a moderate Attention-Deficit/ Hyperactivity Disorder, Combined Presentation; and that Student had the ability to pay attention; however, he/she had difficulty exerting voluntary control over his/her attention. This meant that Student struggled to keep his/her attentional "spotlight" focused without becoming distracted and to hold information "in mind" long enough to perform a task; that Student's ADHD manifested in difficulty sustaining attention to non-preferred

tasks, distractibility, trouble balancing speed and accuracy on timed tasks, problems with organization and self-monitoring, difficulty with planning and organization and problems with multitasking and becoming easily overwhelmed by multi-step tasks. Independent Psychologist reported that Student's academic difficulties were further exacerbated by his/her weaknesses in executive functioning and processing speed. Independent Psychologist reported that Student had atypical levels of variability in his/her cognitive profile; that Student performed at the Average range on measures of processing speed, showed Average academic skills and social reciprocity, and his/her performance was Below Average on measures of sustained attention and executive functioning. Independent Psychologist reported that Student's reported symptoms of irritability, low frustration tolerance, and anxiety associated with schoolwork were indicative of an Unspecified Anxiety Disorder. She reported that Student had social deficits better explained through his/her symptoms of ADHD and anxiety and that Student's social skills should continue to be monitored and re-assessed as needed. Independent Psychologist summarized that Student's profile was seen in the context of a bright child with strengths in his/her verbal abilities. Student's difficulties with writing, attention, anxiety, and executive functioning denoted the need for continued support and intervention in order to make progress both academically and psychosocially. Independent Psychologist diagnosed Student with Attention-Deficit/Hyperactivity Disorder, Combined Presentation, Specific Learning Disorder with impairment in written expression and Unspecified Anxiety Disorder. Her educational

recommendations to DCPS were, *inter alia*, that Student would continue to benefit from 1-1 instruction with clear structure and project-based and experiential learning to provide Student with the interventions, differentiation of instruction, and opportunity for individualized support that Student needed in order to benefit from instruction and access the curriculum; that the Other Health Impaired special education category would be most appropriate for Student and Student's IEP goals should focus on spelling, text organization, writing fluency, attention, and behavioral/emotional regulation. Exhibit P-3.

12. On July 13, 2021, DCPS' SCHOOL PSYCHOLOGIST 3 provided a written review of Independent Psychologist's June 3, 2021 assessment of Student and there was no indication that School Psychologist 3 disagreed with Independent Psychologist's findings or conclusions. Exhibit R-8.

13. In her January 12, 2022 Addendum to the psychological assessment, Independent Psychologist wrote that Student continued to meet criteria for diagnoses of ADHD, Combined Presentation, Specific Learning Disorder with impairment in written expression and Unspecified Anxiety Disorder. She reported that Student may have required less social and emotional support by the time of the addendum, because he/she had reportedly responded well to interventions such as medication, therapy, increased academic support and increased social activities. Independent Psychologist wrote that Student may only require a school-based social skills group on an as-needed basis. Exhibit P-3.

14. DCPS convened Student's annual IEP review meeting, online, on May 26, 2022. The parents, an attorney in Petitioners' Counsel's firm, Educational Consultant and Home School Teacher attended the meeting. Father reported that home schooling had been a blessing for Student, that Student's reading had grown and Student was interested and excited to learn. Home School Teacher reported that Student engaged appropriately with children at the park and was excited to start a new school. In the meeting, Home School Teacher reported that Student was above grade level in Reading and Math. She reported that Student was reading at a 7<sup>th</sup> Grade level. She reported that Student was not a shy child and was able to walk up to people and make friends. She reported that Student did not need assistive technology. Father reported that Student was not anxious about his/her then current home school. Exhibit R- 7. The IEP team identified as areas of concern, Written Expression, Emotional, Social and Behavioral Development and Motor Skills/Physical Development. The team decided that Student would receive 5 hours per week of Specialized Instruction and 120 minutes per month of Behavioral Support Services, all outside general education. In addition the IEP provided for 30 minutes per month, each, of consultation services in Occupational Therapy (OT) and Specialized Instruction. Exhibits R-7, R-8. The parents disagreed with the IEP team's decision because they thought Student needed a more intensive program. Father said at the meeting that Student required a 20 hours per week special education program. Testimony of Educational Consultant.

15. By letter of July 18, 2022, Petitioners' Counsel provided notice to DCPS that Student would attend Private School for the 2022-2023 school year and that the parents did not believe that DCPS had offered Student an appropriate special education program. Counsel requested that DCPS place and fund Student at Private School and indicated that should DCPS refuse the request for private school funding, the parents reserved the right to seek funding for the placement. By letter of August 1, 2022, RESOLUTION TEAM DIRECTOR responded that DCPS had made a FAPE available to Student with an appropriate IEP and a placement in the least restrictive environment at City School 1 and that DCPS did not agree to bear the cost of a private placement for Student. Exhibit P-7.

16. The parents unilaterally enrolled Student in Private School for the 2022-2023 school year. Private School is a small, independent, alternative, day school in the District of Columbia, with an enrollment of 65 students in grades 6 through 12. All students at Private School are on the diploma track. Private School is not a special education school and does not implement IEPs. The school enrolls a lot of students who struggle in traditional school settings and may have difficulties with attention, anxiety, learning challenges, emotional challenges and stressed relationships with teachers. The school offers project-based, hands-on learning with differentiated teaching. Class sizes are as small as 5-6, and up to 10, students. Private School is accredited by the Association of Independent Maryland and DC Schools. Testimony of Dean of Students.

Private School does not hold a Certificate of Approval (COA) from the Office of the State Superintendent of Education. Stipulation of Petitioners' Counsel.

17. A teacher at Private School assessed Student with the Gray Oral Reading Test (GORT) in October 2022. The teacher reported that Student was a “higher than average” reader and that she had “no concerns” about his/her reading ability and comprehension skills. Exhibit P-8.

18. At Private School, Student excelled academically for the 2022-2023 school year. Over the 5 school terms that year, Student received all A's except for 1 B+ and 4 A-grades. Exhibit P-15.

19. Student is very smart, and a leader at school. Student can be a little impulsive and has some challenges with attention. Student is very good at doing his/her work, but might need gentle reminders to get refocused. He/she is amenable to correction. Student's writing skills are not on a par with how smart he/she is, but he/she can learn to close that gap. The parents have reported that Student has periods when he/she is anxious at home, but that was not observed a lot at school. If a student has a problem or anxiety at Private School, Dean of Students or a teacher may attend to it. That has never happened with Student. Student is pretty relaxed at Private School. Testimony of Dean of Students.

20. Educational Consultant observed Student at Private School on May 1, 2023. Student's advisor/math teacher told Educational Consultant that Student was a “wonderful student” who was happy to be in school; that Student was incredibly curious

and creative; that Student asked great questions when in a focused space and sought understanding of all material, whether a preferred or non-preferred topic. According to the teacher, Student was a diligent and dedicated worker who finishes all assigned classwork. He/she benefitted from a discussion based approach to learning and was an active participant. The teacher reported that Student had some struggles in English, mostly with the independent reading project, had difficulty keeping up with the assignment and chose books that were longer than expected. The teacher reported that in math, Student was able to focus in order to get the work done, however he/she interrupted frequently and randomly made, “animal sounds.” Student was on grade level in math with some skills above. Student’s impulse control had improved significantly since the beginning of the school year but it continued to be an area of need. In reading, Student was above grade level, as he/she had skills that surpassed his/her peers, which made differentiation necessary. The teacher reported that socially, Student worked collaboratively with all students and maintained positive relationships with cohorts. Student liked the attention of being the youngest student and rose to the occasion when given higher expectations. Testimony of Educational Consultant.

21. On or about May 9, 2023, DCPS provided the parents a draft IEP for Student to be reviewed at the upcoming IEP annual review meeting. The parents’ expert, Educational Consultant, reviewed the draft IEP and provided written feedback. Exhibit P-12. The DCPS Central Office IEP team convened online on May 16, 2023. Both parents, Petitioners’ Counsel and Educational Consultant participated in the

meeting. The parents reported that Student loved Private School, was hitting his/her stride and rising to the occasion. There was discussion about the draft IEP present levels of performance (PLOPs) and DCPS agreed to update the PLOPs and to provide a revised IEP draft to the parents. It was a contentious meeting and DCPS decided to terminate the meeting early. It was agreed that the IEP team would reconvene Exhibits P-14, R-16.

22. Student's IEP team reconvened on June 16, 2023, facilitated (at the request of DCPS) by Impartial Hearing Officer Coles Ruff. DCPS had provided a revised IEP draft for consideration. There was a lot of back and forth between the sides at the meeting and DCPS agreed to some IEP changes. At the suggestion of Mr. Ruff, the meeting was adjourned to allow the DCPS representative to make changes to the IEP draft. Exhibits P-14, R-16.

23. Student's IEP team reconvened on July 17, 2023. Hearing Officer Ruff again was present to facilitate the discussion. Both parents, Petitioners' Counsel and Educational Consultant participated in the meeting. Prior to the meeting, DCPS provided the parents an updated IEP draft, to which Educational Consultant furnished written feedback. At the July 17, 2023 meeting, DCPS proposed that Student should receive 5 hours per week of Specialized Instruction Services outside the general education setting. Petitioners' Counsel stated that all special education services should be inside general education, and DCPS agreed to change the setting to general education. For purposes of the IEP educational placement, Petitioners' Counsel and

Educational Consultant wanted special education support for Student in the general education setting throughout the school day. The proposed IEP also provided for 120 minutes per month of Behavioral Support Services for Student. Petitioners' Counsel and Educational Consultant stated that Student was making progress at Private School without a mental health provider and Student did not need a social worker to support him/her at school. School Psychologist 2 responded that if a new eligibility determination were made, they could discuss removing Behavioral Support Services from Student's IEP. The proposed IEP also provided for 30 minutes per month of consultation services each, for both occupational therapy (OT) and specialized instruction, to which Petitioners' Counsel objected. The DCPS representatives on the IEP team finalized the July 17, 2023 IEP, over the parents' disagreement. Testimony of Educational Consultant; Exhibits P-17, R-9, R-11.

24. By letter of August 3, 2023, Petitioners' Counsel provided notice to DCPS that Student would continue to attend Private School for the 2023-2024 school year and that the parents did not believe that DCPS had offered Student an appropriate special education program. Counsel requested that DCPS place and fund Student at Private School and indicated that should DCPS the refuse request for private school funding, the parents reserved the right to seek funding for the placement. By letter of August 11, 2023, Resolution Team Director responded that DCPS had made a FAPE available to Student with an appropriate IEP and a placement in the least restrictive

environment at CITY SCHOOL 2 and that DCPS did not agree to bear the cost of a private placement for Student. Exhibit P-7.

25. The parents unilaterally re-enrolled Student in Private School for the 2023-2024 school year. For the 2023-2024 school year, Student had a great year and continued to flourish at the private school. Testimony of Mother. Student's grades for the first 3 terms of the 2023-2024 school year at Private School were all A- or higher. Exhibit P-24.

26. The parents paid 100 percent of Student's tuition and fees at Private School for both the 2022-2023 and 2023-2024 school years. The cost was \$40,800 and \$42,200 for the respective school years. Testimony of Mother.

27. DCPS convened an online Analysis of Existing Data (AED) meeting for Student on October 5, 2023 to address the parents' concerns for Student in the areas of reading and math. The parents, Petitioners' Counsel, Educational Consultant and Dean of Students attended. The MDT team determined that formal testing of Student in reading and math was not necessary at the time. All MDT team members were in agreement. No change was made to the July 17, 2023 IEP. Testimony of Educational Consultant, Exhibits P-23, R-13.

### **CONCLUSIONS OF LAW**

Based upon the above Findings of Fact and argument of counsel, as well as this hearing officer's own legal research, my Conclusions of Law are as follows:

Burden of Proof

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

ANALYSIS

Reimbursement for Private School Expenses

In this proceeding, the parents seek reimbursement from DCPS for their expenses for Student to attend Private School for school years 2022-2023 and 2023-2024, on the grounds that DCPS' proposed May 26, 2022 and July 17, 2023 IEPs failed to offer Student a free appropriate public education (FAPE). For the reasons explained below, I will order DCPS to reimburse the parents for their Private School expenses for the 2022-2023 school year only.

In the Court's decision in *E.W.-G. v. District of Columbia*, No. CV 20-2806 (CKK), 2023 WL 2598680 (D.D.C. Mar. 22, 2023), U.S. District Judge Colleen

Kollar-Kotelly explained the private school tuition reimbursement remedy under the IDEA:

[P]arents who “unilaterally” place a child with a disability in a private school, without consent of the school system, “do so at their own financial risk.” *Florence Cty. Sch. Distr. Four v. Carter*, 510 U.S. 7, 15 (1993) (quoting *School Comm. of Town of Burlington, Mass. v. Dep’t of Educ. of Mass.*, 471 U.S. 359, 373-74 (1996)). To qualify for tuition reimbursement under the IDEA, a plaintiff must demonstrate that: (1) the school district failed to provide a FAPE; (2) the plaintiff’s private placement was suitable; and (3) the equities warrant reimbursement for some or all of the cost of the child’s private education. *Forest Grove Sch. Dist. v. T.A.*, 557 U.S. 230, 247 (2009).

*E.W.-G.* at \*2 (D.D.C. Mar. 22, 2023). “[I]f there is an ‘appropriate’ public school program available . . . the District need not consider private placement, even though a private school might be more appropriate or better able to serve the child.” *Jenkins v. Squillacote*, 935 F.2d 303, 305 (D.C. Cir. 1991). *See, also, Leggett v. District of Columbia*, 793 F.3d 59, 63 (D.C. Cir. 2015) (IDEA requires school districts to reimburse parents for their private-school expenses if (1) school officials failed to offer the child a free appropriate public education; (2) the private-school placement chosen by the parents was otherwise proper under the Act; and (3) the equities weigh in favor of reimbursement—that is, the parents did not otherwise act unreasonably.)

#### Did DCPS Fail to Offer Student a FAPE?

The first consideration for the parents’ reimbursement claim is whether DCPS offered Student a FAPE with its proposed May 26, 2022 and July 17, 2023 IEPs. The parents made a *prima facie* showing, through the testimony of Educational Consultant, that neither IEP was adequate for Student. Therefore, DCPS must shoulder the burden

of persuasion on the appropriateness of the proposed IEP programs and placements.

U.S. District Judge Rudolph Contreras explained in *Middleton v. District of Columbia*, 312 F. Supp. 3d 113 (D.D.C. 2018), how a court or a hearing officer must assess an IEP:

In reviewing a challenge under the IDEA, courts conduct a two-part inquiry: “First, has the State complied with the procedures set forth in the Act? And second, is the individualized educational program developed through the Act’s procedures reasonably calculated to enable the child to receive educational benefits?” *Bd. of Educ. of Hendrick Hudson Cent. Sch. Dist. v. Rowley*, 458 U.S. 176, 206–07, 102 S.Ct. 3034, 73 L.Ed.2d 690 (1982) (footnotes omitted).

*Middleton* at 128.

At the due process hearing in this case, the parents’ expert, Educational Consultant, testified that there were no procedural violations alleged. Therefore, I turn to the second, substantive, prong of the *Rowley* inquiry: Were the May 26, 2022 and July 17, 2023 IEPs proposed by DCPS appropriate, that is, was each IEP reasonably calculated to enable Student to make progress in light of the child’s circumstances. *See Andrew F. ex rel. Joseph F. v. Douglas Cnty. Sch. Dist. RE-1*, 580 U.S. 386, 399, 137 S. Ct. 988, 999, 197 L. Ed. 2d 335 (2017).

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

A “free and appropriate public education,” or “FAPE,” is delivered by local education authorities through a uniquely tailored “ ‘individualized education program,’ “ or “IEP.” *Andrew F. ex rel. Joseph F. v. Douglas Cnty. Sch. Dist.*, 137 S. Ct. 988, 993-994 (2017); *see also* 20 U.S.C. §§ 1401(9)(D), 1412(a)(1). To be IDEA-compliant, an IEP must reflect “careful consideration of the child’s individual circumstances” and be “reasonably calculated to enable the child to receive educational benefits,” *Andrew F.*, 137 S. Ct. at 994, 996 (cleaned up), “even as it stops short of

requiring public schools to provide the best possible education for the individual child,” *Z.B. v. District of Columbia*, 888 F.3d 515, 519 (D.C. Cir. 2018). . . . An IEP failing to satisfy these statutory directives may be remedied through an IDEA claim to the extent the IEP “denies the child an appropriate education.” *Z.B.*, 888 F.3d at 519.

*A.D.*, 2022 WL 683570 at \*1. “[A]n IEP’s adequacy thus ‘turns on the unique circumstances of the child for whom it was created,’ and a reviewing court should defer to school authorities when they ‘offer a cogent and responsive explanation’ showing that an IEP ‘is reasonably calculated to enable the child to make progress appropriate in light of [her] circumstances.’” *A.D.* at \*7, quoting *Endrew F.*, *supra*, 137 S. Ct. at 1001-02. A hearing officer “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.” *See Endrew F.*, 137 S.Ct. at 1002.

May 26, 2022 IEP

Student is eligible for special education as a student with an Other Health Impairment/Attention Deficit Disorder or Attention Deficit Hyperactivity Disorder disability (OHI-ADHD). In the 2019-2020 school year, Student had a difficult year at City School 1 where, according to Father’s testimony, Student experienced severe anxiety. In March 2020, all DCPS schools closed for in-person learning in response to the COVID 19 pandemic. For the 2020-2021 and 2021-2022 school years, the parents provided a home-based program for Student with 1:1 instruction by a private tutor. Student flourished in the home-based program.

In June 2021, Student was evaluated by Independent Psychologist. The independent psychologist described Student as a bright child, who had difficulties with writing, attention, anxiety, and executive functioning. The psychologist diagnosed Student with Attention-Deficit/Hyperactivity Disorder, Combined Presentation, Specific Learning Disorder with impairment in written expression and Unspecified Anxiety Disorder. She recommended to DCPS that Student would continue to benefit from one-on-one instruction with clear structure and project-based and experiential learning, to provide Student with the interventions, differentiation of instruction, and opportunity for individualized support that Student needed in order to benefit from instruction and access the curriculum. She recommended that Student's IEP goals should focus on spelling, text organization, writing fluency, attention, and behavioral/emotional regulation. In a January 2022 addendum to her psychological report, Independent Psychologist reported that Student had reportedly responded well to interventions such as medication, therapy, increased academic support and increased social activities and by that stage, Student may have required less social and emotional support. The IEE evaluation was provided to DCPS and reviewed for Student's IEP team by School Psychologist 3.

By May of 2022, the parents decided that, after two years of home schooling, Student was ready be with other children and they started to look at schools that would offer a smaller educational community. In late May or June of 2022, the parents

applied for Student's admission to Private School, where they unilaterally enrolled Student for the start of the 2022-2023 school year.

On May 26, 2022, DCPS' central IEP team, including the parents, Home School Teacher, Educational Consultant and the parents' attorney met online to develop Student's annual IEP. The May 26, 2022 IEP team identified Written Expression, Emotional, Social and Behavioral Development and Motor Skills/Physical Development as areas of concern for Student and decided that Student would receive 5 hours per week of direct Specialized Instruction outside general education, 120 minutes per month of Behavioral Support Services and some consultation services. The parents disagreed with the IEP team's decision because they thought Student needed a more intensive program. Father said at the meeting that Student required a 20 hours per week special education program. Father also objected to Student's returning to City School 1, where in the 2019-2020 school year, Student allegedly had difficulties in class with students and teachers, exacerbating Student's anxiety condition.

In her testimony at the due process hearing, Petitioners' expert, Educational Consultant, addressed only indirectly the alleged appropriateness of the May 26, 2022 IEP. She testified, in general, to her opinion that Student needed a lot of teacher attention and that he/she would be lost in general education and also that Student benefitted from project-based learning, as opposed to traditional classroom teaching. For their part, DCPS' experts, School Psychologist 2, School Social Worker and Program

Specialist, all testified that the special education services in the May 26, 2022 IEP were appropriate for Student.

An IEP's appropriateness must be evaluated based upon the information available to the IEP team when the program was developed. *See, e.g., A.B. by Holmes-Ramsey v. District of Columbia*, No. CV 10-1283 (ABJ/JMF), 2012 WL 13041578, at \*8 (D.D.C. Feb. 14, 2012). (Appropriateness of IEP must be judged prospectively based on the information available to Student's IEP team at the time of its development.) At the time of the May 26, 2022 meeting, it was known that for the proceeding two school years, Student had received only one-on-one home-based instruction. In the most recent psychological assessment of Student, Independent Psychologist recommended that Student would continue to benefit from one-on-one instruction with clear structure and project-based and experiential learning. This was the most current substantive information on Student's education needs available to Student's IEP team when the May 26, 2022 IEP was developed.

At the due process hearing, DCPS' experts did not provide a cogent and responsive explanation for how providing only 5 hours of Specialized Instruction per week on Student's IEP would satisfy Student's reported need for one-on-one instruction with clear structure and project-based and experiential learning, as recommended in Independent Psychologist's assessment. For that reason, I did not find persuasive the opinions of DCPS' experts that the special education services in the proposed May 26, 2022 IEP were appropriate for Student. I conclude that DCPS did not meet its burden

of persuasion that its proposed May 26, 2022 IEP was reasonably calculated to enable Student to make progress “appropriate in light of [his/her] circumstances.” *See Andrew F., supra.*

July 17, 2023 IEP

By the time of the July 17, 2023 IEP review meeting, the IEP team had much more information on Student’s education needs. Student had attended Private School a small alternative, day school, for a full school year. Although Private School enrolls a lot of students who struggle in traditional school settings it is not a special education school and does not implement IEPs. At Private School, Student’s anxiety condition, which had such an impact on Student three years before at City School 1, was not observed a lot. Over the 5 school terms in the 2022-2023 school year at Private School, Student earned superior grades and thrived socially. This was in a full-time general education setting. Class size was smaller at Private School, but Student did not regularly receive one-on-one instruction.

Over three IEP meetings in May, June and July 2023, the parents, their representatives and DCPS developed the July 17, 2023 IEP. At the July 17, 2023 IEP team meeting, DCPS proposed that Student should receive 5 hours per week of Specialized Instruction Services outside of the general education setting. However, Petitioners’ Counsel stated that Student’s special education services should be inside general education and DCPS agreed to that change. The parents and their

representatives wanted special education support for Student in the general education setting throughout the school day.

The July 17, 2023 proposed IEP also provided for 120 minutes per month of Behavioral Support Services for Student. At the meeting, Petitioners' Counsel and Educational Consultant stated that Student was making progress at Private School without a mental health provider and Student did not need a social worker to support him/her at school. However, the DCPS representatives were not willing at that point to remove Behavioral Support Services from Student's IEP. The proposed July 17, 2023 IEP also provided for 30 minutes per month of consultation services each for OT and specialized instruction.

In her testimony at the due process hearing, the parents' expert, Educational Consultant, testified that Student had shown progress in self-regulation, impulse control, work completion, working independently, peer relationships and self-confidence. However, she opined that Student required small classes and differentiated instruction, and she still wanted special education support for Student throughout the school day. Educational Consultant opined that the July 17, 2023 IEP was not adequate and that the public school general education setting was not an appropriately restrictive environment.

DCPS' expert witnesses, Program Specialist, School Psychologist 2 and School Social Worker, all opined that the provision for 5 hours per week of Specialized Instruction Services proposed in the July 17, 2023 IEP was appropriate for Student and

Student did not need a special school placement. School Psychologist 2 testified that the proposed services were consistent with Student's needs and that Student would benefit from interaction with general education peers in the regular classroom. School Social Worker agreed that placing Student in the regular classroom with 5 hours per week of special education would allow Student to interact with typically developing peers and still get the support he/she needed. Program Specialist testified that there was not data to support a need for a specific small class size for Student and that the program proposed for Student, including specialized instruction for writing, would be academically appropriate.

With respect to the July 17, 2023 proposed IEP, I found DCPS' witnesses to be more credible. Like Educational Consultant, each of these DCPS experts had reviewed Student's records and observed Student at Private School. While Educational Consultant maintained that Student required special education support throughout the school day as well as small class size, I found this opinion unconvincing. As to Student's need for full-time special education, at Private School, Student had thrived for two school years in the general education setting without any special education services. Concerning small class size, in the June 2022 IEE psychological assessment, Independent Psychologist recommended small group instruction only for writing intervention. For the July 17, 2023 IEP, DCPS proposed to provide Student's Specialized Instruction for writing outside of general education. However, DCPS

deferred to the parents' request that all instruction be provided in the general education setting.

In order to provide a FAPE after an IEP is developed, the public agency must provide the student a placement in a school that is capable of implementing the IEP. *See Johnson v. District of Columbia*, 962 F. Supp. 2d 263, 268 (D.D.C. 2013). Special Education Director testified, and it was not disputed, that City School 2 was capable of implementing the proposed July 17, 2023 IEP.

At base, this dispute appears to be about whether for the 2023-2024 school year, DCPS was obliged to fund Student's placement at Private School where he/she was undoubtedly thriving, or whether DCPS' proposed public school program for Student was reasonably calculated to enable Student to receive educational benefit. *See Andrew F., supra*. DCPS' burden was to demonstrate that its proposed placement of Student for the 2023-2024 school year was appropriate – not that it represented the best possible programming for the student. *See Middleton v. District of Columbia*, 312 F. Supp. 3d 113, 143 (D.D.C. 2018); *Kerkam v. McKenzie*, 862 F.2d 884, 886 (D.C. Cir. 1988) (“[P]roof that loving parents can craft a better program than a state offers does not, alone, entitle them to prevail under the Act.”) I conclude DCPS demonstrated that for the July 17, 2023 IEP, the IEP team carefully considered Student's individual circumstances, notably Student's academic and social growth in the general education program at Private School, and that DCPS has met its burden of persuasion on the appropriateness of its proposed July 17, 2023 IEP for Student.

Other Reimbursement Requirements (2022-2023 School Year)

Having found that DCPS failed to establish that it offered Student a FAPE with an appropriate IEP for the 2022-2023 school year, I consider the other two requirements for tuition reimbursement pronounced by the D.C. Circuit's *Leggett* decision – that the private school chosen by the parents, Private 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 choice 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, 137 S. Ct. 988, 999, 197 L. Ed. 2d 335 (2017).

Private School is a small, independent, alternative, day school in the District of Columbia. All students at Private School are on the diploma track. The school enrolls a lot of students who struggle in traditional school settings and may have difficulties with attention, anxiety, learning challenges, emotional challenges and stressed relationships with teachers. The school offers small class size and project-based, hands-on learning with differentiated teaching. Private School is accredited by the Association of Independent Maryland and DC Schools, but does not hold a Certificate of Approval from the Office of the State Superintendent of Education.

DCPS' experts, opined in their testimony that Nonpublic School was not proper for Student because it does not offer special education programming and does not implement IEPs. However, it is undisputed that Student thrived academically at Private School. Under the *Leggett* decision precedent, the nonpublic placement chosen by the parents need not be a special education school. I find that the parents' choice of Private School for Student was reasonably calculated to provide Student educational benefit and, for the 2022-2023 school year, was proper for Student under the IDEA. *See Leggett*, 793 F.3d at 72.

Lastly, the *Leggett* decision requires that the "equities weigh in favor of reimbursement — that is, the parents did not otherwise act 'unreasonabl[y].'" *Leggett*, 793 F.3d at 67. Reimbursement may be "reduced or denied" if the parents failed to notify school officials of their intent to withdraw the child or otherwise acted unreasonably. *Leggett, supra*, at 63; 34 C.F.R. § 300.148(d). By letter of July 18, 2022, Petitioners' Counsel provided notice to DCPS that the parents did not believe that DCPS had offered Student a FAPE with the May 26, 2022 IEP and that Student would attend Private School for the 2022-2023 school year. Counsel put DCPS on notice that should DCPS refuse the parents' request for private school funding, they reserved the right to seek reimbursement relief. Here, there has been no showing that the parents acted unreasonably in unilaterally placing Student at Private School for the 2022-2023 school year.



cc: Counsel of Record  
Office of Dispute Resolution