

**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  
May 24, 2019

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

Date Issued: May 24, 2019

Petitioner,

Hearing Officer: Peter B. Vaden

v.

Case No: 2019-0024

DISTRICT OF COLUMBIA  
PUBLIC SCHOOLS,

Hearing Dates: April 1, 2 and 30, 2019

Office of Dispute Resolution, Room 423  
Washington, D.C.

Respondent.

---

**HEARING OFFICER DETERMINATION**

**INTRODUCTION AND PROCEDURAL HISTORY**

This matter came to be heard upon the Administrative Due Process Complaint Notice filed by the Petitioners (PARENTS), under the Individuals with Disabilities Education Act, as amended (the IDEA), 20 U.S.C. § 1400, *et seq.*, and Title 5-E, Chapter 5-E30 of the District of Columbia Municipal Regulations (“D.C. Regs.”). In their due process complaint, Petitioners seek reimbursement from Respondent District of Columbia Public Schools (DCPS) for Student’s private school tuition on the grounds that DCPS allegedly failed to ensure that an appropriate initial Individualized Education Program (IEP) was developed for Student for the 2018-2019 school year. The parents

---

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

also allege that DCPS violated District law by not timely allowing them to observe the placement proposed for Student at CITY SCHOOL.

Petitioners' Due Process Complaint, filed on January 25, 2019, named DCPS as Respondent. The undersigned hearing officer was appointed on January 28, 2019. On February 21, 2019, I convened a telephone prehearing conference with counsel to discuss the issues to be determined, the hearing date and other matters. The due process hearing was initially set for March 29 and April 2, 2019. At the request of Petitioners, the hearing was rescheduled for April 1-2, 2019. Due to the illness of one of the parents, the hearing was not completed on April 2, 2019 and was reconvened for a third day, April 30, 2019. To accommodate this hearing schedule, I granted the Petitioners' several requests to extend the final decision due date from April 10, 2019 eventually to May 31, 2019. On February 14, 2019, the parties met for a resolution session and were unable to resolve the issues in dispute.

The due process hearing was convened before the undersigned impartial hearing officer on April 1, 2 and 30, 2019 at the Office of Dispute Resolution in Washington, D.C. The hearing, which was closed to the public, was recorded on an electronic audio recording device. The Petitioners appeared in person and were represented by PETITIONERS' COUNSEL. Respondent DCPS was represented by LEA REPRESENTATIVE and by DCPS' COUNSEL.

Petitioners' Counsel made an opening statement. MOTHER testified at the hearing and the parents called as additional witnesses EDUCATIONAL CONSULTANT 1, EDUCATIONAL CONSULTANT 2 and SCHOOL ADMINISTRATOR. DCPS called as witnesses OCCUPATIONAL THERAPIST, SPEECH-LANGUAGE PATHOLOGIST, SPECIAL EDUCATION SPECIALIST and LEA Representative. Petitioners called

Educational Consultant 1 and Mother as rebuttal witnesses.

Petitioners' Exhibits P-2 through P-54 were admitted into evidence, with the exceptions of Exhibits P-12, P-29, P-32 through P-35, P-37, P-44, P-49, P-50 and P-52 through P-54. Exhibits P-2 through P-5, P-7, P-9, P-36, P-38, P-39, and P-51 were admitted over DCPS' objections. Exhibits P-1, P-12, P-29, P-32 through P-35, P-37, P-44, P-49, P-50 and P-52 through P-54 were withdrawn. DCPS' Exhibits R-2 and R-4 through R-15, including Exhibit R-8A, were admitted into evidence, including Exhibits R-6, R-7, R-10 and R-12 admitted over Petitioners' objections. Exhibits R-1 and R-3 were withdrawn.

At the request of Petitioners' Counsel, I granted the parties leave to file written closing arguments. Both parties submitted written closings.

### **JURISDICTION**

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

### **ISSUE AND RELIEF SOUGHT**

The issue for determination, as certified in the February 21, 2019 Prehearing Order, and clarified by email from Petitioners' Counsel are:

A. Did DCPS deny Student a free appropriate public education (FAPE) by failing to propose an appropriate IEP or placement for the 2018-2019 school year, with more intensive support for Student than the July 27, 2018 IEP, which provided ten hours per week of pull-out support, five hours per week of support in the general education classroom, and four hours per month of Occupational Therapy (OT) services?

B. Did DCPS deny Student a FAPE by significantly delaying the visit of the parents and their designee to observe the proposed placement for Student at City School?

For relief, the parents requested that DCPS be ordered to place and fund Student

at Nonpublic School for the 2018-2019 school year and to reimburse the parents for their expenditures for Student to attend Nonpublic School.

### **FINDINGS OF FACT**

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

1. Student, an AGE child, resides in the District of Columbia with the parents. Testimony of Mother.
2. Student is eligible for special education under the IDEA disability classification Multiple Disabilities (Other Health Impairment with Specific Learning Disability). Exhibit R-7.
3. Student was born, extremely premature, at 26 weeks of pregnancy and spent 81 days in the hospital Newborn Intensive Care Unit. Student's medical history since the newborn stage is unremarkable. Student's early development was followed at HOSPITAL with appropriate skill development through Age 3. Complex gross motor and fine motor coordination are problematic for Student. The parents obtained private Occupational Therapy (OT) services for Student, at ages 4 to 6, which was replaced with vision therapy for ages 6 to 7. Exhibit P-7.
4. Beginning at two years of age, the parents placed Student at a neighborhood private pre-school. Testimony of Mother. For pre-kindergarten, the parents enrolled Student in a regular education private day school (DAY SCHOOL) in the District. Student was noted to struggle with attention and behavioral regulation. Student was held back for a second year in kindergarten due to concerns that Student was socially, emotionally, behaviorally and academically not ready for the increased

structure and expectations of 1<sup>st</sup> grade. Exhibit P-7, Testimony of Mother.

5. In May 2015, Student was administered the Wechsler Preschool and Primary Scale of Intelligence (WPPSI-IV) at Hospital. Student's scores on the WPPSI-IV indicated High Average verbal reasoning, Average fluid reasoning and basic working memory, with Low ("borderline") range performance on processing speed tasks noted to be secondary to inattention/distractibility, disorganized approach, and fine motor challenges. There was noted intra-subtest variability in the visual-spatial reasoning domain, with a particular challenge on the Block Design subtest, while performance on Object Assembly was average. Exhibit P-7.

6. In the middle of the 2017-2018 school year, alarmed by an evaluation by Student's City School teacher, the parents had Student independently evaluated by NEUROPSYCHOLOGIST. In her January 2018 report, Neuropsychologist described Student's neuropsychological profile as consistent with children who are born very pre-term, who commonly present with a pattern of weaknesses similar to Student's, with developmental weaknesses affecting visual-spatial and fine/gross motor skills and are at increased risk for challenges in attention and executive function, and academic challenges in reading and/or math. Neuropsychologist reported, *inter alia*, that Student's neuropsychological profile highlighted specific areas of weakness in attention, executive function, spatial skills, motor coordination (affecting left-hand worse than right), and reading. Student was of generally average intelligence, with a relative strength for language/verbal skills. Learning/memory was intact, though vulnerable to disruption from poor attention and task persistence/sustained mental effort, with a clear benefit for additional scaffolding/structure to facilitate retrieval. There were no reported concerns for social or emotional functioning. Student presented with noted symptoms of

hyperactivity and impulsivity (both verbal and behavioral). The severity of Student's reading challenges exceeded that which may be explained by attention challenges alone, and was a specific area of weakness in comparison to other academic skills. Phonological processing showed a probable benefit of interventions received from Student's reading specialist at Day School, though Student's overall functional reading level remained well below expectations. Student presented with longstanding challenges with coordinated motor movements, affecting both fine and gross motor skills. Neuropsychologist diagnosed Student with Attention-Deficit Hyperactivity Disorder (ADHD), Combined Presentation; Specific Learning Disability, with impairment in reading and Developmental Motor Coordination Disorder. Exhibit P-7.

7. In her report, Neuropsychologist noted, *inter alia*, that Student's difficulties with attention put Student at risk for being unavailable to learn (e.g. missing important information) due to attention lapses, distractibility, and difficulty processing multiple streams of information simultaneously. Additionally, working memory weaknesses could also make it such that Student is more apt to have difficulty managing multi-step tasks or following multi-step instructions. Student's tendencies towards impulsivity and hyperactive fidgety behaviors also place Student at risk for difficulties at school due to a likelihood to rush through work, getting into trouble for blurting out answers or off-task behaviors, and/or to become distracted by the need to move, making it more difficult to focus/complete school work. Student's "boredom intolerance" and difficulties with task persistence also would create big obstacles to learning and life in general as Student is unlikely to have the necessary motivation to push through when things are difficult or not immediately interesting/gratifying, which may result in resistance to completing the school work in general or to tasks/subject areas (e.g.

reading, writing) that are more challenging. Testing also highlighted that although Student may need repeated exposures to facilitate learning due to attention challenges, Student has poor tolerance for repetition/boredom which results in decreased benefit from excessive repeated learning trials, which will require a highly individualized learning environment that is continually assessing Student's level of mastery before progressing to the next skill. Additionally, as the learning paradigm begins to shift away from "learning to read" towards "reading to learn," Student will be at risk for academic failure across all subject areas as a direct result of Student's reading disability.

Neuropsychologist noted that Student has many solidly age-appropriate cognitive and interpersonal skills and predicted that with an appropriate balance of challenge, support, and intervention, Student would continue to make progress and experience successes.

8. For academics/education, Neuropsychologist recommended that in the public school setting Student would require academic supports through an IEP, coded jointly as Other Health Impairment (OHI) and SLD as Student's reading disability and ADHD presented as significant disabilities which limit availability for learning and access to the curriculum. She recommended that Student would be best served by a private school with particular expertise in educating children with learning differences, such as Nonpublic School or a similar program; that Student required research-based reading intervention delivered in a small group and/or individual setting; that Student should work regularly with a reading specialist who would provide a multi-sensory research-based reading intervention which, in order to be effective, should target both phonological awareness/decoding as well as more applied reading skills, be delivered in a systematic and explicit manner, with consistent correction and reinforcement, 5 days per week. Neuropsychologist noted that reading programs meeting these requirements

include, *inter alia*, Orton-Gillingham and the Wilson Reading program.

Neuropsychologist further recommended that any small group instruction/intervention (*e.g.*, reading, etc.) should be conducted in a separate setting away from distractions, because Student would not likely benefit from small group instruction provided at the back of the classroom where there are distractions and that the timing of any pull-out small group intervention should be carefully considered so that Student would not miss out on other crucial instruction periods or on opportunities for movement or socialization (*e.g.*, recess, lunch). Neuropsychologist recommended that Student would respond best with high levels of structure and organization in every class, predictable routines, clear written expectations, very frequent monitoring of progress on ongoing assignments, preferential seating away from environmental distractions and movement breaks. Exhibit P-7.

9. Educational Advocate 2 completed a reading assessment of Student on March 7, 2018. The results indicated that Student had made significant progress in phonological awareness but continued to struggle in reading fluency, reading decoding, and overall reading skills. On tests of rapid naming, Student obtained a standard score of 85 (Below Average) in objects but a score of 65 (Very Poor) in colors, a score of 80 (Below Average) in letters, and a score of 77 (Poor) in numbers. On the Dynamic Indicators of Basic Early Literacy Skills (DIBELS) benchmark assessment nonsense word fluency for Student's then-current grade, Student had difficulty with both vowel-consonant and consonant-vowel-consonant words. Exhibits P-6, P-17.

10. On March 1 or March 7, 2018, DCPS receive a referral for an initial special education eligibility evaluation for Student. Exhibits P-11, P-13. On April 30, 2018, DCPS convened an Analysis of Existing Data (AED) meeting at the Central Office. Both



parents and Petitioners' Counsel attended. The parents stated that reading was a huge factor that was hindering Student's academic progress. School Psychologist undertook to review the Neuropsychological report obtained by the parents and to complete an educational assessment. The team also agreed that DCPS would conduct a review of an independent OT evaluation of Student obtained by the parents and to have a DCPS speech-language pathologist complete and observation and records review. The parents provided their consent for the proposed assessments of Student, records reviews, and observations. Exhibit R-3.

11. In June 2018, School Psychologist conducted a review of Neuropsychologist's evaluation of Student. School Psychologist considered Neuropsychologist's report to be appropriate and she did not question the veracity of Neuropsychologist's testing of Student. Because Neuropsychologist did not include a classroom observation or teacher interview, School Psychologist completed these tasks. School Psychologist also administered the Gray Oral Reading Test – Fifth Edition (GORT-5) to further assess Student's reading abilities. On the GORT-5, Student's reading comprehension score fell in the Very Poor range of functioning, being severely impacted by Student's reading decoding skills, in that Student was unable to read sentences with accuracy to answer the questions asked. In the classroom observation at Day School, Student was observed as participating in classroom activities and lessons. Student required minimal verbal prompting and redirection. During independent work, Student was helped by the teachers to complete the work. Socially, Student interacted appropriately with peers. On the most recent the Fountas & Pinnell reading assessment, Student's reading level was at Level C, which was a year below grade level. School Psychologist concluded that Student met IDEA criteria for both SLD and OHI

disabilities. Exhibit P-17.

12. Student's scores on the GORT reading test, as well as Student's lack of progress with the Foundations reading program at Day School and information from Nonpublic School, are consistent with Student's having severe dyslexia. Testimony of Educational Consultant 1.

13. On June 18, 2018, Speech-Language Pathologist completed a Speech and Language Observation Report on Student. She reported that given her classroom observation and oral language screening information, Student appeared to have good use of oral language skills and that screening information did not indicate significant oral language weakness. Exhibit R-4.

14. On June 14, 2018, Occupational Therapist completed an Independent Occupational/Physical Therapy Assessment Review Report. Occupational Therapist reported that upon chart review, observation, clinical observation and ruling out sensory processing challenges as a primary area of concern, the independent OT assessment remained valid. She reported that Student had strengths in the area of visual perceptual skills free of the distal fine motor component (using the hands for refined fine motor tasks); Student's delayed fine motor skills impacted writing in terms of pressure grading, endurance, and consistencies in size and orientation; that Student had not fully integrated some primitive reflexes and that these retained reflexes may be impacting the equal development of both Student's flexor and extensor musculature resulting in poor balance, coordination, endurance, trunk control and strength; that Student's delayed bilateral coordination skills, along with lack of midline crossing, impacted Student's ability to manipulate tools efficiently and made manipulating fasteners laborious; that Student was not crossing midline visually, making it difficult for Student to follow along

with reading without moving the head. Occupational Therapist recommended various classroom aids and services for Student. Exhibit R-5.

15. On June 25, 2018, DCPS convened a special education eligibility meeting for Student at the Central Office. Both parents and Petitioners' Counsel attended. The eligibility team determined that Student was eligible for special education under the IDEA Multiple Disabilities (MD) classification, based upon concurrent SLD and OHI disabilities. The parents agreed with the determination. Exhibit R-7.

16. On July 10, 2018, DCPS convened a special education eligibility meeting for Student at the Central Office. Both parents and an attorney from Petitioners' Counsel's law firm participated by telephone. The July 10, 2018 IEP identified mathematics, reading, written expression and motor skills/physical development as areas of concern. The IEP team decided that Student should receive 10.5 hours per week of Specialized Instruction Services, including 5.5 hours per week for reading, outside general education and 2.5 hours each for mathematics and for written expression in general education. The IEP also provided for Student to receive 240 minutes per month of OT services outside general education and 30 minutes per month of OT Consultation Services. Exhibit R-8. DCPS determined that the initial IEP could be implemented at Student's neighborhood school. Exhibit R-8A. There was agreement on annual goals and other classroom aids and services for Student, but the parents did not agree on the level of special education services. The parents felt that Student needed a separate special education day school. Testimony of Special Education Specialist.

17. On July 27, 2018, Student's IEP team reconvened to amend Student's initial IEP to get the input of Day School for academic goals. The IEP team agreed to amend a written expression goal, to increase Specialized Instruction Services to 15 hours

per week, including 10 hours outside general education, and to supplement Other Classroom Aids and Services. Exhibit R-13.

18. For Other Classroom Aids and Services, the July 27, 2018 IEP provided that Student would respond best with verbal instruction; that Student would benefit from the use of explicit instruction, such as, clear modeling of the solution specific to the problem, thinking the specific steps aloud during modeling, presenting multiple examples of the problem and applying the solution to the problems, and providing immediate corrective feedback on Student's accuracy; that Student benefits from an environment with limited distractions (visual and auditory), strategic seating, teacher proximity, positive peer modeling, increased environmental structure (building in routines for everyday activities), prompting, supportive signals or cues as reminders to initiate an activity, chunking (breaking up activities into small units), redirection, breaks and frequent follow-ups or check-ins, alerting cues and accompanying oral directions with written or visual directions, repetition of instructions, and repetition of tasks for improvement memory/knowledge acquisition; that Student needs a visual timer for tasks, particularly if they are 5-10 minutes duration; that Student sometimes sits in a chair that faces backwards, allowing pressure against the chest; that Student benefits from a visual schedule and visual checklist; that visual aids should have pictures as well; that Student benefits from interactive, hands-on, or laboratory learning activities; that Student should use a slant board whenever possible; that Student should work in a well-lit area and use worksheets that are clear copies; that Student should have the use of enlarged graph paper for math computations to aid in spacing and alignment; that computation signs should be highlighted; that Student should write on wide format paper with lines; that when working with printed materials, there should be space in between questions; that

Student should be able to write answers in a test booklet and be given additional time to complete assignments and tests; and that Student should have preferential seating with minimized chalkboard-to-desk copying. Exhibit P-26.

19. The July 27, 2018 IEP states in the Least Restrictive Environment section that Student has significant deficits in reading and “is in need of an intense reading intervention that occurs in a low distraction environment.” The IEP does not specify what special education instruction would be provided to Student to address the reading deficits or identify any reading program or teaching methodology that would be used with Student. Exhibit P-26.

20. At the July 27, 2018 IEP team meeting, counsel for the parents stated that the parents still felt that Student needed a separate day school or a separate special education program. The DCPS representative stated that with this being Student’s initial IEP, it was not appropriate to recommend a separate school or separate special education program when less restrictive interventions had not yet been attempted. At Special Education Specialist’s suggestion, Mother agreed to observe the programs at Student’s DCPS neighborhood school and talk to the local education agency (LEA) representative there. Exhibits R-9, R-10 and R-11.

21. By letter of August 6, 2018, Petitioners’ Counsel gave notice to DCPS that the parents did not believe that an appropriate special education program had been identified or offered for Student by DCPS for the 2018-2019 school year and that the parents requested that DCPS place Student and fund Student’s enrollment at Nonpublic School. The parents gave notice that Student would attend Nonpublic School for the 2018-2019 school year and if DCPS refused their private school placement request, they reserved the right to seek public funding for that placement. Exhibit P-29. By letter of

August 9, 2018, DCPS' representative responded that DCPS had made a FAPE available to Student with an appropriate IEP and placement at City School and DCPS did not agree to bear the cost of the private placement requested for Student. Exhibit P-30.

22. Beginning August 10, 2018, Mother sought, through telephone calls and email messages to the principal of City School, to arrange a visit to observe the program proposed by DCPS for Student. On September 28, 2018, Educational Consultant 1 wrote the principal by email to request to observe the program proposed for Student. City School did not arrange for Mother to observe the program until November 30, 2018. Educational Consultant 1's visit was first set for December 5, 2018, but cancelled because the classroom children were on a field trip. Educational Consultant's observation was eventually conducted on February 1, 2019. Testimony of Educational Consultant 1, Testimony of LEA Representative.

23. At the end of August 2018, Student started at Nonpublic School under the parents' unilateral placement. Nonpublic School is a private day school in the District of Columbia for students with language-based learning disabilities. The school has a total enrollment of around 350 student. The school has a current certificate of approval (COA) from the D.C. Office of the State Superintendent of Education (OSSE). In Student's classroom, there are about 12 students, taught by a special education teacher and a teaching assistant. Testimony of Administrator. The annual tuition for Student is around \$52,000, plus additional charges for OT services. Testimony of Mother.

24. Nonpublic School uses a Orton-Gillingham based reading program for Student. At Nonpublic School Student has made progress on reading and has benefitted from Nonpublic School's program. Testimony of Educational Consultant 1, Testimony of School Administrator. When Student started at Nonpublic School, Student was not

reading. By five weeks later, Student was able to read simple things. Student's handwriting has also improved and as have Student's math skills, because Student can now read math word problems. Testimony of Mother.

### **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 Petitioners in this case, shall bear the burden of production and the burden of persuasion, except that where there is a dispute about the appropriateness of the student's IEP or placement, or of the program or placement proposed by the local education agency, in this case DCPS, the agency shall hold the burden of persuasion on the appropriateness of the existing or proposed program or placement; provided that the Petitioners shall retain the burden of production and shall establish a *prima facie* case before the burden of persuasion falls on the agency. The burden of persuasion shall be met by a preponderance of the evidence. *See* D.C. Code § 38-2571.03(6).

#### **Analysis**

- A. Did DCPS deny Student a FAPE by failing to propose an appropriate IEP or placement for the 2018-2019 school year, with more intensive support for Student than the July 27, 2018 IEP, which provided ten hours per week of pull-out support, five hours per week of support in the general education classroom, and four hours per month of Occupational Therapy (OT) services?

In this proceeding, the parents seek reimbursement from DCPS of their expenses

for Student to attend Nonpublic School for the 2018-2019 school year. Under the IDEA, parents who unilaterally decide to place their disabled child in a private school, without obtaining the consent of local school officials, “do so at their own financial risk.” *Florence County Sch. Dist. Four v. Carter*, 510 U.S. 7, 15, 114 S.Ct. 361, 126 L.Ed.2d 284 (1993) (quoting *Sch. Comm. of the Town of Burlington v. Dep’t of Educ.*, 471 U.S. 359, 374, 105 S.Ct. 1996, 85 L.Ed.2d 385 (1985)). However, “[i]f a school system fails to provide a [disabled] student with an appropriate education and such education is offered at a private school, the school system may be liable to reimburse the [parents] for the cost of private education.” *Z. B. v. District of Columbia*, 888 F.3d 515, 519 (D.C. Cir. 2018) (citing 20 U.S.C. § 1412(a)(10)(C)(ii); *Leggett, supra*). “As interpreted by the Supreme Court, IDEA requires school districts to reimburse parents for their private-school expenses if (1) school officials failed to offer the child a free appropriate public education in a public or private school; (2) the private-school placement chosen by the parents was otherwise “proper under the Act”; and (3) the equities weigh in favor of reimbursement—that is, the parents did not otherwise act “unreasonabl[y].” *Leggett, supra*, at 66-67, (citing *Carter, supra*, 510 U.S. at 15–16, 114 S.Ct. 361; 20 U.S.C. § 1412(10)(C)(iii)(III).)

The indispensable condition for private school reimbursement from the *Z. B.* and *Leggett* decisions is that the public school officials failed to offer the child a FAPE. That leads to the principle query in this case: Was DCPS’ July 27, 2018 amended IEP (the July 27, 2018 IEP) and the proposed educational placement of Student at City School appropriate, that is, adequate to provide Student a FAPE?

In *Moradnejad v. District of Columbia*, 177 F. Supp. 3d 260 (D.D.C. 2016), the Court adopted the Report and Recommendation of U.S. Magistrate Judge G. Michael



Harvey, which explained how a court or a hearing officer must assess an IEP:

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

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

*Moradnejad* at 274-75. Here, the parents do not allege that DCPS failed to comply with the IDEA's procedural requirements in developing the July 27, 2018 IEP. Therefore, I turn to the second, substantive, prong of the *Rowley* inquiry, was the July 27, 2018 IEP appropriate for Student?

In *Endrew F. ex rel. Joseph F. v. Douglas Cty. Sch. Dist. RE-1*, — U.S. —, 137 S.Ct. 988, 197 L.Ed.2d 335 (2017), the U.S. Supreme Court elaborated on the standard, first enunciated in *Rowley*, for what constitutes an appropriate IEP under the IDEA:

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

advancement] his educational program must be appropriately ambitious in light of his circumstances, just as advancement from grade to grade is appropriately ambitious for most children in the regular classroom. The goals may differ, but every child should have the chance to meet challenging objectives. *Id.* . . . A reviewing court may fairly expect [school] authorities to be able to offer a cogent and responsive explanation for their decisions that shows the IEP is reasonably calculated to enable the child to make progress appropriate in light of his circumstances. *Id.*, 137 S.Ct. at 1002.

*See also Z. B., supra*, 888 F.3d at 517 (In *Endrew F.*, Supreme Court held that the IDEA requires education “reasonably calculated to enable a child to make progress in light of the child’s circumstances”—a standard markedly more demanding than requiring merely some educational benefits.)

Through the testimony of their expert witnesses, Petitioners established a *prima facie* case that the July 27, 2018 IEP, specifically the less than full time special educational placement, was inappropriate for Student. Therefore, under the Student Rights Act, the burden of persuasion as to the appropriateness of the proposed IEP falls on DCPS.

In their post-hearing brief, Petitioners assert that Student has “two overarching disabilities” which the July 27, 2018 IEP is not adequately designed to meet, namely Student’s extreme dyslexia and Student’s executive functioning deficits. DCPS’ experts opined that the proposed IEP was reasonably calculated to enable Student to make appropriate progress in these areas, especially considering that this was an initial IEP designed for Student’s first public school experience.

With regard to provision for Student’s executive functioning deficits, the evidence was undisputed that Student has ADHD and executive functioning issues and I find that these concerns are appropriately addressed in the July 27, 2018 IEP. For example, for each academic area of concern, the IEP describes how Student’s attention and executive

functioning challenges with sustained auditory attention and simultaneous attention tasks affect Student's access to the general education curriculum. The IEP addresses these challenges with numerous specific interventions in the Communication Consideration and Other Classroom Aids and Services sections, including verbal and explicit instruction, modeling of the solution, presenting multiple examples of the problem, immediate corrective feedback, limited distractions, strategic seating, teacher proximity, increased environmental structure (building in routines for everyday activities), prompting, repetition and reinforcement of oral directions, visual timers, *et cetera*. Petitioners' experts did not dispute the appropriateness of these aids and services to address Student's attention and executive functioning deficits.

Nor were Petitioners' experts, notably Educational Consultant 1, persuasive that Student requires a full-time special education setting. Educational Consultant 1 based her opinion that Student needed a full-time program on the fact that Student had not been successful at Day School, a private school. However, Student was not offered special education services at Day School. Moreover, this expert did not observe Student at Day School or speak to Student's classroom teachers there.

Petitioners' independent psychologist, Neuropsychologist, recommended in her January 2018 neuropsychological report that Student would be "best served" by a private school with particular expertise in educating children with learning differences. (Neuropsychologist also recommended that if served in the public school setting, Student should have academic supports through an IEP to address Student's reading disability and ADHD.) "Best served" is not the standard for IEP appropriateness. The IDEA does not require the best possible education for the individual child, *see Rowley*, 458 U.S. at 200, while the Act does require that children with disabilities be included in school

programs with nondisabled children, to the maximum extent appropriate. *See, e.g., Moradnejad, supra*, 177 F. Supp. 3d at 273.

DCPS' expert, School Psychologist, had the opportunity to observe Student in the general education setting at Day School. She reported that Student participated in classroom activities and lessons, required minimal verbal prompting and redirection, was helped by the teachers during independent work to complete work, and interacted appropriately with peers. School Psychologist's opinion was that Student did not need a full-time special education placement. I found this opinion more credible than the contrary opinions of Educational Consultant 1 and Neuropsychologist, who did not observe Student in the general education setting. I find that DCPS has met its burden of persuasion that a special school, where Student would be segregated from nondisabled peers, is not Student's least restrictive environment.

Notwithstanding, DCPS did not establish that the proposed July 27, 2018 IEP, which did not include an instructional program or strategy that would be used to address Student's severe reading deficits, was appropriate for Student,. It has long been the guidance of the U.S. Department of Education that there are circumstances where the particular teaching methodology needs to be incorporated into a student's IEP:

Case law recognizes that instructional methodology can be an important consideration in the context of what constitutes an appropriate education for a child with a disability. At the same time, these courts have indicated that they will not substitute a parentally-preferred methodology for sound educational programs developed by school personnel in accordance with the procedural requirements of the IDEA to meet the educational needs of an individual child with a disability.

In light of the legislative history and case law, it is clear that in developing an individualized education there are circumstances in which the particular teaching methodology that will be used is an integral part of what is "individualized" about a student's education and, in those circumstances will need to be discussed at the IEP meeting and incorporated into the

student's IEP. *For example, for a child with a learning disability who has not learned to read using traditional instructional methods, an appropriate education may require some other instructional strategy.*

Other students' IEPs may not need to address the instructional method to be used because specificity about methodology is not necessary to enable those students to receive an appropriate education. There is nothing in the definition of "specially designed instruction" that would require instructional methodology to be addressed in the IEPs of students who do not need a particular instructional methodology in order to receive educational benefit. In all cases, whether methodology would be addressed in an IEP would be an IEP team decision.

*Assistance to States for the Education of Children With Disabilities and the Early Intervention Program for Infants and Toddlers With Disabilities*, 64 FR 12406, 12552 (OSERS March 12, 1999) (emphasis supplied). *See, also, L.C. on behalf of A.S. v. Issaquah Sch. Dist.*, 2019 WL 2023567 (W.D. Wash. May 8, 2019) (School districts need not specify an instructional methodology in an IEP unless that methodology is necessary to enable the student to receive a FAPE.) I find that due to Student's severe dyslexia and acknowledged need for intense reading intervention, in order for Student to receive a FAPE, it was necessary to incorporate in Student's IEP a teaching methodology or program for reading.

The July 27, 2018 IEP identifies Student's reading disability deficits, includes annual goals for reading and states that Student is in need of "intense reading intervention." However, even though the IEP provides for a total of 15 hours per week of Specialized Instruction, it does not identify any reading program or methodology to address Student's severe dyslexia disability or otherwise specify how the 15 hours of Specialized Instruction would be tailored to address Student's reading deficits.

DCPS' expert, LEA Representative, testified that City School could provide Student the intensive Wilson Reading System, which she explained was based upon the

Orton-Gillingham approach.<sup>2</sup> Assuming City School has that capability, that does not save the July 27, 2018 IEP because neither the Wilson Reading System nor any other teaching methodology for reading was incorporated in the proposed IEP. *See, e.g., N.S. ex rel. Stein v. District of Columbia*, 709 F.Supp.2d 57, 72 (D.D.C. 2010) (“In evaluating whether a school district offered a FAPE, a court generally must limit its consideration to the terms of the IEP itself.” *Id.* at 72. (citing *A.K. ex rel. J.K. v. Alexandria City Sch. Bd.*, 484 F.3d 672, 682 (4th Cir. 2007))). I conclude that, due to the omission of a reading program or methodology in the July 27, 2019 IEP to address Student’s severe dyslexia and need for intense reading intervention, DCPS has not met its burden of persuasion that the IEP was reasonably calculated to enable Student to make educational progress appropriate in light of Student’s circumstances. This was a failure to offer Student a FAPE.

- B. Did DCPS deny Student a FAPE by significantly delaying the visit of the parents and their designee to observe the proposed placement for Student at City School?

Beginning August 10, 2018, through telephone calls and email messages to the principal of City School, Mother sought to arrange a parental visit to observe the program proposed by DCPS for Student. On September 28, 2018, Educational Consultant 1

---

<sup>2</sup> Petitioners’ expert, Educational Consultant 1, opined that Student required the Orton-Gillingham based program used by Nonpublic School to address Student’s severe reading deficits. It is well established in IDEA case law that parents do not have a right to compel a school district to provide a specific program or employ a specific methodology in educating a student. *See, e.g., David G. v. Council Rock Sch. Dist.*, 2011 WL 7678685 (E.D. Pa. Dec. 23, 2011), *report and recommendation adopted*, 2012 WL 1231812 (E.D. Pa. Apr. 12, 2012); *Lachman v. Illinois Bd. Of Educ.*, 852 F.2d 290, 297 (7th Cir.1988) (“Once it is shown that the Act’s requirements have been met, questions of methodology are for resolution by the responsible authorities.” *Lachman* at 292). I do not decide here what reading program is required for Student, only that given Student’s acknowledged need for an intense reading intervention, an IEP which does not specify a methodology or provide for a reading program is not adequate.

separately wrote the principal by email to request to observe the proposed program. After Mother sent numerous follow-up communications, City School arranged for Mother to observe its program on November 30, 2018. Educational Consultant 1's observation was initially scheduled for December 5, 2018, but had to be canceled because the classroom children were on a field trip. Educational Consultant 1 was eventually able to observe on February 1, 2019. Petitioners contend that DCPS' failure to allow these classroom observations sooner was a violation of the D.C. Special Education Student Rights Act of 2014 (Student Rights Act). The Student Rights Act provides,

Upon request, an LEA shall provide timely access, either together or separately, to the following for observing a child's current or proposed special educational program:

- (i) The parent of a child with a disability; or
- (ii) A designee appointed by the parent of a child with a disability who has professional expertise in the area of special education being observed . . .

D.C. Code § 38–2571.03(5)(A).

Assuming, without deciding, that DCPS' not timely allowing a parental observation visit required by the Student Rights Act is an IDEA violation, DCPS' delay in this case was a procedural violation, which did not rise to a denial of FAPE. Procedural violations may only be deemed a denial of FAPE if the procedural inadequacies—

- (i) Impeded the child's right to a FAPE;
- (ii) Significantly impeded the parent's opportunity to participate in the decision-making process regarding the provision of a FAPE to the parent's child; or
- (iii) Caused a deprivation of educational benefit.

34 CFR § 300.513(a)(2). *Cf. E.D. v. Colonial School District*, 117 LRP 12348 (E.D. Pa 3/31/17) (Denying the observation request of a parent's expert did not impede the

student's right to FAPE, impede the parent's opportunity to participate in the decision making process or cause a deprivation of educational benefits.)

Mother first requested permission to observe at City School late in DCPS' summer break after the parents had already given notice that Student would attend Nonpublic School. By the time an observation could have been accommodated, that is, after the children had returned to City School and resumed classroom routines, the parents had already enrolled Student in Nonpublic School for the 2018-2019 school year, which started at the beginning of September 2018. Likewise, by the time Educational Consultant 1 requested to conduct an observation, Student was already attending Nonpublic School. I find that City School's alleged delay in responding to the parents' observation requests did not impede Student's right to a FAPE, impede the parents' opportunity to participate in the decision making process or cause a deprivation of educational benefit. Therefore, assuming DCPS' delay in scheduling the observations violated the timely access provision of the Student Rights Act, this procedural violation may not be deemed a denial of FAPE.

### Remedy

Having found that DCPS failed to offer Student a FAPE with its proposed July 27, 2018 IEP, I turn next to the other two requirements for tuition reimbursement pronounced in the *Leggett* decision – that the private school chosen by the parents was proper and that the parents did not otherwise act unreasonably. In *Leggett*, analogizing to the standard for IEP appropriateness from the U.S. Supreme Court's *Rowley* decision, the D.C. Circuit held that for the private school chosen by the parents to be proper, it need be “reasonably calculated to enable the child to receive educational benefits.” *Leggett, supra*, at 71. That standard must be updated to reflect the Supreme Court's



more recent holding in *Andrew F.*, that an IEP must be “reasonably calculated to enable a child to make progress appropriate in light of the child’s circumstances.” *See Andrew F.*, 137 S.Ct. at 999. Therefore, it follows that for the private school chosen by the parents to be “proper,” it must be reasonably calculated to enable the child to make progress appropriate in light of the child’s circumstances.

Student has attended Nonpublic School since September 2018. Nonpublic School is approved by OSSE to serve children with learning disabilities. Nonpublic School’s focus is to serve children, like Student, who have language-based learning disabilities. Educational Consultant 1, School Administrator and Mother all testified that Student is making educational progress at Nonpublic School and that the private school is beneficial for Student. Mother testified that when Student started at Nonpublic School, Student was not reading. By five weeks later, Student was able to read simple things. Student’s handwriting has also improved and as have Student’s math skills, because Student can now read math word problems. In light of this evidence of Student’s academic progress since enrolling at Nonpublic School, I find that the parents’ choice of Nonpublic School for Student was reasonably calculated to enable Student to make progress appropriate in light of Student’s circumstances and was, therefore, proper under the *Leggett* standard.

Lastly, the *Leggett* decision requires that the “equities weigh in favor of reimbursement—that is, the parents did not otherwise act ‘unreasonabl[y].” *Leggett*, 793 F.3d at 67. DCPS has offered no creditable argument that the parents acted unreasonably enrolling Student in Nonpublic School. Therefore, pursuant to the D.C. Circuit’s decision in *Leggett, supra*, I find that DCPS must reimburse the parents for their expenses for Student to attend Nonpublic School for the 2018-2019 school year. DCPS may, of course, offer Student an IEP for the 2019-2020 school year, revised by the

IEP team in accordance with this decision and the requirements of 34 CFR §§ 300.324, *et seq.*

**ORDER**

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

**ORDERED:**

1. Upon receipt of documentation of payment by the parents, as may be reasonably required, DCPS shall, without undue delay, reimburse the parents their costs for tuition and related covered expenses, including OT related services, for Student's enrollment at Nonpublic School for the private school's 2018-2019 regular school year and
2. All other relief requested by the Petitioners herein is denied.

Date: May 24, 2018

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

**NOTICE OF RIGHT TO APPEAL**

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

cc: Counsel of Record  
Office of Dispute Resolution  
OSSE - SPED  
DCPS Resolution Team