

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

OSSE
Office of Dispute Resolution
November 27, 2019

PARENTS as Attorneys-in-Fact,
for STUDENT,¹

Date Issued: November 27, 2019

Petitioner,

Hearing Officer: Peter B. Vaden

v.

Case No: 2019-0153

DISTRICT OF COLUMBIA
PUBLIC SCHOOLS,

Hearing Dates: September 18 and 19, 2019
October 25 and 31, 2019

Respondent.

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

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 at NONPUBLIC SCHOOL for the 2017-2018 school year on the grounds that DCPS allegedly failed in its “child-find” obligations in the 2016-2017 school year and erroneously determined in the 2017-2018 school year that Student was not a student with an IDEA disability.

¹ Personal identification information is provided in Appendix A.

Petitioners' Due Process Complaint, filed on June 18, 2019, named DCPS as Respondent. The undersigned hearing officer was appointed on June 19, 2019. On July 11, 2019, the parties met for a resolution session and were unable to resolve the issues in dispute. On July 18, 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 August 7, 2019. Due to counsel and witness scheduling conflicts, the hearing dates had to be repeatedly rescheduled or continued. The Petitioners filed three, successive, consent continuance motions which I granted. The due process hearing was concluded on October 31, 2019 and counsel were granted leave to file written closing memoranda. My final decision is now due by November 29, 2019.

On September 9, 2019, Petitioners, by counsel, filed a motion to quash a Notice to Appear served by DCPS on Student. I granted this motion by order issued September 16, 2019. On October 15, 2019, DCPS filed a motion to quash the Notice to Appear served by Petitioners on a Nonpublic School administrator. I denied that motion by order issued October 15, 2019.

The due process hearing was convened before the undersigned impartial hearing officer on September 18, September 19, October 25 and October 31, 2019. The Petitioners appeared in person and were represented by PETITIONERS' COUNSEL and PETITIONERS' CO-COUNSEL. Respondent DCPS was represented by PRINCIPAL and by DCPS' COUNSEL.

Petitioners' Counsel and DCPS' Counsel made opening statements. MOTHER testified at the hearing and the Petitioners called as additional witnesses THERAPIST, CLINICAL COORDINATOR, and EDUCATION DIRECTOR. DCPS called as witnesses SCHOOL PSYCHOLOGIST, CITY SCHOOL TEACHER 1, CITY SCHOOL TEACHER 2, SCHOOL COUNSELOR, CITY SCHOOL TEACHER 3, RESOLUTION SPECIALIST, NONPUBLIC MONITOR, HHIP MANAGER and Principal. Petitioners re-called Mother as a rebuttal witness.

Petitioners' Exhibits P-1 through P-24 were admitted into evidence, including Exhibits P-2, P-3, P-9, P-13, P-14, and P-18 admitted over DCPS' objections. DCPS' Exhibits R-1 through R-15, including Exhibit R-5A, were admitted into evidence without objection.

At the request of counsel for both parties, I granted the parties leave to file written closing arguments. Both parties submitted written closings on November 15, 2019.

JURISDICTION

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

ISSUES AND RELIEF SOUGHT

The issues for determination, as certified in the July 18, 2019 Prehearing Order, are:

A. Did DCPS deny Student a FAPE by failing to timely identify and

evaluate Student for special education services during the 2016-2017 school year?

B. Did DCPS deny Student a FAPE by failing to find Student eligible for special education services beginning in the 2016-2017 school year?

For relief, Petitioners request that DCPS be ordered to reimburse the parents for the cost of private school tuition and any related services for Student's enrollment at Nonpublic School for the 2017-2018 school year.

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, now an AGE adult, resides in the District of Columbia with the parents. Testimony of Mother.
2. Student has never been determined eligible for special education and related services under the IDEA. Testimony of Mother.
3. From the 2014-2015 school year through the 2016-2017 school year, Student was enrolled in City School. At City School, Student was an advanced student and always did very well academically. Testimony of Mother.
4. Student was diagnosed with Crohn's Disease during the 2014-2015 school year. Testimony of Mother. Crohn's Disease is a form of Inflammatory Bowel Disease (IBD). Crohn's Disease can affect any part of the digestive track from the mouth to the anus. The most common symptoms are diarrhea, abdominal and rectal pain and

cramping, nausea, vomiting, fatigue and arthritis-like joint pain. Exhibit P-3.

5. The parents informed City School and DCPS about Student's Crohn's Disease diagnosis. Student was approved for DCPS' Home Hospital Instruction Program (HHIP) services in the 2014-2015 school year, because it was understood that Student would intermittently be prevented from attending school due to the illness. Exhibit P-2.

6. On November 2, 2016, City School developed a Section 504 Plan (Section 504 of the Rehabilitation Act of 1973) to meet Student's Crohn's Disease related needs at school. Exhibit P-3.

7. In the 2016-2017 school year, it became more difficult for the parents to get Student to go to school. At first, Student would miss a day or week and the missed days increase beginning in November 2016. Testimony of Mother. When Student attended City School that fall, Student seemed well adjusted and did not show signs of mental health concerns. Testimony of City School Teacher 1, City School Teacher 2, School Counselor, City School Teacher 3, Principal. Student attained high marks in mostly advanced placement classes throughout the school year. Exhibit P-5.

8. On November 28, 2016, Mother wrote City School Teacher 3 to let her know that Student's new medications were making Student feel worse and that Student had been in pain and had trouble concentrating and focusing. Mother also stated that Student's doctors were advising that Student take assessments at home, because any stress would make Student's condition worse because Student was still not in remission.

Exhibit R-1.

9. On January 4, 2017, Mother wrote School Counselor by email to report that Student's health had gotten worse over the winter break and Student had been hospitalized. Mother stated that the doctors were hoping that Student would go into remission, but thought Student should do school from home to help Student deal with the stress. Mother asked if Student needed to be approved again for HHIP services. School Counselor responded by email on January 5, 2017, set up a meeting with Mother and asked Mother to bring a current physician's report to add to Student's HHIP record.

Exhibit P-6. On January 17, 2017, Mother wrote City School Teacher 3 that there had been a meeting with HHIP on January 16, 2017 and they were hopeful that Student would start the HHIP program. Mother wrote that Student might not be able to return to City School for the rest of the year until Student's health improved. Exhibit R-1. Mother gave no indication to City School Teacher 3 that Student was not returning to school because Student was depressed or had anxiety. Testimony of City School Teacher 3.

10. On or about January 16, 2017, Mother applied for Student to again be approved for DCPS HHIP services. Mother provided the HHIP office a January 6, 2017 written statement from Student's Pediatric Gastroenterologist requesting home schooling for Student. The physician stated that due to the medications Student was taking and to the nature of Crohn's Disease, Student would experience episodes of fatigue, abdominal pain, loose stools or diarrhea and difficulty maintaining focus at

times, and that these episodes could be worsened during times of emotional tension and stress. The physician wrote that the most beneficial treatment for Student at that time would be for Student to have home schooling. Exhibit P-7.

11. PSYCHIATRIST was treating Student during this time. On January 25, 2017, Psychiatrist signed a DCPS HHIP Physician Verification Form which recommended full-time homebound services for Student; indicated that Student's diagnoses were Major Depression recurrent - severe and Severe Generalized Anxiety; that Student was extremely depressed and unable to concentrate for any long term periods; that while Student loved school, it had been a chore to work through Student's depression and the side effects of medications; that Student had been having crying spells, was very withdrawn and could not get out of bed some days; that at the time Student was unable to take the pressure of a rigorous structured academic schedule; and that Student would do "much better to have [Student's] own schedule and work at [Student's] academics." Exhibit P-7.

12. Beginning in the 2017-2018 school year, Therapist, a clinical psychologist, provided weekly or twice a week psychotherapy to Student. On January 23, 2017, Therapist spoke with an HHIP analyst by telephone concerning Student. Therapist followed up with a February 21, 2017 letter to the analyst. Therapist wrote, *inter alia*, that Student should not attend school due to major depression and that it would be detrimental to Student's mental health and recovery to be forced to be physically present in school; and that Student's City School teachers had appropriately accommodated

Student to help Student complete current courses with only 3½ months remaining in the school year. She added that Student was an extremely intelligent and strong student, who she believed was likely to complete the classes from home with the support of Student's private tutor and/or instruction through HHIP. Exhibit R-9. At that time, Therapist was just advocating for HHIP services for Student's medical condition. Therapist's reference in the February 21, 2017 letter to the delay in granting Student's "application for specialized instruction" was speaking of the delay in HHIP approval, out of concern that Student not be considered truant. Testimony of Therapist.

13. HHIP Manager had conversations with Mother in January 2017. All of those conversations were related to Crohn's Disease - IBD. HHIP reached out to Mother to get HHIP teachers to Student. Mother responded that Student was not comfortable with teachers at home, whom Student did not know. Mother said that Student preferred the private tutor engaged by the parents. City School put in place a plan to get school work to Student to do at home. Testimony of HHIP Manager.

14. On April 17, 2017, HHIP issued a "No Service Form" to Mother and to City School. The form stated that Student was determined ineligible for HHIP services because Student was not under intense medical care which confined Student to the home or hospital for 15 consecutive days or more and because Student's parents refused HHIP services because of Student's inability to tolerate instruction at that time. Exhibit P-10.

15. Mother had a long meeting in winter 2017 with Principal and School

Counselor. Student was in an academically elite group of students at City School, taking five Advanced Placement (AP) classes. Exhibit P-5. At the meeting, Principal proposed reducing Student's workload. Mother was concerned that dropping the AP classes would upset Student. Principal emailed all of Student's teachers for input. Except for the Spanish teacher, the teachers all responded that Student was doing the work, earning A's and should not be "demoted." The Spanish teacher said that Student needed to be in the classroom for speaking and reading the foreign language and she wanted Student to either audit the class or withdraw. Student withdrew from Spanish but completed the other courses. Testimony of Principal.

16. From January 2017 to the end of the school year, Student did not return to City School. Mother obtained work packets for Student from the school, which Student completed. In the spring of 2017, a private tutor retained by the parents worked with Student. Testimony of Mother.

17. Student's final grades for the 2016-2017 school year at City School were all A's except for a B in AP Physics. Exhibit R-4.

18. In the spring of 2017, Mother realized that Student was getting worse. She started pushing Therapist and Psychiatrist for advice. One of the professionals suggested Nonpublic School for Student. Mother visited Nonpublic School and made application for Student in spring 2017. Testimony of Mother.

19. DCPS' 2016-2017 regular school year ended on June 14, 2017. Exhibit R-4.

20. Student started at Nonpublic School on July 5, 2017. The parents did not give prior notice to DCPS or to City School that they were withdrawing Student from DCPS or enrolling Student in Nonpublic School. Testimony of Mother.

21. On July 9, 2017, Father wrote Principal that on the recommendation of Student's therapist and psychiatrist, and as a result of "inaction" by DCPS, the parents had enrolled Student at Nonpublic School for the 2017-2018 school year, which began on July 5, 2017. Father wrote that the parents reserved their right to seek public funding for Student's tuition and related services. Father also requested that DCPS initiate the special education eligibility process as soon as possible. Exhibit P-11.

22. On July 21, 2017, DCPS' Resolution Team Manager responded to Father's July 10, 2017 [*sic*] letter and stated that DCPS did not agree to bear the cost of a private placement for Student. The Resolution Team Manager also wrote, *inter alia*, that DCPS had made persistent efforts to support Student as Student's depression worsened during the second half of the 2016-2017 school year and that when HHIP had intervened around February 2017, it became apparent that Student's absences from City School stemmed from a psychological condition, not Student's Crohn's Disease for which Student was receiving accommodations under the 504 Plan. Exhibit P-11.

23. By Prior Written Notice (PWN) dated August 9, 2017, DCPS gave the parents notice that it proposed to meet to analyze existing data and gather any additional pertinent information to determine Student's special education eligibility. Exhibit P-12. At an Analysis of Existing Data (AED) meeting at City School on August

24, 2017, the parents signed a consent for DCPS to observe Student at the private school. The parents reported that Nonpublic School was in the process of evaluating Student [with a comprehensive psychological evaluation]. Exhibit R-5A. Mother wanted Nonpublic School to conduct its evaluation in preference to DCPS' evaluating Student. Testimony of Mother. Nonpublic School conducted its psychological evaluation of Student over 8 days in September and October 2017, finishing on October 13, 2017. Exhibit P-13. On January 18, 2018, Petitioners' Co-Counsel forwarded the completed Nonpublic School Comprehensive Psychological Evaluation to DCPS. Exhibit P-14.

24. In the Nonpublic School Comprehensive Psychological Evaluation, the assessor (Private School Evaluator) reported that Student was experiencing considerable levels of depression and stress, and that when Student experienced constant stress, Student would feel immediately overwhelmed and become emotionally dysregulated. Private School Evaluator opined that this was likely the situation in January 2017, when Student experienced a significant increase in depression symptoms which led to Student's missing a substantial period of the 2016-2017 school year. Private School Evaluator diagnosed Student with Persistent Depressive Disorder (Dysthymia), with anxious distress, in partial remission, early onset, with intermittent major depressive episodes, without current episode, moderate. Exhibit P-13.

25. On February 9, 2018, School Psychologist completed a DCPS review of the Nonpublic School psychological evaluation. In addition, on January 19, 2018, School

Psychologist made a behavior observation of Student at Nonpublic School. School Psychologist also interviewed Student, Mother and two Nonpublic School teachers. School Psychologist concluded that although it appeared that Student's school experience was directly impacted by depression and anxiety, especially from January thorough June 2017, Student continued to thrive academically. She likewise concluded that it appeared that Student's academic performance had not been directly impacted by symptoms related to Student's Crohn's Disease. Exhibit P-15.

26. On February 28, 2018, a Multidisciplinary Team (MDT) was convened by DCPS to conduct an initial eligibility determination for Student. Both parents and Petitioners' Co-Counsel attended the meeting. The team considered Student's special education eligibility under the Emotional Disturbance (ED) and Other Health Impairment (OHI) disabilities. The team determined that Student did not meet either of the two eligibility criteria for ED. For OHI, the team found that Student's chronic or acute health problem did not adversely affect Student's educational performance. Exhibit R-9. The team proposed that Student was ineligible for special education and related services. Petitioners' Co-Counsel indicated opposition to this determination. Exhibit P-16.

27. Student earned a high school diploma at the end of the 2017-2018 school year. Student matriculated to a university in the District of Columbia for the 2018-2019 school year, where Student continues to excel academically. Testimony of Mother. Exhibit R-12. Student takes a reduced course load at the university and still sees

Student's therapist and psychiatrist regularly. Testimony of Mother.

28. Nonpublic School is in the Maryland suburbs. At the school, there are about 80 students. The school primarily serves students with ED and Autism Spectrum Disorder. Nonpublic School holds a Certificate of Approval from the D.C. Office of the State Superintendent of Education (OSSE). Testimony of Program Director.

29. In Student's program at Nonpublic School, there are 9 to 12 students, most with ED as their primary disability. At Nonpublic School, Student had individual, small group and family therapy. Student did well at Nonpublic School. At first, Student was quiet and kept to oneself. Over time, Student started opening up and engaged in classes and with peers. Attendance was not an issue for Student at Nonpublic School.

Testimony of Program Director, Testimony of Mother. For the 2017-2018 school year, Student was on the Honor Roll at Nonpublic School and received A's in all courses.

Exhibit P-18.

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

Reimbursement for Unilateral Private School Placement

In this case, the parents seek reimbursement from DCPS for their unilateral placement of Student at Nonpublic School for the 2017-2018 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 v. District of Columbia*, 793 F.3d 59, 63 (D.C. Cir. 2015)). "As interpreted by the Supreme Court, IDEA requires

school districts to reimburse parents for their private-school expenses if (1) school officials failed to offer the child a free appropriate public education in a public or private school; (2) the private-school placement chosen by the parents was otherwise “proper under the Act”; and (3) the equities weigh in favor of reimbursement—that is, the parents did not otherwise act “unreasonabl[y].” *Leggett, supra*, at 66-67, (citing *Carter, supra*, 510 U.S. at 15–16, 114 S.Ct. 361; 20 U.S.C. § 1412(10)(C)(iii)(III).)

In the present case, DCPS never offered Student a FAPE under the IDEA because it determined on February 28, 2018 that Student was not eligible for special education as a student with an IDEA disability, and prior to that determination, DCPS never evaluated Student for eligibility.

The two issues raised by the parents in this case are,

1. Did DCPS deny Student a FAPE by failing to timely identify and evaluate Student for special education services during the 2016-2017 school year? and
2. Did DCPS deny Student a FAPE by failing to find Student eligible for special education services beginning in the 2016-2017 school year?

Statute of Limitations

The Petitioners’ due process complaint in this case was filed on June 18, 2019. DCPS asserts, as an affirmative defense, that Petitioners’ claims, as to alleged violations of the IDEA that occurred more than two years before their due process complaint was filed, are barred by the Act’s two-year statute of limitations. *See* 34 CFR § 300.511(e).²

² *Timeline for requesting a hearing.* A parent or agency must request an impartial hearing on their due process complaint within two years of the date the parent or agency knew or should have known about the alleged action that forms the basis of the due

The U.S. District Court for the District of Columbia observed in *Damarcus S. v. District of Columbia*, 190 F.Supp.3d 35 (D.D.C. 2016), that the IDEA establishes a filing deadline, requiring that a due process hearing be requested “within 2 years of the date the parent or agency knew or should have known about the alleged action that forms the basis of the complaint.” *Id.* at 43. As the Court pronounced in *Damarcus S.*, so long as the complaint is filed within two years of the known or should have known (KOSHK) date, the petitioners are entitled to full relief for that injury. The statute of limitations inquiry requires a “fine-grained analysis” to determine the KOSHK dates for the respective IDEA violations alleged. *See id.*, quoting *K.H. v. New York City Dep’t of Educ.*, 2014 WL 3866430 (E.D.N.Y. Aug. 6, 2014). *See, also, Collette v. D.C., No. CV 18-1104 (RC), 2019 WL 3502927 at 9 (D.D.C. Aug. 1, 2019).* The statute of limitations inquiry should focus upon the particular deficiency asserted, and the parents’ ability to recognize it. *See Damarcus S.*, 190 F.Supp.3d at 45.

Following the guidance from *Damarcus S.*, in order to determine whether any of the Petitioners’ claims may be time-barred, I turn now to the particular deficiencies asserted by the parents in this case. The parents claim that DCPS denied Student a FAPE by failing to timely identify and evaluate Student for special education services during the 2016-2017 school year and by failing to find Student eligible for special

process complaint, or if the State has an explicit time limitation for requesting such a due process hearing under this part, in the time allowed by that State law.

34 CFR § 300.511(e).

education services beginning in the 2016-2017 school year.

2016-2017 School Year

Under the IDEA's child find requirement, the District of Columbia must "ensure that '[a]ll children with disabilities residing in the [District] . . . who are in need of special education and related services are identified, located, and evaluated.'" *Scott v. District of Columbia*, 2006 WL 1102839, at 8 (D.D.C. Mar. 31, 2006) (quoting *Reid ex rel. Reid v. District of Columbia*, 401 F.3d 516, 519 (D.C.Cir.2005); 20 U.S.C. § 1412(a)(3). "As soon as a child is identified as a potential candidate for services, DCPS has the duty to locate that child and complete the evaluation process." *Long v. District of Columbia*, 780 F.Supp.2d 49, 56 (D.D.C.2011). "The 'child find' duty extends even to '[c]hildren who are suspected of being a child with a disability . . . even though they are advancing from grade to grade.' 34 C.F.R. § 300.111(c)(1)." *Sch. Bd. of the City of Norfolk v. Brown*, 769 F. Supp. 2d 928, 941 (E.D.Va. 2010); *Horne v. Potomac Preparatory P.C.S.*, 209 F. Supp. 3d 146, 157–58 (D.D.C. 2016).

As to when the parents knew or should have known about their IDEA child-find claim, Student was diagnosed with Crohn's Disease in the 2014-2015 school year. On November 2, 2016, City School developed a Section 504 Plan (Section 504 of the Rehabilitation Act of 1973) to meet Student's Crohn's Disease related needs at school. From January 2017 until the end of the school year, Student did not go to City School, but stayed home in Student's room. The parents sought homebound services from DCPS' HHIP office. In support of the application for HHIP services, Psychiatrist

completed a Physician Verification Form on January 25, 2017 indicating that Student had diagnoses of Major Depression recurrent - severe and Severe Generalized Anxiety. The psychiatrist reported that Student was extremely depressed, very withdrawn and not able to get out of bed some days. In a letter to DCPS dated February 21, 2017, Therapist wrote that at that time, Student should not attend classes due to major depression.

Mother testified that she started pushing Student's therapist and psychiatrist for more help and Psychiatrist or Therapist recommended a full-time special education school, Nonpublic School, for Student. Nonpublic School primarily serves students who have Autism Spectrum Disorder and Emotional Disturbances. Sometime in the spring of 2017, Mother visited Nonpublic School and applied for Student's admission there. I conclude that at least by the time the parents applied for Student's admission to Nonpublic School, that is, in the spring term of the 2016-2017 school year, the parents knew or should have known that Student's Section 504 Plan was not meeting Student's needs and that Student was a potential candidate for special education services.

DCPS' 2016-2017 school year ended on June 14, 2017. The Petitioners did not file their due process complaint in this case until June 18, 2019. Therefore, I conclude that the IDEA's two-year statute of limitations bars Petitioners' claims that DCPS denied Student a FAPE by violating the Act's child-find mandate and by failing to find Student eligible for special education services during the 2016-2017 school year.

Evaluation and Eligibility After the 2016-2017 School Year

On July 9, 2017, Father wrote City School Principal that the parents had enrolled Student at Nonpublic School for the 2017-2018 school year, which began on July 5, 2017. In that letter, Father also requested DCPS to “initiate the special education eligibility process as soon as possible.” On August 9, 2017, DCPS gave the parents PWN that it would analyze existing data and gather any other pertinent information needed to determine Student’s special education eligibility. At that time, Nonpublic School was in the process of assessing Student. At an Analysis of Existing Data (AED) meeting on August 24, 2017, the parents’ attorney requested DCPS to allow Nonpublic School to complete its evaluation in preference to DCPS’ evaluating Student.

On January 18, 2018, the parents’ attorney sent the completed Nonpublic School Comprehensive Psychological Evaluation to DCPS. On January 19, 2018, DCPS’ School Psychologist made a behavior observation of Student at Nonpublic School. School Psychologist also interviewed Student, Mother and two Nonpublic School teachers. On February 9, 2018, School Psychologist completed a DCPS review of the Nonpublic School psychological evaluation. On February 28, 2018, a Multidisciplinary Team (MDT) was convened by DCPS to conduct the initial eligibility determination for Student. The team considered Student’s possible special education eligibility under the Emotional Disturbance (ED) and Other Health Impairment (OHI) disabilities, found that Student did not meet criteria for either disability and concluded that Student was ineligible for special education and related services. This determination of non-

eligibility raises two queries for the hearing officer: (1) In the 2017-2018 school year, should Student should have been determined eligible for special education as a student with an IDEA disability and (2) If so, when should that determination have been made?

To be eligible for special education services, a student must be evaluated as having an intellectual disability, a hearing impairment, a speech or language impairment, a visual impairment, an emotional disturbance, an orthopedic impairment, autism, traumatic brain injury, an other health impairment, a specific learning disability, deaf-blindness, or multiple disabilities, and who, by reason thereof, needs special education and related services. *See* 34 CFR § 300.8; *Capital City Public Charter School v. Gambale*, 27 F.Supp.3d 121, 124 (D.D.C.2014). Determination of eligibility for special education should follow a two-step approach. The MDT team first determines the existence of an IDEA disorder and then whether the student needs special education and related services by reason of that disability. *See Lincoln-Sudbury Reg'l Sch. Dist. v. W.*, No. CV 16-10724-FDS, 2018 WL 563147, at *2 (D. Mass. Jan. 25, 2018), *appeal dismissed sub nom. Lincoln Sudbury Reg'l Sch. Dist. v. Mr. & Mrs. W.*, No. 18-1524, 2018 WL 6584118 (1st Cir. Aug. 8, 2018).

As pertains to this case, the IDEA regulations define Emotional Disturbance (ED) to mean a condition exhibiting one or more of the following characteristics over a long period of time and to a marked degree that adversely affects a child's educational performance:

(A) An inability to learn that cannot be explained by intellectual, sensory, or

health factors.

(B) An inability to build or maintain satisfactory interpersonal relationships with peers and teachers.

(C) Inappropriate types of behavior or feelings under normal circumstances.

(D) A general pervasive mood of unhappiness or depression.

(E) A tendency to develop physical symptoms or fears associated with personal or school problems.

The IDEA regulations define Other Health Impairment (OHI) to mean,

having limited strength, vitality, or alertness, including a heightened alertness to environmental stimuli, that results in limited alertness with respect to the educational environment, that—

(i) Is due to chronic or acute health problems such as asthma, attention deficit disorder or attention deficit hyperactivity disorder, diabetes, epilepsy, a heart condition, hemophilia, lead poisoning, leukemia, nephritis, rheumatic fever, sickle cell anemia, and Tourette syndrome; and

(ii) Adversely affects a child's educational performance.

34 CFR § 300.8(c); *See, also*, 5E DCMR § 3001.1 (Definitions).

It does not appear to be disputed in this case that when Student was evaluated in the 2017-2018 school year, Student was suffering from chronic depression.³ Throughout the 2017-2018 school year and even through the present, Therapist, a clinical psychologist, was seeing Student weekly for depression. In the Nonpublic School

³ Student also had Crohn's Disease which had been diagnosed in the 2014-2015 school year. There was considerable evidence at the due process hearing that Student's depression related to the Crohn's Disease diagnosis or the medications Student took for that condition. For purpose of this decision, it is not necessary to determine the causal relationship, if any, between Student's physical illness and Student's depression.

Comprehensive Psychological Evaluation, the assessor, Private School Evaluator, reported that Student was experiencing considerable levels of depression and stress, and that when Student experienced constant stress, Student would feel immediately overwhelmed and become emotionally dysregulated. Private School Evaluator opined that this was likely the situation in January 2017, when Student experienced a significant increase in depression symptoms which led to Student's missing a substantial period of the 2016-2017 school year. Private School Evaluator diagnosed Student with Persistent Depressive Disorder (Dysthymia), with anxious distress, in partial remission, early onset, with intermittent major depressive episodes, without current episode, moderate. DCPS' expert, School Psychologist, affirmed at the due process hearing that there was nothing in the Nonpublic School psychological evaluation that she took issue with. In sum, I find that the evidence establishes that Student suffered from a "general pervasive mood of unhappiness or depression" that is, Persistent Depressive Disorder, at the time of DCPS' February 28, 2018 eligibility determination. *See* 34 CFR § 300.108.

With that criterion established, the next prong of the ED eligibility inquiry is whether Student needed special education and related services by reason of Student's persistent depressive disorder. *See Lincoln-Sudbury Reg'l Sch. Dist., supra*. DCPS' expert, School Psychologist, agreed that Student's school experience was directly impacted by depression and anxiety, but School Psychologist concluded that Student's depression did not align with the IDEA's definition of ED because there was no evidence that Student's condition had an "educational impact." School Psychologist's coming to

this conclusion is understandable. It is undisputed that even when not going to school after January 2017, Student excelled academically at City School for the rest of the 2016-2017 school year and earned A's in all but one AP class. This is a credit not only to Student's outstanding effort, but also to the caring and dedicated support provided by Student's City School team and by the parents. For the 2017-2018 school year at Nonpublic School, Student also excelled academically, earning all A's for every grading period.

However, I do not agree with DCPS that Student's chronic depression and anxiety did not have educational impact. Numerous court decisions have recognized that an MDT eligibility team must not look only at academic achievement in deciding whether a disorder adversely affects a child's educational performance. In a concurring opinion in *Doe v. Cape Elizabeth Sch. Dist.*, 832 F.3d 69, 91 (1st Cir. 2016), Circuit Judge Lipez explained,

In a similar vein, I do not confine "educational progress" or "educational benefits" to strictly academic performance. In [*Bd. of Educ. v. Rowley*, 458 U.S. 176, 102 S.Ct. 3034, 73 L.Ed.2d 690 (1982)], the district court had found that Amy was "a remarkably well-adjusted child who interact[ed] and communicate[d] well with her classmates and ha[d] developed an extraordinary rapport with her teachers," *id.* at 185, 102 S.Ct. 3034 (internal quotation marks omitted), and hence there was no need for the Court to discuss the relevance of a child's social or behavioral performance to the sufficiency-of-an-IEP inquiry. One can imagine a scenario, however, in which a child with a disorder is struggling with a social or behavioral problem that is traceable to the disability, and that interferes with the child's educational experience in school. Under such circumstances, I believe that an assessment of "educational benefits" or "educational progress" under the need prong must include, in addition to academic performance, broader aspects of the child's school experience. That is to

say, even a child, like Jane, who is performing well above average according to grades and standardized test results, may be able to show a need for special education, if she can demonstrate a social or behavioral problem that hinders her ability to benefit from the educational experience in school. *See West Chester Area Sch. Dist. v. Bruce & Suzanne C. ex rel. Chad C.*, 194 F.Supp.2d 417, 420 (E.D. Pa. 2002) (“There is no precise standard for determining whether a student is in need of special education, and well-settled precedent counsels against invoking any bright-line rules for making such a determination.”); *Venus Indep. Sch. Dist. v. Daniel S. ex rel. Ron S.*, No. CIV.A. 301CV1746P, 2002 WL 550455, at *11 (N.D. Tex. Apr. 11, 2002) (observing that “need” under the IDEA is not “strictly limited to academics, but also includes behavioral progress and the acquisition of appropriate social skills as well as academic achievement”); see also Robert A. Garda, Jr., *Untangling Eligibility Requirements Under the Individuals with Disabilities Act*, 69 Mo. L. Rev. 441, 499 (2004) (observing that “attendance and behavior are educational performance that must be addressed despite good academic performance” under the need inquiry because “[t]hey are not merely means to the end of academic achievement, but are themselves educational ends”).

Doe v. Cape Elizabeth Sch. Dist., 832 F.3d at 91.

In another decision with facts resembling the present case, *M.M. v. New York City Dep’t of Educ.*, 26 F. Supp. 3d 249 (S.D.N.Y. 2014), a high school student did well academically and received good grades. However, the student missed several weeks of school and reported that she had difficulty going to school because of her anxiety, depression and fear. The special education State Review Officer (SRO) had found that the student had been offered a FAPE [*sic*] in New York City’s public schools, because she was not disabled, in that the student was unaffected by her emotional problems, because she received good grades at school, had good relationships with relatives and had a few age-appropriate friends. The U.S. District Court overturned this administrative

decision, holding, *inter alia*, that the SRO erred in ignoring the evidence of the child's inability to attend school. "Few things could be more indicative of an emotional problem that 'adversely affected' a student's education than one that prevented her from attending school." *M.M.* at 256.

In the present case, before the parents unilaterally placed Student at Nonpublic School, Student was so overwhelmed by depression and anxiety that for the second half of the 2016-2017 school year, Student was unable to attend City School, where Student had theretofore been an exceptional student, and on some days Student could not get out of bed. Student started attending Nonpublic School in July 2017. At Nonpublic School, Student was placed in a small classroom with about 6 students. Student received weekly individual therapy and weekly group therapy as well as family therapy. Petitioners' expert, Clinical Coordinator, testified that the small classroom setting enabled Student to be supported 1:1, to ask questions, and have reduced anxiety about being judged by the teacher or other students. She opined that Student required the regular individual, group and family therapy in order to get Student to come to school and that Student needed the small classroom setting to manage anxieties and fears. This opinion was not challenged by DCPS' experts.

I find that the Petitioners have established that at the time of Student's initial eligibility determination on February 28, 2018, Student had exhibited depression and anxiety over a long period of time and to a marked degree and that from January 2017 until Student was provided the small classroom settings and regular therapy at

Nonpublic School, Student's depression kept Student from attending school at all. I conclude, therefore, that Student's depression adversely affected Student's educational performance.

Because the preponderance of the evidence establishes that at the time of the February 28, 2018 eligibility meeting, Student exhibited a general pervasive mood of unhappiness or depression which adversely affected Student's educational performance, the DCPS eligibility team erred in determining that Student was not eligible for special education and related services as a student with an ED disability. Student was denied a FAPE as a result.⁴

Reimbursement for Unilateral Placement

Under the D.C. Circuit's *Leggett* decision, DCPS must reimburse parents for their private-school expenses if (1) school officials failed to offer the student 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. I have determined that DCPS failed to offer Student a FAPE by not finding Student eligible for special education at the February 28,

⁴ In light of my decision that the February 28, 2018 eligibility team erred in determining that Student did not have an ED disability, I do not reach the question of whether the eligibility team erred in determining that Student did not have an Other Health Impairment. *See, e.g. Letter to Anonymous*, 48 IDELR 16 (OSEP 2006) (Child's identified needs, not the child's disability category, determine the services that must be provided to her).

2018 meeting. Before considering whether Nonpublic School was a proper choice under the IDEA or how the equities weigh, I must determine the duration of DCPS' denial of FAPE to Student. That is, did the denial of FAPE start with the February 28, 2018 eligibility team's erroneous decision or on some earlier date?

I have held above in this decision that the IDEA's two-year statute of limitations bars Petitioners' claims that DCPS denied Student a FAPE by not conducting child-find and by not determining Student eligible for special education services during the 2016-2017 school year. After the 2016-2017 school year, the event "triggering" DCPS' duty to evaluate Student for special education eligibility was the receipt of Father's July 9, 2017 letter requesting the evaluation. *See* 34 CFR § 300.301(b). (A parent may initiate a request for an initial evaluation to determine if the child is a child with a disability.) At the time of Father's request, District of Columbia special education regulations required that DCPS must evaluate a student for special education eligibility within 120 days of referral. *See* 5E DCMR § 3005.2. Therefore, DCPS' initial determination of Student's eligibility, following Father's July 9, 2017 written evaluation request, would normally have been due on or about November 6, 2017.

However, at the August 24, 2017 Analysis of Existing Data (AED) meeting, the parents requested to be able to obtain their own evaluation of Student, which they stated was being done at Nonpublic School. DCPS appropriately agreed to this request. *See* 5E DCMR § 3006.3 (IEP team shall consider all assessment reports in completing any evaluation of a child suspected of having a disability.) The parents also signed a consent

for DCPS to observe Student at Nonpublic School. Petitioners' Co-Counsel provided to DCPS the report from the Nonpublic School psychological evaluation, conducted from September 8 through October 13, 2017, on January 18, 2018.

On these facts, I find that DCPS cannot be faulted for not making its eligibility determination before receiving the Nonpublic School psychological evaluation of Student. However, considering that under current D.C. law, it is expected that the entire initial evaluation and eligibility determination should be completed within 60 days, *see* 5E DCMR § 3005.2(a), I conclude that a reasonable period for DCPS to have completed its initial evaluation of Student would have been within 30 days after receipt of the Nonpublic School psychological – that is, on or about February 16, 2018. Presuming that DCPS would have made the same eligibility decision on February 16, 2018 – that Student was not eligible for special education and related services – I find that DCPS' denial of FAPE to Student ran from that date.

Having found that DCPS denied Student a FAPE beginning on or about February 16, 2018, by not determining that Student was eligible for special education, 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 *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), that an IEP must be "reasonably calculated to enable a child to make progress appropriate in light of the child's circumstances." *See Endrew F.*, 137 S.Ct. at 999. Therefore, it follows that for the private school chosen by the parents to be "proper," it must be reasonably calculated to enable the student to make progress appropriate in light of the student's circumstances.

Student attended Nonpublic School for the entire 2017-2018 school year, starting in July 2017. Nonpublic School was recommended for Student by Student's psychiatrist or therapist. Nonpublic School is approved by OSSE to serve students with special needs. A focus of Nonpublic School is to serve students, like Student, who have ED disabilities. Therapist, Clinical Coordinator, Education Director and Mother all testified that Student made good educational and social-emotional progress at Nonpublic School and that the private school was beneficial for Student. Student graduated from Nonpublic School with excellent grades and was able to matriculate to college. From the extensive evidence at the due process hearing, I conclude 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. The IDEA provides that the cost of reimbursement for private school may be reduced or denied if —

(i) At the most recent IEP Team meeting that the parents attended prior to removal of the child from the public school, the parents did not inform the IEP Team that they were rejecting the placement proposed by the public agency to provide FAPE to their child, including stating their concerns and their intent to enroll their child in a private school at public expense; or

(ii) At least ten (10) business days (including any holidays that occur on a business day) prior to the removal of the child from the public school, the parents did not give written notice to the public agency of the information described in paragraph (d)(1)(i) of this section.

34 CFR § 300.148(d). In this case, the parents only gave notice to DCPS of their intent to enroll Student in Nonpublic School at public expense after Student was already attending the private school. However, DCPS was not prejudiced by the delayed notice because even months after DCPS did learn that the parents had removed Student from City School and that the parents would seek public reimbursement for enrolling Student in Nonpublic School, DCPS still did not determine Student eligible for special education or offer Student an IEP. I conclude that it would not be equitable to reduce or deny the cost of reimbursement for Student's Nonpublic School expenses due to the parents' failure to give DCPS written notice prior to Student's removal from City School. DCPS offered no probative evidence that the Parents otherwise acted unreasonably in enrolling Student in Nonpublic School. Therefore, I conclude that Petitioners have established, pursuant to the D.C. Circuit's *Leggett* decision, that the IDEA requires DCPS to reimburse them for their expenses for Student to attend Nonpublic School after

February 16, 2018 through the end of the 2017-2018 Nonpublic School school year.

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 for Student's enrollment at Nonpublic School from February 16, 2018 through the end of the private school's 2017-2018 school year, calculated on *pro rata* basis based on the private school's 2017-2018 year-round tuition charges and
2. All other relief requested by the Petitioners herein is denied.

Date: November 27, 2019

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
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