

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

PARENT, on behalf of STUDENT, ¹)	
)	
Petitioner,)	Date Issued: November 1, 2022
)	
v.)	Hearing Officer: Peter B. Vaden
)	
)	Case No: 2022-0131
)	
DISTRICT OF COLUMBIA)	Online Videoconference Hearing
PUBLIC SCHOOLS,)	
)	Hearing Dates: September 28 & 29;
Respondent.)	October 19, 2022
)	

HEARING OFFICER DETERMINATION

INTRODUCTION AND PROCEDURAL HISTORY

This matter came to be heard upon the Administrative Due Process Complaint Notice filed by the parent under the Individuals with Disabilities Education Act, as amended (the IDEA), 20 U.S.C. § 1400, *et seq.*, and Title 5-A, Chapter 5-A30 of the District of Columbia Municipal Regulations (“D.C. Regs.”).² In this administrative due process proceeding, the parent seeks private school tuition reimbursement from Respondent District of Columbia Public Schools (DCPS) on the grounds that DCPS allegedly denied ■■■ child a free appropriate public education (FAPE) by failing to offer an appropriate Individualized Education Program (IEP) and educational placement for the 2022-2023 school year.

¹ Personal identification information is provided in Appendix A.

² Effective July 1, 2022, DCMR Chapter 5E-30 was repealed and replaced by the new Chapter 5A-30.

Petitioner's Due Process Complaint, filed on July 8, 2022, named DCPS as respondent. The undersigned hearing officer was appointed on July 11, 2022. On July 8, 2022, DCPS filed a Notice of Insufficiency, which I overruled by order issued July 19, 2022. On July 19, 2022, the parties met for a resolution session and were unable to resolve the issues in dispute. On July 19, 2022, I convened a telephone prehearing conference with counsel to discuss the issues to be determined, the hearing date and other matters. By orders issued September 19, 2022 and October 26, 2022, I granted Petitioner's unopposed continuance requests to extend the final decision due date. My final decision in this case is now due by November 7, 2022.

With the parent's consent, the due process hearing was held online and recorded by the hearing officer, using the Microsoft Teams videoconference platform. The hearing, which was open to the public, was convened before the undersigned impartial hearing officer on September 28 and 29 and October 19, 2022. MOTHER appeared online for the hearing and was represented by PETITIONER'S COUNSEL and PETITIONER'S CO-COUNSEL. Respondent DCPS was represented by CIEP SPECIALIST 1 and by DCPS' COUNSEL.

Petitioner's Co-Counsel made an opening statement. Mother testified and called as additional witnesses CLINICAL PSYCHOLOGIST, DIVISION HEAD, NONPUBLIC SCHOOL DIRECTOR, and EDUCATIONAL CONSULTANT. DCPS called as witnesses SOCIAL WORKER, OCCUPATIONAL THERAPIST, SPEECH-LANGUAGE PATHOLOGIST (SLP), CIEP SPECIALIST 2, PROGRESS MONITOR and CIEP

Specialist 1. Petitioner re-called Mother as a rebuttal witness.

Petitioner's Exhibits P-2 through P-13, P-15 through P-20, P-22 through P-24, P-26, and P-28 through P-36 were admitted into evidence, including Exhibits P-2, P-9, P-13, P-15 through P-20, P-22 through P-24, P-30 and P-31 which were admitted over DCPS' objections. DCPS' Exhibits R-1 through R-23, including Exhibit R-3A, were all admitted into evidence, including Exhibits R-20 and R-21 which were admitted over Petitioner's objections.

On the last day of the hearing, after the taking of the evidence, counsel for the respective parties made oral closing arguments. The parties were granted leave until October 21, 2022 to submit, by email, citations to persuasive or controlling authority. Counsel for both parties timely submitted citations to authority.

JURISDICTION

The hearing officer has jurisdiction under 20 U.S.C. § 1415(f) and D.C. Regs. tit. 5-A, § 3049.1.

ISSUE AND RELIEF SOUGHT

The issues for determination in this case, as set out in the July 19, 2022 Prehearing Order are:

Has DCPS denied the Student a free appropriate public education (FAPE) by failing to propose an appropriate full-time special education program and placement for the 2022-2023 school year?

For relief, Petitioner originally requested that the hearing officer order DCPS to place and fund the Student at NONPUBLIC SCHOOL for the 2022-2023 school year. At

the due process hearing, Petitioner's Counsel requested that DCPS be ordered to reimburse Mother for her tuition and related expenses for Student to attend Nonpublic School in the 2022-2023 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 of counsel, my findings of fact are as follows:

1. Student, an AGE youth, resides with the Mother in the District of Columbia. Testimony of Mother.
2. Student is eligible for special education as a student with Multiple Disabilities (MD) based upon coexisting impairments, Specific Learning Disability (SLD) and Other Health Impairment (OHI). Exhibit R-15. Student was diagnosed with Attention Deficit-Hyperactivity Disorder (ADHD) in 2016 and Fragile X Syndrome in March 2017. Exhibit R-6. (Fragile X Syndrome is a genetic condition involving changes in part of the X chromosome. This condition causes a range of developmental problems including learning disabilities and cognitive impairment. Some people may have more symptoms than others and symptoms can range from mild to severe. National Institutes of Health, Genetic and Rare Diseases (GARD) Information Center, <https://rarediseases.info.nih.gov/diseases/6464/fragile-x-syndrome>).
3. Student has had a DCPS IEP since 1st Grade. Testimony of Mother.
4. For the 2019-2020 school year, Student attended CITY SCHOOL 1, a DCPS public school. Exhibit P-6.

5. In fall 2019, the parents referred Student for a neuropsychological evaluation by NEUROPSYCHOLOGIST. In his December 16, 2019 Neuropsychological Evaluation Report, Neuropsychologist reported, *inter alia*, that along with Fragile X Syndrome, Student had an attention disorder and executive functioning weaknesses, learning disabilities in reading and writing, an anxiety disorder, and fine motor and verbal retrieval weaknesses. Testing revealed areas of cognitive weaknesses primarily in the domains of attention and executive functioning; expressive language; social emotional functioning; academics, including fine motor and verbal retrieval weaknesses, and attention and executive functioning. Student also demonstrated difficulty with task initiation and self-monitoring at school. Specific weaknesses in the areas of verbal retrieval and oral language formulation revealed an underlying weakness which impacted Student's ability to express him/herself in writing. Student was reported to have significant levels of anxiety about a variety of topics. He/she was frequently worried and refused to participate in things that made him/her anxious, and this anxiety was impactful in Student's daily life. Student had poor fine motor skills and difficulty with spelling, which made his/her writing very difficult to decipher. Student's math was also impacted by poor attention and task-monitoring. Dr. [REDACTED] diagnosed Student with Fragile X chromosome (by history); Attention-Deficit/Hyperactivity Disorder, Combined presentation; Frontal lobe and executive function deficit in the areas of planning/organization, task-monitoring, working memory, flexibility, task initiation, and self-monitoring; Specific Learning Disorder, with impairment in reading (Dyslexia)

and in written expression (Dysgraphia); Generalized Anxiety Disorder; Fine Motor Weakness and Verbal Retrieval Weakness. Exhibit P-3.

6. In the December 2019 report, Neuropsychologist recommended, *inter alia*, that for Student's educational placement,

- Student would be best served in an educational setting specifically tailored to meet the needs of children with language, based learning challenges;
- Student would benefit from a highly structured and predictable environment;
- Student needed a supported educational setting to address his/her ADHD and related weaknesses in executive functioning, fine motor weaknesses, and emotional sensitivity, that is, a classroom environment that supports sustained attention, reduces distracters, and provides appropriate organizational routines or roadmaps for task completion.

For reading, Neuropsychologist recommended specialized instruction including focus on phonological processing, sound blending, and phoneme segmentation.

Neuropsychologist also recommended Occupational Therapy to help Student's fine motor weaknesses. Exhibit P-3.

7. On March 15, 2020, a DCPS school psychologist reviewed Neuropsychologist's December 16, 2019 report to help determine Student's continued special education eligibility and educational needs. The DCPS psychologist also conducted a classroom observation and interviewed Student and his/her teachers. The DCPS psychologist reported that Student was then receiving 3 hours per month of written expression instruction, 8 hours a month of math instruction and 4 hours a month of reading instruction in the general education setting. Student was also

receiving 3 hours of written expression instruction, 4 hours of math instruction and 4 hours of reading instruction each month outside of the general education setting. Additionally, he/she was receiving 120 minutes per month of behavior support services inside general education. Exhibit P-7.

8. Beginning in March 2020, DCPS schools were closed to in-person learning in response to the COVID-19 pandemic. Hearing Officer Notice.

9. In May 2020, Student's father died from cancer. Testimony of Mother.

10. Mother unilaterally placed Student at Nonpublic School at the start of the 2020-2021 school year. At the start of the year, Nonpublic School offered only virtual learning. Over the course of the school year, Nonpublic School returned to in person classes. Testimony of Mother.

11. Student continued at Nonpublic School for the 2021-2022 school year. This was a especially difficult year for Student emotionally, because the child was grieving over the loss of his/her father and because, over the winter break, Student and Mother both contracted COVID. Testimony of Mother.

12. In the 2021-2022 school year, in the Nonpublic School classroom, Student struggled with maintaining attention, was fidgety and liked to move around, could sometimes get emotional, would take breaks and had challenges organizing him/herself and starting tasks. Student often worked 1:1 with the teacher or in small groups. Student has social-emotional and executive functioning challenges in school and tries to get around things that are hard. Math became a point of class refusal. Toward the end

of the 2021-2022 school year, Nonpublic School pulled Student out of written language and math classes out of concern for Student's emotional outbursts. After that change, Nonpublic School saw fewer outbursts. Testimony of Division Head, Testimony of Nonpublic School Director.

13. Student struggled with reading when he/she started at Nonpublic School in fall 2020, reading around a 2nd grade level. By the spring of 2022, Student had made a lot of progress in reading. Testimony of Division Head. In the current, 2022-2023, school year, Student is still roughly 2 grade levels behind in reading, but has made progress in closing the gap. Testimony of Nonpublic School Director.

14. In the 2022-2023, school year, Student has demonstrated increased success. Student is participating in classes and responds to questions in English class. There have no behavior concerns from Student this school year. In math, Student's confidence is growing and he/she is going to class. Testimony of Nonpublic School Director.

15. Mother previously filed due process complaints against DCPS seeking payment of Nonpublic School expenses for Student for the 2020-2021 and 2021-2022 school years. Those cases both ended in settlements. Testimony of Mother.

16. On May 20, 2022, the DCPS Central IEP (CIEP) team convened an IEP annual review meeting for Student. Mother, Petitioner's Co-Counsel, Educational Consultant and Nonpublic School representatives participated. Exhibit R-16. At the meeting, Mother shared with the team everything that was going on with Student,

including the impact of the death of Student's father's and the emotional crisis Student was experiencing in the academic setting. Mother told the team that she was asking for a full-time special education environment for Student. The DCPS participants did not have a response to that request. Testimony of Mother. However, the DCPS team members decided that Student's IEP would provide for 5 hours per week of Specialized Instruction in General Education and 10 hours per week Outside General Education. The IEP also provided, as Related Services, 120 minutes per month of Behavioral Support Services, 120 minutes per month of Speech-Language Pathology, 180 minutes per month of Occupational Therapy (OT) and 30 minutes per month of OT consultation services. Exhibit R-15. There was no discussion at the meeting of how the special education hours would be implemented. Testimony of Mother, Testimony of Educational Consultant. Mother and her representatives objected to the proposed IEP. Exhibit R-16. (Petitioner's Co-Counsel clarified in closing argument that, but for the allegedly insufficient hours of special education services and the failure to provide a full-time placement for Student at a special education day school, Mother agreed with the proposed May 20, 2022 IEP.)

17. By letter of July 18, 2022, Petitioner's Co-Counsel wrote DCPS RESOLUTION TEAM DIRECTOR that Student would attend Nonpublic School for the 2022-2023 school year. Counsel wrote that they did not believe that an appropriate special education program had been identified or offered by DCPS for the upcoming school year. Counsel requested that DCPS place and fund Student at Nonpublic School

and gave notice that if DCPS refused the funding request, the parent reserved the right to seek DCPS funding for that placement. Resolution Team Director responded by letter dated July 25, 2022, asserting that it was DCPS's position that the District had made a FAPE available to Student with an appropriate IEP and a placement in the least restrictive environment at CITY SCHOOL 2, and that DCPS did not agree to bear the cost of the private placement. Exhibit P-29.

18. Mother unilaterally enrolled Student at Nonpublic School for the 2022-2023 school year. The parent is on the school's monthly tuition payment plan and is paying approximately \$4,600 per month in tuition and costs. Mother started making payments for the 2022-2023 school year in March or April 2022. Testimony of Mother.

19. Nonpublic School is a private special education day school in the District of Columbia, which primarily serves students with language-based learning disabilities. Nonpublic School has a total enrollment of 380 students. Nonpublic School holds a current certificate of approval (COA) issued by the D.C. Office of the State Superintendent of Education (OSSE). Testimony of Nonpublic School Director.

20. For substantive academic classes at Nonpublic School, Student is in classes of 6 to 7 students for larger classes. His/her English class has 4 students. Student receives reading instruction with one other student for a 2:1 student-to-teacher ratio. Student is not currently receiving related services at the private school. Testimony of Nonpublic School Director.

21. In the current 2022-2023 school year, Student is off to a good start.

He/she stays in school full time and has not needed to meet with the social worker.

Student is doing his/her homework. Testimony of Mother. Student has made astounding progress in reading with a huge increase in automaticity. Student still races through reading and skips words. The Nonpublic School reading teacher noted lots of progress. Testimony of Educational Consultant.

CONCLUSIONS OF LAW

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

Burden of Proof

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

Analysis

In this proceeding, the parent seeks reimbursement from DCPS for Student's

private school tuition for the 2022-2023 school year. Student has attended Nonpublic School since the beginning of the 2020-2021 school year when Mother unilaterally placed him/her at the private school.

As a preliminary consideration, in her July 8, 2022 due process complaint, the parent requested the hearing officer to order DCPS to “place and fund the Student at [Nonpublic School] for the 2022-2023 school year.” See Prehearing Order, July 19, 2022. The parent did not request tuition reimbursement from DCPS in the complaint. The school year is now well underway and the Parent testified that she has already paid much Student’s tuition costs for this year under Nonpublic School’s monthly payment plan. She now seeks tuition reimbursement, as opposed to a placement award, from DCPS.

Requests for public funding for private school placement are considered under the factors set out in the Circuit Court’s decision in *Branham v. Government of the Dist. of Columbia*, 427 F.3d 7, 11-12 (D.C. Cir. 2005). Reimbursement claims are analyzed under the D.C. Circuit’s guidance in *Leggett v. District of Columbia*, 793 F.3d 59 (D.C. Cir. 2015) and subsequent decisions. Under the *Leggett* decision, a parent’s unilateral private school choice may be approved by the hearing officer for reimbursement so long as the private school chosen by the parent was “proper under the [IDEA].” See *Leggett* at 66-67. The requirements for public funding for prospective private school placement, under the *Branham* decision are, arguably, more rigorous. See *Branham* at 12.

In an analogous decision, *K.B. v. Dist. of Columbia*, No. CV 13-0649 (RC), 2015

WL 5191330 (D.D.C. Sept. 4, 2015), U.S. District Judge Royce Lambert considered a related question. There, the parent sought DCPS funding for Student's private school expenses, but not reimbursement, because, while the parent allegedly owed the private school payment for the child's tuition charges, she had not actually paid for the child's tuition. In a 2015 *pendente lite* determination, after Student had graduated from the private school, Judge Lambert found that effectual relief was available to the parent in the form of an order requiring DCPS to pay the private school for the child's outstanding tuition from the final school year, thus relieving the parent of that obligation. Judge Lambert held that there was injury to the parent, "traceable to DCPS's failure to fund K.B.'s placement at Monroe, and that is redressable by a court order requiring DCPS to pay the outstanding tuition, thereby relieving [the parent] of her contractual obligations." *K.B.*, 2015 WL 5191330, at *9. The Court noted that the IDEA, 20 U.S.C. § 1415(i)(2)(C), provides courts with discretion to "grant such relief as the court determines is appropriate." *Id.* at *8.

In the present case, the parent's due process complaint, filed before the start of the current school year, omits to allege that the parent had already paid a portion of Student's private school tuition charges and would seek reimbursement from DCPS. However, DCPS cannot be surprised that the parent seeks reimbursement relief because Student has been attending Nonpublic School since the 2020-2021 school year and there were two prior due process complaints against DCPS, which were both settled. Moreover, it would have been evident to the District that, as this proceeding continued

into the 2022-2023 school year, the parent would have been required to pay tuition for Student before the due process hearing could be completed. I conclude, therefore, that the parent is not barred from seeking reimbursement for current year tuition payments and that the *Leggett* reimbursement criteria, not the *Branham* private school placement consideration, are applicable to this case.

U.S. Magistrate Judge Deborah Robinson explained the *Leggett* reimbursement standards in *A.D. v. Creative Minds Int'l Pub. Charter Sch.*, No. CV 18-2430 CRC/DAR, 2020 WL 12654618 (D.D.C. Aug. 14, 2020), *report and recommendation adopted*, No. 18CV2430CRCDAR, 2020 WL 6373329 (D.D.C. Sept. 28, 2020), *appeal dismissed sub nom. A. D. by E.D. v. Creative Minds Int'l Pub. Charter Sch.*, No. 20-7106, 2021 WL 1654481 (D.C. Cir. Mar. 31, 2021).

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

A.D. 2020 WL 12654618 at *19. *See, also, School Committee of Town of Burlington v. Department of Education of Massachusetts*, 471 U.S. 359, 369, 105 S.Ct. 1996, 85 L.Ed.2d 385 (1985).

Applying the *Leggett* standards to this case, the first factor in deciding whether

DCPS must reimburse the parent for Student's Nonpublic School 2022-2023 tuition expenses is whether DCPS failed to offer Student a FAPE in a public or private school. The parent alleges that DCPS failed to offer Student a FAPE with its allegedly inappropriate May 20, 2022 IEP and proposed educational placement.

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

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

Middleton at 128. Petitioner does not allege that DCPS failed to comply with IDEA procedural requirements in developing the May 20, 2022 IEP. Therefore, I move to the second prong of the *Rowley* inquiry. Was the May 20, 2022 IEP appropriate for Student?

As U.S. District Judge Randolph Moss explained in *Smith v. Dist. of Columbia*, No. CV 16-1386 (RDM), 2018 WL 4680208 (D.D.C. Sept. 28, 2018), in *Endrew F. v. Douglas County School District RE-1*, 137 S. Ct. 988 (2017), the U.S. Supreme Court updated the standards for assessing the appropriateness of proposed IEP:

In [*Endrew F.*], the Court held that an IEP must be "reasonably calculated to enable [the] child to make progress appropriate in light of the child's circumstances." 137 S. Ct. at 999; *see id.* at 1001 ("[A]dequacy . . . turns on

the unique circumstances of the child.”). This “fact-intensive” standard recognizes that “crafting an appropriate program of education” requires “the expertise of school officials” as well as “the input of the child’s parents or guardians.” *Id.* at 999. . . . [T]he inquiry centers on “whether the IEP is reasonable, not whether the court regards it as ideal.” *Id.* at 999. A reviewing court may not “substitute [its] own notions of sound educational policy for those of the school authorities.” *Rowley*, 458 U.S. at 206. This deference “is based on the application of expertise and the exercise of judgment by school authorities.” *Endrew F.*, 137 S. Ct. at 1001. . . . [B]ecause the deference the Court owes school authorities is a product of their expertise, “[a] reviewing court may fairly expect those authorities to be able to offer a cogent and responsive explanation for their decisions,” and this explanation should show why “the IEP is reasonably calculated” to ensure that the child “make[s] progress appropriate in light of his circumstances.” *Id.* at 1002.

Smith, 2018 WL 4680208, at *5.

Student, a child with multiple disabilities, has attended Nonpublic School, a full-time special education day school, since the 2020-2021 school year and Mother told the May 20, 2022 CIEP team that she was asking for a full-time special education environment for her child. At core, the dispute between the parent and the District in this case is whether the special education services – 5 hours per week in General Education and 10 hours Outside General Education – and the educational placement mostly in a DCPS regular education classroom were reasonably calculated to enable Student to make appropriate progress. I find that Mother established a *prima facie* case, through the testimony of Educational Consultant and the Nonpublic School witnesses, that DCPS’ proposed program of 15 hours per week of special education services was not adequate for Student. Therefore DCPS holds the burden of persuasion on the appropriateness of the proposed May 20, 2022 IEP.

DCPS' witnesses uniformly opined that the service hours in the May 20, 2022 IEP were appropriate and that Student did not require a separate special education day school environment. In his 2019 neuropsychological evaluation, Neuropsychologist recommended that Student needed a supported educational setting to address his/her ADHD and related weaknesses in executive functioning, fine motor weaknesses, and emotional sensitivity. This is the most recent comprehensive evaluation of Student in the record. None of DCPS' witnesses explained how placing Student in a general education classroom for most of the school day would meet the child's need for a supported educational setting.

Petitioner's expert, Educational Consultant, has worked with Student and his/her family since 2019, and has observed Student several times at Nonpublic School. She testified that because of his/her Fragile X condition, Student presents as autistic in many ways; that Student has severe dyslexia and in the 2021-2022 school year, was provided one-on-one reading instruction and that Student has social-emotional and executive functioning challenges in school and tries to get around things that are hard. According to Educational Consultant, because of these social-emotional and executive functioning challenges, Student requires instruction in a smaller setting with a lot of one-on-one support, teaching at Student's pace, and instructional adjustments to Student's social-emotional and executive functioning challenges.

Neuropsychologist's 2019 recommendation that Student would benefit from a highly structured and predictable environment and needed a supported educational

setting to address his/her ADHD and related weaknesses in executive functioning, fine motor weaknesses, and emotional sensitivity was not challenged at the due process hearing. I also found persuasive Educational Consultant's opinion that Student requires instruction in a smaller setting with a lot of one-on-one support, teaching at Student's pace, and instructional adjustments to Student's social-emotional and executive functioning challenges. All of this information was available to the May 20, 2022 IEP team. I must conclude, therefore, that DCPS did not offer a "cogent and responsive explanation" for the CIEP team's decision that placing Student mostly in a general education setting, with 15 hours total per week of special education, was reasonably calculated to enable Student to make progress appropriate in light of his/her circumstances.³ See *Endrew F.*, 137 S.Ct. at 1002. I find that the May 20, 2022 IEP did not offer Student a FAPE.

Tuition Reimbursement

Under the D.C. Circuit's holding in *Leggett v. Dist. of Columbia*, *supra*, school districts must reimburse parents for their private-school expenses if: (1) school officials failed to offer the child a FAPE in a public or private school; (2) the private-school placement chosen by the parents was otherwise proper under the IDEA; and (3) the equities weigh in favor of reimbursement. *Id.*, 793 F.3d at 66-67. In this decision, I have

³ Because DCPS has the burden of persuasion that its proposed IEP was adequate for Student, I determine only that DCPS did not establish that its proposed program of 15 hours per week of special education services and placement mostly in the general education setting was appropriate. I do not decide whether Student requires a full-time special education placement, as alleged by the parent.

found that DCPS failed to establish that it offered Student a FAPE with its proposed May 20, 2022 IEP. I turn, next, to the other two requirements for tuition reimbursement pronounced in the *Leggett* decision – that the private school chosen by the parent, Nonpublic School, was proper and that the parent did not otherwise act unreasonably.

Analogizing to the standard for IEP appropriateness from the U.S. Supreme Court’s decision in *Bd. of Ed. of Hendrick Hudson Cent. Sch. Dist., Westchester Cty. v. Rowley*, 458 U.S. 176 (1982), the D.C. Circuit held in *Leggett* that for the private school chosen by the parent to be proper, it need be “reasonably calculated to enable the child to receive educational benefits.” *Leggett, supra*, at 71.

In *L.H. v. Hamilton Cty. Dep’t of Educ.*, 900 F.3d 779 (6th Cir. 2018), the Sixth Circuit Court of Appeals explained the requirements which a private school must satisfy to be found appropriate for reimbursement purposes after the *Andrew F.* decision:

[E]ven though the IDEA’s requirements do not apply to private schools, *Florence Cnty. Sch. Dist. Four v. Carter*, 510 U.S. at 13-14, for reimbursement purposes, the private school must satisfy the substantive IEP requirement, *i.e.*, it must be “reasonably calculated to enable a child to make progress appropriate in light of the child’s circumstances.” *Andrew F.*, 137 S.Ct. at 999.

L.H., 900 F.3d at 791. Drawing on guidance in the *Leggett* and *L.H.* decisions, I conclude that for the parent’s private school placement to be proper, Petitioner must show her school choice was reasonably calculated to enable Student to make progress appropriate in light of his/her circumstances.

Nonpublic School is a private special education day school in the District of

Columbia, which primarily serves children with predominantly language-based learning disabilities. Student has attended Nonpublic School since the 2020-2021 school year. According to Petitioner's experts, Division Head, Nonpublic School Director and Educational Consultant, Student, who has a range of academic and emotional-behavioral challenges, has made appropriate progress at Nonpublic School, notably in reading, but also in math and written expression. Student's in-school emotional outbursts, which led the private school team to stop math and writing classes at the end of last year, have not reappeared in the current school year.

DCPS' Counsel argues that Nonpublic School was not an appropriate parental placement because the private school allegedly does not comply with OSSE regulations for schools serving children with disabilities. For example, many of Student's teachers at Nonpublic School are not certified to teach special education and the school does not offer a music class. Nor is Student receiving the related services specified in the May 20, 2022 IEP – Behavioral Support Services, Speech-Language Pathology and OT. However, Nonpublic School holds a current Certificate of Approval from OSSE to enroll children with Student's disabilities and it is not the place of this hearing officer to review the standards used by OSSE in its private schools approval process. Moreover, a parental placement may be found to be appropriate by a hearing officer even if the private school does not meet the state standards that apply to education provided by local education agencies. *See* 34 C.F.R. § 300.148(c). I find that Petitioner has established that her choice of Nonpublic School for Student was reasonably calculated to

enable Student to make progress appropriate in light of his/her circumstances. That is, the parent’s choice of Nonpublic School for Student for the 2022-2023 school year was “proper” under the *Leggett* guidance.

Lastly, the *Leggett* decision requires that the “equities weigh in favor of reimbursement — that is, the parents did not otherwise act ‘unreasonabl[y].” *Leggett*, 793 F.3d at 67. Reimbursement may be “reduced or denied” if the parents failed to notify school officials of their intent to withdraw the child or otherwise acted unreasonably. *Leggett, supra*, 793 F.3d at 63. Petitioner’s attorneys gave notice to DCPS on July 18, 2022 that Student would attend Nonpublic School for the 2022-2023 school year and requested DCPS funding for Student to continue to attend the private school because the parent did not believe that DCPS had offered Student a FAPE. *See* 34 C.F.R. § 300.148(d). DCPS has not shown that Mother acted unreasonably in continuing Student’s unilateral placement at Nonpublic School this school year.

ORDER

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

ORDERED:

DCPS shall fund Student’s covered enrollment expenses at Nonpublic School, not yet paid, for the private school’s 2022-2023 regular school year. Upon receipt of documentation of payment by the parent as may be reasonably required, DCPS shall, without undue delay, reimburse the parent her costs heretofore paid for covered tuition and related expenses for Student’s enrollment at Nonpublic School for the 2022-2023 school year.

Date: November 1, 2022

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
DCPS - SPED
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