

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 24, 2022

PARENT, on behalf of STUDENT, ¹)	
)	
Petitioner,)	Date Issued: November 24, 2022
)	
v.)	Hearing Officer: Peter B. Vaden
)	
)	Case No: 2022-0160
)	
DISTRICT OF COLUMBIA)	Online Videoconference Hearing
PUBLIC SCHOOLS,)	
)	Hearing Dates: November 16 & 18, 2022
Respondent.)	
)	

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 funding from Respondent District of Columbia Public Schools (DCPS) on the grounds that DCPS allegedly denied her 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² Effective July 1, 2022, DCMR Chapter 5E-30 was repealed and replaced by the new Chapter 5A-30.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 September 1, 2022, named DCPS as respondent. The undersigned hearing officer was appointed on September 2, 2022. On September 12, 2022, the parties met for a resolution session and were unable to resolve the issues in dispute. On September 16, 2022, I convened a telephone prehearing conference with counsel to discuss the issues to be determined, the hearing date and other matters. By order issued September 20, 2022, I granted DCPS' unopposed continuance request to extend the final decision due date in this case to December 2, 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 closed to the public, was convened before the undersigned impartial hearing officer on November 16 and 18, 2022. MOTHER appeared online for the hearing and was represented by PETITIONER'S COUNSEL. Respondent DCPS was represented by LEA REPRESENTATIVE and by DCPS' COUNSEL.

Petitioner's Counsel made an opening statement. Mother testified and called as additional witnesses EDUCATIONAL CONSULTANT and NONPUBLIC ADMINISTRATOR. DCPS called as witnesses LEA Representative and MONITORING SPECIALIST.

Petitioner's Exhibits P-1 through P-8, P-10 through P-16 and P-18 through P-23 were admitted into evidence, including Exhibits P-1 through P-3, P-7, P-8, P-12, P-14 through P-16, P-18 and P-22 which were admitted over DCPS' objections. I sustained

DCPS' objections to Exhibit P-17 and to a supplemental exhibit offered by the parent, a letter to NONPUBLIC SCHOOL from the D.C. Office of the State Superintendent of Education (OSSE) dated September 21, 2022. DCPS' Exhibits R-1, R-2, R-2A, R-3 (pages 1-9 only), R-4 through R-14, R-14A, R-15 through R-19 and R-21 were admitted into evidence, including Exhibits R-3 (in part) and R-5 admitted over the parent's objections. I sustained the parent's objection to Exhibit R-20.

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.

ISSUES AND RELIEF SOUGHT

The issues for determination in this case, as set out in the September 16, 2022 Prehearing Order are:

- A. Whether DCPS denied the student FAPE by failing to develop an appropriate IEP, thereby failing to provide an appropriate LRE and placement in the January 25, 2022 IEP, and for the 2022-2023 school year, including inappropriate hours of specialized instruction outside general education necessary to meet Student's special education needs and implement the IEP goals and objectives, and failure to provide an appropriate LRE and placement;
- B. Whether DCPS denied the student FAPE by failing to provide an appropriate educational placement for Student for the 2022-2023 school year and

C. Whether the parent is entitled to reimbursement of all tuition, expenses, costs of related services, fees, and other costs, including any transportation expenses related to the parental unilateral placement at Nonpublic School for the 2022-2023 school year.

For relief, Petitioner seeks an order from the hearing officer requiring DCPS to reimburse the parent for all tuition, fees, costs, including transportation expenses related to the parental placement of Student at Nonpublic School for the 2022-2023 school year and to prospectively fund the student's placement at Nonpublic School, including all related services as necessary to provide a FAPE.

PREVIOUS DUE PROCESS PROCEEDINGS

In a prior Office of Dispute Resolution due process case concerning Student (Case No. 2021-0008), the parent sought private school tuition reimbursement from DCPS for the 2021-2022 school year, based upon her claim, among others, that DCPS had failed to provide Student an appropriate IEP and placement. In the February 26, 2020 IEP at issue in that case, the IEP team had provided for Student to receive five hours per week of specialized instruction services outside general education, five hours per week of specialized instruction inside general education and sixty minutes per month of occupational therapy.

In a May 21, 2021 hearing officer determination (the May 21, 2021 HOD) Impartial Hearing Officer Michael Lazan concluded that DCPS had denied Student a FAPE because the February 26, 2020 IEP failed to provide a sufficient amount of specialized instruction. Hearing Officer Lazan found, *inter alia*, that Student needed

more reading intervention at DCPS to make sustained, meaningful progress in reading; that to make progress in reading, the Student needed additional small group reading intervention; that Student did better in small groups regardless of subject, and that therefore, the February 26, 2020 IEP meeting should have centered on how to provide the Student with additional, more intensive, small group reading. Citing *Florence Cnty. Sch. Dist. Four v. Carter By & Through Carter*, 510 U.S. 7, 114 S. Ct. 361, 126 L. Ed. 2d 284 (1993), Hearing Officer Lazan ordered DCPS to pay the parent tuition reimbursement for Student's expenses at Nonpublic School for the 2020-2021 school year. Exhibit P-1.

On August 27, 2021, the parent filed another Due Process Complaint alleging that DCPS had denied Student a FAPE by failing to provide an appropriate IEP and placement on February 26, 2021 for the 2021-2022 school year. In that proceeding, Case No. 2021-0130, Impartial Hearing Officer Coles Ruff granted, *pendente lite*, the parent's stay-put motion under 20 U.S.C. § 1415(j), and ordered DCPS to fund the Student's continued placement at Nonpublic School during the pendency of the administrative proceedings. Exhibit P-2. The parent and DCPS later settled that case and Student remained at Nonpublic School for the 2021-2022 school year. For the current, 2022-2023, school year, DCPS is funding Student's stay-put placement at Nonpublic School during the pendency of the proceedings in this case. Representation of Petitioner's Counsel.

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 an Other Health Impairment - Attention Deficit Disorder or Attention Deficit Hyperactivity Disorder (OHI-ADHD). Exhibit P-6.
3. In a March 2019 Neuropsychological Evaluation Report, NEUROPSYCHOLOGIST reported, *inter alia*, that Student presented with many remarkable strengths and had the potential to make excellent progress. Neuropsychologist's findings reflected the presence of average reasoning skills. Qualitative observation and formal test findings reflected ongoing language-based vulnerabilities for Student, particularly in regard to more complex sentence formulation, word retrieval, and language organization. This was considered to be consistent with a mild language disorder. Student displayed good working memory, sentence memory, and narrative memory. Formal testing indicated difficulty focusing and sustaining attention, inhibiting impulses, following multi-step instructions, and working with speed and accuracy, which suggested that Student was likely to struggle with problem-solving efficiency, planning, organization, and task-monitoring. Neuropsychologist wrote that Student would be expected to display varying levels of

attention, impulse control, organization, and frustration tolerance depending on his/her level of interest in/mastery of a particular task/activity. While Student performed within TEST YEAR GRADE expectations on tests of paper-and-pencil math and basic sentence-writing, he/she displayed weak mastery of foundational language-based literacy skills, including grasp of phonology and his/her naming speed. Student's abilities on tests of sight-word identification, phonetic decoding, spelling, reading fluency, and reading comprehension spanned from the early kindergarten to the mid 1st grade level, with skills clustering for the most part at the early 1st grade level of proficiency. Reports from teachers indicated that Student's reading ability ranked well below grade expectations and was impacting his/her learning across academic domains. Neuropsychologist reported a diagnosis for Student of a learning disorder affecting reading. She noted that this diagnosis overlapped with that of dyslexia, which refers to the ability to read words accurately and fluently. In line with his/her reading disorder, attention disorder, and language disorder, Student also struggled with academic fluency more generally, as well as language-based math. Neuropsychologist diagnosed Student with ADHD - Combined Presentation, Language Disorder/Mixed Receptive-Expressive Language Disorder and Specific Learning Disorder with Impairment in Reading.

Exhibit P-3.

4. For school services and supports, Neuropsychologist recommended, *inter alia*, that Student required IEP services and supports including access to a stimulating academic curriculum, in the context of a classroom environment that offered high levels

of structure, predictability, and routine, as well as a nurturing, supportive, and tolerant perspective; typical supports required by students with identified difficulties in attention/executive functioning, including the mindful provision of directions, preferential seating, and the use of multi-modal instruction (including visual supports during verbal instruction, and opportunities for “hands-on”/experiential learning); specialized instruction in reading provided for 45-60 minutes on a daily basis, by an appropriately trained and experienced professional (*i.e.*, special education teacher/literacy specialist) in a one-to-one or small group setting, and speech and language therapy to target oral expression and vocabulary. Exhibit P-3. In its June 2019 review of Neuropsychologist’s evaluation, DCPS waived conducting its own evaluation of Student. Exhibit P-4. Neuropsychologist’s March 2019 evaluation is the most recent psychological evaluation report on Student. Testimony of Educational Consultant.

5. For the 2021-2022 school year, Student attended Nonpublic School. On January 25, 2022, DCPS’ central office convened an IEP team meeting for the annual update of Student’s DCPS IEP. The January 2022 IEP team incorporated into the IEP present levels of performance data for Student provided by Nonpublic School. Testimony of Nonpublic Administrator. For descriptions of how Student’s disability affects his/her access to, and progress in, the general education curriculum, the January 25, 2022 IEP team reported, *inter alia*, that Student’s disability has made accessing the general education curriculum difficult in math, reading and written expression without

special education support. For math, the IEP team reported that Student's attention issues have an impact on his/her access to the general education environment as he/she needs constant repetition and check-ins to insure he/she has an understanding of the subject matter; that Student should be given small group instruction within the classroom and given wait time on questions; that Student displays receptive language and expressive language challenges that affect his/her ability to recall and reproduce specific math terms and apply them as required to math learning; that Student's executive function deficits in planning, organization and management during class inhibit work completion and that Student becomes easily distracted in the classroom setting which affects his/her ability to receive and process directions and instruction.

The IEP team reported that for reading, Student's disability has made accessing the general education curriculum difficult without small group/co-teaching support; that Student understands words, but has difficulty understanding the meanings of words; that Student should be given a scaffolded text and small group reading instruction to access the general education curriculum; that Student's attention issues and executive functioning struggles affect his/her ability to access the general education curriculum; that Student inconsistently completes class and homework; that Student works best with a co-teaching classroom where he/she can access the general education curriculum while receiving scaffolds that gives him/her the ability to access the general education curriculum; that Student's word retrieval, memory weaknesses, organization and executive functioning skills negatively impact his/her reading and that Student's

attention issues have an impact on his/her access to the general education environment as he/she needs constant repetition and check-ins to insure he/she has an understanding of the subject matter.

The IEP team reported for written expression that Student's difficulty in writing has made accessing the general education curriculum difficult without small group support; that Student exhibits poor handwriting skills and spatial organization; that he/she has difficulty maintaining relevance to writing topics, inconsistently completes class work and leaves assignments half-finished; that Student has difficulty maintaining focus on a task and staying on topic; that Student's poor executive function impacts his/her ability to begin a writing task; that Student's writing conventions, such as consistent use of capitalization, spacing of letters within words and spacing between words, and cursive writing, continue to need individual support; that Student's difficulty with focus and attention greatly impact work completion within the class time period and that Student's attention issues have an impact on his/her access to the general education environment when writing, as he/she needs constant repetition and check-ins to insure an understanding of the subject matter.

Exhibit P-5.

6. For special education and related services, the January 25, 2022 DCPS IEP provided for Student to receive a total of 13 hours per week of Special Education Services. These hours included 5 hours per week outside general education for Reading, 2 hours per week in general education for Written Expression and 3 hours per week in

general education and 3 hours per week outside general education for Mathematics. The IEP also provided for 60 minutes per month of Occupation Therapy for Student and 1 hour per week of Specialized Instruction Consultation Services. For other classroom aids and services, the January 25, 2022 IEP provided for, *inter alia*, small group instruction, activity and movement breaks; flexible seating; modified and shortened assignments, extended time during testing and visual aids such as graphic organizers, sentence starters, and sentence stems during ELA. Exhibit P-5.

7. In a January 27, 2022 Prior Written Notice (PWN), DCPS gave notice that the parent disagreed with the District's proposed 13.25 hours per week of specialized instruction and 60 minutes per month of OT for Student and that the parent and the Nonpublic School team indicated that Student required a "full time IEP." Exhibit P-6.

8. By letter of August 8 2022, Petitioner's Counsel provided notice to DCPS, pursuant to 34 C.F.R. § 300.148(c)(1)(ii), that the parent maintained that DCPS' proposed January 25, 2022 IEP remained inappropriate for Student as she required specialized instruction across all content areas and for all portions of the school day. In that letter, Petitioner's Counsel informed DCPS that the parent would unilaterally place Student at Nonpublic School for the 2022-2023 school year and would be seeking reimbursement from DCPS for all tuition, fees, costs, and related expenses, including any related services and transportation, for Student to attend the private school. Exhibit P-19. By letter of August 18, 2022, DCPS' DIRECTOR-RESOLUTION TEAM responded to the parent that it was DCPS' position that it had made a FAPE available to Student

with an appropriate IEP and a placement in the least restrictive environment at CITY SCHOOL, and that DCPS did not agree to bear the cost of a private placement for Student. Exhibit P-20.

9. Nonpublic School is located in the District of Columbia. The typical learning profile is a student of average to above average intelligence, who has a language-based learning disability. Nonpublic School serves students with OHI, Specific Learning Disability, Speech-Language Impairment and Multiple Disabilities impairments. Nonpublic School has a 180-day school year. Nonpublic School holds a current certificate of approval (COA) issued by OSSE. The annual tuition is \$56,000. Testimony of Nonpublic Administrator.

10. In March 2022, OSSE issued a Corrective Action Plan to Nonpublic School, because Nonpublic School was not meeting OSSE personnel regulations. Specifically, a large portion of the DCPS-funded Students at Nonpublic School were being instructed by teachers not certified in special education. Testimony of Monitoring Specialist. At the due process hearing, Nonpublic Administrator testified that Nonpublic School had met the requirements of the Corrective Action Plan and that the plan had been closed in September 2022. By email to the hearing officer sent November 21, 2022, Petitioner's Counsel acknowledged that Nonpublic Administrator had erred in her testimony. I find that the March 2022 Corrective Action Plan issued by OSSE to Nonpublic School has not been closed.

11. Student has attended Nonpublic School since the 2019-2020 school year.

Nonpublic School does not have grade levels, but Student is currently in what would be considered GRADE at a regular DCPS school. At Nonpublic School, Student struggles with sustaining attention and is affected by internal and external distractions. Student is a laborious decoder in reading and has slow fluency, which impacts his/her reading comprehension and his/her ability to keep up with the flow. Testimony of Nonpublic Administrator.

12. Student has a daily 2:1 reading class with the reading teacher and one other student. This is progress over the 2021-2022 school year, when Student required 1:1 reading instruction. The majority of Student's other classes at Nonpublic School have around 9 students. There are 2 instructors for writing class, theater and physical education. Testimony of Nonpublic Administrator.

13. Since January 2022, Student has made about a year's worth of growth in reading. Testimony of Nonpublic Administrator. In reading class, he/she will now re-read sentences to correct errors. This impacts Student's ability to comprehend. Student is now about 2-3 years behind grade level in reading. Student has shown some improvement in attention skills and impulsivity, but distractibility still impacts him/her. In a recent classroom observation, Student was observed getting up out of his/her seat, talking to a peer, showing frustration and not self-advocating. Testimony of Educational Consultant.

14. In an email exchange between Petitioner's Counsel and DCPS' Counsel on September 12, 2022, Petitioner's Counsel sought confirmation of Student's stay-put

status at Nonpublic School. DCPS' Counsel responded that there had been no interruption of OSSE's payments to Nonpublic School and that those payments would "continue pending the outcome of this litigation." Exhibit P-22.

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, the parent in this case, 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 her September 1, 2022 due process complaint, the parent requested the hearing officer to order DCPS to reimburse her for all expenses related to her placement

of Student at Nonpublic School for the 2022-2023 school year and to place and fund Student there for the 2022-2023 school year. *See* Prehearing Order, September 16, 2022. In fact, since the start of the 2022-2023 school year, OSSE has funded Student's enrollment at Nonpublic School under the IDEA's stay-put provision.³ At this point, therefore, the parent does not have a reimbursement claim against DCPS. But the parent may still seek DCPS funding for Student's prospective placement at the private school for the remainder of the 2022-2023 school year. *See, e.g., McKenzie v. Smith*, 771 F.2d 1527 (D.C. Cir. 1985) (Upon finding that DCPS had failed to provide an appropriate placement for the child, the district court acted within its discretion when it ordered placement in the only program supported by any evidence in the record. *Id.* at 1534-35.)

The parent's prospective placement claim is founded on her allegation that in its January 25, 2022 IEP, DCPS failed to offer Student adequate special education services in an appropriate educational setting. DCPS' proposed January 25, 2022 IEP would have provided Student 13 hours per week of Special Education Services, divided between pull-out (8 hours per week) and push-in (5 hours per week) special education. The parent contends that these services were not appropriate because Student required

³ 34 C.F.R. § 300.518 Child's status during proceedings.

(a) Except as provided in § 300.533, during the pendency of any administrative or judicial proceeding regarding a due process complaint notice requesting a due process hearing under § 300.507, unless the State or local agency and the parents of the child agree otherwise, the child involved in the complaint must remain in his or her current educational placement.

full-time special education services.

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. Therefore, I move to the second prong of the *Rowley* inquiry: Was DCPS’ proposed January 25, 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 pronounced 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 has attended Nonpublic School, a special education day school, since the beginning of the 2019-2020 school year. This is a full-time special education program. Petitioner’s expert, Educational Consultant, testified that Student still needs specialized instruction, in a small group setting, throughout the school day due to his/her weaknesses in reading, written expression, executive functioning and organization and processing speed. Educational Consultant credits the daily 2:1 explicit reading instruction, which Student receives at Nonpublic School, for the “amazing” progress Student has made since January 2022, but maintains that Student still requires special education support in anything that requires reading. The parent’s other expert, Nonpublic Director, opined that the 13 hours of special education proposed in the January 25, 2022 IEP would not suffice for Student to make progress on the DCPS IEP goals. I find that the parent has established a *prima facie* case that the January 25, 2022 IEP was not appropriate for Student. Therefore, DCPS must shoulder the burden of persuasion on the appropriateness of the proposed program.

DCPS’ expert, LEA Representative, agreed in her testimony that under the proposed DCPS IEP, Student would not have the in-school support of a special educator

for 17 hours per week. She, nonetheless, opined that DCPS' proposed January 25, 2022 IEP was appropriate to meet Student's learning needs. However, the January 25, 2022 IEP team agreed that Student's disability has made accessing the general education curriculum difficult without special education support; that Student requires constant repetition and check-ins and that he/she needs small group instruction in math, reading and written express and co-teaching support in the classroom to access the general education curriculum. I find that LEA Representative did not credibly explain how, with Student's undisputed need for small group instruction in math, reading and written expression, as well as his/her deficits in reading generally, and in attention and executive functioning, he/she would be likely to make appropriate educational progress in the general education setting for the majority of the school week, without the in-class support of a special educator.

DCPS' witness, Monitoring Specialist, also testified that he believed that the hours on the January 25, 2022 IEP were sufficient to implement Student's IEP goals and objectives. This DCPS employee has never been a special educator and did not attend Student's IEP meetings. I did not find his opinion on the appropriateness of the proposed IEP service hours was due was due much weight.

In sum, I conclude that DCPS did not offer a "cogent and responsive explanation" for how the January 25, 2022 IEP team's decision to place Student mostly in a general education setting, with 13 hours total per week of special education, was reasonably calculated to enable Student to make progress appropriate in light of his/her

circumstances.⁴ *See Endrew F.*, 137 S.Ct. at 1002. I find that DCPS did not meet its burden of persuasion that the proposed January 25, 2022 IEP offered Student a FAPE.

For relief in this case, the parent requests that DCPS be ordered to place and fund Student at Nonpublic School for the remainder of the 2022-2023 school year. Although the parent initially brought this matter as a private school reimbursement case, since OSSE has actually funded Student's enrollment at Nonpublic School this school year under the IDEA's stay-put provision, I find that the requested relief should be analyzed as a prospective placement claim.

In *Branham v. Gov't of the District of Columbia*, 427 F.3d 7 (D.C. Cir. 2005), the D.C. Circuit recognized a set of factors to determine whether a prospective placement is appropriate for a student:

Specifically, courts have identified a set of considerations "relevant" to determining whether a particular placement is appropriate for a particular student, including the nature and severity of the student's disability, the student's specialized educational needs, the link between those needs and the services offered by the private school, the placement's cost, and the extent to which the placement represents the least restrictive educational environment. . . . Because placement decisions implicate equitable considerations, moreover, courts may also consider the parties' conduct.

Branham, 427 F.3d at 12 (citations omitted). With respect to the appropriateness of the Nonpublic School program for Student, I will address each of these considerations in

⁴ 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 13.25 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.

turn.

a. Nature and Severity of Student's Disability

Student's IDEA disability is Other Health Impairment - Attention Deficit Hyperactivity Disorder (OHI-ADHD). In Student's last psychological evaluation conducted in 2019, Neuropsychologist diagnosed Student with ADHD - Combined Presentation, Language Disorder/Mixed Receptive-Expressive Language Disorder and Specific Learning Disorder with Impairment in Reading.

b. Student's Specialized Educational Needs

Neuropsychologist recommended that Student required a classroom environment that offered, *inter alia*, high levels of structure, predictability, and routine, opportunities for "hands-on"/experiential learning); specialized instruction in reading provided for 45-60 minutes on a daily basis, by an appropriately trained and experienced professional in a one-to-one or small group setting, and speech and language therapy to target oral expression and vocabulary. The January 25, 2022 IEP team agreed that for math, reading and written expression, accessing the general education curriculum was difficult for Student without small group support.

c. Link between Student's Needs and the Services Offered by Nonpublic School

Nonpublic School is a special education day school in the District of Columbia, which serves children with language-based learning disabilities. As compared to a general education school, Nonpublic School offers small class size for all classes and, for

Student, daily intensive 2:1 specialized reading instruction. Nonpublic School serves students, like Student who have been diagnosed with ADHD as well as learning disabilities.

At the hearing in this case, as in prior cases involving Nonpublic School, DCPS sought to introduce evidence that Nonpublic School was not appropriate for Student because of the school's alleged failure to meet OSSE staffing and program requirements. I excluded most of this proffered evidence because Nonpublic School holds a current COA 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).

d. Cost of Placement at Nonpublic School

The annual tuition at Nonpublic School is approximately \$56,000. DCPS has not shown that Nonpublic School's annual tuition cost is out of line with other OSSE-approved day schools for students with similar disabilities.

e. Least Restrictive Environment

The IDEA contemplates a continuum of educational placements to meet the needs of students with disabilities. Depending on the nature and severity of the disability, a student may be instructed in regular classes, special classes, special schools, at the home, or in hospitals and institutions. *See* 5E DCMR § 3012, 20 U.S.C. §

1412(a)(5), 34 CFR § 300.115. The IDEA requires that students with disabilities be placed in the “least restrictive environment” so that they can be educated in an integrated setting with students who are not disabled to the maximum extent appropriate. *See, e.g., Smith v. District of Columbia*, 846 F.Supp.2d 197, 200 (D.D.C. 2012).

While DCPS credibly contends that Student could be successfully educated in a less restrictive environment than a full-time special education day school, DCPS has not offered a placement which provides the intensive level of special education support which Student needs for most classes. *See Leggett v. District of Columbia*, 793 F.3d 59, 72 (D.C. Cir. 2015) (Parent’s private school placement was the only program supported by any evidence in the record that could plausibly offer educational benefit to the child.) Moreover, the least restrictive setting factor in *Branham* is of less importance than the IDEA’s “primary goal of providing disabled students with an appropriate education.” *See Q.C-C. v. District of Columbia*, 164 F. Supp. 3d 35, 55 (D.D.C. 2016) (quoting *Carter By & Through Carter v. Florence Cty. Sch. Dist. Four*, 950 F.2d 156, 160 (4th Cir. 1991), *aff’d*, 510 U.S. 7, 114 S. Ct. 361, 126 L. Ed. 2d 284 (1993)).

Considering the factors from the *Branham* decision, I conclude that Petitioner has established that the Nonpublic School program is appropriate for Student and I will order DCPS to fund Student’s placement there for the remainder of the 2022-2023 school year.

ORDER

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

ORDERED:

1. DCPS shall fund Student's covered private school enrollment expenses at Nonpublic School, not yet paid, including special education transportation expenses, for the remainder of the private school's 2022-2023 regular school year.
2. All other relief requested by the Petitioner herein is denied.

Date: November 24, 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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