

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

OSSE
Office of Dispute Resolution
October 23, 2021

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| PARENT, |) | |
| on behalf of STUDENT, ¹ |) | |
| |) | Case No: 2021-0099 |
| Petitioner, |) | |
| |) | Hearing Officer: Peter Vaden |
| v. |) | |
| |) | Online Video Conference Hearing |
| DISTRICT OF COLUMBIA |) | |
| PUBLIC SCHOOLS, |) | Hearing Dates: September 9, 13, |
| |) | and 14, 2021; October 6, 2021 |
| Respondent. |) | |

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| DISTRICT OF COLUMBIA |) | |
| PUBLIC SCHOOLS, |) | |
| |) | |
| Petitioner, |) | |
| |) | |
| v. |) | Case No: 2021-0108 |
| |) | |
| PARENT, |) | |
| on behalf of STUDENT, |) | |
| |) | |
| Respondent. |) | |

HEARING OFFICER DETERMINATION

INTRODUCTION AND PROCEDURAL HISTORY

This matter came to be heard upon consolidated Administrative Due Process Complaint Notices filed by the parent (Parent or Mother), Case No. 2021-0099, and by District of Columbia Public Schools (DCPS), Case No. 2021-0108, 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.

¹ Personal identification information is provided in Appendix A.

Regs.”). In Case No. 2021-0099, the Parent seeks private school tuition funding from 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 the student an appropriate Individualized Education Program (IEP) and educational placement for the 2021-2022 school year. In Case No. 2021-0108, DCPS seeks a determination that its proposed IEP and placement for Student for the 2021-2022 school year were appropriate.

In Case No. 2021-0099, the Parent’s due process complaint, filed on July 22, 2021, named DCPS as Respondent. DCPS’ due process complaint in Case No. 2021-0108, filed on August 4, 2021, named the Parent as Respondent. The undersigned hearing officer was appointed on July 26, 2021 and August 5, 2021 in the respective cases.

In Case No. 2021-0108, on August 11, 2021, Parent, by counsel, filed a Notice of Insufficiency which I overruled by order issued August 12, 2021. Also, on August 11, 2021, Parent filed a motion to dismiss DCPS’ complaint and a motion *in limine* to bar DCPS from arguing legal positions regarding whether it offered Student a FAPE for the 2020-2021 school year. By order issued August 20, 2021, I sustained Parent’s motion to dismiss DCPS’ request for a determination that it offered a FAPE to Student for the 2020-2021 school year. In the same order, I denied Parent’s motion to dismiss DCPS’ claims concerning the 2021-2022 school year and denied, without prejudice, Parent’s motion *in limine*.

In the prehearing conference on August 10, 2021, I granted the parties' consent request to consolidate Case No. 2021-0108 with Case No. 2021-0099, On August 11, 2021, Parent, by counsel, followed up with a formal motion to consolidate Case No. 2021-0108 with Case No. 2021-0099.

On August 5, 2021, the parties met for a resolution session for Case No. 2021-0099 and were unable to resolve the issues in dispute. Because Case No. 2021-0108 was brought by the school division, no resolution session was required.

On August 10, 2021, I convened a telephone prehearing conference with counsel to discuss the issues to be determined in the consolidated cases, the hearing date and other matters. The due process hearing was initially set for September 9, 13 and 14, 2021. An additional hearing session, for oral argument, was convened on October 6, 2021. By orders issued August 18, 2021 and September 28, 2021, I granted the parties' unopposed continuance requests to extend the final decision due dates in the consolidated cases, ultimately to October 24, 2021.

Due to the COVID-19 pandemic concerns, the due process hearing was held online and recorded, using the Microsoft Teams video conference platform. The hearing, which was closed to the public, was convened before the undersigned impartial hearing officer on September 9, 13 and 14 and October 6, 2021. The Parent appeared online for the hearing and was represented by PARENT'S COUNSEL and PARENT'S CO-COUNSEL. Respondent DCPS was represented by PROGRAM SPECIALIST and by DCPS' COUNSEL.

Counsel for the Parent made an opening statement. Parent called as witnesses Mother, EDUCATIONAL CONSULTANT and PRIVATE SCHOOL SPEECH-LANGUAGE PATHOLOGIST (SLP). DCPS called as witnesses ENGLISH LANGUAGE LEARNER (ELL) MANAGER, DCPS OCCUPATIONAL THERAPIST (OT), SCHOOL PSYCHOLOGIST, RESOLUTION SPECIALIST, Program Specialist, DCPS SLP, DCPS SOCIAL WORKER, DCPS READING SPECIALIST, and FORMER LEA REPRESENTATIVE. Parent and Educational Consultant were recalled as rebuttal witnesses for Parent.

Parent's Exhibits P-1 through P-3 and P-5 through P-15 were admitted into evidence, including Exhibits P-9 and P-13 admitted over DCPS' objections. Exhibit P-4 was withdrawn. DCPS' Exhibits R-2 through R-8, R-15, R-16, R-19, R-20, R-23 through R-32, R-33 (Pages 6, 7, 10, 11, 15-22 and 28), R-34 through R-39 and R-44 were admitted into evidence, including Exhibits R-2 through R-8, R-15, R-16, R-19, R-20, R-25 through R-27, R-30, R-33 (in part) and R-36 admitted over Parent's objections. I sustained Parent's objection to Exhibit R-10.

After the Parent rested in Case No. 2021-0099, DCPS, by counsel, made an oral motion for a directed finding that the Parent had not made a *prima facie* showing that the District's proposed IEP and educational placement for Student were not appropriate. I denied the motion.

On the last day of the hearing, counsel for the respective parties made oral closing arguments. The parties were granted leave until October 12, 2021 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-E, § 3029.

ISSUES AND RELIEF SOUGHT

The issues remaining for determination in these consolidated cases are:

Did DCPS deny Student a FAPE by failing to propose an appropriate IEP and placement for Student for the 2021-2022 school year?

Was the IEP and placement proposed by DCPS for Student for the 2021-2022 school year appropriate and did DCPS make a FAPE available to the student?

Is NONPUBLIC SCHOOL a proper placement for Student for the 2021-2022 school year?

For relief, the Parent requests that DCPS be ordered to fund Student at Nonpublic School for the 2021-2022 school year, with all related fees and costs. For its part, DCPS seeks an order from the hearing officer and specific findings that a FAPE was offered by DCPS to Student for the 2021-2022 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. Student is eligible for special education and related services as a student with

Multiple Disabilities (MD) based on coexisting impairments, Specific Learning Disability (SLD) and Other Health Impairment-Attention Deficit Hyperactivity Disorder (OHI-ADHD.) Exhibit P-7.

2. At the beginning of the 2016-2017 school year, Mother unilaterally placed Student at Nonpublic School. In a prior case before this hearing Officer, Case No. 2017-0044, Mother sought reimbursement and/or funding from DCPS for tuition and related expenses for Student's 2016-2017 school year. In a Hearing Officer Determination issued June 13, 2017 (the June 13, 2017 HOD), I determined that DCPS established that its initial March 24, 2016 IEP was appropriate for Student, but concluded that DCPS did not meet its burden of persuasion that its proposed March 20, 2017 IEP, which offered Student 10 hours per week of Special Education, including 3 hours outside general education, was adequate. In the June 13, 2017 HOD, I ordered DCPS to reimburse Mother for Student's enrollment expenses at Nonpublic School for the period March 21, 2017 through the end of the school year. Exhibit R-11. The Parent unsuccessfully appealed my finding that the 2016 IEP was appropriate to the U.S. District Court. *See Exhibits R-12, R-13.*

3. Also, in the June 13, 2017 HOD, this hearing officer found that Student needed to be in a small classroom setting for at least all academic subjects, but the evidence in that case did not support the Parent's claims that Student required segregation from nondisabled peers for the entire school day or that Student could not

attend electives and specials classes with nondisabled peers. That part of the June 13, 2017 HOD was not appealed by the Parent. Exhibits R-11, R-12, R-13.

4. Student has continued to attend Nonpublic School through the present 2020-2021 school year. Testimony of Mother. Since 2017, Mother has filed new due process complaints against DCPS seeking District funding for Student's continued enrollment at Nonpublic School. These subsequent cases were ended by settlements, dismissal orders or withdrawal by the Parent. In the most recent prior case, Case No. 2021-0060, on July 26, 2021, I granted the Parent's motion to withdraw her complaint, without prejudice and subject to conditions. Although none of the subsequent administrative proceedings resulted in a substantive determination that DCPS had denied Student a FAPE, DCPS continued to fund Student's enrollment at Nonpublic School through the 2020-2021 school year, pursuant to settlements with the Parent or under the IDEA's stay-put provision, 20 U.S.C. § 1415(j), and its implementing regulations.² Hearing Officer Notice.

5. There has never been a determination by an LEA IEP team or by a hearing officer or Court that the severity of Student's disability is such that education in regular classes for at least part of the school day, with the use of supplementary aids and services cannot be achieved satisfactorily. Hearing Officer Notice.

² For additional background on prior cases, see Decision and Order on Parent's Motion for Enforcement of Stay-put Rights in Case No. 2021-0060 (June 28, 2021) between the same parties.

6. In early 2020, DCPS School Psychologist conducted a Comprehensive Psychological Reevaluation of Student to obtain updated information regarding Student's cognitive, academic and social-emotional functioning. In a March 23, 2020 evaluation report, School Psychologist reported that on the Wechsler Intelligence Scale for Children Fifth Edition (WISC-V), Student's cognitive functioning fell within the Average range (FSIQ = 88). Academically, on the Woodcock-Johnson IV Tests of Achievement (WJ IV ACH), Student's Broad Reading (SS = 53), Broad Math (SS = 61) and Broad Written Language (SS = 69) skills fell within the Very Low range. Student's reading decoding (SS = 61), reading comprehension (SS = 69), sentence reading fluency (SS = 53), phonic (SS = 65) skills, and oral reading skills (SS = 65) and spelling (SS = 60) all fell within the Very Low range. Student's basic writing skills (SS = 88) fell within the Low Average range. Sentence writing fluency skills (SS = 77) fell within the Low range. Student's basic math calculation (SS = 56) and math facts fluency skills (SS = 69) fell within the Very Low range while Student's applied math reasoning skills (SS = 73) fell within the Low range. Student also presented with attention problems for which he/she was being medicated. Results from the Conners 3rd Edition (Conners 3) teacher and parent forms reported elevated or very elevated in the areas of Inattention, Hyperactivity/Impulsivity, Learning Problems and Executive Functioning subscales. In addition, teacher concerns were elevated in the areas of Defiance/Aggression and Peer Relations. Results of the Conners 3 forms indicated that Student demonstrated significant difficulties with maintaining concentration and attention, impulsivity and

executive functioning that were significantly impacting Student's academic progress. School Psychologist found that Student met criteria for special education services as a student with Multiple Disabilities (SLD and OHI). Exhibit P-3.

7. On April 7, 2021, Nonpublic School staff developed an updated IEP (the Private School IEP) for Student. The Private School IEP addressed Student's purported needs in Reading, Written Language, Math, Academic Behavior/Executive Functioning, Social Behavioral, Speech-Language, Occupational Therapy and Psychological Services. Exhibit P-5.

8. On April 8, 2020, the DCPS multidisciplinary team determined that Student continued to be eligible for special education and related services under the MD disability category for SLD and OHI-ADHD. Exhibit R-30.

9. In spring 2021, DCPS prepared a draft annual IEP for Student which it provided to the Parent's representatives. On April 15, 2021, Educational Consultant provided feedback and requested changes to the draft IEP, notably requesting that the data from the Private School IEP be incorporated into the DCPS IEP. Educational Consultant also objected that the DCPS draft IEP provision for 20 hours per week of Specialized Instruction Services was "not enough." Exhibit P-6.

10. On April 19, 2021, DCPS convened a meeting of Student's DCPS IEP team for the annual review of Student's DCPS IEP. Mother, Parent's Co-Counsel, Educational Consultant and several Nonpublic School staff members attended the meeting. DCPS' draft IEP identified Mathematics, Reading, Written Expression, Communication/

Speech and Language, Emotional-Social-Behavioral Development and Motor Skills/ Physical Development as areas of concern for Student. The draft IEP proposed for Student to be provided 20 hours per week of Specialized Instruction Services, 180 minutes per month of OT services, 240 minutes per month of Speech-Language Pathology (SLP) services, and 120 minutes per month of Behavioral Support Services (BSS), all outside the general education setting. In addition the draft IEP provided for consultative services in OT, SLP and BSS. The IEP review was not completed at the April 19, 2021 meeting. A second meeting was scheduled for June 3, 2021. Exhibits R-35, R-36.

11. Student's DCPS IEP team was reconvened on June 3, 2021. Mother, Parent's Co-Counsel, Educational Consultant and Nonpublic School staff members attended the meeting. Over the objection of Mother and her representatives, the IEP team agreed to offer Student 20 hours per week of SIS outside the general education setting in a Specific Learning Support (SLS) classroom with 12 or less students. Student would be in this setting for all academic classes (math, reading, writing, social studies, and science). Mother objected that the proposed placement was not sufficient for Student. Educational Consultant said that the progress Student was making was directly tied to Student's education at Nonpublic School. Parent's Co-Counsel asserted that Student needed a full-time special education school and asked which SLS Program would be recommended. For related services, the DCPS IEP provided for 240 minutes per month of SLP, 180 minutes per month of OT and 120 minutes per month of BSS.

The IEP team agreed on the related services and accommodations and modifications in the June 3, 2021 IEP. Exhibits R-36, R-37. The resulting IEP was finalized on June 10, 2021 (the June 10, 2021 IEP). (Exhibits P-7, R-35.)

12. The June 10, 2021 IEP does not identify executive functioning as a separate area of concern for Student or provide specific annual goals for executive functioning. In DCPS IEPs, executive functioning may be addressed in Classroom Aids and Services and occupational therapy sections. Testimony of DCPS OT. In the June 10, 2021 IEP, Student's executive functioning challenges are addressed in the OT section, in Classroom Aids and Services and in the Social-Emotional area. Testimony of DCPS OT, Testimony of DCPS Social Worker.

13. By letter of June 30, 2021, DCPS notified Mother that CITY SCHOOL had been identified for school year 2021-2022 as the location of special education services for Student and that City School had the programming in place to implement Student's educational and IEP needs. Exhibit R-38.

14. By letter of August 4, 2021, Parent's Counsel gave notice to DCPS that the Parent did not believe that an appropriate special education program had been identified or offered by DCPS for Student and that Student would continue to attend Nonpublic School for the 2021-2022 school year. Parent's Counsel requested that DCPS place and fund Student at Nonpublic School and reserved the right to seek funding for that placement if DCPS refused the Parent's request for funding. Exhibit P-11.

15. DCPS responded by letter of August 13, 2021, in which the DCPS representative asserted, *inter alia*, 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 the City School Specific Learning Support classroom. The DCPS representative stated that if the Parent chose not to enroll Student at City School, DCPS would consider Student to be a parentally-placed private school student. Exhibit P-11.

16. City School has three grade levels with a total of approximately 1,500 students. Testimony of Former LEA Representative.

17. On July 13, 2021, Mother wrote Former LEA Representative to request to visit City School to investigate how the school would propose to implement the June 3, 2021 IEP. A visit was arranged for August 12, 2021 in which Mother and Educational Consultant participated. At that time, school was not in session and Mother was not able to see actual programming. On August 18, 2021, Mother sent a follow-up letter to Former LEA Representative with 25 questions about the proposed program for Student at City School. Exhibits P-12, P-13. Mother did not receive a response to the August 18, 2021 email. Testimony of Mother. Former LEA Representative did not respond to Mother's August 18, 2021 email because he was no longer the LEA Representative for City School. Testimony of Former LEA Representative.

18. Nonpublic School is an independent school in the District of Columbia for students with language-based difficulties. The total enrollment is around 388 students in grades 1 through 12. All students enrolled at Nonpublic School have disabilities.

Nonpublic School holds a Certificate of Approval from the D.C. Office of the State Superintendent of Education (OSSE). Testimony of Nonpublic School SLP.

19. Student's math and reading classes at Nonpublic School are small. There are 3 students this year in Student's reading class. Student's other classes can be larger, up to about 10 student in the class. Testimony of Private School SLP.

20. Student has significant challenges in reading. Student is still someone who is learning to read, as opposed to reading to learn. Testimony of Educational Consultant. In fall 2018, Student's instructional baseline in reading was at the Pre-Primer level. Exhibit R-23. In spring 2020, Student's Broad reading skills, assessed with the WJ-IV ACH, fell within the Very Low range. In spring 2021, as assessed by Nonpublic School, Student's independent reading (reading without any assistance) was at the 2.5 level. At the instructional level, where Student was able to read with some assistance, Student was at the 3.5 level. Exhibit R-35, Testimony of Program Specialist, Testimony of Reading Specialist.

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, Parent in Case No. 2021-0099 and DCPS in Case No. 2021-0108, 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 public agency, the agency shall hold the burden of persuasion on the appropriateness of the proposed IEP or placement; provided that the parent shall retain the burden of production and shall establish a *prima facie* case before the burden of persuasion falls on the agency. Here, Mother has established a *prima facie* case that DCPS' proposed June 10, 2021 IEP and proposed City School location were not appropriate for Student. DCPS, therefore, holds the burden of persuasion on the appropriateness of the program and placement it proposed for Student for the 2021-2022 school year. The burden of persuasion shall be met by a preponderance of the evidence. See D.C. Code § 38-2571.03(6).

Analysis

Did DCPS deny Student a FAPE by failing to propose an appropriate IEP and placement for Student for the 2021-2022 school year? (Case No. 2021-0099)

Were the IEP and placement proposed by DCPS for Student for the 2021-2022 school year appropriate and did DCPS make a FAPE available to the student? (Case No. 2021-0108)

Student has attended Nonpublic School, a private special education day school in the District of Columbia, since the start of the 2016-2017 school year. Since March of 2017, DCPS has funded Student's attendance at Nonpublic School pursuant to hearing officer orders or by agreement with the Parent. However, throughout this period, DCPS has maintained that it has offered Student appropriate special education programming within the public school system. In the current due process proceeding, Mother seeks

funding from DCPS for Student's continued placement at Nonpublic School for the 2021-2022 school year. For its part, DCPS seeks a finding that it made FAPE available to Student with its offer of the June 10, 2021 IEP and proposed placement at City School and that the District should not be required to continue to fund Student's enrollment at Nonpublic School.

Since DCPS is apparently currently funding Student's enrollment at Nonpublic School under the IDEA's stay-put provision, 20 U.S.C. § 1415(j), the Parent has not technically incurred private-school expenses for the 2021-2022 school year.

Notwithstanding, the Parent has unilaterally placed Student at Nonpublic School and she would be responsible for the private school costs, but for the IDEA's stay-put mandate. I find, therefore, that the IDEA standards for reimbursement of parents for unilateral placements at private schools is applicable to this case.

As U.S. District Judge Rosemary M. Collyer, explained in *R.B. v. District of Columbia*, No. CV 18-662, 2019 WL 4750410, (D.D.C. Sept. 30, 2019), the IDEA authorizes reimbursement to parents for private-school expenses under certain circumstances:

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." *Leggett v. District of Columbia*, 793 F.3d 59, 66-67 (D.C. Cir. 2015) (citing *Florence Cty. Sch. Dist. Four v. Carter By and Through Carter*, 510 U.S. 7, 15-16 (1993)).

R.B., *supra* at 7. 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).

This is often cited as the *Burlington Carter* test.

Applying the *Burlington Carter* test to this case, the first factor for deciding whether DCPS must pay for Student's private school expenses is whether the District failed to offer Student a FAPE in a public or private school. Mother alleges that DCPS failed to offer Student a FAPE for the 2021-2022 school year because the District's proposed June 10, 2021 IEP was not appropriate and because DCPS offered Student an unsuitable school location at City School. DCPS maintains that the June 10, 2021 IEP and the placement location at City School were appropriate and that it offered Student a FAPE for the 2021-2022 school year.

June 10, 2021 Individualized Education Program

U.S. Magistrate Judge Zia M. Faruqui recently explained the IDEA standard for IEP appropriateness in *N.G. v. E.L. Haynes Pub. Charter Sch.*, No. 20-CV-1807-TJK-ZMF, 2021 WL 3507557 (D.D.C. July 30, 2021):

The IDEA aims to provide "every child [with] a meaningful opportunity to benefit from public education." *Boose v. District of Columbia*, 786 F.3d 1054, 1056 (D.C. Cir. 2015). Congress enacted the IDEA "to ensure that all children with disabilities have available to them a [FAPE] that emphasizes special education and related services designed to meet their unique needs and prepare them for further education, employment, and independent living." 20 U.S.C. § 1400(d)(1)(A). "While the District of Columbia is required to provide a FAPE to disabled students, it is not required to, and does not guarantee, any particular outcome or any particular level of academic success." *Holman v. District of Columbia*, 153 F. Supp. 3d 386, 389–90 (D.D.C. 2016) (citing *Bd. Of Educ. of Hendrick Hudson Central Sch. Dist. v. Rowley*, 458 U.S. 176, 192 (1982)) (citation omitted). "No law could do that—for any child." *Andrew*

F. ex rel. Joseph F. v. Douglas Cty. Sch. Dist. RE-1, 137 S. Ct. 988, 998 (2017).

To satisfy the FAPE requirement, “school districts must develop a comprehensive plan, known as an [IEP], for meeting the special-educational needs of each student with a disability.” *A. W. v. District of Columbia*, No. 12-cv-411, 2014 WL 12884524, at *3 (D.D.C. Sept. 19, 2014) (citing 20 U.S.C. § 1414(d)(2)(A)). “The IEP is a written statement that is reviewed annually and includes goals and instructional objectives for the student’s education, services to be provided, projections regarding the dates on which such services are to be offered, and criteria for evaluating whether instructional objectives are met.” *Holman*, 153 F. Supp. 3d at 389 (citing 20 U.S.C. §§ 1401(14), 1414(d)(1)(A)) (citation omitted). When evaluating an IEP, a court must determine whether: (1) “the State complied with the procedures set forth in the [IDEA],” *Rowley*, 458 U.S. at 206, and (2) the IEP was “reasonably calculated to enable a child to make progress appropriate in light of the child’s circumstances,” *Endrew F.*, 137 S. Ct. at 999.

N.G., 2021 WL 3507557 at *1.

Parent has not claimed in this case that DCPS did not comply with IDEA procedures in developing the June 10, 2021 IEP. So, I move on to the second, substantive, prong of the *Rowley/Endrew F.* inquiry. Was the June 10, 2021 IEP proposed by DCPS reasonably calculated to enable Student to make progress appropriate in light of Student’s circumstances? DCPS holds the burden of persuasion on this issue.

The June 10, 2021 IEP was the product of extensive collaboration among the DCPS representatives, the Parent and her representatives and Nonpublic School staff. In the proposed IEP, the City School IEP team identified Mathematics, Reading, Written Expression, Communication/Speech and Language, Emotional-Social-Behavioral Development and Motor Skills/Physical Development as areas of concern for Student.

The proposed IEP provided for Student to receive 20 hours per week of Specialized Instruction Services outside the general education setting, in addition to Related Services, including 240 minutes per month of Speech-Language Pathology (SLP), 180 minutes per month of Occupational Therapy (OT) and 120 minutes per month of Behavioral Support Services (BSS). The IEP also provide for consultative services in SLP, OT and BSS and for extensive Other Classroom Aids and Services. The Parent does not claim that the Related Services, consultative services or Other Classroom Aids and Services in the June 10, 2021 IEP were inappropriate.

Mother testified at the due process hearing and called Educational Consultant and Private School SLP as expert witnesses. To establish her *prima facie* case that DCPS' proposed June 10, 2021 IEP was inappropriate, the Parent relied chiefly on the testimony of Educational Consultant, who qualified as an expert in special education programming and placement. In her hearing testimony, Educational Consultant opined that the June 10, 2021 IEP was not appropriate for the following reasons –

- The IEP Present Levels of Performance were not updated based on Nonpublic School's April 7, 2021 IEP;
- The IEP lacked annual goals for phonemic awareness or specific interventions in the form of an evidence-based program, with daily instruction that focuses on various sound patterns for reading and spelling;
- The IEP lacked academic behavior executive functioning goals and
- The IEP does not provide for full-time special education services for all classes.

Mother and Educational Consultant also opined that DCPS' proposed school placement

for Student at City School was inappropriate.

Present Levels of Performance

Federal IDEA regulations require that every IEP contain, *inter alia*,

(1) A statement of the child's present levels of academic achievement and functional performance, including—

(i) How the child's disability affects the child's involvement and progress in the general education curriculum (i.e., the same curriculum as for nondisabled children) . . .

See 34 C.F.R. § 300.320(a).

I find unfounded Educational Consultant's assertion that the Present Levels of Performance (PLOPs) in the June 10, 2011 IEP were not appropriately updated with information from the recent Private School IEP. The PLOPs for each of the academic areas of concern in the June 10, 2021 IEP include information from the April 7, 2021 Private School IEP on Student's levels, relative strengths and needs. The information for the Motor Skills/Physical Development PLOPs was also obtained from the Private School IEP. The Communication/Speech and Language section of the IEP cites progress reports, progress summaries, and service trackers from Nonpublic School, dating from May 2020 to March of 2021. The PLOPs for Social, Emotional and Behavioral Development were drawn, in part, from a March 2021 psychotherapy note, which was written by a Nonpublic School psychologist, who had been working with Student since winter 2019. I conclude that DCPS has established that the PLOPs in the June 10, 2021 IEP were appropriate.

Phonemic Awareness Goals and Interventions

For the reading area of concern, DCPS' proposed June 10, 2021 IEP included annual goals for Student aimed at improved decoding, increasing reading speed, and citing textual evidence. For writing, the IEP included goals for proofing and completing drafts and writing explanatory texts. Student's IEPs from Nonpublic School had all identified phonemic awareness as a goal or concern. At the spring 2021 IEP team meetings, Educational Advocate strongly advocated for adding phonemic awareness goals and interventions for Student in the DCPS IEP. The DCPS team members did not agree to this request.

In her hearing testimony, Educational Consultant described phonemic awareness³ as the manipulation of a phoneme as an individual speech sound, an underlying skill that allows people to read and spell. According to Educational Consultant, components of phonemic awareness include the manipulation of sounds and the sequencing of sounds to form words, and that is how people read and spell. Educational Consultant opined in her testimony that phonemic awareness continued to be a critical area of need for Student and that DCPS' decision not to include annual goals or interventions for phonemic awareness made the June 10, 2021 IEP inappropriate.

DCPS' expert, DCPS Reading Specialist, testified about DCPS' decision not to

³ In their examinations of the expert witnesses, counsel appeared to use the terms "phonemic" and "phonological" interchangeably, as did the witnesses in their responses. For purposes of this analysis, I assume that both parties' experts' testimony about phonemic awareness applied equally to phonological awareness and vice versa.

include phonological awareness goals or methodology in the June 10, 2021 IEP. She agreed that Student still had weaknesses in phonological awareness, but explained that phonemic awareness is an auditory skill that teachers really focus on in pre-reading activities, in kindergarten, first and second grade, and “kind of” finish out by third grade. DCPS Reading Specialist opined that Student, who would be in GRADE for the 2021-2022 school year, was now past the auditory stage.

DCPS Reading Specialist was qualified to testify as an expert in Reading Instruction and I found her to be a credible witness. Educational Consultant has testified in many due process hearings and I also found her to be credible, but on this issue, I give more weight to DCPS Reading Specialist’s opinion because of her more extensive background in reading instruction.

Moreover, the experts’ disagreement over whether to continue phonemic or phonological awareness goals and strategies for Student in the June 10, 2021 IEP goes to the methodology of special education instruction in reading and writing. As Judge Collyer explained in *R.B. v. District of Columbia*, No. CV 18-662 (RMC), 2019 WL 4750410, at *13 (D.D.C. Sept. 30, 2019), LEAs have the primary responsibility for choosing the most suitable educational method.

“The primary responsibility for formulating the education to be accorded . . . and for choosing the educational method most suitable to the child’s needs, was left by [IDEA] to state and local education agencies in cooperation with the parents or guardian of the child.

R.B., supra, quoting Rowley, supra, 458 U.S. at 208. This allows for some deference to

the exercise of judgment by school authorities. *See Andrew F., supra*, 137 S. Ct. at 1001. But as Judge Contreras pronounced in *A.G., supra*, while the *Andrew F.* reasonableness standard incorporates deference to school officials due to their subject matter expertise and judgment, a hearing officer “may fairly expect those authorities to be able to offer a cogent and responsive explanation for their decisions that shows the IEP is reasonably calculated to enable the child to make progress appropriate in light of his [or her] circumstances.” *A.G.*, 2020 WL 6799139 at *12, quoting *Andrew F.*, 137 S. Ct. at 1002.

DCPS Reading Specialist opined that with the very intensive interventions Student had received in five years at Nonpublic School, based on Student’s potential, one would have expected to see much more progress in reading than they were seeing. DCPS Reading Specialist testified that it was her opinion and the opinion of the DCPS IEP team members that Student’s current IEP reading goals needed to be focused on the written text, sounding out difficult words, and building vocabulary, fluency and comprehension – instead of continuing to focus on phonological awareness.

I found DCPS Reading Specialist’s explanation for the decision to not provide phonemic awareness goals or strategies in the June 10, 2021 IEP cogent and responsive. It is undisputed that in five school years at Nonpublic School, Student made only limited progress in reading, despite receiving intense services from the Nonpublic School team. By spring 2021, Student’s independent reading level had advanced to only the 2.5 level – years below grade expectations. School Psychologist opined that this progress in

reading was “very, very slow.” While the Parent’s expert, Educational Consultant, opined that Student’s progress at Nonpublic School was appropriate and meaningful, she also characterized Student as “still someone who is learning to read as opposed to reading to learn.”

When a student with a disability has not been making expected progress, it is appropriate for the IEP team to devise a new approach. *Cf. Damarcus S. v. District of Columbia*, 190 F. Supp. 3d 35, 53 (D.D.C. 2016) (IEP team to revise the IEP as appropriate to address lack of expected progress.) For the June 10, 2021 IEP, the DCPS IEP team members elected to include annual reading goals for Student aimed at decoding, increasing reading speed, and citing textual evidence and writing goals for proofing and completing final drafts and writing explanatory texts – and not to continue the phonemic awareness goals from the Nonpublic School IEPs. Allowing for some deference to DCPS officials due to their subject matter expertise, I conclude that DCPS has met its burden of persuasion that its team members’ decision not to include phonemic/phonological awareness goals and interventions in the June 10, 2021 IEP was reasonably calculated to enable Student to make progress appropriate in light of his/her circumstances. *See Andrew F., supra*, 137 S.Ct. at 1001.

Executive Functioning Annual Goals

Educational Consultant also opined that the June 10, 2021 IEP was inadequate because it lacked annual goals and interventions specifically for executive functioning.

This opinion was not persuasive. DCPS' witnesses explained that Student's executive functioning needs were addressed in multiple parts of the June 10, 2021 IEP, rather than in a separate executive functioning section. In *Z.B. v. District of Columbia*, 888 F.3d 515 (D.C. Cir. 2018), the D.C. Circuit Court of Appeals found no fault with this approach. (DCPS addressed executive functioning skills within the IEP's treatment of other areas of concern. Parents did not demonstrate any respect in which the IEP's treatment of executive functioning goals denied child an appropriate education. *Id.* at 527.)

Specifically, in the June 10, 2021 IEP, Student's executive functioning needs were addressed in the OT and Social-Emotional-Behavioral sections of the IEP, as well as in Classroom Aids and Services. DCPS' experts, DCPS OT and DCPS Social Worker, agreed that it was appropriate for Student's executive functioning needs to be addressed in multiple parts of the IEP. DCPS Social Worker explained that the school team works collaboratively with children who have attention and sensory challenges, because these challenges may overlap in different areas. I found these witnesses' testimony credible and I conclude that DCPS has established that the IEP team's decision not to identify executive functioning as a separate area of concern in the June 10, 2021, with specific annual goals, was not inappropriate.

Full-Time Special Education

Since the start of the 2016-2017 school year, Student has attended Nonpublic School, where Student has had no in-school interaction with typically developing peers. In all this time, there has never been a determination by an LEA IEP team or by a hearing officer or Court that the severity of Student's disability is such that education in regular classes for at least part of the school day, with the use of supplementary aids and services cannot be achieved satisfactorily.

As explained by Program Specialist in her testimony, under the proposed June 10, 2021 IEP, Student would have received 20 hours per week of Specialized Instruction outside of general education, meaning that all of Student's academic subjects, including reading, math, science and social studies, would be taught in a small self-contained classroom, with a special education teacher and aide. That would leave only "specials" classes (gym and art/music) and lunch and recess in the general education environment.

The Parent's expert, Educational Consultant, opined that the June 10, 2021 IEP was not appropriate and Student needs all classes, including Specials, to be in special education because Student's needs are very significant and Student is still learning for basic skills. Mother also opined in her testimony that 20 hours per week of Specialized Instruction was not enough for Student because Student is not able to function in a large classroom where a teacher is standing in front of the room and Student needs to process multi-step directions.

Student's alleged need for full-time special education was also an issue in the spring 2017 due process hearing for Student. In the June 13, 2017 HOD, this hearing officer found that Student needed to be in a small classroom setting for at least all academic subjects, but the evidence in the prior hearing did not support the Parent's claims that Student required segregation from nondisabled peers for the entire school day or that Student could not attend electives and specials classes with nondisabled peers. (This discussion of the spring 2017 due process proceedings is provided for background only. The decisions of the hearing officer and the U.S. District Court in the 2017 case are in no way determinative in the present administrative proceedings.)

In *Z. B., supra*, the D.C. Circuit emphasized "the IDEA's imperative that, to 'the maximum extent appropriate,' public schools provide students with disabilities an education in the 'least restrictive environment' possible." *Z.B.*, 888 F.3d at 528, *citing* 20 U.S.C. § 1412(a)(5)(A):

Ordinarily, states must ensure "removal of children with disabilities from the regular educational environment occurs only when the nature or severity of the disability of a child is such that education in regular classes with the use of supplementary aids and services cannot be achieved satisfactorily." 20 U.S.C. § 1412(a)(5)(A). [In *Andrew F.*] [t]he Supreme Court . . . affirmed that "the IDEA requires that children with disabilities receive education in the regular classroom 'whenever possible.'" *Id.*, 137 S.Ct. at 999 (quoting *Rowley*, 458 U.S. at 202, 102 S.Ct. 3034).

Z.B., 888 F.3d at 528.

In their hearing testimony in the present case, DCPS' experts opined that allowing Student to attend a few classes a week with typically developing peers was

appropriate. School Psychologist, who evaluated Student in March 2020, opined that Student would benefit from being able to have access to nondisabled peers from several standpoints, including exposure to same-age [typically developing] peers in terms of socialization, as well as in terms of being surrounded by typical language which Student could absorb. School Psychologist opined that this would provide Student with additional access to things Student would not normally get in a full-time special education program. DCPS Reading Specialist, who qualified as an expert in special education programming and placement, as well as in reading instruction, testified that with the June 10, 2021 IEP, DCPS offered Student an appropriate IEP. DCPS SLP opined that students with disabilities should spend time around typically developing peers as much as they can to “model-up” their language skills. She cited the benefit to Student of the social language aspect from having some time in the general education setting. DCPS SLP also noted that in Specials, *i.e.*, non-academic classes, typically language is less structured and less demanding. DCPS Social Worker opined that to be better able to function with all types of student populations, students with IEPs should be available to neurotypical peers, because the goal is to get IEP students to a place where they are not isolated and where they can use some of the coping strategies being taught.

Of course, none of the testifying experts (or Mother) has observed Student in mainstream classes, at least since the 2015-2016 school year. Nor has any

psychoeducational or other formal evaluation been proffered, which concluded that Student's least restrictive environment is a full-time special education program.

DCPS cannot guarantee that Student would make appropriate progress under the June 10, 2021 IEP if placed with typically developing peers in a few classes every week. But it is not required to do so. *See Holman v. District of Columbia, supra*. 153 F. Supp. 3d 386, 389–90 (D.D.C. 2016). However, DCPS was required to ensure that Student receives education in the regular classroom “whenever possible.” *Andrew F., supra*, 137 S.Ct. at 999.

On this evidence, I found the opinions of Clinical Psychologist, DCPS SLP, DCPS OT and Program Specialist that Student would benefit from school interactions with typically developing peers more credible than the seemingly conclusory opinion of Educational Consultant that Student requires all special education classes because Student is still learning for basic skills and has very significant needs in all courses. Nor was competent evidence offered from a mental health or other professional to support Mother's belief that Student would not be able to function in a large classroom, even with appropriate classroom aids and services. I conclude that DCPS met its burden of persuasion that the educational placement provision in the June 10, 2021 IEP, with 20 hours per month of Specialized Instruction, outside of general education, was reasonably calculated to enable Student to make progress appropriate in light of his/her circumstances. *See Andrew F., supra*.

Suitability of City School

By letter of June 30, 2021, DCPS informed Mother that City School had been identified as the location of special education services for Student for school year 2021-2022. The Parent contends that City School is unsuitable for Student. At the due process hearing, Educational Consultant opined that City School is not appropriate because it cannot provide Student with a full-time special education and related services program. In addition, Educational Consultant opined that City School is not appropriate because it is a building with “quite a big footprint” and Student can be quite anxious in large spaces.

A parent may challenge a school placement under the IDEA if the placement is not “capable of substantially implementing [a child’s] IEP.” *W.S. v. District of Columbia*, 502 F. Supp. 3d 102, 119 (D.D.C. 2020), *citing Johnson v. Dist. of Columbia*, 962 F. Supp. 2d 263, 268 (D.D.C. 2013). DCPS’ witness, Former LEA Representative at City School, testified that he had reviewed the June 10, 2021 IEP and that at the start of the 2021-2022 school year, City School was able to implement this IEP for Student. This evidence was not rebutted by the Parent.

Educational Consultant’s opinion that City School is not appropriate because it allegedly cannot provide Student with a full time special education and related services program is unfounded because the June 10, 2021 IEP does not require a full-time special education program for Student.

Likewise, I find unsupported Educational Consultant's opinion that City School is not appropriate because it is a building with a big footprint and Student can be quite anxious in large spaces. City School has three grade levels with a total of approximately 1,500 students. No competent evidence was introduced at the due process hearing that Student suffers from a condition which would make the City School building an inappropriate location of services. I conclude that DCPS has met its burden of persuasion that City School is capable of substantially implementing the June 10, 2021 IEP and, as such, its proposed placement of Student at City School was not inappropriate.

In sum, I find that the DCPS has met its burden of persuasion that it did not deny Student a FAPE, either by proposing an inappropriate IEP for the 2020-2021 school year or by offering an inappropriate placement at City School to implement the IEP. In light of my conclusion that DCPS did not fail to offer Student a FAPE with the proposed June 10, 2021 IEP or City School placement, I do not reach the remaining two factors of the *Burlington Carter* test. *See Jalloh v. District of Columbia*, 968 F. Supp. 2d 203, 215 (D.D.C. 2013) (Petitioner failed to satisfy the threshold question that DCPS denied child a FAPE.) I conclude that Mother is not entitled to public funding or reimbursement from DCPS for Student to attend Nonpublic School for the 2021-2022 school year.

ORDER

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

ORDERED:

1. The hearing officer finds that DCPS offered Student a free appropriate public education for the 2021-2022 school year;
2. The Parent's request that DCPS be ordered to fund Student's enrollment at Nonpublic School for the 2021-2022 school year is denied and
3. All other relief requested by the respective parties herein is denied.

Date: October 23, 2021

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
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