

DISTRICT OF COLUMBIA
OFFICE OF THE STATE SUPERINTENDENT OF EDUCATION
Office of Dispute Resolution
810 First Street, N.E., 2nd Floor
Washington, DC 20002

OSSE
Office of Dispute Resolution
November 29, 2015

PETITIONER, on behalf of)	
STUDENT, ¹)	Date Issued: November 29, 2015
)	
Petitioner,)	Hearing Officer: Peter B. Vaden
)	
v.)	Case No: 2015-0297
)	
DISTRICT OF COLUMBIA)	Hearing Date: November 17, 2015
PUBLIC SCHOOLS,)	
)	Office of Dispute Resolution, Room 2006
Respondent.)	Washington, D.C.
)	

HEARING OFFICER DETERMINATION

INTRODUCTION AND PROCEDURAL HISTORY

This matter came to be heard upon the Administrative Due Process Complaint Notice filed by Petitioner (the Petitioner or FATHER), under the Individuals with Disabilities Education Act, as amended (the IDEA), 20 U.S.C. § 1400, *et seq.*, and Title 5-E, Chapter 5-E30 of the District of Columbia Municipal Regulations (D.C. Regs.). In his due process complaint, Petitioner seeks reimbursement from DCPS for his costs to enroll Student in a private special education day school.

Student, an AGE youth, is a resident of the District of Columbia. Petitioner's Due Process Complaint, filed on September 8, 2015, named DCPS as respondent. The undersigned Hearing Officer was appointed on September 9, 2015. The parties convened for a resolution session on September 21, 2015, which did not result in an

¹ Personal identification information is provided in Appendix A.

agreement. The 45-day period for issuance of this Hearing Officer Determination began on October 10, 2015. The original decision due date was November 22, 2015. On October 9, 2015, I convened a prehearing telephone conference with counsel to discuss the hearing date, issues to be determined and other matters. The due process hearing was originally scheduled for November 12, 2015. On October 29, 2015, I granted Petitioner's unopposed motion for a continuance of the hearing date and 10-day continuance of the decision due date which extended the due date for this decision to December 2, 2015. On November 9, 2015, Petitioner filed a motion to compel DCPS to fund Student's placement at NONPUBLIC SCHOOL until the completion of these administrative due process proceedings, pursuant to the IDEA's "stay-put" provision. By order entered November 24, 2015, I denied the stay-put motion.

The due process hearing was held before this Impartial Hearing Officer on November 17, 2015 at the Office of Dispute Resolution in Washington, D.C. The hearing, which was closed to the public, was recorded on an electronic audio recording device. The Petitioner appeared in person and was represented by PETITIONER'S COUNSEL. Respondent DCPS was represented by DCPS' COUNSEL.

Petitioner testified and called as witnesses EDUCATIONAL CONSULTANT and Nonpublic School HEAD OF SCHOOL. DCPS called as witnesses RESOLUTION SPECIALIST and LEA REPRESENTATIVE. Petitioner's Exhibits P-1 through P-15 and DCPS' Exhibits R-1 through R-12 were all admitted into evidence without objection. DCPS' Exhibit R-13 was not offered. After the hearing was completed, a DCPS memorandum, Notice of Proposed New Location of Special Education Services – Expedited Case dated February 25, 2015, with related documents, was admitted into

evidence, without objection, as Joint Exhibit 1.²

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 following issues for determination were certified in the October 9, 2015

Prehearing Order:

- Whether by offering CITY SCHOOL as a location of services for Student for the 2015-2016 school year, DCPS failed to offer Student a suitable placement capable of implementing Student’s May 7, 2015 proposed Individualized Education Program (IEP);
- Whether City School is not capable of implementing Student’s May 7, 2015 IEP because the school lacks a speech-language pathologist and its social skills training, multi-modal instruction, and research-based interventions are not available across all skills areas and
- Whether DCPS violated the IDEA’s procedural requirements by refusing to consider Nonpublic School as a location of services for Student.

For relief, Petitioner requests that the Hearing Officer order DCPS to reimburse the parent for Student’s private placement at Nonpublic School for the 2015-2016 school year and order DCPS to maintain Nonpublic School as Student’s ongoing placement until such time as DCPS offers a suitable placement for Student.

FINDINGS OF FACT

Petitioner filed a previous due process complaint concerning this student on September 5, 2014. On December 21, 2014, following a three-day due process hearing in November and December 2014, Impartial Hearing Officer Coles B. Ruff issued a

² Joint Exhibit 1 consists of the February 25, 2015 Notice of Proposed New Location of Special Education Services, a February 25, 2015 email to officials at City Middle School and a July 31, 2014 IEP proposed for Student.

Hearing Officer Determination (the December 21, 2014 HOD). The parties, by counsel, have agreed that I may adopt those Findings of Fact from the December 21, 2014 HOD which I deem to be relevant to the present case. Accordingly, I adopt the following Findings of Fact from the December 21, 2014 HOD:

In March 2014, Student was determined eligible for special education services pursuant to IDEA with a disability classification of Specific Learning Disability. Finding 1.

Student attended kindergarten and first grade in Bethesda, Maryland prior to moving with Student's parents out of the country where Student attended a private school for second and third grade. During the time Student was attending school outside the United States, Student began to display severe anxiety that resulted in the parents' engaging the services of a therapist for Student. Student also began taking medication for Attention Deficit Hyperactivity Disorder ("ADHD") in September 2011. In 2012, after returning to the Washington, D.C. area, the Student's parent enrolled Student in Nonpublic School, a private full time special education school. Student began to display far less anxiety once Student began attending Nonpublic School and for the first time began to acquire friends. Student continued at Nonpublic School at the start of the 2013-2014 school year. In October 2013 Petitioner contacted Student's neighborhood DCPS middle school, to discuss educational options for Student's transition to middle school for the 2014-2015 school year. Findings 2 through 5.

On January 13, 2014, DCPS convened a meeting to discuss Petitioner's request for services and Student's referral for special education services. DCPS convened a meeting on March 24, 2014, at which DCPS found Student eligible for special education with the SLD classification. Initially DCPS did not draft an IEP because Student was not attending a DCPS school. Findings 9 and 12.

After performing an additional evaluation, DCPS convened an IEP meeting on June 2, 2014. During this meeting DCPS presented a draft IEP that prescribed that student be provided 19 hours of specialized instruction per week outside of general education; 120 minutes per month occupational therapy outside of general education; and, 180 minutes per month of speech language services outside of general education and 180 minutes per month of speech language services inside general education. Because remaining evaluations had not yet been completed another IEP meeting was scheduled. Finding 19.

On July 31, 2014, DCPS convened another IEP meeting for the student. The team determined the student required 15.75 hours of specialized instruction per week outside of general education, in the areas of reading, math and written expression; 120 minutes per month occupational therapy outside of general education; and, 180 minutes per month of speech language services outside of

general education and 180 minutes per month of speech language services inside general education and the following consultative services: 15 minutes per month of Occupational Therapy (OT) and 90 minutes per month speech language pathology. Finding 21.

At the July 31, 2014 IEP meeting, the team discussed Student's history of anxiety and whether anxiety was currently effecting Student in the school environment. The parent provided DCPS consent to conduct an evaluation of the educational impacts of anxiety on Student. Finding 24.

Additional Findings of Fact

After considering all of the evidence admitted at the November 17, 2015 due process hearing in the present case, as well as the arguments of counsel, this Hearing Officer's additional Findings of Fact are as follows:

1. Student is an AGE resident of the District of Columbia, where she resides with Father. Testimony of Father. Student has been determined eligible for special education and related services based upon Multiple Disabilities (MD) comprising SLD and Other Health Impairment - Attention Deficit Hyperactivity Disorder (OHI-ADHD). Exhibit R-8.

2. In the December 21, 2014 HOD, Hearing Officer Ruff determined, *inter alia*, that the overwhelming evidence at the prior hearing demonstrated that Student had severe academic deficits and needed specialized instruction in all academic subjects; that the IEP developed for Student on July 31, 2014, which prescribed 15.5 hours per week of Specialized Instruction was not reasonably calculated to provide Student educational benefit and that Student was denied a free appropriate public education (FAPE); that an area of concern, anxiety, had not been fully determined and considered by an IEP team as to whether Student's social and emotional functioning was such that she could not be at all with general education peers and that the Hearing Officer was not convinced that Student needed to be totally removed from the non-

disabled peers. Hearing Officer Ruff ordered, *inter alia*, that Student's IEP be amended to prescribe 25 hours per week of Specialized Instruction outside general education, in addition to then-current related services; that DCPS conduct an assessment of Student's social/emotional functioning with particular focus on the educational impact of anxiety on Student and that DCPS convene an IEP meeting to revise Student's proposed IEP and to make a determination as to Student's placement for the remainder of the 2014-2015 school year. As a remedy for the denial of FAPE, Hearing Officer Ruff ordered DCPS to reimburse Father for the cost for Student to attend Nonpublic School from the beginning of the 2014-2015 school year until DCPS proposed a suitable placement and location of services for Student. The Hearing Officer denied the parent's request to order DCPS to fund Student's prospective placement at Nonpublic School. Exhibit R-1.

3. As ordered in the December 21, 2014 HOD, DCPS obtained a comprehensive psychological reevaluation of Student in January 2015. Because Student was not attending a DCPS school, DCPS contracted with an independent psychologist, INDEPENDENT PSYCHOLOGIST, to conduct the evaluation. Testimony of Compliance Specialist. In her January 22, 2015 report, Independent Psychologist reported, *inter alia*, that Student's general cognitive ability was in the Borderline range. Student's general verbal comprehension abilities were in the Low Average range. Student's general perceptual reasoning abilities were in the Borderline range. Student's working memory abilities were in the Extremely Low range. Student's general processing speed abilities were in the Low Average range. Student's abilities to sustain attention, concentrate and exert mental control were a weakness relative to Student's verbal reasoning abilities. On testing of academic functioning, Student was markedly below Student's age and grade levels. In some areas, Student was four grades below same-

aged peers. Independent Psychologist reported that Student exhibited debilitating anxiety. She reported that Student showed an extremely significant deficit in the area of memory and that Student continued to present with symptomology consistent with a diagnosis of ADHD. Exhibit P-4.

4. Independent Psychologist diagnosed Student with ADHD (by history), Anxiety Disorder Not Otherwise Specified, Rule/Out Transient Tic Disorder, and Learning Disorder Not Otherwise Specified. Exhibit P-4.

5. Independent Psychologist recommended, *inter alia*, that Student was in need of a full-time therapeutic special education program; that she would likely function best in a highly structured, specialized education program that had a low pupil to teacher ration, with an instructional learning environment that utilized multiple presentation formats; that the program should have a therapeutic focus that provides access to psychotherapeutic intervention; that the program should have a well defined progress monitoring system in order to monitor emotional progress and positively reinforce pro-social coping skills; that Student needs a special educational program that is highly controlled, organized, therapeutic and void of excessive external stimuli; that Student could benefit from learning how to develop appropriate social relationships; that Student receive individual therapy at a minimum of one session per week aimed at improving Student's ability to recognize and express her emotions and to enhance her social skills. Exhibit P-4.

6. On February 25, 2015, DCPS' Office of Specialized Instruction Location Unit sent an email and memorandum to the principal of City School and LEA Representative identifying the Specific Learning Support (SLS) program at City School

as the program in the District that could implement the services outlined on Student's July 31, 2014 IEP, as amended by the December 21, 2014 HOD. Joint Exhibit 1.

7. On May 7, 2015, DCPS convened an IEP team meeting for Student at NEIGHBORHOOD SCHOOL to review the January 22, 2015 psychological reevaluation of Student conducted by Independent Psychologist and to update Student's eligibility status and IEP. The IEP team concluded that Student continued to meet criteria for special education as a student with Multiple Disabilities. Exhibit R-7. The team then proceeded to review and update Student's proposed DCPS IEP. The May 7, 2015 IEP included annual goals to Mathematics, Reading, Written Expression; Communication/Speech and Language; Emotional, Social and Behavioral Development and Motor Skills/Physical Development. Exhibit R-8. For Special Education Services, the IEP provided for Student to receive 25.25 hours per week of Specialized Instruction outside general education. As Related Services, the IEP specified that Student would receive 120 minutes per month of OT, 180 minutes per month of Speech-Language Pathology and 240 minutes per month of Behavioral Support Services. In addition, the IEP provided for 15 minutes and 90 minutes per month, respectively, of Consultation Services in OT and Speech-Language Pathology.

8. In the Other Classroom Aids and Services section of the IEP, the IEP team incorporated Independent Psychologist's recommendations that Student requires manipulatives, graphic organizers, editing checklists, dictionaries/spell checker, and task completion checklists to be successful; that she also requires movement breaks and teacher/therapist check-ins to manage her anxiety, a visual timer, a fidget toy, and a highlighter; that Student also requires a location with minimal distractions, a highly flexible teaching environment, with support in social skills; that Student requires a

highly structured environment with a low student to teacher ratio in a learning environment that utilizes multiple presentation formats to include visual, auditory, kinesthetic, and tactile modalities; and that Student's program should be highly controlled and organized and void of external stimuli. Exhibit P-3.

9. By letter of May 28, 2015, transmitted by email, DCPS informed Father that City School had been identified as Student's location of service and that City School was able to implement Student's IEP with the special education services Student needed. Exhibits P-5, P-6. The selection of City School was made unilaterally by DCPS without any input from Father. Testimony of Father.

10. On June 17, 2015, Father and Educational Consultant visited City School, where they met with LEA Representative, toured the building and observed the SLS classroom where Student would be assigned. Testimony of Father, Testimony of Educational Consultant.

11. City School is a big public school. Student would enter the building through the middle school entrance and navigate to the second floor where the SLS classroom is located. City School is a bustling environment with students transitioning in the hallways. LEA Representative discussed safety with Father. She explained that the school has a history of challenging students and is patrolled by school resource officers and about 10 security officers, and that sometimes disruptions are facts of life at City School. Testimony of LEA Representative.

12. The SLS classroom is located on the second floor of City School and is staffed by a special education teacher and a paraprofessional. The classroom serves 12-13 students from all three junior high school grades. Students are divided into small groups for direct mathematics and reading instruction by the special education teacher

and the direct teaching is supplemented by individual access to computer-based learning programs. All of the students in the SLS program are instructed in written language, history/social studies and science by the special education teacher.

Testimony of LEA Representative.

13. Students in the SLS Program attend specials (non-core subject) classes with other special education students, including students in the behavioral support program, who may have disruptive behaviors. Students in the SLS program have lunch in the school cafeteria with non-disabled students. Otherwise the SLS students do not have interaction during instruction time with nondisabled students. Testimony of LEA Representative.

14. City School has a school psychologist on staff who conducts evaluations and provides other services, but does not provide direct services to students. The school has five social workers on staff who pull out students for individual or group counseling services. Testimony of LEA Representative.

15. By letter of August 6, 2015, Petitioner's Counsel advised Compliance Specialist that Father did not find City School to be appropriate for Student and rejected the school as inappropriate for implementation of Student's IEP. The attorney gave notice that Father intended to return Student to Nonpublic School and expected that the private placement would be at DCPS expense. Exhibit P-8. By Letter of August 12, 2015, DCPS' Director for Resolution acknowledged receipt of the August 6, 2015 letter and informed Father that it was DCPS' position that it had made a FAPE available to Student with an appropriate IEP and placement in the least restrictive environment. She stated that DCPS would not agree to fund Student's placement at Nonpublic School. Exhibit P-9.

16. On September 8, 2015, Father, by counsel, filed his due process complaint in this case, seeking reimbursement from DCPS for Student's enrollment at Nonpublic School for the 2015-2016 school year.

17. Nonpublic School is a private school located in the District of Columbia. It serves only students with disabilities, primarily SLD but also ADHD, anxiety disorder, dysgraphia, and disabilities in writing, mathematics and reading. Nonpublic School employs a variety of instruction modalities based upon the student's needs. It offers small group instruction, especially in a student's areas of weakness. The school uses lots of manipulatives and visual and auditory reinforcement. Testimony of Head of School.

18. In her program at Nonpublic school, Student's classes are very small – four students in English and math, three students in reading, seven or eight students in science and social studies, 10 students in art and 20 students in physical education. All classes are taught by one teacher, except for physical education which has two teachers. Testimony of Head of School.

19. Student is one of the lowest skilled students in Nonpublic School. She is placed with children with similar needs, including for lots of prompting, reframing and re-teaching. Student is quiet in class and needs assertive teacher intervention to review her work and guide her. Student is making slow and steady progress in the Nonpublic School program. Testimony of Head of School.

20. Nonpublic School holds a current Certificate of Approval issued by the D.C. Office of the State Superintendent of Education. Testimony of Head of School. The annual tuition for Student at Nonpublic School is approximately \$43,000. As of the hearing date, Father had paid \$26,500 of the school year 2015-2016 annual tuition fee. Testimony of Father.

CONCLUSIONS OF LAW

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

Burden of Proof

The burden of proof in a due process hearing is the responsibility of the party seeking relief – the Petitioner in this case. *See* D.C. Regs. tit. 5-E, § 3030.3. *See, also, Schaffer ex rel. Schaffer v. Weast*, 546 U.S. 49, 62, 126 S.Ct. 528, 536, 163 L.Ed.2d 387 (2005); *Hester v. District of Columbia*, 433 F.Supp.2d 71, 76 (D.D.C. 2006).

Analysis

Did DCPS fail to offer Student a suitable educational placement for the 2015-2016 school year that was capable of implementing the May 7, 2015 IEP?

In the December 21, 2014 HOD, Hearing Officer Ruff found that DCPS' proposed August 4, 2014 IEP denied Student a FAPE. The Hearing Officer ordered DCPS, *inter alia*, to conduct additional assessments of Student and to convene an IEP team meeting to revise, as appropriate, Student's IEP and educational placement. At an IEP team meeting on May 7, 2015, Father and the DCPS representatives agreed on the content of a revised IEP for Student. This IEP incorporated recommendations made by Independent Psychologist in her January 22, 2015 psychological reevaluation and provided for full-time Specialized Instruction Services outside of the general education setting. Subsequent to the IEP meeting, DCPS informed Father that City School had been identified as Student's location of services to implement the May 7, 2015 IEP. After Father and Educational Consultant visited the proposed program at City School, Father notified DCPS that he rejected the location as inappropriate for the implementation of

Student's IEP and that he intended to maintain Student's enrollment, at DCPS' expense, at Nonpublic School for the 2015-2016 school year.

In this proceeding, Father seeks reimbursement from DCPS for Student's enrollment at Nonpublic School for the current school year. DCPS responds that it offered Student a free appropriate public education and that City School was an appropriate placement for her. DCPS maintains that Father is not entitled to reimbursement for his unilateral placement of Student at Nonpublic School.

The U.S. Court of Appeals for the District of Columbia recently enunciated the IDEA standard for tuition reimbursement to parents who unilaterally enroll their child in a private school:

Although Congress envisioned that children with disabilities would normally be educated in "the regular public schools or in private schools chosen jointly by school officials and parents," *Florence County School District Four v. Carter By and Through Carter*, 510 U.S. 7, 12, 114 S.Ct. 361, 126 L.Ed.2d 284 (1993), it provided that parents who believe that their child's public school system failed to offer a free appropriate public education—either because the child's IEP was inadequate or because school officials never even developed one—may choose to enroll the child in a private school that serves her educational needs. *Id.* Specifically, IDEA provides that if parents "enroll the child in a private . . . school without the consent of [the school district], a court or a hearing officer may require the [school district] to reimburse [them] for the cost of that enrollment. . . ." 20 U.S.C. § 1412(10)(C)(ii). The statute requires reimbursement, however, only where the school district has failed to "ma[k]e a free appropriate public education available to the child." *Id.* Reimbursement, moreover, may be "reduced or denied" if the parents fail to notify school officials of their intent to withdraw the child, *id.* § 1412(10)(C)(iii)(I), deny them a chance to evaluate the student, *id.* § 1412(10)(C)(iii)(II), or, of special relevance here, otherwise act "unreasonabl[y]," *id.* § 1412(10)(C)(iii)(III).

Leggett v. District of Columbia, 793 F.3d 59, 63 (D.C. Cir. 2015). The *Leggett* decision further explained that, "[a]s interpreted by the Supreme Court, IDEA requires school districts to reimburse parents for their private-school expenses if (1) school officials failed to offer the child a free appropriate public education in a public or private school;

(2) the private-school placement chosen by the parents was otherwise “proper under the Act”; and (3) the equities weigh in favor of reimbursement—that is, the parents did not otherwise act ‘unreasonabl[y].’” *Leggett*, 793 F.3d at 66-67 (citing *Carter*, 510 U.S. at 15–16, 114 S.Ct. 361; 20 U.S.C. § 1412(10)(C)(iii)(III)).

In the present case, DCPS does not contend that Father acted unreasonably in placing Student at Nonpublic School for the 2015-2016 school year. However, as stated, DCPS maintains that because it offered Student a FAPE in City School, Father is not entitled to reimbursement for his parental placement of Student at Nonpublic School. DCPS also contends that Nonpublic School is not appropriate because it is not Student’s least restrictive environment (LRE). *See* 34 CFR § 114(a)(2)(e) (District must ensure that, to the maximum extent appropriate, children with disabilities, including children in public or private institutions or other care facilities, are educated with children who are nondisabled.)

A.

Did DCPS fail to offer Student a FAPE in the City School Program?

Both Father and DCPS agree that the May 7, 2015 IEP is appropriate for Student. Designing an appropriate IEP is necessary but not sufficient to provide a FAPE. DCPS must also implement the IEP, which includes offering an educational setting that is capable of fulfilling the student’s IEP. *See O.O. ex rel. Pabo v. D.C.*, 573 F. Supp. 2d 41, 53 (D.D.C. 2008); *Lofton v. District of Columbia*, 7 F. Supp. 3d 117, 123 (D.D.C. 2013).

Petitioner’s expert, Educational Consultant, opined in his testimony that although the SLS program at City School meets Student’s IEP requirement for a full-time special education program outside of general education, the program is not capable of fulfilling other important IEP requirements. Specifically Educational Consultant

focused on the May 7, 2015 IEP requirements that Student needs a location with minimal distractions, a highly flexible teaching environment, with support in social skills; that Student requires a highly structured environment with a low student-to-teacher ratio in a learning environments that utilizes multiple presentation formats to include visual, auditory, kinesthetic, and tactile modalities and that Student's program should be highly controlled and organized and void of external stimuli. These IEP provisions were incorporated in the May 7, 2015 IEP based upon the recommendations of Independent Psychologist.

Educational Consultant testified that when he and Father visited City School, he observed that the program was sited in a large public school environment. He was concerned that City School was not a highly controlled therapeutic school void of external stimuli. He observed that the school was overwhelming visually and spatially for a child with Student's anxiety and learning disabilities. He noted an overwhelming police presence and concerns for students' safety. He was concerned that the large school layout was not a small structured environment with minimal distractions. With regard to the SLS classroom, Educational Consultant observed that most instruction was being provided via computer learning programs and that social studies and science were taught by a single teacher to a class drawn from three grade levels. Educational Consultant opined that neither the City School location nor the SLS classroom was appropriate for Student. He opined that the demands on the single teacher, serving 13 students at three grade levels, and the use of computerized teaching programs would not allow for the constant teacher "check-in" which Student requires. Educational Consultant also opined that the SLS program was not suitable because of the large number of students (26 students) in the physical education class, and a lack of social

skills instruction.

Head of School expressed concerns about Student's being able to manage in a classroom of 12-13 students. She emphasized that class size really matters for Student because Student is easily overwhelmed in a larger environment. She was concerned that due to Student's anxiety disorder, it would be difficult for Student to deal with the challenge of school violence and students who do not want to be in school. Head of School noted that Student is easily overwhelmed in large school environments and that even transitioning from Nonpublic School's elementary program to the junior high school program was a significant adjustment for Student. Head of School opined that 6 to 7 students was the maximum Student should have in a class and that in a larger class, Student would be lost and it would be incredibly difficult for the teacher to regularly review Student's work and provide the repetition that Student needs.

DCPS called LEA Representative to testify about the SLS program at City School. LEA Representative had never met or observed Student. LEA Representative was generally knowledgeable about the SLS program and instruction in reading and math, but was "not sure" how Science, Social Studies and English/Written Language instruction was delivered to the combined class of students from three grade levels. LEA Representative was also unable to speak to whether the computerized instruction programs used for reading and mathematics in the SLS classroom were suitable for Student.

I found the testimony of Petitioner's experts, Educational Consultant and Head of School, to be credible and, generally, not rebutted by the DCPS witnesses. Both of Petitioner's expert witnesses are very knowledgeable about Student's disabilities. They testified convincingly that the SLS program at City School would not meet Student's

needs, recognized by her IEP team, for a highly structured environment with minimal distractions, a highly flexible teaching environment and a program that would be highly controlled, organized and void of external stimuli. These experts were also convincing that City High School was not a suitable environment for a Student whose disability includes extreme anxiety and emotional turmoil, which the IEP team reported limits her ability to access the curriculum. I conclude that Father met his burden of proof to establish that, for the 2015-2016 school year, DCPS denied Student a FAPE by failing to offer an educational setting that was capable of fulfilling Student's special education and related services needs as documented in the May 7, 2015 IEP.

B.
Was Nonpublic School Proper under the IDEA?

The second requirement for private school reimbursement discussed by the D.C. Circuit in the *Leggett* decision is that the private school chosen by the parent be "proper" under the IDEA. The Court determined that for a reimbursement claim, "a parent's unilateral private placement is proper under the Act so long as it is 'reasonably calculated to enable the child to receive educational benefits.'" *Leggett*, 793 F.3d at 71 (quoting *Board of Education of Hendrick Hudson Central School District v. Rowley*, 458 U.S. 176, 207, 102 S.Ct. 3034, 73 L.Ed.2d 690 (1982)). The evidence is overwhelming that Student has received educational benefit since her enrollment at Nonpublic School at the start of the 2013-2014 school year. Head of School testified that Nonpublic School is the perfect fit for Student and she and Father agreed that Student is making slow, but steady, progress there. DCPS' witness, Compliance Expert agreed in her testimony that Student was benefitting from the environment at Nonpublic School. Independent Psychologist, who was engaged by DCPS to evaluate

Student in January 2015, reported that Student had reportedly made academic gains at Nonpublic School and that she “thrived socially and emotionally” there.

DCPS has contended that Nonpublic School is not Student’s least restrictive environment. However, under the *Leggett* decision, a parent’s unilateral private placement will be deemed proper under the IDEA so long as the placement is reasonably calculated for the student to receive educational benefit. It is not a requirement for reimbursement that the parent’s private placement be the student’s least restrictive environment.

In sum, I conclude that Father has established that DCPS failed to offer Student a FAPE in the placement at City School for the 2015-2016 school year and Father’s private placement of Student at Nonpublic School was proper under the IDEA. Therefore, under the standards set by the D.C. Circuit in the *Leggett* decision, Father is entitled to reimbursement from DCPS for his costs for Student to attend the private school for the 2015-2016 school year.³

Father also seeks an order for DCPS to maintain Nonpublic School as Student’s ongoing placement until such time as DCPS offers a suitable placement for Student. It is clear from the testimony of Head of School in this case that Student has difficulty with

³ Because of my disposition of the first issue in this matter, it is unnecessary to reach the remaining issues asserted by the Petitioner,

– Whether City School is not capable of implementing Student’s May 7, 2015 IEP because the school lacks a speech-language pathologist and its social skills training, multi-modal instruction, and research-based interventions are not available across all skills areas and

– Whether DCPS violated the IDEA’s procedural requirements by refusing to consider Nonpublic School as a location of services for Student.

transitions and I will order DCPS to fund Student's placement at Nonpublic School through the end of the regular 2015-2016 school year.⁴ *Cf. Branham v. Government of the Dist. of Columbia*, 427 F.3d 7, 12-13 (D.C. Cir. 2005) (Asking whether setting aside placement order might disrupt child's education.) However, DCPS is not required to maintain Student's placement at Nonpublic School past the 2015-2016 school year, if it offers another appropriate public or private school program. *See, e.g., Jenkins v. Squillacote*, 935 F.2d 303, 305 (D.C. Cir. 1991) (If there is an "appropriate" public school program available, *i.e.*, one reasonably calculated to enable the child to receive educational benefits, the District need not consider private placement.) Moreover, as the D.C. Circuit emphasized in *Leggett*, it is DCPS that retains "complete control over the situation, *i.e.*, to avoid burdensome reimbursement obligations, they need only offer each child a free appropriate public education, either in a public school or in a private school the district chooses." *Id.* at 75. Whether DCPS will offer Student an appropriate ongoing placement after the 2015-2016 school year – and whether Nonpublic School will continue to be proper for Student – remain to be determined. I decline to order DCPS to maintain Nonpublic School as Student's ongoing placement after the 2015-2016 school year.⁵

⁴ The May 7, 2015 IEP states that Extended School Year (ESY) Services are required for the provision of FAPE to Student. There was no testimony at the due process hearing about whether or not Nonpublic School offers ESY Services and Petitioner did not specifically seek funding for private school ESY Services in his due process complaint. Therefore, I do not determine whether DCPS must fund nonpublic ESY Services for Student for the summer of 2016.

⁵ This is without prejudice to Father's rights and remedies with regard to future IEPs or educational placements offered by DCPS.

ORDER

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

ORDERED:

1. Upon receipt of documentation of payment by Father, as may be reasonably required, DCPS shall reimburse Father the costs of tuition expenses for Student's enrollment at Nonpublic School for the 2015-2016 regular school year. To the extent any portion of the approximately \$43,000 tuition amount for the 2015-2016 school year remains due to Nonpublic School, DCPS shall pay the remaining sum directly to Nonpublic School; and
2. All other relief requested by the Petitioner herein is denied.

Date: November 29, 2015

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
Chief Hearing Officer
OSSE - SPED
DCPS Resolution Team