

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

OSSE  
Office of Dispute Resolution  
June 8, 2015

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PARENTS, on behalf of STUDENT, <sup>1</sup>	)	Date Issued: June 8, 2015
	)	
Petitioners,	)	Hearing Officer: Peter B. Vaden
	)	
v.	)	Case No: 2015-0091
	)	
DISTRICT OF COLUMBIA PUBLIC SCHOOLS,	)	Hearing Dates: May 13, 21 and 29, 2015
	)	
Respondent.	)	Office of Dispute Resolution Rooms 2006, 2003 and 2004 Washington, D.C.
	)	

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**HEARING OFFICER DETERMINATION**

**INTRODUCTION AND PROCEDURAL HISTORY**

This matter came to be heard upon the Administrative Due Process Complaint Notice filed by the parents (the Petitioners or PARENTS), under the Individuals with Disabilities Education Act, as amended (the IDEA), 20 U.S.C. § 1400, *et seq.*, and Title 5-E, Chapter 5-E30 of the District of Columbia Municipal Regulations (D.C. Regs.). In their due process complaint, Petitioners allege that respondent District of Columbia Public Schools (DCPS) denied Student a free appropriate public education (FAPE) by failing to offer him an appropriate Individualized Education Program (IEP) in June 2014. The Parents seek reimbursement for Student’s private school enrollment expenses.

Student, an AGE child, is a resident of the District of Columbia. Petitioners' Due Process Complaint, filed on March 17, 2015, named DCPS as respondent. The undersigned Hearing Officer was appointed on March 18, 2015. The parties met for a resolution session on April 7, 2015 and were unable to reach an agreement. The 45-day deadline for issuance of this Hearing Officer Determination began on April 17, 2015. On April 10, 2015, I convened a prehearing telephone conference with counsel to discuss the hearing date, issues to be determined and other matters.

The evidentiary portion of the due process hearing was held before this Impartial Hearing Officer on May 13 and 21, 2015 at the Office of Dispute Resolution in Washington, D.C. On March 29, 2015, the hearing was reconvened, via an on-the-record telephone conference call, to receive oral closing argument. The hearing, which was closed to the public, was recorded on an electronic audio recording device. The Petitioners appeared in person and were represented by PETITIONERS' COUNSEL. Respondent DCPS was represented by LEA REP and by DCPS' COUNSEL.

MOTHER testified and Petitioners called as witnesses READING TUTOR, READING INSTRUCTOR, SPECIAL EDUCATION CONSULTANT and NONPUBLIC SCHOOL CURRICULUM SPECIALIST. DCPS called as witnesses SCHOOL PSYCHOLOGIST, CLASSROOM TEACHER, SPECIAL EDUCATION TEACHER and LEA Rep. Petitioners' Exhibits P-1 through P-34, with the exception of Exhibit P-27, were admitted into evidence without objection. Exhibit P-27 was withdrawn. DCPS' Exhibits R-1 through R-15 were admitted into evidence without objection, except for Exhibit R-12 to which Petitioners' objection was sustained. Counsel for Petitioners made an opening statement. Counsel for both parties made oral closing arguments in a telephone conference hearing session. Neither party requested leave to file post-

hearing written argument. By a written order issued on May 29, 2015, I granted DCPS' unopposed motion for a 10-day extension of the due date for the final decision in order to allow sufficient time to prepare this Hearing Officer Determination, after the completion of oral argument on May 29, 2015.

### **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 issue for determination was certified in the April 10, 2015

Prehearing Order:

– Whether DCPS' March 31, 2014 IEP, as amended on June 19, 2014, denied Student a FAPE because the IEP provided insufficient, direct special education instruction delivered outside the general education environment; lacked sufficient intensive, research-based interventions in all aspects of reading, particularly focusing on the early stages of decoding, and failed to provide sufficient small group/out of general education instruction to enable Student to make meaningful educational progress.

For relief, Petitioners request that DCPS be ordered to reimburse them for their expenses for Student's enrollment at Nonpublic School for the 2014-2015 school year.

### **FINDINGS OF FACT**

After considering all of the evidence, as well as the arguments of counsel, this Hearing Officer's Findings of Fact are as follows:

1. Student is an AGE resident of the District of Columbia, where he resides with Parents. Student has been identified as eligible for special education and related services under the disability classification Specific Learning Disorder (SLD). Testimony of Mother, Exhibit R-7.

2. Student attended CITY ELEMENTARY SCHOOL from pre-kindergarten

through PRIOR GRADE. At the end of the 2013-2014 school year, the Parents withdrew Student from public school and unilaterally placed him at Nonpublic School, where he is currently in the GRADE. Testimony of Mother.

3. From August 2011 to August 2014, the Parents engaged Reading Tutor to provided private 1:1 tutoring in Reading to Student once a week. Reading Tutor collaborated closely with Student's City Elementary School teachers. Testimony of Mother, Testimony of Reading Tutor.

4. When Student was in 1<sup>st</sup> grade at City Elementary School, he was referred for a full comprehensive psychological evaluation by a DCPS psychologist at the request of Mother and the City Elementary School multidisciplinary team (MDT). The DCPS psychologist administered a battery of cognitive, educational and behavioral assessments and observed Student in his 1<sup>st</sup> grade classroom. On the Reynolds Intellectual Assessment Scales (RIAS), Student tested in the Above Average range for both verbal and nonverbal intellectual abilities. On the Woodcock-Johnson Tests of Achievement – Third Edition (WJ-III), Student's overall level of performance was Low-Average; his academic skills were in the Average range; his academic fluency with tasks and his ability to apply academic skills were determined to be in the Low Average range; Student's Standard Scores on the WJ-III were High Average in broad mathematics, math calculation skills and brief mathematics; Average in written expression; and Low Average in broad and brief reading, broad written language and brief writing. In a May 23, 2012 Psychological Evaluation Report, the DCPS psychologist reported that Student was currently performing two years or more below his general education peers in reading fluency and in the broad reading intra-achievement cluster. He concluded that Student met criteria under the IDEA and the D.C. Regs. for identification as a child with

an SLD. Exhibit R-3.

5. On June 12, 2012, the City Elementary School MDT team determined that Student was eligible for special education and related services on the basis of an SLD primary disability. On the same day, Student's IEP team developed his initial IEP. The June 12, 2012 IEP identified Reading as the only area of concern for Student and provided that Student would receive two hours per week of Specialized Instruction in the general education setting. Exhibit P-8. As of January 25, 2013, Student was reported to be Progressing on his initial IEP annual goals. Exhibit R-11.

6. Student's City Elementary School IEP team convened for his annual IEP review on March 28, 2013. The IEP team reported that Student had been making progress in the areas of decoding and reading fluency and that on a Fountas and Pinnell Benchmark Assessment given March 15, 2013, Student was able to read with 97 percent accuracy with appropriate fluency and comprehension on Level G (first grade level) text. However, the IEP team noted, *inter alia*, that although Student had been improving his fluency, he was still far below his grade benchmark as indicated by progress monitoring and teacher observation. The IEP team reported, *inter alia*, that Student's SLD disability directly affected his progress because he required support on most reading tasks and that he required small group instruction and one-on-one supports in order to complete most tasks that require reading. On the March 28, 2013 IEP, Student's Specialized Instruction was increased to one hour per week in general education and two hours per week outside general education. In addition, the IEP team added Read & Write Gold text reading software and Graphic Organizers as Assistive Technology (AT) to Student's IEP. Exhibit P-6. As of June 18, 2013, Student was reported to be Progressing on all of his March 28, 2013 IEP goals. Exhibit R-11.

7. Over the 2013 summer, for nine weeks, Parents paid for Student to attend the Lindamood-Bell Learning Center for intensive reading remediation. Testimony of Special Education Consultant. The program was not beneficial for Student. Testimony of Mother.

8. When Student returned to City Elementary School in fall 2013, he exhibited anger and frustration over his school work. The Parents felt that he was not making any progress in his Reading. In November 2013, the Parents began the application process for Student to enter Nonpublic School. On December 11, 2013, Classroom Teacher completed a Teacher Evaluation of Student Strengths and Needs form for Nonpublic School. She reported as “areas of significant concern” for Student, Reading decoding, Reading fluency, Written expression, Writing mechanics, and Independent work. In written comments, Classroom Teacher wrote, *inter alia*, that Student comprehended when being read to but struggled when reading independently; and that he often became frustrated with assignments so he had trouble self-starting and staying motivated; and that he appeared distracted and disengaged at times because he was overwhelmed. Exhibit P-10.

9. During the 2013-2014 school year, Special Education Teacher provided instruction to Student, outside general education, targeting Reading and Written Expression, including spelling. In the general education classroom, she worked with Student to “generalize” these skills. Student was not making meaningful progress in terms of generalizing the skills he was being taught in the pull-out setting. Testimony of Special Education Teacher.

10. DCPS staff administered a psychological reevaluation of Student in December 2013. Under the subtest of his cognitive functioning, on the Kaufman

Assessment Battery for Children 2<sup>nd</sup> Edition (KABC-II), Student received a Far Below Average score (2 percentile). On the Reynolds Intelligence Screening Test (RIST), Student achieved a standard score of 98 – Average range. On the WJ-III achievement tests, Student received a broad reading score of 67 – Far below Average, broad math score of 97 – Average, and a written expression score of 96 - Average. Exhibit P-9.

From the prior administration of the WJ-III in April 2012, Student's standard scores had declined in the following areas:

- single word decoding from 92 to 75
- math calculations from 105 to 94
- math fluency from 104 to 90
- sentence-length reading comprehension from 71 to 59.

Student's reading fluency score was constant, showing a year's progress; however his scores were very low, 72 (3<sup>rd</sup> percentile) on each administration. His writing fluency scores were also constant, showing progress but no closing of the gap with his peers. His sentence-length writing score improved from 90-110. Exhibit P-12, Testimony of Special Education Consultant.

11. In January 2014, Special Education Teacher referred Student to DCPS for a Least Restrictive Environment (LRE) review seeking more strategies to use in the general education setting to work on Student's reading and writing skills. Testimony of Special Education Teacher. In the written LRE referral, Special Education Teacher wrote that "the IEP team recently reevaluated [Student] and his academic scores, particularly in reading, have not progressed sufficiently in the 20 months since his prior evaluation. He continues to be well behind grade level expectations in reading despite significant interventions at school and outside of school funded by his parents." Special Education Teacher also marked a box on the LRE referral form which stated,

“Instructional/Educational - Student’s academic needs exceed the capacity of available school resources.” Testimony of Special Education Teacher, Exhibit P-9.

12. LRE OBSERVER from DCPS observed Student at City Elementary School on January 28, 2014. LRE Observer reported that Student was observed as a pleasant student whose behavior was controlled and primarily situation appropriate. She recommended that Student remain in his current setting at City Elementary School. Exhibit P-9.

13. At City Elementary School, Student had good relationships with his nondisabled peers and benefitted from being in class with them. Testimony of Classroom Teacher, Testimony of Special Education Teacher.

14. By March 2014, Student was accepted by Nonpublic School for the 2014-2015 school year. The Parents deposited funds to secure Student’s place at the private school. Testimony of Mother.

15. An IEP annual review meeting for Student was convened at City Elementary School on March 13, 2014. Parents, Petitioners’ Counsel, Special Education Consultant and Reading Tutor attended the meeting. In the March 13, 2014 IEP, Student’s Present Levels of Academic Achievement and Functional Performance (PLOP) for Reading was reported as,

[Student] has been making progress in the areas of decoding and reading fluency. As indicated by teacher observation, data collection, and work samples, he is able to comprehend text that is read to him on or above grade level. [Student] is able to decode many irregular and regularly spelled words in isolation. He is working on mastering vowel sounds and other letter combinations in order to increase his fluency when reading. He has improved from a fluency score of 8 to 20 as indicated by his Dibels middle of the year benchmark which was assessed on February 5, 2013. His accuracy of the words read was 71%. He has been showing higher scores since this date. On March 15, 2013, the Fountas and Pinnell Benchmark Assessment revealed that [Student] is able to read with 97% accuracy with appropriate fluency and comprehension on a level G text (first grade level).

The description of how Student's disability affects his access to the general education curriculum stated,

[Student's] reading ability greatly impacts his ability to access the general education curriculum throughout his day. He requires small group and one on one supports in order to complete most tasks that require reading (directions, ideas on a high level, response to a question, math word stories, etc.) The use of visuals, technology, and teacher supports are essential for his success in the area of reading. Specialized instruction is necessary in order to guide [Student] towards accessing the general education curriculum.

In the March 13, 2014 IEP, Student's Special Education Services were increased to 3 hours per week of Specialized Instruction outside general education and 4 hours per week of Specialized Instruction in general education. The IEP also provided that Student would receive 180 minutes per month of Occupational Therapy to address his difficulties with left/right discrimination and motor fluency. Text to speech and word prediction software, graphic organizers, visual cues on keypad and a laptop computer trial were specified for AT. Exhibit R-5.

16. The March 13, 2014 IEP was revised on June 19, 2014 to add annual goals and additional Specialized Instruction for Mathematics, including 1 hour per week in general education and 30 minutes per week outside general education. Special Education Consultant had previously recommended that Student's IEP target math and on June 19, 2014, Student was determined eligible for special education based upon an SLD in mathematics, in addition to the SLD in Reading. Exhibits R-7, R-9, Testimony of LEA Rep.

17. By letter of June 20, 2014, Petitioners' Counsel wrote the principal of City Elementary School to notify DCPS that the Parents rejected the March 13, 2014 IEP, as amended on June 19, 2014. In his letter, Petitioner's Counsel asserted that Student required a full-time special education program that utilized research based programs to

remediate his learning disabilities. The attorney gave notice that the Parents intended to enroll Student at Nonpublic School effective summer of 2014, and that it was the Parents' intention for the private school placement to be at public expense. Exhibit P-2. Petitioners' Counsel sent a follow-up letter to the City Elementary School Principal on July 3, 2014 to repeat that the Parents rejected the DCPS IEP and placement and to demand that DCPS fund Student's placement at Nonpublic School. Exhibit P-3. The Parents did not receive a response from DCPS to either letter. Testimony of Mother.

18. Student began attending Nonpublic School at the beginning of the 2014-2015 school year. Nonpublic School is a private day school for Students with specific learning disabilities, grades 1 through 12, located in the District of Columbia. There are 90 students in the program. Every student at Nonpublic School has a full-time special education placement. Nonpublic School holds a current Certificate of Approval from the D.C. Office of the State Superintendent of Education (OSSE). Testimony of Curriculum Specialist. The Parents paid Nonpublic School approximately \$44,900 for Student's enrollment expenses for the 2014-2015 school year. Testimony of Mother.

19. When Student entered Nonpublic School in August 2014, he was functionally illiterate. He was severely disabled in reading and written language and was unable to access anything requiring being able to read written language. Nonpublic School started Student on the Wilson Foundations reading program. He did not make expected progress. In January 2015, Nonpublic School changed Student's reading program to the Phonographics program. Also in February 2015, Nonpublic School brought in a reading teacher to provide an extra daily 1:1 reading class to Student. Student is the only student at Nonpublic School being provided two daily periods of reading instruction. Testimony of Curriculum Coordinator.

20. Since February 2015, Student has made progress in reading. His composite reading score improved from 68 (not ready for GRADE reading material) to 92 (approaching reading material readiness). Testimony of Curriculum Coordinator, Exhibit P-28. His Nonpublic School reading instructor qualified this report of progress by noting that Student was not yet ready for grade level materials and his improvement depends on 1:1 instruction, which has been crucial to his success. Exhibit P-28.

### **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 Petitioners 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).

#### **Legal Standard for Private Placement Reimbursement**

In this case, the Parents seek reimbursement for their unilateral placement of Student at Nonpublic School because DCPS allegedly failed to offer Student an appropriate IEP at City Elementary School for the 2014-2015 school year. Under the IDEA, parents who unilaterally decide to place their disabled child in a private school, without obtaining the consent of local school officials, “do so at their own financial risk.” *Florence County Sch. Dist. Four v. Carter*, 510 U.S. 7, 15, 114 S.Ct. 361, 126 L.Ed.2d 284 (1993) (quoting *Sch. Comm. of the Town of Burlington v. Dep't of Educ.*, 471 U.S. 359, 374, 105 S.Ct. 1996, 85 L.Ed.2d 385 (1985)). Under what is known as the *Burlington-*

*Carter* test, Parents may receive tuition reimbursement only upon a finding that the local education agency (LEA) “violated the IDEA, that the private school placement was an appropriate placement, and that [the] cost of the private education was reasonable[.]” *Holland v. District of Columbia*, 71 F.3d 417, 425 (D.C.Cir.1995) (citing *Florence County, supra.*)

i. Alleged Violation of the IDEA

The Parents claim that DCPS violated the IDEA by not offering Student an appropriate revised IEP at IEP meetings on March 13, 2014 and June 19, 2014. The IDEA requires that an LEA must ensure that the IEP team reviews the child’s IEP periodically, but not less than annually, to determine whether the annual goals for the child are being achieved; and revises the IEP, as appropriate, to address, *inter alia*, any lack of expected progress toward the annual goals and in the general education curriculum and the results of any eligibility reevaluation. Student’s prior year, March 28, 2013, IEP at City Elementary School provided him three hours per week of Specialized Instruction in Reading, including two hours outside general education. In January 2014, Student’s IEP team referred Student to DCPS for an LRE review because the team had determined that Student’s academic achievement scores, particularly in Reading, had not progressed sufficiently in the preceding 20 months. Subsequently, Student’s IEP team revised his IEP at meetings on March 13 and June 19, 2014 (hereafter, the “June 19, 2014 IEP”). The June 19, 2014 IEP increased Student’s Specialized Instruction in Reading to 7 hours per week, including 3 hours outside general education. (The IEP also provided Student, as a new service, 90 minutes per week of Specialized Instruction in Mathematics.) The Parents contend that Student was denied a FAPE by the June 19, 2014 IEP, because the IEP provided insufficient, direct

special education instruction delivered outside the general education environment; lacked sufficient intensive, research-based interventions in all aspects of reading, particularly focusing on the early stages of decoding, and failed to provide sufficient small group/out of general education instruction to enable Student to make meaningful educational progress.

To determine whether a revised IEP is adequate to provide a FAPE, a hearing officer must determine “[f]irst, has the [District] complied with the procedures set forth in the [IDEA]? And second, is the individualized educational program developed through the Act’s procedures reasonably calculated to enable the child to receive educational benefits? If these requirements are met, the [District] has complied with the obligations imposed by Congress and the courts can require no more.” *A.M. v. District of Columbia*, 2013 WL 1248999, 11 (D.D.C.2013), quoting *Bd. of Educ. of the Hendrick Hudson Cent. Sch. Dist., Westchester County v. Rowley*, 458 U.S. 176, 206-07, 102 S.Ct. 3034, 73 L.Ed.2d 690 (1982) (*Rowley*). Petitioners have not raised an IDEA procedural issue with respect to the development of the June 19, 2014 IEP. Therefore, I turn to the second prong of the *Rowley* inquiry: Was the June 19, 2014 IEP reasonably calculated to enable Student to receive educational benefits?

In *K.S. v. District of Columbia*, 962 F.Supp.2d 216 (D.D.C.2013), U.S. District Judge Boasberg reviewed case law precedents on the requirements for an appropriate IEP:

The IEP must be formulated in accordance with the terms of IDEA and “should be reasonably calculated to enable the child to achieve passing marks and advance from grade to grade.” *Rowley*, 458 U.S. at 204, 102 S.Ct. 3034. IDEA also requires that children with disabilities be placed in the “least restrictive environment” so that they can be educated in an integrated setting with children who do not have disabilities to the maximum extent appropriate. *See* [20 U.S.C.] § 1412(a)(5)(A). . . . IDEA

provides a “basic floor of opportunity” for students, *Rowley*, 458 U.S. at 201, 102 S.Ct. 3034, rather than “a potential-maximizing education.” *Id.* at 197 n. 21, 102 S.Ct. 3034; *see also Jenkins v. Squillacote*, 935 F.2d 303, 305 (D.C.Cir.1991) (inquiry is not whether another placement may be “more appropriate or better able to serve the child”) (emphasis in original); *Houston Indep. Sch. Dist. v. V.P. ex rel. Juan P.*, 582 F.3d 576, 583 (5th Cir.2009) (IDEA does not guarantee “the best possible education, nor one that will maximize the student’s educational potential”; instead, it requires only that the benefit “cannot be a mere modicum or *de minimis*; rather, an IEP must be likely to produce progress, not regression or trivial educational advancement.”) (quoting *Cypress–Fairbanks Indep. Sch. Dist. v. Michael F. ex rel. Barry F.*, 118 F.3d 245, 248 (5th Cir.1997)). Consistent with this framework, “[t]he question is not whether there was more that could be done, but only whether there was more that had to be done under the governing statute.” *Houston Indep. Sch. Dist.*, 582 F.3d at 590.

*K.S.* 962 F.Supp.2d at 200-221.

The IDEA further requires that the District ensure that every IEP is based upon the “individualized consideration of and instruction for each child.” *See Rowley, supra*, at 189-190. Examining the quantum of benefit necessary for an IEP to satisfy IDEA, the Third Circuit Court of Appeals in *Polk v. Central Susquehanna Intermediate Unit 16*, 853 F.2d 171 (3d Cir.1988), rejected the notion that what was “appropriate” could be reduced to a single standard, holding the benefit “must be gauged in relation to the child’s potential.” *Id.* at 185. The “IDEA calls for more than a trivial educational benefit and requires a satisfactory IEP to provide significant learning and confer meaningful benefit. . . .When students display considerable intellectual potential, IDEA requires a great deal more than a negligible benefit.” *Ridgewood Bd. of Educ. v. N.E. ex rel. M.E.*, 172 F.3d 238, 247 (3<sup>rd</sup> Cir.1999) (citations and internal quotations omitted.) *See, also, Hall v. Vance Cty. Bd. of Educ.*, 774 F.2d 629, 635 (4th Cir.1985) (stating that *Rowley* holds that “no single substantive standard can describe how much educational benefit is sufficient to satisfy [IDEA]”); *A.I. ex rel. Iapalucci v. District of Columbia*, 402

F.Supp.2d 152, 168 (D.D.C.2005) (“*de minimis benefits*” are insufficient to satisfy *Rowley’s* “some educational benefit” standard.)

In the present case, consistent cognitive testing demonstrates that Student has Average to High Average intellectual potential. However, he is held back by a severe learning disability in Reading. School Psychologist testified that Student’s visual recognition memory was Borderline and has a significant impact on his learning. Student’s classroom teacher reported in December 2013, when Student still attended City Elementary School, that the child’s Reading decoding and Reading fluency were significant areas of concern, and that although he could comprehend when read to aloud, he struggled when reading independently. In her testimony at the due process hearing, this teacher agreed that Student’s ability to learn was significantly compromised because he was struggling to read. On the WJ-III achievement tests administered in January 2014, Student attained a broad reading score of 67 for a 1.5 grade equivalency. Reading Instructor administered several Reading assessments in May 2014, including the TOWRE-2, for sight word efficiency and the GORT-5 for reading comprehension. Student scored below the 1<sup>st</sup> percentile on both assessments. According to the Nonpublic School Curriculum Director, when Student entered the private school at the beginning of the 2014-2015 school year, he was “functionally illiterate.”

The Parents contend that, informed by this information, DCPS was obliged to ensure that when Student’s IEP was revised in spring 2014, his IEP services in Reading were substantially augmented to enable him to learn to read in accordance with his intellectual potential. They argue that by increasing Student’s Specialized Instruction in Reading by only four hours per week, including two additional hours outside general

education, the June 19, 2014 IEP was not adequate to provide Student “significant learning” and confer “meaningful benefit.” *See Ridgewood, supra.*

In support of their contention, the Parents called two experts. Special Education Consultant, who qualified as an expert in special education programming for students with learning disabilities, opined that Student failed to make meaningful educational progress over the 2013-2014 school year and that, because of the severity and pervasiveness of his reading disability, the services offered in the June 19, 2014 IEP were not sufficient. I found Special Education Consultant to be a credible witness. She has extensive experience assessing students with learning disabilities and advising parents. Her opinion in this case was based upon a full review of Student’s records, her observation of Student in his classroom at City Elementary School, discussions with Student’s teachers and the results of the battery of reading tests she administered.

Reading Instructor, who also testified as an expert for the Petitioners, opined that Student needs a minimum of 50 minutes per day of 1:1 reading instruction using systematic, explicit multi-sensory instruction. Although I credit the test results of the standardized Reading assessments which Reading Instructor administered, I accord less weight to his opinion. In his testimony, Reading Instructor was unable to fully recall what occurred at an IEP meeting he attended for Student in spring 2014 or even whether he had observed Student in a classroom setting.

For its part, DCPS maintains that the June 19, 2014 IEP was appropriate for Student. The District’s expert witnesses, Special Education Teacher and LEA Rep, both opined that the provision in the revised IEP for Student to receive 7 hours per week of Specialized Instruction in Reading, including 3 hours outside general education, was appropriate programming for Student. While the decisions of school division personnel

are entitled to some deference, *see, e.g., T.T. v. District of Columbia*, 2007 WL 2111032, 9 (D.D.C. 2007), I find these opinions of the District's witnesses unpersuasive. In her psychological reevaluation of Student conducted in December 2013, School Psychologist found that Student's overall reading ability and his reading comprehension were in the Far Below Average range. In her January 2014 LRE Referral, Special Education Teacher wrote that Student's IEP team had found that Student's academic scores had not progressed significantly in the preceding 20 months. Special Education Teacher testified that at the time of the IEP meeting, Student's comprehension, when material was read aloud to him, was at Level R (4<sup>th</sup> grade equivalent), but his independent reading level, as measured by Fountas and Pinnell testing, was only Level J (2<sup>nd</sup> grade equivalent).

"[T]he ability to read is truly the key that opens the door to all other aspects of an education." *Nein v. Greater Clark County School Corp.*, 95 F.Supp.2d 961, 977 (S.D.Ind.2000). According to Curriculum Coordinator, Student was functionally illiterate when he entered Nonpublic School in August 2014. It is undisputed that, intellectually, Student has considerable potential. Clearly, during the 2013-2014 school year, Student's reading disability was keeping him from progressing as expected with such potential. *See Polk, supra*. Academic progress is one of the "yardsticks" used by courts to assess the validity and sufficiency of an IEP. *See, e.g., Smith v. District of Columbia*, 846 F.Supp.2d 197, 201 (D.D.C. 2012). I find that the Petitioners have met their burden of proof to show that the increase of Specialized Instruction in Reading in the June 19, 2014 IEP, from three to seven hours per week, of which only three hours would be provided outside general education, was not adequate to address Student's severe disability in Reading and hence, not reasonably calculated to enable the child to

receive educational benefits. This was a violation of the IDEA and Student was denied a FAPE as a result.

ii. Appropriateness of Parental Placement

The second part of the *Burlington-Carter* test for private school reimbursement is whether the private school placement made by the parents was an appropriate placement and whether the cost of the private education was reasonable. In deciding whether a private school placement is appropriate, the D.C. Circuit has identified specific factors for consideration: (1) the nature and severity of the student's disability, (2) specialized educational needs, (3) the link between those needs and the private schools offered services, (4) the placement's cost, and (5) the extent to which the placement represents the least restrictive environment. *Fisher v. Friendship Public Charter School*, 2012 WL 11916732, 6 (D.D.C. Jan. 26, 2012) (citing *Branham v. Gov't of D.C.*, 427 F.3d 7, 12 (D.C.Cir. 2005)). Pursuant to the *Branham* guidance, I will address each of these considerations in turn.

a. Nature and Severity of Student's Disability

The evidence in this case establishes that Student's primary IDEA disability is a severe Specific Learning Disability in Reading. Although cognitive tests establish that Student's IQ is Average or Above Average, in spring 2013, his independent reading was at least two grade levels below his cognitive ability. Student's overall reading ability and reading comprehension were in the Far Below Average range.

b. Student's Specialized Educational Needs

Based upon her extensive testing and observation of Student in the classroom, Special Education Consultant reported that Student required full-time special education programming for bright children with learning disabilities and, specifically, daily 1:1

intervention in phonemic awareness and decoding. (Whether Student requires full-time special education programming was not an issue in this case. For purposes of this analysis, I determine only that Student requires daily intensive reading intervention by a teacher qualified to instruct a child with a severe learning disability in Reading.)

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

Nonpublic School offers a specialized program to instruct bright children like Student, who are held back educationally by a severe learning disability. Nonpublic School is providing two periods per day of Reading Instruction to Student in small group and 1:1 settings. Student is making educational progress in the program at Nonpublic School.

d. Cost of Placement at Nonpublic School

The cost of tuition at Nonpublic School is approximately \$45,000 per year. Nonpublic School holds a current Certificate of Approval from OSSE to enroll District children with SLDs. DCPS offered no evidence that the cost of placement at Nonpublic School is unreasonable or higher than at other OSSE approved nonpublic day schools.

e. Least Restrictive Environment

The IDEA requires that children with disabilities be placed in the "least restrictive environment" so that they can be educated in an integrated setting with children 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). At City Elementary School, Student had good relationships with his nondisabled peers and benefitted from being in class with them. At Nonpublic School, Student has no opportunity to interact with nondisabled peers. In *N.T. v. District of Columbia*, 839 F.Supp.2d 29

(D.D.C.2012), the Court held it was appropriate for a hearing officer to consider whether a private school was the least restrictive environment in evaluating whether private placement was the proper remedy. *See id.* at 35, n.3. The facts in *N.T.* are inapposite to this case. The child in *N.T.* required small group instruction and it was established that DCPS could provide her such instruction at her neighborhood school. The Court held that because DCPS could craft an appropriate IEP to provide a FAPE to the child in the public school setting, the District was not required to reimburse the parents for the child's tuition at a private school that did not accept non-disabled students. In the instant case, DCPS did not offer Student a less restrictive placement option that would meet his needs resulting from his severe Reading disability. For that reason, the Parents' placement need not be the least restrictive environment. *See N.T., supra; Thompson R2-J School Dist. v. Luke P.*, 2007 WL 1879981, 10 (D.Colo.2007). (Since no other placement options were offered by LEA, the evidence does not establish that there was a less restrictive appropriate placement for student than parental placement.)

Considering all of the above factors, and in light of the failure of DCPS to propose an appropriate IEP for Student, I conclude that at the time the Parents placed Student at Nonpublic School, it was an appropriate placement and the cost of the private education was reasonable.

The Parents seek reimbursement for their costs for Student to attend Nonpublic School for the 2014-2015 school year. The Nonpublic School witness, Curriculum Coordinator, testified that Student is provided a second reading period, daily, where he receives one-on-one reading instruction to supplement Nonpublic School's "generic programming" for students with SLDs. Student is the only child at Nonpublic School who is provided a second reading period. The supplemental cost of that service, if any,

was not stated. The hearing evidence does not establish that Student requires a second daily reading period to meet the *Rowley* “basic floor of opportunity” standard. *See K.S., supra* (IDEA does not guarantee the best possible education, nor one that will maximize the student’s educational potential.) Therefore, while I will order DCPS to reimburse the Parents for the regular enrollment costs of Student’s 2014-2015 school year placement at Nonpublic School, I will not require DCPS to reimburse any additional fees charged by the school to provide Student the supplementary 1:1 reading period.

**ORDER**

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

ORDERED:

1. Upon receipt of documentation of payment by the Parents, as may be reasonably required, DCPS shall reimburse the Parents the costs of tuition expenses for Student’s enrollment at Nonpublic School for the 2014-2015 school year, exclusive of the amounts charged, if any, by Nonpublic School for providing Student supplemental 1:1 reading instruction; and
2. All other relief requested by the Petitioners herein is denied.

Date: June 8, 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**