

**COMMONWEALTH OF VIRGINIA
DEPARTMENT OF EDUCATION**

Office of Dispute Resolution and Administrative Services

In re: STUDENT¹

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} Hearing Officer: Peter B. Vaden

Due Process Hearing Request }

(Public Schools) }

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HEARING OFFICER DECISION

INTRODUCTION AND PROCEDURAL HISTORY

This matter came to be heard upon the Administrative Due Process Complaint Notice filed by the Petitioners (the PARENTS), under the Individuals with Disabilities Education Act, as amended (the IDEA), 20 U.S.C. § 1400, *et seq.*, and the *Regulations Governing Special Education Programs for Children with Disabilities in Virginia*, 8 VAC 20-81-10, *et seq.* (Virginia Regulations). In their due process complaint, the Parents seek tuition reimbursement for private school expenses they incurred for their child, Student, due to respondent Public Schools' (PS) alleged failure to

¹ In this decision, descriptive terms have been substituted for personally identifiable information to preserve the confidentiality of student and witness information. Names and other identification information is provided in the Key to Personal Identification attached to this decision.

offer Student an appropriate Individualized Education Program (IEP) for the 2018-2019 school year.

Student, an AGE child, is a resident of _____, Virginia. Petitioners' Amended Due Process Complaint, filed on March 1, 2019, named PS as respondent. The case was initially assigned to another special education hearing officer who recused himself. The undersigned hearing officer was appointed on March 29, 2019. PS filed its response to the amended due process complaint on March 15, 2019. On April 3, 2019, I convened a telephone prehearing conference with the parties and their counsel to set the due process hearing date and discuss issues to be determined and other matters.

The due process hearing was held before this Impartial Hearing Officer over six days, on June 6, 7, 24, 25 and 26, 2019 and July 1, 2019 at the PS Center in _____, Virginia. The hearing, which was closed to the public, was transcribed by court reporters. The Petitioners appeared in person and were represented by PETITIONERS' COUNSEL and by PETITIONERS' CO-COUNSEL. Respondent PS was represented by DUE PROCESS COORDINATOR and by PS' COUNSEL and PS' CO-COUNSEL.

Counsel for the respective parties made opening statements. Petitioners called as witnesses MOTHER, ACADEMIC SUPERVISOR, NEUROPSYCHOLOGIST and EDUCATIONAL CONSULTANT. PS called as witnesses REGULAR EDUCATION TEACHER, OCCUPATIONAL THERAPIST, ASSISTANT PRINCIPAL, SPEECH-LANGUAGE PATHOLOGIST, SPECIAL EDUCATION TEACHER, ACADEMIC SUPERVISOR, SCHOOL PSYCHOLOGIST, EDUCATIONAL SPECIALIST and PROGRAM MANAGER. Educational Specialist was also recalled by PS as a rebuttal

witness. Numerous exhibits offered by the respective parties were received into evidence. At the conclusion of the due process hearing on July 1, 2019, I granted the parties' joint request to file written closing briefs in lieu of making oral arguments and to extend the due date for my final decision from July 12, 2019 to July 31, 2019. Counsel for both parties timely filed written closings.

JURISDICTION

The hearing officer has jurisdiction under 20 U.S.C. § 1415(f) and 8 VAC § 20-81-210(A).

ISSUES AND RELIEF SOUGHT

The issues for determination, as memorialized in my April 3, 2019 prehearing order, are:

Whether PS denied Student a free appropriate public education (FAPE) by developing an inappropriate IEP in August 2018, which proposed an inadequate program of twelve hours and thirty minutes per week of specialized instruction inside general education and ten hours per week of specialized instruction outside of general education, and by proposing an unsuitable educational placement at SCHOOL.

For relief, the parents requested that PS be ordered to place Student at NONPUBLIC SCHOOL for the 2018-2019 school year and to reimburse them for their expenses for their unilateral placement of Student at Nonpublic School for the 2018-2019 school year, to include tuition together with all related services and costs.

FINDINGS OF FACT

After considering all of the evidence, as well as the argument and written memoranda of counsel, this hearing officer's findings of fact are as follows:

1. Student, an Age child, resides in _____, Virginia with Student's parents. Testimony of Mother.
2. Student is eligible for special education under the IDEA disability classification Other Health Impairment (OHI), as a result of chronic or acute health problems, namely, Attention Deficit Disorder (ADD) and generalized anxiety. Exhibit R-42. Student was initially determined eligible for special education by PS on June 10, 2014. Exhibit R-18.
3. Student attended _____ School, from the 2013-2014 school year until the end of the 2017-2018 school year. The parents unilaterally placed Student at Nonpublic School for the 2018-2019 school year. Testimony of Mother.
4. In a June 13, 2014 Psychological Evaluation Report, a PS' school psychologist reported that Student's cognitive abilities, as measured by the Wechsler Intelligence Scale for Children – Fourth Edition (WISC-IV), were overall in the Average range, with verbal reasoning abilities in the Average range, visual spatial skills within the Average range, working memory within the Average range, and processing speed in the Average range. Testing with the Kaufman Assessment Battery for Children – Second Edition (KABC-II) indicated generally average abilities, including average verbal skills, long-term retrieval and short-term memory. Nonverbal reasoning abilities were measured to be in the superior range. A measure of visual motor integration indicated abilities in the Average range. Reports of Student's social-emotional functioning at school were reflective of an elevated activity level, some aggressive behaviors and difficulty recovering after a setback. Student's parents reported a number of clinically significant concerns at home, including, Hyperactivity, Aggression, Atypicality, Attention Problems, and Adaptability. At-

Risk concerns were also reported in a variety of areas, including Conduct Problems, Anxiety, Depression, Social Skills, Activities of Daily Living and Functional Communication. Exhibit R-15.

5. In a May 2014 PS educational evaluation report, it was reported that Student was perceived to enjoy school; that Student's classroom teacher did not have concerns about Student's academic performance; that behavior was an area of concern for Student and that Student had a hard time keeping hands to self; that on the Kaufmann Test of Educational Achievement – Second Edition (KTEA-II), Student demonstrated Average abilities across all areas of testing, including Reading, Writing, Math, and Oral Fluency and that Student had diagnoses in the areas of ADHD-Combined Type, Sensory Integration Disorder, and Anxiety. Exhibit R-14.

6. Student's initial IEP, for the 2014-2015 school year, identified Behavior Improvements and Social Skills as Areas of Need. Exhibit R-23.

7. Parents had Student privately evaluated by Neuropsychologist in December 2014 and January 2015. The Parents identified concerns about Student's inattention, impulsivity, emotion dysregulation and sensory integration weaknesses. At that time, Student was already participating in psychotherapy and occupational therapy with private specialists. The Parents described Student as a strong student overall, noting that was a strong reader and had strong math skills, but tended to compose sentences slowly. Neuropsychologist administered an extensive battery of cognitive, educational achievement and behavioral assessments. On cognitive measures, Student's performance yielded a Verbal Cluster score in the Above Average range, a Nonverbal Cluster score in the Very Superior range and a Spatial Cluster score in the

Above Average range. The resulting composite General Conceptual Ability (GCA) score was in the Very Superior range (131 –98th percentile). On educational achievement measures, Student's performance was within the Average range for Reading and Written Language and in the Above Average range for Mathematics. On social and emotional measures, Student completed a screening questionnaire which resulted in significantly elevated scores for physiological anxiety symptoms, worry and social anxiety. The Parents and Student's classroom teacher completed behavior rating scales. The Parents' responses indicated significant externalizing symptoms, including difficulty with attention and hyperactivity, as well as aggression and conduct problems, social communication, reading social cues, understanding socially relevant information, demonstrating social motivation, handling changes in routine, sensory interests and becoming overly focused on specific topics. The teacher's responses did not endorse any significantly elevated scales aside from the hyperactivity scale. Neuropsychologist concluded that Student presented as a highly intelligent child with substantial weaknesses in attention, impulse control and executive functioning that contributed to significant difficulties with emotion and behavior self-regulation; that Student presented with high levels of anxiety, including social anxiety, worry and several fears, and that Student's academic skills were developing in most areas, but mild weaknesses were observed in sight-word reading and sentence level written composition. Neuropsychologist reported that Student's test results were consistent with a diagnoses of ADHD, Combined Type; Executive Functioning Weaknesses in the areas of organization, working memory, flexibility and self-monitoring and Unspecified Anxiety Disorder and poor self-regulation. For Student's educational setting, Neuropsychologist recommended a

classroom setting that would provide high levels of structure and support, a low student to teacher ratio, and regular periods of individualized and small group instruction to address weaknesses in Reading and written language. Exhibit P-13.

8. In interview with Neuropsychologist, Student reported that enjoyed going to school and liked classroom teacher, but reported having difficulty with attention and concentration and said that often got in trouble for having trouble “focusing.” Student said that enjoyed doing math and found reading fun because liked to learn. also identified a number of friends from school. Exhibit P-13.

9. Student’s end-of-year grades for the 2014-2015 school year were consistently 4's and 3's on a 1 to 4 scale (“Consistently” or “Usually” demonstrates concepts and skills of standard.) Exhibit R-19. At the end of the school year, Student was reported to be “making sufficient progress” on most IEP annual goals. was reported to have met one goal (utilized coping strategies) and to have demonstrated some progress on IEP goals to maintain “social distance” and to generate alternative approaches when stuck or engaged in rigid thinking. Exhibit R-23.

10. At the request of the Parents, Neuropsychologist provided regular therapy to Student from approximately September 2015 to December 2018. Psychotherapist focused on Student’s anxiety, regulation, attention, impulsivity, and the organizational and self-management challenges associated with executive functioning weaknesses. Psychotherapist was not addressing Student’s academic performance. He was addressing other aspects of Student’s behavior. Testimony of Neuropsychologist.

11. During some of the time that Student was seeing Neuropsychologist, was also seeing a psychiatrist, who prescribed medication for Student. The goals of

the psychiatric management were to better support Student's ADHD symptoms and better support anxiety and emotion regulation symptoms. To the knowledge of Neuropsychologist, as of the hearing date, Student continued to work with the psychiatrist for management of those conditions. Testimony of Neuropsychologist.

12. At a meeting on August 4, 2015, Student's IEP was revised at School. The IEP team reviewed, *inter alia*, Neuropsychologist's Neuropsychological Evaluation Report on Student. Writing/Written Language and Social Skills were identified as Areas of Need in the revised IEP. The IEP provided for Student to receive 16 hours per week of AUT-Autism [*sic*] Primary Services in the special education setting and .5 hours per week of counseling. Exhibit P-14A.

13. Student's IEP was revised again on May 10, 2016. Writing/Written Language, Cognitive/Attention and Social Skills were identified as Areas of Need for Student. Student was reported to have made great progress in the concern over using hands to touch other students. The May 10, 2016 IEP team maintained Student's AUT-Autism [*sic*] Primary Services at 16 hours per week, but reduced services in the special education setting to 2 hours per week and reduced counseling services to .5 hours per month. Exhibit R-31.

14. At the end of the 2015-2016 school year, Student was reported to be making sufficient progress toward achieving IEP goals for all annual goals, except for on spelling skills, where Student had demonstrated "some progress" but continued to work on spelling skills. At this point, Student had not fully met criteria for any 2015-2016 IEP goals. Exhibit R-30. Student's end-of-year grades for the 2015-2016 school year were consistently 4's and 3's. ("Consistently" [4] / "Usually" [3] demonstrates concepts and skills of standard.) Exhibit R-26.

15. On October 18, 2016, School revised Student's IEP without a meeting to update Student's current progress, to add a Reading goal to help with vocabulary acquisition and to change service hours to reflect Student's need for more small group support. Student's primary special education services were kept at 16 hours per week, of which the time in the special education setting was increased from 2 hours to 6 hours per week. Mother consented to this IEP addendum. Exhibit R-34.

16. As of April 7, 2017, Student was reported to be making sufficient progress toward achieving IEP goals for all annual goals, except for goals for Cognitive/Attention and Social Skills where Student had only demonstrated "some progress." At this point, Student had not fully met criteria for any 2016-2017 IEP goals. Exhibit R-36. Student's end-of-year grades for the 2016-2017 school year were consistently 4's and 3's. Exhibit R-33.

17. On May 12, 2017, Student's IEP team convened for the annual IEP review meeting. Writing/Written Language, Behavior Improvements, Reading and Cognitive/Attention were identified as Areas of Need. The IEP team reduced Student's Primary special education services to 10 hours per week, including 7 hours in the special education setting. For Curriculum/Classroom Accommodations and Modifications, the May 12, 2017 IEP provided for frequent breaks, graphic organizers, clearly defined limits/expectations, positive reinforcement system, and peer tutoring/paired writing assignments. In addition, the IEP specified that Student's peer partners needed to be able to communicate in a positive manner and be flexible in changing strategies with Student; that Student needed minimal distractions in environment and should be in close proximity to the point of instruction and that Student needed directions explicitly stated and then to have

Student state them back. The IEP did not include any counseling or other related services, but noted that Student was in a social skills group. Mother consented to this IEP. Exhibit R-37.

18. In a Teacher Narrative Report completed by Student's special education teacher on June 8, 2017, Student's areas of academic difficulty were identified as reading vocabulary, written expression and problem solving. Student's off task behavior was reported to often distract Student and those around from completing their work. Student was reported to be very independent with work, if was confident with a skill, and was also reported to love reading and drawing. Exhibit R-40.

19. Student's PS triennial special education reevaluation was done in June 2017. The team reviewed Neuropsychologist's 2014 neuropsychological evaluation of Student, the 2014 educational evaluation and social history reports and the teacher narrative/report, the PS Developmental Reading Assessment (DRA) and current work samples and written work. Based on these data, the School eligibility committee determined that Student continued to have an OHI disability, based on diagnoses of Attention Deficit Disorder and generalized anxiety and that Student was in need of special education and related services. Exhibits R-41, R-42.

20. For the 2017-2018 school year, Student was in GRADE at School. Student's IEP for the school year provided for 10 hours of primary special education. Of those hours, 7 hours were in the special education setting and were used for reading and writing. For the rest of the school week, Student was in the general education setting, which was a classroom of 24 children. A teaching assistant provided 3 hours per week of push-in special education services to Student in the

general education classroom. As specified in IEP, Student was provided frequent breaks, graphic organizers and a positive, praise-focused, reinforcement system. Testimony of Regular Education Teacher, Testimony of Special Education Teacher.

21. In the special education setting, Student was in a group of 9 students taught by Special Education Teacher and another teacher in separate groups. Testimony of Special Education Teacher.

22. Student's end-of-year grades for the 2017-2018 school year were all 4's and 3's. Student's end-of-year grades in Language Arts were all 3's, progressing from 2's ("Sometimes" demonstrates concepts and skills of standard) in half of the component areas. Exhibit R-46. Student was receiving special education instruction in Language Arts and in November 2017, was reading at a beginning 3rd grade level for fiction. Exhibit R-57, Testimony of Special Education Teacher.

23. As of June 15, 2018, Student was reported to have mastered two of four 2017-2018 IEP goals (Writing and Reading) and to be making sufficient progress toward achieving the other two goals (Behavior Improvements - Attention Seeking and Cognitive/Attention - Self-Regulation). By the end of the school year, Student was very close to mastery of IEP behavior goals. Exhibit R-44, Testimony of Special Education Teacher.

24. On the i-Ready diagnostic assessments for Reading and Math, over the 2017-2018 school year, Student's scores for Math Performance went from 464 (Approaching Level 4) at the beginning of the school year (BOY), to 448 at the middle of the school year (MOY), to 481 (At Level 4) at the end of the year (EOY). During the same period Student's i-Ready scores for Reading were 528 (Approaching

Level 4) at BOY, 530 at MOY and 571 (At Level 4) at EOY. Exhibit R-53.

25. On the Developmental Reading Assessment (DRA) administered in February 2018, Student passed the Level 38 fiction passage for oral reading and comprehension. In May 2018, Student passed the Level 40 fiction passage, which was the benchmark level for grade. Testimony of Assistant Principal, Exhibit R-16.

26. On Core Phonics surveys administered in September 2017 and May 2018, Student made a lot of progress in multi-syllabic words and low frequency words. Student still had difficulties with short vowel vs. long vowel sounds. Testimony of Special Education Teacher, Exhibit R-49.

27. In Spring 2018, Student passed the Virginia Standards of Learning (SOL) tests for Mathematics and Virginia Studies. Student did not pass the SOL for Reading. Testimony of Program Manager.

28. At the beginning of the 2017-2018 school year, behaviorally, Student lacked confidence in self. would have “shutdowns,” refusing to speak with a teacher, around once a week. At the beginning of the school year, Student also had a tough time forming friendships. As the year progressed, Student’s confidence and comfort in the regular education classroom improved. Over the school year, the “shutdowns” were reduced, only occurring around once a month. Student’s behaviors were not a significant hindrance to school work. By the end of the 2017-2018 school year, Student was feeling better about self, was better at advocating for self and had better relationship with peers and adults at school. Testimony of General Education Teacher. There was less shutting down, less touching other people, less not paying attention and more focus. Testimony of Special Education Teacher.

29. In the 2017-2018 school year, Student really enjoyed school at School. liked to belong. liked to get up and did not resist going to school. liked to see other kids. really wanted to make those relationships with other kids and liked to learn. still was having problems and felt traumatized at times at school. Testimony of Mother.

30. From September to December 2017, Neuropsychologist saw Student eight times for therapy. From January to June 2018, Neuropsychologist saw Student nine times. Exhibit R-25. Over the period he provided therapy to Student, Neuropsychologist had discussions with the Parents about Student's not making the progress in school they wanted to make, whether Student's current education plan was meeting needs and whether there were other strategies to better meet Student's needs. The suggestion of changing school came up. In the end Neuropsychologist did support a change to private school because he believed that Student was not succeeding in the large classroom setting. Neuropsychologist probably recommended Nonpublic School and another nonpublic school as avenues worth looking into. Testimony of Neuropsychologist.

31. Around the middle of the 2017-2018 school year, the Parents began the process of applying to private schools for Student, including Nonpublic School. Testimony of Mother. Student was accepted by Nonpublic School and in the spring of 2018, the Parents put down a deposit to reserve Student's place for the 2018-2019 school year. Testimony of Mother.

32. About late January 2018, on the recommendation of Neuropsychologist, the Parents got in touch with Educational Consultant to work with them on Student's education issues. Educational Consultant met with the Parents, observed Student in

the resource classroom at _____ School and participated in Student's IEP meetings. Testimony of Educational Consultant.

33. Educational Consultant also conducted her own "Diagnostic Educational Evaluation" of Student on April 2, 2018. She administered the Woodcock-Johnson Tests of Achievement-Fourth Edition (WJ-4) and the Gray Silent Reading Test Form A (GSRT) and she had Mother and Student's _____ School teachers complete behavior rating scales. Mother completed rating scales for the Achenbach Child Behavior Checklist (CBCL) and the Behavior Rating Inventory of Executive Function-Second Edition (BRIEF-2). General Education Teacher and Special Education Teacher completed rating scale questionnaires for the Achenbach Teacher's Report Form (TRF) and the BRIEF-2. In this testing, all of Student's educational achievement scores on the WJ-4 fell in the Average range with the exception of the Passage Comprehension subtest, which fell in the Low Average range. Student's scores on the GSRT fell in the Low Average range. During the testing, Student's use of processes and procedures, and _____ general pace of process and output when engaged in academic tasks, were slow or extremely slow. Exhibit P-43.

34. Educational Consultant reported that Mother's and the teachers' respective responses to the behavior rating scales indicated that in non-specialized environments, that is at home and in the general education classroom, Student's behavior and executive functioning were indicated to be significantly poorer than in the special education classroom. Exhibit P-45.

35. On April 26, 2018, Nonpublic School administered subtests of the Woodcock-Johnson achievement tests to Student. Student's scores were generally in

the Average range except for Low Average for Passage Comprehension. Student's Broad Math score of 60 was considerably higher than Broad Reading score of 49.

Exhibit P-39.

36. In May 2018, School Psychologist conducted an updated psychological evaluation of Student using a battery of measures, including, *inter alia*, cognitive tests (the Wechsler Intelligence Scale for Children, Fifth Edition (WISC-V)) and behavioral rating scales. In her May 10, 2018 report, School Psychologist reported that Student's overall abilities appeared to fall in the Average to High Average range. Student struggled to attend to multi-step directions, which often appeared to impact performance on these tasks. Student obtained Above Average range scores on a visual motor integration activity and High range scores on a Visual Perception task. Student demonstrated a slight personal weakness in Motor Coordination. Taken altogether, Student demonstrated a very solid cognitive profile with several areas of strength and Student did not appear to present with a processing deficit. Exhibit R-60.

37. With regard to Social/Emotional/Behavioral Functioning, based upon rating scales responses from Mother, General Education Teacher, Special Education Teacher and Student, and her own observations in the testing environment, School Psychologist reported that Student appeared to struggle the most with focusing and impulsivity. Mother endorsed items that led to Clinically Significant range scores on the Attention Problems and Hyperactivity scale, while General Education Teacher's ratings resulted in At-Risk range scores on both scales. Across settings, Student appeared to struggle with becoming easily distracted, having a short attention span, having trouble concentrating, and disrupting other children's activities. In the

classroom, Student reportedly rarely appeared to stay on topic when talking, to listen closely to directions, to think about the consequences before acting, or maintain self-control. School Psychologist found that these behaviors appeared to be consistent with Student's diagnosis of ADHD. She reported that the teachers' responses indicating Very Elevated range scores on the Sensory Sensitivity scale on the Autism Spectrum Rating Scales (ASRS) were likely related to Student's low threshold for frustration and limited ability to regulate impulses. Related to these behaviors, Student also appeared to have difficulty with executive functioning. In the classroom, Student appeared to have the most difficulty in regulating emotions and showing inhibition (or suppressing behaviors). Student attained Low Average range scores on the following executive functioning related skills: attention, flexibility, initiation, organization, and planning. School Psychologist noted that Student was previously diagnosed with an Unspecified Anxiety Disorder in January 2015 and reported that a theme of anxiety also arose throughout her evaluation, notably from General Education Teacher's responses to the Behavior Assessment Scales for Children, Third Edition (BASC-3) rating scales and the ASRS, as well as Student's self-reporting on the Multidimensional Anxiety Scale for Children, Second Edition (MASC-2). She reported that Student also exhibited symptoms of anxiety, becoming particularly nervous about how will be accepted by peers. School Psychologist reported that this combination of inattention, low tolerance for frustration, and anxiety often impacted Student's ability to work well with classmates. Exhibit R-60.

38. Beginning May 15, 2018, PS convened a series of meetings of Student's School IEP team to develop a revised IEP for Student's 2018-2019 school year.

Although the Parents had already made a non-refundable deposit to hold Student's

place at Nonpublic School for the 2018-2019 school year, the Parents were open to considering whether PS would propose a revised IEP for Student that addressed their concerns for Student's education. Testimony of Mother. IEP team meetings were held on May 15, 2018, July 6, 2018, August 13, 2018 and August 20, 2018.

Exhibit R-70. The Parents, their attorney and Educational Consultant participated in the meetings. Educational Consultant submitted written comments on the earlier IEP drafts on July 2, 2018 and on August 8, 2018. Exhibits R-57. P-57.

39. By a letter sent by email on August 3, 2018, Petitioners' Co-Counsel notified PS that Student would attend Nonpublic School for the 2018-2019 school year and requested that PS place and fund Student at Nonpublic School. The attorney wrote that "[w]e do not believe that an appropriate special education program had been identified or offered by PS" for Student. Exhibit P-55.

40. PS' proposed 2018-2019 IEP for Student was finalized at the August 20, 2018 IEP team meeting. As areas of need, the IEP identified Writing/Written Language, Reading, Executive Functioning, Social Skills, Mathematics, Spelling and Self-Regulation. For Present Levels of Performance in the Executive Functioning and Social Skill areas of concern, strengths noted by the IEP team included that Student was able to follow classroom routines and procedures in the classroom and follow schedules; that Student stayed on task and completed preferred tasks with minimal prompting; that Student liked asking questions, helping others and sharing thoughts; that Student more actively participated in group projects and responded to peer modeling; that Student was eager to learn and liked to please teachers, took pride in work and responded positively to teacher redirection; that Student initiated and maintained conversations with peers; that Student participated in most

classroom and team activities and worked well when given structured tasks and that Student engaged in reciprocal conversations with teachers and peers. Exhibit R-66. The Parents' expert, Educational Consultant agreed with IEP present levels of performance. Testimony of Educational Consultant.

41. The proposed August 20, 2018 IEP provided for Student to receive 22.5 hours per week of primary Learning Disability special education services, of which 10 hours per week would be provided in the Special Education setting. Student would not receive specialized instruction for "Specials" classes, lunch or recess. As Curriculum/ Classroom Accommodations and Modifications, the proposed IEP provided for the following supports: Frequent Breaks (after 30 minutes of classroom assignments and assessments); Extended time for tests, quizzes and classroom assignments; Minimal distractions in environment and close proximity to the point of instruction; Have directions explicitly stated and then have Student state them back; Access to fidgets within the classroom setting (*i.e.* putty, finger fidget, ball, etc.); Wobble stool; Clearly defined limits and expectations; Positive reinforcement system - focused on frequent verbal praise when Student completes a task or activities as expected; Attentional strategies such as Re-Alert to Task, Visual Task List, Problem Solving Templates, Reminders, etc. The IEP would have been implemented at School. Exhibit R-66, Testimony of Program Manager. The Parents believed that Student required placement at Nonpublic School and were not in agreement with the August 20, 2018 IEP placement proposal. The IEP team considered the input of the Parents and Educational Consultant, but the PS members of the team maintained that providing Student with ten hours per week of direct support in a special education setting and 12½ hours of support in the general

education setting would provide the support Student needed to address areas of need in both settings. Exhibit R-66.

42. On August 21, 2018, the Parents executed a PS Student Withdrawal form stating that Student was transferring to Nonpublic School. Exhibit R-67.

43. Nonpublic School is a small private school, grades 1 through 8, which specializes in working with children who have learning disabilities or dyslexia. The maximum class size is 10-13 students, with two teachers in every classroom. Testimony of Academic Supervisor.

44. Nonpublic School did a great job with Student in 2018-2019 school year. Testimony of Educational Consultant, Testimony of Mother, Exhibit P-67. Academically, did very well and made good progress in Reading and Math. Testimony of Academic Supervisor. Student was doing so well from the mental health standpoint that in December 2018, Neuropsychologist recommended ending therapy services because Student did not need therapy any more. Testimony of Neuropsychologist.

CONCLUSIONS OF LAW

Based upon the above findings of fact, and argument and legal memoranda 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 Petitioners, as the parties challenging PS' proposed August 20, 2018 IEP have the burden of proof in this proceeding. *See, e.g., Sch. Bd. of the City of Norfolk v. Brown*, 769 F. Supp. 2d 928, 938 (E.D. Va. 2010) ("The burden of proof in an administrative hearing challenging an IEP is properly placed upon the party seeking relief," quoting *Schaffer ex rel. Schaffer v. Weast*, 546 U.S. 49, 62, 126 S.Ct. 528, 163 L.Ed.2d 387 (2005). The burden of persuasion shall be met by a preponderance of the evidence. *See, e.g., Cty. Sch. Bd. of Henrico Cty., Va. v. R.T.*, 433 F. Supp. 2d 657, 671 (E.D. Va. 2006) (Hearing Officer's factual conclusions supported by the preponderance of the record evidence.)

Analysis

Did PS deny Student a free appropriate public education (FAPE) by developing an inappropriate IEP on August 20, 2018, which proposed an inadequate program, twelve hours and thirty minutes per week of specialized instruction inside general education and ten hours per week of specialized instruction outside of general education, and by proposing an unsuitable educational placement at School?

Student is a child with a disability who has ADHD and an unspecified anxiety disorder. Student attended PS' School from the 2013-2014 school year through the 2017-2018 school year. At School, Student was provided Individualized Education Programs (IEPs) as a child with an Other Health Impairment (OHI) disability. In the 2017-2018 school year, the Parents were not satisfied with Student's academic progress at School and began to look at private school alternatives suggested by Student's therapist. Student was accepted at Nonpublic School, a small

private day school in _____ that serves children with learning disabilities.

In July 2018, the Parents gave notice to _____ PS that they were enrolling Student in Nonpublic School for the 2018-2019 school year, but that they would continue to participate in _____ PS' process to develop a revised annual IEP for Student. Student's revised _____ PS IEP was completed on August 20, 2018. Although this IEP substantially increased Student's special education services over the prior IEP, the Parents continued to believe that Student required placement at a full-time special education day school and they did not agree to the August 20, 2018 IEP. The Parents unilaterally placed Student at Nonpublic School for the 2018-2019 school year. In this administrative proceeding, the Parents seek reimbursement from _____ PS for their private school expenses.

As the U.S. District Court for the District of Maryland recently explained *C.B. v. Smith*, Civil Action No. 8:18-cv-01780-PX, 2019 WL 2994671 (D.Md. July 9, 2019), parents of children with disabilities are afforded the opportunity to participate in the development of their child's IEP. Once an IEP is finalized, the parents may accept or reject it. If the parents reject the public school IEP as failing to provide a free appropriate public education (FAPE), they may pursue administrative remedies before a hearing officer in a due process proceeding. In the interim, the parents may elect to pay for services, to include placement in a private school, and afterwards seek reimbursement from the school district. *C.B. supra. See, also, Sch. Comm. of Burlington v. Dep't of Educ.*, 471 U.S. 359, 369–70 (1985). Under the IDEA, the hearing officer may order reimbursement of private special education expenses if he finds that: (1) the public school's proposed IEP did not provide the child with a FAPE; and (2) the parents' alternative placement was proper under IDEA. *See Jaynes v. Newport News*

Sch. Bd., 2001 WL 788643, 13 Fed.Appx. 166, 172 (4th Cir. 2001); *S.H. v. Fairfax Cty. Bd. of Educ.*, 875 F. Supp. 2d 633, 641 (E.D. Va. 2012).

In determining whether the public agency has offered a child an appropriate IEP, the hearing officer's inquiry is two-fold. "First, has the State complied with the procedures set forth in the IDEA? And second, is the IEP developed through the Act's procedures reasonably calculated to enable the child to receive educational benefits? If these requirements are met, the State has complied with the obligations imposed by Congress and the courts can require no more." *Bd. of Educ. of Hendrick Hudson Cent. Sch. Dist., Westchester Cty. v. Rowley*, 458 U.S. 176, 206–07, 102 S. Ct. 3034, 3051, 73 L. Ed. 2d 690 (1982). In the present case, the Parents have not alleged that PS failed to comply with the IDEA's procedural requirements. Therefore, I turn to the second, substantive, prong of the *Rowley* inquiry: Was PS' proposed August 20, 2018 IEP and educational placement appropriate for Student?

In *Andrew F. ex rel. Joseph F. v. Douglas Cty. Sch. Dist. RE-1*, --- U.S. ---, 137 S.Ct. 988, 197 L.Ed.2d 335 (2017), the U.S. Supreme Court elaborated on the standard, first enunciated in *Rowley, supra*, for what constitutes an appropriate IEP under the IDEA:

To meet its substantive obligation under the IDEA, a school must offer an IEP reasonably calculated to enable a child to make progress appropriate in light of the child's circumstances. . . . The "reasonably calculated" qualification reflects a recognition that crafting an appropriate program of education requires a prospective judgment by school officials. . . . Any review of an IEP must appreciate that the question is whether the IEP is *reasonable*, not whether the court regards it as ideal. . . . The IEP must

aim to enable the child to make progress. . . . [T]he essential function of an IEP is to set out a plan for pursuing academic and functional advancement. . . . When a child is fully integrated in the regular classroom, as the Act prefers, what that typically means is providing a level of instruction reasonably calculated to permit advancement through the general curriculum. . . . [A] child's educational program must be appropriately ambitious in light of his circumstances, just as advancement from grade to grade is appropriately ambitious for most children in the regular classroom. The goals may differ, but every child should have the chance to meet challenging objectives. . . . A reviewing court may fairly expect [school] 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 circumstances.

Endrew F., 137 S.Ct. at 992, 999, 1000, 1002 (emphasis in original).

The IEP at issue in this case, PS' proposed August 20, 2018 IEP for Student, was the product of four IEP team meetings at which the Parents, Educational Consultant and Petitioners' counsel were active participants. Educational Consultant, especially, worked closely with the school representatives, contributing at least two written commentaries on preliminary drafts. A representative of Nonpublic School also participated in the final IEP team meeting. Educational Consultant thought that the final IEP was very appropriate except for the special education services and location of services.

In Student's prior, May 12, 2017, PS IEP, Student was provided 10 hours per

week, total, of special education services. For the August 20, 2018 IEP, school representatives agreed to increase Student's special education services from 10 hours to 22.5 hours per week, of which 10 hours would be provided in the special education setting. The Parents disagreed with the IEP team's decision that Student should remain at School, served primarily in the general education setting. They contended that Student required a more restrictive setting, that is, placement in full-time special education day school.

With regard to whether PS offered Student a FAPE, both sides correctly focus on the IEP appropriateness standard, pronounced by the U.S. Supreme Court in the *Endrew F.* decision, namely whether the August 20, 2018 IEP was reasonably calculated to enable Student to make progress appropriate in light of circumstances. Counsel have not cited, and I have not found, a decision from the Fourth Circuit or a federal district court in Virginia which "unpacks" the *Endrew F.* decision, specifically the language, "progress appropriate in light of the child's circumstances." There are two recent decisions from the District of Maryland which provide helpful guidance. In *D.F. v. Smith*, Civil Action No. PJM 18-93, 2019 WL 1427800, (D.Md. Mar. 29, 2019), U.S. District Judge Messitte analyzed the *Endrew F.* appropriate progress language in another case where the parents sought reimbursement for their child's private school expenses. Judge Messitte wrote:

An IEP must be "reasonably calculated to enable a child to make progress appropriate in light of the child's circumstances." *Endrew F. v. Douglas Cty. Sch. Dist. RE-1*, 137 S.Ct. 988, 999 (2017). A "reasonably calculated" IEP "reflects a recognition that crafting an appropriate program of education requires a prospective judgment by school officials." *Id.* Crafting an IEP is a fact-intensive inquiry into a student's past performance that incorporates "the expertise of school officials" and "the input of the child's parents or guardians." *Id.* The key question is "whether the IEP is *reasonable*, not whether the court regards it as ideal." *Id.* (emphasis in

original).

The “progress” that an IEP envisions for a student must be greater than “merely more than *de minimis*” improvement from year to year. *Andrew F.*, 137 S.Ct. at 1001. However, there is no bright-line rule on what constitutes “appropriate” progress, and courts should determine appropriateness on a case by case basis without “substitut[ing] their own notions of sound educational policy for those of the school authorities which they review.” *Andrew F.*, 137 S. Ct. at 1001 (quoting *Rowley*, 458 U.S. at 206) (internal quotation marks omitted). School officials must be able to offer a “cogent and responsive explanation” for their decisions in developing an IEP “reasonably calculated to enable the child to make progress appropriate in light of his circumstances.” *Andrew F.*, 137 S.Ct. at 1002.

D.F. v. Smith, supra. In another recent Maryland private school reimbursement case, *C.B. v. Smith, supra*, U.S. District Court Xinis found that where the school division provided the child with an educational plan that was appropriately ambitious and provided enough support to allow the child to access the general education curriculum and to participate, to the extent possible, in the same activities as children without disabilities, the IEPs provided the child with a FAPE. *Id.*

In the Parents’ post-hearing brief in the present case, the Parents ground their claim that PS’ proposed August 20, 2018 IEP was inappropriate for Student on two general arguments. They contend (i) that Student did not make appropriate academic or social-emotional progress under prior PS IEP during the 2017-2018 school year at School and (ii) that the proposed 2018-2019 IEP, with 10 hours per week of services in the special education setting, was inadequate because, due to Student’s significant needs in the areas of attention, anxiety, and executive functioning, required a full-time placement in small, self-contained classes. PS disagrees with both claims. It asserts on brief that Student was making steady progress under May 12, 2017 IEP and that the proposed August 20, 2018 IEP, with its substantial increase in special education

services, constituted an appropriate and least restrictive special education program for Student.

Student's Circumstances when the IEP was Developed

The *Andrew F.* decision requires a consideration of Student's "circumstances" when the August 20, 2018 IEP was developed. Here, there was some discrepancy in the hearing evidence. With regard to Student's cognitive abilities, the Parents assert on brief that intellectually, Student was "clearly superior. Dramatically above average." This characterization is based primarily on the evidence of Neuropsychologist, who obtained a General Conceptual Ability (GCA) score of 131 when he tested Student with the Differential Ability Scales II in 2015. PS suggests that this GCA score was an outlier because other cognitive testings of Student in 2014 and in May 2018 yielded intelligence scores for Student more in the average range.

In May 2018, School Psychologist administered the Wechsler Intelligence Scale for Children, Fifth Edition (WISC-V) to Student and concluded that Student's overall abilities appeared to fall in the Average to High Average range. The Parents' expert, Neuropsychologist, agreed that there was nothing wrong with School Psychologist's administration of the WISC-V to Student or with the test itself. Since the May 2018 WISC-V test was the most recent cognitive assessment of Student, I find that Student's IEP team appropriately considered the results of that measure, rather than relying on the cognitive functioning scores obtained by Neuropsychologist when he evaluated Student in January 2015. *See* 34 CFR § 300.324(a)(iii) (IEP team to consider most recent evaluation of the child.)

There was also a strong disagreement in the testimony about Student's emotional

functioning at school over the 2017-2018 school year. The Parents' expert, Educational Consultant, testified to her understanding that when placed with typically developing peers in the general education classroom at School, Student experienced "tremendous" and "acute" distress. Educational Consultant did not observe Student in the general education classroom setting. She acknowledged in her testimony that at the May 2018 IEP team meeting, General Education Teacher did not say that Student was in acute distress – Rather that the teacher had told the IEP team that as to anxiety and social/emotional issues, Student had gotten better over the course of the year. In his hearing testimony General Education Teacher affirmed that as the 2017-2018 school year progressed, Student's gained confidence in self and showed "comfortability" in the general education setting. On this evidence, I did not find credible Educational Consultant's assertion that Student was in tremendous or acute distress in the general education setting at School.

In summary, with regard to Student's circumstances at the time the August 20, 2018 IEP was developed, the evidence establishes that Student was a child with average to high average abilities and substantial weaknesses in attention, impulse control and executive functioning related to ADHD, and that Student presented, at times, with high levels of anxiety. The hearing record does not support Educational Consultant's assertion that in the general education setting, Student was in tremendous or acute distress.

Academic Progress in 2017-2018 School Year

Turning to Student's progress at School over the 2017-2018 school year, the Parents conceded in their closing brief that Student made some academic progress at School, including during the 2017-2018 school year, but they argue that this progress

was not appropriate. They point to Student's not passing the state SOL's for Reading and having mastered only two of four of the annual goals in May 12, 2017 IEP as inadequate progress.

PS argued on brief that looking at the totality of measures, Student made steady academic progress over the 2017-2018 school year. PS points to the separate Woodcock-Johnson achievement test results obtained by Educational Consultant and by Nonpublic School in April 2018, where, relative to typically developing peers, all of Student's scores were in the Average range, except for in the Low Average range for passage comprehension.² Citing Student's School report card, PS asserts that at the end of the 2017-2018 school year, Student was fully on grade level and received satisfactory marks in math, history and science.

PS also argues that over the 2017-2018 school year, Student made appropriate progress in Reading and Written Language, which were identified as Areas of Need in the August 20, 2018 IEP. PS notes that Student received better than passing marks in Language Arts on end-of-year report card and that mastered the annual IEP goals for both Reading and Writing from May 12, 2017 IEP.

As evidence of progress, PS also cites the increase in Student's i-Ready diagnostic scores for Reading and Math over the course of the 2017-2018 school year, and improvement on the Developmental Reading Assessment (DRA) measure in Reading. On the i-Ready diagnostic, over the 2017-2018 school year, Student's scores for Math Performance went from 464 (Approaching Level 4) at the beginning of the year

² Educational Consultant opined in her May 2018 Diagnostic Educational Evaluation that Student's Average range achievement scores on the WJ-4 and the GRST fell below expectations given how "incredibly bright" Student is. She appears to have based this assertion on Neuropsychologist's report that Student's GCA score in January 2015 was in the Very Superior range. As noted, this score appears to have been an outlier. On other cognitive tests administered to Student in 2014 and 2018, Student scored in the Average to High Average range.

(BOY) to 481 (At Level 4) at the end of the year (EOY). During the same period, Student's i-Ready scores for Reading improved from 528 (Approaching Level 4) at BOY to 571 (At Level 4) at EOY. On the DRA, Student advanced from the Level 38 fiction passage oral reading and comprehension in February 2018 to Level 40 – the benchmark level for Student's grade – in May 2018. PS' expert in special education assessments, Educational Specialist, stated that Student's scores on the i-Ready and DRA assessments indicated that Student would be considered to be on grade level for Reading and Math at the end of the 2017-2018 school year and she opined that these assessments, as well as Student's scores on the Woodcock-Johnson achievement tests, showed that Student was making progress over time.

Petitioners' expert, Educational Consultant, disputed the value of the i-Ready and DRA assessments to show academic progress. She cited a Johns Hopkins University study, not offered into evidence, which apparently questions the validity of the i-Ready assessment. However, she did not refute Educational Specialist's testimony that the i-Ready math and reading assessment is used in many other places as a diagnostic screening tool for all students and that it was adopted by PS after a fairly arduous study process or that the DRA is a common reading assessment used by school systems to determine how a student is progressing in Reading through the grade levels. Based upon the widespread use of the i-Ready and DRA assessments, I did not find persuasive Educational Consultant's opinion that these assessments should not be used to track a student's progress in Math and Reading.

Student's School teachers for the 2017-2018 school year also opined that Student had made academic progress. General Education Teacher opined that Student made meaningful progress over the school year. He testified that Student, who was in

higher level math groups for most of the year showed a lot of growth in Math; that Student's progress reports showed improvements in Reading and Writing; that Student loved Social Studies and that Student had a really strong understanding of science throughout the year. General Education Teacher opined that the 2017-2018 school year was a "just a really, really good year academically for Student." Special Education Teacher, who worked with Student in Language Arts, opined that Student made lots of progress in Reading over the course of the 2017-2018 school year.

Based upon the totality of the evidence – Student's grades, IEP progress reports, the diagnostic assessments, the Woodcock-Johnson achievement test results and the testimony of Student's teachers, I find that Student did make meaningful academic progress at School over the 2017-2018 school year.

Social-Emotional Progress

In their closing brief, Petitioners' counsel identify as the "greatest concern" Student's alleged lack of progress at School in the area of social and emotional functioning, including attention and executive functioning. As with academics, PS maintains that Student also made appropriate progress in these areas.

The impact of ADHD and Student's anxiety disorder on the child's behavior and social-emotional functioning is well-documented. In his January 2015 Neuropsychological Report, Neuropsychologist concluded that Student presented with high levels of anxiety, including social anxiety, worry and several fears and that Student's substantial weaknesses in attention, impulse control and executive functioning contributed to significant difficulties with emotion and behavior self-regulation. In the PS triennial reevaluation of Student in 2017, generalized anxiety was identified as a component, with ADHD, of Student's OHI disability. School Psychologist reported in her May 2018

psychological evaluation report that a theme of anxiety arose throughout her evaluation of Student, notably from General Education Teacher's responses to the BASC-3 and ASRS rating scales, as well as from Student's self-reporting on the MASC-2 questionnaire.

The IDEA requires that, in the case of a student whose behavior impedes his or her learning or that of others, the IEP team consider the use of positive behavioral interventions and supports, and other strategies, to address that behavior. *See* 20 U.S.C. § 1414(d)(3); 34 CFR § 300.324(a)(2)(i). But removing a child from the mainstream setting is disfavored in the IDEA. As the Fourth Circuit explained in *DeVries by DeBlaay v. Fairfax County Sch. Bd.*, 882 F.2d 876 (4th Cir.1989),

Mainstreaming of handicapped children into regular school programs where they might have opportunities to study and to socialize with nonhandicapped children is not only a laudable goal but is also a requirement of the [IDEA]. Specifically, the Act mandates that states establish procedures to assure that, to the maximum extent appropriate, handicapped children . . . are educated with children who are not handicapped, and that special classes, separate schooling, or other removal of handicapped children from the regular educational environment occurs only when the nature or severity of the handicap is such that education in regular classes with the use of supplementary aids and services cannot be achieved satisfactorily. . . . 20 U.S.C. § 1412(5)(B).

Devries at 878.

In the May 12, 2017 IEP, the IEP team sought to address Student's anxiety and social-emotional and behavioral challenges with classroom accommodations and modifications designed to enable Student to participate in the general education setting with typically developing peers. These IEP accommodations included frequent breaks, graphic organizers, clearly defined limits/expectations, peer partners, minimized distractions, clarity and confirmation of directions and teacher proximity to Student. From the hearing evidence, it appears that these accommodations were beneficial.

General Education Teacher testified that at the beginning of the 2017-2018 school year, behaviorally, Student lacked confidence in self. would have “shutdowns,” refusing to speak with a teacher, around once a week. Student also had a tough time forming friendships, but as the year progressed, Student’s confidence and comfort in the classroom improved. The “shutdowns” were reduced, only occurring around once a month later in the year. Special Education Teacher also testified to Student’s behavior issues at the beginning of the 2017-2018 school year, such as shutting down, touching other people, not focusing and throwing away work when would get upset. She testified that toward the end of the year, Student had made “so much progress” that there was less shutting down, less touching other people, less not paying attention to teachers, and more staying focused. She testified that Student had been “very, very close” to mastering the behavior goals in May 12, 2017 IEP.

The teachers’ testimony was supported by other evidence in the record. The Present Level of Performance sections of the proposed August 20, 2018 IEP, which Educational Consultant agreed were “very appropriate,” state that Student was able to follow classroom routines and procedures and was a great participant in the classroom. Mother testified that Student really enjoyed school at School, even though was in the general education setting for all but seven hours per week. Neuropsychologist testified that Student told him that “really liked” general education teacher.

At the hearing and on brief, Petitioners’ counsel emphasized that whatever the teachers may have testified about Student’s progress in the classroom, General Education Teacher’s and Student’s own responses to the behavior rating scales, administered by School Psychologist and by Educational Consultant in the spring of 2018, indicated clinically significant scores for Student in conduct problems, anxiety,

depression, somatization, atypicality, withdrawal, adaptability, stress, emotional regulation and other categories. General Education Teacher acknowledged that responses to the rating scales indicated that in spring 2018, he was still seeing some challenging behaviors from Student, but he maintained that these behaviors were not significantly affecting Student's education.

I find that the Petitioners' use of General Education Teacher's and Student's responses to the rating scales to show lack of IEP progress is misplaced. PS does not dispute the pervasiveness of Student's social-emotional and behavioral challenges. To the contrary, School Social Worker's May 10, 2018 Psychological Evaluation Report stated explicitly that due to ADHD, Student's struggles affected executive functioning skills in areas such as self-regulation, inhibition, and organization and that Student's combination of inattention, low tolerance for frustration, and anxiety often impacted ability to work well with classmates. I do not find that the rating scales responses from General Education Teacher and Student self, indicating that Student had these issues at the time when Student was evaluated in spring 2018, are inconsistent with the testimony of Student's teachers that they had observed meaningful progress in Student's social-emotional functioning and classroom behaviors over the 2017-2018 school year.

The August 20, 2018 IEP

For the August 20, 2018 IEP, the school members of the IEP team agreed to increase Student's special education services from 10 hours to 22.5 hours per week, which included an increase in time in the special education setting from 7 hours to 10 hours per week. In addition, the proposed IEP added to and enhanced the Classroom Accommodations and Modifications to support Student's continued participation for

most of the week in the general education setting with nondisabled peers.

PS' experts, General Education Teacher, Assistant Principal, School Psychologist, Program Manager and Special Education Teacher all opined that the educational program and placement for Student in PS' proposed August 20, 2018 IEP were appropriate. Petitioners' expert, Educational Consultant opined that the IEP was not appropriate because it continued Student's placement for most of the day in the general education classroom, where she understood that Student experienced tremendous or acute stress. I have explained above in this decision that I did not find Educational Consultant's characterization of Student's classroom stress level credible because it was at odds with the first-hand accounts of Student's 2017-2018 classroom teachers who worked with Student daily and because Educational Consultant never observed Student in the general education classroom.

Neuropsychologist, who provided psychological therapy to Student for several years, opined that the large classroom setting at School setting was not appropriate for Student because School was "not a place where Student could succeed," and he and the Parents believed that Student was not "not making the kind of progress we want[ed] Student to make." I did not find persuasive Neuropsychologist's opinion about Student's success at School because, according to the credible testimony of Student's educators, Student did make appropriate progress at School, as measured by report cards, IEP progress reports and periodic diagnostic assessments. Neuropsychologist did not talk to these educators or observe Student at School. For the Parents and Neuropsychologist to want Student to make more progress is natural. However, the IDEA requires that an IEP be reasonable, not ideal. *See D.F. v. Smith, supra.*

By all accounts, since enrolling at Nonpublic School in the fall of 2018, Student has done “great.” Academic Supervisor from Nonpublic School opined that Student needed Nonpublic School for the 2018-2019 school year because small class sizes were helpful to , specialized instruction helped learn about self as a learner and “perhaps lowered anxiety a bit.” Student’s social-emotional development has continued to improve – so much so that Neuropsychologist determined in December 2018 that the child no longer needed psychotherapy. However, Student’s success at Nonpublic School does show that PS’ proposed public school IEP was not appropriate. That is because the “[t]he IDEA does not require that a school district provide a disabled child with the best possible education. . . . Rather, a school must provide an Individualized Education Program (“IEP”) that is “reasonably calculated to enable a child to make progress appropriate in light of the child’s circumstances.” *A.H. v. Smith*, 367 F. Supp. 3d 387, 394 (D. Md. 2019) (citations and internal quotations omitted). *See, also, S.H. v. Fairfax Cty. Bd. of Educ.*, special education services over the prior IEP, the Parents continued to believe that Student required placement at a full-time special education day school and they did not agree to the August 20, 2018 IEP. The Parents unilaterally placed Student at Nonpublic School for the 2018-2019 school year. In this administrative proceeding, the Parents seek reimbursement from PS for their private school expenses.

As the U.S. District Court for the District of Maryland recently explained *C.B. v. Smith*, Civil Action No. 8:18-cv-01780-PX, 2019 WL 2994671 (D.Md. July 9, 2019), parents of children with disabilities are afforded the opportunity to participate in the development of their child’s IEP. Once an IEP is finalized, the parents may accept or reject it. If the parents reject the public school IEP as failing to provide a free

appropriate public education (FAPE), they may pursue administrative remedies before a hearing officer in a due process proceeding. In the interim, the parents may elect to pay for services, to include placement in a private school, and afterwards seek reimbursement from the school district. *C.B. supra. See, also, Sch. Comm. of Burlington v. Dep't of Educ.*, 471 U.S. 359, 369–70 (1985). Under the IDEA, the hearing officer may order reimbursement of private special education expenses if he finds that: (1) the public school's proposed IEP did not provide the child with a FAPE; and (2) the parents' alternative placement was proper under IDEA. *See Jaynes v. Newport News Sch. Bd.*, 2001 WL 788643, 13 Fed.Appx. 166, 172 (4th Cir. 2001); *S.H. v. Fairfax Cty. Bd. of Educ.*, 875 F. Supp. 2d 633, 641 (E.D. Va. 2012).

In determining whether the public agency has offered a child an appropriate IEP, the hearing officer's inquiry is two-fold. "First, has the State complied with the procedures set forth in the IDEA? And second, is the IEP developed through the Act's procedures reasonably calculated to enable the child to receive educational benefits? If these requirements are met, the State has complied with the obligations imposed by Congress and the courts can require no more." *Bd. of Educ. of Hendrick Hudson Cent. Sch. Dist., Westchester Cty. v. Rowley*, 458 U.S. 176, 206–07, 102 S. Ct. 3034, 3051, 73 L. Ed. 2d 690 (1982). In the present case, the Parents have not alleged that PS failed to comply with the IDEA's procedural requirements. Therefore, I turn to the second, substantive, prong of the *Rowley* inquiry: Was PS' proposed August 20, 2018 IEP and educational placement appropriate for Student?

In *Andrew F. ex rel. Joseph F. v. Douglas Cty. Sch. Dist. RE-1*, --- U.S. ---, 137 S.Ct. 988, 197 L.Ed.2d 335 (2017), the U.S. Supreme Court elaborated on the standard, first enunciated in *Rowley, supra*, for what constitutes an appropriate IEP under the

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was the product of four IEP team meetings at which the Parents, Educational Consultant and Petitioners' counsel were active participants. Educational Consultant, especially, worked closely with the school representatives, contributing at least two written commentaries on preliminary drafts. A representative of Nonpublic School also participated in the final IEP team meeting. Educational Consultant thought that the final IEP was very appropriate except for the special education services and location of services.

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or social-emotional progress under prior PS IEP during the 2017-2018 school year at School and (ii) that the proposed 2018-2019 IEP, with 10 hours per week of services in the special education setting, was inadequate because, due to Student's significant needs in the areas of attention, anxiety, and executive functioning, required a full-time placement in small, self-contained classes. PS disagrees with both claims. It asserts on brief that Student was making steady progress under May 12, 2017 IEP and that the proposed August 20, 2018 IEP, with its substantial increase in special education services, constituted an appropriate and least restrictive special education program for Student.

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WISC-V test was the most recent cognitive assessment of Student, I find that Student's IEP team appropriately considered the results of that measure, rather than relying on the cognitive functioning scores obtained by Neuropsychologist when he evaluated Student in January 2015. *See* 34 CFR § 300.324(a)(iii) (IEP team to consider most recent evaluation of the child.)

There was also a strong disagreement in the testimony about Student's emotional functioning at school over the 2017-2018 school year. The Parents' expert, Educational Consultant, testified to her understanding that when placed with typically developing peers in the general education classroom at School, Student experienced "tremendous" and "acute" distress. Educational Consultant did not observe Student in the general education classroom setting. She acknowledged in her testimony that at the May 2018 IEP team meeting, General Education Teacher did not say that Student was in acute distress – Rather that the teacher had told the IEP team that as to anxiety and social/emotional issues, Student had gotten better over the course of the year. In his hearing testimony General Education Teacher affirmed that as the 2017-2018 school year progressed, Student's gained confidence in self and showed "comfortability" in the general education setting. On this evidence, I did not find credible Educational Consultant's assertion that Student was in tremendous or acute distress in the general education setting at School.

In summary, with regard to Student's circumstances at the time the August 20, 2018 IEP was developed, the evidence establishes that Student was a child with average to high average abilities and substantial weaknesses in attention, impulse control and executive functioning related to ADHD, and that Student presented, at times, with high levels of anxiety. The hearing record does not support Educational Consultant's

assertion that in the general education setting, Student was in tremendous or acute distress.

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PS argued on brief that looking at the totality of measures, Student made steady academic progress over the 2017-2018 school year. PS points to the separate Woodcock-Johnson achievement test results obtained by Educational Consultant and by Nonpublic School in April 2018, where, relative to typically developing peers, all of Student's scores were in the Average range, except for in the Low Average range for passage comprehension.³ Citing Student's School report card, PS asserts that at the end of the 2017-2018 school year, Student was fully on grade level and received satisfactory marks in math, history and science.

PS also argues that over the 2017-2018 school year, Student made appropriate progress in Reading and Written Language, which were identified as Areas of Need in the August 20, 2018 IEP. PS notes that Student received better than passing marks in Language Arts on end-of-year report card and that mastered the annual IEP goals

³ Educational Consultant opined in her May 2018 Diagnostic Educational Evaluation that Student's Average range achievement scores on the WJ-4 and the GRST fell below expectations given how "incredibly bright" Student is. She appears to have based this assertion on Neuropsychologist's report that Student's GCA score in January 2015 was in the Very Superior range. As noted, this score appears to have been an outlier. On other cognitive tests administered to Student in 2014 and 2018, Student scored in the Average to High Average range.

for both Reading and Writing from May 12, 2017 IEP.

As evidence of progress, PS also cites the increase in Student's i-Ready diagnostic scores for Reading and Math over the course of the 2017-2018 school year, and improvement on the Developmental Reading Assessment (DRA) measure in Reading. On the i-Ready diagnostic, over the 2017-2018 school year, Student's scores for Math Performance went from 464 (Approaching Level 4) at the beginning of the year (BOY) to 481 (At Level 4) at the end of the year (EOY). During the same period, Student's i-Ready scores for Reading improved from 528 (Approaching Level 4) at BOY to 571 (At Level 4) at EOY. On the DRA, Student advanced from the Level 38 fiction passage oral reading and comprehension in February 2018 to Level 40 – the benchmark level for Student's grade – in May 2018. PS' expert in special education assessments, Educational Specialist, stated that Student's scores on the i-Ready and DRA assessments indicated that would be considered to be on grade level for Reading and Math at the end of the 2017-2018 school year and she opined that these assessments, as well as Student's scores on the Woodcock-Johnson achievement tests, showed that Student was making progress over time.

Petitioners' expert, Educational Consultant, disputed the value of the i-Ready and DRA assessments to show academic progress. She cited a Johns Hopkins University study, not offered into evidence, which apparently questions the validity of the i-Ready assessment. However, she did not refute Educational Specialist's testimony that the i-Ready math and reading assessment is used in many other places as a diagnostic screening tool for all students and that it was adopted by PS after a fairly arduous study process or that the DRA is a common reading assessment used by school systems to determine how a student is progressing in Reading through the grade levels. Based

upon the widespread use of the i-Ready and DRA assessments, I did not find persuasive Educational Consultant's opinion that these assessments should not be used to track a student's progress in Math and Reading.

Student's School teachers for the 2017-2018 school year also opined that Student had made academic progress. General Education Teacher opined that Student made meaningful progress over the school year. He testified that Student, who was in higher level math groups for most of the year showed a lot of growth in Math; that Student's progress reports showed improvements in Reading and Writing; that Student loved Social Studies and that Student had a really strong understanding of science throughout the year. General Education Teacher opined that the 2017-2018 school year was a "just a really, really good year academically for Student." Special Education Teacher, who worked with Student in Language Arts, opined that Student made lots of progress in Reading over the course of the 2017-2018 school year.

Based upon the totality of the evidence – Student's grades, IEP progress reports, the diagnostic assessments, the Woodcock-Johnson achievement test results and the testimony of Student's teachers, I find that Student did make meaningful academic progress at School over the 2017-2018 school year.

Social-Emotional Progress

In their closing brief, Petitioners' counsel identify as the "greatest concern" Student's alleged lack of progress at School in the area of social and emotional functioning, including attention and executive functioning. As with academics, PS maintains that Student also made appropriate progress in these areas.

The impact of ADHD and Student's anxiety disorder on the child's behavior and social-emotional functioning is well-documented. In his January 2015 Neuropsych-

logical Report, Neuropsychologist concluded that Student presented with high levels of anxiety, including social anxiety, worry and several fears and that Student's substantial weaknesses in attention, impulse control and executive functioning contributed to significant difficulties with emotion and behavior self-regulation. In the PS triennial reevaluation of Student in 2017, generalized anxiety was identified as a component, with ADHD, of Student's OHI disability. School Psychologist reported in her May 2018 psychological evaluation report that a theme of anxiety arose throughout her evaluation of Student, notably from General Education Teacher's responses to the BASC-3 and ASRS rating scales, as well as from Student's self-reporting on the MASC-2 questionnaire.

The IDEA requires that, in the case of a student whose behavior impedes his or her learning or that of others, the IEP team consider the use of positive behavioral interventions and supports, and other strategies, to address that behavior. *See* 20 U.S.C. § 1414(d)(3); 34 CFR § 300.324(a)(2)(i). But removing a child from the mainstream setting is disfavored in the IDEA. As the Fourth Circuit explained in *DeVries by DeBlaay v. Fairfax County Sch. Bd.*, 882 F.2d 876 (4th Cir.1989),

Mainstreaming of handicapped children into regular school programs where they might have opportunities to study and to socialize with nonhandicapped children is not only a laudable goal but is also a requirement of the [IDEA]. Specifically, the Act mandates that states establish procedures to assure that, to the maximum extent appropriate, handicapped children . . . are educated with children who are not handicapped, and that special classes, separate schooling, or other removal of handicapped children from the regular educational environment occurs only when the nature or severity of the handicap is such that education in regular classes with the use of supplementary aids and services cannot be achieved satisfactorily. . . . 20 U.S.C. § 1412(5)(B).

Devries at 878.

In the May 12, 2017 IEP, the IEP team sought to address Student's anxiety and

social-emotional and behavioral challenges with classroom accommodations and modifications designed to enable Student to participate in the general education setting with typically developing peers. These IEP accommodations included frequent breaks, graphic organizers, clearly defined limits/expectations, peer partners, minimized distractions, clarity and confirmation of directions and teacher proximity to Student. From the hearing evidence, it appears that these accommodations were beneficial. General Education Teacher testified that at the beginning of the 2017-2018 school year, behaviorally, Student lacked confidence in self. would have “shutdowns,” refusing to speak with a teacher, around once a week. Student also had a tough time forming friendships, but as the year progressed, Student’s confidence and comfort in the classroom improved. The “shutdowns” were reduced, only occurring around once a month later in the year. Special Education Teacher also testified to Student’s behavior issues at the beginning of the 2017-2018 school year, such as shutting down, touching other people, not focusing and throwing away work when would get upset. She testified that toward the end of the year, Student had made “so much progress” that there was less shutting down, less touching other people, less not paying attention to teachers, and more staying focused. She testified that Student had been “very, very close” to mastering the behavior goals in May 12, 2017 IEP.

The teachers’ testimony was supported by other evidence in the record. The Present Level of Performance sections of the proposed August 20, 2018 IEP, which Educational Consultant agreed were “very appropriate,” state that Student was able to follow classroom routines and procedures and was a great participant in the classroom. Mother testified that Student really enjoyed school at School, even though was in the general education setting for all but seven hours per week. Neuropsychologist

testified that Student told him that “really liked” general education teacher.

At the hearing and on brief, Petitioners’ counsel emphasized that whatever the teachers may have testified about Student’s progress in the classroom, General Education Teacher’s and Student’s own responses to the behavior rating scales, administered by School Psychologist and by Educational Consultant in the spring of 2018, indicated clinically significant scores for Student in conduct problems, anxiety, depression, somatization, atypicality, withdrawal, adaptability, stress, emotional regulation and other categories. General Education Teacher acknowledged that responses to the rating scales indicated that in spring 2018, he was still seeing some challenging behaviors from Student, but he maintained that these behaviors were not significantly affecting Student’s education.

I find that the Petitioners’ use of General Education Teacher’s and Student’s responses to the rating scales to show lack of IEP progress is misplaced. PS does not dispute the pervasiveness of Student’s social-emotional and behavioral challenges. To the contrary, School Social Worker’s May 10, 2018 Psychological Evaluation Report stated explicitly that due to ADHD, Student’s struggles affected executive functioning skills in areas such as self-regulation, inhibition, and organization and that Student’s combination of inattention, low tolerance for frustration, and anxiety often impacted ability to work well with classmates. I do not find that the rating scales responses from General Education Teacher and Student self, indicating that Student had these issues at the time when Student was evaluated in spring 2018, are inconsistent with the testimony of Student’s teachers that they had observed meaningful progress in Student’s social-emotional functioning and classroom behaviors over the 2017-2018 school year.

The August 20, 2018 IEP

For the August 20, 2018 IEP, the school members of the IEP team agreed to increase Student's special education services from 10 hours to 22.5 hours per week, which included an increase in time in the special education setting from 7 hours to 10 hours per week. In addition, the proposed IEP added to and enhanced the Classroom Accommodations and Modifications to support Student's continued participation for most of the week in the general education setting with nondisabled peers.

PS' experts, General Education Teacher, Assistant Principal, School Psychologist, Program Manager and Special Education Teacher all opined that the educational program and placement for Student in PS' proposed August 20, 2018 IEP were appropriate. Petitioners' expert, Educational Consultant opined that the IEP was not appropriate because it continued Student's placement for most of the day in the general education classroom, where she understood that Student experienced tremendous or acute stress. I have explained above in this decision that I did not find Educational Consultant's characterization of Student's classroom stress level credible because it was at odds with the first-hand accounts of Student's 2017-2018 classroom teachers who worked with daily and because Educational Consultant never observed Student in the general education classroom.

Neuropsychologist, who provided psychological therapy to Student for several years, opined that the large classroom setting at School setting was not appropriate for Student because School was "not a place where could succeed," and he and the Parents believed that Student was not "not making the kind of progress we want[ed] to make." I did not find persuasive Neuropsychologist's opinion about Student's success at School because, according to the credible testimony of

Student's educators, Student did make appropriate progress at School, as measured by report cards, IEP progress reports and periodic diagnostic assessments.

Neuropsychologist did not talk to these educators or observe Student at School.

For the Parents and Neuropsychologist to want Student to make more progress is natural. However, the IDEA requires that an IEP be reasonable, not ideal. *See D.F. v. Smith, supra.*

By all accounts, since enrolling at Nonpublic School in the fall of 2018, Student has done "great." Academic Supervisor from Nonpublic School opined that Student needed Nonpublic School for the 2018-2019 school year because small class sizes were helpful to , specialized instruction helped learn about self as a learner and "perhaps lowered anxiety a bit." Student's social-emotional development has continued to improve – so much so that Neuropsychologist determined in December 2018 that the child no longer needed psychotherapy. However, Student's success at Nonpublic School does show that PS' proposed public school IEP was not appropriate. That is because the "[t]he IDEA does not require that a school district provide a disabled child with the best possible education. . . . Rather, a school must provide an Individualized Education Program ("IEP") that is "reasonably calculated to enable a child to make progress appropriate in light of the child's circumstances." *A.H. v. Smith*, 367 F. Supp. 3d 387, 394 (D. Md. 2019) (citations and internal quotations omitted). *See, also, S.H. v. Fairfax Cty. Bd. of Educ., supra.* ("[P]roof that loving parents can craft a better program than a state offers does not, alone, entitle them to prevail under the Act." *S.H.* at 660, n. 22, quoting *Shaw v. Dist. of Columbia*, 238 F.Supp.2d 127, 139 (D.D.C.2002) (quotations omitted.))

I have found in this decision that the evidence shows that Student made

appropriate academic and social-emotional and behavioral progress at School under the May 12, 2017 IEP. For the 2018-2019 school year, PS' proposed to more than double the special education service hours provided to Student and to enhance classroom accommodations and modifications. On this record, I find that PS' proposed August 20, 2018 IEP was reasonably calculated to enable Student to continue to make progress appropriate in light of circumstances. Therefore, I conclude that the Parents have not met their burden of persuasion that PS denied Student a FAPE with the proposed August 20, 2018 IEP. Because I do not find that PS denied Student a FAPE, I do not reach the question of whether the Parents' placement of Student at Nonpublic School was proper under the IDEA. *See S.H. v. Fairfax Cty. Bd. of Educ., supra*, 875 F. Supp. 2d at 641.

ORDER

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

ORDERED:

All relief requested by the Petitioners herein is denied.

Date: July 30, 2019

s/ Peter B. Vaden
Peter B. Vaden, Hearing Officer

NOTICE OF RIGHT TO APPEAL

This is the final administrative decision in this matter. A decision by the special education hearing officer in any hearing is final and binding unless the decision is appealed by a party in a state circuit court within 180 days of the issuance of the decision, or in a federal district court within 90 days of the issuance of the decision. The appeal may be filed in either a state circuit court or a federal district court without regard to the amount in controversy.