

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

PETITIONER,
on behalf of STUDENT,¹

Date Issued: August 23, 2018

Petitioner,

Hearing Officer: Peter B. Vaden

Case No: 2018-0152

v.

Hearing Dates: August 7 and 8, 2018

DISTRICT OF COLUMBIA
PUBLIC SCHOOLS,

Office of Dispute Resolution, Room 112
Washington, D.C.

Respondent.

HEARING OFFICER DETERMINATION

INTRODUCTION AND PROCEDURAL HISTORY

This matter came to be heard upon the Administrative Due Process Complaint Notice filed by Petitioner (the Petitioner or MOTHER), 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 (DCMR). In her Due Process Complaint, Petitioner contends that Respondent District of Columbia Public School (DCPS) has denied Student a free appropriate public education (FAPE) by not developing appropriate Individualized Education Programs (IEPs) for Student for the 2016-2017 and 2017-2018 school years, by making unsuitable school placements and by not conducting a speech and language reevaluation requested by the parent.

¹ Personal identification information is provided in Appendix A.

Student, an AGE child, is a resident of the District of Columbia. Petitioner's Due Process Complaint, filed on June 12, 2018, named DCPS and the D.C. Office of the State Superintendent of Education (OSSE) as respondents. Petitioner and DCPS met for a resolution session on June 20, 2018 and did not reach an agreement. On July 24, 2018, I convened a telephone prehearing conference with counsel to discuss the hearing date, issues to be determined and other matters. On July 25, 2018, Petitioner filed a notice of withdrawal of her claims against OSSE. I dismissed OSSE as a party respondent by order entered July 26, 2018. My final decision in this case is due by August 26, 2018.

The due process hearing was held before this Impartial Hearing Officer on August 7 and 8, 2018 at the Office of Dispute Resolution in Washington, D.C. The hearing, which was closed to the public, was recorded on an electronic audio recording device. The Petitioner appeared in person, and was represented by PETITIONER'S COUNSEL. Respondent DCPS was represented by DCPS' COUNSEL.

Counsel for the respective parties made opening statements. Petitioner testified and called as additional witnesses NEUROPSYCHOLOGIST, TUTORING CENTER DIRECTOR and SPECIAL EDUCATION ADVOCATE. DCPS called as witnesses SPEECH-LANGUAGE PATHOLOGIST, NONPUBLIC SCHOOL 2 PRINCIPAL, PROGRAM MANAGER, SPECIAL EDUCATION COORDINATOR and MONITORING SPECIALIST. Petitioner's Exhibits P-1 through P-27 and P-35 through P-40 were admitted into evidence without objection. Exhibit P-29 was admitted over DCPS' objection. Exhibits P-28, P-30, P-31, P-32, P-33 and P-34 were withdrawn. DCPS' Exhibits R-1 through R-43 were admitted into evidence without objection. Counsel for both parties made closing arguments. There was no request to file post-hearing briefs.

JURISDICTION

The Hearing Officer has jurisdiction under 20 U.S.C. § 1415(f) and DCMR tit. 5-E, § 3029.

ISSUES AND RELIEF SOUGHT

The following issues for determination were certified in the July 24, 2018

Prehearing Order:

Whether DCPS denied Student a FAPE by not conducting a speech and language reevaluation as requested by the parent beginning in March 2018;

Whether DCPS denied Student a FAPE by placing Student in an unsuitable Early Learning Support (ELS) classroom for the 2016-2017 school year;

Whether DCPS denied Student a FAPE by placing Student in an unsuitable nonpublic school location at NONPUBLIC SCHOOL 2 beginning in March 2018;

Whether DCPS denied Student a FAPE by not ensuring that Student's IEP team timely reviewed and appropriately revised Student's IEP after Student was diagnosed with Epilepsy in fall 2016 and

Whether DCPS denied Student a FAPE by not ensuring that its June 2016 IEP for Student was appropriate in that the IEP lacked appropriate annual goals and specialized instruction services to meet those goals.

For relief, Petitioner requests that the hearing officer order DCPS to fund an appropriate compensatory education award to compensate Student for the denials of FAPE alleged in the complaint. In addition, Petitioner requests the hearing officer to order DCPS to conduct a speech and language evaluation of Student and to ensure that Student's IEP is revised, as appropriate, after the evaluation is completed.

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, an AGE child, resides with Mother in the District of Columbia.

Testimony of Mother.

2. Student is a child with a disability in need of special education and related services. Student's IDEA disability classification is Multiple Disabilities (MD) based upon co-existing impairments, Intellectual Disability (ID) and Other Health Impairment (OHI). Exhibit P-35.

3. For the 2014-2015 and 2015-2016 school years, Student attended CITY SCHOOL 1. From fall 2016 until March 2017, Student attended CITY SCHOOL 2. For about one week in March 2017, Student was enrolled in CITY SCHOOL 3. Student was enrolled in NONPUBLIC SCHOOL 1 from March 2017 until March 2018. From March 6, 2017 until April 30, 2018, Student was enrolled in Nonpublic School 2. In June 2018, Student attended a half-day reading program at TUTORING CENTER. Since July 3, 2018, Student has attended NONPUBLIC SCHOOL 3. Testimony of Mother.

4. Student was initially determined eligible for special education in November 2013 as a child with a Speech or Language Impairment (SLI). In February 2016, in Student's second year at City School 1, a DCPS school psychologist conducted a Psychological Reevaluation of Student due to Mother's and staff's concerns about Student's intellectual functioning and academic achievement. This evaluator reported that cognitive testing with the Reynolds Intellectual Assessment Scales (RIAS) indicated that Student's cognitive abilities were highly diverse. Student's overall nonverbal/fluid reasoning ability fell in the Below/Low Average range while overall verbal reasoning/crystallized intellectual ability fell in the Moderately Below Average range. Student's memory for visual information was found to be stronger than Student's memory for language-based material. On the Woodcock-Johnson IV Tests of Achievement (WJ-IV), Student's basic literacy and math skills in most areas were weak and were significantly

weaker than Student's nonverbal intellectual ability and at least two years below age-expected levels. While Student's spelling and reading comprehension skills on the WJ-IV fell in the Low Average and Average range, respectively, Student's performance on curriculum-based assessments indicated that Student's phonemic awareness was well below age and grade level standards and Student's teacher noted that Student struggled to perform grade level tasks across the curriculum. The evaluator concluded that Student clearly required specialized instruction to make adequate academic gains and Student could also benefit from accommodations to enhance attention and focus. The evaluator opined that Student's severe language impairment was impacting both Student's intellectual problem solving skills and ability to understand academic concepts. The evaluator recommended that Student had a need for intervention beyond that which was provided in the general education setting at the time, and given how difficult it had been for Student to make strong gains in an inclusion setting, placement in a full-time special education setting might be most appropriate. Exhibit P-1.

5. In February 2016, Student was assessed with the Beery Developmental Test of Visual-Motor Integration (Beery VMI), on which Student demonstrated decreased bilateral coordination and visual motor skills. These difficulties affected Student's ability to complete written work and participate in class activities. Exhibit R-26.

6. On March 11, 2016, Student's disability classification was changed to Specific Learning Disability. Exhibit R-26.

7. On May 20, 2016, Student's IEP team at City School 1 convened for the annual review of Student's IEP. Mother and FORMER ATTORNEY attended the meeting. Mathematics, Reading, Written Expression, Communication/Speech and

Language and Motor Skills/Physical Development were identified as IEP areas of concern. Student's Present Levels of Academic Achievement and Functional Performance were updated based upon, *inter alia*, the psychological and Beery VMI assessments conducted in February 2016, and the Goldman Fristoe Test of Articulation and the Preschool Language Scale - 5th Edition. The IEP team provided for Student to receive 20 hours per week of Specialized Instruction outside general education, 2 hours per month of Speech-Language Pathology and 240 minutes per month of Occupational Therapy (OT). Exhibit R-26.

8. After the end of the 2015-2016 school year, Student was first assigned to the Early Learning Support (ELS) classroom City School 3. On August 5, 2016, Student was reassigned to the ELS classroom at City School 2. Exhibits R-27, R-30.

9. On October 4, 2016, City School 2 convened an IEP team meeting for a 30-day review of Student's progress. Mother and Former Attorney attended the meeting. Mother reported that she initially had some concerns about Student's behavior but those concerns had subsided. Mother also reported that at home, Student sat down with her for homework with more ease. Mother expressed that if Student's focus did not improve, it may be necessary to take a look at focus and ways to improve it. The special education teacher reported that overall, Student was a good student. The IEP team agreed not to change any of the goals in Student's May 20, 2016 IEP and determined that Student's needs could be met at City School 2. Exhibit R-32. At City School 2, neither Mother nor Former Attorney objected to the May 20, 2016 IEP or, prior to December 2016, complained about the instruction Student was receiving. Testimony of Mother.

10. Student's IEP was amended on November 3, 2016 at City School 2 for the

purpose, according to Special Education Coordinator, of making sure that the percentage of school time outside the general education setting was accurate. However, there were no changes made to the Special Education and Related Services or the Least Restrictive Environment (LRE) parts from the May 20, 2016 IEP. Exhibit R-33, Testimony of Special Education Coordinator.

11. Student's City School 2 IEP team convened on December 12, 2016 to hear Mother's concerns about the student. Mother and Former Attorney attended the meeting. Mother reported that Student's behaviors were going in the wrong direction and that at home, Student had used profanity and was not showing empathy. Former Attorney stated that Mother had concerns about negative behaviors that Student was picking up from the ELS classroom setting. The ELS classroom teacher and Student's related services providers reported that they did not have behavior problems with Student. The classroom teacher said that she did not believe she had any major behavior problems in her classroom and that while she did have to spend time redirecting students, she was able to provide instruction and Student was making good progress. The team agreed to collect data, weekly, on Student and provide the information to Mother. Mother stated that if there were no changes, she would remove Student from the school and place Student in another ELS classroom where the children have only early learning needs, not behavior concerns. Exhibit R-34. Mother did not have concerns about Student's academic progress at City School 2. Her concerns were about Student's behaviors. Testimony of Mother.

12. On November 2, 2016, Student's child neurologist at CITY HOSPITAL wrote a memorandum "To whom it may concern" advising that Student had been evaluated for staring spells and that Student's EEG was consistent with childhood

absence epilepsy. The physician recommended that it would be helpful for the school to monitor Student for staring spells. She noted, in addition, that children with epilepsy were at an increased risk for learning disabilities and this should be taken into account when discussing education modifications. Exhibit P-16. Mother provided this memorandum, the next day, to Student's classroom teacher at City School 2. It appears that the teacher did not act on the memorandum. Mother shared the information on Student's epilepsy with the IEP team at the December 12, 2016 meeting. Special Education Coordinator agreed to share the diagnosis information with all of Student's teachers and provide the information to the school nurse. Exhibit R-34. In a January 2018 physician treatment order, a City Hospital neurologist wrote that Student had seizures which are characterized by staring; that the teacher should call Student's name to get Student's attention; that the spells last several seconds and may occur in clusters; that no "intervention" was needed as the spells are brief and self-limiting; that Student had never had a generalized convulsive seizure and that Student should resume Student's school work after the seizures occur. Exhibit P-15.

13. In a February 3, 2017 IEP progress report, Student's special education teacher and related services providers at City School 2 reported that Student was progressing on all IEP goals, except for the comparing numbers math goal, which had just been introduced, two of four Speech and Language goals, which Student had mastered and an OT goal for completing tasks with the non-dominant hand, which had not yet been introduced. Exhibit R-35.

14. In March 2017, after Mother continued to express concerns about Student's peer match, curriculum and class, DCPS offered to move Student to the ELS classroom at City School 3. The classroom teacher at City School 3 told Mother that the

behaviors of the children in the ELS classroom were more severe than Mother's description of the classmates at City School 2. Student stayed about 5 days at City School 3. Then, Nonpublic School 1, where Mother had made an application for Student, informed Mother that Student had been accepted at the private school. On March 24, 2017, Mother unilaterally placed Student at Nonpublic School 1. Testimony of Mother. Student loved Nonpublic School 1 and Mother re-enrolled Student for the 2017-2018 school year. Testimony of Mother. (Mother has not sought reimbursement from DCPS for her unilateral placement of Student at Nonpublic School 1.)

15. In October 2017, Neuropsychologist conducted a comprehensive neuropsychological evaluation of Student, due to Mother's ongoing concern about Student's academic progress. Neuropsychologist administered a battery of assessments of Student's cognitive, adaptive, academic and behavioral functioning. In her written report, Neuropsychologist reported that Student demonstrated significant weaknesses in verbal reasoning and language-based processing, visual/nonverbal reasoning, problem-solving/conceptual understanding, core academic skills, and multiple aspects of adaptive functioning. While Student demonstrated adequate abilities in several areas of adaptive functioning (*e.g.* aspects of social and play/leisure skills), Student demonstrated significant weakness in self-care, self-direction/executive functioning, home living, and functional academics. Neuropsychologist reported that academically, Student had made minimal progress since being previously evaluated in February 2016. Intellectual testing indicated that Student's cognitive functioning seemed to have declined, although that may have been a factor of different testing instruments. Based on Student's complex neuropsychological profile, with evidence of broad delays impacting multiple domains, Neuropsychologist diagnosed Student with an Intellectual

Disability. Neuropsychologist opined that Student was at continued risk for difficulty in academic, social, and behavioral areas of functioning. Neuropsychologist recommended that Student be placed in a developmentally appropriate educational environment, predicting that otherwise Student was at risk for becoming increasingly frustrated, withdrawing emotionally and/or becoming a behavior management challenge. Neuropsychologist recommended that Student would need individualized educational supports, specialized instruction, and a classroom environment that would allow Student to work at an individualized pace in order to further academic progress. She opined that in the social domain, Student would be increasingly at risk for peer rejection and for feelings of frustration and decreased self-esteem due to the developmental issues. Neuropsychologist recommended that Student required intensive specialized educational services to be successful academically, behaviorally, and socially. Exhibit P-13.

16. Mother shared the October 2017 neuropsychological report with staff at Nonpublic School 1, who informed her that the school could not serve children with ID disabilities. Mother then sought a revised IEP and educational placement from DCPS. Nonpublic School 1 was willing to continue to serve Student until DCPS found a placement. Testimony of Mother. Mother provided the neurological evaluation of Student to DCPS on December 12, 2017. Exhibit R-16. LEA REPRESENTATIVE was the point of contact. Testimony of Mother.

17. LEA Representative convened a multidisciplinary team (MDT) meeting for Student at DCPS' Central Office on December 13, 2017. Mother, Petitioner's Counsel and ATTORNEY 3 attended the meeting. Prior to the meeting, DCPS developed a draft IEP for Student. Mother updated the team on Student's special education history and

Student's epilepsy diagnosis. Attorney 3 asserted that DCPS had been provided enough information to make an eligibility determination and develop an IEP and location of services for Student. LEA Representative responded that the team needed to comprehensively review the data and plan for all aspects of Student's development. At the meeting, Mother withheld consent for DCPS to conduct additional assessments of Student. The team did not review the draft IEP which had been prepared by DCPS before the meeting. Exhibit R-16.

18. On December 29, 2017, a DCPS school psychologist completed a review of Neuropsychologist's October 2017 evaluation report on Student. This DCPS school psychologist reported that Student met criteria for Multiple Disabilities based upon ID and OHI (Childhood Absence Epilepsy). Exhibit R-13.

19. DCPS convened an MDT meeting for Student on January 3, 2018 at its Central Office. Mother, Petitioner's Counsel and Attorney 3 attended the meeting. At this meeting, Student's MD disability classification was confirmed and an updated IEP was developed. The IEP team determined that Student's least restrictive environment was a separate school and that Student needed one-to-one and small group instruction, in a smaller classroom setting, in order to effectively access classroom instruction. The IEP team provided for Student to receive 30.5 hours per week of Specialized Instruction outside general education, 240 minutes per month of Behavioral Support Services, 240 minutes per month of OT and 60 minutes per month of Consultation Speech-Language Pathology. Exhibit P-14.

20. On February 5, 2018, a Change in Placement meeting with OSSE was convened at DCPS' Central Office. Mother attended this meeting. The OSSE representative asserted that Student could be served in a DCPS school. However, the

DCPS representatives and the parent insisted that DCPS was not able to support Student's needs, based upon Student's history in DCPS special education programs. The OSSE representative accepted the DCPS team decision and committed to submit placement packages to at least three separate day schools for Student. Exhibit R-11, Testimony of Mother.

21. At the time of the February 5, 2017 meeting, private schools under consideration for Student included Nonpublic School 2, Nonpublic School 3, NONPUBLIC SCHOOL 4, NONPUBLIC SCHOOL 5, NONPUBLIC SCHOOL 6 and NONPUBLIC SCHOOL 7. Nonpublic School 3 and Nonpublic School 6 did not have immediate openings. Mother thought that Nonpublic School 4 and Nonpublic School 5 would not be a good fit for Student. Nonpublic School 7 stated that Student did not fit their student profile. Exhibit R-11, Testimony of Mother, Testimony of Program Manager. Mother visited Nonpublic School 2 and did not like it. However, OSSE recommended Nonpublic School 2 and no additional special schools were proposed. Mother enrolled Student at Nonpublic School 2 on March 6, 2018. Testimony of Mother.

22. After an incident in March 2018 when Student was allegedly assaulted by another student and an incident in April 2018 when Student allegedly hit another child, Mother told staff at Nonpublic School 2 that she did not want Student to go back to the school because Student was scared. Testimony of Mother.

23. Student's MDT team convened at Nonpublic School 2 on May 14, 2018 for a 30-day review meeting. Mother and Special Education Advocate attended the meeting. The school members of the MDT team reported that Student's sporadic attendance had hampered academic growth and Student's receiving behavioral support.

Mother stated that Nonpublic School 2 was not appropriate for Student based on alleged bullying and toileting issues. Principal stated that he believed that Nonpublic School 2 could provide Student a FAPE, but that he would not object to a change in placement if that was what Mother wanted. Testimony of Special Education Advocate, Testimony of Principal, Exhibit R-19. Mother did not allow Student to return to Nonpublic School 2. Testimony of Mother.

24. In March 2018, after Student had started at City School 3, Mother requested in a conversation with Speech-Language Pathologist that Student receive a speech-language evaluation. The evaluation request was discussed again at the May 14, 2018 MDT meeting at Nonpublic School 2. Testimony of Mother, Testimony of Speech-Language Pathologist.

25. On May 29, 2018, Student's January 3, 2018 IEP was amended to add Extended School Year (ESY) services and goals to Student's program. Exhibit P-35.

26. By letter of May 10, 2018, DCPS informed the parent that Nonpublic School 3 had been identified as Student's location of services for summer 2018 Extended School Year (ESY) services and for the 2018-2019 school year. Exhibit R-6. After the parent stopped sending Student to Nonpublic School 2, there was no other special school immediately available, which could meet Student's IEP requirements. On June 8, 2018, DCPS authorized funding for Student to receive interim Specialized Instruction at Tutoring Center for 47 hours. This was per the request of Petitioner's Counsel. Exhibit P-27. Student went to Tutoring Center for 4 hours per day for the month of June 2018. After Student completed the authorized hours, Student stayed home for a week or so and then began attending the ESY program at Nonpublic School 3. Student was scheduled to attend Nonpublic School 3 for the 2018-2019 school year, with DCPS

funding, beginning August 20, 2018. Testimony of Mother.

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

As provided in the D.C. Special Education Student Rights Act of 2014, the party who filed for the due process hearing, the Petitioner in this case, shall bear the burden of production and the burden of persuasion, except that where there is a dispute about the appropriateness of the student's IEP or placement, or of the program or placement proposed by DCPS, the District shall hold the burden of persuasion on the appropriateness of the existing or proposed program or placement; provided that the Petitioner shall retain the burden of production and shall establish a *prima facie* case before the burden of persuasion falls on the District. The burden of persuasion shall be met by a preponderance of the evidence. See D.C. Code § 38-2571.03(6).

Analysis

Individualized Education Programs

- i. Did DCPS deny Student a FAPE by not ensuring that its June 2016 IEP for Student was appropriate, in that the IEP lacked appropriate annual goals and specialized instruction services to meet those goals?

Petitioner alleges that Student's June 2016 IEP was inappropriate because it lacked appropriate annual goals and specialized instruction services. (The IEP team meeting date was not in June 2016, but was held on May 20, 2016.) DCPS responds that the May 20, 2016 IEP was appropriate for Student and that Mother and Mother's special education attorney, who both participated in the IEP team meeting, had no objection to

the IEP at the time it was developed.

In *Moradnejad v. District of Columbia*, 177 F. Supp. 3d 260 (D.D.C. 2016), the Court adopted the Report and Recommendation of U.S. Magistrate Judge G. Michael Harvey, which explained how a court or a hearing officer must assess an IEP:

The Supreme Court explained in [*Bd. of Educ. v. Rowley*, 458 U.S. 176, 102 S.Ct. 3034, 73 L.Ed.2d 690 (1982)] that a court’s assessment of an IEP involves two inquiries:

First, has the State complied with the procedures set forth in the [IDEA]? And second, is the [IEP] developed through the [IDEA’s] procedures [appropriate]? If these requirements are met, the State has complied with the obligations imposed by Congress and the courts can require no more.

Moradnejad at 274-75. Petitioner does not allege that DCPS failed to comply with IDEA procedural requirements when the May 20, 2016 IEP was developed. Therefore, I move to the second prong of the *Rowley* inquiry: Was the IEP 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*, for what constitutes an appropriate IEP. Discussing these decisions in *Z. B. v. District of Columbia*, 888 F.3d 515 (D.C. Cir. 2018), the D.C. Circuit Court of Appeals explained that in *Andrew F.*, the Supreme Court

raised the bar on what counts as an adequate education under the IDEA. *Andrew F.* held that the Act requires education “reasonably calculated to enable a child to make progress in light of the child’s circumstances”—a standard that the Court described as “markedly more demanding than the ‘merely more than *de minimis*’ standard the Tenth Circuit had applied. . . . In requiring more than merely some “educational benefits,” *id.* at 77 (quoting *Bd. of Educ. v. Rowley*, 458 U.S. 176, 207, 102 S.Ct. 3034, 73 L.Ed.2d 690 (1982)), the Court in *Andrew F.* stressed that “every child should have the chance to meet challenging objectives,” and that a student’s “educational program must be appropriately ambitious in light of his circumstances.” 137 S.Ct. at 1000.

Z. B., 888 F.3d at 517.

Substantively, the IDEA “requires an educational program reasonably calculated to enable a child to make progress appropriate in light of the child’s circumstances,” *Endrew F.*, 137 S.Ct. at 1001, even as it stops short of requiring public schools to provide the best possible education for the individual child, *Rowley*, 458 U.S. at 200, 102 S.Ct. 3034, or an education “equal” to that of non-disabled peers, *Endrew F.*, 137 S.Ct. at 1001; *Rowley*, 458 U.S. at 198-99, 102 S.Ct. 3034.

Z. B., 888 F.3d at 519.

The IDEA calls on public schools throughout the United States to provide a free, appropriate education. Congress has not committed to educational perfection: “Any review of an IEP must appreciate that the question is whether the IEP is *reasonable*, not whether the court regards it as ideal.” *Endrew F.*, 137 S.Ct. at 999 (emphasis in original). If there is a gap between the best education that money can buy at a private school for a student with disabilities and the free and appropriate education at a public school that the IDEA promises, one might justly hope to close that gap for all students. Meanwhile, what Congress has required is that public schools be “ambitious” for every child, giving each the opportunity to “meet challenging objectives.” *Id.* at 1000. Disabilities can be subtle and complex. They may require expertise to identify accurately.

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

Understanding the particulars of a child’s current skills and needs is critical to developing an “individualized” educational plan: “An IEP is not a form document. It is constructed only after careful consideration of the child’s present levels of achievement, disability, and potential for growth.” *Endrew F.*, 137 S.Ct. at 999 (citing 20 U.S.C. §§ 1414(d)(1)(A)(i)(I)-(IV), (d)(3)(A)(i)-(iv)).

Z. B., 888 F.3d at 522.

Applying the IDEA as interpreted in *Endrew F.*, we must ask whether, in developing the [contested IEP], the [education agency] adequately evaluated [the student’s] particular needs and offered her an IEP tailored to what it knew or reasonably should have known of her disabilities at the time. *See Endrew F.*, 137 S.Ct. at 999.

Z. B., 888 F.3d at 524.

The key inquiry regarding an IEP’s substantive adequacy is whether, taking account of what the school knew or reasonably should have known of a student’s needs at the time, the IEP it offered was reasonably calculated to enable the specific student’s progress. *See Endrew F.*, 137 S.Ct. at 999. . . . [T]hat standard calls for evaluating an IEP as of “the time each IEP was created” rather than with the benefit of hindsight. . . . At the same time, . . . evidence that post-dates the creation of an IEP is relevant to the inquiry to whatever extent it sheds light on

whether the IEP was objectively reasonable at the time it was promulgated.

Z. B., 888 F.3d at 524 (internal quotations and citations omitted.) DCPS must shoulder the burden of persuasion as to the appropriateness of the challenged IEPs.

With regard to the appropriateness of the annual goals in the May 20, 2016 IEP, the IDEA requires that each child's IEP must include a statement of measurable annual goals, including academic and functional goals, designed to,

(A) Meet the child's needs that result from the child's disability to enable the child to be involved in and make progress in the general education curriculum; and

(B) Meet each of the child's other educational needs that result from the child's disability.

See 34 CFR § 300.320(a)(2)(i). DCPS' expert, Special Education Coordinator, opined that looking at Beginning of Year (BOY) data for Student for the 2016-2017 school year, the annual goals in the May 20, 2016 IEP were appropriate. Petitioner's expert, Special Education Advocate, opined that the IEP annual goals were inappropriate because Student "has not mastered any of [the] IEP goals and twelve goals were not introduced."

The Supreme Court teaches in *Andrew F.* that the IDEA requires ambitious IEP goals so that "every child should have the chance to meet challenging objectives." *Id.*, 137 S. Ct. at 992. Judging the appropriateness of the IEP goals after the fact, by whether specific goals were, or were not mastered, is misguided. *See, e.g., S.S. ex rel. Shank v. Howard Road Academy*, 585 F.Supp.2d 56 (D.D.C. 2008) ([B]ecause the question . . . is not whether the IEP will guarantee some educational benefit, but whether it is reasonably calculated to do so, . . . the measure and adequacy of an IEP can only be determined as of the time it is offered to the student.) This is especially true when, as in this case, the parent and her special education attorney participated in crafting the

goals.

In any event, Special Education Advocate's analysis is based on erroneous data. By the end of the second reporting period of the 2016-2017 school year, half-way through the May 20, 2016 IEP year, Student had mastered 3 of the 11 annual goals in the IEP and was progressing on all of the rest, except for two goals which had not been – or had just been – introduced. (In her assertions that Student had not mastered any IEP goals and that twelve goals were not introduced, Special Education Advocate apparently relied on the April 26, 2018 progress report from Nonpublic School 2, which reported on Student's three-months progress toward the January 3, 2018 IEP annual goals.)

With regard to the appropriateness of the specialized instruction services in the May 20, 2016 IEP, the IDEA requires, *inter alia*, a statement of the special education services that will be provided to enable the child to advance appropriately toward attaining the IEP annual goals. The May 20, 2016 IEP provided for Student to receive 20 hours per week of Specialized Instruction outside general education. There was no evidence that Mother or her special education attorney objected to the number of Specialized Instruction hours, either at the IEP meeting or after Student transferred to City School 2. Nor was any competent evidence offered that these hours of Specialized Instruction were not adequate to enable Student to advance appropriately toward attaining the May 20, 2016 IEP annual goals. I conclude, therefore, that DCPS has met its burden of persuasion that based upon the information available to Student's IEP team at the time the IEP was developed, the annual goals and the specialized instruction services provided in the May 20, 2016 IEP were reasonably calculated to enable Student to make progress appropriate in light of the child's circumstances. *See Andrew F., supra*, 137 S.Ct. at 1001.

ii. Did DCPS deny Student a FAPE by not ensuring that Student's IEP team timely reviewed and appropriately revised Student's IEP after Student was diagnosed with epilepsy in fall 2016?

In November 2016, Student was diagnosed with childhood absence epilepsy. Mother promptly informed Student's classroom teacher and Student's IEP team at City School 2 of the diagnosis. The parent contends that DCPS denied Student a FAPE by not ensuring that Student's IEP was revised after receiving this diagnosis. I infer that the parent's position is that there should have been related services or supplementary aids and services added to Student's IEP, in response to the new medical diagnosis.

The IDEA's FAPE mandate requires that an IEP provide "educational instruction specially designed to meet the unique needs of the handicapped child, supported by such services as are necessary to permit the child 'to benefit' from the instruction." *Hendrick Hudson Dist. Bd. of Educ. v. Rowley*, 458 U.S. 176, 188-89, 73 L. Ed. 2d 690, 701, 102 S. Ct. 3034, 3042 (1982). The term "such services" in the *Rowley* decision refers to IEP "Related services," "which broadly encompass[s] those supportive services that 'may be required to assist a child with a disability to benefit from special education.'" *See Cedar Rapids Cmty. Sch. Dist. v. Garret F. ex rel. Charlene F.*, 526 U.S. 66, 73, 119 S. Ct. 992, 997, 143 L. Ed. 2d 154 (1999), *quoting* 20 U.S.C. § 1401(a)(17). An IEP must also provide for supplementary aids and services as may be needed to enable children with disabilities to be educated with nondisabled children to the maximum extent appropriate. *See* 34 CFR § 300.42. Because individual IEPs must be "tailored to the unique needs" of each child, *Bd. of Educ. v. Rowley*, 458 U.S. 176, 1817, 102 S.Ct. 3034 (1982), the IEP must be revised regularly in response to new information regarding the child's performance, behavior, and disabilities. *Pinto v. District of Columbia*, 938 F. Supp. 2d 25, 30 (D.D.C. 2013), *citing* 20 U.S.C. § 1414(d)(4). *See*,

also, 34 CFR § 300. 324(b)(ii).

In the physician's note provided to City School 2 in early November 2016, Student's neurologist reported that Student had been evaluated for staring spells and that Student's EEG was consistent with childhood absence epilepsy. The physician recommended that it would be helpful for the school to monitor Student for staring spells. Mother provided the physician's note to Student's classroom teacher on November 3, 2016 and informed the rest of Student's IEP team at the December 12, 2016 IEP team meeting. At the December 12, 2016 meeting, Special Education Coordinator undertook to share the information on Student's epilepsy diagnosis and the physician's recommendation with all of Student's teachers and the school nurse. Mother stated at the meeting that she was not looking for the school to provide additional supports at that time.

The parent now faults DCPS for not ensuring that Student's IEP was reviewed and revised after the school was informed of Student's childhood absence epilepsy diagnosis. DCPS responds that no IEP revision was needed because Student's epilepsy condition did not have an educational impact on Student at school. At the due process hearing, there was no competent evidence that due to Student's absence epilepsy condition, Student required supportive related services to benefit from special education or supplementary aids or services to enable Student to be educated with nondisabled children. At the time, Student was already placed in an Early Learning Support classroom of some six children, taught by two teachers.

In her fall 2017 Neuropsychological Evaluation report, Neuropsychologist recommended that Student's IEP should have a detailed medical plan to address the seizure disorder, to include typical signs and symptoms, as well as what action should be

taken should Student have any uncontrolled seizure episodes while at school. I discount that recommendation in light of the information from Student's City Hospital neurologists. Student's neurologist wrote in January 2018 that no "intervention" was needed for Student's absence epilepsy seizures because the spells are brief and self-limiting and Student had never had a generalized convulsive seizure. The physician recommended that Student should resume normal schoolwork after the seizures occur. The physician was obviously more qualified than Neuropsychologist to describe how Student's absence epilepsy condition presented and to address whether interventions at school would be needed.

I conclude that DCPS has established that based upon the information available to the City School 2 IEP team in the fall of 2016, Student's medical diagnosis of absence epilepsy did not necessitate additional related services or supplementary aids and services for Student to benefit from special education and that this new information did not require a revision to Student's May 20, 2016 IEP. However, it was, of course, appropriate for City School 2 to ensure that Student's teachers and the school nurse were informed about Student's absence epilepsy condition, as was apparently done.

School Placements

iii. Did DCPS deny Student a FAPE by placing Student in an unsuitable Early Learning Support (ELS) classroom for the 2016-2017 school year?

Petitioner alleges that DCPS' assignment of Student to the ELS classroom at City School 2 for the 2016-2017 school year was inappropriate because the children in Student's classroom had significant emotional and behavioral problems, which distracted Student, affected Student's ability to learn and negatively affected Student's behaviors. *See Due Process Complaint Notice, June 12, 2018.* DCPS, which has the

burden of persuasion, contends that the services location at City School 2 was appropriate to implement Student's IEP.

“Once the IEP is developed, the school system must provide an appropriate placement that meets those needs or else enable the student to seek adequate private services. At a minimum, the placement must be ‘based on the child’s IEP,’ 34 C.F.R. § 300.116(b)(2), and be capable of fulfilling the student’s IEP, *see also Roark ex rel. Roark v. District of Columbia*, 460 F.Supp.2d 32, 44 (D.D.C. 2006) (explaining that appropriateness hinges on whether school “can provide” services mandated by IEP.)” *Joaquin v. Friendship Pub. Charter Sch.*, No. CV 14-01119 (RC), 2015 WL 5175885 (D.D.C. Sept. 3, 2015) (citations and internal quotations omitted.)

Student's May 20, 2016 DCPS IEP provided for Student to receive 20 hours per week of Specialized Instruction outside general education, 2 hours per month of Speech-Language Pathology and 240 minutes per month of OT. For the 2016-2017 school year, DCPS assigned Student to the Early Learning Support (ELS) classroom at City School 2. This was a non-categorical resource classroom with six special education students taught by 2 teachers. Special Education Coordinator testified that Student liked coming to school at City School 2 and fit nicely in the classroom. Although Mother expressed concerns about a decline in Student's behavior at home after being at City School 2, the ELS classroom teacher and Student's related services providers reported at the December 12, 2016 IEP team meeting that they did not have behavior problems with Student. The classroom teacher stated at the meeting that she did not believe she had any major behavior problems in her classroom and that while she did have to spend time redirecting students, she was able to provide instruction and Student was making good progress.

Even if the parent is correct that Student's behavior declined after being placed with other children with disabilities in the ELS classroom, that does not mean that DCPS' assignment of Student to City School 2 was not appropriate. DCPS cannot guarantee that an educational placement will work out for a child with a disability. "The purpose of the [IDEA] was "more to open the door of public education to handicapped children on appropriate terms than to guarantee any particular level of education once inside." *Rowley, supra.* at 192, 102 S.Ct. at 3043; *accord Luncford v. District of Columbia Bd. of Educ.*, 745 F.2d 1577, 1583 (D.C.Cir.1984) (Ruth Bader Ginsburg, J.) (because public "resources are not infinite," federal law "does not secure the best education money can buy; it calls upon government, more modestly, to provide an appropriate education for each [disabled] child"). *See, also, N.T. v. Dist. of Columbia*, 839 F.Supp.2d 29, 33 (D.D.C.2012) ("While the District of Columbia is required to provide students with a public education, it does not guarantee any particular outcome or any particular level of education."). Here, there was no evidence that DCPS' assignment of Student to the ELS classroom at City School 2 was not based on Student's May 20, 2018 IEP or that the placement location would not be capable of fulfilling the IEP. I find that DCPS has met its burden of persuasion that its placement of Student at City School 2 was appropriate.

iv. Did DCPS deny Student a FAPE by placing Student in an unsuitable nonpublic school location at Nonpublic School 2 beginning in March 2018?

On February 20, 2018, OSSE issued a location assignment for Student to attend Nonpublic School 2, following the January 3, 2018 DCPS IEP team's decision that Student's least restrictive environment was a separate school and that Student would receive 30.5 hours per week of Specialized Instruction outside general education, as well

as 240 minutes per month of Behavioral Support Services, 240 minutes per month of OT and 60 minutes per month of Consultation Speech-Language Pathology. In her due process complaint, the parent alleges that Student's placement at Nonpublic School 2 was inappropriate because, after enrolling at Nonpublic School 2, Student was subjected to repeated bullying, exposed to older children with significant behavioral problems, and was threatened by a classroom teacher. Nonpublic School 2 Principal denied these allegations in his testimony. However, at a meeting on May 14, 2018, Principal agreed that the parent could withdraw Student, if she did not feel comfortable with Student's attending the private school. For the remainder of the school year, Student did not attend Nonpublic School 2.

Mother's assertion that Student was subjected to bullying and other misconduct by students or teachers at Nonpublic School 2 is disputed by school staff and it is not necessary for me to decide the validity of this claim. As explained in the preceding section, the IDEA requires that the placement location selected by the school district must be "based on the child's IEP," 34 C.F.R. § 300.116(b)(2), and be "capable of fulfilling the student's IEP." *Joaquin, supra*. Program Manager opined that Nonpublic School 2 was an appropriate placement because the private school has a Certificate of Approval from OSSE, a very strong principal, and the staff and training required for Student's needs. Principal testified that Nonpublic School 2 was an appropriate setting for Student and that the school was able to, and did, implement Student's January 3, 2018. I find that DCPS has met its burden of persuasion that at the time Student was assigned to Nonpublic School 2, the placement was based on Student's IEP and the private school was capable of fulfilling the IEP.

Speech and Language Reevaluation

v. Did DCPS deny Student a FAPE by not conducting a speech and language reevaluation as requested by the parent beginning in March 2018?

In her fall 2017 Neuropsychological Evaluation report, Neuropsychologist recommended that Student required intensive speech/language services to address difficulties, including vocabulary development, and expressive and receptive language deficits. She also recommended that Student have an updated speech/language evaluation. In March 2018, after Student had started at City School 3, in a conversation with Speech-Language Pathologist, Mother requested a speech-language evaluation for Student. The evaluation request was discussed again at the May 14, 2018 MDT meeting at Nonpublic School 2. Since it was agreed at that meeting that Student would not continue at the private school, Speech-Language Pathologist and Monitoring Specialist understood that the evaluation would be conducted after Student started at Nonpublic School 3.

In *Herbin ex rel. Herbin v. District of Columbia*, 362 F.Supp.2d 254 (D.D.C.2005), the Court explained that because the IDEA and its implementing regulations are silent about the time frame within which an agency must conduct a reevaluation, reevaluations should be conducted in a “reasonable period of time,” or “without undue delay,” as determined in each individual case. *Id.* at 259, *citing Office of Special Education Programs Policy Letter in Response to Inquiry from Jerry Saperstone*, 21 IDELR 1127, 1129 (1995). In this case, Mother only claims that DCPS should have conducted the speech-language evaluation after she made the request to Speech Language Pathologist in March 2018 – not at the time of Neuropsychologist’s recommendation in fall 2017. I find that DCPS’ deferring the evaluation until after Student started at City School 3 was not an undue delay, given all of the transitions

Student was already experiencing at the time (*i.e.*, withdrawal from Nonpublic School 2, weeks of tutoring at Tutoring Center and ESY at Nonpublic School 3.) However, Student started at Nonpublic School 3 on July 3, 2018. As of the August 7-8, 2018 due process hearing, the speech-language reevaluation still had not been completed. Under the circumstances, I find that DCPS' not conducting this reevaluation, which Mother requested in March 2018, for more than four weeks after Student began attending Nonpublic School 3, was undue delay.

The failure to timely conduct a requested IDEA reevaluation is a procedural violation of the IDEA. *See, e.g. G.G. ex rel. Gersten v. District of Columbia., supra*, 924 F. Supp. 2d at 280 (School district's failure to adequately evaluate student was a procedural error.) Procedural violations may only be deemed a denial of FAPE if the procedural inadequacies—

- (i) Impeded the child's right to a FAPE;
- (ii) Significantly impeded the parent's opportunity to participate in the decision-making process regarding the provision of a FAPE to the parent's child; or
- (iii) Caused a deprivation of educational benefit.

34 CFR § 300.513(a)(2). It does not appear that in this case DCPS' failure to conduct the requested speech-language reevaluation has impeded Student's right to a FAPE or impeded Mother's opportunity to participate in the decision-making progress.

Moreover, DCPS' Counsel represents that DCPS is willing to conduct a Speech and Language reevaluation of Student. Therefore I do not find that Student has been denied a FAPE by the delay in completing the assessment. Notwithstanding, I will order DCPS to complete Student's speech-language reevaluation without further delay.

ORDER

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

ORDERED:

1. Within 15 school days of the date of this decision, subject to obtaining Mother's written consent, DCPS shall conduct an appropriate Speech-Language reevaluation of Student. The completed reevaluation report shall be promptly reviewed by Student's IEP team to enable the IEP team to revise Student's IEP, as appropriate, and
2. All other relief requested by the Petitioner herein is denied.

Date: August 23, 2018

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
Student Hearing Office
Chief Hearing Officer
OSSE Division of Specialized Education
DCPS Resolution Team