

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

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PETITIONER,  
on behalf of STUDENT,<sup>1</sup>

Date Issued: July 23, 2018

Petitioner,

Hearing Officer: Peter B. Vaden

v.

Case No: 2018-0062

PUBLIC CHARTER SCHOOL,

Hearing Dates: May 23-25, 2018

Respondent.

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

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**HEARING OFFICER DETERMINATION**

**INTRODUCTION AND PROCEDURAL HISTORY**

This matter came to be heard upon the Administrative Due Process Complaint Notice filed by Petitioner (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 (“D.C. Regs.”). In her due process complaint, Petitioner seeks reimbursement from Respondent PUBLIC CHARTER SCHOOL (PCS) for her unilateral placement of Student at NONPUBLIC SCHOOL for the 2016-2017 school year.

In the 2016-2017 school year, Student, now an AGE child, was a resident of the District of Columbia. Petitioner’s Due Process Complaint, filed on March 6, 2018,

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<sup>1</sup> Personal identification information is provided in Appendix A.

named PCS as respondent.<sup>2</sup> The undersigned hearing officer was appointed on March 7, 2018. The due process hearing was set for May 23 through 25, 2018. To accommodate these hearing dates, the final decision due date was extended from May 20, 2018 to June 15, 2018. At the conclusion of the due process hearing, I granted the parties' joint request to further extend the final decision due date to July 25, 2018 to allow time for counsel to file post-hearing briefs.

The due process hearing was held before the undersigned impartial hearing officer on May 23, 24 and 25, 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 PCS was represented by DIRECTOR OF STUDENT SUPPORT and by PCS' COUNSEL.

Counsel for the respective parties made opening statements. Mother testified and called as additional witnesses, ACADEMIC DEAN, OCCUPATIONAL THERAPIST, EDUCATIONAL CONSULTANT and SPEECH-LANGUAGE PATHOLOGIST. PCS called as witnesses SPECIAL EDUCATION TEACHER 1, OSSE PLACEMENT COORDINATOR, SCHOOL COUNSELOR, SPECIAL EDUCATION TEACHER 2 and Director of Student Support. Petitioner's Exhibits P-1 through P-48 were admitted into evidence without objection except Exhibits P-37A and P-39A. PCS' objections to Exhibits P-37A and P-39A as well as to Exhibits P-49 and P-50 were sustained. PCS'

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<sup>2</sup> In 2017, Petitioner filed and later withdrew two prior due process complaints on behalf of Student, Case Numbers 2017-0200 and 2017-0307, alleging substantially the same claims. I convened prehearing conferences in those cases and issued prehearing orders. In this present case, with agreement of counsel, I did not convene another prehearing conference or issue a third prehearing order.

Exhibits R-1 through R-55 were admitted into evidence without objection.<sup>3</sup> In lieu of receiving oral closing arguments, I granted the parties' joint request for leave to file post-hearing written briefs after the hearing transcript was prepared. On July 6, 2018, counsel for each party filed a closing memorandum and on July 11, 2018, the respective counsel filed response briefs.

### **JURISDICTION**

The hearing officer has jurisdiction under 20 U.S.C. § 1415(f) and D.C. Regs. tit. 5-E, § 3029.

### **ISSUES AND RELIEF SOUGHT**

The issues for determination, as memorialized in the Prehearing Order in Case No. 2017-0307 and read into the record at the beginning of the due process hearing on May 23, 2018, are:

- A. Did PCS deny Student a FAPE by failing to provide an appropriate IEP program for the 2016-2017 school year?
- B. Did PCS deny Student a FAPE by providing an inappropriate placement for the 2016-2017 school year?
- C. Did PCS deny Student a FAPE by curtailing the IEP development process for Student after August 30, 2016?

For relief, the parent requests that the hearing officer order PCS to reimburse her for the cost of tuition, including all related services and fees, for Student's attendance at Nonpublic School for the 2016-2017 school year. (For the 2017-2018 school year, Student was a resident of New York and was enrolled in a nonpublic school there.)

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<sup>3</sup> In addition to these exhibits, *Letter to Steinke*, 18 IDELR 739 (OSEP January 2, 1992), discussing the "five-day evidence rule," cited by Petitioner's Counsel during the due process hearing, was admitted as Hearing Officer Exhibit 1.

## **FINDINGS OF FACT**

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

1. For the 2016-2017 school year, Student, an AGE child, resided in the District of Columbia with Mother. Testimony of Mother.

2. At all times concerned in this matter, Student was eligible for special education under the IDEA disability classification Multiple Disabilities, based upon the underlying impairments Specific Learning Disability and Other Health Impairment. Exhibit R-15.

3. Mother first enrolled Student at PCS for Student's pre-kindergarten year. Student continued to attend PCS until the 2016-2017 school year, when Mother unilaterally placed Student at Nonpublic School. Student attended Nonpublic School for the 2016-2017 school year. The family moved to New York State and Student attended a nonpublic school there for the 2017-2018 school year. Testimony of Mother.

4. In February 2013, Student's general education teacher at PCS referred Student for an initial special education eligibility evaluation. On the referral form, the teacher cited Student's difficulty with fine motor skills and speech. Exhibit P-2. At a meeting on May 7, 2013, the PCS eligibility team determined that due to an articulation disorder, Student met criteria for the IDEA Speech or Language Impairment. Student's initial IEP at PCS, dated May 7, 2013, identified Communication/Speech and Language and Motor Skills/Physical Development as areas of concern. The IEP provided for 60 minutes per week of Speech-Language Pathology services and 45 minutes per week of Occupational Therapy services. The IEP did not provide for Student to receive Specialized Instruction. Mother consented to the IEP services for Student. Exhibit P-4.

5. In the fall of 2013, Student was referred by PCS to PSYCHOLOGY OFFICE for an initial comprehensive psychological evaluation to assess Student's current level of functioning for educational planning purposes. PSYCHOLOGIST interviewed Mother and Special Education Teacher 2 and administered a battery of cognitive, educational and behavior assessments. In the February 3, 2014 Psychology Office evaluation report, Psychologist reported that Student's general cognitive ability was assessed within the Average range (Standard Score = 99; 4th percentile). There was marked variability reported among the index scores indicating that this score may not be the best representation of Student's overall cognitive potential. Student presented with cognitive strengths in verbal reasoning abilities and working memory abilities with scores falling within the High Average range. Student demonstrated well developed verbal expressive skills, knowledge of a wide range of general topics, and memory for visual stimuli. Student's visual-spatial abilities and fluid reasoning abilities appeared adequately developed with scores falling within the Average range. Current performances suggested that Student's visual processing speed abilities were slightly underdeveloped especially when compared to cognitive strengths. The examiner noted that fluctuations in motivation, effort, and self-confidence, as well as test anxiety, could have affected Student's performance on these processing speed tasks. On the achievement assessment, Woodcock Johnson Tests of Achievement, Third Edition (WJ-III), Student demonstrated periods of frustration, distress, lack of self-confidence and a tendency to give up on challenging academic items. These observations were most evident during the administration of the reading, spelling, and writing tasks. Student presented with underdeveloped word reading, reading comprehension, spelling, and sentence writing skills. Student presented with an academic strength in mathematics. When comparing

Student's academic achievement skills with assessed cognitive abilities, there was a significant discrepancy with regard to written language/expressive skills. Psychologist reported that Student met diagnostic criteria for a Specific Learning Disorder in Written Expression. With regard to behavior assessments, the parent's behavior ratings indicated concerns regarding Student's difficulties sustaining friendships, self-organizing and getting started on tasks. The teacher's responses yielded Clinically Significant and At-Risk concerns in regard to Student's periods of sadness, frustration, anxiety and withdrawal. Learning problems and difficulties with peer relationships were also of concern for the teacher. Student's low frustration tolerance, pessimism, low-self-confidence (in regard to academic skills) and tendency to give up on challenging items were noted during the evaluation. Psychologist wrote that Student's negative emotionality was very likely the result of academic struggles and Student's awareness of those limitations. In addition, Student appeared to be continuing to process and grieve the September 2012 death of the child's father. Psychologist diagnosed Student with Specific Learning Disorder with Impairment in Written Expression and with Uncomplicated Bereavement. Psychology Office recommended that Student was eligible for special education services under the IDEA SLD classification with impairment in written language/expression. Psychologist also recommended, *inter alia*, that Student may benefit from school counseling services to help learn coping skills to better manage feelings of frustration (with academic tasks) and overcome negative and anxious feelings, and that Student continue to participate in community counseling services to address feelings of frustration, anxiety and sadness.

Exhibit P-6.

6. Student's IEP team met on February 27, 2014 to review the psychological

evaluation report, discuss a change in Student's eligibility classification and review Student's IEP. Psychologist reviewed for the team the February 5, 2014 comprehensive psychological evaluation report. The team agreed that Student's learning disability was the primary area of concern that was impacting both Student's academic and emotional functioning. The speech-language pathologist and the occupational therapist reported that Student had made good progress in these areas and recommended that speech and language and OT services for Student be continued. The team proceeded to complete Student's annual IEP. Student's disability classification was changed to Specific Learning Disability. Reading; Written Expression; Communication/Speech and Language; Emotional, Social and Behavioral Development and Motor Skills/Physical Development were identified as areas of concern. For Special Education and Related Services, the IEP provided for Student to receive 5.5 hours per week of Specialized Instruction, including 2.5 hours per week outside general education, 60 minutes per week of Speech-Language Pathology, 45 minutes per week of OT and 120 minutes per month of Behavioral Support Services. The IEP team agreed to the IEP. Exhibit P-7.

7. At the February 27, 2014 IEP team meeting, Mother raised the idea of retaining Student in REPEATED GRADE. That decision was deferred to see how Student progressed with the revised IEP. Exhibit P-7. Student was retained in Repeated Grade at PCS for the 2014-2015 school year. Testimony of Mother.

8. Mother unilaterally enrolled Student in Nonpublic School's 2014 summer tutoring program. This is a program for children with SLDs. Student was reported to have made nice progress on academic skills. Exhibits P-9, P-10.

9. On February 24, 2015, Student's IEP team convened at Nonpublic School to review and update Student's IEP. Reading, Written Expression, and Motor

Skills/Physical Development were identified as areas of concern. The Speech-Language Pathologist reported that Student had done very well in mastering sounds but was having difficulty in carrying those skills into conversation. She recommended that Student be discharged from speech services because Student's errors in speech were not impacting Student in the classroom and it was not fruitful for Student to miss an hour of class for speech services, where Student was not making progress. The team noted that Student had regressed in independent reading over the summer in 2014. For Special Education and Related Services, the February 24, 2015 IEP provided for Student to receive 8 hours per week of Specialized Instruction, including 5 hours per week outside general education, 45 minutes per week of OT and 30 minutes per month of Behavioral Support Services. Extended School Year (ESY) services were noted as required for FAPE. Mother informed the team that Student had been evaluated at Nonpublic School and the team agreed to meet again after the Nonpublic School evaluation report was received. Exhibit P-11.

10. In February 2015, on Mother's referral, NONPUBLIC SCHOOL PSYCHOLOGIST conducted an updated psychoeducational evaluation to better clarify Student's learning profile. Nonpublic School Psychologist interviewed Mother and administered a battery of cognitive, educational and behavior assessments. In her Psychoeducational Evaluation Report, Nonpublic School Psychologist reported that Student had well developed oral language skills and placed in the Superior range on a test of expressive vocabulary and in the High Average range on a test of abstract verbal reasoning skills. Student scored in the High Average range on a visual-motor test of analysis-synthesis skills. Student had good visual processing and visual-spatial thinking skills. Student struggled with fine motor skills, which directly impacted penmanship

and struggled with producing written work. Processing speed skills could be relatively slow for Student in comparison to peers. Student's fluency was evenly developed and fell in the Average range overall. Fluid reasoning or problem solving skills were slightly variable and fell within the Low Average to Average range. Student's auditory or phonological processing skills fell largely in the Average range. Student had evenly developed memory skills. Attention was a big area of weakness and negatively impacted all areas of functioning, including learning and social interactions. Student showed some signs of struggling with executive functioning skills such as initiation and organization. Student's general academic knowledge of science fell in the Average range. Student's knowledge of social studies was a relative weakness, falling in the Low Average range. Student struggled with concepts relating to humanities. Student struggled with all aspects related to reading, including both sight word reading and phonetic decoding skills. Student had evenly developed math skills. Student had fine-motor deficits that contributed to poor penmanship. Student did not consistently know when to use capitals and struggled with basic spelling. Nonpublic School Psychologist reported that Student was vulnerable emotionally, and was struggling with many things. Nonpublic School Psychologist diagnosed Student with Attention Deficit Hyperactivity Disorder, Combined Presentation and a Specific Learning Disability Impairment in Reading. She reported that Student was also at risk for an SLD Impairment in Written Expression due to fine motor issues and weaker spelling. Nonpublic School Psychologist recommended, *inter alia*, that Student's IEP should reflect these current diagnoses and should provide in-school services to include, without limitation, weekly speech and language therapy to promote emerging reading skills, weekly OT to focus on fine-motor skills like penmanship and organization, and weekly

counseling services to promote better advocacy and coping skills. She also recommended that in-school behavioral planning and interventions be instituted.

Exhibit P-10.

11. On April 10, 2015, Mother forwarded Nonpublic School Psychologist's psychological report on Student to the special education coordinator at PCS. Mother described concerns she had about Student's allegedly not making appropriate academic gains and about Student's attention difficulties. Based on those concerns, Mother declined to sign the February 24, 2015 IEP. Exhibit P-12.

12. On May 18, 2015, an independent Occupational Therapist conducted an OT evaluation of Student. She noted that Student was clearly benefitting from and progressing with OT services at PCS. She opined that Student's performance on OT testing were at least partially related to vision defects. She recommended that Student continue to receive 45 minutes per week of individual OT services to continue with writing and postural control development and to support Student's visual deficits.

Exhibit P-13.

13. Student's IEP team at PCS met on June 4, 2015 to review Student's progress. The team reviewed the independent OT's report on Student and updated Student's IEP to reflect the new evaluation results. Exhibit P-14.

14. At the end of the last reporting period for the 2014-2015 school year, Student was reported to be progressing toward most goals on the February 24, 2015 IEP. Special Education Teacher 2 reported that Student had made a lot of progress in reading over the semester. She reported that Student's independent reading on the Fountas and Pinnell reading levels had advanced to Level I, that Student was able to read grade-level sight words with 95% accuracy and that Student had met the

benchmark for reading fluency. Special Education Teacher 2 also reported that Student had made a lot of progress in writing. The OT provider reported that Student was also progressing on letter writing and number formation goals, that Student had made “tremendous improvement” in the legibility of written work and that Student’s confidence and willingness to participate in non-preferred tasks had improved. Exhibit R-15. Student’s Reading score on the Northwest Educational Association (NWEA) Rasch Unit (RIT) scale rose from 165 in fall 2014 to 193 in spring 2015. Exhibit P-17.

15. As early as the 2014-2015 school year, Mother started thinking about Nonpublic School potentially as an option for Student. Early in the 2015-2016 school year, Mother began to believe that Student needed a full-time special education school and she brought in Educational Consultant to assist her. Educational Consultant conducted an observation of Student at PCS on October 20, 2015. Testimony of Mother, Exhibit P-18.

16. On December 1, 2015, the PCS MDT team met to update Mother on Student’s progress. Mother and Educational Consultant attended the meeting. Mother stated that Student loved coming to school and that Student’s scores were looking good. But Mother was concerned about how that translated in the real world and about Educational Consultant’s comments upon observing Student in the classroom. The meeting participants agreed to update Student’s IEP after the winter break. Exhibit R-13.

17. On December 1, 2015, Student’s City School eligibility team changed Student’s IDEA disability classification to Multiple Disabilities (MD) with underlying SLD and OHI (based on Attention Deficit-Hyperactivity Disorder) impairments. In the eligibility determination report, the MDT team agreed that Student’s disability impacted

Student's participation in Reading; Written Expression; Emotional, Social and Behavioral Development and Motor Skill/Physical Development. Exhibits R-13, R-14.

18. On February 2, 2016, Student's PCS IEP team convened for the annual IEP review. Reading; Written Expression; Emotional, Social and Behavioral Development and Motor Skills/Physical Development were identified as areas of concern. Student's Specialized Instruction services were increased from 8 hours per week to 12.5 hours per week, including 5 hours per week outside general education. For Related Services, the IEP provided 180 minutes per month of OT and 20 minutes per month of Behavioral Support Services. The IEP also provided for 30 minutes per month of consultation Behavioral Support Services. The IEP specified that Student required ESY services. Exhibit R-15. Neither Mother nor Educational Consultant expressed any objections to the revised IEP at the February 2, 2016 meeting.

19. Despite not objecting to the February 2, 2016 IEP, Mother felt as though she was starting to do Student a disservice by not putting Student in a full-time special education school, because she felt that as hard as PCS tried to meet Student's needs, the charter school was not able to provide full-time special education across the whole continuum. She felt that Student needed special education "around the clock." Mother decided to make the switch from PCS to Nonpublic School. Testimony of Mother.

20. In May 2016, INDEPENDENT PSYCHOLOGIST, on a referral from Mother, administered the Woodcock-Johnson IV Tests of Achievement (WJ-IV ACH) to Student. Student's Broad Reading tested in the Borderline range, and included Below Average decoding, reading accuracy, and comprehension and Borderline level Reading Fluency. Student's Broad Math was in the Below Average range, and included Below Average level computation and Borderline Math Facts Fluency. Student's math word

problems tested in the Above Average range and were an area of strength. Student's Broad Written Language was in the bottom of the Below Average range. Student's Spelling and Fluency of Writing were in the Borderline Range and Student's Writing Samples were in the Average Range. Independent Psychologist reported it notable that Student's academic fluency (for reading, writing and math) was in the Borderline Range. Independent Psychologist reported that her evaluation provided evidence for Student's difficulties that were commensurate with the criteria for a Specific Learning Disability in Written Language and in Reading and continued to provide evidence for Student's Attention Deficit Hyperactivity Disorder, Combined Type. Exhibit R-19.

21. On May 31, 2006, Student's IEP was amended to add extended school year (ESY) special education and related services details and ESY goals. Exhibit R-20.

22. The MAP is the Measures of Academic Progress assessment tool, put out by the Northwest Educational Association (NWEA). It is a standards-based computer driven test used by both PCS and Nonpublic School to monitor students' progress. Testimony Academic Dean. At PCS, Student's MAP score for reading rose from 172 (37 percentile) in spring 2014 to 193 (86 percentile) in spring 2015 to 201 (80 percentile) in spring 2016. Exhibit R-4. The spring 2015 MAP score did not reveal significant gaps in Student's foundational reading skills as compared to Student's grade level peers.

Testimony Academic Dean.

23. At PCS, Student's MAP score for math rose from 170 (28 percentile) in spring 2014 to 198 (54 percentile) in spring 2015 to 209 (91 percentile) in spring 2016. Exhibit R-4. The spring 2016 MAP math score suggested that Student was outperforming 89 or 90 percent of grade level peers, when Student ended the 2015-2016 school year at PCS. Testimony Academic Dean.

24. From the end of the 2014-2015 school year to the end of the 2015-2016 school year, Student's DIBELS Oral Reading Fluency score rose from 48 to 74 and Student's Text Reading Comprehension (TRC) score rose from Level J to Level N. Both assessments indicated that Student had met or surpassed grade-level expectations for reading. Exhibit R-44.

25. On June 8, 2016, Petitioner's Counsel provided notice by letter to the PCS principal that Mother did not believe that Student had been offered a FAPE for the 2016-2017 school year and that Mother had put a deposit down for Student to attend Nonpublic School. The letter stated that although the IEP development process was still underway, Mother reserved the right to seek public funding for Student's placement at Nonpublic School if the parent were not to agree that Nonpublic School had offered an appropriate special education program for Student for the 2016-2017 school year. Exhibit R-21.

26. By email of June 9, 2016, an attorney in Petitioner's Counsel's law firm wrote PCS' Counsel to advise that Mother believe that Student needed more intensive services because while there had been some minimal academic progress, Student remained below grade level in many academic areas. Additionally, Mother was reported to be concerned about Student's lack of independence in the classroom, because Student's teacher reportedly said that Student typically worked one-on-one or in a small group with adult support throughout the school day. The attorneys agreed to have an evaluation review/IEP and change in placement meeting the week of July 18, 2016. Exhibit R-22.

27. An MDT team meeting for Student was convened at PCS on July 19, 2016. Mother, Petitioner's Counsel, Educational Consultant and OSSE Placement Coordinator

attended. The MDT team discussed purported evidence of Student's progress at PCS. Petitioner's Counsel maintained that Student's scores on the WJ-IV ACH and the Gray Oral Reading Test (GORT) indicated that Student was performing miserably and that Student needed more support. Educational Consultant stated that Student needed a smaller group, repetition and prompting for initiation and sustaining, and that this level of support could not be provided in the PCS setting. The participants agreed to reconvene in late August, 2016. Exhibit R-24.

28. By letter of July 26, 2016, Petitioner's Counsel gave notice to OSSE Placement Coordinator that Mother had made arrangements for Student to attend Nonpublic School for the 2016-2017 school year because she did not believe that PCS had offered Student sufficient special education services and that Student had not made meaningful educational progress. The letter stated that although the IEP development process was still underway, Mother reserved the right to seek public funding for Student's placement at Nonpublic School for the 2016-2017 school year. Exhibit R-26.

29. Student's MDT team met at PCS on August 24, 2016. Petitioner's Counsel advised that the parent could not participate in the meeting then because she and her representatives needed time to go through new materials recently obtained. The meeting was rescheduled for August 30, 2016. Exhibit R-32.

30. Student's MDT team reconvened at City School on August 30, 2016. The school representatives cited the progress they had observed for Student in the prior school year. Petitioner's Counsel acknowledged some progress but stated that the parent believed Student's progress was not sufficient given Student's psychoeducational profile. Petitioner's Counsel gave notice that Mother had already unilaterally enrolled Student at Nonpublic School and that Student would remain there. Mother stated that

she would formally notify the PCS registrar that she was withdrawing Student from PCS. Exhibit R-35. Mother did not ask PCS for any additional IEP meetings after the August 30, 2016 meeting. Testimony of Mother.

31. Student attended Nonpublic School's elementary school campus for the 2016-2017 year. Nonpublic School is a private special education day school in the District of Columbia that serves some 400 students, Grades 1 through 12, who have SLD and ADHD disabilities. The annual tuition, with related services, is approximately \$46,000 to \$47,000. The school holds a Certificate of Approval (COA) issued by the D.C. Office of the State Superintendent of Education (OSSE). Testimony of Academic Dean.

### **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**

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 the local education agency, in this case PCS, the agency 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 agency. The burden of persuasion shall be met by a preponderance of the evidence. *See* D.C. Code §

38-2571.03(6).

Analysis

- A. Did PCS deny Student a FAPE by failing to provide an appropriate IEP program for the 2016-2017 school year?
- B. Did PCS deny Student a FAPE by providing an inappropriate placement for the 2016-2017 school year?
- C. Did PCS deny Student a FAPE by curtailing the IEP development process for Student after August 30, 2016?

Student began attending PCS in the 2011-2012 school year. Student was determined eligible for special education and was provided IEPs by PCS beginning in the spring of 2013. Student's educational placement in PCS' February 2, 2016 IEP, as amended on May 31, 2016 (the February 2, 2016 IEP), was primarily the general education setting, with provision for Student to receive 12.5 hours per week of Specialized Instruction, including 5 hours per week outside general education, as well as Occupational Therapy and Behavioral Support related services. PCS proposed to continue these IEP services and educational placement for Student for the 2016-2017 school year. After the February 2, 2016 IEP team meeting, Mother decided that Student needed full-time special education. She unilaterally enrolled Student in Nonpublic School for the 2016-2017 school year. In her due process complaint, Mother alleges that PCS' proposed IEP and educational placement for the 2016-2017 school year were inappropriate and denied Student a FAPE. Mother seeks reimbursement from PCS for Student's tuition and related costs at Nonpublic School. PCS maintains that the February 2, 2016 IEP was appropriate for Student for the 2016-2017 school year.

Under the IDEA, parents who unilaterally decide to place their disabled child in a private school, without obtaining the consent of local school officials, "do so at their own

financial risk.” *Florence County Sch. Dist. Four v. Carter*, 510 U.S. 7, 15, 114 S.Ct. 361, 126 L.Ed.2d 284 (1993) (quoting *Sch. Comm. of the Town of Burlington v. Dep’t of Educ.*, 471 U.S. 359, 374, 105 S.Ct. 1996, 85 L.Ed.2d 385 (1985)). “As interpreted by the Supreme Court, IDEA requires school districts to reimburse parents for their private-school expenses if (1) school officials failed to offer the child a free appropriate public education in a public or private school; (2) the private-school placement chosen by the parents was otherwise “proper under the Act”; and (3) the equities weigh in favor of reimbursement—that is, the parents did not otherwise act “unreasonabl[y].” *Leggett, supra*, at 66-67, (citing *Carter, supra*, 510 U.S. at 15–16, 114 S.Ct. 361; 20 U.S.C. § 1412(10)(C)(iii)(III)).

The indispensable condition for private school reimbursement from the *Z. B.* and *Leggett* decisions is that the public school officials failed to offer the child a FAPE. That leads to the principle query in this case: Was the February 2, 2016 PCS IEP appropriate for Student for the 2016-2017 school year? 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 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.

*Moradnejad* at 274-75. Before reaching the substantive issue in this case – whether

PCS' proposed IEP was appropriate – I consider a procedural claim brought by the parent, whether PCS unlawfully “curtailed” the IEP development process for Student after August 30, 2016. The parent has the burden of persuasion on this procedural issue.

The genesis of Petitioner’s claim that PCS curtailed the IEP development process appears to be a colloquy between counsel at the August 30, 2016 MDT team meeting. By that time, Student had begun attending Nonpublic School. Petitioner’s Counsel inquired about what would happen if down the road, there were new data on Student from Nonpublic School. PCS’ Counsel responded that once Student was “un-enrolled” from the charter school, PCS would no longer have access to Student or jurisdiction over Student’s IEP. However the representative from the D.C. Office of the State Superintendent of Education (OSSE) stated that this was a question for OSSE’s general counsel or her supervisor.

There is persuasive case law in this jurisdiction that a parent’s enrollment of a child with a disability in a private school does not relieve District of Columbia Public Schools (DCPS) of its duty to offer FAPE to the child. *See, e.g., District of Columbia v. Wolfire*, Civil Action No. 12-1527, 2013 WL 4830664 (D.D.C. Sept. 6, 2013), *report and recommendation adopted*, 10 F. Supp. 3d 89 (D.D.C. 2014). This holding is grounded in the obligation of local education agencies in the District to provide FAPE to every child with a disability who is a resident of the District of Columbia. *See* 5E DCMR §§ 3002.1(a). Counsel have not cited, nor have I found, any court decision that imposes the same obligation on D.C. public charter schools, as imposed on DCPS, to offer FAPE to children with disabilities in private schools. It is unnecessary for me to decide that issue in this case, because the evidence does not establish that PCS curtailed the IEP

development process for Student. Mother testified that she withdrew Student from PCS after the August 30, 2016 MDT meeting to make “coveted” space in the charter school available to other students and that she did not request PCS to convene an IEP meeting for Student after the August 30, 2016 meeting. Mother also acknowledged that she was not required by PCS to withdraw Student. I conclude, therefore, that Mother did not meet her burden of persuasion that PCS curtailed the IEP development process for Student after August 30, 2016, resulting in a denial of FAPE.

Turning to the second, substantive, prong of the *Rowley* inquiry, 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 *Rowley, supra*, for what constitutes an appropriate IEP. As explained by the D.C. Circuit in *Z. B. v. District of Columbia*, 888 F.3d 515 (D.C. Cir. 2018),

The Supreme Court . . . , in *Andrew F. . . .*, 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,” *Andrew 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, *Andrew 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.” *Andrew 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.” *Andrew 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.

...

Ordinarily, states must ensure “removal of children with disabilities from the regular educational environment occurs only when the nature or severity of the disability of a child is such that education in regular classes with the use of supplementary aids and services cannot be achieved satisfactorily.” 20 U.S.C. § 1412(a)(5)(A). [In *Andrew F.*, the Supreme Court] affirmed that “the IDEA requires that children with disabilities receive education in the regular classroom ‘whenever possible.’ “ *Andrew F.*, 137 S.Ct. at 999 (quoting *Rowley*, 458 U.S. at 202, 102 S.Ct. 3034). *Z. B.*, 888 F.3d at 527–28.

...

Applying the IDEA as interpreted in *Andrew 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 Andrew 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 Andrew 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.)

If a local education agency fails to provide a student with an appropriate education and such education is offered at a private school, the agency may be liable to reimburse the parent for the cost of the child’s private education. *Z. B.*, *supra*, 888 F.3d

at 519 (citing 20 U.S.C. § 1412(a)(10)(C)(ii); *Leggett v. District of Columbia*, 793 F.3d 59 (D.C. Cir. 2015.)) PCS must shoulder the burden of persuasion that the IEP and educational placement it offered Student for the 2016-2017 school year were appropriate. *See* D.C. Code § 38-2571.03(6).

Applying the D.C. Circuit's guidance from *Z. B.*, the substantive query in the present case is whether, in developing Student's IEP for the 2016-2017 school year, taking account of what PCS knew or reasonably should have known at that time of Student's present levels of achievement, disability and potential for growth, was the IEP PCS offered reasonably calculated to enable Student to make progress appropriate in light of Student's circumstances. *See Z. B.*, 888 F.3d at 519, 522, 524.

At the time of the summer 2016 MDT team meetings at PCS, Student's disability classification was Multiple Disabilities (MD), based on the diagnoses of Specific Learning Disability and Attention Deficit-Hyperactivity Disorder (ADHD). Student's cognitive functioning indices, measured in February 2015, varied from the Borderline to the High Average range, with particular weakness in Processing Speed. Expert Witnesses called by Petitioner at the due process hearing opined generally that "slow and steady" progress was appropriate for Student in the 2016-2017 school year given Student's disabilities, although Academic Dean opined that Student would be expected to make faster progress in mathematics, a relative strength.

For the 2016-2017 school year, PCS proposed to continue the services and educational placement for Student provided in the February 2, 2016 IEP. As stated above, Student's educational placement in this IEP was primarily the general education setting, with provision for Student to receive 7.5 hours per week of Specialized Instruction in the regular classroom and 5 hours per week outside general education.

The 12.5 hours of Specialized Instruction in Student's February 2, 2016 IEP was an increase over the total 8 hours per week of Specialized Instruction provided in the February 24, 2015 IEP.

In support of its assertion that the February 2, 2016 IEP was reasonably calculated to enable Student to make appropriate progress in the 2016-2017 school year, PCS points to Student's progress over the preceding 2015-2016 school year. The MAP assessment is the Measures of Academic Progress tool, put out by the Northwest Educational Association (NWEA). It is a standards-based computer driven test used by both PCS and Nonpublic School to monitor students' progress. At PCS, Student's MAP score for reading rose from 193 (86th percentile of same grade peers) in spring 2015 to 201 (80th percentile) in spring 2016. Student's MAP score for math rose from 198 (54th percentile) in spring 2015 to 209 (91st percentile) in spring 2016. The spring 2016 MAP scores suggested that when Student ended the 2015-2016 school year at PCS, Student was outperforming 79 percent of same grade peers in reading and 90 percent of peers in math. Over the same period, Student's DIBELS Oral Reading Fluency score rose from 48 to 74 and Student's Text Reading Comprehension (TRC) score rose from Level J to Level N. Both assessments indicated that Student had met or surpassed grade-level expectations for reading.<sup>4</sup>

On brief, Petitioner's counsel questioned whether these instruments were valid measures of progress. However, PCS' expert, Director of Student Support, testified to

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<sup>4</sup> The Achievement Network (ANET) interval assessments are aligned to District of Columbia common core standards. On the ANET interval assessments administered to Student in the 2015-2016 school year, Student's score increased from 87% correct after the first quarter to 94% correct at the end of the third quarter. Both scores surpassed the district wide average (approximately 50% correct) for same grade D.C. students. According to Director of Student Support, the ANET assessment is not used for progress monitoring.

the assessments' validity and Petitioner offered no contrary evidence. Moreover, Petitioner's expert, Educational Consultant, used the same assessments in her analysis of Student's progress.

In addition to the indicators of Student's progress from the standardized assessments, Student's providers from PCS attested to Student's progress in the 2015-2016 school year. Director of Student Support testified that by the end of the 2015-2016 school year, Student was "thriving" at PCS and that Student's improved scores on standardized testing corresponded to the observations of Student's progress made by the PCS classroom teaching team. Special Education Teacher 1 testified that Student made a lot of progress over the school year in self-advocacy, reading and writing. Occupational Therapist testified to improvement in Student's handwriting and in Student's ability to write longer sentences and paragraphs, including writing multiple paragraph stories. School Counselor testified to Student's mastering IEP self-advocacy goals in the 2015-2016 school year and to a boost in Student's self-confidence.

Petitioner's principle contrary arguments, asserted on brief, that Student had not made appropriate progress under the PCS IEPs, are that Student's Woodcock Johnson achievement scores showed significant drops by the end of Student's time at PCS and that at the end of the 2015-2016 school year, Student had "mastered" only 17% of current IEP goals. Counsel's reliance on the Woodcock Johnson achievement tests is unwarranted. Petitioner's expert, Academic Dean, testified that even when Student was purportedly benefitting from the full-time special education program at Nonpublic School, some of Student's scores on the Woodcock Johnson tests declined. This expert opined that the Woodcock Johnson achievement tests "really shouldn't be used for progress monitoring," and agreed that this was also the position of the tests' publishers.

Petitioner also argues on brief that Student's progress at PCS was not adequate because, by the end of the 2015-2016 school year, Student had "mastered" only 2 of 17 annual goals in the February 2, 2016 IEP. This argument is unpersuasive. 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. However the Act does not promise any particular educational outcome. "No law could do that—for any child." *Id.* at 998. As Parent's expert, Educational Consultant, testified, an IEP is a year-long program and a student would not be expected to master every goal in 4 months. She asserted that she would hope that Student would have made progress toward multiple goals from February to June 2016. The evidence establishes that Student did make such gains. Of the 17 annual goals in the February 2, 2016 IEP, by June 17, 2017 – less than one-half school year later – Student had reportedly mastered 2 goals and was progressing on the rest. I find that this was appropriate progress in light of Student's circumstances. *See Z. B., supra*, 888 F.3d at 519.

Petitioner also argues on brief that aside from educational progress, the hearing officer should consider the evidence that Student's functional skills were not adequately addressed in the February 2, 2016 IEP, including "managing [Student's] frustration and self-esteem, not feeling stupid, having positive peer relationships and working on increased attention throughout the day." Petitioner's Closing Argument, p. 22. In her hearing testimony, Mother described her perception that in the 2015-2016 school year, Student's self-worth plummeted, Student's frustration seemed to really increase and, at home, around things like homework, reading and writing, there was explosions. However, at an MDT meeting on December 1, 2015, Mother told the team that Student loved coming to school at PCS, though Student struggled with homework.

When a child's emotional issues have a significant effect on the child's ability to learn, they should be addressed in the child's IEP. *See, e.g., G.H. v. Great Valley School Dist.*, 2013 WL 2156011, 6 (E.D.Pa.) (E.D.Pa. May 20, 2013) ("Courts have been clear that emotional issues which occur at home are still relevant to IDEA analysis so long as those problems had a significant effect on her ability to learn. Put another way, the fact that outbursts occurred at home does not in and of itself deprive those outbursts of relevance; the question is whether the outbursts adversely affected her educational performance." *Id.* at 6 (discussing special education eligibility under the Emotional Disturbance classification) (citation and internal quotations omitted.))

The February 2, 2016 IEP provided for Student to receive 20 minutes per month of direct Behavioral Support Services and 30 minutes per month of consultation services. Petitioner's expert, Educational Consultant, who attended the December 1, 2015 MDT meeting and the February 2, 2016 IEP meeting with Mother, testified that she collaborated with the school representatives and that she did not disagree with the behavioral goals for Student. School Counselor worked with Student at PCS in both the 2014-2015 and 2015-2016 school years. She originally provided grief counseling to Student after the death of Student's father. School Counselor testified that by the end of the 2015-2016 school year, Student's negative self-talk had disappeared, Student was able to self-advocate and Student's self confidence was high. Special Education Teacher 1, who taught Student in the 2015-2016 school year, testified that she did not see a lot of frustration or negative behavior and that by the end of the school year, Student had gained so much confidence and self-esteem that she was confident of Student's continued success at PCS. School Counselor testified that at year's end, she was interested in "retiring" Student from counseling services. Notwithstanding, when the

February 2, 2016 IEP was amended on May 31, 2016, Student's Behavioral Support Services were left in place. I conclude, therefore, that PCS has established that it appropriately addressed Student's emotional issues in the IEP proposed for the 2016-2017 school year.

In three days of hearing testimony, the respective witnesses for the charter school and for the parent presented starkly contrasting views on Student's progress in the 2015-2016 school year at PCS. Director of Student Support opined that Student was thriving at PCS by the end of the 2015-2016 school year. She testified that Student made outstanding progress the last four months of the 2015-2016 school year and was on track to master the IEP goals. This expert opined that the February 2, 2016 IEP was appropriate for Student when it was developed and continued to be appropriate for Student going into 2016-2017 school year. Student's special education teacher and the OT provider at PCS testified to Student's progress over the school year in reading and writing. By contrast, the parent's expert, Educational Consultant, opined that Student needed a full-time special education school for the 2016-2017 school year because Student had not been making progress at PCS. However, she conceded on cross-examination that Student had been making progress on the February 2, 2016 IEP goals, on which she and Mother collaborated. For her part, Academic Dean opined, that for the 2016-2017 school year, Student needed Specialized Instruction in a small group setting, as provided at Nonpublic School, for the entire school day.

I found all of these witnesses to be credible. However, nearly all of the data from standardized tests (except for the Woodcock Johnson achievement scores, which are not to be used for progress monitoring), support PCS' contention that Student did make significant academic progress at PCS by the end of the 2015-2016 school year. School

Counselor also testified, credibly, to Student's progress in self-advocacy and increased self-confidence. Mother praised the PCS school staff for loving and caring for Student tremendously and it was clear that the PCS witnesses were extremely knowledgeable about Student's progress under the February 2, 2016 IEP.

As discussed above, the D.C. Circuit explained in the *Z. B.* decision that the IDEA stops short of requiring education agencies to provide the best possible education, but the Act requires that an IEP be reasonably calculated to enable Student to make progress appropriate in light of Student's circumstances. According to Petitioner's expert, Academic Dean, "slow and steady" progress was appropriate for Student for the 2016-2017 school year. Crediting the standardized test results and considering the testimony of PCS staff, the hearing evidence establishes that Student's progress at PCS under the February 2, 2016 IEP surpassed the slow and steady standard endorsed by Academic Dean. I find that PCS has met its burden of persuasion that its proposal to continue the February 2, 2016 IEP program and educational placement for Student into the 2016-2017 school year was reasonably calculated to enable Student to make progress appropriate in light of Student's circumstances. I conclude that Student was not denied a FAPE by PCS' failing to provide an appropriate IEP program or educational placement for the 2016-2017 school year. The parent is therefore not entitled to reimbursement for her expenses for Student to attend Nonpublic School. *See Leggett, supra*, 793 F.3d at 66-67.

**ORDER**

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

ORDERED:

All relief requested by the Petitioner herein is denied.

Date: July 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  
Office of Dispute Resolution  
OSSE Division of Specialized Education