District of Columbia
Office of the State Superintendent of Education
Office of Dispute Resolution
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Parents, on behalf of Student,[1]	)	
Petitioners,	)	
	)	**Hearings: 7/9/18, 7/13/18, 7/16/18**
v.	)	**Date: July 27, 2018**
	)	**Hearing Officer: Michael Lazan**
	)	**Case No.: 2018-0123**
School A PCS and OSSE,	)	
	)	
Respondents.	)	

HEARING OFFICER DETERMINATION

I. Introduction

This is a case involving a student who is currently eligible for services as a student with a Specific Learning Disability (the "Student").

A Due Process Complaint ("Complaint") was received by School A Public Charter School ("Respondent School A PCS" or "School A PCS") and Office of the State Superintendent of Education ("OSSE" or "Respondent OSSE") pursuant to the Individuals with Disabilities Education Act ("IDEA") on May 4, 2018. Petitioners are the parents of the Student. On May 14, 2018, Respondent OSSE filed a response. On May 15, 2018, Respondent School A PCS filed a response. The resolution period expired on June 3, 2018.

II. Subject Matter Jurisdiction

This due process hearing was held, and a decision in this matter is being rendered, pursuant to the Individuals with Disabilities Improvement Act ("IDEIA"), 20 U.S.C.

[1] Personally identifiable information is attached as Appendix A and must be removed prior to public distribution.

Sect. 1400 et seq., its implementing regulations, 34 C.F.R. Sect. 300 et seq., Title 38 of the D.C. Code, Subtitle VII, Chapter 25, and the District of Columbia Municipal Regulations, Title 5-E, Chapter 30.

III. Procedural History

This case follows a previous case (Case # 2018-0002), which Petitioners filed on the same issues. In the previous case, pleadings were filed, a prehearing order was issued, and testimony was taken. However, there was an issue with the accuracy of at least some of the testimony taken in the prior case. The parties and the Hearing Officer discussed this issue at length, and Petitioners ended up withdrawing the earlier Due Process Complaint without prejudice so that the instant case could be filed. To avoid unfairness to witnesses who had already testified, and because of the questionable quality of the unofficial transcripts in the earlier case, the Hearing Officer did not allow the admission of transcripts from the prior case.

On June 28, 2018, Respondent OSSE moved to dismiss Petitioners' claims. Petitioners submitted opposition to the motion on July 2, 2018, and Respondent School A PCS submitted opposition to the motion on July 5, 2018. Respondent OSSE filed a reply on July 6, 2018. The motion was denied by the Hearing Officer's order dated July 7, 2018.

A prehearing conference was held on June 21, 2018. Attorney A, Esq., counsel for Petitioners, appeared. Attorney B, Esq., counsel for Respondent School A PCS, appeared. Attorney C, Esq., counsel for Respondent OSSE, appeared. A prehearing conference order was issued on June 29, 2018, summarizing the rules to be applied in this hearing and identifying the issues in the case.

On July 16, 2018, Petitioners filed a motion for a continuance. This motion was to allow for the parties to present an oral argument and present a written submission on the case, and to allow the Hearing Officer time to write a decision. Respondents consented to the motion, which extended the decisional timeline to July 27, 2018.

Three hearings were held: July 9, 2018; July 13, 2018; and July 16, 2018. These were closed proceedings. Petitioners were represented by Attorney A, Esq. Respondent School A PCS was represented by Attorney B, Esq. Respondent OSSE was represented by Attorney C, Esq. Petitioners moved into evidence Exhibits 1-59. Objections were made to Exhibits 50-59 by Respondent School A PCS. These objections were overruled. Exhibits 1-59 were admitted. Respondent School A PCS moved into evidence Exhibits 1-25. There were no objections. Exhibits 1-25 were admitted. Respondent OSSE moved into evidence Exhibits 1-8. There were no objections. Exhibits 1-8 were admitted. At the close of testimony, both sides presented oral closing statements, supplemented by written statements (from Petitioners and Respondent School A PCS) on July 20, 2018.

Petitioners presented as witnesses: the Student's mother; the Student's father; Witness A, a psychologist; Witness B, an educational consultant; and Witness C, Head of the Junior High School at School B. Respondent School A PCS presented as witnesses: Witness D, the Head of School at School A PCS; Witness E, a former Director of Student Support at School A PCS; and Witness F, a former teacher at School A PCS. Respondent OSSE called: Witness G, a Special Programs Manager at OSSE.

IV. Issues

As identified in the Prehearing Conference Summary and Order and in the Due Process Complaint, the Free Appropriate Public Education ("FAPE") issues to be determined were as follows:

1. Did Respondent School A PCS fail to provide the Student with an appropriate Individualized Education Program ("IEP") in February, 2016? If so, did Respondent School A PCS act in contravention of 34 CFR 300.320 and Hendrick Hudson Bd. Of Educ. v. Rowley, 458 U.S. 176 (1982)? If so, did Respondent School A PCS deny the Student a FAPE?

Petitioners contended that the Student did not get enough specialized instruction hours, had inappropriate goals, and needed a therapeutic, full-time program.

2. Did both Respondents fail to provide the Student with an IEP and program for the 2017-2018 school year? If so, did Respondents violate 34 CFR 300.323 and deny the Student a FAPE?

Petitioners contended that Respondent School A PCS improperly refused to provide the Student with an IEP, at the direction of Respondent OSSE.

As relief, Petitioners are seeking tuition reimbursement for School B for the 2016-2017 and 2017-2018 school years.

V. Findings of Fact

1. The Student is an emotional X-year-old who has particular difficulty with written expression and anxiety. The Student also has sensory needs and issues with math, reading, attention, and social relationships, and requires a small group setting to perform best in school. The Student also requires constant reinforcement and positive feedback, including sensory breaks. The Student also needs help in organizing material and

decoding. (P-18a; P-35; Testimony of Witness A; Testimony of Witness B; Testimony of Witness C; Testimony of Witness F; Testimony of mother; Testimony of father)

2. The Student started his/her academic career with District of Columbia Public Schools ("DCPS"), but moved to Respondent School A PCS grade. The Student became eligible for special education services in or about 2012. For the 2013-2014 school year, at School A PCS, the Student was eligible for services as a student with a Specific Learning Disability and received two hours of specialized instruction per week, outside general education, in writing. (P-5)

3. The Student continued at School A PCS for the 2014-2015 school year. After Petitioners indicated concern about the Student's social and emotional issues, the Student's February, 2015, IEP added behavioral support services for thirty minutes per week. However, the specialized instruction in the IEP decreased from two hours per week to one hour per week. The IEP contained goals in written expression and emotional, social and behavioral development, and indicated that the Student experienced anxiety around school, which impacted the Student's abilities. The IEP also indicated that the student benefited from small group instruction both inside and outside general education. (P-11; P-16; Testimony of mother)

4. During the 2014-2015 school year, the Student attended School A PCS and made progress. The Student became more inclined to share concerns, asked for tools and resources, became more mature, and was able to articulate to teachers if there was trouble with work. Petitioners raised concerns about the Student's spelling abilities and anxiety in the classroom, but did not raise objections with respect to the Student's IEP at this time. (Testimony of Witness E)

5. Approximately during this time, the Student had a "significant weakness" in sentence writing. The Student could not write a sentence with three target words, struggled "tremendously" in sounding out unfamiliar words, and was unable to write out any basic sentences to describe a corresponding picture. (R-3-3)

6. For the 2015-2016 school year, the Student continued at School A PCS, where there were approximately twelve students in the classroom. There were three adults in the room, including a teacher and two assistant teachers with some experience in working with special education children. The instructors provided small group instruction, with each adult leading three "stations" of students. Per the Student's IEP, Teacher A provided the Student with pull-out instruction in reading and writing with one other student. Teacher A also pushed into the Student's class for math. The Student also received check-ins, breaks, and sensory interventions such as a "sit disc," a swing, a trampoline, and cushioned mats. Teachers taught to the "common core" standards. (Testimony of Witness E; Testimony of Witness F)

7. The Student was "withdrawn" when the 2015-2016 school year started, but became more engaged as the year went on. During the year, the Student mastered almost all of the common core standards that were the subject of instruction for math, reading, and writing. The Student's reading was considered to be "strong." Petitioners indicated a concern with the Student's performance in math, which resulted in the provision of a "math binder" with reference sheets. The Student would "sometimes" put his/her head down in class, "maybe once every week," but participated during class discussions. (Testimony of Witness F)

8. Also during the 2015-2016 school year, the Student showed anxiety, sadness, and frustration. The Student did not like going to school during much of the 2015-2016 school year. (Testimony of mother; Testimony of father; Testimony of Witness E; P-55-44, 48-49)

9. In January, 2016, the Student was evaluated. On the Wechsler Intelligence Scale for Children-V, the Student's Full Scale IQ was determined to be 104, in the average range. The Student was also tested pursuant to the Woodcock-Johnson III Tests of Achievement. The Student scored at the 41st percentile in "Broad Reading," in the average range, but scored at the 21st percentile in "Broad Math," in the low average range. The Student's "Math Facts Fluency" score was at the 6th percentile, in the low range. In "Broad Writing," the Student tested at the 13rd percentile, in the low average range, and the Student's spelling was in the 3rd percentile, in the low range. A Behavior Assessment Scale for Children-2 test was also administered to the Student. According to the teacher rating scale for this test, the Student only manifested issues with somatization in the classroom. (19-8-9, 14-15)

10. On January 5, 2016, Petitioners sent an email to the school indicating that, among other things, they were looking for a private school for the Student because "middle school is a big decision that can impact on college," and because "the Student would be able to benefit more from other educational opportunities that are more established." (Testimony of Witness D; Testimony of mother; P-18)

11. Petitioners then sought out several non-public placements for the Student, including two placements that did not offer any specialized instruction. (Testimony of mother; Testimony of father)

12. The Student's report card reflected an improved attitude in writing for the second reporting period at School A PCS, and indicated that the Student was a "fluent" reader who had progressed in reading, as reflected by the "DRA" test. The Student was considered "resilient" and a "positive presence" in class. (P-23)

13. An IEP meeting was held for the Student in February, 2016. The parties discussed the Student's math, reading, writing, and emotional issues in the classroom. There was no discussion at the meeting as to why the Student did not master IEP goals from the previous year. Petitioners did not object to the terms of the IEP and did not suggest that they planned to seek tuition reimbursement from School A PCS during this meeting. (Testimony of mother; Testimony of Witness F)

14. The February, 2016, IEP included reading goals that related mainly to the Student's responses to inferential questions. The IEP also contained writing goals that related mainly to spelling and social/emotional/behavioral goals related mainly to coping strategies, peer relationships, and "positive relationship of self." The IEP recommended one hour per week of specialized instruction outside general education, with behavior support services for thirty minutes per week and occupational therapy services for thirty minutes per month. Small group instruction was suggested for the Student, as was a location with minimal distractions, clarification/repetition of instructions, extended time, and frequent breaks. (P-22)

15. After the February, 2016, IEP, Petitioners arranged for the Student to get math tutoring. (Testimony of mother)

16. In March, 2016, the Student was accepted at School B. (P-55-63; Testimony of mother)

17. In April, 2016, an employee of School A PCS sent an email to Petitioners that provided them with reenrollment forms. Petitioners informed this employee that the Student was going to attend School B, and they did not fill out the reenrollment forms. (Testimony of mother)

18. Between April, 2016, and August 4, 2016, there was no further contact between School A PCS, OSSE, and Petitioners in regard to the Student's education for the forthcoming school year. There was also no communication between School A PCS, OSSE, and/or Petitioners about the Student being "disenrolled" from School A PCS. (Testimony of mother; Testimony of Witness D)

19. In or about June, 2016, School A PCS wrote the Student's final IEP progress report. The report indicated that the Student was progressing in all goal areas. The final School A PCS report card indicated mastery of common core subject matter areas, significant progress in math and writing, and above-grade-level reading. (P-27)

20. On August 4, 2016, Petitioners sent School A PCS a letter expressing that they did not believe the Student was offered a FAPE, informing School A PCS that they intended to place the Student at School B, and reserving the right to seek public funding for the placement. Petitioners also expressed interest in a new IEP for the 2016-2017 school year. (P-29)

21. School A PCS responded to Petitioners and indicated that they might be able to provide the Student with additional or new services but needed to contact OSSE before taking any action. (Testimony of mother)

22. OSSE told School A PCS that it could do nothing further for the Student, who was no longer enrolled. OSSE also indicated that it could not initiate a "change of

placement meeting" for the Student since the Student was not enrolled in a school district. (Testimony of Witness G; R-2)

23. On August 17, 2016, Respondent School A PCS indicated to Petitioners that it could no longer revise the Student's program because the Student was no longer enrolled at the school, referencing the instruction from Respondent OSSE. Petitioners were advised that they could enroll the Student in DCPS or try to re-enroll the Student at School A PCS through the school lottery. (P-30; Testimony of Witness G; Testimony of mother)

24. Petitioners did not enroll the Student in DCPS or re-enter the lottery for School A PCS. Since a sibling of the Student goes to School A PCS, the Student would have received a preference in the lottery and may have been able to attend the school shortly after entering the lottery. (Testimony of Witness D; Testimony of mother)

25. The Student attended School B for the 2016-2017 school year. School B is a non-public school that services students who have difficulties with reading, writing, math, and attention. There are about 350 children in the school, which provides classes in English, math, science, social studies, performing arts, and physical education, among other subjects. The Student also received individual psychotherapy at the school, a service that is not offered to all children. (Testimony of Witness C)

26. School B wrote an IEP for the Student for the 2016-2017 school year. This IEP indicated that the Student's instructional level was at the 5.0 grade level equivalent in reading and math, and at the 4.0 grade level equivalent in writing. The IEP provided goals for reading, writing, math, and social behavior. (P-34; Testimony of Witness C)

27. When the Student started at School B, the Student had school-related anxiety. The Student had poor coping skills and became overwhelmed, but these issues mostly resolved during the year. The Student's reading and writing levels increased, though the Student's math levels did not increase as much. Socially, the Student did well in some respects, but also sometimes did not want to go to the playground and "retreated" into books. (Testimony of Witness B; Testimony of Witness C)

28. The School B IEP dated May, 2017, indicated that the Student's instructional levels had increased to the 6.5 grade level equivalent in reading and the 5.5 grade level equivalent in written language. However, the Student's instructional level in math had not changed from the 5.0 grade level equivalent. (P-38)

29. In or about August, 2017, Petitioners sent a letter to School A PCS indicating that they were placing the Student in School B for the 2017-2018 school year and were reserving the right to request tuition reimbursement as a result. Petitioners also asked for an IEP from School A PCS. Thereafter, OSSE sent Petitioners an email indicating that the Student was not enrolled at School A PCS and was not eligible for a placement review at OSSE. (P-42; P-43)

30. The Student attended School B for the 2017-2018 school year. The Student had a "rocky" start, but the Student's instructional levels improved. (Testimony of Witness B; Testimony of Witness C)

VI. Conclusions of Law

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

The burden of proof in District of Columbia special education cases was changed by the local legislature through the District of Columbia Special Education Student Rights Act of 2014. That burden is expressed in statute as the following:

> Where there is a dispute about the appropriateness of the child's individual educational program or placement, or of the program or placement proposed by the public agency, the public agency shall hold the burden of persuasion on the appropriateness of the existing or proposed program or placement; provided, that the party requesting the due process hearing shall retain the burden of production and shall establish a prima facie case before the burden of persuasion falls on the public agency. The burden of persuasion shall be met by a preponderance of the evidence.

See D.C. Code § 38-2571.03(6)(A)(i)

Both issues in this case involve a challenge to the Student's proposed IEP or placement. Accordingly, the burden of persuasion is with Respondent. The record is clear that Petitioners have presented some credible testimony and evidence to support their claims, meeting the requirement to establish a *prima facie* case. Respondent does not claim otherwise.

1. Did Respondent School A PCS fail to provide the Student with an appropriate IEP in February, 2016? If so, did Respondent School A PCS act in contravention of 34 CFR 300.320 and Hendrick Hudson Bd. Of Educ. v. Rowley, 458 U.S. 176 (1982)? If so, did Respondent School A PCS deny the Student a FAPE?

A FAPE is offered to a student when (a) the school district complies with the procedural requirements set forth in the IDEA, and (b) the IEP developed through the IDEA's procedures is reasonably calculated to enable the student to receive educational benefits. Hendrick Hudson Bd. Of Educ. v. Rowley, 458 U.S. 176 (1982). The IEP should be both comprehensive and specific, and targeted to the Student's "unique needs." McKenzie v. Smith, 771 F.2d 1527, 1533, D.C. Cir. 1985); N.S. ex rel. Stein v. District of Columbia, 709 F.Supp.2d 57, 60 (D.D.C. 2010); 34 CFR Sect. 300.320(a)(2)(B)(the

IEP must contains goals that meet each of the child's educational needs that result from the child's disability); 34 CFR Sect. 300.324(a)(1)(iv)(the IEP must address the academic, developmental, and functional needs of the child).

While school districts are required to comply with all IDEA procedures, not all procedural errors render an IEP legally inadequate under the IDEA. Pursuant to the IDEA, when procedural violations are alleged, an administrative officer may find that a child did not receive a FAPE only if the procedural inadequacies (a) impeded the child's right to a FAPE, (b) significantly impeded the parents' opportunity to participate in the decision-making process regarding the provision of a FAPE to the child, or (c) caused a deprivation of educational benefits. 20 U.S.C. Sect. 1415(f)(1)(E)(ii); 34 C.F.R. Sect. 300.513(a)(2).

In 2017, the Supreme Court addressed a split amongst the circuit courts regarding what the IDEA means when it requires school districts to provide an "appropriate" level of education to children with disabilities. Endrew F. ex rel. Joseph F. v. Douglas County School Dist. RE-I, 137 S. Ct. 988 (2017). In Endrew F., the Court held that an IEP must be "reasonably calculated to enable a child to make progress appropriate in light of the child's circumstances." Id. at 1001. The Court made clear that the standard is "markedly more demanding than the 'merely more than de minimis' test" applied by many courts. Id. at 1000. The Court found that the school district denied Endrew a FAPE, indicating that a child "should have the chance to meet challenging objectives." Id. at 1000. It added that, for students in placements that are not based in "general education," the IEP "must be appropriately ambitious in light of [the student's] circumstances…just as advancement from grade to grade is appropriately ambitious for most [students] in the

regular classroom." Id. at 1000. The Court stated: "(a) substantive standard not focused on student progress would do little to remedy the pervasive and tragic academic stagnation that prompted Congress to act." Id. At 999.

Petitioners and Respondent School A PCS presented testimony and evidence suggesting two different students. Respondent School A PCS presented witnesses who testified that the Student was making progress in all three main subject matter areas: reading, math, and writing. The Student's end-of-year report card for the 2015-2016 school year, which was issued before the school knew of the claim for tuition reimbursement, indicated that the Student was considered to have mastered all the areas of the common core curriculum for the appropriate grade in every subject. The Student's DRA and MAP test scores were consistent with this, putting put the Student at or near the norm in math and reading.

However, the School B IEP indicated otherwise. The School B IEP found that the Student was two years below grade level in writing, with needs in spelling, keyboarding, grammar, mechanics, vocabulary usage, paragraph structure, multi-paragraph structure, essay development, sequencing, maintaining relevance to topic, editing, and revision. The School B IEP also found that the Student was one year below grade level in math, with issues in, among other things, division, decimals, fractions, percent calculation, and application of calculation to problem solving.

Significantly, Witness E, a witness for Respondent School A PCS, provided some support for Petitioners. This witness agreed in part with the School B IEP, indicating at one point that the Student's instructional levels in writing and math as reported by School B "could be correct." The Woodcock-Johnson Tests of Achievement-III results from

January, 2016, were also consistent with the School B IEP. According to these tests, the Student was at the 21st percentile in broad math (with "math facts fluency" only at the 6th percentile). The Student's writing scores were lower, with broad written language at the 13th percentile, and spelling at the 3rd percentile, in the low range.

Despite the Student's relatively low levels in math facts fluency, the Student's IEP from Respondent School A PCS did not provide for any assistance in math, which resulted in Petitioners having to get a math tutor for their child after school. Moreover, and of particular importance, the Student's IEP from Respondent School A PCS only provided a minimal amount of assistance in writing. In fact, the Student's specialized instruction in writing was reduced in the February, 2016, IEP. This is made clear by comparing the "areas of concern" in the February, 2015, IEP with the "areas of concern" in the February, 2016, IEP. The February, 2015, IEP provided for one hour per week of specialized instruction, and mentioned writing only as an "area of concern." That IEP contained writing goals but not reading goals. The February, 2016, IEP also provided one hour per week of specialized instruction. However, this IEP referred to two "areas of concern," in reading and writing. The February, 2016, IEP therefore contained reading goals and writing goals, all of which had to be addressed in a single session with Teacher A. It can therefore be fairly approximated that the amount of specialized instruction that the Student was entitled to in writing was reduced to approximately thirty minutes per week.

There is nothing in the record to suggest that there should have been a reduction of writing services in the February, 2016, IEP. To the contrary, the Student's low writing scores on the Woodcock-Johnson Tests of Achievement-III in January, 2016, and the

Student's hard-to-understand work samples suggest that the Student's issues had not been resolved as of the date of the IEP.[2]

Accordingly, Respondent School A PCS denied the Student educational benefit, and therefore a FAPE, through its IEP dated February, 2016.[3]

2. Did both Respondents fail to provide the Student with an IEP and program for the 2017-2018 school year? If so, did Respondents violate 34 CFR 300.323 and deny the Student a FAPE?

There is no dispute that, during the 2017-2018 school year, the Student was eligible for services as a student with a disability. Accordingly, even though the Student was in a private school, and even though Petitioner had not notified a Local Education Agency ("LEA") about the need for an IEP, the Student's LEA was still responsible for identifying the Student and offering the Student a FAPE. District of Columbia v. Abramson, 493 F.Supp.2d 80, 81–82, 85–86 (D.D.C.2007) (LEA required to continue evaluation of child even after the parents enrolled the child in an out-of-state private school); District of Columbia v. West, 699 F.Supp.2d 273, 280 (D.D.C.2010) (per attorney's fees decision, district's failure to convene a multi-disciplinary team meeting even though the child was not enrolled in a public school at the time not frivolous).[4]

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[2] Only nine months earlier, a document entitled "Analysis of Existing Data" indicated that the Student had a "significant weakness" in sentence writing. The Student could not write a sentence with three target words and was unable to write out any basic sentences to describe a corresponding picture.

[3] Petitioners also argued that School A PCS denied the Student a FAPE because the Student had not mastered IEP goals during the past few years. However, this assertion, while true, does not establish that the current IEP goals are inappropriate. The current goals are different from the goals in the February, 2015, IEP. Moreover, Petitioners provided no authority for the proposition that goals must be considered inadequate if the Student did not master goals in prior IEPs. Sean C. through Helen C. v. Oxford Area Sch. Dist., CV 16-5286, 2017 WL 3485880 (E.D. Pa. Aug. 14, 2017) (FAPE found though Student did not master all goals).

[4] The "Child Find" provisions of the IDEA, which require each state to have affirmative policies and procedures in effect to ensure that "[a]l1 children with disabilities residing in the State...who are in need of special education and related services, are identified, located, and evaluated." 20 U.S.C. Sect. 1412(a) (3)

The first question here is: did the Student even have an LEA for the 2017-2018 school year? Petitioners suggested that School A PCS was the Student's LEA, since School A PCS was the last LEA to provide services to the Student. Respondents suggested that there was no LEA, though they indicated that DCPS would have been the Student's LEA if the Student had enrolled in DCPS.

The Student should be deemed to have had an LEA for the 2017-2018 school year. A student does not have to be enrolled for an LEA to be responsible for *offering* a student a FAPE. As explained by Judge Collen Kollar-Kottelly:

> (O)nce a parentally placed private school child is identified as a student with disabilities under the IDEA, the local educational agency will offer the child a FAPE, i.e., an IEP, at which point the parents either (1) "accept the offer of FAPE and enroll the child in a public school," at which point the local educational agency "is obligated to make FAPE available to the child"; or (2) the parents "make clear [their] intent to keep the child enrolled in the private ... school," and the local educational agency "is not required to make FAPE available to the child" (citation omitted). By the Department of Education's own interpretation of the governing regulations, the receipt of services pursuant to an IEP is predicated on a child enrolling in a public school, but an offer of an IEP is not.

District of Columbia v. Vinyard, et al., 971 F. Supp. 2d 77, 86-87 (D.D.C. 2013).

The second question is, should the Student's LEA be deemed to be School A PCS or DCPS? Here, enrollment does come into play. 5-E DCMR 3019.3(g) indicates that a charter school's responsibility for a student ends when the student is no longer enrolled at the school. This section states:

> Pursuant to the IDEA (20 U.S.C. § 1415(a)), an LEA Charter shall establish and implement policies and

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(A); 34 C.F.R. Sect. 300.111(a); Reid v. District of Columbia, 401 F.3d 516, 518-19 (D.C. Cir. 2005); Hawkins v. District of Columbia, 539 F. Supp. 2d 108 (D.D.C. 2008).

> procedures to ensure that children with disabilities and their parents are guaranteed procedural safeguards with respect to the provision of a free appropriate public education (FAPE). An LEA Charter is responsible for responding to any due process complaint made in respect of a child *enrolled* in the LEA Charter, including any child who attends a nonpublic school. The Student Hearing Office, located within the OSSE, will continue to adjudicate due process complaints.
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> 5-E DCMR 3019.3(g)(emphasis added).

It is undisputed that the Student is no longer enrolled at School A PCS. Accordingly, upon the Student's disenrollment from the charter school, the "default" LEA, i.e. DCPS, should be deemed to be responsible for offering the Student a FAPE, even if the Student is not enrolled there.

Petitioners suggested that 5-E DCMR 3019.9 supports their position, but this section requires LEA Charters to retain responsibility for a student only when the student's placement changes to a nonpublic school due to a Hearing Officer Determination, Settlement Agreement, or a placement decision by the LEA Charter's IEP team. Those circumstances are not present in this fact pattern. There was no Hearing Officer Determination, Settlement Agreement, or placement decision by an IEP team that resulted in the Student's placement at School B.

Petitioners also pointed to a recent decision by Hearing Officer Keith Seat in support of their position. Matter of Student, Case #2017-0027 (2017). However, the Seat decision turned on the fact that the student at issue never received a FAPE offer because of the actions of the charter school. Here, Respondents did not "lead the parents on" at all. Certainly for the 2017-2018 school year, Respondents directed Petitioners to DCPS, but Petitioners did not contact DCPS during the entirety of the 2017-2018 school year.

It is noted that OSSE, as the State Educational Agency ("SEA"), had no responsibility to deliver a FAPE for the Student for the 2017-2018 school year. While there is caselaw indicating that a SEA can be responsible for a Student's FAPE, where the LEA is not available to provide a FAPE or the Student cannot obtain relief without the participation of the SEA, neither situation has been established here. Rempson v. D.C., 802 F.Supp.2d 153 (D.D.C. 2011)("[t]he SEA may only be held responsible for developing and implementing a FAPE…if an LEA previously notified the SEA that it was unwilling or unable to provide a FAPE to a child, and the SEA agreed to assume responsibility, or if a hearing officer directed the SEA to provide the child with an FAPE."); Idea Pub. Charter Sch. v. Belton, No. CIV.A. 05-467 (RMC), 2006 WL 667072, at *5 (D.D.C. Mar. 15, 2006) (the Court is therefore convinced that, under these circumstances, complete relief can be afforded to the parties without requiring the School to join the District as a defendant, and that the District's absence will neither impair its ability to protect its interests nor leave the remaining parties subject to inconsistent judgments).

Accordingly, claims against School A PCS and OSSE for the 2017-2018 school year must be dismissed.

RELIEF: 2016-2017

Parents who unilaterally place their child at a private school without the consent of school officials do so at their own financial risk. Florence Cnty. Sch. Dist. 4 v. Carter, 510 U.S. 7, 15 (1993). Parents in such situations may be reimbursed only if "the court or hearing officer finds that the agency had not made FAPE available to the child in a timely manner prior to that enrollment and that the private placement is appropriate." 34 C.F.R.

Sect. 300.148(c) (2012); see also Florence Cnty., 510 U.S. at 15 (parent may only receive tuition reimbursement "if a federal court concludes both that the public placement violated IDEA and that the private school placement was proper under the Act"); Holland v. District of Columbia, 71 F.3d 417, 420 n. 3 (D.C.Cir.1995) (noting that the circuit has ordered reimbursement "where the public agency violated [the IDEA] and the parents made an appropriate placement").

School B is designed for children like the Student, who has an average IQ but experiences difficulties in reading, writing, and math. To address these deficits, School B provided the Student with a detailed, organized plan for instruction in all three of these academic areas, which included small class sizes and instruction by a special education teacher in the main academic areas. Three adults were assigned to the Student's classes to make the teacher-student ratio even lower, and all instructors in the class were trained in special education techniques. Additionally, the Student's emotional issues in school were addressed through weekly psychotherapy, which is a particularly appropriate service here since the Student's father testified that the Student had expressed, at least once, suicidal ideation. It is notable that School B's approaches to instruction resulted in significant progress in the Student's instructional levels in writing. In particular, Witness B said that the Student no longer shuts down in writing and in fact has learned how to write a paragraph.

School B is not perfect for the Student. The Student has had anxious moments at the school and, at least in the 2016-2017 school year, did not make much progress in math. However, the record indicates that this school is, on the whole, "proper" under the Act. It is noted that parents need not show that their placement provides every possible

educational service that might be necessary to maximize the student's potential. Frank G. v. Bd. of Ed., 459 F.3d 356, 364-365 (2d Cir. 2006).

It is further noted that Respondent School A PCS's witnesses did not indicate that School B was inappropriate for the Student. On the contrary, School A PCS was at least exploring the possibility of conducting a meeting about a "change of placement" for the Student from OSSE to School B.

The IDEA allows that tuition reimbursement may be reduced or denied when parents fail to raise the appropriateness of an IEP in a timely manner, fail to make their child available for evaluation by the district, or upon a finding of unreasonableness with respect to the actions taken by the parents. 20 U.S.C. Sect. 1412(a)(10)(C)(iii). With respect to parents' obligation to raise the appropriateness of an IEP in a timely manner, the IDEA provides that tuition reimbursement may be denied or reduced if parents neither (a) inform the CSE of their disagreement with its proposed placement and their intent to place their child in a private school at public expense at the most recent CSE meeting prior to their removal of the child from public school, nor (b) provide the school district with written notice stating their concerns and their intent to remove the child within ten business days before such removal. 34 CFR Sect. 148(d)(i), (ii). Under 20 U.S.C. Sect. 1412(a)(10)(C)(iii), a denial or reduction in reimbursement is discretionary. IDEA's limitation on reimbursement was "created to give the school system an opportunity, before the child is removed, to assemble a team, evaluate the child, devise an appropriate plan, and determine whether a FAPE can be provided by the public schools." M.G. v. Dist. of Columbia, 246 F. Supp. 3d 1, 13 (D.D.C. 2017).

Petitioners signed an enrollment contract with School B in or about March, 2016. The act of signing the enrollment contract should be considered to be Student's "removal" from School A PCS, triggering a duty to provide School A PCS with notice of the intent to seek reimbursement within ten days. M.C.I. on behalf of M.I. v. N. Hunterdon-Voorhees Reg'l High Sch. Bd. of Educ., CV 17-1887, 2018 WL 902265, at *5 (D.N.J. Feb. 15, 2018) (Signing enrollment contract constitutes removal).

Petitioners sent School A PCS notice of their request for funding for the Student's placement at School B on or about August 7, 2016, just before school was to start for the 2016-2017 school year. As Respondent School A PCS pointed out in closing, this lack of notice was meaningful. After receiving the late notice, Respondent School A PCS sincerely explored the possibility of presenting Petitioners with additional options, but were precluded from doing so. Mindful of caselaw indicating that parents should give a school district "a meaningful opportunity to minimize its expenses by developing its own IEP that would provide the child with a FAPE within the School District" (W.M. v. Lakeland Cent. Sch. Dist., 783 F.Supp.2d 497, 504 (S.D.N.Y. 2011)), this Hearing Officer will therefore exercise discretion and reduce Petitioner's tuition reimbursement award by fifty percent. It is noted that Petitioners provided no excuse for their failure to provide Respondent School A PCS with earlier notice. Parenthetically, any further reduction in the award would be inappropriate, since School A PCS failed to advise Petitioners that their child was disenrolled when the 2015-2016 school year ended.

VII. Order

As a result of the foregoing, the following is hereby ordered:

1. Respondent School A PCS shall reimburse Petitioners for fifty percent of tuition and related expenses for School B for the 2016-2017 school year;

2. Petitioners' other requests for relief are denied.

Dated: July 27, 2018

Michael Lazan
Impartial Hearing Officer

cc: Office of Dispute Resolution
Petitioners' Representative: Attorney A, Esq.
Respondent School A PCS' Representative: Attorney B, Esq.
OSSE Representative: Attorney C, Esq.
OSSE Division of Specialized Education
Contact.resolution@dc.gov

XIII. Notice of Appeal Rights

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 USC §1415(i).

Date: July 27, 2018

Michael Lazan
Impartial Hearing Officer