

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

OSSE
Office of Dispute Resolution
June 30, 2019

PARENT,
on behalf of STUDENT,¹

Date Issued: June 30, 2019

Petitioner,

Hearing Officer: Peter B. Vaden

v.

Case No: 2019-0115

PUBLIC CHARTER SCHOOL,

Hearing Dates: June 27 and 28, 2019

Respondent.

Office of Dispute Resolution, Room 423
Washington, D.C.

HEARING OFFICER DETERMINATION

INTRODUCTION AND PROCEDURAL HISTORY

This matter came to be heard upon the Administrative Due Process Complaint Notice filed by the 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 alleges that Respondent Public Charter School (PCS) denied Student a free appropriate public education (FAPE) by developing an inappropriate Individualized Education Program (IEP) on March 27, 2019 and by failing to conduct an updated functional behavioral assessment of Student.

¹ Personal identification information is provided in Appendix A.

Petitioner's Due Process Complaint, filed on April 30, 2019², named PCS as Respondent. The proceedings were set on the non-expedited timeline, normally requiring a final decision within 75 calendar days. The undersigned hearing officer was appointed on May 1, 2019. PCS' response to the due process complaint was timely filed on May 10, 2019. On May 13, 2019, I convened a telephone prehearing conference with counsel to discuss the issues to be determined, the hearing date and other matters, and issued a Prehearing Order. On May 16, 2019, the parties met for a resolution session and were unable to resolve the issues in dispute. My final decision in this matter is due by July 14, 2019.

Petitioner filed her prehearing disclosures on June 21, 2019, attaching proposed Exhibits P-1 through P-49. At the due process hearing, Petitioner offered supplemental Exhibit P-50. Respondent PCS filed its prehearing disclosures on June 20, 2019, attaching proposed Exhibits R-1 through R-39. No written objections to the respective disclosures were filed.

The due process hearing was convened before the undersigned impartial hearing officer on June 27 and 28, 2019 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 LEA REPRESENTATIVE and by PCS' COUNSEL.

² All filing dates for party pleadings refer to the date the pleading was received, during regular business hours, by the Office of Dispute Resolution.

Counsel for the respective parties made an opening statements. Petitioner testified and called as additional witnesses INDEPENDENT PSYCHOLOGIST, who was qualified as an expert in clinical psychology and EDUCATIONAL ADVOCATE, who was qualified as an expert in IEP development and special education programming. PCS called as witnesses SCHOOL PSYCHOLOGIST, who was qualified as an expert in psychological evaluations and diagnoses, THERAPIST, COORDINATOR and LEA Representative, who was qualified as an expert in development and implementation of IEPs. Petitioner's Exhibits P-1 through P-50 and PCS' Exhibits R-1 through R-39 were admitted into evidence without objection. After the presentation of the evidence, counsel for the respective parties made oral closing arguments. There was no request to file post-hearing briefs.

JURISDICTION

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

ISSUE AND RELIEF SOUGHT

The issues for determination, as certified in the May 13, 2019 Prehearing Order, are:

Whether PCS failed to develop an appropriate Individualized Education Program (IEP) for Student at the IEP meeting on or about March 27, 2019, when the team amended the September 11, 2018 IEP, in that the amended IEP failed to provide specialized instruction in an appropriate full time outside of general education setting, failed to place Student in an appropriate placement, and/or failed to appropriately accommodate Student's needs with an appropriate Functional Behavioral Assessment (FBA) and Behavior Intervention Plan (BIP);

Whether PCS failed to timely and comprehensively evaluate Student in each area

of suspected disability during the 2018-2019 school year, by the failure to complete an updated FBA and revise Student's BIP to address Student's ongoing disruptive behaviors, elopement from class, and tardiness to school.

For relief, Petitioner requests that the hearing officer order as follows:

- a. PCS will conduct a Functional Behavior Assessment level II, and any other assessments reasonably recommended by the assessor;
- b. PCS will convene a Multidisciplinary Team (MDT) meeting to: review those assessments, review and revise the IEP, determine any compensatory education that may be due, and determine an appropriate placement, with placement to be made within 10 days of completion of the assessments;
- c. PCS will develop an appropriate IEP to include appropriate goals, baselines and specialized instruction in a full time outside of general education setting, or be ordered to convene a meeting to do so;
- d. PCS will craft an appropriate IEP within 28 days of the hearing officer's decision in this matter;
- e. PCS will provide all requested education records to the parent;
- f. PCS will fund, at market rates, an amount of compensatory education specified by the Hearing Officer to be performed by a provider of the parent's choosing; or, in the event that the Hearing Officer finds that more information is needed to craft a compensatory education plan, the Hearing Officer will order additional information be provided at PCS's expense and
- g. If the Hearing Officer orders additional information to be provided at PCS's expense, PCS will fund, at market rates, the Hearing Officer's award of compensatory education based on the additional information to be performed by a provider of the parent's choosing.

FINDINGS OF FACT

After considering all of the evidence received at the due process hearing in this case, as well as the argument of counsel, my findings of fact are as follows:

1. Student, an AGE youth, resides in the District of Columbia with the

parents. Testimony of Mother.

2. Student is eligible for special education under the IDEA disability classification Other Health Impairment - Attention Deficit or Attention Deficit Hyperactivity Disorder (OHI-ADHD). Exhibit R-10.

3. Student has attended PCS, an independent local education agency (LEA) public charter school, since the 2015-2016 school year. For the 2018-2019 school year, Student was in GRADE. Testimony of Mother.

4. In May 2017, CERTIFIED SCHOOL PSYCHOLOGIST conducted a functional behavioral assessment (FBA) of Student. She reported that Student's behaviors, including elopement, verbal outbursts and physical aggression began around 2015. Based on teacher and staff reports, the behaviors were moderate, but still prevented Student from being able to complete work and access instruction and also diminished Student's ability to learn and remain on task in class. Mother reported that Student did not exhibit the behaviors at home. The assessor stated that Student displayed a lack of confidence in completing work and hypothesized that the behaviors were due to task avoidance or to gain attention from peers. She stated that it appeared that Student was able to regulate emotions and control behavior. Exhibit R-1.

5. In May 2017, Certified School Psychologist conducted a comprehensive psychological evaluation of Student for Student's initial special education eligibility evaluation. In her June 9, 2017 evaluation report, she reported that Student's overall Full-Scale IQ score, measured with the Wechsler Intelligence Scale for Children Fifth Edition (WISC-V), fell in the Low Average range. with relatively weak verbal

comprehension and working memory skills. Academically, on the Woodcock-Johnson IV Tests of Achievement (WJ-IV), Student obtained an overall Brief Achievement cluster score of 99, which fell within the Average range. Student demonstrated relative weakness in reading comprehension. Social emotional behavior was assessed with the Behavior Assessment System for Children, Third Edition (BASC-3) rating scales. Based on the raters' responses, Student exhibited as primary concerns, Conduct Problems, Aggression, and Hyperactivity. Based on responses to the Conners 3rd Edition (Conners 3) short version rating scales for ADHD, Student was demonstrating challenges both at home and at school in conduct and aggression. In school, Student demonstrated high concerns for hyperactivity/impulsivity, learning problems, and peer relations. Certified School Psychologist recommended that Student met the criteria for a student with the IDEA Other Health Impairment disability. Exhibit R-2.

6. On July 1, 2017, Student was determined eligible for special education and related services as a Student with OHI-ADHD. Student's initial September 5, 2017 IEP identified Mathematics, Reading and Emotional, Social and Behavioral Development as areas of concern. The September 5, 2017 initial IEP provided for Student to receive 10 hours per week of Specialized Instruction, including 5 hours outside general education and 180 minutes per month of Behavioral Support Services, including 120 minutes per month outside general education. Exhibit P-18.

7. Student was the subject of a prior special education due process proceeding in the fall of 2018. (Case No. 2018-0173). The issue in that case was whether PCS denied Student a FAPE by not reviewing and revising Student's September

5, 2017 IEP in December 2017. Petitioner claimed in that proceeding that Student needed a full-time self-contained educational setting. In his December 14, 2018 Hearing Officer Determination (the December 14, 2018 HOD), Hearing Officer Michael Lazan found that as of December 2017, Student was making satisfactory grades and making progress in class and Hearing Officer Lazan determined that PCS had been under no duty to revise Student's IEP at that time. Exhibit P-50.

8. Student's PCS IEP was revised on March 1, 2018. The March 1, 2018 IEP identified Mathematics, Reading and Emotional, Social & Behavioral Development as areas of concern for Student. The IEP provided for Student to receive 7.5 hours per week of Specialized Instruction, including 2.5 hours outside general education; 280 minutes per month of Behavioral Support Services, including 120 minutes per month outside general education; and 40 minutes per month of Behavioral Support Consultation Services. Exhibit P-20.

9. In spring 2018, PCS referred Student for an updated FBA due to the maladaptive behaviors Student was engaging in in the classroom and school settings and to determine whether Student's current placement was appropriate. In her April 10, 2018 FBA report, BEHAVIOR ANALYST reported that when Student encountered non-preferred demands, Student was more likely to engage in noncompliance in order to escape or avoid the non-preferred demand, particularly during whole group instruction. Exhibit P-12.

10. As of June 11, 2018, Student was reported to be progressing on all March 1, 2018 IEP academic and behavioral goals. Exhibit P-34.

11. For the 2017-2018 school year at PCS, Student passed all courses with C's or higher grades, except for an F in Technology. Exhibit R-15. At that time, Student was close to grade level in academics and stood out as a leader, but also had some behavior challenges. Testimony of LEA Representative.

12. PCS developed Behavior Intervention Plans for Student on April 12, 2017, September 5, 2017, June 5, 2018, and March 29, 2019. The targeted behaviors were Out of Location, Disruptive Mischievous Behaviors and Throwing Objects (April 12 and September 5, 2017); Out of Seat, Disruptive - Disrespectful Engagement with Adults, Disruptive Mischievous Behaviors and Throwing Objects (June 5, 2018, March 29, 2019) Exhibits P-6, P-11, P-15, R-8, and R-12, Testimony of Therapist.

13. PCS uses an incentive system for all students giving "dollar" credits to recognize expected appropriate behaviors and to reward behaviors that exceed expectations. Dollars are taken away for behaviors that are inappropriate. A student may use his or her dollars to buy "dress down" days at school. This incentive system has been the motivation foundation for Student's Behavior Intervention Plans. Testimony of LEA Representative, Testimony of Therapist.

14. On September 11, 2018, Student's IEP team met for Student's annual IEP review. Mother stated that she did not have any concerns. However, Educational Advocate stated that current concerns were that PCS was not an appropriate placement for Student due to Student's ongoing behaviors not being extinguished. It was reported at the meeting that on spring 2018 Measures of Academic Progress (MAP) testing, Student outperformed District of Columbia peers in Mathematics. Student scored

below peers in Reading, with low scores in the areas of Literature text, Information text and vocabulary, and Student struggled to write independently. For behavior, Student was reported to demonstrate high concerns with hyperactivity/impulsivity, learning problems and peer relations. The IEP team increased Student's Specialized Instruction Services to 10 hours per week, including 5 hours outside general education, and maintained Student's Behavioral Support Services at 280 minutes per month, including 120 minutes outside general education. The September 11, 2018 IEP also provided for 40 minutes per month of Behavioral Support consultation services. Exhibits R-6, R-7.

15. Student's academic grades fell over the first and second quarters of the 2018-2019 school year. For the 2nd quarter, Student received F's in English, History, Writing and Math. Student's MAP Reading score also declined in winter and spring testing. Exhibits R-15, R-32.

16. Beginning February 21, 2019, PCS' Counsel communicated with Mother and her representatives by email to request to hold a meeting to discuss Student's progress. Mother's representatives were not available until mid-March 2019. An IEP team meeting was scheduled for March 27, 2019. Exhibit R-24.

17. Student's IEP team convened at PCS on March 27, 2019. Mother and FORMER COUNSEL attended in person. Educational Advocate participated by telephone. Mother and LEA Representative both expressed concerns over Student's declining grades and worsening behaviors. The teachers shared that when Student completed work, Student was performing at or above grade level, but Student's work refusal was impeding Student from succeeding academically. Mother reported that

Student's psychiatrist had stopped ADHD medication in January 2019, after Student told the physician that Student was doing better in school and did not need medications any more. When asked about putting Student back on medications, Mother stated that she had an appointment with the psychiatrist for April 25, 2019. The school representatives recommended that Student receive special education services in the regular classroom because Student did not want to go to pull-out classes. Mother's representatives maintained that Student's services should be outside general education. The IEP team agreed to increase Student's Specialized Instruction hours to 15 hours per week outside general education and to add Extended School Year (ESY) services.

Exhibits R-10, R-11, R-13.

18. Petitioner's Counsel filed Petitioner's request for a due process hearing in this case on April 30, 2019. Later the same day, Education Advocate emailed a "Dissent Letter" to LEA Representative concerning the March 27, 2019 IEP and requesting, *inter alia*, an FBA for Student and an updated behavior intervention plan, a dedicated aide and 27.5 hours per week of specialized instruction outside general education. Exhibit P-31, Testimony of LEA Representative.

19. For the 4th quarter of the 2018-2019 school year, there has been an uptick in Student's grades, although Student still received an F in English. Exhibit R-15. Student's MAP scores in English and Mathematics declined in spring 2019. Exhibit R-32. The amount of time Student spent completing the test In the spring 2019, on DC-wide PARCC (Partnership for Assessment of College and Career Readiness) testing, Student passed the math portion, but not the ELA portion. The very short amount of

time Student worked on the ELA part of the computerized test, 15 minutes, indicated that the ELA score was not valid. Testimony of Coordinator.

20. On the 2018-2019 4th Quarter IEP Progress Report, Student was reported to be progressing on IEP academic goals but to have made no progress on two of three behavioral goals. Exhibit R-16.

21. Student has told school staff that Student does not want to be at PCS and that Student “knows” Student will be attending a different school for the next school year. Testimony of Coordinator. However, Mother has enrolled Student at PCS for the 2019-2020 school year. Testimony of LEA Representative.

CONCLUSIONS OF LAW

Based upon the above Findings of Fact and argument of counsel, as well as this hearing officer’s own legal research, my Conclusions of Law 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, 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 must be met by a preponderance of the evidence. *See* D.C. Code § 38-2571.03(6).

Analysis

1. Did PCS fail to timely and comprehensively evaluate Student in each area of suspected disability during the 2018-2019 school year, by the failure to complete an updated FBA and revise Student's BIP to address Student's ongoing disruptive behaviors, elopement from class, and tardiness to school?

In this proceeding, Petitioner alleges that PCS did not comprehensively evaluate Student during the 2018-2019 school year because the school did not conduct an updated Functional Behavioral Assessment (FBA) to revise Student's Behavior Intervention Plan (BIP). In April 2018, PCS referred Student for an FBA by a Board Certified Behavior Analyst and PCS maintains there was not a need to obtain an updated FBA in the 2018-2019 school year. Petitioner has the burden of persuasion on this issue.

Functional Behavioral Assessment or "FBA" refers to a systematic set of strategies that are used to determine the underlying function or purpose of a behavior so that an effective behavior management plan can be developed. *See Banks v. St. James Par. Sch. Bd.*, No. 2:65-CV-16173, 2017 WL 2554472 (E.D.La. Jan. 30, 2017) An LEA's failure to complete an FBA and develop a Behavior Intervention Plan, when warranted, will constitute a denial of a FAPE. *See, e.g., Long v. District of Columbia*, 780 F.Supp.2d 49, 61 (D.D.C.2011).

In this case, PCS obtained independent FBAs of Student in May 2017 and April 2018. The IDEA requires that a reevaluation of each child with a disability is conducted at least once every three years and sooner, if the child's parent or teacher requests a reevaluation or if the LEA determines that the needs of the child warrant a reevaluation.

See 34 CFR § 300.303. In her due process complaint, Petitioner alleges that her legal representatives requested an updated FBA in a dissent letter following the March 27, 2019 IEP team meeting. This assertion is inaccurate. Educational Advocate only sent the dissent letter after the due process complaint was filed on April 30, 2019. There was no evidence that the parent or her representatives had requested that an updated FBA be conducted at the March 27, 2019 IEP team meeting.

Student's BIP was most recently revised on March 29, 2019. Therapist testified credibly that Student's IEP team had enough information on the functions of Student's behaviors and that a revised FBA was not needed to update Student's BIP. She also testified that after the March 27, 2019 IEP meeting, Student's concerning behaviors had decreased. Petitioner's expert, Educational Advocate, opined that Student needed a new FBA because the triggers for Student's maladaptive behaviors were not clear. However, as noted, Educational Advocate did not request a new FBA for Student until after the due process complaint in this case was filed. I found her opinion less credible than that of Therapist, who provided Behavioral Support Services to Student and drafted the March 29, 2019 BIP. Nor did Petitioner attempt to make a showing that the March 27, 2019 BIP was not appropriate for Student. I find that Petitioner has not met her burden of persuasion on this issue.

2. Did PCS fail to develop an appropriate IEP for Student at the IEP meeting on or about March 27, 2019, when the team amended the September 11, 2018 IEP, in that the amended IEP failed to provide specialized instruction in an appropriate full-time outside of general education setting, failed to place Student in an appropriate placement, and/or failed to appropriately accommodate Student's needs with an

appropriate FBA and BIP?

Since at least the fall of 2018, Petitioner, through her legal representatives, has been requesting a full-time, self-contained educational setting for Student. In the December 14, 2018 HOD, Hearing Officer Lazan explained that this claim did not adequately take into account the mandate of Congress to provide students with instruction in the least restrictive environment. In the present proceeding, Petitioner again alleges that Student's IEP is not appropriate because it does not provide for a full-time, outside of general education setting.³ PCS responds that Student's IEP team appropriately revised the IEP at the March 27, 2019 IEP team meeting, with increased special education time outside of general education, and that there has not been enough time to assess if these revision will work such as to warrant moving Student to an even more restrictive setting. Petitioner made a *prima facie* showing through her expert witnesses that the March 27, 2019 IEP was not adequate. Therefore PCS must meet the burden of persuasion as to the appropriateness of the March 27, 2019 IEP and educational placement for Student.

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:

³ I addressed the allegation that Student needed an updated FBA and BIP in the previous part of this decision.

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. Here, the parent does not allege that PCS failed to comply with the IDEA's procedural requirements in developing the March 27, 2019 IEP. Therefore, I turn to the second, substantive, prong of the *Rowley* inquiry, was the March 27, 2019 IEP appropriate for Student?

In *Endrew 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 *Endrew F.* . . . , raised the bar on what counts as an adequate education under the IDEA. *Endrew 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 *Endrew F.* stressed that “every child should have the chance to meet challenging objectives,” and that a student’s “educational program must be appropriately ambitious in light of his circumstances.” 137 S.Ct. at 1000. *Z. B.*, 888 F.3d at 517. Substantively, the IDEA “requires an educational program reasonably calculated to enable a child to make progress appropriate in light of the child’s circumstances,” *Endrew F.*, 137 S.Ct. at 1001, even as it stops short of requiring public schools to provide the best possible education for the individual child, *Rowley*, 458 U.S. at 200, 102 S.Ct. 3034, or an education “equal” to that of non-disabled peers, *Endrew F.*, 137 S.Ct. at 1001; *Rowley*, 458 U.S. at 198-99, 102 S.Ct. 3034.

...

Applying the IDEA as interpreted in *Endrew F.*, we must ask whether, in developing the [contested IEP], the [education agency] adequately evaluated [the student's] particular needs and offered her an IEP tailored to what it knew or reasonably should have known of her disabilities at the time. *See Endrew F.*, 137 S.Ct. at 999. *Z. B.*, 888 F.3d at 524. . . . The key inquiry regarding an IEP's substantive adequacy is whether, taking account of what the school knew or reasonably should have known of a student's needs at the time, the IEP it offered was reasonably calculated to enable the specific student's progress. *See Endrew F.*, 137 S.Ct. at 999. . . . [T]hat standard calls for evaluating an IEP as of "the time each IEP was created" rather than with the benefit of hindsight. . . . At the same time, . . . evidence that post-dates the creation of an IEP is relevant to the inquiry to whatever extent it sheds light on whether the IEP was objectively reasonable at the time it was promulgated.

Z. B., 888 F.3d at 519, 524 (some internal quotations and citations omitted.)

Prior to spring 2019, Student's PCS IEP was last revised at an IEP team meeting on September 11, 2018. Student had finished the 2017-2018 school year with marked progress and at the September 11th meeting, Mother stated that she did not have any concerns. However, Educational Advocate asserted that PCS was not an appropriate placement for Student due to Student's ongoing problem behaviors not having been extinguished. At the September 11, 2018 meeting, the IEP team increased Student's Specialized Instruction Services from 7.5 hours to 10 hours per week, including an increase of services outside general education from 2.5 to 5 hours per week.

Student's academic grades fell over the first and second quarters of the 2018-2019 school year. For the 2nd quarter, Student received F's in English, History, Writing and Math. Student's MAP Reading score also declined in winter and spring testing. Concerned by these developments, beginning February 21, 2019, PCS took the initiative of communicating with Mother's representative to reconvene Student's IEP team.

Mother's representatives were not available until mid-March 2019 and the IEP team meeting was held on March 27, 2019. At the March 27th meeting, Mother and PCS staff shared their concerns about Student's worsening behaviors. Student's teachers expressed concerns about Student's work refusal, sleeping in the classroom and walking out of class. Mother informed the school, for the first time, that in January 2019, the treating psychiatrist had taken Student off medications, because Student had told the doctor that Student was doing better in school and did not need them any more.

Although school members of the IEP team explained that Student was resistant to pull-out classes, Mother's representatives requested that Student receive more support outside the general education setting. The IEP team agreed to increase Student's Specialized Instruction Services from 10 hours to 15 hours per week and to provide all of these services outside general education. The team also agreed to update Student's BIP and to add ESY services to Student's IEP. It was left that the team would meet again at the end of the 2018-2019 school year to update the IEP again, as needed. On April 30, 2019, after the due process complaint in this case had been filed, Educational Advocate submitted a dissent letter to the March 27, 2019 IEP.

Petitioner's expert, Independent Psychologist, opined that as of March 2019, Student needed more support in the regular classroom setting than the PCS teachers could provide. Independent Psychologist did not have the opportunity to discuss Student's needs with the teachers or to conduct a classroom observation, so her opinion is suspect. In any case, the March 27, 2019 IEP team appears to have addressed this concern by increasing Student's special education services outside general education

from 2.5 hours per week to 15 hours per week.

In her dissent letter sent after the due process complaint was filed, Educational Advocate advocated for full-time special education services for Student outside of general education. PCS' expert, LEA Representative, opined that Student's full-time removal from the general education setting would be harmful because Student had been able to flourish in the less restrictive environment with typically developing peers. LEA Representative acknowledged that as of the due process hearing date, the increased services in Student's March 27, 2019 IEP were not as effective as hoped. He attributed this to Student's not getting outside-of-school support, notably medication support⁴, and to Student's not wanting to be at PCS. Notwithstanding, LEA Representative noted that over the years, Student had been able to access the curriculum at PCS with IEP support and that the March 27, 2019 IEP had not yet been implemented long enough to know whether the program revisions were working.

As the D.C. Circuit pronounced in *Z. B., supra*, the key inquiry regarding an IEP's substantive adequacy is taking account of what the school knew or reasonably should have known of the student's needs *at the time of the IEP meeting*, whether the IEP was reasonably calculated to enable the student's progress. Courts have consistently underscored that the "appropriateness of an IEP is not a question of whether it will guarantee educational benefits, but rather whether it is reasonably calculated to do so." *K.S. v. Dist. of Columbia*, 962 F.Supp.2d 216, 221 (D.D.C.2013) (citing *Thompson R2-J*

⁴ As PCS' witnesses acknowledged, an LEA may not require a student to take prescription medications as a condition to receiving special education services. See 34 CFR § 300.174.

Sch. Dist. v. Luke P. ex rel. Jeff P., 540 F.3d 1143, 1148–49 (10th Cir.2008)).

For the March 27, 2019 IEP revision, the IEP team increased Student's Specialized Instruction Services by 50% to 15 hours per week and, at the request of Mother's attorney, changed Student's setting for special education to all pull-out services. Accepting that over the last part of the 2018-2019 school year, the revised IEP has not been as effective as hoped in curbing Student's challenging behaviors, I nonetheless conclude that from what PCS knew at the time of the March 27, 2019 meeting, including Student's prior IEP progress in the mostly general education setting, the relative recency of the decline in Student's educational performance and Mother's statement that she had an appointment with the psychiatrist to discuss putting Student back on ADHD medications, the March 27, 2019 IEP was reasonably calculated to enable Student to make progress appropriate in light of Student's circumstances. *See Andrew F., supra*, 137 S. Ct. at 1001. PCS has met its burden of persuasion on this issue.

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, without prejudice to the right of the parent to request another IEP team meeting to review and revise, as appropriate, Student's IEP in light of Student's not making the academic and behavioral progress envisaged by Student's March 27, 2019 IEP team.

Date: June 30, 2019

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

NOTICE OF RIGHT TO APPEAL

This is the final administrative decision in this matter. 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 - SPED
PCS Resolution Team
[REDACTED]@k12.dc.gov
[REDACTED]@k12.dc.gov