

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

PETITIONER,
on behalf of STUDENT,¹

Date Issued: November 15, 2019

Petitioner,

Hearing Officer: Peter B. Vaden

v.

Case No: 2019-0193

DISTRICT OF COLUMBIA
PUBLIC SCHOOLS,

Hearing Dates: September 24, 2019
November 6 and 7, 2019

Respondent.

Office of Dispute Resolution
Rooms 111 and 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 District of Columbia Public Schools (DCPS) denied Student a free appropriate public education (FAPE) by failing to conduct a timely and comprehensive special education reevaluation, by failing to develop appropriate Individualized Education Programs (IEPs) for Student for the

¹ Personal identification information is provided in Appendix A.

2017-2018 and 2018-2019 school years and by failing to implement Student's IEP requirement for an individual dedicated aide.

Petitioner's Due Process Complaint, filed on July 31, 2019, named DCPS as Respondent. The undersigned hearing officer was appointed on August 1, 2019. On August 20, 2019, the parties met for a resolution session and were unable to resolve the issues in dispute. On August 26, 2019, I convened a telephone prehearing conference with counsel to discuss the issues to be determined, the hearing date and other matters. Also, on August 26, 2019, Petitioner's counsel filed a motion for an order to allow staff from a private school to observe Student at PUBLIC CHARTER SCHOOL (PCS). I denied the motion by order issued August 29, 2019. On August 27, 2019, DCPS filed an unopposed motion to extend the final decision due date to October 25, 2019, which motion I granted by order issued September 21, 2019.

The due process hearing was convened before the undersigned impartial hearing officer on September 24, 2019 at the Office of Dispute Resolution in Washington, D.C. At the beginning of the hearing, DCPS reported that PCS had agreed to conduct additional formal evaluations of Student. The parties agreed to continue the due process hearing to November 6-7, 2019 to allow time to complete these assessments. On September 27, 2019, I granted DCPS' unopposed motion to further extend the final decision due date to November 15, 2019 to accommodate the continued hearing dates.

The parties reconvened for the due process hearing on November 6-7, 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. Mother appeared in person for the hearing and was represented by PETITIONER'S COUNSEL. Respondent DCPS was represented by ASSISTANT PRINCIPAL and by DCPS' COUNSEL.

Counsel for Petitioner made an opening statement. Mother testified at the hearing and called INDEPENDENT OT, NONPUBLIC SCHOOL PRINCIPAL, INDEPENDENT PT, HOME NURSE and EDUCATIONAL ADVOCATE from LAW FIRM as additional witnesses. DCPS called as witnesses SPECIAL EDUCATION TEACHER, PCS PT, PCS OT, PCS SLP, PCS SCHOOL NURSE and SCHOOL PSYCHOLOGIST. Petitioner's Exhibits P-6 through P-95 were admitted into evidence, including Exhibits P-13, P-15 and P-86 admitted over DCPS' objections. Exhibits P-1 through P-3 were withdrawn. I sustained DCPS' objections to Exhibits P-4 and P-5. DCPS' Exhibits R-1, R-3, R-4, R-7, R-10, R-13, R-16 through R-28, R-37 through R-39 and R-41 were all admitted into evidence without objection. DCPS did not offer the remaining exhibits filed with DCPS' prehearing disclosures. At the conclusion of the presentation of evidence, counsel for the respective parties made oral closing arguments.

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 in this case, as certified in the August 26, 2019

Prehearing Order, are:

A. Whether DCPS denied the student a FAPE by failing to conduct a triennial psychological reevaluation and/or a psychological reevaluation to determine why the student is unable to make sufficient progress and/or conduct comprehensive Occupational Therapy (OT), Speech and Language and Physical Therapy (PT) reevaluations;

B. Whether DCPS failed to develop and/or provide the student with an appropriate Individualized Educational Program (IEP) or placement and/or location of services for the 2017-2018 and 2018-2019 school years, in that Student is not provided a personal dedicated aide who has medical or nursing training; the IEPs lack appropriate annual goals particularly in the area of adaptive goals; there is not provision for ABA therapy; the school has not provided sufficient behavioral support services; the IEPs do not have up-to-date data; related services are insufficient particularly in the areas of PT and OT; the school is too large and student to teacher ratio too high and PCS is not appropriate for Student;

C. Whether DCPS failed to implement Student's IEPs during the 2017-2018 and 2018-2019 school years by failing to provide the student with an individual dedicated aide.

For relief, Petitioner requests that DCPS be ordered to ensure that Student's IEP is updated to provide goals and baselines reflective of Student's current abilities and needs, to place Student at a nonpublic therapeutic day school and to provide Student with compensatory education for the denials of FAPE alleged in the complaint. (At the due process hearing, Petitioner's Counsel withdrew the parent's request that DCPS be ordered to conduct psychological, PT, OT, and speech reevaluations of Student.)

FINDINGS OF FACT

After considering all of the evidence received at the October 18, 2019 due process hearing in this case, as well as the argument of counsel, my findings of fact are as follows:

1. Student, an AGE child, is a resident of the District of Columbia.

Testimony of Mother.

2. Student is eligible for special education under the IDEA disability classification Multiple Disabilities, based upon concurrent Intellectual Disability (ID) and Other Health Impairment (OHI) disabilities. Exhibit R-6.

3. Student has been diagnosed by HOSPITAL with ID and Epilepsy. Student experienced the first seizure at approximately age 1½ years. At present Student experiences frequent atonic or “drop” seizures. Exhibit R-42. Student eats little by mouth and Student’s diet is supplemented with feedings through a permanent gastrostomy feeding tube (G-tube). Testimony of Mother. The drop seizures put Student at risk for injuries from falls. Due to Student’s use of the G-tube and to the seizure events, Student is provided overnight skilled nursing at home by another District agency. Testimony of Home Nurse.

4. In 2011, Hospital reported to Mother the results of a Bayley Mental Index score, below 50, and a Vineland Adaptive Behavior Composite score of 52 and concluded that Student presented with severe cognitive and adaptive delays. Exhibit R-34. School Psychologist conducted a Comprehensive Psychological Reevaluation of

Student in fall 2019 and reported that evaluators were not able to obtain updated cognitive functioning data for Student as a result of Student's testing limitations.

Exhibit R-42.

5. In her October 18, 2019 psychological reevaluation report, School Psychologist reported that Special Education Teacher's responses to the Vineland Adaptive Behavior Scales, 3rd Edition (Vineland-3) indicated that Student's overall level of adaptive functioning (20) fell within the Low range with a percentile rank of <1. Student's standard scores in the Communication, Daily Living Skills and Socialization domains were all in the Low range and in the <1 percentile rank. Exhibit R-42.

6. Student is nonverbal. PCS SLP conducted a speech-language reevaluation of Student in October 2018. She reported that Student presents with significant deficits in expressive and receptive language. Student communicates with body movements, using eyes to make choices and with an Accent 1400 speech generating Augmentative and Alternative Communication (AAC) device, with the NuEye eye-gazing key selection accessory. Student communicates at the one unit and single word level to express preferences and uses approximately 6 core words (*e.g.*, "come", "want", "play", "good", "bad", "like"). Student most frequently initiates communications by looking to the communication partner or reaching out and touching her. Student is then prompted to use the AAC device. Exhibit R-44.

7. Student has attended PCS for six or seven years. Testimony of Mother. PCS is a special education day school in the District which serves children with

moderate to severe intellectual disabilities. DCPS is the local education agency (LEA) for PCS. Hearing Officer Notice.

8. At PCS, Student is placed in a self-contained classroom with 11 other students and 8 adult staff members, including Special Education Teacher. In the classroom, there is a 1:1 aide with Student at all times. The aides are assigned on a rotating basis and a specific aide is assigned to Student for one day at a time. Student interacts some with adults, but not much with other students. Student has difficulty opening up to unfamiliar adults. Testimony of Special Education Teacher.

9. Student's drop seizures are a frequent occurrence. Typically Student has a seizure at home before going to school and may have a seizure at school. Testimony of Mother. At PCS, if Student experiences two seizures within 30 minutes or if a seizure is sustained for too long, Student will be taken to see the school nurse. Not all of Student's seizures are drop seizures. Testimony of Special Education Teacher.

10. When evaluated by PCS in November 2013, in the area of adaptive living skills, Student was able to communicate desires, express feelings, and respond to a communication partner with simple gestures. Student was also able, to an extent, to manipulate and hold eating utensils, to show some independence in self-feeding when using an adaptive spoon and given some assistance in loading the spoon, to seat self upon request and to remove clothes independently. In the area of speech, Student was able to engage in babbling. In the motor skills area, Student was able to grasp classroom objects such as blocks and large markers for a short period and could maintain static

standing balance over a BOSU balance ball for, at best, 10 seconds. Exhibit P-42.

When assessed for AAC needs in November 2016, Student had a limited number of vocalizations intelligible only to Student's parents, and could say "No". Student has now lost most of those capabilities. Student has tactile defensiveness and will not readily open hands. Student does not want to grasp anything. Student is no longer holding a spoon or able to load a spoon. Student can no longer take off clothes independently or maintain balance over a BOSU ball without close supervision. Student does not vocalize. Testimony of Special Education Teacher, Exhibit P-26.

11. In the 2017-2018, 2018-2019 and 2019-2020 school years, Student has suffered injuries from falls at school due to seizures. Testimony of Special Education Teacher. These incidents included injuries on February 15, 2018 (bruising, swelling of nose), May 1, 2018 (small laceration bottom lip), June 8, 2018 (bit tongue and lip), June 18, 2018 (injury to face), October 2, 2018 (injury to lips, mouth), December 5, 2018 (abrasion, scratch by self), December 18, 2018 (a.m.) (cut on chin), December 18, 2018 (p.m.) (cuts on lips) and March 5, 2019 (injury to mouth). Exhibit P-50. On October 24, 2019, Student experienced a drop seizure and fell into a file cabinet before staff could break the fall, knocking out upper two front teeth. Exhibit P-87.

12. PCS conducted a special education reevaluation of Student in the middle of the 2013-2014 school year. This reevaluation included psychological and OT assessments conducted in December 2013. (The Confidential Psychological Reevaluation report is misdated January 3, 2013. The report was presumably issued in

January 2014. *See Exhibit P-20.*) Speech and Language and PT assessments of Student had been completed in November 2012. Exhibits P-18 through R-20. Student's eligibility for special education and related services was confirmed by the PCS IEP team on February 11, 2014. Exhibit R-25.

13. In November 2016, PCS obtained a communications skills and needs assessment of Student to determine if the child would benefit from an AAC device. Exhibit R-32.

14. PCS conducted a triennial reevaluation of Student in December 2016. In a Prior Written Notice (PWN) issued to Mother in December 2016, PCS wrote that Student's continued eligibility for special education would be determined based upon current testing on file, that is, the 2013-2014 psychological, speech, OT and PT assessments, except that the physical therapist was requesting updated testing for goal development purposes. Exhibit R-25. Student's PCS eligibility team, including Mother, met on December 6, 2016. The team determined that Student continued to meet eligibility requirements as a child with MD, including ID and OHI (seizures). In addition to the 2013-2014 assessments, the team considered Student's current progress reports and classroom observations by Student's instructor and related services providers. Exhibit R-27.

15. In January 2017, PCS PT conducted a PT evaluation of Student to update testing and present levels of performance for further goal development. Exhibit P-26.

16. Student's May 16, 2017 PCS IEP identified Mathematics, Reading,

Adaptive/Daily Living Skills, Communications/Speech and Language, Emotional, Social and Behavioral Development and Motor Skills/Physical Development as areas of concern. The IEP provided for Student's placement at PCS (a special school) with 27.75 hours per week of Specialized Instruction, 1 hour per week of Speech-Language Pathology, 1 hour per week of OT and 1 hour per month of PT. The IEP also provided for Assistive Technology (AT) devices for access, communication and learning and studying, classroom aids and services, and a full-time, 30 hours per week, dedicated aide. The IEP stated that PCS provides opportunities for its students to interact with typically developing peers through activities such as Best Buddies and community-based instruction. Exhibit R-12.

17. Student's April 5, 2018 PCS IEP identified Mathematics, Reading, Adaptive/Daily Living Skills, Communications/Speech and Language, Emotional, Social and Behavioral Development and Motor Skills/Physical Development as areas of concern. The annual goals for Mathematics and Reading were carried over, substantially unchanged, from the May 16, 2017 IEP. The 2018 IEP provides for Student's placement at PCS (a special school) with 27.75 hours per week of Specialized Instruction, 1 hour per week of Speech-Language Pathology, 1 hour per week of OT and 1 hour per month of PT. The IEP also provided for AT devices, classroom aids and services, and a full-time, 30 hours per week, dedicated aide. Exhibit R-9.

18. Student's March 1, 2019 PCS IEP identified Mathematics, Reading, Adaptive/Daily Living Skills, Communications/Speech and Language, Emotional, Social

and Behavioral Development and Motor Skills/Physical Development as areas of concern. The 2019 IEP provided for Student's placement at PCS (a special school) with 28.25 hours per week of Specialized Instruction, 1 hour per week of Speech-Language Pathology, .5 hour per week of OT and 1 hour per month of PT. The IEP also provided for AT devices, classroom aids and services, and a full-time, 30 hours per week, dedicated aide. Exhibit R-6.

19. As of July 2019, Student was reported to be "Expanding" (40-59% accuracy) or "Progressing" (60-79% accuracy) on most IEP mathematics and reading goals. Student was reported to be "Developing" (20-39% accuracy) on Adaptive/Daily Living Skills and Speech-Language goals. Student was reported to be Expanding on Behavioral goals. Student was reported to be Progressing on PT goals. Student was reported to be at "Awareness" (<20% accuracy) on OT goals. Student was reported to be at Awareness or Developing on Transition goals. Exhibit R-13.

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, not applicable to this case, 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 DCPS deny Student a FAPE by failing to conduct a triennial psychological reevaluation and/or a psychological reevaluation to determine why Student is unable to make sufficient progress and/or conduct comprehensive Occupational Therapy, Speech and Language, and Physical Therapy reevaluations?

The IDEA requires local education agencies to reevaluate students at least once every three years unless the parent and the local education agency deem such reevaluation unnecessary. *See* 20 U.S.C. § 1414(a)(2)(B)(ii); 34 C.F.R. § 300.303(b)(2). *Cooper v. District of Columbia*, 77 F. Supp. 3d 32, 37 (D.D.C. 2014). The purpose of a reevaluation is to determine whether a child continues to have a qualifying disability and the nature and extent of the special education and related services that the child needs. *See* 34 CFR § 300.15.

PCS reevaluated Student and confirmed the child's eligibility for special education on February 11, 2014. For that reevaluation, PCS conducted formal psychological and OT assessments of Student in December 2013. Speech and Language and PT assessments had been completed in November 2012. PCS conducted a triennial

reevaluation of Student in December 2016. In a Prior Written Notice (PWN) issued to Mother in December 2016, PCS wrote that Student's continued eligibility for special education would be determined based upon "assessments on file from 2013," that is, the assessments conducted by PCS in 2012 and 2013, except that updated PT testing was requested and completed for goal development purposes. Student's PCS eligibility team, including Mother, met on December 6, 2016. Based on the existing assessments, as well as on current progress reports and classroom observations, the team determined that Student continued to meet eligibility requirements for a child with MD, including ID and OHI (seizures).

Petitioner contends that DCPS denied Student a FAPE by not ensuring that PCS conducted psychological, OT, Speech and Language and PT reevaluations as part of the December 2016 triennial reevaluation. DCPS contends that due to the impediments to formal testing from Student's severe ID impairment, additional formal testing was not warranted. Generally, when a child has been evaluated for special education eligibility and the appropriateness of the agency's evaluation is at issue, the hearing officer must consider whether the agency adequately gathered functional, developmental and academic information about the child's needs to determine the content of the IEP in all areas of suspected disability and that the evaluation was sufficiently comprehensive to identify all of the child's needs. 20 U.S.C. §§ 1412(a)(6)(B), 1414(b)(1-3); 34 C.F.R. § 300.304(b)(1-3), (c)(4, 6). The Petitioner has the burden of persuasion that the 2016 reevaluation was not adequate.

Petitioner's psychological expert, Independent Psychologist, testified, that by law, special education reevaluations must be done every two years [*sic*], and he opined it was "striking" that 5 or 6 years had elapsed between Student's 2013 and 2019 psychological reevaluations. While Independent Psychologist was correct that special education reevaluations must be conducted every three years (but not every *two* years), it is up to the child's IEP team to first review existing data and then identify what additional data are needed for the triennial assessment. *See* Department of Education, *Assistance to States for the Education of Children with Disabilities*, 71 Fed. Reg. 46540 at -641. (August 14, 2006) ("The review of existing data is part of the reevaluation process. The IEP Team and other qualified professionals, as appropriate, must review existing evaluation data, and on the basis of that review, and input from the child's parents, identify what additional data, if any, are needed to determine whether the child continues to have a disability, and the educational needs of the child." *Id.* at 641.)

DCPS' Expert, School Psychologist, who was a member of the 2016 IEP team, explained that a psychological reevaluation was not recommended for the December 2016 triennial because there was no question about Student's disability classification and the IEP team was able to understand where Student was functioning from the teachers' input. She testified that based on the existing data, including the 2013 psychological evaluation, classroom observations, adaptive measures, as well as Student's disability classification and complex medical history, there was agreement among the IEP team members not to conduct a formal psychological reevaluation.

With her knowledge of Student, both from having evaluated the child and serving on Student's 2016 IEP team, School Psychologist was a credible witness.

IDEA evaluations depend upon the exercise of professional judgment by the child's educators, which is entitled to a reasonable degree of deference. *Perrin on behalf of J.P. v. Warrior Run Sch. Dist., No. 4:13-CV-2946*, 2015 WL 6746306 (M.D.Pa. Sept. 16, 2015), report and recommendation adopted *sub nom. Perrin v. The Warrior Run Sch. Dist., No. 13-CV-02946*, 2015 WL 6746227 (M.D. Pa. Nov. 4, 2015), citing *County Sch. Bd. of Henrico County v. Z.P.*, 399 F.3d 298, 307 (4th Cir.2005). I conclude that the decision of Student's IEP team not to conduct a formal psychological reevaluation for the 2016 triennial is entitled to deference and Petitioner has not met her burden to show that Student was denied a FAPE by this decision.

Petitioner offered no probative evidence that Student required formal OT, Speech and Language or PT reevaluations after 2013. Student's PCS service providers for these related services all testified that their observations and daily service notes, as compiled in Student's service trackers, were sufficient to determine Student's respective related services needs and formal reassessments were not warranted. I conclude that Petitioner has not met her burden of persuasion that Student's 2016 triennial reevaluation was not appropriate for want of formal psychological, OT, Speech and Language or PT reevaluations. (At the parent's request, PCS conducted these reevaluations, as well as a Functional Behavior Assessment of Student, in October 2019 after the Resolution Session Meeting in this case.)

- B. Did DCPS fail to develop and/or provide Student with an appropriate IEP or placement and/or location of services for the 2017-2018 and 2018-2019 school years, in that Student is not provided a personal dedicated aide who has medical or nursing training; the IEPs lack appropriate annual goals particularly in the area of adaptive goals; there is not provision for ABA therapy; the school has not provided sufficient behavioral support services; the IEPs do not have up-to-date data; related services are insufficient particularly in the areas of PT and OT; the school is too large and student-to-teacher ratio too high and PCS is not appropriate for Student?
- C. Did DCPS fail to implement the Student's IEPs during the 2017-2018 and 2018-2019 school years by failing to provide the Student with an individual dedicated aide?

Petitioner alleges that PCS's IEPs for Student for the 2017-2018 and 2018-2019 school years were inappropriate for want of provision for a personal dedicated aide with medical or nursing training, inappropriate present levels data and annual goals, no provision for Applied Behavior Analysis (ABA) therapy, insufficient behavioral support services, insufficient PT and OT services and an unsuitable educational placement.

There were three IEPs in place for Student for the 2017-2018 and 2018-2019 school years, namely the May 16, 2017 IEP, the April 5, 2018 IEP and the March 1, 2019 IEP. In its response to the complaint, DCPS asserted as an affirmative defense that allegations of events prior to July 31, 2017 are barred by the IDEA's statute of limitations. *See Collette v. District of Columbia*, No. CV 18-1104 (RC), 2019 WL 3502927, at *9 (D.D.C. Aug. 1, 2019) (Pursuant to 20 U.S.C. § 1415(f)(3)©, a parent can "request an impartial due process hearing within two years of the date the parent . . .

knew or should have known about the alleged action that forms the basis of the complaint.”) The May 16, 2017 IEP was developed more than two years before the parent’s due process complaint was filed on July 31, 2019. Therefore, I will consider the appropriateness only of the April 5, 2018 and March 1, 2019 IEPs.

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 in *Bd. of Educ. v. Rowley*, 458 U.S. 176, 102 S.Ct. 3034, 73 L.Ed.2d 690 (1982), for what constitutes an appropriate IEP under the IDEA:

To meet its substantive obligation under the IDEA, a school must offer an IEP reasonably calculated to enable a child to make progress appropriate in light of the child’s circumstances. *Endrew F.*, 137 S.Ct. at 999. . . . The ‘reasonably calculated’ qualification reflects a recognition that crafting an appropriate program of education requires a prospective judgment by school officials. *Id.* . . . Any review of an IEP must appreciate that the question is whether the IEP is *reasonable*, not whether the court regards it as ideal. *Id.* (emphasis in original.) . . . The IEP must aim to enable the child to make progress. . . . [T]he essential function of an IEP is to set out a plan for pursuing academic and functional advancement. *Id.* . . . A focus on the particular child is at the core of the IDEA. The instruction offered must be “*speciall*y designed” to meet a child’s “*unique* needs” through an “*individualized* education program.” 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. *Id.* (emphasis in original.) . . . A reviewing court may fairly expect [school] authorities to be able to offer a cogent and responsive explanation for their decisions that shows the IEP is reasonably calculated to enable the child to make progress appropriate in light of his circumstances. *Id.*, 137 S.Ct. at 1002.

See also Z. B. v. District of Columbia, 888 F.3d 515 (D.C. Cir. 2018) (“[The *Endrew F.*] 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.* at 517.)

As the Supreme Court emphasized in *Andrew F.*, a focus on the particular child is at the core of the IDEA. The IEP must be specially designed to meet the child’s unique needs. Here, Student was placed a PCS, a special education day school for children with moderate to severe intellectual disabilities, because Student is a severely disabled child with an Intellectual Disability and a seizure disorder. As was clear from the evidence at the due process hearing, Student has unique needs due to these impairments.

First and foremost, Student has safety needs. Student’s atonic or “drop” seizures cause Student to fall on the floor unless an adult is at hand and able to break the fall. In the 2017-2018 school year, Student had at least four reported injuries from falls at school attributed to seizures. In the 2018-2019 school year, Student was injured at least three times at PCS in such falls from seizures. In October 2019, Student fell again during a seizure, this time losing two front teeth. Special Education Teacher explained that even though a classroom aide is always with Student, the seizures are sudden and the aides have not always been able to break Student’s falls.

DCPS’ counsel argues that with the nature of Student’s disability, it is not possible to guaranty that Student will not have falls. This argument is unavailing. “An IEP failing to ensure a student’s safety denies a FAPE.” *Sch. Dist. of Philadelphia v. Drummond*, No. CV 14-2804, 2016 WL 1444581, at *5 (E.D. Pa. Apr. 12, 2016), citing *Lillbask v. Conn. Dep’t of Educ.*, 397 F.3d 77, 92-94 (2d Cir. 2005). Here, PCS’

knowledge Student's seizure falls predates the April 5, 2018 IEP. Although the April 5, 2018 and March 1, 2019 IEPs provided for Student to have a full-time 1:1 aide, this accommodation has not sufficed to prevent Student's fall injuries. Special Education Teacher testified that Student also has a "gait belt" and that classroom staff are typically able to catch Student with the gait belt before Student falls. However, the gait belt is not one of Student's IEP accommodations and, in any event, is not preventing Student's injuries from drop seizure falls. I conclude that the failure of PCS' IEP team to develop an IEP for Student, on April 5, 2018 or thereafter, which ensured Student would be safe at school from seizure-related falls, has denied Student a FAPE.

Petitioner claims that the failure of the PCS IEP team to address Student's functional regression since 2014 through appropriate IEP revisions has denied Student a FAPE. It is undisputed that Student has regressed in adaptive living skills and in speech capability since Student was evaluated by PCS in November 2013. In November 2013, in the area of adaptive living skills, Student was able to communicate desires, express feelings, and respond to a communication partner with simple gestures. Student was also able, to an extent, to manipulate and hold eating utensils, show some independence in self-feeding with some assistance in loading the adaptive spoon, seat self upon request and remove clothes independently. In the area of speech, Student was able to engage in babbling. In the motor skills area, Student was able to grasp classroom objects such as blocks and large markers for a short period and could maintain static standing balance over a BOSU balance ball for, at best, 10 seconds. When assessed for

AAC needs in November 2016, Student had a limited number of vocalizations (intelligible only to Student's parents) and could say "No." Student has lost most of those capabilities. Student now exhibits tactile defensiveness and does not want to grasp anything. Student is no longer holding a spoon or able to load a spoon. Student can no longer take off clothes independently or maintain balance over a BOSU ball without close supervision. Student no longer vocalizes at all.

Despite Student's regression in adaptive skills and speech, the PCS IEP teams did not change Student's special education services or educational setting in the April 5, 2018 or March 1, 2019 IEPs. Related OT and PT Services were also not changed, except to reduce OT services from 1 hour per week to 30 minutes per week in the 2019 IEP. DCPS' counsel argues that not changing Student's IEPs was appropriate because Student made some progress in the 2017-2018 and 2018-2019 school years. Notably, as Special Education Teacher testified, Student did well on the adaptive living goal in the 2018 IEP (toileting goal) and the 2019 IEP (use of hand to activate a switch). Special Education Teacher and PCS SLP also testified that Student had made progress in the use of the AAC device, although Student's AAC "vocabulary" is limited to some six words.

Unfortunately, the evidence establishes that Student's limited progress under the 2018 and 2019 IEPs has not offset Student's regression in adaptive living skills and in speech capability since Student was evaluated in November 2013. The Supreme Court admonishes in *Andrew F.*, that,

When all is said and done, a student offered an educational program providing

“merely more than *de minimis*” progress from year to year can hardly be said to have been offered an education at all. For children with disabilities, receiving instruction that aims so low would be tantamount to “sitting idly ... awaiting the time when they were old enough to ‘drop out.’ “ *Rowley*, 458 U.S., at 179, 102 S.Ct. 3034 (some internal quotation marks omitted). The IDEA demands more. It requires an educational program reasonably calculated to enable a child to make progress appropriate in light of the child’s circumstances.

Andrew F., supra, 137 S. Ct. 988 at 1001.

It is possible certainly that Student’s loss of skills and reduced educational progress since 2013 is appropriate in light of this child’s circumstance, notably Student’s chronic epilepsy. If so, that was not shown by the evidence. A court or hearing officer “may fairly expect [school] authorities to be able to offer a cogent and responsive explanation for their decisions that shows the IEP is reasonably calculated to enable the child to make progress appropriate in light of his circumstances.” *See Id.* at 1002. Here I conclude that DCPS did not meet its burden to show what progress was appropriate for Student, in light of the child’s circumstances, at the time the April 5, 2018 and March 1, 2019 IEPs were developed or that these IEPs were reasonably calculated to enable Student to make such progress.

Petitioner also contends that Student’s 2018 and 2019 IEPs are inadequate for want of provision for a personal dedicated aide with medical or nursing training, inappropriate annual goals particularly in the area of adaptive goals. lack of provision for ABA therapy, insufficient behavioral support services, lack of up-to-date data, insufficient related services particularly in the areas of PT and OT and because PCS is unsuitable for Student due to the school’s size and student-to-teacher ratio. In light of

my foregoing determination that DCPS did not meet its burden of proof as to the appropriateness of the IEPs generally, it is necessary to reach each of these specific claims. However, for completeness and to provide guidance in the development of a revised IEP for Student, I consider each of these claims in turn.

Dedicated Aide with Nursing/Medical Training

I find that DCPS has met its burden of persuasion that Student has always been provided a dedicated aide at PCS, as required by Student's IEPs. According to Special Education Teacher, PCS' practice is to rotate aides among students, so that a student does not become overly attached to a specific adult. I found persuasive the evidence of School Nurse and Special Education Teacher that with the nursing services available at the school and the training provided to Student's teacher and aides, Student does not need the dedicated aide to have specialized nursing or medical training.

Inappropriate Annual Goals Particularly in the Area of Adaptive Goals

Special Education Teacher, who has worked with Student for the past two school years, testified persuasively that the annual IEP goals, including the adaptive goals for Student were appropriate. She explained that a single adaptive goal per IEP year was best suited for Student in light of Student's severe ID disability. Each of the related service providers likewise provided credible explanations for the respective related services goals identified for Student in the IEPs. I find that DCPS has met its burden of persuasion that the annual goals in the 2018 and 2019 IEPs were appropriate for Student.

Applied Behavior Analysis Therapy

I found credible the testimony of Petitioner's expert, ABA Therapist, that considering Student's limited progress in the PCS classroom setting with 12 students, a teacher and 7 para-educators, Student would be an appropriate candidate for intensive Applied Behavior Analysis (ABA) therapy, used in a smaller setting throughout the school day. ABA Therapist has not, however, worked with Student or participated in Student's IEP team meetings.

While it is important for Student's IEP team to have an open mind as to whether Student an intensive ABA program would benefit Student, the appropriateness of an ABA program for Student should be determined, in the first instance, by the IEP team. *See, e.g., Assistance to States for the Education of Children With Disabilities and the Early Intervention Program for Infants and Toddlers With Disabilities*, 64 FR 12406, 12552 (OSERS March 12, 1999) ("In light of the legislative history and case law, it is clear that in developing an individualized education there are circumstances in which the particular teaching methodology that will be used is an integral part of what is 'individualized' about a student's education and, in those circumstances will need to be discussed at the IEP meeting and incorporated into the student's IEP.") *See, also, Andrew F., supra* at 101 (Courts not to substitute their own notions of sound educational policy for those of the school authorities.) *Cf., Deal v. Hamilton County Board of Education*, 392 F.3d 840 (6th Cir.2004) (Child was deprived of a FAPE where the school district did not come to the IEP meeting with an "open mind" and had

predetermined the IEP as to the important component of ABA therapy).

Behavioral Support Services

The April 5, 2018 and March 1, 2019 IEPs do not provide for Student to receive direct behavioral support services. The purpose of such related services is to assist a child with a disability to benefit from special education. *See* 34 CFR § 300.34(a). Special Education Teacher, who has been Student's lead teacher for the past two school years, testified that Student does well in the classroom and does not exhibit behaviors of concern that need to be addressed. The parent was apparently concerned by Student's occasional leg flailing or foot stomping. Special Education Teacher testified credibly that, at school, these gestures were not targeted or directed at anyone and did not interfere with instruction. I find that DCPS has met its burden of persuasion that Student does not require Behavioral Support Services in Student's IEP.

Up-to-Date Data

Petitioner contends that the content of the respective April 5, 2018 and March 1, 2019 IEPs was not based on up-to-date data. *Cf.* 34 CFR § 300.305(a)(2)(B) (For reevaluations, IEP team is required to identify what additional data are needed child's educational needs.) Special Education Teacher testified that at PCS, data is collected through all instruction, and maintained in binder data books and that the information for Student's IEP present levels of performance was gathered from observations and the data books and IEP progress reports. Based on this testimony and the testimony of the PCS related services providers, I find that DCPS met its burden of persuasion that its

IEPs for Student were based on up-to-date data.

Insufficient Related Services - OT and PT

In Student's March 1, 2019 IEP, OT related services were reduced from 1 hour per week to 30 minutes per week. In her hearing testimony, Independent OT opined that it appeared that Student was still regressing and that reducing OT services would likely put Student at increased risk of regression. The purpose of related services is to assist a child with a disability to benefit from special education. *See* 34 CFR § 300.34(a). PCS OT, who has provided services to Student since the start of the 2018-2019 school year, explained that because Student was being nourished via the G-tube, Student no longer needed OT services to promote self-feeding skills at school. I found PCS OT to be a more credible witness than Independent OT, who had never evaluated Student or met the child. I conclude that DCPS has established that the provision of 2 hours per month of OT services in the March 1, 2019 IEP was appropriate to assist Student to benefit from special education at PCS.

The 2018 and 2019 IEPs provided for Student to receive 1 hour per month of PT related services. Petitioner's expert, Independent PT, recommended that 1 hour per week of PT related services would be appropriate for Student, if Student were able to participate, and opined that 1 hour per month was not sufficient based on documentation of regression since 2017. DCPS' expert, PCS PT explained that Student's PT services had been reduced to 1 hour per month in the May 16, 2017 IEP due to Student's progress at home and at school and Student's increased endurance. She

denied that the decrease in PT services was due to regression. Here, I again find the PCS expert to be more credible. Like Independent OT, Independent PT never met Student or spoke to Student's service providers. PCS PT was Student's PT service provider from 2014 until July 2017 and she participated in a September 4, 2019 Analysis of Existing Data meeting. In sum, I conclude that DCPS has shown through its expert witnesses that the provisions for OT and PT related services in the April 5, 2018 and March 1, 2019 IEP were reasonably calculated to assist Student to benefit from the full-time special education services at PCS.

Suitability of Placement at PCS

Petitioner contends that PCS is unsuitable for Student because the school is too large and the student-to-teacher ratio too high. Here Petitioner paints with too broad a brush. I have determined above in this decision that Student's IEPs were not appropriate because they did not provide adequate accommodations or services to ensure Student would be safe from seizure related falls and injuries. I also found that DCPS had not met its burden to show what extent of progress was appropriate for Student at the time the April 5, 2018 and March 1, 2019 IEPs were developed, or that these IEPs were reasonably calculated to enable Student to make such progress. However, with respect to PCS' school size or the 12:8 student-to-teacher ratio in Student's classroom, that there was no persuasive evidence that PCS is not suitable for Student. I conclude that Petitioner did not make a *prima facie* showing PCS is unsuitable as an educational placement or location of services for Student.

Implementation of Dedicated Aide Requirement

Student's IEPs, since at least May 16, 2017, have provided that Student requires the support of a full-time dedicated aide. To establish a denial of FAPE, a parent "must show more than a *de minimis* failure to implement all elements of that IEP, and, instead, must demonstrate that the school board or other authorities failed to implement substantial or significant provisions of the IEP." *Beckwith v. District of Columbia*, 208 F. Supp. 3d 34, 49 (D.D.C. 2016), citing *Houston Indep. Sch. Dist. v. Bobby R.*, 200 F.3d 341, 349 (5th Cir.2000).

Special Education Teacher, who has taught Student for the last two school years, testified that there is a 1:1 aide with Student all of the time. Educational Advocate testified that when she visited the classroom in September 2019, she saw Student off to one side, unattended. However Special Education Teacher affirmed that the aide was present on that occasion too, although the aide was not in front of Student because the children were transitioning from lunch. I found Special Education Teacher to be a credible witness and I conclude that Petitioner has not established that PCS failed to implement the dedicated aide requirement of Student's IEPs.

Remedy

In this decision, I have determined that DCPS denied Student a FAPE by not developing an IEP for Student, on April 5, 2018 or thereafter, which ensured Student would be safe from seizure-related falls in the PCS education setting. I have also determined that DCPS did not meet its burden of persuasion that with Student's

documented regression since 2013, PCS' April 5, 2018 and March 1, 2019 IEPs were reasonably calculated to enable Student to make progress appropriate in light of the child's circumstances.

For relief, Petitioner requested, *inter alia*, that I order DCPS to place Student at Nonpublic School. In *Branham v. Government of the Dist. of Columbia*, 427 F.3d 7 (D.C. Cir. 2005), the D.C. Circuit Court of Appeals set forth considerations "relevant" to determining whether a private school is appropriate for a particular student, including the nature and severity of the student's disability, the student's specialized educational needs, the link between those needs and the services offered by the private school, the placement's cost, and the extent to which the placement represents the least restrictive educational environment. *Id.* at 12.

The hearing evidence did not establish that the prospective nonpublic placement proposed by Petitioner, Nonpublic School, was appropriate for Student. Notably, the school's representative, Principal, did not recall much about the severity of Student's disability including that Student suffers from drop seizures. Nor could he say which classroom Student would be placed in or the student make up of the class. Nonpublic School's student-to-teacher ratio, 7:3, appeared to be higher than that of PCS. Principal also did not confirm that ABA services are available at Nonpublic School. I conclude that Petitioner did not establish that Nonpublic School is appropriate for this Student.

Petitioner has also requested compensatory education for Student. "An award of compensatory education aims to put a student . . . in the position ■ would be in absent

the FAPE denial, and it accordingly must be reasonably calculated to provide the educational benefits that likely would have accrued from special education services the school district should have supplied in the first place. *Collette v. District of Columbia*, No. CV 18-1104 (RC), 2019 WL 3502927 (D.D.C. Aug. 1, 2019) (internal quotations and citations omitted.)

Law Firm employee, Educational Advocate, offered a compensatory education proposal for Student, which recommended, *inter alia*, 520 hours of Applied Behavior Analysis (ABA) therapy. ABA Therapist, who testified for Petitioner at the due process hearing, also opined persuasively that Student would be an appropriate candidate for ABA services. I find that it is more likely than not that Student would have made progress more appropriate in light of Student's circumstances, had some form of ABA therapy been included in Student's April 5, 2018 and March 1, 2019 IEPs. Therefore, I will order DCPS to provide Student ABA therapy services as compensatory education for the denials of FAPE in this case. This will also be an opportunity to learn whether Student would benefit from intensive ABA services and, if so, whether ABA programming should be part of Student's IEP.

Educational Advocate proposed 520 hours of ABA services based upon a recommendation in a January 3, 2013 psychological evaluation that Student's initiative and attempts at completing tasks be tracked and positive acknowledgment be given when Student would demonstrate memory and initiative. Assuming, as Educational Advocate posited, that this was, in essence, a suggestion for ABA type therapy, the

recommendation was made almost seven years ago. The period of denial of FAPE in this case, beginning with the April 5, 2018 IEP, is approximately 1½ school years. However, there is “no obligation to provide a day-for-day compensation for time missed.” *See Reid v. District of Columbia*, 401 F.3d 516, 524 (D.C.Cir. 2005). As compensatory education for DCPS’ failure to ensure that Student was provided appropriate IEPs on April 5, 2018 and March 1, 2019, I will award Student 150 hours of compensatory ABA services. (The remaining proposals for compensatory education advanced by Educational Advocate do correlate with the denials of FAPE which I have found.)

I will also order DCPS to ensure that the PCS IEP team takes a fresh look at Student’s capabilities and needs to ensure that Student is offered an educational program that meets the *Andrew F.* mandate to enable Student to make progress appropriate in light of the child’s circumstances. Identifying this target will require an thorough assessment by Student’s PCS educators and related service providers, informed by input from the parent and Student’s medical providers, of what progress is appropriate for Student given the child’s severe ID and seizure disabilities. *See Andrew F., supra.* (Child’s educational program must be “appropriately ambitious in light of his circumstances, just as advancement from grade to grade is appropriately ambitious for most children in the regular classroom. The goals may differ, but every child should have the chance to meet challenging objectives.” *Id.* at 1000.) Student’s IEP must then be revised, as appropriate, to ensure that Student’s program offers the services and

accommodations calculated to enable Student to reach these objectives.

The hearing evidence does not establish what educational program would be appropriate for Student and I do not order PCS to include ABA services or provide for a smaller classroom setting in Student's IEP. But Student's IEP team must be open minded to Student's possible need for new methodologies or a different educational setting. DCPS must also ensure that a safety plan is developed for Student to minimize the risk of injuries at school from seizure related falls.

ORDER

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

ORDERED:

1. Within 21 school days of the date of this decision, DCPS shall ensure that Student's IEP team is convened to review Student's capabilities and needs, informed by input from the parent and Student's medical providers, in order to determine what progress is appropriate for Student in light of Student's circumstances including Student's ID and OHI disabilities and to revise Student's IEP to enable Student to make appropriate progress in light of the Student's circumstances. The IEP team must consider the appropriateness of alternative instructional methodologies for Student, such as an intensive ABA program, and shall provide Student an educational placement that is safe and capable of fulfilling Student's IEP needs. If the IEP team decides that Student's educational placement is to continue at PCS, DCPS shall ensure that a seizure action safety plan is developed for Student, by a qualified professional with experience with atonic seizures, to minimize the risk of future injuries from falls at school.
2. As compensatory education for the denials of FAPE in this case, beginning within 21 school days of the date of this decision, DCPS shall provide Student 150 hours of direct individual Applied Behavior Analysis (ABA) services instruction by a Board Certified Behavior Analyst or funding authorization for Student to obtain such services through an independent provider. At DCPS' discretion the ABA services may be provided at PCS or

outside of school. DCPS shall ensure that Student's IEP team is informed of Student's progress with ABA services in order for the IEP team to consider whether direct ABA services should be made part of Student's IEP program and

3. All other relief requested by the Petitioner herein is denied.

Date: November 15, 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
DCPS Resolution Team