

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

PUBLIC CHARTER SCHOOL,	Date Issued: October 12, 2018
Petitioner,	Hearing Officer: Peter B. Vaden
v.	Case No: 2018-0165
PARENTS,	Hearing Dates: Sept. 20, 21 and 24, 2018
on behalf of STUDENT, ¹	Office of Dispute Resolution, Room 112
Respondents.	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 Public Charter School (PCS) against the Parents, 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 its due process complaint, PCS seeks a determination that its Individualized Education Program (IEP), as amended on June 25, 2018, is appropriate for Student.

PCS’ Due Process Complaint, filed on June 27, 2018, named Parents as respondents. The undersigned hearing officer was appointed on June 28, 2018. On July 7, 2018, Parents, by counsel, filed a responsive pleading, including their Motion to Dismiss, Notice of Insufficiency, Motion for Continuance and Response to the Due

¹ Personal identification information is provided in Appendix A.

Process Complaint. By order of July 12, 2018, I overruled the Parents' Notice of Insufficiency. By order of July 27, 2018, I denied the Parents' Motion to Dismiss, granted their Motion for Continuance and extended the final decision due date to October 12, 2018.

The due process hearing was held before the undersigned impartial hearing officer on September 20, 21 and 24, 2018 at the Office of Dispute Resolution in Washington, D.C. The hearing, which was closed to the public, was recorded on an electronic audio recording device. Petitioner PCS was represented by ASSISTANT DIRECTOR and by PCS' COUNSEL. Respondent Parents both appeared in person and were represented by PARENTS' COUNSEL.

At the beginning of the due process hearing, Parents' Counsel renewed, on the record, the Parents' motion to dismiss PCS' due process complaint on the grounds that PCS' complaint was insufficient. I denied the motion.

Counsel for the respective parties made opening statements. Petitioner PCS called as witnesses SPECIAL EDUCATION TEACHER, SCHOOL PSYCHOLOGIST, SPEECH-LANGUAGE PATHOLOGIST 1, OCCUPATIONAL THERAPIST, GENERAL EDUCATION TEACHER and Assistant Director. The Parents called as witnesses EDUCATIONAL CONSULTANT and Mother. Petitioner PCS' Exhibits LEA-1 through LEA-71 were admitted into evidence without objection. The Parents' Exhibits R-1 through R-61, including Exhibits R-12A, R-12B and R-15A, were all admitted into evidence without objection, except for Exhibit R-58 which was withdrawn. Counsel for the respective parties made closing arguments. There was no request to file post-hearing briefs.

JURISDICTION

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

ISSUE AND RELIEF SOUGHT

The issue in this case is whether Petitioner PCS' IEP and educational placement developed for Student in June 2018 were appropriate. For relief, PCS seeks a determination from the Hearing Officer that its June 2018 IEP and educational placement for Student, which are contested by the Parents, are appropriate.²

FINDINGS OF FACT

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

1. Student, an AGE child, resides in the District of Columbia with Parents. Testimony of Mother. Student was adopted by Parents as an infant. Student's birth mother reportedly did not receive prenatal care and had a difficult unplanned delivery at home. The birth mother's health history reportedly includes mental health difficulties and addiction. Exhibit LEA-23.
2. Student is eligible for special education under the primary IDEA disability classification Specific Learning Disability (SLD). Exhibit LEA-51.
3. The Parents enrolled Student in PCS, an independent District of Columbia

² On the last day of the due process hearing, Parents' Counsel sought to assert a claim for reimbursement to the Parents for their unilateral enrollment of Student at NONPUBLIC SCHOOL for the 2018-2019 school year. *See Sch. Comm. of the Town of Burlington v. Dep't of Educ.*, 471 U.S. 359, 105 S.Ct. 1996, 85 L.Ed.2d 385 (1985). Since the Parents did not make their reimbursement claim prior to the hearing, I denied the Parents leave to assert this claim in the present proceeding. In their response to the due process complaint, the Parents reserved the right to seek funding from PCS for their private school placement of Student.

local education agency (LEA), at the beginning of the 2014-2015 school year. Student continued at PCS until the end of the 2017-2018 school year. For the 2018-2019 school year, the Parents have unilaterally enrolled Student in Nonpublic School, where Student is in GRADE. Testimony of Mother.

4. In 2011, the Parents referred Student to DCPS Early Stages for evaluation due to concerns about Student's language development. At the time, testing suggested that Student's cognitive functioning was Low Average. Despite having low speech intelligibility, Student was found to be performing within normal limits for speech and language. Following these evaluations, Student was found ineligible for special education. However, the PCS speech-language pathologist began providing Student speech intervention services in September 2014. Exhibit LEA-13.

5. Student was first determined eligible for special education, based on a Speech or Language Disability, in April 2015. Exhibits LEA-2, LEA-3. Student's initial IEP was developed on May 12, 2015 by the PCS IEP team. The initial IEP identified Adaptive/Daily Living Skills and Communication/ Speech and Language as areas of concern. The May 12, 2015 IEP provided Student 4.5 hours per week of Specialized Instruction in the general education setting and 1 hour per week of Speech-Language Pathology. Exhibit LEA-4.

6. Student's IEP team at PCS met for the annual review of Student's IEP on April 27, 2016. Mother, Father and CONSULTANT attended the IEP team meeting. Reading, Mathematics and Written Expression were added as additional IEP areas of concern. Student's Specialized Instruction Services were increased to 9 hours per week, including 4 hours outside general education. The revised IEP continued to provide for 1 hour per week of Speech-Language Pathology for Student. Exhibit LEA-5. Following an

Occupational Therapy (OT) evaluation in May 2016, Student's IEP was amended on June 20, 2016 to add annual goals for Motor Skills/Physical Development and 1 hour per week of OT services. Exhibit LEA-9.

7. A PCS school psychologist, SCHOOL PSYCHOLOGIST 1 conducted a Psychoeducational Reevaluation of Student in November 2016. In her November 28, 2016 assessment report, School Psychologist 1 wrote that the Parents reported that Student's emotional, behavioral, and attention issues had persisted since Student was a young child; that Student often got very aggressive and angry; that during these episodes Student would become disrespectful and violent; that Student engaged in temper tantrums almost daily, ranging from 10-20 minutes in duration; that even when calm, Student had trouble sitting still, such as during dinner or homework; that Student struggled with any kind of transition, such as returning from school breaks and during these times, Student's aggressive behavior would escalate; that Student had difficulty regulating behaviors and emotions when tired; that Student's oppositional and aggressive behavior spiked when presented with parental commands or if boundaries were imposed; that attention from onlookers appeared to be another motivator, and Student often imitated negative behaviors from others; that positive reinforcement and redirection were helpful in managing Student's behavior, and that the Parents had also implemented a cool down spot and a chart for demonstrating pro-social skills at home. The family had participated in weekly parent-child interaction therapy (PCIT) through a nonprofit center, but Student did not react well to the parent-centered techniques. Exhibit LEA-13.

8. School Psychologist 1 reported that Student's teachers also expressed concerns regarding Student's ability to attend to instruction, retain academic concepts,

express self, and follow directions. During an observation of Student in the classroom setting, School Psychologist 1 observed that Student struggled to follow along with step-by-step instructions and to attend to the group lesson and that Student required frequent support from peers and adults. Exhibit LEA-13.

9. On assessments administered by School Psychologist 1, Student's overall level of cognitive functioning tested within the Below Average range. Student demonstrated Below Average performance across the verbal, nonverbal reasoning, spatial, short-term memory, and long-term retrieval composites. Student struggled to comprehend and follow directions, to identify and complete patterns, and to complete visual-motor integration tasks. School Psychologist 1 reported that Student had difficulty remembering more than 2 pieces of information at a time, which would likely interfere with the ability to follow multi-step directions. Academically, assessment data indicated that Student was performing below grade-level expectations, specifically in mathematics. Student presented with Reading, Written Expression, and Mathematics skills Below Average for Student's age. Student struggled to form letters and numbers correctly, and was inconsistent in both letter identification and letter-sound correspondence skills. Behavior rating scales completed by Mother and teachers indicated elevated levels of attention problems and hyperactivity for Student across the home and school environments. Clinically significant levels of both internalizing and externalizing behaviors were reported to occur within the home setting. Mother reported that Student presented with very high levels of aggression and emotional control issues and struggled to overcome setbacks and to manage responses to everyday challenges. School Psychologist 1 recommended, *inter alia*, that a referral for an

Attention-Deficit/Hyperactivity Disorder (ADHD) might be appropriate for Student within 1-2 years. Exhibit LEA-13.

10. On December 5, 2016, Student's IEP team met at PCS to review the updated evaluations. Mother shared that since the prior year, she had seen great growth in Student, that Student was making text connections and was attending more to task without getting frustrated. The IEP team reviewed Student's eligibility for Speech or Language Impairment (SLI) and Developmental Delay (DD) and agreed that Student met criteria for both categories and that DD was Student's primary disability. Exhibit LEA-14. The team changed Student's primary disability classification to DD. Exhibit LEA-15. The December 5, 2016 IEP provided for Student to receive 9 hours per week of Specialized Instruction, including 4 hours per week outside general education, 1 hour per week of Speech-Language Pathology, and 1 hour per week of OT, divided between 30 minutes each of push-in and pull-out services. Exhibit LEA-14.

11. On or about January 11, 2017, PCS obtained Mother's agreement to amend Student's IEP, without an IEP team meeting, to add language goals to address Student's weaknesses in following multi-step directions, recalling sentences and understanding word relationships. Exhibit R-9. Student's IEP special education and related services were not changed. Exhibit LEA-14.

12. As of March 17, 2017, Student was reported to be progressing on 19 of 22 annual goals in the December 5, 2016 IEP (as amended on January 11, 2017), including 3 goals Student had "Mastered." Student had stalled on the math rote counting goal. Annual goals for segmenting and blending Consonant-Vowel-Consonant (CVC) words and for identifying word-finding strategies had just been introduced. Exhibit R-10.

13. Student's PCS IEP team reconvened on April 10, 2017. Both Parents attended the IEP meeting. Student was reported to have made significant growth in reading and to be doing very well in writing. In math, Student was reported to struggle to explain the math, but was able to show it. The IEP team's plan for math was to work to keep Student on grade level. Student was reported not to have any behavior concerns at school. At the IEP meeting, Student's Present Levels of Performance and Annual Goals were updated. In the April 10, 2017 IEP, the provisions for Student's special education and related services were left unchanged at 9 hours per week of Specialized Instruction, including 4 hours outside general education, 1 hour per week of Speech-Language Pathology and 1 hour per week of OT services. Exhibit LEA-19.

14. Student's final grades for the 2016-2017 school year were "Emerging" in Art, Math and Science; "Progressing" in Behavior, Dance, and ELA; and "Mastery" in Fitness and Music. Exhibit LEA-56.

15. In the 2017-2018 school year, the Parents became concerned by Student's behavior at home. Mother was concerned that she had seen a dramatic shift in Student since the start of the school year and that Student had been very aggressive with her and had acted out negative views of school, both at home and at play therapy. Mother recorded a video of two of these at-home episodes, which she showed to some of the PCS educators. Testimony of Mother. Student's teachers and Assistant Director were surprised by Student's behaviors at home, because they had not seen any extreme behaviors by Student at school. Testimony of Special Education Teacher, Testimony of General Education Teacher, Testimony of Assistant Director.

16. In September 2017, because of concerns about what was going on at home with Student, the Parents engaged Educational Consultant. Testimony of Mother. On

September 25, 2017, Educational Consultant conducted a 2-hour observation of Student at PCS, in both the general education and special education classrooms. Although Educational Consultant observed some weaknesses, notably that Student would become off-task when working independently and was easily distractible, she observed that overall Student was engaged and involved in the classes. Educational Consultant had a positive impression of the PCS program. At that time, Educational Consultant did not recommend that the Parents move Student to another school, but that they “wait and see.” Testimony of Educational Consultant.

17. On October 2, 2017, Student’s IEP team met at PCS. Both Parents and Educational Consultant attended this meeting. Speech-Language Pathologist 1 explained proposed new Speech and Language goals for Student. The IEP team agreed to amend Student’s IEP to include 3 new Speech and Language goals and to adjust language in existing Speech and Language and Reading goals. The school representatives on the IEP team did not believe that additional Speech and Language service hours were warranted. At the meeting, Mother discussed her concerns about the dramatic shift in Student’s behavior, outside of school, since the start of the school year. Special Education Teacher reported that Student did not act out at school. Exhibits LEA-20, LEA-21. On October 5, 2017, Student’s IEP was amended to incorporate the annual goal changes. Exhibit LEA-22.

18. In October 2017, the Parents engaged LICENSED PSYCHOLOGIST to conduct an independent comprehensive psychological evaluation to assess Student’s cognitive and academic functioning, attention and executing functioning skills and social/emotional functioning. In December 2017, Licensed Psychologist conducted a battery of assessments and had the Parents, Student and a teacher complete behavior

rating scales. Licensed Psychologist also interviewed Student and the Parents. In her January 6, 2018 report, Licensed Psychologist reported that Student's Global Ability Index measure of general intelligence fell within the Average range of performance. Student's performance on the Processing Speed Index indicated that processing speed was an area of weakness. Student's performance on the Story Memory subtest indicated that Student had significant difficulty with auditory memory. Licensed Psychologist found that Student met diagnostic criteria for Attention Deficit Hyperactivity Disorder (ADHD), Combined Type, and as a result, Student had trouble controlling attention; that it was extremely hard for Student to sustain attention over time without becoming distracted; that Student was often distracted by uncomfortable feelings (*e.g.*, anxiety, boredom, irritability, or frustration); that Student also presented with hyperactivity, meaning that it was harder for Student to control the impulse to move the body; that Student also met diagnostic criteria for Specific Learning Disorder, with Impairment in Reading, or Developmental Dyslexia; that test results also showed that Student was a dysfluent reader, struggled to decode words, and had difficulty with phonological processing and with reading comprehension; that Student demonstrated writing difficulties, consistent with Dyslexia, and met diagnostic criteria for Specific Learning Disorder With Impairment in Written Expression; that Student demonstrated mathematics difficulties, including problems with basic math facts, number sense, mathematical reasoning, and accurate and fluent calculation, meeting diagnostic criteria for a Specific Learning Disorder With Impairment in Mathematics, or Dyscalculia; that Student met diagnostic criteria for Mixed Receptive-Expressive Language Disorder; that Student had significant difficulties expressing self, particularly with word finding, expressive vocabulary, grammar, sentence construction, and verbal fluency; and that

Student had receptive language problems, specifically with difficulties with phonemic discrimination, auditory comprehension, and difficulties with understanding the grammatical and morphological aspects of language. Licensed Psychologist reported that Student's rate of progress was considerably slower than that of same-aged peers and that Student was demonstrating difficulty tolerating frustration for challenging or non-preferred tasks. Licensed Psychologist reported that Student demonstrated executive functioning weaknesses including difficulties with self-monitoring, difficulty with inhibition, difficulty switching between tasks, difficulty with planning/organization, and difficulty working quickly and efficiently. Additionally, she reported that Student demonstrated difficulties with stamina and arousal, particularly for non-preferred tasks. Licensed Psychologist reported that Student also met diagnostic criteria for Adjustment Disorder, with Anxiety and recommended that Student continue in therapy to learn to cope with anxiety. Exhibit LEA-23. Licensed Psychologist did not conduct an observation of Student at PCS. Testimony of Educational Consultant.

19. By agreement of counsel, Licensed Psychologist submitted a Declaration for the due process hearing, because she was unavailable to testify due to schedule conflicts. Exhibit R-58. In her January 6, 2018 written report, Licensed Psychologist recommended that an appropriate educational placement for Student would be a small classroom setting for all applied subjects and specials classes, being a setting that focuses on the needs of children with reading, writing, and math disabilities. She recommended also that Student would require high levels of support to address Student's Language Disorder, ADHD and executive functioning weaknesses and would need a low student-to-teacher ratio in order for educators to provide Student with sufficient individualized attention. Exhibit LEA-23.

20. The Parents obtained an independent speech and language evaluation of Student in early 2018. The independent evaluator reported that Student had deficits in global language skills, articulation and intelligibility. She recommended that Student receive at least two hours of speech therapy per week. Exhibit LEA-24.

21. Student's IEP team convened at PCS on March 7 and March 16, 2018 to review the independent psychological and speech-language evaluations obtained by the Parents and to revise Student's IEP. Both Parents and Educational Consultant attended the meeting. At the meeting, General Education Teacher reported that Student was making a lot of progress in Foundations, a comprehensive reading, spelling, and handwriting program. Special Education Teacher reported that in math, Student was working within grade level for three domains and was below grade level for measurement and data. Special Education Teacher also reported that in Reading, Student had made more than 1 year of growth since the start of the school year, but was still below grade level. In Writing, Student had mastered a goal for writing numbers and was working on sight words. Speech-Language Pathologist 1 reported that though Student was making progress, Student had not progressed as much as hoped on the multiple goals adopted by the IEP team in fall 2016. The Occupational Therapist reported that Student had made great progress in OT. After updating Student's IEP present levels of performance, baselines and annual goals, the IEP team increased Student's Specialized Instruction Services to 18 hours per week, including 10 hours outside general education. For related services, the team continued 1 hour per week of Speech-Language Pathology and 1 hour per week of OT. Exhibits LEA 26, LEA-27.

22. At the March 16, 2018 IEP team meeting, Educational Consultant stated that the Parents intended to send Student to Nonpublic School for the 2018-2019 school

year. The Parents indicated that their intent was to place Student at Nonpublic School at public expense. Exhibit LEA-28. Educational Consultant and Father both expressed concern about Student's rate of progress at PCS. Educational Consultant stated that Student needed to be in a small class throughout the school day. PCS' Counsel and school staff agreed to put together a justification, on behalf of the Parents, to the D.C. Office of the State Superintendent of Education (OSSE) for consideration of whether Student needed a more restrictive placement. Exhibit LEA-26.

23. At the request of PCS' Counsel, on April 20, 2018, Parents' Counsel provided a memorandum from Educational Consultant outlining the Parents' concerns about Student's educational progress at PCS and the March 16, 2018 IEP. Educational Consultant highlighted, among other issues that the Parents were concerned that Student required Specialized Instruction outside general education for all classes – both content and elective courses – as well as integrated speech and language services throughout the school day. Exhibit LEA-32.

24. PCS convened a Student Support Services (SSS) meeting on April 27, 2018 to discuss whether to proceed with a change in placement process for Student. Both Parents and Educational Consultant attended the meeting. Special Education Teacher reported that Student was becoming a stronger reader. Another educator added that Student had improved in the area of writing and had more strengths in the area. Father expressed concerns about Student's cognitive results and lower academic performance. He stated that PCS was not restrictive enough to provide for Student's needs, particularly in Reading. Educational Consultant asserted that Student had weaknesses in Reading, Writing and Math and that there had been a lack of adequate progress. Assistant Director discussed a proposal to provide Student with an additional hour of

IEP Speech and Language services each week. The team agreed that PCS would conduct additional evaluations of Student before moving forward with the change in placement process. Exhibits LEA-35, LEA-36.

25. On May 4, 2018, PCS increased Student's IEP Speech and Language services to 2 hours per week, plus .5 hours per month of consultation services. Exhibit LEA-37.

26. On May 14, 2018, an independent Speech-Language Pathologist conducted an Assistive Technology (AT) evaluation of Student, upon PCS' referral. This evaluator concluded that Student's immediate need was for improved phonological and executive function awareness, not primarily AT tools, and that the IEP team should reassess Student's AT needs and capacity each year. Exhibit LEA-40.

27. In April and May 2018, PCS' Occupational Therapist conducted an OT reassessment of Student. He concluded that overall, Student presented with fair legibility while writing, but presented difficulties with speed, neatness and accuracy when copying. Exhibit LEA-41.

28. In May 2018, Speech-Language Pathologist 1 reevaluated Student to obtain additional information about Student's word-finding skills. She concluded that Student presented with expressive vocabulary within the average range, receptive vocabulary below the average range and word finding skills within the very weak range. Exhibit LEA-42.

29. In April and May 2018, School Psychologist 2 conducted a psychoeducational reevaluation of Student. In her May 23, 2018 report, School Psychologist 2 reported that Student's parents had concerns about Student's behavior, attention, and emotional regulation skills for many years; that Student continued to

have 'melt-downs' and exhibit both verbal and physical aggression behaviors at home; that Student's current teachers expressed concerns regarding Student's ability to retain academic concepts; that Student's assessment data (iReady) indicated that Student was performing below-grade expectations, specifically in Reading; that during observations in the classroom setting, Student was at times able to maintain attention, but at other times struggled to follow along with step-by-step instructions and attend to lessons; that Student's level of inattention appeared to be higher in the general education setting, even when in a small group; that Student required frequent support from peers and adults. School Psychologist 2 concluded that the results of her current evaluation indicated that Student had some deficits within phonological awareness and phonological memory; that Student was able to blend sounds to create words and isolate beginning and end parts within words; that Student struggled when having to isolate the middle sounds within words; that Student's biggest area of difficulty was with Rapid Naming, which is the efficiency with which individuals are able to retrieve phonological codes, and that these skills may affect how Student remembers pronunciations of letters, word segments, or entire words; that within math, Student was often able to solve simple addition and subtraction problems with the use of visual aids; that Student struggled when numbers were missing from a sentence, when asked to read simple graphs, and to group items based on clues; that Student's performance within some of these tasks may have been impacted by limited ability to maintain attention and by language deficits; that standardized behavior scales collected from Student's mother and teachers revealed elevated levels of learning problems across home and school environments and that At-Risk to Clinically Significant levels of both internalizing and externalizing behaviors were reported to occur within the home setting, including

Student's presenting with very high levels of aggression, emotional control issues, managing responses to everyday challenges, managing impulses and maintaining attention. Exhibit LEA-43.

30. On June 11, 2018, the SSS team reconvened at PCS. Both Parents and Educational Consultant and Parents' Counsel attended the meeting. After reviewing the PCS reevaluations of Student, the team agreed that Student met criteria for Speech and Language Impairment (SLI), Specific Learning Disability (SLD) and Other Health Impairment (OHI). The team agreed that SLD was the more appropriate disability classification for Student. Exhibit LEA-44.

31. As of June 20, 2018, Student was reported to be Progressing on all of the May 4, 2018 IEP annual goals. Exhibit LEA-60.

32. On June 21, 2018, Student's SSS team reconvened at PCS to consider the change-in-placement request previously made by the Parents for Student. OSSE REPRESENTATIVE led the discussion. OSSE Representative queried about current IEP progress report results. The PCS principal shared that Student had grown significantly on the i-Ready assessments and had made more than one year's growth. Parents' Counsel acknowledged that Student had made progress, but asserted that with Student's high cognitive scores, Student should be achieving more, especially in Reading. OSSE Representative concluded that Student was making a good amount of progress and reported that she had not seen that PCS was unable to serve Student. She stated that her recommendation was not to support placement of Student at a special education day school. The school representatives on the team decided that Student did not need a more restrictive placement than Student's educational placement at PCS. Parents' Counsel gave notice that the Parents formally rejected the team's decision and that they

would place Student at Nonpublic School and would seek public funding for the unilateral placement. Exhibit LEA-48.

33. On June 25, 2018, PCS amended Student's IEP to update Present Levels of Performance and Annual Goals, update eligibility information and add to Other Classroom Aids and Services. Exhibit LEA-51.

34. For the last quarter of the 2017-2018 school year, Student's grades at PCS were all P's (Progressing), except for an E (Emerging) in ELA and an M (Mastery) in Music. Exhibit LEA-59.

35. If Student had returned to PCS for the 2018-2019 school year, Student would have been provided ELA and math instruction in a special education setting, one-half in small groups in the general education classroom and one-half with the special education teacher in the pull-out setting. Testimony of Assistant Director.

36. On July 19, 2018, Parents' Counsel provided written notice to PCS that the Parents were withdrawing Student from PCS for the 2018-2019 school year. Exhibit LEA-54.

CONCLUSIONS OF LAW

Based upon the above findings of fact and argument and legal citations of counsel, as well as this hearing officer's own legal research, the conclusions of law of this hearing officer are as follows:

Procedural Background

In this novel proceeding, Public Charter School has taken preemptive action in filing a due process complaint to seek a determination that its June 2018 IEP and educational placement for Student are appropriate under the IDEA. The Parents rejected the IEP and enrolled Student at Nonpublic School for the 2018-2019 school

year. The Parents gave oral notice to PCS that they would seek public funding for their unilateral placement of Student at Nonpublic School. However, prior to PCS' initiating this due process proceeding, the Parents had not formally demanded tuition reimbursement from PCS for their enrollment of Student at Nonpublic School.

As I discussed in my July 27, 2018 order denying the Parents' motion to dismiss PCS' complaint, PCS' right to seek relief in this case finds support in the decision of the U.S. District Court for the District of Maryland in *Yates v. Charles Cty. Bd. of Educ.*, 212 F. Supp. 2d 470 (D. Md. 2002). The court in *Yates* observed that the IDEA expressly provides that either "[a] parent or a public agency may initiate a hearing" before a [hearing officer] when there is a dispute about a child's educational placement. *Id.* at 472. The court pronounced that the public agency's right to have the placement dispute timely resolved by a hearing officer was not overridden by the parents' preference to make a unilateral placement of their child in a private school and litigate the question of their right to reimbursement at a time of their own choosing. *Id.* The *Yates* decision is not binding in this jurisdiction – but it is persuasive precedent. *See, e.g., Idea Pub. Charter Sch. v. District of Columbia*, 374 F. Supp. 2d 158 (D.D.C. 2005), where U.S. District Judge Lamberth explained the *Yates* analysis, without expressing disagreement.³ In my order denying the Parents' motion to dismiss, I concluded that

³

Judge Lamberth wrote,

In *Yates*, a Maryland district court interpreted the regulatory text of [34 CFR § 300.507(a)(1)] (stating that "a parent or public agency" may initiate a due process hearing) in holding that a local school board had standing to request a hearing before an administrative law judge. *Yates*, 212 F.Supp.2d at 474. Because the parents in *Yates* had reserved the right to pursue a claim against the school board following the board's decision not to place the child in a private school, the court held that the board need not wait for the parents to initiate a hearing. *Id.* at 472. By allowing the board to initiate the hearing against the parents, the board would be protected in its statutory obligations

PCS had stated a claim upon which relief can be granted. Throughout this proceeding, Parents' Counsel has preserved the Parents' position that I lack jurisdiction over PCS' due process complaint.

Burden of Proof

As provided in the D.C. Special Education Student Rights Act of 2014, PCS, as the party which filed for the due process hearing, shall bear the burden of production and the burden of persuasion, including on the appropriateness of the existing or proposed IEP program or placement. The burden of persuasion shall be met by a preponderance of the evidence. *See* D.C. Code § 38-2571.03(6).

Analysis

Was the PCS IEP and educational placement, developed for Student in June 2018, appropriate for the child?

By the time of the June 2018 multidisciplinary team (MDT) meetings for Student, the child had been attending Public Charter School (PCS) for four school years and had been receiving special education and related services there since May 2015. Under the April 27, 2016 and April 10, 2017 IEPs, Student had been provided 9 hours per week of Specialized Instruction, including 4 hours outside general education, 1 hour per week of Speech-Language Pathology and 1 hour per week of OT services. PCS' March 16, 2018 IEP, as last amended on June 25, 2018 (hereafter the "June 25, 2018 IEP"), increased Student's Specialized Instruction Services to 18 hours per week, including 10 hours outside general education, and provided for 2 hours per week of Speech-Language

under IDEA, which would thereby protect the student, should the student remain within the protection of IDEA. *Id.* at 471–73.

Idea Pub. Charter Sch., 374 F. Supp. 2d at 165.

Pathology, .5 hours per week of Speech-Language consultation services and 1 hour per week of OT.

Since the March 16, 2018 IEP team meeting, the Parents and their representatives have been clear that they disagreed with the PCS IEP because they believed that Student had not, in the past, made adequate academic progress at PCS. The Parents contend that for the 2018-2019 school year, Student required not just more hours of Specialized Instruction and Speech-Language Pathology as provided in the June 25, 2018 IEP, but an educational placement outside of general education for all classes – both core content and specials courses – as well as integrated speech and language services throughout the school day. PCS must shoulder the burden of persuasion that its proposed June 25, 2018 IEP is appropriate for Student.

In *Andrew F. ex rel. Joseph F. v. Douglas Cty. Sch. Dist. RE-1*, 137 S.Ct. 988, 197 L.Ed.2d 335 (2017), the U.S. Supreme Court elaborated on the standard, it first enunciated in *Bd. of Educ. v. Rowley*, 458 U.S. 176, 207, 102 S.Ct. 3034, 73 L.Ed.2d 690 (1982), for what constitutes an appropriate IEP. Discussing these decisions in *Z. B. v. District of Columbia*, 888 F.3d 515 (D.C. Cir. 2018), the D.C. Circuit Court of Appeals explained that in *Andrew F.*, the Supreme Court

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

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

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

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

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

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

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

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

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

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

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

whether the IEP was objectively reasonable at the time it was promulgated.
Z. B., 888 F.3d at 524 (internal quotations and citations omitted.)

There is no dispute that PCS adequately assessed Student's needs prior to developing the June 25, 2018 IEP. In the 2017-2018 school year, Student was formally evaluated and reevaluated multiple times – both by PCS' psychologist, Speech-Language Pathologists, and an Occupational Therapist and by independent evaluators retained by the Parents. In June 2018, after reviewing these evaluations, Student's MDT team agreed that Student met IDEA disability criteria for Speech and Language Impairment (SLI), Specific Learning Disability (SLD) and Other Health Impairment (OHI-ADHD) and that SLD was more appropriate for Student's primary disability classification.

These assessments of Student, notably the in-depth independent comprehensive psychological evaluation by Licensed Psychologist, are informative as to Student's individual circumstances, that is, as to the extent of Student's disability. Licensed Psychologist, who evaluated Student in December 2017, reported that Student has multiple impairments which affect the child educationally. Student has trouble controlling attention due to ADHD and it is extremely hard for the child to sustain attention over time without becoming distracted. Student is often distracted by uncomfortable feelings (*e.g.*, anxiety, boredom, irritability or frustration). Student presents with hyperactivity, meaning that it is harder for the child to control the impulse to move the body. Student is a dysfluent reader, struggles to decode words and has difficulty with phonological processing. Student demonstrates writing difficulties with sentence structure, grammar, composition and mechanics, consistent with Dyslexia. Student demonstrates mathematics difficulties, or Dyscalculia. Student has Mixed Receptive-Expressive Language Disorder, meaning the child has significant difficulties

expressing self, particularly with word finding, expressive vocabulary, grammar, sentence construction and verbal fluency. Student also has receptive language problems, specifically, difficulties with phonemic discrimination, auditory comprehension and with understanding the grammatical and morphological aspect of language. Student demonstrated a processing speed weakness and executive functioning challenges, including difficulties with self-monitoring, difficulty with inhibition, difficulty switching between tasks, difficulty with planning/organization and difficulty working quickly and efficiently. Licensed Psychologist also reported that Student meets diagnostic criteria for Adjustment Disorder, with Anxiety. School Psychologist 2 reevaluated Student in spring 2018 and her conclusions were not inconsistent with Licensed Psychologist's more in-depth evaluation.

With that understanding of Student's circumstances, I turn to the inquiry in this case: Taking account of what PCS knew or reasonably should have known of Student's needs for the 2018-2019 school year, was the educational program proposed in the June 25, 2018 IEP reasonably calculated to enable Student's progress? *See Z. B., supra* at 524. The respective parties' experts, not unexpectedly, offered divergent opinions based, in large part, upon their differing perceptions of Student's progress in the 2017-2018 school year at PCS.

PCS called several of Student's educators as experts. Special Education Teacher, who was Student's special education teacher for the 2017-2018 school year, described Student as a "rock star" who participated in grade-level instruction with no problems, making consistent progress in all areas over the school year. She cited, specifically, Student's growth in math, reading, and writing and Student's progress toward adaptive goals. She also cited the statements in Student's March 16, 2018 which indicated

improved baselines from the April 10, 2017 IEP. General Education Teacher, who taught Student all year, testified that Student did very well in her classroom and, that with supports, Student thrived academically. She opined that Student had grown socially and academically in the general education setting and noted that Student gained confidence over the school year and showed a large increase in independence. Assistant Director testified that over the last two school years, she saw a lot of progress for Student and opined that Student had made consistent progress and gains. Speech-Language Pathologist 1 testified that Student was doing well and showing consistent growth in Speech and Language skills. All of these experts opined that Student would have been able to continue to make progress at PCS under the proposed June 25, 2018 IEP, which doubled the Specialized Instruction and Speech-Language Pathology services over what Student had been provided in the April 10, 2017 IEP. School Psychologist 2 also opined that Student had been making progress at PCS and that the hours and educational setting proposed in the June 25, 2018 IEP were appropriate.

The Parents' expert, Educational Consultant, praised PCS as a wonderful school that "thinks outside the box" and provides a positive, nurturing experience for its students. However, her opinion was that despite PCS' efforts, Student did not make adequate progress over the 2017-2018 school year and that Student now requires a full-time special education day program as offered by Nonpublic School, with speech therapy services integrated into the classroom. Educational Consultant cited Student's performance on parts of the Comprehensive Test of Phonological Processing, Second Edition (CTOPP-2) and the KeyMath Diagnostic Assessment, 3rd Edition (Key-Math 3) administered by School Psychologist 2 in May 2018. On the CTOPP-2, Student's performance on the Phonological Memory composite fell within the Poor range. On the

Key-Math 3, Student's performance on Applications was within the Well Below Average range. Educational Consultant also cited Student's ability to spell only 2 of 5 Consonant-Vowel-Consonant (CVC) words correctly at the time of the March 16, 2018 IEP team meeting.

However, on cross-examination, Educational Consultant agreed that based on the i-Ready diagnostic assessment, Student made more than one year's growth in both Reading and Math over the 2017-2018 school year and that Student's Fountas and Pinnell (F&P) reading level had increased from Level B to Level D between September 2017 and March 2018. (Educational Consultant did not know Student's end-of-year F&P level.) In her testimony, Educational Consultant discounted the reliability and validity of the i-Ready instrument. But she admitted that had not raised any concerns about the validity of Student's i-Ready results at the MDT meetings where Student's progress was discussed.

Educational Consultant also made much of the fact that in Student's time at PCS, Student had only "Mastered" a few IEP annual goals. However, as the Supreme Court stressed in *Andrew F., supra*, "every child should have the chance to meet challenging objectives." *Id.* 137 S.Ct. at 1000. A New York District Court recently explained, in a decision cited by PCS, that whether a child achieves the annual goals set forth in an IEP is not the controlling issue; rather, it is the child's progress toward achieving them. *See C.S. v. Yorktown Cent. Sch. Dist.*, No. 16-CV-9950, 2018 WL 1627262 (S.D.N.Y. Mar. 30, 2018). In this case, it is undisputed that Student progressed on nearly all IEP goals over the 2017-2018 school year. Moreover, as concerns Student's progress in the last school year, as Special Education Teacher explained, the March 16, 2018 IEP team revised Student's baselines and "pumped up" Student's goals from the April 10, 2017

IEP, before the IEP anniversary date, in light of the progress Student had already made. For example, the March 16, 2018 IEP team increased Student's first math goal – from rote counting up to 120 to reading, writing and counting numbers up to 1000 – because Student had already reached the 120 goal. Educational Consultant's opinion that Student was not making appropriate progress because the IEP progress reports indicated progress, rather than mastery of IEP goals, was not persuasive.

As discussed above, despite Student's generally testing in the Average range on cognitive measures, the evaluations indicate that Student's "circumstances" include multiple challenging impairments including learning disabilities, ADHD, Receptive-Expressive Language Disorder and executive functioning challenges. Given Student's circumstances, I found that Educational Consultant's opinion that Student had not made adequate progress in the 2017-2018 school year to be less persuasive than the opinions of the PCS experts, who worked with Student all year and based their opinions of Student's progress on the child's overall performance, rather than on specific scores reported in the psychological evaluations.

As evidence of Student's need for a full-time special education day school, the Parents also offered written submissions from Licensed Psychologist and CHILD THERAPIST. In her January 6, 2018 psychoeducational evaluation report, Licensed Psychologist recommended that an appropriate educational placement for Student would be a small classroom setting for all applied subjects and specials courses. Child Therapist, who provided play therapy to Student over the 2017-2018 school year, wrote a "To Whom it may Concern" letter in June 2018, in which she opined that given Student's "emotions around the school experience," she could "infer that [Student's] current school setting is not one in which the client is able to thrive, either academically

or emotionally.” See Exhibit R-39. Neither Licensed Psychologist nor Child Therapist qualified as a special education expert or testified at the due process hearing. Nor did either professional observe Student in the classroom or speak with Student’s educators at PCS. I discount their opinions on Student’s educational placement requirements.

In sum, I find that the evidence is persuasive that Student did make educational progress in the 2017-2018 school year at PCS. Indeed, Parents’ Counsel stated as much at the June 21, 2018 MDT meeting (although counsel said that the progress was not adequate). Student’s progress under the prior IEP is not dispositive as to the appropriateness of the June 25, 2018 IEP. See *J.N. v. District of Columbia*, 677 F. Supp. 2d 314, 322 (D.D.C. 2010) (Academic progress is strong, though not dispositive, evidence that an IEP provides educational benefit.) However, PCS was responsive to the Parents’ concern that the progress Student had made at PCS was not sufficient. PCS convened multiple MDT and IEP meetings in the spring of 2018 to consider the Parents’ concerns and to review both the independent evaluations obtained by the Parents and the reevaluations conducted by PCS. PCS also hosted an MDT meeting for the Parents to “justify” to OSSE their request for a more restrictive environment for Student. Both Parents and Educational Consultant were active participants in all of the meetings. As Special Education Teacher testified, the IEP team agreed to everything which the Parents wanted in Student’s IEP except for placement in a full-time special education school. Notably, the IEP team doubled Student’s Specialized Instruction Services to 18 hours per week and increased Speech-Language Pathology to 2 hours per week, as recommended in the independent Speech and Language assessment. Under the June 25, 2018 IEP, Student would have received instruction for all core academic subjects in a special education setting at PCS.

In *Andrew F., supra*, the Supreme Court pronounced that a proposed IEP must be “reasonable,” not necessarily ideal. *See, also, Z. B., supra*, 888 F.3d at 528. While an IEP under the IDEA must be reasonably calculated to enable a child to make progress appropriate in light of the child’s circumstances, it does not have to “maximize the potential of a disabled child or include all the wishes of a child’s parents.” *See Rowley*, 458 U.S. at 189–90, 102 S.Ct. 3034. Considering the evidence before me, including the opinions of the parties’ respective experts, I conclude that PCS has met its burden of persuasion that its June 25, 2018 IEP, with the substantial increase in special education and Speech and Language services over the prior year IEP, was reasonably calculated to enable Student to make progress appropriate in light of the child’s circumstances and that Student’s proposed educational placement at PCS for the 2018-2019 school year was appropriate.

ORDER

Based upon the foregoing Findings of Fact and Conclusions of Law, and having granted the relief requested by Petitioner PCS herein, this matter is ended.

SO ORDERED.

Date: October 12, 2018

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

NOTICE OF RIGHT TO APPEAL

This is the final administrative decision in this matter. Any party aggrieved by this Hearing Officer Determination may bring a civil action in any state court of competent jurisdiction or in a District Court of the United States without regard to the amount in controversy within ninety (90) days from the date of the Hearing Officer Determination in accordance with 20 U.S.C. § 1415(i).

cc: Counsel of Record
Office of Dispute Resolution
OSSE Division of Specialized Education