

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

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OSSE  
Office of Dispute Resolution  
October 02, 2020

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

Date Issued: October 2, 2020

Petitioner,

Hearing Officer: Peter B. Vaden

v.

Case No: 2020-0122

PUBLIC CHARTER SCHOOL,

Online Video Conference Hearing

Respondent.

Hearing Dates: September 15 and 16, 2020

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**HEARING OFFICER DETERMINATION**

**INTRODUCTION AND PROCEDURAL HISTORY**

This matter came to be heard upon the Administrative Due Process Complaint Notice filed by the Petitioner 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 Student has been denied a free appropriate public education (FAPE) by Respondent Public Charter School’s (PCS) failure to ensure that an appropriate Individualized Education Program (IEP) was developed for Student in February 2020 and its failure to determine Student eligible for Extended School Year (ESY) services.

Petitioner’s original Due Process Complaint, filed on June 19, 2020, named PCS

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

as Respondent. The undersigned hearing officer was appointed on June 22, 2020. With leave of the hearing officer, Petitioner filed an amended due process complaint on July 15, 2020. On July 16, 2020, I convened a telephone prehearing conference with counsel to discuss the issues to be determined, the hearing date and other matters.

On July 24, 2020, PCS filed a Notice of Insufficiency. By order issued July 27, 2020, I determined that the amended due process complaint was not sufficient on its face and granted Petitioner leave to file another amended complaint. Petitioner filed her second amended due process complaint on August 3, 2020, which resulted in starting anew the IDEA timelines, including the due date for my final decision. My final decision is now due by October 17, 2020. On August 7, 2020, the parties met for a resolution session and were unable to resolve the issues in dispute.

The hearing, which was closed to the public, was convened before the undersigned impartial hearing officer on September 15 and 16, 2020. Due to the closing of the hearing rooms at the Office of Dispute Resolution in the wake of the Coronavirus outbreak, the due process hearing was held on line and recorded, using the Microsoft Teams video conference platform. Mother appeared on line for the hearing and was represented by PETITIONER'S COUNSEL, PETITIONER'S CO-COUNSEL 1, and PETITIONER'S CO-COUNSEL 2. Respondent PCS was represented by LEA REPRESENTATIVE and by PCS' COUNSEL. A legal intern associated with Petitioner's Counsel audited the proceedings.

Petitioner's Counsel made an opening statement. MOTHER testified at the

hearing and called as additional witnesses EDUCATIONAL ADVOCATE 1, CHILD PSYCHOLOGIST, PSYCHIATRIST, THERAPIST AND EDUCATIONAL ADVOCATE 3. At the conclusion of Petitioner's case in chief, PCS' Counsel made an opening statement and PCS called as witnesses SPECIAL EDUCATION COORDINATOR (SEC), SCHOOL PSYCHOLOGIST, SPECIAL EDUCATION TEACHER and LEA Representative. Petitioner's Exhibits P-1 through P-24 and Respondent's Exhibits R-1 through R-55 were all admitted into evidence without objection. At the conclusion of the evidentiary phase, counsel for the respective parties made oral closing arguments. There was no request to file written closings.

### **JURISDICTION**

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

### **ISSUES AND RELIEF SOUGHT**

The issues for determination, as certified in the July 16, 2020 Prehearing Order, are:

- a. Whether on February 28, 2020, PCS denied Student a FAPE when it failed to provide appropriate IEP supports and services, including educational placement at a non-public therapeutic day school;
- b. Whether PCS denied Student a FAPE by (1) failing to convene a meeting to determine whether Student qualified for Extended School Year services for summer 2020 and (2) failing to provide Student with ESY services during the 2020 summer.

For relief, Petitioner requests that PCS be ordered to convene an IEP Team

meeting to develop appropriate educational programming and an educational placement for Student at a non-public therapeutic day school. The Petitioner also seeks an award of compensatory education for Student and requests that the hearing officer award compensatory education, order a compensatory education study, or reserve the issue of compensatory education.

### **FINDINGS OF FACT**

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

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

#### **Testimony of Mother.**

2. Student is eligible for special education under the IDEA disability classification Specific Learning Disability (SLD). Exhibit R-15. Student was identified as a child with an SLD when in 1<sup>st</sup> Grade. Exhibit R-6.

3. For the 2020-2021 school year, Student is enrolled in PCS, where Student is repeating GRADE. Testimony of Mother. Student first enrolled in PCS in the 2017-2018 school year. Exhibit R-6.

4. In a January 2010 psychological evaluation report, it was reported that Student's scores on cognitive testing were in the Low Average to Average range. Student's academic achievement scores were in the Very Low to Average range. Exhibit P-10. Student's academic achievement was reevaluated in the fall of 2014. The evaluator reported that although Student showed significant improvement in some

academic areas, Student was still below grade level in reading, writing and math and Student's SLD classification was still appropriate. Exhibit P-10.

5. Student's May 3, 2018 IEP, as amended on June 21, 2018, identified Student's areas of concern as Mathematics, Reading and Written Expression. The IEP provided for Student to receive 25.5 hours per week of Specialized Instruction outside the general education setting. The IEP team determined that Extended School Year (ESY) services were not required for the provision of FAPE. Exhibit P-20.

6. PCS convened an IEP annual review meeting for Student on April 26, 2019. Exhibit P-1. That day, Mother had asked for the meeting to be rescheduled but PCS held the meeting without Mother's participation. Testimony of Mother. The IEP team reduced Student's Specialized Instruction Services to 16 hours per week, all outside the general education setting. The April 26, 2019 IEP team determined that Extended School Year (ESY) services were not required for the provision of FAPE. Exhibit P-1.

7. Mother requested another IEP team meeting at the beginning of the 2019-2020 school year. The meeting was held on September 17, 2019. Mother, Educational Advocate 1 and Student attended. Mother stated that she would like for Student's Specialized Instruction Services to be restored to 22.5 hours per week and requested that Student be provided a dedicated aide, and that life skills (counting money and reading an analog clock) be restored to Student's IEP. Mother also requested that

Student be reevaluated by PCS. LEA Representative decided that there would be a review of data, Student would be reevaluated and, after the reevaluation, Student's IEP would be revised as needed based on the evaluation data. Exhibit R-1.

8. School Psychologist started a comprehensive psychological reevaluation of Student at PCS in early October 2019. Cognitive test results revealed that Student's cognitive ability, as estimated by the Wechsler Intelligence Scale for Children Fifth Edition (WISC-V), was in the Extremely Low range (FSIQ=62). School Psychologist considered this score to be an accurate representation of Student's abilities, as Student demonstrated generally evenly developed abilities across cognitive domains. Academic achievement measures showed Student's overall Broad Reading score fell within the Low range (SS=68). Student's overall math abilities were classified as being within the Very Low range and Student's test scores for Broad Written Language indicated Low functioning. As relates to social/emotional functioning, based on rating scales completed by Student, Student was experiencing significant deficits in the areas of Atypicality, Social Stress, Anxiety, Depression, Sense of Inadequacy, Attention Problems, and Hyperactivity. Mother's ratings scales responses indicated that Student was experiencing significant deficits in the areas of Anxiety, Depression, and Somatization. The school social worker's and teacher's responses indicated that Student was experiencing significant issues in the area of Conduct. School Psychologist diagnosed Student with an SLD with moderate impairments in reading and writing and

a severe impairment in mathematics. School Psychologist also made diagnoses of Post Traumatic Stress Disorder (PTSD) and Major Depressive Disorder by history. Although this report was dated November 1, 2019, cognitive and academic testing of Student was completed on October 7, 2019 before Student was hospitalized on October 15, 2019.

Exhibits R-6, R-7.

9. On October 15, 2019, after disclosing suicidal thoughts to the PCS school counselor, school staff took Student to HOSPITAL where Student was admitted to the Adolescent Psychiatric Unit (APU). Student was discharged on October 23, 2019. Staff at Hospital diagnosed Student with Post Traumatic Stress Disorder (PTSD) arising from alleged sexual assault by a relative some 8 years earlier, Major Depressive Disorder (MDD) and suicidal ideation. Exhibit P-18.

10. Child Psychologist wrote a letter "To Whom it May Concern" dated October 23, 2019. This letter reported Student's hospitalization and mental health diagnoses and that it appeared that Student's condition was affecting functioning at school and interfering with the ability to properly access the curriculum, as stress related to school contributed to Student's hospitalization. The psychologist recommended that Student would benefit from increased support for academic needs, as well as increased 1:1, group behavioral and emotional support. The psychologist stated that if additional IEP interventions for anxiety and depression did not improve academic functioning, the Hospital team would recommend a more therapeutic school

for Student. Exhibit P-14. This letter was provided to PCS. Testimony of LEA Representative.

11. On October 24, 2019, Special Education Coordinator wrote Educational Advocate 1 by email that she would like to send over a release authorization that would allow School Psychologist to speak with the doctor who treated/evaluated Student at Hospital. Exhibit R-32. School Psychologist called Mother several times and sent emails to her regarding obtaining release of Student's medical information from Hospital. Testimony of School Psychologist. Student returned to school on October 28, 2019. Exhibit R-23.

12. On November 12, 2019, PCS convened a special education eligibility review meeting for Student. Mother, Student and Educational Advocate 1 participated. Mother reported that Student was getting to be in a better place and, overall, moving in the right direction. School Psychologist went over the psychological reevaluation report she had completed and reported her diagnosis of SLD in reading, mathematics and written expression, as well as diagnoses of PTSD and MDD. The team determined that Student continued to be eligible for special education as a student with an SLD. The team agreed to meet within 30 days to update Student's IEP. Exhibit R-7. This eligibility determination has not been contested by Petitioner. Hearing Officer Notice.

13. On December 4, 2019, Special Education Coordinator sent Mother and her representatives by email a copy of the draft IEP for Student to be discussed at the



December 10, 2019 IEP team meeting. Exhibit R-33.

14. Student's IEP team met on December 10, 2019 to review and revise Student's IEP. Mother, Student, Educational Advocate 1 and EDUCATIONAL ADVOCATE 2 attended the meeting. Mother reported that Student was attending therapy outside of school every week and was on an antidepressant medication. Educational Advocate 1 expressed concern that Student had been missing school 2-3 days per week, due to not feeling well or having some kind of anxiety around school. Educational Advocate 2 reported that Mother had concerns about Student's time in special education and Student's placement at PCS, as well as concerns about academic goals being scaffolded appropriately and geometry goals that did not address underlying skill deficits. Educational Advocate 2 also stated Mother's concern that Student needed a one to one aide. LEA Representative reported that attendance was the most important thing to target then. MATH TEACHER reported that Student had been successful during Quarter 1 and that attendance concerns began around the middle of October and had continued to be a challenge. Mother reported that the absences centered around Student's anxiety and medication management and she was hopeful that the supports in place outside of school would assist in improving Student's attendance. LEA Representative discussed the need for a release of medical records so that the school could communicate with Student's psychiatrist and therapist. Exhibits R-10, P-3.

15. The December 10, 2019 IEP team discussed and updated Post Secondary Transition goals for Student. The team agreed to provide Student 16 hours of Specialized Instruction per week, outside of the general education setting, 60 minutes per month of Behavior Support Services (BSS) inside general education and 60 minutes per month of BSS outside the general education setting. The team did not agree that Student required a dedicated aide. The team decided that Student did not qualify for Extended School Year (ESY) services. This IEP was finalized on December 10, 2019. Exhibits R-10, R-11. Petitioner did not contest the appropriateness of the December 10, 2019 IEP.

Representation of Counsel.

16. Student was admitted to Hospital from December 20 to December 30, 2019 following an alleged attempted suicide at home. The Hospital discharge diagnoses were PTSD Chronic, MDD Recurrent Moderate, Rule out borderline intellectual functioning and Rule out borderline personality disorder. Exhibit P-18.

17. Student was admitted to Hospital from January 16 to January 23, 2020 after reportedly attempting suicide at the home. The discharge diagnoses were PTSD Chronic, MDD Recurrent Moderate, Rule out borderline intellectual functioning and Rule out borderline personality disorder. Exhibit P-18.

18. On February 12, 2020, Educational Advocate 1 sent by email to Special Education Coordinator verification of Student's hospitalizations, including a February 3, 2020 written statement by a Hospital psychiatrist, which stated that she had treated

Student and that Student “would benefit from a level 5 school [private, separate day school] and, at the very least, a higher level services” than Student was receiving.

Exhibit R-34.

19. Student was admitted to Hospital from February 12 to February 20, 2020 after reportedly attempting suicide at the home. The discharge diagnoses were PTSD, MDD Recurrent Moderate, Rule out borderline intellectual functioning and Rule out borderline personality disorder. Exhibit P-18.

20. Beginning February 4, 2020, Special Education Coordinator communicated with Mother by email regarding Student’s school absences and requested documentation of Student’s hospitalizations so that Student’s absences could be excused. On February 12, 2020, Educational Advocate 1 wrote Special Education Coordinator by email that Mother would like to schedule another IEP Review Meeting with the participation of Student’s therapist and one of the doctors. On February 20, 2020, Special Education Coordinator confirmed in an email to Mother and Educational Advocate 1 that an IEP team meeting would be held on February 28, 2020. Special Education Coordinator also attached a release form for Mother’s signature to allow the PCS team, to speak with Student’s treating team at Hospital. Items of discussion intended for the February 28, 2020 meeting included reviewing attendance, reviewing Student’s diagnoses and treatment plan, and verifying Student’s program was appropriate. Exhibit R-37.

21. The PCS IEP team meeting convened on February 28, 2020. Mother, Educational Advocate 1 and Therapist participated in the meeting. Mother started the meeting asking how the school could move forward with Student's education plan. There was discussion of Student's numerous unexcused absences. During the meeting, Mother requested that the IEP Team amend Student's IEP: "1) to reflect [Student's] emotional disturbance classification and 2) to a non-public IEP so that [Student] can attend a nonpublic therapeutic day school." Exhibit P-4, Exhibit R-40. Therapist discussed Student's PTSD and new visual and auditory hallucination symptoms. There was discussion about Student's need for a therapeutic day school placement. LEA Representative explained the process of making a request to the D.C. Office of the State Superintendent of Education (OSSE) for a change of placement to a nonpublic school. There was discussion about whether Student's disability classification, SLD, should be changed and the need to obtain Student's medical records from Hospital. The MDT team decided on the following next steps:

Obtain consent to evaluate Student with a clinical evaluation (school-based psychologist with collaboration with [REDACTED] mental health professionals);

Schedule a home visit with the school social worker and an additional member of the team during the school day;

Discussion with Student and Mother about graduated plan for Student's re-entry into school, consider re-entry to school with a modified schedule;

Amendments to Student's IEP to increase Behavior Support Services (BSS) from 120 minutes to 240 minutes per month, provide a dedicated aide and possibly

add specialized school transportation.

Exhibit P-4.

22. Educational Advocate 1 testified she recalled a request to change IEP goals at the February 28, 2020 IEP team meeting. Special Education Coordinator denied that there was a request from Mother or her representatives to change Student's December 10, 2019 IEP, except the request for a change in placement to a therapeutic day school. Educational Advocate 1's meeting notes do not document a request to change the December IEP, except to request a therapeutic school placement. I find by the preponderance of the evidence that at the February 28, 2020 IEP team meeting, there was no request to change the annual goals in Student's IEP, no request to change Student's IEP post-secondary transition plan and no request for Student to be determined eligible for ESY services. Exhibits R-7, P-4; Testimony of Educational Advocate 1, Special Education Coordinator.

23. On February 28, 2020, PCS completed an amended IEP form for Student to increase Student's BSS to 240 minutes per month, all outside general education, and to add a dedicated aide for 6 hours per day. The December 10, 2019 IEP was not otherwise changed. Exhibit R-15.

24. Student was admitted to Hospital from March 4 to March 10, 2020 for reported suicidal ideations. The discharge diagnoses were MDD, PTSD and Intellectual Disability (ID). Exhibit P-18.

25. Student was admitted to Hospital from March 28 to April 3, 2020 for alleged attempted suicide. The discharge diagnoses were PTSD Chronic, ID and rule out MDD with psychotic features, Borderline personality traits. Exhibit P-18.

26. On April 2, 2020, Educational Advocate 1 forwarded to PCS by email the consent to release medical records form executed by Mother. Exhibit P-6. On April 6, 2020, School Psychologist forward the release form by facsimile to Hospital. Exhibit R-49. School Psychologist also attempted, unsuccessfully, to reach Student's treating psychologist and psychiatrist at Hospital by telephone to discuss Student's case.

Testimony of School Psychologist.

27. On April 3, 2020, Hospital sent PCS, by facsimile, a 47 page discharge report on Student, following Student's discharge from Hospital on April 3, 2020. Exhibit R-49. These were the only records for Student, which PCS received from Hospital in response to School Psychologist's requests in spring 2020. Testimony of School Psychologist.

28. Educational Advocate 1 received all of Student's medical records from Hospital in early summer 2020. She did not provide copies of these records to PCS. Testimony of Educational Advocate 1. PCS first received these additional records when included in Petitioner's prehearing disclosures. Testimony of LEA Representative.

29. On May 5, 2020, Child Psychologist and Psychiatrist from Hospital prepared a "To Whom it May Concern" letter comprehensively documenting Student's

admissions, treatment and diagnoses at Hospital over the 2019-2020 school year. These caregivers reported that Student met criteria for PTSD, MDD with anxious distress and ID. They recommended, *inter alia*, that Student was in need of a therapeutic school setting in which Student would be separated from nondisabled peers, and would be able to receive instruction in a smaller setting with more support as well as therapeutic services to access as needed within the school building. They predicted that if not provided these services, Student would require placement in a residential treatment center to meet Student's complex psychiatric and academic needs. Exhibit P-14. PCS did not receive the letter from Student's treating psychologist and psychiatrist until it was provided with Petitioner's prehearing disclosures on or about September 8, 2020. Testimony of School Psychologist, Testimony of LEA Representative.

30. PCS uses the Measure of Academic Progress (MAP) computerized adaptive test to measure students' growth over time in academics. Student's MAP scores did not indicate that Student regressed in critical skills over the 2019 summer break in either Reading or Mathematics. Exhibit R-24, Testimony of LEA Representative.

31. Student was admitted to Hospital from March 4 to March 10, 2020 after reportedly expressing suicidal ideations to Student's outside therapist. The discharge diagnoses were PTSD, MDD and Intellectual Disability (ID). Exhibit P-18.

32. On March 9, 2020, Educational Advocate 1 informed PCS by email that Mother reaffirmed her request for a change in placement for Student. Exhibit R-41. On

March 16, 2020, Special Education Coordinator notified the parent that a change-in-placement meeting, with OSSE, was scheduled for March 31, 2020. Exhibit R-42.

33. On March 16, 2020, PCS and other public schools in the District of Columbia closed for in-person classes due to the Coronavirus pandemic. Testimony of LEA Representative, Hearing Officer Notice.

34. On March 31, 2020, PCS convened a videoconference change-in-placement meeting with OSSE CIP COORDINATOR participating. Mother, Educational Advocate 1 and DEDICATED AIDE also participated. OSSE CIP Coordinator, encouraged the school team to create a plan to re-integrate Student back to school, emphasized that when Student is not in school, Student is missing out on IEP plans and stated that the team was missing the data and documentation around Student's progress with the plan. OSSE CIP Coordinator recommended against a nonpublic placement for Student. Exhibit R-18, R-19.

35. On April 1, 2020, PCS issued a Prior Written Notice (PWN) informing Mother that the OSSE representative recommended against a change in placement for Student and that the school IEP team members also did not believe a change in placement was warranted; that the team believed that it needed more information from Student's treatment team at Hospital; the team needed to complete the previously agreed upon reevaluation of Student to better determine the impact of emerging mental health issues on Student's school performance as well as to determine an appropriate



disability classification for Student and that the team wanted to see how Student would respond to the additional supports recently put into place. The PWN stated that the team agreed to revisit the need for a change in placement after additional information was gathered. Exhibit R-20.

36. Student was admitted to Hospital from March 28 to April 3, 2020 after reportedly attempting suicide at the home. The discharge diagnoses were PTSD, ID and Rule out MDD with Psychotic Features, Borderline Personality Traits. Exhibit P-18.

37. On May 6, 2020, School Psychologist conducted an in person interview with Student and conducted social-behavioral testing. The interview had been delayed due to Student's unavailability and virus restrictions. From the testing administered to Student, Student's responses to rating scales and her review of the April 3, 2020 discharge summary from Hospital, School Psychologist concluded that Student should continue treatment with both school based and community based mental health providers to address all clinical symptoms with a specific focus on school refusal; that as Student had been diagnosed with an Intellectual Disability, Student lacks the proper coping techniques to navigate age appropriate issues with peers; that Student lacks the mental and emotional capacity to implement appropriate boundaries in interpersonal relationships; that therapy should focus on boundary setting, challenging Student's views of the world around as Student has the propensity to distort reality, and assertiveness training to ensure that Student is able to request proper accommodations

to combat academic issues; that Student would also benefit from learning anxiety specific techniques so that Student is able to address academic and social issues separately without becoming overwhelmed to the point that Student engages in self-injurious behaviors and other means of attention-seeking; that regardless of the school environment that is provided, Student would need to address these therapeutic components to be successful and to begin creating healthy relationships; that Student should continue to meet with the psychiatrist to implement and maintain a consistent course of psychotropic treatment; that Student should participate in a Functional Behavioral Assessment so that the MDT is able to continue addressing specific factors centered around school refusal behaviors with the purpose of creating and implementing a plan to remove the barriers that make it difficult to Student to access education and that ongoing MDT meetings should include Student's treatment team at Hospital to provide the most appropriate collaborative care. Exhibit R-21.

38. On July 2, 2020, Educational Advocate 1 wrote Special Education Coordinator to inquire whether Student would be participating in ESY for summer 2020. LEA Representative responded by email the same day that the IEP team had not found Student eligible for ESY and ESY was not included in Student's IEP. Exhibit R47.

39. From December 16, 2019 through the virus-related school closings on March 16, 2020, Student was only present for several school days. Exhibit R-23. During the distance learning period after March 16, 2020, Dedicated Aide would check

in with Student several times a day. Student only engaged a handful of times.

Testimony of LEA Representative. Student made no progress on IEP goals for the 3<sup>rd</sup> and 4<sup>th</sup> grading periods of the 2019-2020 school year. Student failed all courses for the 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> grading periods. Exhibit P-7.

40. At the Resolution Session Meeting for this case on August 7, 2020, the PCS representatives requested an IEP team meeting to review the addendum to the psychological evaluation completed by School Psychologist in May 2020 and stated that the request for a change in placement would be on the table. The parent refused to meet at that time. Testimony of Mother, Exhibit R-22.

### **CONCLUSIONS OF LAW**

Based upon the above Findings of Fact and argument and legal memoranda of counsel, as well as this hearing officer's own legal research, my Conclusions of Law are as follows:

#### **Burden of Proof**

As provided in the D.C. Special Education Student Rights Act of 2014, the party who filed for the due process hearing, the Petitioner in this case, shall bear the burden of production and the burden of persuasion, except that where there is a dispute about the appropriateness of the student's IEP or placement, or of the program or placement proposed by the local education agency, the agency shall hold the burden of persuasion on the appropriateness of the existing or proposed program or placement; provided that

the Petitioner shall retain the burden of production and shall establish a *prima facie* case before the burden of persuasion falls on the agency. The burden of persuasion shall be met by a preponderance of the evidence. *See* D.C. Code § 38-2571.03(6).

### Analysis

A. On February 28, 2020, did PCS deny Student a FAPE when it failed to provide appropriate IEP supports and services, including educational placement at a non-public therapeutic day school?

On December 10, 2019, Student's IEP team at PCS met for the annual review of Student's IEP. Mother and two educational advocates for Student participated in the meeting. At that point, Student's school attendance had become a major concern. The IEP team reviewed and updated Student's April 26, 2019 IEP and agreed to provide Student 16 hours of specialized instruction per week, outside of the general education setting, 60 minutes per month of Behavior Support Services (BSS) inside general education and 60 minutes per month of BSS outside the general education setting.

After the annual IEP meeting, Student was hospitalized twice, following reported suicide attempts in December 2019 and January 2020. Through the closing of school in March 2020 due to the Coronavirus pandemic, Student only attended several days of school. On February 12, 2020, Educational Advocate 1 wrote Special Education Coordinator by email that Mother would like to schedule another IEP review meeting with the participation of Student's therapist and one of the doctors. An IEP team meeting was scheduled for February 28, 2020. Special Education Coordinator wrote

mother that items of discussion for this meeting would included reviewing Student's attendance, reviewing Student's diagnoses and treatment plan, and verifying that Student's program was appropriate.

Mother, Educational Advocate 1 and Student's therapist participated in the February 28, 2020 IEP team meeting. At the meeting, Mother and Educational Advocate 1 requested that Student's educational placement be changed to a therapeutic day school. There was also discussion about PCS' need to receive Student's medical records from Hospital. The IEP team did not change Student's educational placement at the February 28<sup>th</sup> meeting. LEA Representative explained the process of making a request to the D.C. Office of the State Superintendent of Education (OSSE) for a change of placement to a nonpublic school. In the interim, the team decided, *inter alia*, to conduct a clinical evaluation of Student and to immediately amend Student's IEP to increase Behavior Support Services (BSS) from 120 minutes to 240 minutes per month and to provide for a dedicated aide. On February 28, 2020, PCS completed an IEP amendment form to increase Student's BSS to 240 minutes per month and to add a dedicated aide for 6 hours per day. Student's December 10, 2019 annual IEP, was not otherwise changed.

On March 31, 2020, PCS convened a videoconference change-in-placement meeting, with OSSE's representative participating. OSSE recommended against a nonpublic placement for Student. On April 1, 2020, PCS issued a Prior Written Notice to

Mother informing her that the school IEP team members also did not believe a change in placement was warranted, that the team needed more information from Student's treatment team at Hospital and that Student's clinical reevaluation needed to be completed.

In this matter, Petitioner challenges the appropriateness of the February 28, 2020, IEP amendment. Petitioner has never formally contested the appropriateness of the December 10, 2019 IEP or the subsequent decision of the IEP team not to change Student's placement at the March 31, 2020 meeting with OSSE.

Petitioner's Counsel argues that when Student's IEP team met on February 28, 2020, it was obliged to review and revise, as appropriate, Student's entire December 10, 2019 IEP, even though Petitioner's representatives only requested that the IEP be changed to place Student at a therapeutic day school.<sup>2</sup> I disagree. The IDEA requires that a local education agency (LEA) must ensure that an IEP team reviews the child's IEP periodically, but not less than annually, to determine whether the annual goals for the child are being achieved. At the annual review meeting, the team must revise the IEP as appropriate to address annual goals, results of any reevaluation, information about the child, the child's anticipated needs, or other matters. 34 C.F.R. §§ 300.324(b)(1) (i)-(ii), 300.324(b)(2).

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<sup>2</sup> Educational Advocate 1 had also requested that Student's disability classification be changed from SLD to Emotional Disturbance (ED). In this proceeding, Petitioner has not contested PCS's failure to change Student's disability classification.

After the annual IEP team meeting for a school year, changes to an IEP, *without redrafting the entire IEP*, may be made by the entire IEP team at an IEP team meeting, or the IEP may be amended without an IEP team meeting when the parent and public agency agree. Upon request, a parent must be provided with a revised copy of the IEP with the amendments incorporated. *See* 34 C.F.R. §§ 300.324(a)(4), (a)(6); U.S. Department of Education, *Assistance to States for the Education of Children with Disabilities*, 71 Fed. Reg. 46540, 46686 (August 14, 2006). I conclude that when Student's IEP team met on February 28, 2020 to change parts of Student's December 10, 2019 IEP, PCS was not obliged to review and redraft the entire IEP.

Petitioner's expert witness, Educational Advocate 3, opined in her testimony that the February 28, 2020 IEP amendment was inappropriate, not only because the IEP team did not change Student's placement to a therapeutic day school and but also because the IEP annual goals and baselines and the post-secondary transition plan were not appropriate. However, the IEP goals, baselines and transition plan were developed at the December 10, 2019 annual IEP team meeting and, at the February 28, 2020 IEP team meeting, no one proposed changing these parts of Student's annual IEP. I conclude, therefore, that the IEP appropriateness issue in this case is limited to whether the PCS IEP team denied Student a FAPE by not changing Student's educational placement to a non-public therapeutic day school in the February 28, 2020 IEP amendment. PCS has the burden of persuasion on this issue.

In *Endrew F. ex rel. Joseph F. v. Douglas Cty. Sch. Dist. RE-1*, *supra*, the U.S. Supreme Court elaborated on the standard, first enunciated *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 "*specially 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).

As the U.S. District Court explained in *Moradnejad v. District of Columbia*, 177 F. Supp. 3d 260 (D.D.C.), the IDEA also requires "mainstreaming" of students with disabilities to the maximum extent appropriate.

[I]t is important to note that, in addition to the IDEA requirement that IEPs be "reasonably calculated to enable the child to receive educational benefits," *Rowley, supra*, 458 U.S. at 206–07, 102 S.Ct. 3034, the IDEA



also requires that children with disabilities be placed in the “least restrictive environment” (“LRE”). 20 U.S.C. § 1412(a)(5)(A). This means that children with disabilities must be educated in an integrated setting with children who do not have disabilities to the maximum extent appropriate. *Id.* “Special classes, separate schooling, or other removal of children with disabilities from the regular educational environment” should occur only if “the nature or severity of the disability is such that education in regular classes with the use of supplementary aids and services cannot be achieved satisfactorily.” 34 C.F.R. § 300.114(a)(2)(ii).

*Moradnejad*, at 279.

PCS’ Counsel argues that at the time of the February 28, 2019 IEP team meeting, the IEP team did not have enough information to support changing Student’s placement from the integrated setting at PCS to a nonpublic therapeutic school. I agree. The appropriateness of the February 28, 2020 IEP Amendment must be judged prospectively based on the information available to Student’s IEP team at the time of its development. *See, e.g., A.B. by Holmes-Ramsey v. District of Columbia*, No. CV 10-1283 (ABJ/JMF), 2012 WL 13041578, at \*8 (D.D.C. Feb. 14, 2012) (“[T]he adequacy or appropriateness of an IEP is evaluated based on the information available to the IEP team at the time of its formulation.”), *report and recommendation adopted*, 2012 WL 13041526 (D.D.C. Mar. 7, 2012). It is constructed only after careful consideration of the Student’s disability. *See Endrew F. supra*.

At the due process hearing, Student’s caregivers at Hospital, Child Psychologist and Psychiatrist, both offered very credible opinions that Student now requires placement at a therapeutic nonpublic day school. However, PCS only received these

experts' recommendations with Petitioner's September 9, 2020 prehearing disclosures. Previously, PCS had made several requests for Student's health records. At the December 10, 2019 IEP team meeting, LEA Representative discussed the need for a release of medical records so that the school could communicate with Student's psychiatrist and therapist. There was also discussion at the February 28, 2020 IEP team meeting about PCS' need to receive Student's medical records from Hospital PCS. Mother's consent for the release of Student's medical records was not provided to PCS until April 2, 2020. PCS was able to obtain Hospital's latest discharge summary for Student on April 3, 2020, but was only provided the rest of Student's Hospital records with Petitioner's prehearing disclosures. I find that as of the February 28, 2020 IEP team meeting, PCS lacked sufficient information and documentation that "the nature or severity of [Student's] disability" was such that Student required removal from PCS and placement at a special education day school. *See* 34 C.F.R. § 300.114(a)(2)(ii).<sup>3</sup>

The February 28, 2020 IEP team amended Student's IEP to double BSS services and provide for a dedicated aide, but deferred changing Student's educational placement, pending receipt of Student medical records and a new clinical psychological evaluation. I find that PCS has established that, based on the information available to

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<sup>3</sup> Even before receiving Child Psychologist and Psychiatrist's written recommendations, PCS offered at the August 7, 2020 Resolution Session Meeting to convene a meeting to review the updated psychological evaluation of Student, consider any additional information provided by Hospital and Mother, and consider a change in placement for Student.

Student's IEP team at the time, the February 28, 2020 IEP Revision was reasonably calculated to enable Student to make progress appropriate in light of Student's circumstances. *See Endrew F., supra*, 137 S.Ct. at 999.

B. Did PCS deny Student a FAPE by (1) failing to convene a meeting to determine whether Student qualified for Extended School Year services for summer 2020 and (2) failing to provide Student with ESY services during the 2020 summer.

Petitioner alleges that PCS did not convene a meeting to determine whether Student qualified for Extended School Year (ESY) services for summer 2020. This is incorrect. At the December 10, 2019, annual IEP review meeting, the IEP team decided that Student did not qualify for ESY. That decision was memorialized in the December 10, 2019 IEP and was reflected in the meeting notes. Petitioner and her representatives did not object to the ESY decision at the time or request reconsideration of ESY when the IEP team met again on February 28, 2020.

On July 2, 2020, Educational Advocate 1 wrote PCS to inquire whether Student would be participating in ESY for summer 2020. LEA Representative responded by email the same day that Student's IEP team had not found Student eligible for ESY and ESY was not included in Student's IEP. Petitioner claims that PCS' failure to provide Student ESY services in the summer of 2020 was a denial of FAPE. PCS contends that Student did not meet ESY criteria.

Under District of Columbia Municipal Regulations, in determining whether

extended school year services are necessary for the provision of FAPE, the IEP team shall utilize at least three (3) months of progress monitoring data from the current school year, or any relevant current data or information if three (3) months of progress monitoring data from the current school year is not available, to consider and document each of the following:

- (a) The impact of break in service on previously attained or emerging critical skills;
- (b) The likelihood and degree of regression related to previously attained or emerging critical skills; and
- (c) The time required for recoupment of previously attained or emerging critical skills.

5E DCMR § 3017.2 (2018). “ESY Services are only necessary to a FAPE when the benefits a disabled child gains during a regular school year will be significantly jeopardized if he is not provided with an educational program during the summer months.” *S.S. ex rel. Shank v. Howard Rd. Acad.*, 585 F. Supp. 2d 56, 68-69 (D.D.C. 2008), adopting standard from *MM v. Sch. Dist. of Greenville County*, 303 F.3d 523, 537–38 (4th Cir.2002)). See, also *Johnson v. District of Columbia*, 873 F. Supp. 2d 382, 386 (D.D.C. 2012) (“[A]ll students, disabled or not, may regress to some extent during lengthy breaks from school. ESY Services are required under the IDEA only when such regression will substantially thwart the goal of ‘meaningful progress.’”)

PCS’ expert, LEA Representative, testified that Student had historically not been

found eligible for ESY and there was no data to show that Student regressed in critical skills over summer breaks. She pointed out that MAPP achievement testing showed that Student experienced growth in both Reading and Math skills over the 2019 summer break. Petitioner's expert, Educational Advocate 3, opined that Student should have qualified for ESY because, based on Student's being so far behind in Student's critical skills and current level of functioning, there was a likelihood of regression over the summer break. However, Educational Advocate 3's opinion was founded on an assumption, based on Student's current level of functioning, not on actual progress monitoring data available to the IEP team. LEA Representative, by contrast, was much more familiar with Student's needs from regular meetings with the teaching team at PCS and she supported her opinion with hard data. I found LEA Representative's opinion regarding Student's need for ESY services more credible than that of Educational Advocate 3 and I conclude that PCS has met its burden of persuasion that the IEP team's decision that Student did not qualify for ESY services for summer 2020 was not a denial of FAPE.

**ORDER**

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

ORDERED:

All relief requested by the Petitioner herein is denied without prejudice to Petitioner's right to renew her request to PCS for a change in Student's educational placement based on developments since the February 28, 2020 IEP

team meeting.

Date: October 2, 2020

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