

**DISTRICT OF COLUMBIA**  
**OFFICE OF THE STATE SUPERINTENDENT OF EDUCATION**  
Office of Dispute Resolution  
810 First Street, N.E., 2<sup>nd</sup> Floor  
Washington, DC 20002

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PETITIONERS, on behalf of STUDENT, <sup>1</sup>	)	Date Issued: September 22, 2017
	)	
Petitioners,	)	Hearing Officer: Peter B. Vaden
	)	
v.	)	Case No: 2017-0111
	)	
PUBLIC CHARTER SCHOOL,	)	Hearing Dates: July 17-18, 2017
	)	August 17, 2017
Respondent.	)	
	)	Office of Dispute Resolution
	)	Rooms 2006, 2003
	)	Washington, D.C.

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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 Petitioners 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.).

Student, an AGE youth, is a resident of the District of Columbia. Petitioners' Due Process Complaint, filed on April 21, 2017, named Public Charter School (PCS) and the D.C. Office of the State Superintendent of Education (OSSE) as respondents. The undersigned hearing officer was appointed on April 24, 2017. On April 26, 2017, I granted OSSE's unopposed request to be dismissed as a party to this proceeding.

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

On May 12, 2017, I convened a prehearing telephone conference with counsel for the Petitioners and counsel for PCS to discuss the hearing date, issues to be determined and other matters. In order to accommodate the due process hearing dates agreed to by counsel, July 17-18, 2017, I granted the Petitioners' unopposed request to extend the due date for the final decision in this case from July 5, 2017 to August 4, 2017. The hearing was convened as scheduled on July 17 and 18, 2017 and was not completed. An additional hearing day was set for August 17, 2017. At the unopposed request of Petitioners, I extended the final decision due date to September 1, 2017. The due process hearing was completed on August 17, 2017. In order to allow time for counsel to submit post-hearing written argument and for the hearing officer to review the evidence and prepare the written decision, I granted the Petitioners' unopposed request to further extend the final decision due date to September 22, 2017.

The due process hearing was convened before this Impartial Hearing Officer on July 18 and 19 and August 17, 2017 at the Office of Dispute Resolution in Washington, D.C. The hearing, which was closed to the public, was recorded on an electronic audio recording device. The Petitioners appeared in person and were represented by PETITIONERS' COUNSEL and PETITIONERS' CO-COUNSEL. Respondent PCS was represented by PCS PRINCIPAL and by PCS' COUNSEL. An attorney representing PCS in a related judicial proceeding also attended.

Counsel for the respective parties made opening statements. Mother testified and Petitioners called as additional witnesses EDUCATIONAL CONSULTANT, SPECIAL EDUCATION TEACHER 1 and EARLY CHILDHOOD COORDINATOR. PCS called as witnesses SPEECH LANGUAGE PATHOLOGIST, OCCUPATIONAL THERAPIST, ABA SPECIALIST, SPECIAL EDUCATION TEACHER 2, OSSE

PLACEMENT COORDINATOR and Principal. Petitioners' Exhibits P-1 through P-52 were admitted into evidence, except for Exhibits P-26A, P-34, P-41 and P-42, which were withdrawn, and Exhibits P-18A and P-46 to which PCS' objections were sustained. Exhibits P-18 and P-22A were admitted over PCS' objections. PCS' Exhibits R-1 through R-73 were admitted into evidence, including Exhibits R-7, R-14, R-20 and R-50 admitted over Petitioners' objections.

At the beginning of the second day of the due process hearing, Petitioners' Counsel made a motion *in limine* to bar PCS from offering testimony about how Student's IEP would have been implemented in the 2016-2017 school year on the grounds that Educational Consultant's request to observe the proposed classroom at PCS in the fall of 2016 was refused. For the reasons explained on the record, I denied the motion *in limine*.

In lieu of making closing arguments, counsel for both parties filed written closings and responses.

### **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 following issues for determination were certified in the May 12, 2017 Prehearing Order:

- a. Whether PCS' proposed June 23, 2016 IEP was inappropriate for Student because the IEP included Discrete Trials, insufficient Specialized Instruction and Related Services hours, the IEP did not provide an integrated service approach, but relied on a pull-out model and the IEP did not provide for a classroom staffed by appropriately trained adults;
- b. Whether PCS denied Student a FAPE by failing to provide a suitable

educational placement in a separate special education day school with a developmental model for educational development;

c. Whether PCS denied Student a FAPE by failing to offer a placement in a safe educational setting and

d. Whether PCS denied Student a FAPE by not allowing Petitioners' educational consultant to conduct an observation of the proposed program and placement at PCS, after the parents enrolled Student in NONPUBLIC SCHOOL.

For relief, the parents request that PCS be ordered to reimburse them for the cost of Student's tuition and related costs for Nonpublic School since the 2016-2017 school year and to fund Student's placement there for remainder of the 2017-2018 school year.

### **FINDINGS OF FACT**

After considering all of the evidence admitted at the due process hearing in this case, as well as the arguments and legal memoranda of counsel, this hearing officer's Findings of Fact are as follows:

1. Student, an AGE child resides of the District of Columbia with Petitioners. Testimony of Mother. Student is eligible for special education and related services as a student with Multiple Disabilities based upon coexisting Visual Impairment and Other Health Impairment disabilities. Exhibits P-14, R-53.

2. Student had a premature birth and suffered significant post-natal complications including respiratory distress, intraventricular hemorrhages, increased intraventricular pressure for which received a ventriculoperitoneal (VP) shunt for hydrocephalus. Student later underwent surgery to release a suspected tethered spinal cord and multiple shunt revisions. Exhibit R-30. Student's medical diagnoses include early prematurity, bilateral intraventricular hemorrhages, hydrocephalus - status post VP shunt, tethered spinal cord - status post release, Cortical visual impairment (CVI),

Developmental delay, and Increased appendicular tone more on the right side. Exhibit P-7.

3. In the first quarter of 2016, CLINICAL PSYCHOLOGIST conducted a comprehensive psychological evaluation of Student upon the referral of the parents and PCS. Clinical Psychologist was unable to measure Student's cognitive abilities or academic achievement because Student had difficulty sustaining attention and was frequently unresponsive to the presented items on the standardized tests. Based on observations of Student, information from Mother and responses on rating scales by Mother and Student's teachers, Clinical Psychologist concluded that Student presented with symptoms consistent with a diagnosis of Global Developmental Delay; that Student's Cognitive Domain fell within the Significant Developmental Delay range for Student's age; that Student's Adaptive Domain fell within the Significant Developmental Delay range; that Student's Personal-Social Domain fell within the Mild Developmental Delay range and could be considered an area of relative strength. Exhibit P-31.

4. Student was initially determined eligible for special education and related services by District of Columbia Public Schools (DCPS) on October 8, 2014. Exhibit P-14.

5. Beginning in January 2013, Student attended SCHOOL 1 on two to three mornings per week where Student was placed in a general education classroom with a dedicated aide. In August 2015, Mother enrolled Student in PCS. Exhibit P-31.

6. PCS is an "LEA Charter," that is, an independent local education agency (LEA) within the meaning of the IDEA. Hearing Office Notice.

7. PCS' special education teachers must have a least a bachelor's degree and pass a Praxis exam for core knowledge in special education. Teaching Assistants must

have a high school diploma and an Associates degree or higher training. Dedicated aides must have at least a high school diploma and a background with children. All PCS staff members receive 2 weeks of training at the beginning of the school year and additional formal training throughout the school year. Testimony of PCS Principal.

8. PCS convened an IEP team meeting on September 15, 2015 to review Student's IEP because Student was new to PCS. The September 15, 2015 IEP identified Adaptive/Daily Living Skills, Communication/Speech and Language, Health/Physical and Motor Skills/Physical Development as areas of concern. With regard to how Student's disability affected access to the general education curriculum, the IEP team reported, *inter alia*, that Student required support in toileting, attendance to tasks and safety awareness; that due to Student's CVI impairment, Student had difficulty with complexity in two-dimensional materials and distance viewing; that Student's receptive language delay greatly affected Student's ability to follow directions, learn new language and vocabulary and understand academic concepts; that Student's expressive language delay impacted the ability to ask and answer questions, interact socially, communicate wants, needs and ideas and participate in classroom activities and that Student's gross and fine motor impairments limited Student's keeping up with classmates, use of bilateral coordination for bimanual tasks and participation in age-expected visual motor activities. The IEP provided for Student to receive 24.5 hours per week of Specialized Instruction outside general education (including 30 minutes per week of vision therapy) and, for related services, 60 minutes per week of Occupational Therapy (OT), 60 minutes per week of Speech-Language Pathology (SLP) and 1 hour per week of Physical Therapy (PT). The IEP related services were to be provided outside general education. The IEP also provided for 2 hours per month of Orientation and Mobility services as

Consultation Services. The September 15, 2015 IEP team determined that Student did not require a dedicated aide. Exhibit P-16.

9. At PCS, for the 2015-2016 school year, Student was initially placed in a fully self-contained, non-categorical GRADE A classroom. This was a class of 8 students with a staff of 5 adults. Exhibits R-3, R-28.

10. In the PCS November 16, 2015 Student Progress Report, Student was reported to have mastered some goals for Cognitive Development (Bangs and Shakes Toys, Pats Mirror Image and Reaches Persistently), Language Development (Combines Syllables “Da-Da” “Ba-Ba” “Mama”, Smile and Vocalizes to Mirror Image and Squeals) Social Development (May fear performing some familiar activities, Strong mother attachment, Smiles, pats, Vocalizes to Mirror Image, First separation anxiety begins) and Self-Help Development (Chews most foods well, Cooperates in Dressing and Takes off hat, shoes). Exhibit R-65.

11. Over the first quarter of the 2015-2016 school year, Mother was in regular contact with school administrators and classroom staff. While often expressing appreciation for the staff’s efforts, Mother reported recurring concerns including the frequency of communications from Student’s teachers and providers, Student’s bib not being changed when wet, Student’s toileting and Student’s not napping at school. Exhibits R-3, R-5.

12. From the beginning of the 2015-2016 school year, Mother sought more inclusion time for Student with nondisabled peers. Exhibits R-4, R-11, R-13, R-17, R-23. On November 27, 2016, Mother wrote the PCS Special Education Coordinator that Student’s medical team all agreed that Student needed to be regularly engaged with typically developing children in a classroom setting. Exhibit R-72.

13. On or about December 21, 2016, Mother learned that LEAD TEACHER had made allegations that paraprofessionals in Student's classroom had forcibly restrained Student on the cot at naptime while Student was screaming. The parents immediately stopped sending Student to school and demanded that Student be moved to a different classroom. Exhibit P-22. Lead Teacher's charges were reported to District of Columbia Child and Family Services Agency and were also investigated by PCS' Human Resources office which found the charges to be unfounded. Exhibit R-18. Lead Teacher's claims were also reported to the Metropolitan Police Department which did not result in charges. Testimony of Mother.

14. Principal met with the parents on December 23, 2016. The parents aired their concerns and insisted that Student be moved to another classroom. On January 5, 2016, an IEP team meeting was convened at PCS. The parents stated that they would not be returning Student to the current classroom and also requested that Student be reevaluated. The parents requested that Student be placed in a full-time inclusion classroom, to which the school representatives would not agree. The team agreed that Student would be moved to the GRADE B self-contained classroom on a temporary basis and that Student would also attend for 5 hours per week in a general education classroom with Student's brother. The team agreed to this change and to add the inclusion hours to Student's IEP. The team also agreed that the school would have Comprehensive Psychological, Comprehensive Occupational Therapy, Comprehensive Speech and Language and Comprehensive Physical Therapy reevaluations conducted. Exhibit R-23.

15. Student's IEP was revised on January 5, 2016 to provide for 24.5 hours per week of Specialized Instruction including 19.5 hours per week outside general education and 5 hours per week in general education. Exhibit R-22.

16. Student was moved to the Grade B self-contained classroom on January 11, 2016. Exhibit R-24. Like the Grade A self-contained classroom, in this classroom there were some 7 children with 5 adult staff members. Testimony of Educational Consultant, Exhibit R-28. Mother never observed anyone at PCS being verbally or physically abusive to Student and she never had any concerns about abuse or mistreatment of Student after Student was moved to the Grade B classroom in January 2016. Testimony of Mother.

17. Student's related services providers at PCS provided services to Student both in the self-contained classroom and on a pull-out basis. ABA Specialist also assisted in the classroom with staff development, helping to get Student down for naps and toilet training. Testimony of Speech Language Pathologist, Testimony of PCS Principal, Testimony of Occupational Therapist, Testimony of Special Education Teacher 2, Testimony of ABA Specialist.

18. By the last reporting period of the 2015-2016 school year, Student was reported to be progressing on 13 of Student's January 5, 2016 IEP goals and to have mastered 2 goals. Exhibit R-56.

19. Over the course of the 2015-2016 school year, Student made progress in different areas, including oral motor skills, up and down jaw movement for feeding, attention/duration to participate in an activity, imitation skills, physical development, following one-step directions and in communicating in a variety of ways. Testimony of Speech Language Pathologist. There was also seen slow but steady progress with the

ability to follow routines, to come when asked to engage in and to participate in things with peers. Testimony of ABA Specialist.

20. For occupational therapy (OT) goals, Student made slow but steady progress over the 2015-2016 school year, including increased independence with things in the classroom, increased use of the right hand and increased use of drawing. Student did not master any of the IEP Occupational Therapy (OT) IEP goals. Testimony of Occupational Therapist.

21. Over the 2015-2016 school year, Student made progress in mobility. Starting off, Student would need a head start to go to the playground. Closer to the spring, Student could lead with the class and keep up with the class independently. Student became more comfortable with using a “spork” to eat. Student made big gains with toileting and communicating toileting needs using the Communication Board, a low-tech Augmentative and Alternative Communication (AAC) device, which was introduced for Student in October 2016. Student made progress on remaining quiet at appropriate times. Student made progress on pointing and in turning Student’s head when spoken to by an adult, and by the end of the year, using the Communication Board to express “yes” or “no”. Testimony of Speech Language Pathologist, Testimony of Special Education Teacher 2.

22. In March 2016, the parents applied for Student’s admission to Nonpublic School. By letter of May 23, 2016, Nonpublic School offered Student acceptance in its half-day GRADE C program which runs from 12:15 p.m. to 3:30 p.m. The acceptance letter stipulated that Student would be provided 120 minutes per week of Speech and Language Therapy, 30 minutes per week of Counseling, 90 minutes per week of Occupational Therapy, 60 minutes per week of Physical Therapy, and the support of a

full time one-on-one aide. Related services and fees were to be charged in addition to tuition costs. The parents were required to make a non-refundable enrollment deposit by June 3, 2016. Exhibit P-33. The parents informed PCS that Student had been accepted at Nonpublic School. Testimony of Mother.

23. In April 2016, Petitioners' Co-Counsel contacted PCS' Counsel by email to advise that the parents had concerns about PCS' being able to meet Student's needs and would likely seek a more restrictive placement. In the meantime, Petitioners' Co-Counsel requested that the IEP team's review of Student's IEP be postponed. The parents also engaged Educational Consultant to advise them. Exhibit R-38.

24. Educational Consultant made an observation of Student at PCS on May 27, 2016. She observed Student in the noncategorical Grade B classroom and in the general education classroom. In her June 8, 2016 Observation Report, Educational Consultant recommended, *inter alia*, that "[g]iven that no benefit was observed from [Student's] participation in the general education setting and [Student's] complex needs (vision, mobility, communication, fine/gross motor, academic) [Student] requires a more intensive placement. [Student's] placement should include being with students who are verbal and able to interact as [Student] requires practice and models for those skills. [Student] requires specialized instruction, integrated therapy (speech, OT, PT) and a dedicated aide throughout [the] school day." Exhibit P-35.

25. On May 23, 2016, PCS submitted to OSSE, on behalf of the parents, a change in placement request. OSSE Placement Coordinator conducted an observation of Student at the school. A Change in Placement (CIP) meeting was convened at PCS on June 14, 2016. The parents, Petitioners' Co-Counsel and Educational Consultant attended the meeting. OSSE Placement Coordinator stated that OSSE felt that the

people and program were in place at PCS to meet Students' needs and that OSSE did not feel it was warranted to move Student to a nonpublic school. This was followed by a CIP team vote resulting in a decision that Student did not need a more restrictive environment. The parents and their representatives disagreed. Exhibit R-44.

26. Following the CIP meeting, Student's IEP team convened to review a draft IEP. That review was not completed and the parents were provided the draft IEP in order to offer changes. Exhibits R-44, R-66.

27. By letter of June 22, 2016, Educational Consultant, on behalf of the parents, requested changes to the IEP, including, changes to baseline data and annual goals in Mathematics and Reading; changes to Present Levels of Performance, baseline data and Annual Goals for Adaptive/Daily Living Skills; changes to baseline data and annual goals for Vision; changes to annual goals for Health/Physical; additions to Other Classroom Aids and Services; provision for a toileting protocol; the need for a full-time dedicated aide; Adaptive Physical Education; direct Counseling hours and Vision Consultation services. Educational Consultant also asserted that Student required an increase in service hours and a setting with integrated services throughout the day; that Student required a more restrictive setting and should receive all instruction in a special education setting that contained students who are verbal and able to interact as Student requires practice and models for those skills and that Student required specialized instruction, integrated therapy (speech, OT, PT) and a dedicated aide throughout the school day. Exhibit P-36. The IEP team reconvened on June 23, 2016. Most of Educational Consultant's recommendations, with the exception of Student's need for a more restrictive setting, were incorporated into the final IEP. Testimony of Educational Consultant.

28. PCS' June 23, 2016 Amended IEP for Student provided for 20 hours per week of Specialized Instruction Services outside general education, 5 hours per week of Specialized Instruction in general education, 90 minutes per week of OT, 90 minutes per week of Speech-Language Pathology and 2 hours per week of Physical Therapy. The IEP also provided for Consultation Services, including 2 hours per month of Orientation and Mobility, 30 minutes per month of OT, 30 minutes per month of Speech-Language Pathology and 30 minutes per month of Physical Therapy. The IEP also provided, *inter alia*, that Student required a full-time, 27.5 hours per week, dedicated aide, adaptive physical education, a toileting protocol and visually appropriate teaching materials based on Student's CVI needs. The IEP specified that Student was to receive 5 hours per week of inclusion in the general education setting to engage with peers to assist with play skills and language development. Exhibit R-53.

29. At the request of the parents, Discreet Trial Instruction (DTI) methodology was removed from the June 23, 2016 IEP and PCS representatives said that they would not use DTI instruction for Student in the 2016-2017 school year.

Testimony of Mother.

30. On July 4, 2016, PCS' Counsel forwarded the final June 23, 2016 Amended IEP to Petitioners' Co-Counsel. PCS Counsel asserted that with the exception of the placement dispute, PCS believed it had addressed all of the parents' requests. By email of July 6, 2016, Petitioners' Co-Counsel responded that the parents' "major remaining concern is the placement" and that the parents would not be accepting PCS' IEP and placement for the 2016-2017 school year. Exhibit P-37.

31. The parents unilaterally enrolled Student in Nonpublic School for the 2016-2017 school year. Student was in a Grade C class with 8-10 other children who had

a range of disabilities. Nonpublic School developed an individualized education program, called Diagnostic Prescriptive Goals (DPG), for Student at a multidisciplinary team meeting in early December 2016. For the academics sections of the DPG, the MDT team reported that Student's challenges in sustained attention and engagement, cognitive abilities, communication, motor planning, vision and social interactions make it challenging for Student to learn and participate in a larger, structured general education classroom. In order to best teach to Student's academic potential, Student requires 1: 1 and small group learning settings (no more than Student and 1 other child for academic lessons) in which the lessons are individualized to Student's strengths and weaknesses, in a specialized educational environment. Student also requires integrated and individualized therapeutic intervention throughout the school day to support Student's educational needs. In addition to academics, the DPG identified Classroom Play/Social Interaction, Speech and Language, Occupational Therapy, Gross Motor, and Social Emotional/Social Interaction as areas of concern. In addition to full-time special education, the DPG provides for Student to have a dedicated aide and to receive 120 minutes per week of Speech-Language Pathology, 90 minutes per week of Occupational Therapy, 60 minutes per week of Physical Therapy and 30 minutes per week of Counseling. Exhibit P-40. Nonpublic School does not provide visual support services for Student. However the occupational therapist works on visual perceptual goals.

Testimony of Early Childhood Coordinator.

32. For related services, Nonpublic School uses a combination of pull-out and push-in services. For speech, Student was pulled out for the majority of the sessions because in the larger classroom, attention was challenging. There are times when speech therapy is integrated into the classroom as opposed to pullout sessions. The

Occupational Therapist and psychologists work the same way. The Physical Therapist worked with Student outside the classroom on mobility and, in conjunction with the teacher or teacher's assistant, worked with Student on positioning during academic lessons as well. Testimony of Early Childhood Coordinator.

33. Over the 2016-2017 school year, Student made slow progress on some DPG goals at Nonpublic School. Student vocalized and verbalized more, progressed with functional communication, showed improvement in motor skills and in the ability to interact with peers. Testimony of Early Childhood Coordinator.

34. The parents paid \$50,000-55,000 for Student's tuition and related services expenses at Nonpublic School for the 2016-2017 school year. Testimony of Mother.

35. In the fall of 2016, Educational Consultant requested permission from PCS to make another observation of the classroom proposed for Student. By that time, Student was attending Nonpublic School. The observation request was denied because Student was no longer enrolled in PCS. PCS Principal told Educational Consultant that visitors were not allowed in the non-categorical classroom due to privacy concerns. Testimony of Educational Consultant, Testimony of PCS Principal.

#### 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 Petitioners 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 (LEA), the LEA shall hold the burden of persuasion on the appropriateness of the existing or proposed program or placement; provided that the Petitioners shall retain the burden of production and shall establish a *prima facie* case before the burden of persuasion falls on the LEA. The burden of persuasion shall be met by a preponderance of the evidence. See D.C. Code § 38-2571.03(6).

### Analysis

#### I.

- a. Was PCS' proposed June 23, 2016 IEP inappropriate for Student because the IEP included Discrete Trials, insufficient Specialized Instruction and Related Services hours, the IEP did not provide an integrated service approach, but relied on a pull-out model and the IEP did not provide for a classroom staffed by appropriately trained adults?
- b. Did PCS deny Student a FAPE by failing to provide a suitable educational placement in a separate special education day school with a developmental model for educational development?
- c. Did PCS deny Student a FAPE by failing to offer a placement in a safe educational setting?

In this case, the parents seek reimbursement from PCS for their unilateral private placement of Student at Nonpublic School for the 2016-2017 and 2017-2018 school years. As justification for their claim, the parents allege that PCS denied Student a FAPE because the June 23, 2016 IEP team denied their request to fund Student's placement in a more restrictive separate special education day school. Specifically, the parents claim that PCS' June 23, 2016 IEP was inappropriate for Student because it included Discrete Trial Instruction (DTI), insufficient Specialized Instruction and

Related Service hours and did not provide for integration of related services. In addition, the parents allege that the classroom staff at PCS is not appropriately trained and the PCS classroom setting was not safe for Student.

Under the IDEA, parents who unilaterally decide to place their disabled child in a private school, without obtaining the consent of local school officials, “do so at their own financial risk.” *Florence County Sch. Dist. Four v. Carter*, 510 U.S. 7, 15, 114 S.Ct. 361, 126 L.Ed.2d 284 (1993) (quoting *Sch. Comm. of the Town of Burlington v. Dep’t of Educ.*, 471 U.S. 359, 374, 105 S.Ct. 1996, 85 L.Ed.2d 385 (1985)). “As interpreted by the Supreme Court, IDEA requires school districts to reimburse parents for their private-school expenses if (1) school officials failed to offer the child a free appropriate public education in a public or private school; (2) the private-school placement chosen by the parents was otherwise “proper under the Act”; and (3) the equities weigh in favor of reimbursement—that is, the parents did not otherwise act “unreasonabl[y].” *Leggett v. District of Columbia*, 793 F.3d 59, 66–67 (D.C. Cir. 2015) (citing *Carter, supra*, 510 U.S. at 15–16, 114 S.Ct. 361; 20 U.S.C. § 1412(10)(C)(iii)(III)).

The indispensable condition for private school reimbursement from the *Leggett* decision is that the local education agency, PCS in this case, failed to offer the child a FAPE. The query in this case is whether PCS failed to offer Student a FAPE in the June 23, 2016 IEP before the parents enrolled Student in Nonpublic School. PCS has the burden of persuasion on the appropriateness of the June 23, 2016 IEP and proposed placement at PCS.

In *Moradnejad v. District of Columbia*, 177 F. Supp. 3d 260 (D.D.C. 2016), the Court adopted the Report and Recommendation of U.S. Magistrate Judge G. Michael Harvey, which explained how a court or a hearing officer must assess an IEP:

The Supreme Court explained in [*Bd. of Educ. v. Rowley*, 458 U.S. 176, 102 S.Ct. 3034, 73 L.Ed.2d 690 (1982)] that a court’s assessment of an IEP involves two inquiries:

First, has the State complied with the procedures set forth in the [IDEA]? And second, is the [IEP] developed through the [IDEA’s] procedures reasonably calculated to enable the child to receive educational benefits? If these requirements are met, the State has complied with the obligations imposed by Congress and the courts can require no more.

*Moradnejad* at 274-75. In *Andrew F. ex rel. Joseph F. v. Douglas Cty. Sch. Dist. RE-1*, 137 S.Ct. 988 (2017), the U.S. Supreme Court elaborated on the standard, first enunciated in *Rowley, supra*, for what constitutes an appropriate IEP:

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. *Andrew 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 “*pecially 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.) . . . When a child is fully integrated in the regular classroom, as the Act prefers, what that typically means is providing a level of instruction reasonably calculated to permit advancement through the general curriculum. *Id.*, 137 S.Ct. at 1000. . . . [For a child who is not fully integrated in the regular classroom and not able to make grade-level advancement] ■ educational program must be appropriately ambitious in light of ■ circumstances, just as advancement from grade to grade is appropriately ambitious for most children in the regular classroom. The goals may differ, but every child should have the chance to meet challenging objectives. *Id.* . . . 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.

“The adequacy of an IEP can be measured only at the time it is formulated, not in hindsight.” *District of Columbia v. Walker*, 109 F. Supp. 3d 58, 66 (D.D.C. 2015) (citing *S.S. ex rel. Shank v. Howard Road Academy*, 585 F.Supp.2d 56, 66 (D.D.C.2008)).

With regard to the development of the June 23, 2016 IEP, Petitioners have not alleged any procedural violations. Therefore, I turn to the second prong of the *Rowley/Andrew F.* inquiry. Was this IEP reasonably calculated to enable Student to make progress appropriate in light of Student’s circumstances? PCS’ witnesses, Speech Language Pathologist, Occupational Therapist and ABA Specialist all opined that the June 23, 2016 IEP was appropriate for Student. These witnesses and PCS Principal also opined that at the time of the IEP meeting, PCS was an appropriate placement for Student.

Petitioners’ counsel argue on brief that for several reasons the June 23, 2016 IEP, and Student’s continued placement at PCS, was not appropriate.

#### Discreet Trial Instruction

Petitioners argue that PCS’ use of Discreet Trial Instruction (DTI) under Applied Behavior Analysis (ABA) principles was inappropriate for Student. This was based on the opinion of Educational Consultant that DTI was not beneficial for Student because of Student’s cortical visual impairment (CVI) condition. Educational Consultant’s opinion relied upon what unnamed vision specialists had shared with her. I found more persuasive the testimony of ABA Specialist, who is a Board Certified Behavior Analyst and had the opportunity to work with Student at PCS. ABA Specialist described DTI as one systematic way of teaching skills, found in the Verbal Behavior Milestones Assessment and Placement Protocol (VB-MAPP), by giving a child a prompt and letting the child respond and then either prompting the response to shape it to be correct or

reinforcing if it was correct. ABA Specialist explained that while there is more research on using DTI for children on the autism spectrum, there is also plenty of emerging research of how to use it with children across other disability categories. In any event, at the request of the parents, the use of DTI instruction for Student was removed from the June 23, 2016 IEP and PCS agreed that it would not use DTI methodology for Student in the 2016-2017 school year. Petitioners' complaint about the inappropriateness of DTI instruction is not germane to the appropriateness of the June 23, 2016 IEP.

#### Specialized Instruction in Inclusion Setting

The parents assert that maintaining 5 hours per week of Specialized Instruction in the general education setting in the June 23, 2016 IEP was not appropriate for Student. Until Student was admitted to Nonpublic School in May 2016, Mother had lobbied PCS all year for Student to be provided more services in an inclusion setting with nondisabled peers. In response, on January 5, 2016, the PCS staff agreed to revise Student's IEP to provide Student 5 hours per week of Specialized Instruction in the general education setting. Several PCS witnesses, who testified at the due process hearing, opined that the opportunity to interact with nondisabled peers had been beneficial to Student. Speech Language Pathologist testified that initially she had doubts about whether the time in general education was appropriate, but that after giving Student the 5 hours per week agreed upon, she saw progress, as did the other staff members, throughout the year in general education. Occupational Therapist opined that Student seemed to be doing "really well" in the general education setting and that Student would imitate a lot of what peers were doing and trying new play areas where the peers were. ABA Specialist opined that Student needed specialized instruction outside general education for academics but that Student is a very socially

aware child who also needs opportunities around typically developing peers.

Petitioners' counsel asserted in the closing brief that Clinical Psychologist, who observed Student in the general education classroom at PCS, did not recommend an inclusion setting for Student. This is incorrect. In her March 22, 2016 report, after describing how in the general education classroom, the aide allowed Student to "go to any [activity] center chose," Clinical Psychologist recommended that Student's "educational environment should encourage increasing periods of sustained attention through encouragement to stay at chosen centers for longer than initially desired and frequent redirection to the task at hand." *See Exhibit R-33.*

Only Petitioners' expert, Educational Consultant, opined that the inclusion time was not beneficial for Student because, when she observed Student in the general education classroom on May 27, 2016, Student did not actively participate in the morning meeting or rotate among activity centers with nondisabled peers. I found Educational Consultant's opinion less persuasive than the opinions of the PCS experts who had multiple opportunities to observe Student in the general education setting and opined that Student benefitted from interacting with nondisabled peers. Moreover, the IDEA requires that to the maximum extent appropriate, children with disabilities be educated with children who are nondisabled. *See 34 CFR § 300.112(a)(2)(i).* I find that the evidence established that the limited inclusion time with nondisabled peers provided in Student's IEP was beneficial for Student.

#### Lack of Annual Goals for Attention

Petitioners' counsel argue on brief that the June 23, 2016 IEP was inappropriate because the IEP lacked annual goals in the area of attention. This claim is problematical because the adequacy of the annual goals in June 23, 2016 IEP is not an issue that was

previously raised by Petitioners either in their due process complaint or by counsel at the prehearing conference. Moreover, in her June 23, 2016 comments on the draft IEP, Educational Consultant requested numerous changes to the draft IEP's annual goals, all of which PCS accepted. Had Educational Consultant requested the addition of an annual IEP goal for attention, it seems likely that PCS would have agreed.

Assuming that an annual IEP goal in the area of attention would have been warranted for Student and this issue had been pleaded and certified in the Prehearing Order, the omission of the attention goal would be only a procedural violation of the IDEA. *See, e.g., D.B. v. Ocean Tp. Bd. of Educ.*, 985 F.Supp. 457, 536 (D.N.J.1997) (Failure of IEP to include the required components of some annual goals made form of IEP procedurally deficient.) Procedural violations may only be deemed a denial of FAPE if the procedural inadequacies—

- (i) Impeded the child's right to a FAPE;
- (ii) Significantly impeded the parent's opportunity to participate in the decision-making process regarding the provision of a FAPE to the parent's child; or
- (iii) Caused a deprivation of educational benefit.

34 CFR § 300.513(a)(2). *See also, e.g., Brown v. District of Columbia*, No. 15-0043, 2016 WL 1452330 (D.D.C. Apr. 13, 2016). In this case, I find that the lack of an attention goal in the June 23, 2016 IEP did not impede Student's right to a FAPE or the parents' opportunity to participate in the decision making process or cause any deprivation of educational benefit. I conclude that the omission of an annual goal for attention in the proposed IEP was not a denial of FAPE.

#### Integrated Related Services

The parents contend that Student's June 23, 2016 IEP proposed placement at

PCS was inappropriate because related services would not be integrated into the self-contained classroom. Petitioners' expert, Educational Consultant, opined that Related Service providers do not have to all be in Student's classroom at the same time, but those providers should be involved in the classroom providing support to the teachers and instruction. The June 23, 2016 IEP does not specify that Student would receive related services only on a pull-out basis. It provides that all of Student's related services would be provided outside general education. That necessarily follows from the IEP team's determination that all but 5 hours per week of Student's instruction would be outside general education. Student's providers for Speech and Language, Occupational Therapy and ABA-DTI as well as PCS Principal all testified that related services and DTI services were regularly provided to Student in the self-contained classroom. This is similar to the program at Nonpublic School, where, according to Early Childhood Coordinator, there are times when speech therapy, occupational therapy and counseling is integrated into the classroom. However, Student was pulled out for the majority of the related services sessions because in the larger classroom, holding Student's attention was challenging. I conclude that the evidence establishes that at PCS, Student's related services providers were, in fact, involved in the classroom and that related services for Student were integrated in the classroom.

#### Student's Progress at PCS

Petitioners' counsel argue that Student failed to make progress while attending PCS. Counsel point to results on the Peabody Developmental Motor Scales Second Edition (PDMS-2) and on speech and language testing administered in 2016, on which Student's scores were stagnant or falling further behind same aged peers. However, there was considerable evidence that Student did make progress at PCS. By the last

reporting period of the 2015-2016 school year, Student was reported to have mastered two January 5, 2016 IEP goals and to be progressing on the rest. Additionally, ABA Specialist and Student's related services providers testified that in the 2015-2016 school year, Student made progress in speech deficits including oral motor skills, up and down jaw movement for feeding, attention/duration to participate in an activity, imitation skills, physical development, following one-step directions and in communicating in a variety of ways. In the OT area of concern, Student made slow but steady progress including increased independence with things in the classroom, increased use of the right hand and increased use of drawing. Student made progress in mobility. At the beginning of the year, Student needed a head start to go to the playground. By spring 2016, Student could lead with the class and keep up with the class independently. Student became more comfortable with using a "spork" to eat. Student also made big gains with toileting and communicating toileting needs using the Communication Board. In the classroom, Student made progress on remaining quiet when appropriate, on pointing, on turning the head when spoken to by an adult, and, by the end of the year, using the Communication Board to express "yes" or "no". ABA Specialist also testified to Student's slow but steady progress with the ability to follow routines, to come when asked and to engage in and participate in things with peers. Petitioners' counsel argue that Student made little progress in communicating with the Communication Board device. However, Speech-Language Pathologist testified to the contrary that after the device was introduced in October 2016, she noticed consistent progress with Student's use of the Communication Board, using more independent hits and imitating her hits. Student's accuracy and self-correcting skill were improving. I find that the preponderance of the evidence establishes that in the 2015-2016 school year at PCS,

Student made “progress appropriate in light of the child’s circumstances.” *See Andrew F., supra*, 137 S. Ct. at 1001.

### Safety Concerns

Petitioners’ counsel argue that safety concerns affected Student’s right to appropriate educational services at PCS. The root of this claim was the December 2016 allegation by the former lead teacher in Student’s Grade A classroom that paraprofessionals in Student’s classroom had forcibly restrained Student on the cot at naptime while Student was screaming. After learning of this allegation, the parents kept Student home from school until Student was moved to a different classroom. Lead Teacher’s charges were investigated internally by the school which found them to be unfounded. The charges were also investigated by the D.C. Child and Family Services Agency and the Metropolitan Police Department, but were never proven. Mother never observed anyone at PCS being verbally or physically abusive to Student and she never had any concerns about abuse or mistreatment of Student after Student was moved to the Grade B classroom in January 2016. The parents were concerned that after Student moved to the Grade B classroom, another child might unintentionally knock Student over because Student is very small in stature. However, the classroom teachers used lessons and reminders for the entire class about safe bodies and the transition for Student went well. Student was never knocked over by classroom peers.

If safety issues interfere with the child’s right to receive a free appropriate public education, the school setting may be inappropriate. *See, e.g., Lillbask ex rel. Mauclaire v. State of Conn. Dept. of Educ.* 397 F.3d 77, 93 (2<sup>nd</sup> Cir. 2005). (Declaring hearing officer’s jurisdiction to review safety challenges to IEPs where they related to disabled child’s educational placement or provision of free appropriate public education.) In this

case, whatever the validity of Lead Teacher's allegations, PCS responded appropriately by investigating and by moving Student to another classroom. I conclude that by the time the June 23, 2016 IEP was developed, there were no *bona fide* safety issues which interfered with Student's right to a FAPE at PCS.

### Staff Training

Finally, Petitioners alleged that the June 23, 2016 IEP did not provide for a classroom staffed by appropriately trained adults. The IEP did not specify the level of training required for the staff who would work with Student. That is not a requirement of the IDEA. *See* 34 CFR § 300.320. However, PCS Principal testified that PCS' teachers must have a least a bachelor's degree and pass a Praxis exam for core knowledge in special education. Teaching Assistants must have a high school diploma and an Associates degree or higher training. Dedicated aides must have at least a high school diploma and a background with children. All PCS staff members receive 2 weeks of training at the beginning of the school year and additional formal training throughout the school year. Petitioners offered no evidence in support of their claim that PCS classroom staff are not appropriately trained.

In *Andrew F., supra*, the Supreme Court pronounced that a proposed IEP must be "reasonable," not necessarily ideal. 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; *Kerkam v. McKenzie*, 862 F.2d 884, 886 (D.C.Cir.1988) (Proof that loving parents can craft a better program than a state offers does not, alone, entitle them to prevail under the Act.) In its *Leggett* decision, *supra*, the D.C. Circuit wrote that the IDEA requires

school districts to reimburse parents for their private-school expenses if school officials failed to offer the child a free appropriate public education. In this case, I conclude that PCS has met its burden of persuasion that its June 23, 2016 IEP proposed for Student was reasonable, was reasonably calculated to enable Student to make progress appropriate in light of Student's circumstances and that PCS did not fail to offer Student a FAPE. I, therefore, decline to order PCS to reimburse the parents for their expenses for Student to attend Nonpublic School.

## II.

Did PCS deny Student a FAPE by not allowing Petitioners' educational consultant to conduct an observation of the proposed program and placement at PCS, after the parents enrolled Student in Nonpublic School?

In the fall of 2016, Educational Consultant requested permission from PCS to make a new observation of the classroom proposed for Student. Educational Consultant had previously observed Student's classrooms at PCS on May 27, 2016. By the fall of 2016, Student was no longer enrolled in PCS and was attending Nonpublic School. Educational Consultant's observation request was denied by PCS because Student was no longer enrolled in the school. PCS Principal told Educational Consultant that visitors were not allowed in the PCS non-categorical classroom due to privacy concerns. Petitioners contend that this was a violation of the D.C. Special Education Student Rights Act of 2014 (Student Rights Act).

The Student Rights Act provides,

Upon request, an LEA shall provide timely access, either together or separately, to the following for observing a child's current or proposed special educational program:

- (i) The parent of a child with a disability; or
- (ii) A designee appointed by the parent of a child with a disability who has

professional expertise in the area of special education being observed . . .

D.C. Code § 38–2571.03(5)(A).

PCS' Counsel asserts on brief that PCS did not permit Educational Consultant's observation during the 2016-2017 school year because Student was no longer attending or enrolled at PCS. Counsel argues that District law is clear that a charter school's responsibilities are contingent on enrollment. Since Student was no longer enrolled in PCS, counsel reasons that PCS was not bound to provide access to Educational Consultant for observing Student's proposed special education program.

This argument is unavailing. The D.C. Regulations make each LEA Charter responsible for compliance with all requirements applicable to an LEA under the IDEA and its implementing regulations, and local laws, regulations, and policies. *See* 5E DCMR 3019.3. PCS is an LEA Charter and therefore it is responsible for compliance with the requirements of the Student Rights Act to the same extent as any other LEA in the District, including, providing timely access to the parents' designee for observing a proposed special educational program. PCS' refusal to permit Educational Consultant's observation of the program proposed for Student violated 5E DCMR § 3019.3 and D.C. Code § 38–2571.03(5)(A).

PCS' Counsel argues that if PCS erred in not allowing the observation, it was a procedural violation and did not result in a denial of FAPE. I agree. *Cf. E.D. v. Colonial School District*, 117 LRP 12348 (E.D. Pa 3/31/17) (Denying the observation request of a parent's expert did not impede the student's right to FAPE, impede the parent's opportunity to participate in the decision making process or cause a deprivation of educational benefits.) As noted above in this decision, procedural violations may only be deemed a denial of FAPE if the procedural inadequacies—

- (i) Impeded the child's right to a FAPE;
- (ii) Significantly impeded the parent's opportunity to participate in the decision-making process regarding the provision of a FAPE to the parent's child;  
or
- (iii) Caused a deprivation of educational benefit.

34 CFR § 300.513(a)(2). PCS's failure to allow Educational Consultant to make a second observation at the school, after Student was already enrolled for the 2016-2017 year at Nonpublic School, did not impede Student's right to a FAPE, impede the parents' opportunity to participate in the decision making process or cause a deprivation of educational benefit. Therefore, I conclude that PCS' erroneous interpretation of the Students Rights Act may not be deemed a denial of FAPE. Notwithstanding, PCS must promptly provide access to the parents or their lawful designee for observing PCS' last proposed classroom for Student, if the parents' request for an observation is renewed.

**ORDER**

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

ORDERED:

1. Upon renewal in writing of a request for observation by the parents or their designee pursuant to D.C. Code § 38-2571.03(5)(A), PCS shall promptly provide access to the parents or their designee for observing PCS' last proposed special educational program for Student and
2. All other relief requested by the Petitioners herein is denied.

Date: September 22, 2017

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