

**DISTRICT OF COLUMBIA
OFFICE OF THE STATE SUPERINTENDENT OF EDUCATION**

Office of Dispute Resolution
810 First Street, N.E., 2nd Floor
Washington, D.C. 20002

OSSE
Office of Dispute Resolution
August 24, 2017

| | | |
|-------------------------------------|---|--------------------------------------|
| <i>Student</i> , ¹ |) | Case No.: 2017-0165 |
| through <i>Parent</i> , |) | |
| <i>Petitioner</i> , |) | Date Issued: 8/24/17 |
| |) | |
| v. |) | Hearing Officer: Keith L. Seat, Esq. |
| |) | |
| District of Columbia Public Schools |) | Hearing Dates: 8/11/17 & 8/14/17 |
| ("DCPS"), |) | ODR Hearing Room: 2006 |
| Respondent. |) | |
| |) | |

HEARING OFFICER DETERMINATION

Background

Petitioner, Student’s Parent, pursued a due process complaint alleging that Student had been denied a free appropriate public education (“FAPE”) in violation of the Individuals with Disabilities Education Improvement Act (“IDEA”) because had not been adequately reevaluated or provided appropriate Individualized Education Programs (“IEPs”). DCPS responded that Student had been reevaluated to the extent possible and that IEPs were appropriate.

Subject Matter Jurisdiction

Subject matter jurisdiction is conferred pursuant to IDEA, 20 U.S.C. § 1400, *et seq.*; the implementing regulations for IDEA, 34 C.F.R. Part 300; and Title V, Chapter E-30, of the District of Columbia Municipal Regulations (“D.C.M.R.”).

Procedural History

Following the filing of the due process complaint on 6/19/17, the case was assigned to the undersigned on 6/21/17. DCPS filed a timely response on 6/22/17 and did not challenge jurisdiction. The 30-day resolution period ended on 7/19/17. The resolution session meeting took place on 7/20/17. A final decision in this matter must be reached no

¹ Personally identifiable information is provided in Appendix A, including terms initially set forth in italics.

Hearing Officer Determination

Case No. 2017-0165

later than 45 days following the end of the resolution period, which requires a Hearing Officer Determination (“HOD”) by 9/2/17.

The due process hearing took place on 8/11/17 and 8/14/17 and was closed to the public. Petitioner was represented by *Petitioner’s counsel*. DCPS was represented by *Respondent’s counsel*. Petitioner was only present for the first morning of the hearing, due to her work schedule.

Petitioner’s Disclosures, submitted on 8/4/17, contained documents P1 through P16, which were admitted into evidence without objection. Respondent’s Disclosures, submitted on 8/4/17, contained documents R1 through R17, which also were admitted into evidence without objection.

Petitioner’s counsel presented three witnesses in Petitioner’s case-in-chief (*see* Appendix A):

1. Parent
2. *Private Psychologist* (qualified without objection as an expert in Psychology)
3. *Educational Advocate* (qualified without objection as an expert in Special Education Programming)

Respondent’s counsel presented three witnesses in Respondent’s case (*see* Appendix A):

1. Student
2. *Special Education Teacher* at Public School (qualified without objection as an expert in Special Education Programming)
3. *LEA Representative* (qualified without objection as an expert in Social Work and Special Education Programming and Placement)

The issues to be determined in this Hearing Officer Determination are:

Issue 1: Whether DCPS denied Student a FAPE by failing to conduct a triennial reevaluation, where last formalized testing occurred in October 2011. *Petitioner has the burden of persuasion on this issue.*

Issue 2: Whether DCPS denied Student a FAPE by providing inappropriate IEPs in February 2015, January 2016, and/or November 2016, where (a) current evaluation data was not available, (b) baselines and academic goals were repeated from year to year, and/or (c) Student has suffered a lack of academic progress by failing the large majority of classes. *Respondent has the burden of persuasion on this issue, if Petitioner establishes a prima facie case.*

Petitioner seeks the following relief:

Hearing Officer Determination

Case No. 2017-0165

1. A finding that Student was denied a FAPE.
2. Within 10 business days, DCPS shall convene an IEP meeting and revise Student's IEP based on current data.
3. DCPS shall fund (a) compensatory education for any denial of FAPE,² (b) an independent compensatory education study to provide the basis for a compensatory education award, and/or (c) any additional assessments needed to develop a compensatory education plan.
4. Any other just and reasonable relief.³

As soon as Petitioner rested, Respondent moved for a directed verdict on Issue 2, which was denied on the record based on the lack of evaluation data, the repetition of some baselines and goals, and Student's lack of progress.

Findings of Fact

After considering all the evidence, as well as the arguments of both counsel, the Findings of Fact⁴ are as follows:

² Petitioner's counsel was put on notice during the prehearing conference that Petitioner must introduce evidence supporting the requested compensatory education, including evidence of specific educational deficits resulting from Student's alleged denial of FAPE and the specific compensatory measures needed to best correct those deficits, i.e., to elevate Student to the approximate position Student would have enjoyed had Student not suffered the alleged denial of FAPE. Respondent was encouraged to be prepared to introduce evidence contravening the requested compensatory education in the event a denial of FAPE were found.

³ An additional paragraph (numbered 3 in the Prehearing Order) of requested relief stating "Within 10 business days, DCPS shall reimburse Parent for the cost of the Independent Educational Evaluation she obtained." was expressly withdrawn without prejudice at the beginning of the due process hearing.

⁴ Footnotes in these Findings of Fact refer to the sworn testimony of the witness indicated or to an exhibit admitted into evidence. To the extent that the Hearing Officer has declined to base a finding of fact on a witness's testimony that goes to the heart of the issue(s) under consideration, or has chosen to base a finding of fact on the testimony of one witness when another witness gave contradictory testimony on the same issue, the Hearing Officer has taken such action based on the Hearing Officer's determinations of the credibility and/or lack of credibility of the witness(es) involved.

Hearing Officer Determination

Case No. 2017-0165

1. Student is a resident of the District of Columbia; Petitioner is Student's Parent.⁵ Student is *Age* and in *Grade* at *Public School*, neighborhood school, where began late in 2013/14.⁶ Student previously attended *Public Charter School*.⁷

2. Student is eligible for special education and related services based on Multiple Disabilities ("MD"), with both Emotional Disturbance ("ED") and Other Health Impairment ("OHI") due to Attention Deficit Hyperactivity Disorder ("ADHD").⁸ At Public Charter School Student had been classified as MD with Specific Learning Disability and OHI, although prior to that was classified as ED/OHI.⁹

3. Student's relevant IEPs are dated 2/6/15, 1/4/16 and 11/8/16, each of which provided 26 hours/week of specialized instruction outside general education and two hours/month of Behavioral Support Services ("BSS") outside general education.¹⁰ BSS was reduced from four to two hours/month on 2/6/15 to give Student more time in class.¹¹

4. Some of the goals and baselines were repeated in Student's IEPs, but there was not extensive repetition.¹² For example, Mathematics Annual Goal 1 was the same between 2/6/15 and 1/4/16 and nearly the same in 11/8/16.¹³ Mathematics Annual Goal 3 in 2/6/15 was the same as Goal 2 in 1/4/16 and even copied with the old date in 11/8/16.¹⁴ In Mathematics, one of the baselines was the same in 11/8/16, but the others differed to at least some degree.¹⁵ The 1/4/16 IEP omitted one of the earlier Mathematics goals, while the 11/8/16 IEP added a third goal.¹⁶ The 1/4/16 IEP had the most repeated goals; the baselines generally had some differentiation throughout.¹⁷

5. The goals for the 1/4/16 and 11/8/16 IEPs were appropriate and were based on Student's current functioning and progress on previous goals.¹⁸ Common Core standards were always reviewed while discussing and setting goals, as the expectation is that

⁵ Parent.

⁶ *Id.*

⁷ Parent; R10-3.

⁸ P4-1 (eligibility on 2/6/15); R5; P13-8; Parent.

⁹ R10-3.

¹⁰ P1-1,12; P2-1,11; P3-1,12.

¹¹ R10-3.

¹² P3; P2; P1.

¹³ P1-5; P2-4; P3-5.

¹⁴ *Id.*

¹⁵ P1-5,6; P2-4; P3-5,6.

¹⁶ P2-4; P3-6.

¹⁷ P1; P2; P3.

¹⁸ Special Education Teacher.

Hearing Officer Determination

Case No. 2017-0165

all students will move toward satisfying the Common Core goals.¹⁹ The IEPs do not contain goals for attendance, which is usually covered in other documents instead.²⁰

6. Student provided input on one aspect of 11/8/16 IEP when it was being developed and stated that did not have any other questions or concerns about IEP.²¹ Although she left the 11/8/16 meeting early due to a disagreement with Student, Parent didn't seek to change the IEP or state that it was inadequate.²²

7. Special Education Teacher was on Student's IEP team and credibly testified that he and the rest of the IEP team found Student's IEPs to be appropriate and no one objected to the IEPs.²³ In the IEP meetings, Special Education Teacher asked for input on the IEPs, whether additions or deletions, but there were no changes sought that were not made; in particular, counsel for Petitioner did not object to the IEPs, nor did Educational Advocate ever object or indicate that she was unhappy with any aspect of Student's IEPs.²⁴

8. LEA Representative, Student's teacher in 2015/16 and the LEA Representative/Special Education Coordinator in 2016/17, considered both IEPs appropriate.²⁵ On both IEPs the present levels of performance were updated along with Student's baselines, or else an explanation was included.²⁶ Public School sought to obtain updated data and was required to update Student's IEPs whether updated data was available or not.²⁷ The IEPs were reviewed closely by the full IEP teams; there is no indication that they were not appropriate for Student.²⁸ To LEA Representative's knowledge, Educational Advocate did not disagree with either IEP, nor did any counsel for Petitioner.²⁹

9. An independent Comprehensive Psychological Evaluation was completed by Private Psychologist of Student on 8/3/17; it was authorized by DCPS on 7/20/17.³⁰ The 8/3/17 Comprehensive Psychological found that Student's brief intellectual ability was 71 (Low range) as measured by a Woodcock-Johnson IV ("WJ-IV") Test of Cognitive Abilities,

¹⁹ *Id.*

²⁰ LEA Representative.

²¹ Student; R8-2; R16-20.

²² Parent.

²³ Special Education Teacher.

²⁴ *Id.*

²⁵ LEA Representative (although she joined Student's IEP team a few months after the 1/4/16 IEP).

²⁶ LEA Representative.

²⁷ *Id.*

²⁸ *Id.*

²⁹ *Id.*

³⁰ P6-1; R14-1.

Hearing Officer Determination

Case No. 2017-0165

which was consistent with Student's 10/24/11 Comprehensive Psychoeducational Evaluation which found FSIQ to be 72 based on the WISC-IV.³¹

10. The 8/3/17 Comprehensive Psychological Evaluation included the WJ-IV Tests of Achievement which found Student's score for the Reading domain to be 78 (Low), score for the Math domain to be 66 (Very Low), score for the Written Language domain to be 76 (Low), with age equivalency references some 10 years below Student's actual age.³²

11. Special Education Teacher documented on 10/21/16 that he had made three attempts to assess Student for IEP; Student was unavailable even though Special Education Teacher had a good relationship with Student and explained to the need for assessment.³³ Parent knew that Special Education Teacher had tried to evaluate Student on various occasions.³⁴ On a fourth attempt, Special Education Teacher was able to obtain Student's agreement and administered a Brigance to Student, which provided both academic and transition/occupational input.³⁵ The Brigance was an appropriate assessment for Student, as performance was likely to fall in the grade range of the test.³⁶ Special Education Teacher had tried to evaluate Student with a Brigance in 2015/16, but Student was not available or refused assessment.³⁷ Student may have been given a Brigance TSI (Transition Skills Inventory) on 12/18/15.³⁸ An Ohio Youth Problem Functioning and Satisfaction Scale was completed with Student on 10/31/16, with earlier ones completed on 12/15/15 and 10/15/14.³⁹

12. Parent and her advocates did not seek any evaluations of Student beyond a request to test for bipolar disorder on 2/6/15.⁴⁰ Bipolar disorder testing is not an academic assessment, but could be obtained from various sources outside the school system.⁴¹ Student's IEP team would have been willing to do more assessments if Student had cooperated.⁴²

13. An FBA was conducted on 12/19/14.⁴³ A BIP was developed on 2/6/15 in an effort, among other things, to keep Student academically engaged, respectful towards adults, and

³¹ P13-4,2; P6-5,15.

³² P13-4,5,6,10.

³³ Special Education Teacher; R4; Student (testified that Special Education Teacher is a good teacher and they get along).

³⁴ Parent.

³⁵ Special Education Teacher; P3-17.

³⁶ LEA Representative.

³⁷ Special Education Teacher.

³⁸ P2-16,17 (ambiguity created by the inclusion of "(Records review)" in listing of assessment tool).

³⁹ P3-10; P2-9,10; P1-11.

⁴⁰ LEA Representative; R10-3.

⁴¹ LEA Representative.

⁴² Special Education Teacher.

⁴³ R13-1.

Hearing Officer Determination

Case No. 2017-0165

attending all classes and staying for the entire class.⁴⁴ The BIP was implemented with, among other things, an attendance monitoring form to ensure that Student attended class on time and a teacher to make a daily assessment of progress using a behavior chart and communicate a weekly assessment of behavior to Parent.⁴⁵

14. Educational Advocate testified that she attended Student's IEP and MDT meetings at Public School and that she asked for comprehensive psychoeducational evaluations of Student at "every single meeting."⁴⁶ Educational Advocate has been the educational advocate for Petitioner for 15 years for several of her children and has worked with Student for five years.⁴⁷ Educational Advocate harshly criticized Public School in a manner that undermined her credibility, stating that Public School had taught Student "literally nothing" during the last three years, that Public School had done "nothing" to encourage Student, and that Public School set up Student for failure and wanted to "get rid" of Student by getting to drop out of school.⁴⁸ Educational Advocate's credibility in recalling her actions over the years was not helped by mis-remembering the one number in her compensatory education proposal (which was only two sentences long in total and had been completed just a week earlier).⁴⁹

15. A 2/6/15 Evaluation Summary Report summarized information from a variety of sources used in reevaluating Student, including classroom observations; work samples; 2014/15 report card; a behavior tracker (to which Student responded well "for about two weeks"); the 10/24/11 Comprehensive Psychoeducational Evaluation; a "school created assessment called Interim testing"; a log; behavioral referrals; and teacher reports.⁵⁰ The 2/6/15 Report stated that no additional assessments were needed for Mathematics, Reading, and Written Expression, but that an FBA was needed for the area of Emotional, Social, and Behavioral Development, which was completed with a BIP.⁵¹ The 2/6/15 Report noted that several areas were not of concern for Student, including Speech and Language, Hearing, and Motor Skills/Physical Development.⁵²

16. School attendance is a huge concern with Student.⁵³ In 2016/17, Student had 161 absences, the large majority of which were not excused.⁵⁴ As of 2/2/15, Student had only been present 44 of 95 school days.⁵⁵ Parent harmed her credibility by testifying that

⁴⁴ P5-1.

⁴⁵ P5-1,2.

⁴⁶ Educational Advocate.

⁴⁷ *Id.*

⁴⁸ *Id.*

⁴⁹ P15; Educational Advocate.

⁵⁰ P4-4,5,6,8,9.

⁵¹ P4-5,7,8,9.

⁵² P4-8,4,10.

⁵³ Private Psychologist.

⁵⁴ R7-5.

⁵⁵ P3-4.

Hearing Officer Determination

Case No. 2017-0165

Student's attendance was "good" and that was going to class "as far as she knew."⁵⁶ Parent admitted on cross-examination that she had meetings with LEA Representative and knew Student was not going to class regularly.⁵⁷

17. Public School's social worker used various interventions to try to get Student to attend class.⁵⁸ Student was not willing to sign an Attendance Plan, as felt that getting a sheet signed by teacher in each class was not "age appropriate."⁵⁹ Student refused to sign a BIP in 2016/17.⁶⁰ Public School sought to engage Parent in addressing Student's attendance issues and planned to make a home visit, but Parent came to school instead; Parent was engaged and active.⁶¹ Parent and LEA Representative brainstormed ways to get Student to LEA Representative's class, but didn't know what else could be done and had trouble coming up with incentives.⁶²

18. Student acknowledged that doesn't go to class every day, and doesn't stay in classes even when goes, even though teachers spoke to about going to class.⁶³ LEA Representative, the social worker, and the dean had multiple conversations with about attendance.⁶⁴ Student stated it is a waste of time to take classes has "already passed," and that should be out of school by now, but testified that would try to go to class more in 2017/18.⁶⁵ In 2016/17, LEA Representative dug back into the records of Public Charter School in response to Student's concerns about having previously taken classes and discovered Student's transcript which showed that had passed courses that allowed grade level to be adjusted upwards by two years.⁶⁶ Student was not interested in having any extra tutoring in the future, stating that it "wouldn't work," that doesn't have time with schedule, and would be a "waste" of time.⁶⁷

19. Student's teachers viewed as capable of doing schoolwork, but failing because of lack of attendance.⁶⁸ Student's grades were not good.⁶⁹ As of 2/9/17, Student's 2016/17 Transcript included 7 "F's," 1 "D," and 2 "C's."⁷⁰

⁵⁶ Parent.

⁵⁷ *Id.*

⁵⁸ LEA Representative.

⁵⁹ *Id.*

⁶⁰ *Id.*

⁶¹ *Id.*

⁶² *Id.*

⁶³ Student.

⁶⁴ *Id.*

⁶⁵ *Id.*

⁶⁶ LEA Representative.

⁶⁷ Student.

⁶⁸ P3-4 (e.g., " failed Geometry because only attended the class 3-4 times").

⁶⁹ Parent.

⁷⁰ P9-6.

Hearing Officer Determination

Case No. 2017-0165

20. Student's behavior at Public School was not good, as [redacted] was involved in fights, verbal disagreements, and walking the halls; Parent estimated that [redacted] was suspended about 20 times in three years at Public School.⁷¹ In early 2017, Public School sought to involuntarily transfer Student from Public School, but Petitioner's counsel fought the effort and succeeded in an appeal to keep Student at Public School.⁷²

21. Parent and Educational Advocate asserted that they knew within six weeks of Student arriving at Public School in 2014 that the school wasn't appropriate for [redacted], but were not able to get anyone to observe Student to consider a different setting.⁷³ Educational Advocate and Parent sought a different placement for Student on 2/6/15.⁷⁴ By early 2017, Parent refused to let [redacted] go to several schools that DCPS proposed as more suitable for [redacted] apparently because of concerns about Student's safety in other neighborhoods.⁷⁵ Parent now wants Student out of Public School and at another school where Student will "be happy" and finish school, but recognizes that Student is "[redacted] own person."⁷⁶ Student wants to stay at Public School; [redacted] is concerned about [redacted] safety in other neighborhoods.⁷⁷ Educational Advocate testified that she opposed alternative schools for Student because of [redacted] difficulties with transitions and wants Student to remain at Public School with an IEP that is written properly and implemented properly.⁷⁸

22. Student's 1/4/16 and 11/8/16 IEPs stated that [redacted] has been provided with small classrooms at Public School.⁷⁹ An observation recorded that Student's classes on 2/9/17 were small, with a low ratio of students to professionals: Student's Biology class (where Student arrived 15 minutes prior to class ending) had a 7:2 ratio; Student's Geography class (with Special Education Teacher) was 4:1; Student's Spanish class (Student peeked in window, but did not enter classroom) was 2:1.⁸⁰

23. Public School sought the classroom observation of Student which occurred on 2/9/17, to see whether Student might flourish in a different environment, as [redacted] has had numerous problems at Public School in 2016/17.⁸¹ The DCPS observer suggested that Student may wish to consider certain alternative high schools in order to have peers in age range.⁸²

⁷¹ Parent.

⁷² P7-1,2; P10.

⁷³ P11-2.

⁷⁴ R10-3.

⁷⁵ Parent.

⁷⁶ *Id.*

⁷⁷ Student.

⁷⁸ Educational Advocate.

⁷⁹ P3-3; P2-2.

⁸⁰ P9-3.

⁸¹ P9-1,2.

⁸² P9-7.

Hearing Officer Determination

Case No. 2017-0165

24. DCPS proposed moving Student to a program for students who are “over-age and under-credited,” which has options for scheduling around jobs, offers practical training alternatives, has small classes of older students (like Student) where credits can be earned more quickly, and full-time self-contained IEPs (like Student’s) can be fulfilled.⁸³ Student instead is scheduled to begin 2017/18 at Public School, which LEA Representative does not think is in Student’s best interest.⁸⁴

25. DCPS has pursued every avenue for Student and sought to tailor interventions to what would be most helpful to Student.⁸⁵ Parent acknowledged that there were some good staff members at Public School who had good intentions and tried to help Student, including LEA Representative, Special Education Teacher, the social worker and the dean.⁸⁶ Student stated that has good relationships at Public School with LEA Representative and the social worker, who try to help ; Student “kinda, sorta” has a good relationship with the dean.⁸⁷

26. Strategies that Public School attempted in working with Student included: redirection by mental health team, “dean team,” teachers and others; daily check-in with social worker, daily check-in with dean; referral to transition coordinator; behavior contract; behavior incentive program; and multiple restorative conferences with Parent, Student, teacher and dean.⁸⁸ Public School helped Student obtain a job liked and held for four months near the end of 2016/17.⁸⁹ Employment often helps older students engage more with school and see increased relevance in attending school.⁹⁰

Conclusions of Law

Based on the Findings of Fact above, the arguments of counsel, as well as this Hearing Officer’s own legal research, the Conclusions of Law are as follows:

The overall purpose of the IDEA is to ensure that “all children with disabilities have available to them a free appropriate public education that emphasizes special education and related services designed to meet their unique needs and prepare them for further education, employment, and independent living.” 20 U.S.C. § 1400(d)(1)(A). *See Boose v. Dist. of Columbia*, 786 F.3d 1054, 1056 (D.C. Cir. 2015) (the IDEA “aims to ensure that every child has a meaningful opportunity to benefit from public education”).

⁸³ LEA Representative.

⁸⁴ *Id.*

⁸⁵ *Id.*

⁸⁶ Parent.

⁸⁷ Student.

⁸⁸ P9-2; R12-7 (Student had difficulty abiding by behavior contract).

⁸⁹ Student.

⁹⁰ LEA Representative.

Hearing Officer Determination

Case No. 2017-0165

“The IEP is ‘the centerpiece of the statute’s education delivery system for disabled children.’” *Andrew F. ex rel. Joseph F. v. Douglas County Sch. Dist. RE-1*, 137 S. Ct. 988, 994, 197 L. Ed. 2d 335 (2017), quoting *Honig v. Doe*, 484 U.S. 305, 311, 108 S. Ct. 592, 98 L.Ed.2d 686 (1988). “The IEP is the means by which special education and related services are ‘tailored to the unique needs’ of a particular child.” *Andrew F.*, 137 S. Ct. at 994, quoting *Bd. of Educ. of Hendrick Hudson Cent. Sch. Dist. v. Rowley*, 458 U.S. 176, 181, 102 S. Ct. 3034, 73 L. Ed. 2d 690 (1982).

Once a child who may need special education services is identified and found eligible, DCPS must devise an IEP, mapping out specific educational goals and requirements in light of the child’s disabilities and matching the child with a school capable of fulfilling those needs. See 20 U.S.C. §§ 1412(a)(4), 1414(d), 1401(14); *Andrew F.*, 137 S. Ct. at 994; *Sch. Comm. of Town of Burlington, Mass. v. Dep’t of Educ. of Mass.*, 471 U.S. 359, 369, 105 S. Ct. 1996, 2002, 85 L. Ed. 2d 385 (1985); *Jenkins v. Squillacote*, 935 F.2d 303, 304 (D.C. Cir. 1991); *Dist. of Columbia v. Doe*, 611 F.3d 888, 892 n.5 (D.C. Cir. 2010).

The IEP must be “reasonably calculated to enable a child to make progress appropriate in light of the child’s circumstances.” *Andrew F.*, 137 S. Ct. at 1001. The Act’s FAPE requirement is satisfied “by providing personalized instruction with sufficient support services to permit the child to benefit educationally from that instruction.” *Smith v. Dist. of Columbia*, 846 F. Supp. 2d 197, 202 (D.D.C. 2012), citing *Rowley*, 458 U.S. at 203. The IDEA imposes no additional requirement that the services so provided be sufficient to maximize each child’s potential. *Rowley*, 458 U.S. at 198. In its recent decision, the Supreme Court made very clear that the standard is well above *de minimis*, however, stating that “[w]hen all is said and done, a student offered an educational program providing ‘merely more than *de minimis*’ progress from year to year can hardly be said to have been offered an education at all.” *Andrew F.*, 137 S. Ct. at 1001.

In addition, Respondent must ensure that to the maximum extent appropriate, children with disabilities are educated with children who are nondisabled, and special classes, separate schooling, or other removal of children with disabilities from the regular educational environment occurs 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; *Andrew F.*, 137 S. Ct. at 1000 (children with disabilities should receive education in the regular classroom to the extent possible).

A Hearing Officer’s determination of whether a child received a FAPE must be based on substantive grounds. In matters alleging a procedural violation, a Hearing Officer may find that a child did not receive a FAPE only 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 C.F.R. 300.513(a). In other words, an IDEA claim is viable only if those procedural violations affected the child’s *substantive* rights. *Brown v. Dist. of Columbia*, 179 F. Supp. 3d 15, 25-26 (D.D.C. 2016), quoting *N.S. ex rel. Stein v. Dist. of Columbia*, 709 F. Supp. 2d 57, 67 (D.D.C. 2010).

Hearing Officer Determination

Case No. 2017-0165

Petitioner carries the burden of production and persuasion, except on issues of the appropriateness of an IEP or placement on which Respondent has the burden of persuasion, if Petitioner establishes a prima facie case. D.C. Code Ann. § 38-2571.03(6); *Schaffer ex rel. Schaffer v. West*, 546 U.S. 49, 62, 126 S. Ct. 528, 537, 163 L. Ed. 2d 387 (2005). “Based solely upon evidence presented at the hearing, an impartial hearing officer shall determine whether . . . sufficient evidence [was presented] to meet the burden of proof that the action and/or inaction or proposed placement is inadequate or adequate to provide the student with a FAPE.” 5-E D.C.M.R. § 3030.3.

Issue 1: *Whether DCPS denied Student a FAPE by failing to conduct a triennial reevaluation, where last formalized testing occurred in October 2011. (Petitioner has the burden of persuasion on this issue.)*

Petitioner did not meet her burden of demonstrating that DCPS failed to conduct an appropriate triennial reevaluation of Student and that any alleged failure resulted in substantive harm to Student.

The IDEA requires a reevaluation of each student with a disability at least once every three years, or sooner if the student’s parent or teacher requests a reevaluation, or if the LEA (here DCPS) determines that the needs of the student warrant reevaluation. 34 C.F.R. 300.303. In considering a reevaluation, the IEP team (and other qualified professionals as appropriate) must review existing evaluation data and, with input from the student’s parents, identify what additional data, if any, are needed to determine whether the student continues to have a disability, and the educational needs of the student. 34 C.F.R. 300.305(a); *see* Office of Special Education and Rehabilitative Services, U.S. Department of Education, *Analysis of Comments and Changes*, 71 Fed. Reg. 46643 (2006) (decisions on the areas to be assessed are to be made based on the suspected needs of the child). *Cf. James v. Dist. of Columbia*, 194 F. Supp. 3d 131, 143 (D.D.C. 2016). The IDEA does not require a public agency to administer every test requested by a parent, for the public agency has the prerogative to choose assessment tools and strategies to gather relevant information.

Here, Public School relied on a 2/6/15 Evaluation Summary Report of Student which summarized information from a variety of sources used in reevaluating Student. These sources included classroom observations of Student; work samples; 2014/15 report card; a behavior tracker (to which Student responded well “for about two weeks”); the 10/24/11 Comprehensive Psychoeducational Evaluation; Interim testing; a log; behavioral referrals; and teacher reports. The 2/6/15 Report concluded that no additional assessments were needed for Mathematics, Reading, and Written Expression, but that an FBA was needed for the area of Emotional, Social, and Behavioral Development, which was provided along with a BIP. The 2/6/15 Report also ruled out several areas that were not of concern for Student, including Speech and Language, Hearing, and Motor Skills/Physical Development.

Further, Public School has credibly asserted that it has not been easy to gain Student’s cooperation in conducting assessments. Special Education Teacher documented on 10/21/16 that he had by that time made three attempts to assess Student for most recent IEP, but Student was unavailable even though Special Education Teacher had a good

Hearing Officer Determination

Case No. 2017-0165

relationship with _____ and explained the need for assessment. Special Education Teacher also testified that he tried to evaluate Student in 2015/16, but Student was not available or refused to be assessed. On a fourth attempt in 2016/17, Special Education Teacher was able to obtain Student's agreement and administered a Brigance to Student, which provided both academic and transition/occupational input. Student may also have been given a Brigance on 12/18/15. An Ohio Youth Problem Functioning and Satisfaction Scale was also completed with Student on 10/15/14, 12/15/15 and 10/31/16.

Finally, it is relevant that Parent and her advocates seemingly did not seek evaluations of Student beyond a request to test for bipolar disorder on 2/6/15, which is not an academic test. Student's IEP team would have been willing to conduct more assessments, if Student had cooperated. Educational Advocate, who has advocated for Student for five years, testified that she attended Student's IEP and MDT meetings at Public School and that she asked for comprehensive psychoeducational evaluations of Student at every single meeting. Yet, there was no documentation or other corroboration referencing any such requests for assessment, and the undersigned was persuaded by the more credible contrary testimony of Public School staff.

In sum, this Hearing Officer concludes that Petitioner did not meet her burden of proving a failure by DCPS to adequately reevaluate Student and that, in the circumstances of this case, even assuming such failure it would have been a mere procedural violation and not a cause of any educational harm to Student or impact on _____ substantive rights, as required by 34 C.F.R. 300.513(a). *See Smith v. Dist. of Columbia*, 2010 WL 4861757, at *4,5 (D.D.C. 2010) (no relief warranted where petitioner has not shown that DCPS's failure to conduct the reevaluations "affected substantive rights" or that the child's "education would have been different" but for the violation).

Issue 2: *Whether DCPS denied Student a FAPE by providing inappropriate IEPs in February 2015, January 2016, and/or November 2016, where (a) current evaluation data was not available, (b) baselines and academic goals were repeated from year to year, and/or (c) Student has suffered a lack of academic progress by failing the large majority of classes. (Respondent has the burden of persuasion on this issue, if Petitioner establishes a prima facie case.)*

Petitioner established a prima facie case on this issue, shifting the burden of persuasion to Respondent, which met its burden of demonstrating that it provided appropriate IEPs for Student during the last two years.

The applicable legal standard for analyzing the appropriateness of an IEP has recently been articulated by Chief Justice Roberts for a unanimous Supreme Court as whether it is "reasonably calculated to enable a child to make progress appropriate in light of the child's circumstances." *Endrew F.*, 137 S. Ct. at 1001. The undersigned views this new standard as building on and buttressing prior articulations of whether the challenged IEP was "reasonably calculated to produce meaningful educational benefit" and to permit Student to access the general education curriculum to the extent possible. *See Damarcus S. v. Dist. of Columbia*, 190 F. Supp. 3d 35, 51 (D.D.C. 2016); *A.M. v. Dist. of Columbia*, 933

Hearing Officer Determination

Case No. 2017-0165

F. Supp. 2d 193, 204 (D.D.C. 2013), *quoting Rowley*, 458 U.S. at 206-07. The measure and adequacy of the IEPs are to be determined as of the time they were provided to Student. *See, e.g., S.S. ex rel. Shank v. Howard Rd. Acad.*, 585 F. Supp. 2d 56, 66 (D.D.C. 2008).

The appropriateness of Student's IEPs is analyzed by considering each specific concern raised by Petitioner in turn. *See* 34 C.F.R. 300.320(a)(4),(5); *Honig*, 484 U.S. at 311.

(a) Lack of Evaluation Data. As discussed in Issue 1, above, Public School relied on all the data it had available and would have had more to work with had Student cooperated. As it was, at the time of the first IEP in issue, Public School developed a 2/6/15 Evaluation Summary Report of Student which summarized information from a variety of sources used in reevaluating Student, including classroom observations; work samples; 2014/15 report card; a behavior tracker; the 10/24/11 Comprehensive Psychoeducational Evaluation; Interim testing; behavioral referrals; and teacher reports. The 2/6/15 Report concluded that an FBA was needed, which was provided along with a BIP.

Beyond that, as noted above Special Education Teacher tried to evaluate Student in 2015/16, but was not available or refused assessment. In 2016/17, Special Education Teacher documented that he had made three attempts to assess Student for IEP, but that Student was unavailable notwithstanding Special Education Teacher's good relationship with . On his fourth attempt, Special Education Teacher was able to obtain Student's agreement and administered a Brigance to Student in 2016/17. Special Education Teacher may also have administered a Brigance to Student on 12/18/15. An Ohio Youth Problem Functioning and Satisfaction Scale was completed with Student on 10/15/14, 12/15/15 and 10/31/16, prior to the three IEPs at issue. As LEA Representative persuasively testified, Public School sought to obtain updated data, but was obliged to update Student's IEPs whether updated data was available or not.

In these circumstances, this Hearing Officer finds the IEPs survive challenge based on lack of evaluation data.

(b) Baselines and Goals Repeated. Some of the goals and baselines were in fact repeated in Student's IEPs, but the repetition was not extensive. For example, Mathematics Annual Goal 1 was the same on 2/6/15 and 1/4/16 and nearly the same on 11/8/16. Mathematics Annual Goal 3 in 2/6/15 was the same as Goal 2 in 1/4/16 and even copied the old date in 11/8/16. One of the Mathematics baselines was the same in 11/8/16, but the others differed to at least some degree. The 1/4/16 IEP omitted one of the earlier Mathematics goals, while the 11/8/16 IEP added a third goal. The 1/4/16 IEP had the most repeated goals; the baselines generally had some differentiation throughout.

More to the point, there was credible testimony that the goals for the 1/4/16 and 11/8/16 IEPs were appropriate and were based on Student's current functioning and progress on previous goals. Common Core standards were reviewed while discussing and setting goals, as the expectation was that all students would move toward satisfying the Common Core goals. While carrying over the same goals from year to year may indicate

Hearing Officer Determination

Case No. 2017-0165

failure to make meaningful progress, *see Andrew F.*, 137 S. Ct. at 994, lack of progress is not necessarily the fault of the IEPs, as discussed next. In the circumstances here, with only some repetition, Student's IEPs survive challenge based on repeated goals and baselines.

(c) Lack of Academic Progress. Student's teachers viewed [redacted] as capable of doing course work, but failing due to lack of attendance. Indeed, Private Psychologist emphasized that school attendance was a huge concern with Student. In 2016/17, Student had 161 absences, while at a point early in 2015, Student had only been present 44 of 95 school days. The IDEA does require that a school district respond to a student's frequent or extended absences, *see, e.g., Springfield Sch. Comm. v. Doe*, 623 F. Supp. 2d 150, 159 (D. Mass. 2009), but this is not a case where Student was expected to overcome [redacted] truancy on [redacted] own without assistance. Public School's social worker used various interventions to try to get Student to attend class. But Student was not willing to sign an Attendance Plan, as felt [redacted] was too old to get a sheet signed by [redacted] teacher in each class and also refused to sign a BIP in 2016/17. Public School sought to engage Parent in addressing Student's attendance issues and brainstormed ways to get Student to class, but couldn't figure out what else could be done. Student acknowledged in [redacted] testimony at the hearing that [redacted] teachers spoke to [redacted] about going to class and, in particular, that LEA Representative, the social worker, and the dean had multiple conversations with [redacted] about attendance to no avail.

The IEPs survive challenge based on Student's lack of progress, for there is no guarantee of positive outcomes under the IDEA. *See, e.g., Holman v. Dist. of Columbia*, 153 F. Supp. 3d 386, 389-90 (D.D.C. 2016) (while a FAPE is required, there is no guarantee of "any particular outcome or any particular level of academic success").

Looking beyond the specific concerns raised by Petitioner, it appears that objections had not previously been raised about Student's IEPs. Special Education Teacher was on Student's IEP team and credibly testified that he and the rest of Student's IEP team found [redacted] IEPs to be appropriate and that no one objected to them. During IEP meetings, Special Education Teacher routinely asked for input on the IEPs, whether additions or deletions, but there were no changes sought that were not made; in particular, neither counsel for Petitioner nor Educational Advocate ever objected to the IEPs or indicated dissatisfaction. In particular, on [redacted] most recent IEP, Student provided input on one aspect as it was being developed and stated that [redacted] did not have any other questions or concerns. Nor did Parent seek to change Student's IEP or state that it was inadequate.

In sum, this Hearing Officer concludes that, viewed as of the time they were developed, Student's 2/6/15, 1/4/16 and 11/8/16 IEPs were reasonably calculated to enable Student to make appropriate progress in [redacted] circumstances, so there is no denial of a FAPE on Issue 2.

Hearing Officer Determination

Case No. 2017-0165

ORDER

Petitioner has not prevailed on either issue in this case. Accordingly, **it is hereby ordered** that any and all claims and requests for relief are **dismissed with prejudice**.

IT IS SO ORDERED.

Dated in Caption

/s/ Keith Seat

Keith L. Seat, Esq.
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).

Copies to:

Counsel of Record (Appendix A, by email)
OSSE-SPED (due.process@dc.gov)
ODR (hearing.office@dc.gov)
Contact.resolution@dc.gov