District of Columbia
Office of the State Superintendent of Education
Office of Dispute Resolution
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Parent, on behalf of Student,[1]	)	
Petitioner,	)	
	)	**Hearing Dates: 7/30/19, Room 423;**
	)	**7/31/19, Room 423; 8/5/19, Room**
	)	**112; 8/9/19, Room 423; 8/12/19,**
	)	**Room 112.**
	)	**Hearing Officer: Michael Lazan**
District of Columbia Public Schools,	)	**Case No. 2019-0146**
Respondent.	)	

HEARING OFFICER DETERMINATION

I. Introduction

This is a case involving an X-year-old student who is currently eligible for services as a student with Multiple Disabilities (the "Student"). A Due Process Complaint ("Complaint") was received by District of Columbia Public Schools ("DCPS" or "Respondent") pursuant to the Individuals with Disabilities Education Act ("IDEA") on June 6, 2019. The Complaint was filed by the parent of the Student ("Petitioner"). On June 17, 2019, Respondent filed a response. The resolution period expired July 6, 2019.

II. Subject Matter Jurisdiction

This due process hearing was held, and a decision in this matter is being rendered, pursuant to the Individuals with Disabilities Education Improvement Act ("IDEIA"), 20 U.S.C. Sect. 1400 et seq., its implementing regulations, 34 CFR 300 et seq., Title 38 of

[1] Personally identifiable information is attached as Appendix A and must be removed prior to public distribution.

the D.C. Code, Subtitle VII, Chapter 25, and the District of Columbia Municipal Regulations, Title 5-E, Chapter 30.

III. Procedural History

A prehearing conference was held on July 18, 2019. Attorney A, Esq., counsel for Petitioner, appeared. Attorney B, Esq., counsel for Respondent, appeared. A prehearing conference order was issued on July 23, 2019, summarizing the rules to be applied in the hearing and identifying the issues in the case. The prehearing conference order was modified on July 25, 2019. The hearing proceeded on July 30, 2019, and continued on July 31, 2019, August 5, 2019, August 9, 2019, and August 12, 2019. Closing arguments were presented, on the record, on August 12, 2019. This was a closed proceeding. Petitioner was represented by Attorney A, Esq. Respondent was represented by Attorney B, Esq. Petitioner moved into evidence exhibits 1-45. There were no objections. Exhibits 1-45 were admitted. Respondent moved into evidence exhibits 1-17. There were no objections. Exhibits 1-17 were admitted.

Petitioner presented as witnesses: herself; Witness A, Programs and Admissions Director of School B; Witness B, the Student's grandmother; Witness C, Center Director at Company A (expert: interpretation of reading and written expression assessments used by Company A for students with language based learning disorders); and Witness D, an advocate (expert: special education programming and placement for students with disabilities). Respondent presented as witnesses: Witness E, a teacher; Witness F, a resolution specialist; and Witness G, Manager of Special Education, School A (expert: special education programming and placement).

IV. Issues

As identified in the Prehearing Conference Summary and Order and in the Due Process Complaint, the issues to be determined in this case are as follows:

1. Did DCPS fail to provide the Student with an appropriate Individualized Education Program ("IEP") from the 2017-2018 school year to the present, including on or about November, 2017, April, 2018, and April, 2019? If so, did DCPS act in contravention of 34 CFR 300.320, Endrew F. v. Douglas County School District, 137 U.S. 988 (2017), and Hendrick Hudson Bd. of Educ. v. Rowley, 458 U.S. 176 (1982)? If so, did DCPS deny the Student a Free Appropriate Public Education ("FAPE")? Petitioner contended that the Student's IEPs lacked appropriate specialized instruction hours, appropriate goals, appropriate modifications and accommodations, and did not recommend an education in the Student's least restrictive environment ("LRE").

2. Did DCPS fail to provide the Student with an appropriate educational placement from August, 2017, to present? If so, did Respondent violate the principles articulated in cases such as Gellert v. District of Columbia, 435 F. Supp. 2d 18 (D.D.C. 2006)? If so, did Respondent deny the Student a FAPE?

3. Did DCPS deny Petitioner the opportunity to meaningfully participate in the IEP meeting of April, 2019? If so, did DCPS violate 34 CFR Sect. 300.501 and related provisions? If so, did DCPS deny the Student a FAPE?

As relief, Petitioner is seeking compensatory education and placement at School A for the Student.

V. Findings of Fact

1. The Student is an X-year-old who is eligible for services as a student with Multiple Disabilities. The Student is a lively and energetic child who, when having a good day, likes to be around teachers and other adults. However, the Student has severe reading and writing issues and extreme anger issues that require an "immense" amount of support in the classroom. The Student's "outrageous" behavior in the classroom has included creating weapons. The Student's behaviors are due, at least in part, to having difficulty with academics in school. The Student learns better when s/he is paired with other students who are at or about the same level. Testimony of Petitioner; Testimony of Witness D; Testimony of Witness E; Testimony of Witness G; R-14; P-29-15.

2. The Student's behavioral issues go back to when the Student was quite young. A preschool evaluation of the Student by Early Stages recommended the use of an in-class reward system or behavioral intervention plan ("BIP"). This same evaluation indicated that the Student's Full Scale IQ was 76, in the borderline range. P-29-17, 19.

3. In or about March 4, 2016, the Student was assessed through the Woodcock-Johnson Tests of Achievement, 4th Edition ("WJ-IV"). The Student's overall academic functioning fell within the Low Average range. The Student's IEP dated March 30, 2016, determined that the Student was eligible for services as a student with Other Health Impairment. The Student was recommended for five hours per week of specialized instruction outside general education. Goals were written for the Student in mathematics, reading, and writing. The IEP indicated that the Student would benefit from the use of visual aids to assist in comprehension and retention skills, as well as "explicit modeling" of expectations, repetition of directions, and visual and verbal cues

for transitioning. Frequent breaks, verbal praise, weekly incentives, preferential seating, and additional time for task completion were also recommended. P-3; P-30-2.

4. The Student attended School A for the 2016-2017 school year. It quickly became clear to school staff that the Student needed additional support. The Student's IEP dated December 6, 2016, therefore increased specialized instruction hours to eight hours outside general education and two hours inside general education. A requirement for a location with minimal distractions was also added to this IEP. P-4-9.

5. For the 2016-2017 school year, the Student received "1" grades for mathematics and reading, writing and language in every term. The Student exhibited poor work habits and personal and social skills during this school year. P-25-1.

6. The Student continued at School A for the 2017-2018 school year. Additional WJ-IV testing was conducted on September 28, 2017. This testing determined that the Student was functioning at the kindergarten level in reading, below the kindergarten level in writing, and at the first grade level in mathematics. P-36-1.

7. The Student experienced behavioral difficulty during the 2017-2018 school year. The behaviors occurred multiple times a day across different settings. The behaviors lasted from ten to fifteen minutes on average. The Student had difficulty staying on task in the classroom, often engaged in conversation with peers, and often left his/her designated learning environment. The Student started conflicts with peers that sometimes led to him/her biting another student. Although the Student's behaviors could usually be redirected by verbal prompts, the behaviors made it difficult for the Student to engage in learning. The behaviors occurred less frequently in smaller settings and more frequently when the Student was presented with a non-preferred activity. The Student's

teacher used a variety of positive reinforcements to improve his/her behavior, including verbal praise, classroom-based incentives (such as computer time), and breaks. The Student sometimes lost privileges as a result of his/her behaviors. P-37.

8. By November, 2017, the Student was performing slightly below grade level in mathematics and in the low range in reading. The Student had difficulty reading basic sight words and was considered to be at "Level C" in reading. The Student was also having difficulty focusing in the classroom. P-5.

9. An IEP meeting was held for the Student on or about November 20, 2017. The Student's IEP of November 20, 2017, had one mathematics goal, one writing goal, and reading goals. One of the reading goals anticipated that the Student would reach "Level H" by November, 2018. This IEP provided that the Student would benefit from "chunked" directions in the classroom, multiple repetitions of directions, scaffolding, cues, and prompts. Communication/speech and language goals were added to this IEP, as were motor skills/physical development goals, due to the Student's difficulty in writing and need for sensory interventions. The Student was recommended for ten hours per week of specialized instruction outside general education, 120 minutes per month of speech and language pathology outside general education, and 120 minutes of occupational therapy per month outside general education. Petitioner and Witness B, the Student's grandmother, did not express disagreement with this IEP. P-5; Testimony of Witness B.

10. A BIP was written for the Student on November 20, 2017. This BIP indicated that the Student was off-task 35% of the time, and recommended daily incentives based on a behavior tracker, morning check-in, afternoon check-out, sensory

breaks with a break pass, and a daily schedule with a timer for transitions. A token economy system was also recommended. P-22; R-7.

11. Despite the new IEP and BIP, increased breaks in the classroom, and positive praise and regard when the Student demonstrated pro-social behavior, the Student's problem behaviors continued to occur daily, multiple times per day, across different settings. The Student also displayed physical aggression towards peers, including hitting, and eloped from class. These behaviors were often unprovoked or an overreaction to a perceived threat, and teachers found it difficult to identify any specific triggers for the off-task behavior, though one teacher indicated that redirection could trigger behaviors. The behaviors continued to be more extreme in a larger group or when the Student engaged in a non-preferred activity. The behaviors also manifested themselves when work was challenging. The Student became upset about his/her performance in school at this time and expressed to Witness B that s/he felt "stupid." Witness B then began to report to the school about the Student's difficulties. P-7-10-12; P-45-8-10; Testimony of Witness B; Testimony of Witness E.

12. As of April, 2018, the Student's teacher started communicating with the Student's mother, since the Student's father was then incarcerated. Previously, the teacher had spoken mainly with the Student's father. The incarceration of the Student's father appeared to affect the Student negatively. Testimony of Witness E.

13. A draft IEP was written for the Student in April, 2018. This draft IEP did not address the Student's behavioral issues, change services (except to recommend extended school year services), or change the Student's academic goals. P-6.

14. An IEP meeting was held for the Student on or about April 13, 2018. At this meeting, Petitioner requested that behavioral support services be added to the IEP. It was agreed that a "behavioral chart" would be used for the Student, and 120 minutes per month of behavioral support services were recommended. It was reported that the Student was performing on a kindergarten level in reading, and needed more support in reading fluency, oral reading, reading basic sight words, spelling, and decoding. It was also reported that the Student was still considered to be on "Level C" in reading. R-10.

15. The final IEP of April, 2018, incorporated analysis from the Student's Functional Behavior Assessment ("FBA") from October, 2017. It also added two behavioral goals and increased the Student's specialized instruction hours to fifteen per week outside general education. The IEP also added 120 minutes per month of behavior support services. The IEP made no changes to the reading, writing, and mathematics goals and also indicated, at one point, that the Student did not require positive behavioral supports. Petitioner did not express objections to this IEP at the IEP meeting. P-6; P-7; Testimony of Witness E.

16. In or about June, 2018, Witness E determined that the Student was reading at "Level E," with 91% accuracy. R-11-3; Testimony of Witness E.

17. For the 2017-2018 school year, the Student's grades ranged from "1" to "2" in mathematics and reading, writing and language, with one "3" grade in reading for the third term. The Student's report card for term four indicated that the Student was a "delight" to have in class. Nevertheless, the Student required frequent prompting in work habits, social skills, and personal skills. P-26-1.

18. The Student continued at School A for the 2018-2019 school year. Beginning-of -year testing indicated that the Student was reading at "Level B" at this time. A student at "Level B" in reading only knows how to "handle a book" and cannot genuinely read a book. P-39-1; P-40-1, 3; Testimony of Witness D.

19. The Student's behaviors escalated during the 2018-2019 school year, including menacing other students and staff, and running in the halls. The Student also started to use inappropriate language that was obscene and sexual in nature. The Student's "socially unacceptable" behaviors were disruptive to his/her learning and to the classroom environment. The Student's behaviors were not limited to the general education and special education classrooms. The Student sometimes refused to go to music and often got into trouble during lunch. P-23; P-27-; Testimony of Witness G.

20. A meeting was held with Witness B and the school staff in or about December, 2018, during which it was reported that the Student was reading at "Level B." Also at this meeting, the Student's teacher, Teacher A, indicated that the Student's goals were inappropriately ambitious. The parties then agreed on an amended IEP for the Student that would more closely conform to the Student's needs. Testimony of Witness B; P-45; P-11-2.

21. An IEP meeting was held for the Student on February 7, 2019. The new IEP that resulted from this meeting indicated that the Student had difficulties starting assignments when prompted to do so in class, was easily distracted, was often confused about the instructions for a class assignment, and required 1:1 support. In mathematics, the IEP did not update the section describing the Student's level of performance, but added a new goal on single-digit multiplication and division. In reading, writing,

communication/speech and language, and emotional, social and behavioral development, the IEP repeated the sections describing the Student's levels of performance and all of the Student's goals from prior IEPs. This IEP did change related services to sixty minutes per month of speech and language pathology outside general education, sixty minutes per month of speech and language pathology inside general education, ninety minutes per month of occupational therapy inside general education; thirty minutes per month of occupational therapy outside general education, and 120 minutes per month of counseling. P-8.

22. At about this time, Witness B spoke to Witness G about the Student. Witness G told Witness B that School A could not meet the Student's needs because it did not have enough resources for the Student. Testimony of Witness B.

23. In an educational evaluation of the Student conducted on April 8, 2019, Evaluator A tested the Student on the Kaufman Test of Educational Achievement-3 ("KTEA-3"). In overall academic skills, the Student earned a standard score of 71, in the low range, at the 3rd percentile. The Student's reading scores were particularly low, in the kindergarten range. The evaluator noted that the Student's scores suggested that s/he did not benefit from the Wilson reading methodology used at School A. R-14.

24. At an IEP meeting held for the Student on April 9, 2019, Witness B and Petitioner were told that the Student was at "Level C" in reading and at the first grade level in mathematics. The team agreed that the Student was not making meaningful progress and sought to provide the Student with "full-time" instruction. DCPS staff said that they would refer the student to the "LRE team" in order to increase the Student's specialized instruction hours. Testimony of Witness D.

25. The April 9, 2019, IEP did not change the Student's single math goal. The description of the Student's reading skills in this IEP was exactly the same as that of prior IEPs, adding only that, in September of 2018, the Student was determined to have a Lexile level of 396. Reading goals were also repeated from prior IEPs, though one goal was omitted. This IEP indicated that the Student was able to construct simple sentences "when given all the words that should be or can be included in the sentence." The Emotional, Social and Behavioral section was copied entirely from previous IEPs. In this IEP, the Student's specialized instruction hours were changed to twenty hours per week outside general education, and related services were reorganized to include 120 minutes per month of speech and language therapy outside general education. P-9.

26. The Student's IEP dated May 8, 2019, added extended school year services but reduced the Student's specialized instruction to eighteen hours per week, because the LRE team had not approved the request for twenty hours of specialized instruction per week. P-10; Testimony of Witness D.

27. The Student's case was submitted to the LRE team, which sent staff to observe the Student. The LRE team then agreed that the Student required "full-time" specialized instruction. Testimony of Witness G.

28. Recent testing, conducted in June, 2019, showed that the Student was on the 0.2 grade level in oral reading, at the 2nd percentile. On the Woodcock Reading Mastery Tests-III, Form A, for word attack, the Student was determined to be on the 1.3 grade level equivalent, at the 4th percentile. P-41-5.

29. School B consists entirely of students with disabilities. The school provides related services including speech and language therapy, occupational therapy,

and art therapy. The school has certified special education teachers. There are sixty-one students in the lower program at the school. The school serves children in most disability "categories," and has a 3:1 student-to-teacher ratio. School B provides specialized reading instruction for students who are behind. A teaching assistant is assigned to each class, and a behavior intervention specialist may also be assigned to each classroom. The school has two clinical psychologists, four social workers, behavior intervention "centers" manned by behavior intervention counselors, and therapeutic rooms with sensory interventions for students who are experiencing behaviors. These rooms contain equipment such as punching bags and rock climbing walls. If a student tries to elope from a classroom, behavior intervention counselors are in the hallways to deter them. The school employs a "positive action initiative" with a points system, which places students at different levels reflecting their behaviors. Students receive rewards for good behavior, which entitles them to buy items from the school store or gain access to a therapeutic horse farm or dogs to play with. Most students in the school function from two to three years below grade level. Testimony of Witness A.

30. On or about July 19, 2019, DCPS sent Petitioner a letter recommending that the Student attend a Specific Learning Support ("SLS") classroom at School C for the 2019-2020 school year. The SLS classroom contains a maximum of twelve students, with a paraprofessional in each classroom. Testimony of Witness F; R-16.

VI. Conclusions of Law

Based upon the above Findings of Fact, the arguments of counsel, and this Hearing Officer's own legal research, the Conclusions of Law of this Hearing Officer are as follows:

The burden of proof in District of Columbia special education cases was changed by the local legislature through the District of Columbia Special Education Student Rights Act of 2014. That burden is expressed in statute as the following:

> Where there is a dispute about the appropriateness of the child's individual educational program or placement, or of the program or placement proposed by the public agency, the public agency shall hold the burden of persuasion on the appropriateness of the existing or proposed program or placement; provided, that the party requesting the due process hearing shall retain the burden of production and shall establish a prima facie case before the burden of persuasion falls on the public agency. The burden of persuasion shall be met by a preponderance of the evidence.

D.C. Code Sect. 38-2571.03(6)(A)(i).

Issues #1 and #2 directly involve the appropriateness of the Student's IEP and placement. Therefore, the burden of persuasion must be on Respondent for these issues, provided that Petitioner presents a *prima facie* case. Issue #3 does not directly involve the appropriateness of the Student's IEP and placement. For this issue, the burden of persuasion must be on Petitioner. Schaffer v. Weast, 546 U.S. 49 (2005).

1. Did DCPS fail to provide the Student with an appropriate IEP from the 2017-2018 school year to present, including on or about November, 2017, April, 2018, and April, 2019? If so, did DCPS act in contravention of 34 CFR 300.320, Endrew F. v. Douglas County School District, 137 U.S. 988 (2017), and Hendrick Hudson Bd. of Educ. v. Rowley, 458 U.S. 176 (1982)? If so, did DCPS deny the Student a FAPE?

A school district's duty to create an IEP for students was explained in Hendrick Hudson Bd. of Educ. v. Rowley, 458 U.S. 176 (1982), where the United States Supreme Court found that an IEP must be reasonably calculated to enable the child to receive benefit. In the District of Columbia, this has meant that the IEP should be both comprehensive and specific, and targeted to the student's "unique needs." McKenzie v. Smith, 771 F.2d 1527, 1533 (D.C. Cir. 1985); 34 CFR Sect. 300.324(a)(1)(iv) (the IEP

must address the academic, developmental, and functional needs of the child). The IEP also must comply with the IDEA's requirement that students "be educated in the least restrictive environment possible." Leggett v. District of Columbia, 793 F.3d 59, 74 (D.C. Cir. 2015).

In 2017, the United States Supreme Court addressed a split amongst the circuit courts regarding what the IDEA means when it requires school districts to provide an "appropriate" level of education to children with disabilities. Endrew F. ex rel. Joseph F. v. Douglas County School Cist. RE-I, 137 S. Ct. 988 (2017). The Court made clear that the Rowley standard is "markedly more demanding than the 'merely more than *de minimis*' test" formerly applied by many courts. Id. at 1000. As the Supreme Court recognized, "a student offered an educational program providing merely more than *de minimis* progress from year to year can hardly be said to have been offered an education at all. For children with disabilities, receiving instruction that aims so low would be tantamount to sitting idly…awaiting the time when they were old enough to drop out. The IDEA demands more." Endrew, 137 S. Ct. at 1001 (articulating standards that should govern a court's evaluation of the adequacy of an IEP) (internal quotation marks omitted).

To be sure, the IDEA "stops short of requiring public schools to provide the best possible education for the individual child, or an education equal to that of non-disabled peers." Z.B. v. District of Columbia, 888 F.3d 515, 519 (D.C. Cir. 2018). In some cases, a student's unique attributes may preclude him or her from achieving much more than *de minimis* academic progress. In those circumstances, the student's lack of progress does not prove that the school denied the student a FAPE. J.B. ex rel. Belt v. District of

Columbia, 325 F. Supp. 3d 1, 9 (D.D.C. 2018) (concluding that Endrew "certainly does not stand for the proposition that any time a child makes negligible (or uneven) academic progress, the school system has violated the IDEA").

November, 2017, IEP

Petitioner contended that all three of the contested IEPs lacked appropriate specialized instruction hours, goals, and modifications and accommodations, and did not recommend an education in the Student's least restrictive environment.

The Student's IEP of November 20, 2017, contained one mathematics goal, one writing goal, and four reading goals, one of which was for the Student to reach "Level H" by November, 2018. This IEP provided for "chunked" directions in the classroom, multiple repetitions of directions, scaffolding, cues, and prompts to support the comprehension of information. Communication/speech and language goals were added to this IEP, as were motor skills/physical development goals (because of the Student's difficulty in writing and need for sensory interventions). The Student was recommended for ten hours per week of specialized instruction outside general education, with 120 minutes per month of both speech and language pathology and occupational therapy outside general education. A corresponding BIP, also dated November 20, 2017, recommended daily incentives based on a behavior tracker, morning check-in, afternoon check-out, sensory breaks with a break pass, a daily schedule with a timer for transitions, and a token economy system.

The Student needed additional services in this IEP. Between December, 2016, and November, 2017, the Student exhibited behaviors multiple times a day, across different settings, lasting ten to fifteen minutes each on average. The Student had

difficulty staying on task in the classroom, engaged in inappropriate conversations with peers, and often left his/her designated learning environment. Indeed, for the 2016-2017 school year, the Student's report card reported "1" grades in all academic subjects.

The November, 2017, IEP did not acknowledge some of these difficulties. Instead, it somehow indicated that the Student did not have behavioral issues that affected him/her or other students. This IEP also did not contain a section dedicated to the Student's emotional, social and behavioral needs. However, this IEP was issued with an accompanying BIP, which was written the same day as the IEP. This BIP, which was premised on an FBA from October, 2017, required that the Student receive daily incentives based on a behavior tracker, morning check-ins, afternoon check-outs, sensory breaks with break passes, and a daily schedule with the use of a timer for transitions. A token economy system was also recommended for the Student. While, certainly, the Student's IEP should have been written more carefully, it should be read in tandem with the accompanying BIP. (In the District of Columbia, BIPs are supposed to be annexed to IEPs. 5-E DCMR Sect. 5-3007.3.) When the Student's IEP is viewed together with the accompanying BIP, this Hearing Officer is persuaded that DCPS did provide the Student with a reasonably calculated program at this time.[2] It is noted that, at this point, it was reasonable to provide the Student with only ten hours of specialized instruction per week, since the interventions in the BIP had not yet been tried, and it was reasonable to try to keep the Student in the least restrictive environment possible.

[2] Petitioner also contended that the November, 2017, IEP did not contain sufficient modifications and accommodations. In fact, the IEP copied the same exact language as the prior IEP in regard to "Other Classroom Aids and Services," which is another way of saying "modifications and accommodations." Even so, the interventions in the BIP should be considered to be "modifications and accommodations" that were new and could have helped the Student. Accordingly, this IEP provided the Student with reasonably calculated "modifications and accommodations."

In regard to the contentions concerning the Student's goals in the November, 2017, IEP, Petitioner provided little supporting testimony, save for Witness D's criticism of the goal that the Student should be functioning at "Level H" in reading by the end of the term of the IEP. While the record indicates that this particular goal was unrealistic, since the Student started that year at "Level C" and remains at "Level C" to this day, Petitioner did not provide any specific support for the proposition that the inadequacy of a single IEP goal should invalidate an entire IEP that is otherwise appropriate. Nor did Petitioner show how the Student's education was specifically harmed by this one unrealistic IEP goal. Finally, Petitioner's contention that the IEP was defective because it did not place the Student in his/her least restrictive environment is insufficient on its face, because Petitioner's proposed placement, a full-time placement in a special education school, is more restrictive than the placement DCPS proposed at the time. Accordingly, the November, 2017, IEP is deemed to have been reasonably calculated for the Student.

April, 2018, IEP

By April, 2018, the Student's academic levels had not improved. The Student's reading ability continued to be at "Level C," and the IEP reported that the Student could only read ten whole words. In mathematics, the Student continued to have difficulty solving two-digit by two-digit addition and subtraction problems without regrouping, which issue was mentioned in the previous IEP. In fact, the April, 2018, IEP used the same language as the November, 2017, IEP when discussing the Student's academic levels in reading, writing, and mathematics, suggesting that the Student's progress was so minimal that no changes were needed in these sections of the IEP.

The Student's behavior had also not improved by April, 2018. Despite the new BIP, the Student's problem behaviors continued to occur daily, multiple times per day, across different settings, for an average of ten to fifteen minutes per episode. The Student also eloped from class and exhibited physical aggression towards peers, including hitting them or "shoving them in line." These behaviors were often unprovoked or an overreaction to a perceived threat, and teachers found it difficult to identify any specific triggers for the off-task behavior (though one teacher indicated that attempts to redirect the Student would have the opposite of the desired effect and trigger additional behaviors).

DCPS did increase the Student's specialized instruction hours to fifteen hours per week in the April, 2018, IEP. But given the Student's lack of progress in reading, his/her low reading level, and his/her persistently difficulty behaviors, DCPS should have increased the Student's specialized instruction hours even more to ensure that all of the Student's academic subjects were taught in a small classroom setting with a special educator in the room. The record is clear that, in all classes involving reading, the Student needed individualized instruction in a small group with an educator trained on how to modify the Student's work and address his/her behavior issues. There is nothing in the record to suggest that the fifteen hours per week of specialized instruction was connected to the Student's need for extra help in classes involving reading. Indeed, there is nothing in the record to explain how DCPS came to decide on fifteen hours at all.

The problem with specialized instruction was compounded by the academic goals in this IEP, which were entirely copied from the previous IEP, even though the evidence suggested that many of the goals were too difficult for the Student, including the repeated

goal for the Student to reach "Level H" in reading by April, 2019. Indeed, Teacher A later indicated (in a meeting in December, 2018) that the Student's goals were unrealistic and should be changed. Even after that meeting, the goals were not changed until the resolution meeting for this case. See Damarcus S. v. District of Columbia, 190 F. Supp. 3d 35, 52-53 (D.D.C. 2016) ("the wholesale repetition" of goals and objectives "indicates an ongoing failure to respond to [a student's] difficulties").

Additionally, Petitioner is correct that the April, 2018, IEP did not contain sufficient modifications and accommodations. In fact, the IEP did not include any new accommodations and modifications, and merely repeated the "Other Classroom Aids and Services" language from prior IEPs. While Petitioner's LRE claims are defective for the same reasons stated in regard to the IEP of November, 2017, the April, 2018 IEP did deny the Student educational benefit, and therefore a FAPE.

April, 2019, IEP

Far from improving, the Student's behaviors actually escalated during the 2018-2019 school year. The Student began to menace other students and staff, as well as run in the halls of the building. The Student also started to use obscene and sexual language. The Student's behaviors occurred in all settings, including general education classes, special education classes, "specials," and lunch. The Student also had difficulties starting assignments and was easily distracted in class. The Student did not make any meaningful academic progress during this school year, and was reported to be reading at "Level B," a decrease from the level reported in the IEPs of both April, 2018, and November, 2017. A DCPS evaluator explained that the Student had not benefitted from the Wilson reading methodology used in his/her the school. Indeed, when the Student was administered

common words orally and asked to spell them, s/he could not spell words such as "was" (whs), "home" (hom), and "bath" (bathf). In fact, Witness G told Witness B that School A could no longer meet the Student's needs because it did not have enough resources. As a result, at the IEP meeting in April, 2019, the team agreed that the Student was not making meaningful progress and needed "full-time" instruction.

But to DCPS, "full-time" instruction did not mean that the Student would be in small classes with a special educator throughout the school day. Instead, it meant that the Student would receive specialized instruction for twenty hours per week, leaving the Student with general education students in a large class (as well as during breaks, specials, and lunch), without any specialized instruction, for a significant part of the week. This was inappropriate for the Student, who at that point was creating weapons in class and, according to Witness G from DCPS, not accessing the curriculum *at all.*

Moreover, despite the Student's persistent behaviors, even in special education classes, no additional accommodations and modifications were proposed to allow the Student to be able to be maintained in the school (which had already admitted to the grandmother that it could not educate the Student). Additionally, even though Teacher A told Petitioner that the Student's goals were inappropriate, there was no meaningful change to the academic goals in this IEP. The single math goal, the single writing goal, and the reading goals were all repeated from prior IEPs. While, again, there were no LRE issues with the April, 2019, IEP, it was not reasonably calculated, and thus denied the Student educational benefit, and therefore a FAPE.

2. Did DCPS fail to provide the Student with an appropriate educational placement from August, 2017, to present? If so, did Respondent violate the principles articulated in cases such as Gellert v. District of Columbia, 435 F. Supp. 2d 18 (D.D.C. 2006)? If so, did Respondent deny the Student a FAPE?

Most cases involving FAPE denial focus on the IEP, the "centerpiece" of the Act. Honig v. Doe, 484. U.S. 305, 311 (1988). Nevertheless, petitioners may bring claims based upon an inappropriate educational placement, even if a student's IEP is appropriate. Shore Regional High School Board of Education v. P.S., 381 F.3d 194 (3d Cir. 2004) (denial of FAPE based on the likelihood that a proposed placement would subject a student with an emotional disability to continued bullying because of his perceived effeminacy); M.L. v. Federal Way School District, 394 F.3d 634 (9th Cir. 2005) (if a teacher is deliberately indifferent to the teasing of child with a disability and the abuse is so severe that the child can derive no benefit from the services that he or she is offered by the school district, the child has been denied FAPE).

Since the Student's IEP was reasonably calculated through April, 2018, the Student's educational placement must also be deemed reasonable through April, 2018. There is nothing in the record to suggest that School A could not implement the Student's IEP through this date, and, unlike in Gellert, there are no specific claims in this case that relate only to the Student's educational placement. However, after the creation of the inappropriate IEP of April, 2018, all of the Student's placements must be deemed inappropriate because IEPs are an integral part of a student's educational placement. Eley v. D.C., 47 F. Supp. 3d 1, 17 (D.D.C. 2014); 34 U.S.C. Sect. 300.116. Though this claim is effectively redundant with the IEP claims in this case, Petitioner is correct that the Student's educational placements from April, 2018, onward denied the Student a FAPE.

3. Did DCPS deny Petitioner the opportunity to meaningfully participate in the IEP meeting in April, 2019? If so, did DCPS violate 34 CFR Sect. 300.501 and related provisions? If so, did DCPS deny the Student a FAPE?

Parents of a child with a disability must be afforded an opportunity to participate in meetings with respect to the educational placement of the child. 34 C.F.R. Sect. 300.501(b)(1); 34 C.F.R. Sect. 513(a); 20 U.S.C. Sect. 1414(e). Paolella ex rel. Paolella v. Dist. of Columbia, 210 F. App'x 1, 3 (D.C. Cir. 2006); A.M. v. Dist. of Columbia, 2013 WL 1248999 (D.D.C. Mar. 28, 2013); T.T. v. Dist. of Columbia, 2007 WL 2111032 (D.D.C. July 23, 2007). To ensure that parental participation is not an empty exercise, courts require that a local education agency ("LEA") have an "open mind" at IEP meetings so that parents may actively and meaningfully participate. The need for parental participation requires an LRE at least to seriously consider all feasible options proposed by a parent. T.P. and S.P. v. Mamaroneck Union Free School Dist., 554 F.3d 247 (2d Cir. 2009); Deal v. Hamilton County Board of Educ., 392 F.3d 840 (6th Cir. 2004). Additionally, courts have held that "it is essential that the IEP is created prior to any final placement decisions." D.B. ex rel. H.B. v. Gloucester Twp. Sch. Dist., 751 F. Supp. 2d 764, 771 (D.N.J. 2010), aff'd sub nom. D.B. v. Gloucester Twp. Sch. Dist., 489 F. App'x 564 (3d Cir. 2012).[3]

Here, there is undisputed testimony from Witness D that DCPS was unable to finalize the April, 2019, IEP at the time of the IEP meeting. Instead, DCPS had to clear its proposed hours of specialized instruction for the Student with an "LRE Support team," which then made the decision on the appropriate amount of specialized instruction hours for the Student. This approach violates the IDEA, which requires the IEP team to have

[3] 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 CFR Sect. 300.513(a).

the final say on IEP requirements, so parents can meaningfully participate in the IEP process. There is no dispute that the "LRE Support team" decided on the Student's specialized instruction hours after the creation of the IEP, without the presence or participation of Petitioner. Accordingly, DCPS denied Petitioner the right to participate in the decision-making process regarding the provision of FAPE for her child, and therefore denied the Student a FAPE.

RELIEF

Petitioner seeks placement of the Student at School B and 400 hours of compensatory education for the Student.

When school districts deny students a FAPE, courts have wide discretion to ensure that students receive a FAPE going forward. As the Supreme Court stated, the statute directs the Court to "grant such relief as [it] determines is appropriate." School Committee of the Town of Burlington v. Dep't of Education, Massachusetts, 471 U.S. 359, 371 (1985). The ordinary meaning of these words confer broad discretion on a hearing officer, since the type of relief is not further specified, except that it must be "appropriate."

In Branham v. District of Columbia, 427 F.3d 7 (D.C. Cir. 2005), the court laid forth rules for determining when it is appropriate for hearing officers to order funding of non-public placements. First, the court indicated that "(i)f no suitable public school is available, the [school system] must pay the costs of sending the child to an appropriate private school." Id. At 9 (citing to Jenkins v. Squillacote, 935 F.2d 303, 305 (D.C.Cir.1991)). The court then explained that such relief "must be tailored" to meet a student's "unique needs." Id. at 11-12 (citing to Florence County School Dist. v. Carter,

510 U.S. 7, 16 (1993)). To inform this individualized assessment, courts must consider "all relevant factors" including the nature and severity of the student's disability, the student's specialized educational needs, the link between those needs and the services offered by the private school, the placement's cost, and the extent to which the placement represents the least restrictive educational environment. Id. at 12.

In support of her position, Petitioner presented the testimony of Witness A, who provided significant details about the program at School B. The school provides small class sizes and specialized reading instruction for students who are struggling. Most importantly, the school contains behavioral supports that go well beyond anything that has been tried for the Student at School A. The school has a large staff of behavioral specialists, including two clinical psychologists and four social workers. The school also contains behavior intervention "centers" manned by behavior intervention counselors, and therapeutic rooms with sensory interventions for students who are experiencing behaviors. These rooms include equipment such as punching bags or rock climbing walls. Moreover, to address the Student's issues with elopement, behavior intervention counselors are in the hallways to deter students from leaving class. If students do leave, they are approached for verbal redirection, or a walk, or time in the therapeutic room. The school also employs a "positive action initiative" with a points system, which places students at different levels reflecting their behaviors. Students get rewards for good behavior, which entitles them to buy items from the school store or gain access to a therapeutic horse farm or dogs to play with. The school also provides students with art therapy to further ease behavioral concerns.

DCPS indicated that it could provide the Student with a Behavior and Education Support ("BES") classroom, which contains a behavior technician in a self-contained classroom of special education students. But this is not the program mentioned in a letter that DCPS sent to Petitioner about a month ago, during this litigation, on July 19, 2019. In this letter, DCPS recommended that the Student attend School C in an "SLS" program, which is not geared for students with extreme behavior problems like the Student. Moreover, even at the hearing, DCPS did not identify a school that might be able to implement the BES program for the Student. It is accordingly impossible for this Hearing Officer to determine whether the school housing the subject BES program could possibly be appropriate for the Student, who needs "an immense amount of support" according to DCPS's own witness (Witness G).

DCPS argued that School B had issues back in 2009, which resulted in a loss of certification, but the record establishes that the school has changed and that DCPS itself has recently assigned students to the school. DCPS also argued that the school does not provide an education in the Student's least restrictive environment. However, while the mandate for an LRE is an important one, it does not trump a student's right to a FAPE. Maintaining a less restrictive placement at the expense of educational benefit is not appropriate or required. Hartmann by Hartmann v. Loudoun County Bd. of Educ., 118 F.3d 996 (4th Cir. 1997); see also Clyde K. v. Puyallup Sch. Dist., 35 F.3d 1396 (9th Cir. 1994); MR v. Lincolnwood Bd. of Educ., 843 F. Supp. 1236 (N.D. Ill 1994). Under the circumstances, Petitioner's request for placement at School B is justified. The Student shall therefore be placed at School B for the entire 2019-2020 school year.

In regard to the request for compensatory education, courts and hearing officers may award "educational services to be provided prospectively to compensate for a past deficient program." Reid v. District of Columbia, 401 F.3d 516, 521-23 (D.C. Cir. 2005). In every case, however, the inquiry must be fact-specific and, to accomplish IDEA's purposes, the ultimate award must be reasonably calculated to provide the educational benefits that likely would have accrued from special education services the school district should have supplied in the first place. Id., 401 F.3d at 524; see also Friendship Edison Public Charter School v. Nesbitt, 532 F. Supp. 2d 121, 125 (D.D.C. 2008) (compensatory award must be based on a "'qualitative, fact-intensive' inquiry used to craft an award tailored to the unique needs of the disabled student"). A petitioner need not "have a perfect case" to be entitled to a compensatory education award. Stanton v. District of Columbia, 680 F. Supp. 201 (D.D.C. 2011). Under the IDEA, if a student is denied a FAPE, a hearing officer may not "simply refuse" to grant one. Henry v. District of Columbia, 55 IDELR 187 (D.D.C. 2010). Some students may require only short, intensive compensatory programs targeted at specific problems or deficiencies. Reid, 401 F.3d at 524.

Petitioner seeks 400 hours of academic tutoring from Company A as compensatory education. Witness D appeared to premise the 400 hours on a finding of FAPE denial going back to November, 2017. However, this Hearing Officer has ruled that the Student's FAPE denial started in April, 2018, not in November, 2017. Moreover, Witness D did not clearly explain how she calculated the 400-hour figure. Under the circumstances, the request for tutoring hours shall be reduced to 250 hours,

though Petitioner's suggestion that the Student be provided services by Company A was supported by sufficient testimony from Witness C.

VII. Order

As a result of the foregoing:

1. Respondent shall pay for 250 hours of compensatory tutoring for the Student, to be provided Company A, at a usual and customary rate in the community;

2. The Student shall be placed at School B for the 2019-2020 school year;

3. All compensatory education services shall be used by the Student by December 31, 2021;

4. Petitioner's other requests for relief are denied.

Dated: August 20, 2019
Corrected: August 21, 2019

Michael Lazan
Impartial Hearing Officer

cc: Office of Dispute Resolution
Attorney A, Esq.
Attorney B, Esq.
OSSE Division of Specialized Education
[redacted]/DCPS
[redacted]DCPS

VIII. Notice of Appeal Rights

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 USC §1415(i).

Date: August 20, 2019

Michael Lazan
Impartial Hearing Officer