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,	)	
	)	
v.	)	**Hearing Officer: Michael Lazan**
	)	**Case No.: 2017-0319**
LEA,	)	
	)	
Respondent.	)	

HEARING OFFICER DETERMINATION

I. Introduction

This is a case involving a student who is currently eligible for services as a student with Specific Learning Disability (the "Student"). The case involves an expulsion for the possession of X at the LEA school site.

A Due Process Complaint ("Complaint") was filed by Petitioner against LEA (or, "Respondent") pursuant to the Individuals with Disabilities Education Act ("IDEA") on December 1, 2017. This matter involves the same parties and issues as a case that was previously filed and assigned the number 2017-0290. It also involves claims that must be "expedited" pursuant to 34 CFR Sect. 300.532.

On December 4, 2017, Respondent filed a response. A resolution meeting was not held. The resolution period expired on December 8, 2017.

II. Subject Matter Jurisdiction

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

This due process hearing was held, and a decision in this matter is being rendered, pursuant to the Individuals with Disabilities Improvement Act ("IDEIA"), 20 U.S.C. Sect. 1400 et seq., its implementing regulations, 34 C.F.R. Sect. 300 et seq., Title 38 of the D.C. Code, Subtitle VII, Chapter 25, and the District of Columbia Municipal Regulations, Title 5-E, Chapter 30.

III. Procedural History

This matter involves the same parties and issues as a case that was previously filed and assigned the number 2017-0290. That case was withdrawn before any substantive rulings. The parties agreed to waive the prehearing conference in this case since the issues are the same as in the previous case. The prehearing conference in the prior case took place by telephone on November 27, 2017. Participating in the prehearing conference were Petitioner's Representative, Attorney A, Esq., and Respondent's Representative, Attorney B, Esq. A pre-hearing order was issued on December 4, 2017, summarizing the rules to be applied and identifying the issues in the case.

On December 4, 2017, Respondent moved[2] to dismiss four of the five claims. It contended that the LEA complied with the disciplinary procedures of the IDEA, arguing that it could expel the Student if the Student's behavior was not a manifestation of the Student's disability. It contended that the hearing officer has no jurisdiction over the claim that the LEA failed to comply with its own code of conduct. It also contended that it did offer the Student an appropriate setting after the Student's expulsion, satisfying the requirement to provide a "modified standard" of FAPE, i.e., services to be provided "so

[2] The motion, and also Petitioner's Notice to Appear, are substantively identical to a motion and Notice to Appear filed and argued in a previous case, Case # 2017-0290, which was withdrawn by Petitioner prior to a ruling.

as to enable the child to continue to participate in the general education curriculum." Also on December 4, 2017, Petitioner presented a Notice to Appear for the hearing officer's signature for Mr. X regarding a conversation(s) with the parent.

On December 4, 2017, Petitioner filed a response to the motion. Petitioner argued that Respondent unilaterally changed the Student's placement when the Student was charged with a code of conduct violation, underscoring that the Student did not possess the X in question and did not violate a code of conduct. Petitioner also pointed out that if, *arguendo*, the Student could properly be expelled, the Student was not provided with services to enable the Student to progress toward current IEP goals, per 34 CFR 300.530(d). Also on December 4, 2017, I granted the motion in part. Issues # 1-3 in the Due Process Complaint were dismissed, but the motion to dismiss Issue #5 was denied. Petitioner's motion for a Notice to Appear was denied because the witness in question was to present testimony in support of one of the claims that were dismissed.

There was one hearing date, December 8, 2017. This was a closed proceeding. Petitioner was represented by Attorney A, Esq. Respondent was represented by Attorney B, Esq. Petitioner moved in Exhibits 1-6. There were no objections. Exhibits 1-6 were admitted. Respondent moved into evidence Exhibits 1-15. There were objections to Exhibits 2-5, 8-10, and 13-14 on relevance, lack of completeness, and because some documents reflected settlement discussions. These objections were overruled. Exhibits 1-15 were admitted. At the close of testimony, both sides presented oral closing statements. Petitioner presented as witnesses: Petitioner and Advocate A, an advocate. Respondent presented Director A, Director of Special Education. The HOD in this case

is due on December 22, 2017, which is ten school days after the hearing date per 34 CFR Sect. 300.532(c)(ii).

IV. Credibility.

The main credibility issue in this case is whether Director A or the parent was more credible in regard to their description of the Student's placement after the expulsion, which was Placement Z. Neither witness testified from personal knowledge, and both relied upon hearsay.

Petitioner testified that she would pick up the Student and that, every time she saw the Student at the site, the Student was alone on a computer. Petitioner argued that the Student told her that s/he was left alone at the computer much of the day to do work. Director A characterized the instruction differently, indicating that the Student was in fact taught in a group sometimes. However, Director A later added that the Student's work was entirely computer based, and that there were different "modules" that the Student had to complete on the computer. Director A later explained that the groups were possible because there was one other student who was taught the same work as the Student. That Student, however, was at Placement Z for one month. It is worth noting that the LEA did not present a witness from Placement Z to rebut the parent's claims. Under the circumstances, I found the parent more credible than Director A in regard to Placement Z.

V. Issues

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

1. Did Respondent fail to comply with procedural guidelines of the IDEA, in particular 34 CFR Sect. 300.530(b)(1), when it changed the Student's education placement by expelling [the Student]? If so, did Respondent deny the Student a FAPE? (dismissed 12/4/17)

2. Did Respondent fail to comply with the disciplinary procedures of 34 CFR 300.530(g)(2) when the Student was expelled? If so, did Respondent deny the Student a FAPE?

(dismissed 12/4/17)

3. Did Respondent fail to comply with its own guidelines when it expelled the Student for possessing a substance that was not a controlled substance under the law? If so, did Respondent deny the Student a FAPE?

(dismissed 12/4/17)

4. Did Respondent fail to conduct a functional behavioral assessment and develop a Behavior Intervention Plan pursuant to 34 CFR 300.530(d)(ii) when the Student was disciplined? If so, did Respondent deny the Student a FAPE?

5. Did Respondent failed to identify an appropriate interim educational setting after the expulsion pursuant to 34 CFR 300.530(d)? If so, did Respondent deny the Student a FAPE?

As a remedy, Petitioner is seeking to place the Student in a small, therapeutic setting, for a functional behavioral assessment ("FBA") and Behavior Intervention Plan ("BIP"), a re-evaluation of the Student, and then an MDT meeting to discuss the results of the FBA, BIP and re-evaluation.

VI. Findings of Fact

1. The Student is a B year old who is significantly below grade level in all subjects. The Student is eligible for services as a Student with a Specific Learning Disability. The Student's behavior impedes the child's learning or the learning of others. The Student's verbal comprehension is at the extremely low range, and the Student's processing speed is at the borderline range. The Student deviates from a schedule whenever given a choice and repeatedly asks the teacher to leave the classroom, giving varied, unnecessary excuses. When redirected, the Student will still refuse to do the work. (P-1-2; P-3-7; R-1-1; Testimony of Advocate A)

2. In February, 2015, the Student's full-scale IQ was determined to be borderline. Other testing indicated that the Student had "clinically significant" issues in regard to externalizing problems and internalizing problems. (P-3-8,11-12)

3. An IEP was written for the Student or January 9, 2017. The Student was recommended for five hours per week of specialized instruction outside general education and five hours per week of specialized inside general education, with occupational therapy, thirty minutes per month, and behavioral support services, one hour per month. (P-1-9)

4. The IEP contained math goals relating to solving real world multi-step word problems and identifying the "characteristics of linear inequality and system of linear inequalities." The reading goal was to improve on reading "for an author's claim." The written expression goal was to produce clear and coherent writing. There was also a behavioral goal for improving coping strategies and demonstrating the ability to regulate emotions. (P-1)

5. An incident occurred regarding the Student on August 24, 2017. As a result of the incident, the Student was accused of being in the possession of X on school premises. On August 30, 2017, the Student was suspended pending a suspension hearing in regard to the possession of X. (R-2-1)

6. The suspension hearing was conducted on September 6, 2017. On September 8, 2017, the LEA's Discipline Committee found that the Student possessed X in the school and expelled the Student. (R-2-2; R-3-1)

7. The parent and the LEA met on September 18, 2017, to determine the Student's placement after the suspension. The LEA proposed Placement Z to the parent. Other than an objection to transportation, the parent did not object to this placement, which was to last until the end of the school year (unless the Student left the LEA). No additional options were considered. (R-6-1-2; R-7-1)

8. On September 20, 2017, the LEA sent the parent Prior Written Notice designating Placement Z to provide the Student with educational services between 10:00 am and 3:00 pm four days a week. (R-7-1)

9. During this time period, the LEA did not conduct an FBA or BIP or any other assessment of the Student because of an "oversight." The LEA also felt that the Student did not need an evaluation because the Student was due an evaluation or re-evaluation every three years. (Testimony of Director A)

10. At Placement Z, the Student's program involved the use of two computer programs. The teachers were supposed to explain the material to the students, who then do the work on their own on the computer. The programs involve different subjects, including math foundations, algebra, reading foundations, biology, English, and world

history. The programs first provided a "pre-test." Then, there were "modules" and practice problems for the Student, who eventually got "self-graded." If the Student was able to pass a quiz on a particular "unit," the Student would move on to the next "unit" in the program. (Testimony of Director A)

11. Other students at Placement Z "come and go." At times, the Student was the only one in the room. At one point, another student was taught the same work as the Student, but that Student was at Placement Z for one month. (Testimony of Director A)

12. Every time the parent comes to pick the Student up, the Student is alone, on the computer, working, and wearing headphones. (Testimony of Petitioner)

13. The Student has struggled in the program at Placement Z. In the Student's report card dated October 27, 2017, the Student received F grades in every subject matter area except one. (P-2)

14. After the filing of the Due Process Complaint, the LEA agreed to conduct a re-evaluation of the Student. The parent signed a consent for the re-evaluation on November 30, 2017. (R-12-1; Testimony of Petitioner; Testimony of Director A)

VII. Conclusions of Law

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

1. Burdens.

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 law provides:

> *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 § 38-2571.03(6)(a)(i).

Applying this relatively new statute to the facts here, I find that the burden should be on Petitioner in regard to Issue #4, relating to the requirement to conduct a Functional Behavior Assessment and develop a Behavior Intervention Plan. Shaffer v. Weast, 546 U.S. 49 (2005). The D.C. statute, which puts the burden on the LEA, specifically requires that the LEA bear the burden of persuasion when there is a challenge to an IEP or program. An FBA is an evaluation, not an IEP or a placement. A BIP is an element of a program and/or placement but not a program and/or placement in its entirety.

The more difficult question is in regard to Issue #5, relating to the requirement to provide an appropriate setting for the Student after the expulsion. The LEA contended that the allegation in Issue # 5 related to the Student's "Interim Alternative Educational Setting," not the Student's placement. However, the statute defines "Interim Alternative Educational Setting" as a setting that a Student can be sent into for forty-five days due to significant disciplinary issues. 34 CFR Sect. 300.532(b)(2)(ii). Placement Z is not an "interim" placement. Placement Z was scheduled to be the Student's placement for virtually the entirety of the 2017-2018 school year. The Student has been expelled from the LEA and has no other placement or program at this time. Under the circumstances, Issue #5 should be viewed as an allegation regarding the Student's current placement or program. The burden of persuasion on Issue #5 should therefore be placed on the LEA.

2. FBA/BIP.

According to 34 CFR 300.530(d)(1)(ii), if a child with a disability is removed from the current placement for more than ten school days, and the underlying behavior was not a manifestation of the disability, the Student must receive, as appropriate, an FBA, behavioral intervention services, and modifications that are designed to address the behavior violation so that it does not recur.

The parties agree that the Student was removed for more than ten days. The parties also agree that the removal was due to behavior that was not a manifestation of the Student's disability. Accordingly, an FBA, behavioral intervention services, and/or modifications were appropriate to address the student's behavior if deemed appropriate.

The LEA did not vigorously argue that an FBA was not appropriate. In fact, Director A indicated that the LEA's failure to conduct an FBA after the expulsion was an "oversight" that is now being addressed. There is some suggestion in the record that the FBA may not have been necessary since the Student's behavior was "possessing X" and that no additional incidents involving possession of X have occurred. However, the record makes clear that, in addition to the possession issue, the Student has significant behavioral difficulties in the classroom. The Student has a tendency to deviate from schedule whenever given a choice, repeatedly asks the teacher if s/he can leave the room, and refuses to do work. The Student's behavior disrupts the Student's own classroom performance and the classroom performance of others. Under the circumstances, I find that an FBA, and behavioral intervention services and modifications, were appropriate to ensure that the Student received meaningful educational services at Placement Z. The

LEA violated 34 CFR 300.530(d)(1)(ii) when it failed to provide the Student with an FBA and/or behavioral intervention services or modifications after expulsion.

3. Participation in the General Education Curriculum.

Pursuant to 34 CFR Sect. 300.530(d)(1)(1), a child with a disability who is removed from the child's current placement for more than ten days as a result of conduct that is not a manifestation of the Student's disability must "continue to receive educational services to enable the child to continue to participate in the general education curriculum, although in another setting, and to progress toward meeting the goals set out in the child's IEP."

The extent to which educational services need to be provided, and the type of instruction to be provided, depends on the length of the removal, the extent to which the child has been removed previously, and the child's needs and educational goals. Questions and Answers on Discipline Procedures, 52 IDELR 231 (OSERS 2009) This statute does not require the school to provide "typical" classroom instruction. 64 Fed. Reg. 12,623 (1999). A variety of settings may be used to deliver the curriculum, including alternative schools and homebound instruction. See, e.g., Freeport Pub. Schs., 26 IDELR 1251 (SEA ME 1997)(student had access to the general education curriculum through tutoring based on his regular education classes); Cumberland Sch. Dist., 35 IDELR 269 (SEA WI 2001)(student was able to access the general curriculum because his special education teacher designed the lesson plans used by the teachers in the program); Regional Sch. Unit No. 72, 114 LRP 13097 (SEA ME 09/19/13) (noting that a student's "shortened" school day was appropriate because he received direct instruction for four and a half hours, which was equivalent to a full school day).

All of the cases cited above allowed the school district a fair amount of discretion in crafting a post-suspension placement. However, even though an LEA has some discretion to provide a "modified" version of FAPE, the post-suspension placement must still be designed to allow the Student to reach their IEP goals. Director A's testimony on this point was vague and conclusory, and no witness from Placement Z was ever called as a witness to explain that the Student was specifically working on IEP goals. Tellingly, session notes submitted by Petitioner suggest that the Student was *not* working on IEP goals but was working on another set of goals, ISP goals, which were very broad and not related to the IEP goals. For instance, all four days of the week of November 13, 2017 involved work "on quizzes and assignments with 70 percent accuracy," a generic goal that could encompass virtually any subject matter. There is no such goal in the IEP, which contains specific goals relating to, for instance, "identifying the characteristics of linear inequality and system of linear inequalities, when given a prompt."

It is also worth noting that there is a reference in the Student's IEP to the effect that the Student will take advantage of the situation and not work if left alone, suggesting that it is not appropriate to allow the Student much independent work. Since the program at Placement Z includes much independent work, it is no surprise that the Student is doing little work in the program, and indeed received almost all F grades on a recent report card. Though the LEA argued that the Student's grades improved, there is no documentation of this in the record.

The LEA argued that its post-suspension program for the Student was "reasonably calculated," suggesting they should be judged on the appropriateness of their "plan" for post-suspension services instead of the appropriateness of the services as delivered. In

effect, the LEA is arguing that Bd. of Educ. v. Rowley, 458 U.S. 176, 207 (1982) applies when assessing a placement pursuant to 34 CFR Sect. 300.530(d)(1)(i).

However, Rowley applies when an LEA is being judged on its IEP. An LEA is not required to create a new IEP in this situation, and the LEA did not create a new one for the Student here, although the existing IEP was modified slightly to add transportation. *Arguendo,* even if the LEA is correct that Rowley applies, it is apparent from the record that any plan that might have existed in connection to the post-suspension placement was ineffective. There is nothing in the record to establish that there was any plan to provide for the Student's work to be specifically aligned to IEP goals, as required. Nor is there anything in the record to require Placement Z to carefully monitor the Student and/or make sure the Student does not work alone for an extended period of time.

In sum, I find that the LEA violated 34 CFR Sect. 300.530(d)(1)(i) when it provided the Student with Placement Z as its post-expulsion placement.

REMEDY

There is no dispute that the Student requires an FBA, and there is also no dispute that the Student should receive corresponding behavioral services and modifications. Nor is there any dispute that the Student should be re-evaluated at this time. Indeed, the Student is now being evaluated as a result of the filing of the Due Process Complaint.

The main issue in regard to relief is whether the parent is entitled to a small, therapeutic setting, as suggested by Advocate A. As Petitioner pointed out in closing argument, there is authority in this Circuit for placing Students at particular settings after the Student is assigned to a post-suspension placement. Fisher v. Friendship Public Charter School, 857 F.Supp.2d 64 (D.D.C. 2012). However, in Fisher, the parent had

already placed the Student in a private school and was seeking reimbursement for the payments that the parent had made to the school. That is not what happened here. In fact, Petitioner has not identified any private school for the Student, much less call a witness from a private school as a witness to explain that the school could provide a setting that would meet the Student's needs.

A "small, therapeutic setting" is not necessary for the LEA to satisfy the requirements of 34 CFR Sect. 300.530(d)(1)(i). The LEA's duty is to provide the Student with only a "modified" version of FAPE after a suspension of the kind referenced in this case. I will therefore remand the matter to an IEP team to devise a program that will provide the Student with services that allow the Student to continue to receive educational services to enable the child to continue to participate in the general education curriculum, and to progress toward meeting the goals set out in the child's IEP. The program should also take into account the Student's tendency to disengage from work when left alone.

VIII. Order

As a result of the foregoing:

1. Respondent shall provide the Student with an FBA within ten school days of this order, and a BIP within thirty school days of this order;

2. Respondent shall complete all other necessary evaluations within thirty school days of this order;

3. The IEP team shall convene within thirty school days of this order and provide the Student with a placement that: a) is specifically oriented toward the goals in the Student's IEP; b) does not allow the Student to be left alone during academic periods;

4. All other requests for relief are hereby denied.

Dated: December 22, 2017
Corrected: December 27, 2017

Michael Lazan
Impartial Hearing Officer

cc: Office of Dispute Resolution
Attorney A, Esq.
Attorney B, Esq.
OSSE Division of Specialized Education
Contact.resolution@dc.gov

X. 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: December 22, 2017

Michael Lazan
Impartial Hearing Officer