District of Columbia
Office of the State Superintendent of Education
Office of Dispute Resolution
1050 First Street, NE, Washington, DC 20002
(202) 698-3819 www.osse.dc.gov

Parent, on behalf of Student,[1]	)	
Petitioner,	)	
	)	**Hearings: November 14, 2018,**
	)	**and December 4, 2018**
v.	)	**Date: December 14, 2018**
	)	**Hearing Officer: Michael Lazan**
	)	**Case No.: 2018-0173**
School X PCS,	)	
	)	
Respondent.	)	

HEARING OFFICER DETERMINATION

I. Introduction

This is a case involving a student who is currently eligible for services as a student with Other Health Impairment (the "Student").

A Due Process Complaint ("Complaint") was received by School X PCS (or "Respondent") pursuant to the Individuals with Disabilities Education Act ("IDEA") on July 10, 2018. The Complaint was filed by Petitioner, who is the parent of the Student. On July 19, 2018, Respondent filed a response. The resolution period expired on August 9, 2018.

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 C.F.R. Sect. 300 et seq., Title

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

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

On September 6, 2018, Petitioner moved to amend the Due Process Complaint. There was no objection, and this Hearing Officer allowed the amendment by order dated September 20, 2018. Respondent filed an amended response on September 14, 2018. On October 8, 2018, this Hearing Officer held a prehearing conference. Attorney A, Esq., counsel for Petitioner, appeared. Attorney B, Esq., counsel for Respondent, appeared. On October 11, 2018, a prehearing conference order was issued, summarizing the rules to be applied in this hearing and determining the issue in the case, which is distinct from the issue in the original Due Process Complaint.

A hearing was held on November 14, 2018. However, unexpectedly, the case was not completed on that date. As a result, on November 20, 2018, Petitioner filed a motion for a continuance. Respondent consented to the motion. This Hearing Officer found the motion to be necessary and reasonable, and there was no showing of prejudice to the Student, Petitioner, or Respondent. The Hearing Officer Determination ("HOD") due date was therefore extended to December 14, 2018. A second hearing was held on December 4, 2018.

Throughout this closed proceeding, Petitioner was represented by Attorney A, Esq. Respondent was represented by Attorney B, Esq. Petitioner moved into evidence exhibits 1-56, excluding exhibits 34 and 39. There were no objections. Exhibits 1-56, exclusive of exhibits 34 and 39, were admitted. Respondent moved into evidence exhibits 1-48. There were no objections. Exhibits 1-48 were admitted.

Petitioner presented as witnesses: herself; Witness A, an advocate; and Witness C, an advocate and psychologist. Respondent presented as witnesses: Witness B, a support coordinator; Witness D, a teacher; Witness E, a teacher; Witness F, a psychologist; Witness G, Director of Student Support; and Witness H, a behavior support specialist. At the close of testimony, the parties presented closing arguments.

IV. Issue

As identified in the Prehearing Conference Summary and Order and in the Due Process Complaint, the Free Appropriate Public Education ("FAPE") issue to be determined is as follows:

Did Respondent fail to review and revise the Student's Individualized Education Program ("IEP") in December, 2017? If so, did Respondent violate 34 CFR Sect. 300.324 and 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 Respondent deny the Student a FAPE?

V. Findings of Fact

1. The Student is an X-year-old who is currently eligible for services as a student with Other Health Impairment. The Student has issues with reading and behavior that affect his/her educational needs. The Student has been diagnosed with Attention Deficit Hyperactivity Disorder ("ADHD") and can be inattentive, inappropriate, and will refuse to do work. The Student needs teachers to provide direct and close support so that the Student will feel the presence of an authority. (Testimony of Witness B; Testimony of Witness E; Testimony of Witness H; R-43; R-5-3)

2. The Student has been attending School X PCS, a charter school located in the District of Columbia, since the 2015-2016 school year. This school uses its own behavioral rewards system for students. In this system, students lose "points" for conduct considered to be negative and gain "points" for conduct considered to be positive. Certain point accumulations result in rewards for the students. Conversely, the school requires a "reflection" if a student falls below a certain "points" level. The school also requires "dean's referrals" for students if they have a behavioral incident. About seventy percent of students at the school have two "dean's referrals" weekly, including the Student. (Testimony of Witness G; Testimony of Witness H)

3. The Student had behavioral issues at School X PCS during the 2015-2016 school year. As a result, a Behavior Intervention Plan ("BIP") was written for the Student on October 8, 2015. This BIP directed school staff to use verbal reminders and praise when working with the Student, who was to be positioned near higher functioning students for modeling purposes. The BIP recommended private conversations with the Student after misbehavior, a daily behavior tracker, a classroom job as a reward, and positive phone calls home as an additional incentive. Later BIPs, written on February 15, 2016, and April 12, 2017, provided for largely the same interventions. (R-2; R-6; R-8)

4. The Student attended School X PCS for both the 2015-2016 and 2016-2017 school years. The Student had behavioral issues in school during this time. Still, for the 2016-2017 school year, the Student received a "B" or "C" in all final grades for classes other than "technology." In academic classes, the Student earned a "B" in all classes except "math procedures," where the Student earned a "C." (R-11-1; Testimony of Petitioner)

5. Largely to address the Student's behaviors, a "Section 504 Plan" was put in place for the Student in April, 2017, which provided the Student with counseling. However, this counseling did not solve the Student's problems in the classroom. Since the Student continued to have behavioral challenges and concerns, Respondent conducted an evaluation of the Student, including a comprehensive psychological assessment. The psychological assessment found that the Student's Full Scale IQ was 87, in the low average range, a decrease from the Student's Full Scale IQ in testing in 2015. On the Woodcock-Johnson Tests of Achievement, Fourth Edition, the Student's math and writing scores were found to be in the average range, but the Student's reading comprehension was very low, at a 2.0 grade level equivalent. Additional testing, including the Conners-3 Short Form and the Behavior Assessment System for Children, Third Edition, found that the Student was at risk for hyperactivity, atypicality, and conduct problems. (P-42; Testimony of Witness G)

7. A Functional Behavior Assessment ("FBA") of the Student was conducted on May 31, 2017. The FBA indicated that the Student's behaviors were moderate, occurred three to four times a week, and were likely to occur during unstructured time, transitions, and instruction. The behaviors mainly occurred because of task avoidance. The FBA indicated that the Student had not responded to interventions such as breaks, proximity to the teacher, a visual behavior chart, or positive notes, but had been motivated by immediate incentives. (P-45)

8. The Student was deemed eligible for special education services in July, 2017. In September, 2017, a new BIP and an IEP were written for the Student. The new BIP updated the previous BIP to enable the Student to receive a modified schedule for

getting rewards through the school's "points" system. The IEP, dated September 5, 2017, indicated that the Student should receive ten hours of specialized instruction per week (five hours outside general education in reading, 2.5 hours inside general education for reading, and 2.5 hours inside general education for math), and 180 minutes per month of behavioral support services per week (sixty minutes inside general education and 120 minutes outside general education). Staff were told to refrain from verbal reprimands, and to use a calm, gentle tone with the Student. The IEP included math goals, reading goals, and emotional, social and behavioral goals relating to redirection, remaining on task, and regulating the Student's emotions. The IEP indicated that tasks should be broken up for the Student, and that the Student should get movement breaks, checks for understanding, guided notes, and vocabulary "cheat sheets," together with chunked directions, visual cues, and prompts. The Student's parent agreed with this IEP. (P-50; R-14; R-12-4)

9. From September 6, 2017, through the end of December, 2017, as measured through behavior data reflecting the results of the school's rewards system, the Student engaged in such conduct as talking out of turn, disrupting class, refusing class work, not paying attention, making inappropriate noises, not cooperating, getting out of the assigned seat without permission, and not following directions. However, during this time, the Student also engaged in positive behaviors, including showing leadership, showing initiative, and "doing the right thing." (P-32-1-9)

10. A little more than a month later, on October 19, 2017, Petitioner's advocate sent School X PCS a dissent letter. The advocate expressed concerns about the Student's stated reading levels in the IEP. The advocate also indicated disapproval with

the Student's reading goals and lack of writing goals in the IEP, and indicated that the Student needed to address on-task behavior, self-regulation, aggression, negative comments, and issues with peer interactions. The advocate also indicated that the Student needed a more restrictive environment to address aggressive behaviors and learning gaps in all areas. The advocate also sought extended school year services, an adaptive skills evaluation, a speech and language pathology evaluation, and an occupational therapy evaluation. (P-14)

11. Another IEP meeting for the Student was held on November 1, 2017. During this meeting, the parties reviewed the IEP and the Student's performance during the 2017-2018 school year up to that point. One teacher at the meeting indicated that the Student was appropriate in class, and teachers indicated that the Student's behavior was the same as other students in their classes. The Student engaged in some inappropriate behavior during this time, including throwing items around in class. A next step specifically mentioned in this meeting was to modify the Student's BIP. However, no modifications were made to the IEP during this meeting. (R-17; Testimony of Witness B; R-32)

12. Another IEP meeting was held on November 21, 2017. This meeting was to follow up on the meeting of November 1, 2017, and review the revised BIP. The parties discussed the Student "eating seeds" in class, among other behaviors. But the IEP team members from the school felt that the current BIP was helping to curb the Student's misbehavior, and that it was unrealistic to expect the Student to have no behaviors. School staff also indicated that the Student had recently met goals, and Witness G noted that the Student's behaviors had recently become less frequent. No modifications were

made to the Student's IEP as a result of this meeting. (R-18; Testimony of Witness B; Testimony of Witness D)

13. On December 2, 2017, the Student's parent wrote an email indicating that she thought everything was going well with the Student, though she highlighted an incident wherein a teacher put his hands on the Student. (P-19)

14. The Student was administered Measures of Academic Progress ("MAP") testing in the winter of 2017. This testing indicated that the Student was regressing in reading and math. (P-56-6; Testimony of Witness A)

15. After the Student learned that his/her cousin had been placed in a private school, the Student began to believe that s/he should also be placed in a private school. As a result, at least in part, the Student's behaviors became more frequent during the winter of 2017-2018. (Testimony of Witness B; Testimony of Witness D)

16. Another IEP meeting was held on February 27, 2018. Witness D reported that the Student had been sleeping in class and making noises randomly. Teacher D and Teacher E indicated that the Student got upset when other students ignored him/her. The team resolved to perform another FBA, and to increase behavior support services, among other interventions. (R-19-3-6)

17. The Student's IEP was amended on March 1, 2018, to add more behavioral support services. This IEP called for the Student to receive 120 minutes per month of behavioral support services outside general education, 160 minutes per month of behavioral support services inside general education, and forty minutes per month of behavioral support services "consultation." The Student's behaviors seemed to de-escalate at about this time, but then, in mid-March, the Student was suspended for two

days for making inappropriate sexual comments. (Testimony of Witness B; Testimony of Witness G; P-51; P-27; R-27; R-23; R-23-5)

18. Another FBA of the Student was conducted on April 10, 2018. In connection to the writing of this FBA, a teacher indicated that the Student showed extreme disrespect to adults. Also per the FBA, an observation showed that the Student repeatedly did not comply with demands. (P-48)

19. Overall during the 2017-2018 school year, the Student did work in class about seventy percent of the time, which was considered by school staff to be better than many other students in the school. (Testimony of Witness H; P-32-9-40)

20. The Student's report card for the 2017-2018 school year showed that the Student received "B" and "C" grades in all subjects, except for an "F" grade in math procedures for the second quarter and three "F" grades in technology. (P-35; R-40)

21. Another BIP was written for the Student on June 5, 2018. This BIP provided more specific interventions for the Student, suggesting, among other things, that the Student needed to be given a choice. The BIP also indicated that teachers should make sure not to allow the Student to escape academics through behaviors. The BIP also directed the teachers to minimize attention given to the Student when the Student engaged in more challenging behaviors. (R-28)

22. On September 4, 2018, another IEP meeting was held for the Student. The Student's IEP from September 4, 2018, kept some of the language from the previous IEPs and also included math goals, reading goals, and social, emotional and behavioral goals. The social, emotional and behavioral goals were written to help the Student decrease oppositional behavior, fully participate in class, and regulate his/her emotions. The IEP

indicated that the Student was "significantly impaired" by non-compliance and that all intervention strategies should address non-compliance. This IEP recommended the same ten hours of specialized instruction per week as the 2017-2018 IEP, with the same 320 minutes per month of behavioral support services as the IEP that was amended in March (160 minutes inside general education, 120 minutes outside general education, and forty minutes of consultation). (P-50)

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.

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

The issue in this case involves a challenge to the Student's existing or proposed IEP or placement. Accordingly, Petitioner bears the burden of persuasion, provided that a *prima facie* case has been presented. There was no argument that Petitioner failed to present a *prima facie* case, and the testimony and evidence made clear that Petitioner did satisfy the burden to present a *prima facie* case.

Did Respondent fail to review and revise the Student's IEP in December, 2017? If so, did Respondent violate 34 CFR Sect. 300.324 and 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 Respondent deny the Student a FAPE?

Petitioner contended that the Student's IEP should have been revised because of the Student's increasingly severe academic and behavioral issues in class. Petitioner contended that the Student requires a more restrictive placement, per her advocate's dissent letters.

The main role of a hearing officer is to determine if the IEP developed through the Act's procedures is reasonably calculated to enable the child to receive additional benefits. Hendrick Hudson Bd. Of Educ. v. Rowley, 458 U.S. 176 (1982). 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); N.S. ex rel. Stein v. District of Columbia, 709 F.Supp.2d 57, 60 (D.D.C. 2010); 34 CFR Sect. 300.320(a)(2)(B) (the IEP must contains goals that meet each of the child's educational needs that result from the child's disability); 34 CFR Sect. 300.324(a)(1)(iv) (the IEP must address the academic, developmental, and functional needs of the child).

In S.S. ex rel. Shank v. Howard Road Academy, 585 F. Supp.2d 56, 66-67 (D.D.C. 2008), the Court found that the measure and adequacy of an IEP decision must be determined as of the time it was offered to the student. Citing to circuit court decisions, the Court found that an IEP should be judged prospectively to avoid "Monday morning quarterbacking." See Thompson R2-J Sch. Dist. v. Luke P., 540 F.3d 1143, 1149 (10th Cir. 2008); Adams v. Oregon, 195 F.3d 1141, 1149 (9th Cir. 1999); Carlisle Area Sch. V. Scott P., 62 F.3d 520, 530 (3d Cir. 1995); Roland M. v. Concord Sch. Comm., 910 F.2d 983, 992 (1st Cir. 1990).

In 2017, the 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 Dist. RE-I, 137 S. Ct. 988 (2017). In Endrew F., the Court held that an IEP must be "reasonably calculated to enable a child to make progress appropriate in light of the child's circumstances." Id. at 1001. The Court made clear that the standard is "markedly more demanding than the 'merely more than *de minimis*' test" applied by many courts. Id. at 1000.

The IDEA has a long-standing provision requiring districts to conduct a periodic review of each student's IEP. According to 20 USC 1414 (d)(4)(A) through 20 USC 1414 (d)(4)(B), the Local Education Agency ("LEA") must ensure that the IEP team "reviews the child's IEP periodically, but not less frequently than annually," to "determine whether the annual goals for the child are being achieved." The LEA must also revise the IEP "as appropriate" to address: any lack of expected progress toward the annual goals and in the general education curriculum, where appropriate; the results of any reevaluation conducted; information about the child provided to, or by, the parents concerning additional evaluation data; the child's anticipated needs; or other matters. 34 CFR Sect. 300.324(b)(1)(ii) provides that a school district must revise the IEP, as appropriate, to address any lack of expected progress toward the annual goals, the results of any reevaluation, information about the child provided to, or by, the parents, the child's anticipated needs, other matters. Kevin T. v. Elmhurst Comm. Sch. Dist. No. 205, 36 IDELR 153 (N.D. Ill. 2002).

There are credible reports that the Student engaged in inappropriate behavior on numerous occasions between September, 2017, and December, 2017, and the school district's contention that the Student behaved just like the other children in the class is not especially persuasive. Psychological testing found that the Student was presenting with characteristics of a conduct disorder, and the Student was one of only two students in the school with a modified rewards system. Also, no specific evidence was presented in the record to support the contention that most of the other students in the school had similar behavioral problems. Even if there were such students in the school, the presence of other students with similar issues does not alter the severity or importance of the Student's special educational needs.

However, the Student's behaviors, while significant, were not as severe as Petitioner and Witness A made them out to be. Witness A pointed to behavior charts as evidence that the Student constantly engaged in serious behavioral incidents between September, 2017, and December, 2017. But the behavior charts in question did not show the Student was "disciplined" as a result of serious incidents. Instead, as explained by Witness G, the behavior charts were a product of the school's rewards system. Per this system, the school deducted "points" from students for certain actions, including actions as minor as having poor posture. Witness G explained that this behavioral system was designed to magnify minor behavioral events, including events that would have been ignored at another school, in the interest of helping students recognize their behavioral concerns and modify their behavior.

This strategy appears to have worked for the Student, who was doing reasonably well in class between September, 2017, and December, 2017. In the meetings held

between the school and Petitioner in November, 2017, teachers indicated that the Student was meeting goals, and Witness G reported that the Student's behavior had improved. On November 1, 2017, Witness D said that the Student was meeting math goals a majority of the time and had scored 100 on two of three recent quizzes. Another teacher, Teacher A, said the Student was doing well, though the Student needed reminders to stay on task. Another teacher, Teacher B, said that the Student was doing well in reading, though the Student needed to stay focused. On November 21, 2017, Teacher C said that the Student was completing work and not exhibiting behaviors, and Teacher D said that the Student was increasing his/her grades in reading and writing. *Indeed, in December, 2017, Petitioner herself indicated that she thought the Student had been doing well*, though she did flag an incident where the Student was allegedly touched by a teacher. By the end of the school year, the Student had received C or B grades in all academic areas.

Petitioner pointed to the MAP testing conducted on the Student on or about December, 2017, as evidence that the Student was doing poorly, and there is no dispute in the record that this testing reflected some regression. However, school district staff credibly suggested that the Student does not always take MAP testing seriously. In fact, the Student's MAP testing in reading during the winter of the 2016-2017 school year was remarkably low compared to the Student's scores before and after this testing, suggesting that the Student did not take the MAP testing seriously on a previous occasion. On this record, which includes mostly good grades during the school year, it cannot be said that the MAP scores of the winter of 2017 established that the Student did not progress from September, 2017, to December, 2017.

Petitioner also pointed to testimony that the Student slept in math class. However, the record indicates that this was discussed in the meeting of February 27, 2018, where Witness D said that that the sleeping had been going on for about a month. This suggests that the sleeping began after the month in question in this case, which is December, 2017. While, certainly, a student should never sleep in class, the record suggests that this was not yet a serious problem with the Student in December, 2017.

Petitioner also argued that there was a decline in the Student's Full Scale IQ. Petitioner pointed to the drop in Full Scale IQ in the testing conducted in May, 2017, compared to the testing conducted in October/November, 2015. However, this data is not relevant to the contention that the Student's Full Scale IQ was affected by inadequacies in the Student's educational program in the fall of 2017, which is the period at issue here.

Parenthetically, Petitioner presented no caselaw holding a school district liable for failing to revise an IEP only three months after the IEP in question took effect. Moreover, this Hearing Officer, through independent research, has found no cases where a school district was found to have failed to revise an IEP that was created approximately three months prior to the date a petitioner claimed the IEP should have been revised. It is important to note that Petitioner, at a time when she was represented by counsel, agreed with the Student's first IEP in September, 2017. Also in September, 2017, the school meaningfully revised the previous BIP for the Student to provide a modified schedule of rewards for the Student. The school staff needed some time to determine whether the IEP and BIP were working. It is worth noting that the school district did eventually increase the Student's behavior support services in March, 2018, after the Student was adversely affected by the news that the Student's cousin was going to attend a private school.

Finally, Petitioner's claim that the Student needs a full-time, self-contained setting does not adequately take into account the mandate to provide students with instruction in the least restrictive environment. In enacting the IDEA, "Congress was concerned about the apparently widespread practice of relegating handicapped children to private institutions or warehousing them in special classes." Sch. Comm. of Town of Burlington v. Dep't of Educ. of Mass., 471 U.S. 359, 373 (1985). Accordingly, in formulating an appropriate IEP, an IEP team must "be mindful of IDEA's strong preference for 'mainstreaming,' or educating children with disabilities '[t]o the maximum extent appropriate' alongside their non-disabled peers." Gagliardo v. Arlington Cent. Sch. Dist., 489 F.3d 105, 108 (2d Cir. 2007) (quoting 20 U.S.C. § 1412(a)(5)); Lachman v. Ill. State Board of Educ., 852 F.2d at 295 ("[IDEA's] requirement that mainstreaming be provided to the maximum extent appropriate indicates a very strong congressional preference"); Oberti v. Board of Educ., 995 F.2d 1204 (3d Cir. 1993) (setting forth stringent standards for school districts in connection to their duties to provide an education to students with disabilities in the Least Restrictive Environment).

Here, where the Student was maintaining satisfactory grades and making progress in class, and where the school was closely monitoring the Student's progress through two IEP meetings in November alone, this Hearing Officer finds that Respondent was under no duty to revise the Student's IEP in December, 2017.

VII. Order

As a result of the foregoing, this matter is dismissed with prejudice.

Dated: December 14, 2018

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

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).

Dated: December 14, 2018

Michael Lazan
Impartial Hearing Officer