

District of Columbia
Office of the State Superintendent of Education
Office of Dispute Resolution
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Parents, on behalf of Student,¹)	
Petitioners,)	
)	Hearing Date: 12/7/20
v.)	Hearing Officer: Michael S. Lazan
)	Case No. 2020-0160
District of Columbia Public Schools,)	
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 September 4, 2020. The Complaint was filed by the Student’s parents (“Parents” or “Petitioners”). This Hearing Officer was appointed to this case on September 8, 2020. On September 15, 2020, Respondent filed a response. The resolution period expired on October 4, 2020.

II. Subject Matter Jurisdiction

This due process hearing was held, and a decision in this matter is being rendered, pursuant to the IDEA, 20 U.S.C. 1400 et seq., its implementing regulations, 34 C.F.R.

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

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

A prehearing conference was held on October 6, 2020. Attorney A, Esq., and Attorney B, Esq., counsel for Petitioners, appeared. Attorney C, Esq., counsel for Respondent, appeared. A prehearing order was issued on October 9, 2020, setting the hearing dates in the matter for November 4, 2020, and November 5, 2020. After another case, Case # 2020-0180, was filed on behalf of the Student, DCPS moved to consolidate on October 19, 2020. Petitioners moved for a stay-put injunction on October 21, 2020. On October 22, 2020, Petitioners responded to Respondent's motion to consolidate and DCPS moved to reschedule the hearing dates to November 17, 2020. On agreement of the parties, the hearing dates were then merged and reset to November 17, 2020. DCPS filed opposition to the motion for stay-put on October 26, 2020. On October 28, 2020, the prehearing order was revised to reflect the new hearing date and Petitioners' request for revisions. On October 30, 2020, Petitioners submitted a reply to DCPS's opposition to the motion for stay-put relief. On November 9, 2020, DCPS withdrew its motion to consolidate and its motion to reschedule the hearing dates. On November 11, 2020, this Hearing Officer issued an order denying the motion for stay-put relief and issued a second revised prehearing order.

On November 12, 2020, DCPS moved to dismiss because Petitioners allegedly did not disclose in timely fashion. On November 13, 2020, Petitioners submitted opposition to the motion. The parties appeared at the hearing on November 17, 2020. Respondent generally objected to Petitioners' disclosures due to their alleged lateness,

but the objections were overruled. However, considering Respondent's representation that it was not able to prepare for the case, the hearing date was reset to December 7, 2020. On November 18, 2020, DCPS moved for a continuance to allow the Hearing Officer Determination ("HOD") to be issued by December 14, 2020. On November 18, 2020, the continuance was granted by written order. On November 26, 2020, Petitioners moved to admit additional disclosures in consideration of the new hearing date. On December 1, 2020, Respondent submitted opposition to the motion, which was granted by order dated December 3, 2020. Two notices to appear were signed on December 3, 2020.

On December 7, 2020, the matter was heard. Attorney A, Esq., and Attorney B., Esq., appeared for Petitioners. Attorney C, Esq., appeared for Respondent. Petitioners moved into evidence exhibits P-1 through P-29. Objections were overruled and Exhibits P-1 through P-29 were admitted. Respondent moved into evidence exhibits R-4 through R-6, R-8, R-11, R-13, R-16, R-18, R-22, R-27, R-28, R-30, R-33 through R-40, R-42 through R-44, R-53, R-54, R-57, R-58, R-60, R-61, R-63, R-65, and R-68 without objection. Petitioners presented as witnesses: the Student's mother; Witness A, an expert in special education programming and placement; and Witness B, an expert in compensatory education. Respondent presented as witnesses: Witness C, a psychologist; and Witness D, a teacher, and Local Educational Agency ("LEA") representative. On December 10, 2020, the parties presented written closing arguments.

IV. Issues

As identified in the Revised Prehearing Order and in the Complaint dated November 11, 2020, the issues to be determined in this case are as follows:

1. Did Respondent fail to recommend an appropriate Individualized Education Program (“IEP”) for the Student in or about September, 2020? If so, did Respondent act in contravention of 34 C.F.R. 300.320, Andrew F. v. Douglas County School District, 137 U.S. 988 (2017), Hendrick Hudson Bd. of Educ. v. Rowley, 458 U.S. 176 (1982), and related authority? If so, did Respondent deny the Student a Free Appropriate Public Education (“FAPE”)?

Petitioners contended that the IEP failed to provide services or goals to address the Student’s social-emotional and executive functioning issues, failed to offer the Student necessary specialized instruction inside general education for mathematics or goals in mathematics, and did not provide sufficient information about the Student’s placement/setting in the least restrictive environment (“LRE”).

2. Did Respondent fail to allow Petitioners to meaningfully participate in the IEP meeting for the Student in or about September, 2020? If so, did Respondent violate 34 C.F.R. Sect. 300.501 and related provisions? If so, did Respondent deny the Student a FAPE?

As relief, Petitioners contended that the Student is entitled to compensatory education and a facilitated IEP meeting to develop an IEP with goals and specialized instruction in math and executive functioning.

V. Findings of Fact

1. The Student is an X-year-old who is currently eligible for services as a student with Multiple Disabilities. P-5. The Student has been diagnosed with Attention Deficit Hyperactivity Disorder-Predominantly Inattentive Presentation and Autism Spectrum Disorder. P-1-1. The Student has an above average IQ but has had behavior issues that have caused difficulties for the Student in class, including in mathematics. Testimony of Witness A. The Student’s least favorite subject is mathematics. R-32.

2. The Student was determined to be eligible for services on February 6, 2014. P-4-4. The Student was evaluated and determined to have weaknesses in written

expression, impulsive behaviors, and poor body awareness. P-1-2. The Student was noted to be a good speller and strong reader but would skip words when reading and have issues with time management, figurative language, behavior and distractibility, careless mistakes, and organization, among other things. P-1-2-3. Even so, the Student was determined to be ineligible for services on May 1, 2016. P-4-5.

3. The Student attended School A for the 2018-2019 school year. The Student was considered capable but would frequently “blurt out” comments and chew on objects. The Student would also rush through work, leading to mistakes. The Student was given intervention for both multiplication and division units early in the school year and showed immediate progress, improving thirty-plus percent during the first two weeks of interventions. R-5- 9-10

4. A comprehensive psychological evaluation of the Student was conducted by a DCPS psychologist in May, 2019. On the Woodcock Johnson IV-Tests of Cognitive Abilities (“WJ-IV COG”), the Student scored in the average range. On the Woodcock Johnson IV-Tests of Achievement (“WJ-IV ACH”), the Student scored 117 in mathematics, in the 87th percentile. R-5-17. On the Behavior Rating Inventory of Executive Function, Second Edition (“BRIEF-2”) the Student scored in the average range in the Global Executive Composite, with “mildly elevated” scores in Behavior Regulation Index and “emotional control,” per a teacher’s report. On the Behavior Assessment System for Children-Third Edition (“BASC-3”) teacher report, the Student was at risk for “internalizing problems” and “externalizing problems,” and both parent and teacher reports indicated elevations in aggression, depression, and somatization. The parent and teacher reports also both noted that, in school, the Student could be easily upset, present

as sad, and occasionally make negative statements. The evaluator reported that the Student lost his/her temper easily, teased others, and became argumentative when things did not go his/her way. The evaluator added that the Student sometimes engaged in behaviors that could be considered strange or odd. As part of the comprehensive psychological evaluation, the Student was observed in a smaller setting for a mathematics “support” class, with twelve students and two teachers in the room. In this class, the Student was able to complete independent work, though s/he ran into difficulty with one of the problems. R-5.

5. A Section 504 Plan was written for the Student in May, 2019. Among other things, the plan provided the Student with a break space; stipulated timely home school communications with Petitioners; provided the Student with a “flash pass” when s/he experienced anxiety; required the use of grid paper for mathematics; required small group instruction in mathematics where appropriate; allowed water breaks when needed; required prompts to slow down; required a weekly organization meeting with a counselor to clean out the Student’s binder, locker, and to go over tools; and testing accommodations. The Section 504 Plan also allowed the Student to carry a water bottle and snack, wear sunglasses or a hat in school, use the bathroom without restriction, chew gum, and do make-up work without penalty. P-2.

6. The Student was evaluated by an independent neuropsychologist in July, 2019. On the Wechsler Intelligence Scale for Children-V (“WISC-V”), the Student scored a Full-Scale IQ of 104, at the 61st percentile. The Student demonstrated age-appropriate skills in reading, mathematics, core language, and visual thinking, as well as solid verbal learning ability, though with some weaknesses in social language. The

evaluation indicated that the Student loved to read and could be resilient, but exhibited difficulty with inhibition, attention, planning, organizational skills, fine motor deficits, eye contact, flexibility, repeating phrases, perseverating, non-verbal communication, careless mistakes, and social functioning. The evaluator recommended that the Student receive social functioning interventions and supports to develop social and communication abilities, such as “lunch bunch,” and executive functioning interventions, including working one-on-one with a special educator. P-1-2-15.

7. The Student attended School B for the 2019-2020 school year. This was the Student’s first year at the school. The i-Ready assessment in mathematics was administered to the Student on August 30, 2019. The Student earned an overall score of 509. R-22-118. Based on this score, the Student’s teacher recommended him/her for an accelerated mathematics class. R-22-117-118. The Student’s classroom performance was assessed by DCPS staff in or about September, 2019. In mathematics, the Student was deemed to be above grade level, though it was reported that s/he would make errors due to rushing. In writing, no concerns were noted, though the Student was said to be distractible during independent writing work. The assessments indicated that the Student was organized enough to turn in assignments and chewed gum to focus better. Teachers reported that the Student was mostly in the “target range” with respect to attention, anxiety, and social skills, though below range on one social skill. P-3-3-7.

8. A school social worker observed the Student on September 18 and 19, 2019. During the observation, the social worker noticed that the Student completed his/her mathematics test very quickly, without reviewing his/her work, and frequently required prompts to stop talking to other children during the test. P-3-8. The Student

was observed by Witness A on October 4, 2019, and November 8, 2019. In Spanish, math, and art, the Student got up when s/he was expected to be seated, called out in a provocative and argumentative manner, and was off-task and disruptive, requiring teacher intervention. The Student also chewed on a bottle cap throughout his/her ELA class, played with scissors in art class, and completed work very quickly, if s/he completed it at all. P-4-11.

9. In the 2019-2020 school year, the Student was placed in two counseling groups, one for executive functioning and one for social skills. The Student was reportedly removed from both groups due to disruptive, inappropriate behavior. P-4-12. The Student also made disrespectful comments to peers in mathematics class. The Student's mathematics teacher provided the Student with additional help during the school year, including one-on-one help. Testimony of Mother. The Student had behavioral issues in mathematics to the point where s/he would blame the teacher for being a "bad teacher." Testimony of Mother. The Student received grades of "2" in mathematics in the first and second advisories. In the third advisory, the Student's math grade improved to "3." R-5-9. It was also reported that, after being given classroom jobs in math class, the Student became more engaged, asked for help more often, and shut down less. R-22-117.

10. On January 20, 2020, the Student was again evaluated on the i-Ready measure in mathematics. The Student scored 511, two points higher than the 509 score s/he received on the test at the start of the school year. Both scores represented the same grade level equivalent. R-27-134; P-19; Testimony of Witness C.

11. Hearing Officer Peter Vaden issued an HOD for the Student on August 18, 2020. Hearing Officer Vaden determined that the Student was a “child with a disability,” as defined by 34 C.F.R. Sect. 300.8, and that DCPS should convene an IEP team to develop the Student’s initial IEP within thirty calendar days of the date of the decision. R-30. After the HOD was issued, Witness D tried to set up an IEP meeting. Petitioners wanted the meeting to occur before the school year started, but Witness D found no staff available then. The meeting was therefore scheduled for September 2, 2020, the second day of the 2020-2021 school year. Prior to the meeting, Petitioners were asked for input, and Witness A accordingly provided DCPS with a document containing a detailed proposal for goals and services to be included in the IEP. Testimony of Witness D; P-13.

12. The Student’s IEP meeting of September 2, 2020, included Petitioners, a special education teacher, Witness D, a general education teacher, Witness A, a social worker, a DCPS representative, and Attorney A. P-5-1. At the meeting, Witness D reviewed a draft IEP that he had helped create, and there was a thorough discussion of the Student’s goals. The team adopted some of the goals suggested by Witness A but declined to write goals in other areas, including mathematics, self-awareness, and self-regulation. Witness D explained that the Student was accessing the content in an accelerated mathematics class and that test scores supported their position that no mathematics goals or services were needed. Witness A recommended that the Student be provided with five hours of specialized instruction per week, but DCPS did not agree and instead recommended two hours of specialized instruction per week in written expression. The parties also did not agree on behavioral support services. Petitioners sought 240 minutes of services per month, whereas Respondent offered 120 minutes of

services per month because they were wary of pulling the Student out of class too much.

Nor did the parties agree on the Student's "Other Classroom Aids and Services."

Witness A asked for all the accommodations in the Section 504 plan, but DCPS disagreed. The parties also did not agree to end the meeting. The Student's mother wanted to continue the discussion to address narrative writing, executive functioning, mathematics, and accommodations. However, Witness D indicated that there had to be a timely end point, since the HOD required that an IEP be issued promptly. Respondent would not discuss the Student's forthcoming schedule at the meeting. P-5; P-6; P-27; P-13; Testimony of Witness D; Testimony of Mother.

13. The Student's IEP indicated that the Student's behavior impeded his/her and others' learning, noting that the Student struggled at times to provide positive responses to peer communications and feedback. The IEP included two "Area of Concern" sections, one for written expression and the other for emotional, social, and behavioral development. The corresponding goals for written expression related to editing for errors, maintaining an agenda book, and responding to prompts. The corresponding goals for emotional, social, and behavioral development related to responding to feedback without protest, contributing positively to peer conversations, and responding positively to non-preferred tasks and unexpected situations. The Student was recommended for two hours of specialized instruction per week inside general education on written expression, with 120 minutes of behavioral support services per month (sixty minutes inside general education and sixty minutes outside general education). The IEP also provided "other classroom aids and services," including assigning the Student to leadership tasks, chunking assignments, checking for understanding before the Student

started a task, using a visual timer to help the Student with self-pacing, redirecting and prompting the Student as s/he was completing tasks, giving the Student time-and-a-half for writing tasks, and providing the Student with movement breaks, a flash pass, access to a classroom computer for writing tasks, and assistance with organizing an agenda book to calendar upcoming task deadlines. The IEP also recommended clarifications/repetition of directions, a noise buffer or headphones, preferential seating, and extended time.

Testimony of Witness D.

14. After the IEP was created, Respondent proposed scheduling the Student for some “co-taught” classes. Respondent also sent Petitioners Prior Written Notices describing the IEP meeting and the IEP. Petitioners did not clearly consent to the IEP until approximately one month later, through counsel. Testimony of Witness D; P-8; P-7. In response to the Prior Written Notices, Petitioners corresponded with Respondent, contending that, among other things, the IEP meeting was defective because there was inadequate discussion of the issues, including issues relating to the Section 504 plan, executive functioning, social and emotional supports and services, compensatory education, changes in schedule, and the accuracy of the Student’s scores and grades. P-7; P-8-4; P-9; Testimony of Witness D; Testimony of Mother.

15. Another i-Ready test was conducted for the Student on September 10, 2020. The Student scored 476, two grades below grade level, according to the measure. P-19-3. On the Student’s Term 1 progress report dated October 9, 2020, the Student received an “F” grade in mathematics and music, though other grades were in the “A” and “B” range. P-23-1. On or about October 21, 2020, DCPS proposed a draft IEP for the Student with an “Area of Concern” in mathematics. This draft IEP provided for

mathematics goals relating to solving word problems with variables, problems with decimals and multiplication or division, and expressing decimals as percentages. P-19; Testimony of Witness D.

VI. Conclusions of Law

The burden of persuasion in District of Columbia special education cases was changed in 2014. The District of Columbia code now states that “(w)here there is a dispute about the appropriateness of the child’s individual educational program or placement, 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 establishes “a *prima facie* case.” D.C. Code Sect. 38-2571.03(6)(A)(i). The burden of persuasion for Issue #1 is therefore on Respondent if Petitioners present a *prima facie* case. The burden of persuasion for Issue #2 is on Petitioners since the claim does not directly involve the appropriateness of the Student’s proposed program or placement.

1. Did Respondent fail to recommend an appropriate IEP for the Student in or about September, 2020? If so, did Respondent act in contravention of 34 C.F.R. 300.320, Andrew F. v. Douglas County School District, 137 U.S. 988 (2017), Hendrick Hudson Bd. of Educ. v. Rowley, 458 U.S. 176 (1982), and related authority? If so, did Respondent deny the Student a FAPE?

Petitioners contended that the IEP failed to provide services or goals to address the Student’s social-emotional and executive functioning issues, failed to offer the Student necessary specialized instruction inside general education for mathematics or goals in mathematics, and did not provide sufficient information about the Student’s placement/setting in the LRE.

School districts must develop a comprehensive plan, known as an IEP, for meeting the special educational needs of each disabled student. 20 U.S.C. Sect. 1414(d)(2)(A). In Hendrick Hudson Bd. of Educ. V. Rowley, 458 U.S. 176 (1982), the Court explained that an IEP must be formulated in accordance with the terms of the IDEA and “should be reasonably calculated to enable the child to achieve passing marks and advance from grade to grade.” Id. at 204. The IDEA also requires that children with disabilities be placed in the “least restrictive environment” so that they can be educated in an integrated setting with children who are not disabled to the maximum extent appropriate, that is, one that provides a program that “most closely approximates” the education a disabled child would receive if s/he had no disability. Leggett v. Dist. of Columbia, 793 F.3d 59, 74 (D.C. Cir. 2015); 20 U.S.C. Sect. 1412(a)(5)(A). 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. Andrew F. ex rel. Joseph F. v. Douglas County School Dist. RE-I, No. 15-287, 137 S. Ct. 988 (U.S. Mar. 22, 2017). The Court reasoned that a student who is making “merely more than *de minimis* progress from year to year can hardly be said to have been offered an education at all.” Id. at 1001.

Social-Emotional and Executive Functioning Issues.

An IEP must include “a statement of measurable annual goals, including academic and functional goals.” 20 U.S.C. Sect. 1414(d)(1)(A). The goals are “designed to meet the child’s needs that result from the child’s disability to enable the child to be involved in and make progress in the general education curriculum” and to “meet each of the child’s other educational needs that result from the child’s disability.” Id. Annual

goals must be appropriate in light of the “child’s circumstances.” Andrew F., 137 S. Ct. at 999-1001. In reviewing the substantive adequacy of IEP goals, a court “must appreciate that the question is whether the IEP is reasonable, not whether the court regards it as ideal.” Id. at 999.

Petitioners’ brief characterized these issues as executive functioning issues and contended that the Student’s executive functioning issues were not adequately addressed in the IEP. Petitioners relied primarily on testimony from Witness A to the effect that the Student’s disabilities affect his/her ability to complete tasks, organize work, and maintain focus and attention. Petitioners underscored the Student’s problems with rushing through work, failing to turn in assignments, and disrupting the classroom by, among other things, calling out, getting out of his/her seat, and arguing with school staff. Petitioners contended that the Student required additional specialized instruction to address these issues, again pointing to the testimony of Witness A, who pointed out that only one goal in the IEP related to executive functioning (writing goal #2, which related to an agenda book for organization). Witness A contended that the Student’s executive functioning needs should have been addressed in the emotional, social, and behavioral development goals in the IEP, or in another section entitled “Cognitive.”

However, the IEP did provide the Student with 120 minutes per month of behavior support services (sixty minutes inside general education, sixty minutes outside general education). The record suggests that these services were designed to address the Student’s behavioral difficulties, including issues relating to task completion, distractibility, and misbehavior in class. Indeed, the behavior support services would have been delivered by a counselor who the Student’s mother called “really great” at the

hearing. Additionally, Witness D presented credible testimony to the effect that the IEP's emotional, social, and behavioral development goals did address the Student's executive functioning issues, particularly in regard to task completion. Goal #3 clearly addressed the Student's inability to complete tasks that are not preferred. Goal #5 related to the Student's ability to create a plan to address social and academic problems, which could also address the Student's issues with deadlines. The accommodations in the IEP also addressed the Student's executive functioning issues. As explained by Witness D, the IEP required that the Student receive a visual timer to help with self-pacing, prompts to complete tasks, extra time, movement breaks, and access to a computer. The IEP also addressed the Student's issues with distractibility and impulsivity. In the "Other Classroom Aids and Services" section of the IEP, the Student was recommended for such interventions as movement breaks, private redirection, and chunking of assignments.

Petitioners contended that these accommodations and goals were not enough. Petitioners contended that the Student needs specialized instruction to address his/her executive functioning needs, and additional goals to address his/her executive functioning needs. But Witness A asked for only three additional hours of specialized instruction at the IEP meeting, and the record suggests that this request was premised on the Student's need for specialized instruction in mathematics. Petitioners did not explain why a special educator was necessary to provide the Student with the executive functioning interventions or present any caselaw where FAPE denial was premised on the failure of an IEP to include additional executive functioning goals. Parenthetically, as pointed out by DCPS, the executive functioning goals in the Student's IEP, together with the IEP's accommodations, sync with the Student's neuropsychological assessment of July, 2019,

which emphasized the Student's need to keep track of long term assignments (addressed in written expression goal #2, through the use of an agenda book), be more efficient in accomplishing work (addressed in emotional, social, and behavioral development goal #5, through creating a plan to address academic problems), break down long-term assignments (addressed in the accommodation for "chunking"), and use software applications (addressed in the accommodation for computer access). Accordingly, Petitioners' claim that the IEP did not provide enough goals and services relating to social-emotional and executive functioning issues is without merit and must be dismissed.

Mathematics Services and Goals Issues.

Petitioners contended that the IEP should have addressed the Student's mathematics issues through specialized instruction and goals. Petitioners pointed to emails from the Student's mathematics teacher during the 2019-2020 school year to the effect that the Student often told the teacher that s/he did not know how to do problems, and that the Student would refuse help and instead blame the teacher for his/her difficulties. P-24-1. The teacher also stated that the Student struggled with solving multi-step equations and would have issues going forward. P-24-3. Petitioners also pointed to the Student's i-Ready testing, which showed in a decline in mathematics. Petitioners argued that the Student is now two grade levels behind in mathematics.

Petitioners argued that the August, 2020, HOD of Hearing Officer Vaden supports their position. Petitioners pointed out that Hearing Officer Vaden, in determining the Student was eligible for services, concluded that the Student needed specialized instruction in mathematics. Petitioners also noted that Respondent has changed its mind

and now agrees that the Student requires specialized instruction and goals in mathematics, and that the Student is currently failing mathematics for the 2020-2021 school year.

In response, DCPS contended that the IEP team based its assessment of the Student's need for mathematics services on the information available at the time, in particular the Student's then-recent grades. DCPS also contended that it sought a new IEP meeting to revise the IEP to add mathematics goals and services in October, 2020, suggesting that new information came to light after the September 2, 2020, IEP meeting. However, Witness D did not clearly contend that he relied exclusively on new information when he changed his mind about the Student's mathematics goals and services. Witness D testified that he added math after gaining a full understanding of the sequence of events and receiving input from Teacher A, a mathematics teacher. Nor did Witness D explain why DCPS opted not to provide the Student with specialized instruction in mathematics even though Hearing Officer Vaden premised his finding of eligibility on the fact that the Student's Section 504 plan effectively provided the Student with specialized instruction, including small-group and one-on-one instruction in mathematics. While this Hearing Officer cannot agree with Petitioners that Hearing Officer Vaden's HOD can be said to collaterally estop Respondent's defense, since the issues were different before Hearing Officer Vaden,² this Hearing Officer does agree that

²Collateral estoppel, or issue preclusion, bars litigation of an issue if the issue being raised was contested by the parties and submitted for judicial determination in the prior case, the issue was actually and necessarily determined by a court of competent jurisdiction in the prior case, and if preclusion in the second case is not unfair to the party bound by the first determination. Yamaha Corp. of Am. v. United States, 961 F.2d 245, 254 (D.C.Cir.1992), *cert. denied*, 506 U.S. 1078, 113 S. Ct. 1044, 122 L.Ed.2d 353 (1993) (citations

Respondent's Section 504 plan specifically required the Student to receive small-group instruction in mathematics, and that this kind of instruction is "specially designed instruction" as defined by the IDEA. 20 U.S.C. Sect. 1401(29); 34 C.F.R. Sect. 300.39(b)(3). This Hearing Officer also agrees with Hearing Officer Vaden that the Student's mathematics teacher during the 2019-2020 school year sent correspondence suggesting that the Student had significant issues in mathematics, including that s/he was not able to grasp multi-step equations and problems, and that future problems were likely.

Witness A was able to offer a cogent explanation of the Student's needs in mathematics. Witness A explained that the Student's attentional issues were more impactful in the subject of mathematics, where steps cannot be skipped as easily as in other subjects. Witness A therefore concluded that the Student needs specially designed instruction from a special educator who can adapt, as appropriate, the content, methodology, or delivery of instruction to address the Student's "unique needs." 34 C.F.R. Sect. 300.39(b)(3); cf. G.D. ex rel. G.D. v. Wissahickon Sch. Dist., 832 F. Supp. 2d 455, 466-67 (E.D. Pa. 2011) (the school district had an obligation to look beyond the student's cognitive potential or academic progress to address attentional issues and behaviors); Letter to Anonymous, 55 IDELR 172 (OSEP 2010) (the mere fact that a student is gifted does not disqualify the student from eligibility for special education and related services under the IDEA to address behavioral or social challenges); Memorandum to State Dirs. of Special Educ., 65 IDELR 181 (OSEP 2015) (high cognition is not a bar to eligibility).

omitted). Issues relating to the September 2, 2020, IEP were not raised before Hearing Officer Vaden, who only addressed the Student's eligibility for services.

This Hearing Officer agrees and finds that the September 2, 2020, IEP denied the Student a FAPE because it did not contain mathematics goals and services.

Information in the IEP about the Placement.

Petitioners pointed to Brown v. District of Columbia, 179 F. Supp. 3d 215 (D.D.C. 2016) in support of their position, contending that the Student's IEP did not provide sufficient information about the Student's placement in the LRE. In Brown, the court invalidated the subject IEP in part because of the vagueness of the language in the IEP relating to the student's place in the continuum of alternative placements. Petitioners are correct that the "LRE page" of the September 2, 2020, IEP (P-5-8) only described the Student's Behavioral Support Services and mentioned that the Student previously benefitted from a Section 504 plan. But Petitioners failed to explain how they would have benefitted from a fuller "LRE page," or how additional language on the "LRE page" might have had some impact on the Student's education or on their ability to participate in the placement process. Accordingly, to the extent that the "LRE page" in the Student's September 2, 2020, IEP can be said to be violative of the IDEA, such violation must be considered procedural in nature and does not support a finding that the Student was denied a FAPE.

In sum, this Hearing Officer agrees with Petitioners that the Student was denied educational benefit, and therefore a FAPE when Respondent failed to include mathematics services or goals on the September 2, 2020, IEP, but all other claims relating to the September 2, 2020, IEP are dismissed.

2. Did Respondent fail to allow Petitioners to meaningfully participate in the IEP meeting for the Student in or about September, 2020? If so, did Respondent

violate 34 C.F.R. Sect. 300.501 and related provisions? If so, did Respondent deny the Student a FAPE?

The IDEA requires each LEA to ensure that the parents of each child with a disability participate in meetings with respect to the educational placement of their child. 20 U.S.C. Sect. 1414(e); 34 C.F.R. Sect. 300.501. The placement decisions must be made by a group of persons, including the parents and other persons knowledgeable about the child, the meaning of the evaluation data, and the placement options. 34 C.F.R. Sect. 300.116(a). The IDEA does not define “educational placement,” but courts have interpreted it as extending beyond the specific location of the school at which the student is enrolled. Lunceford v. D.C. Bd. of Educ., 745 F.2d 1577, 1582 (D.C. Cir. 1984); D.K. ex rel. Klein v. D.C., 962 F. Supp. 2d 227, 233 (D.D.C. 2013) (physical school location alone does not constitute an educational placement); Johnson v. District of Columbia, 839 F. Supp. 2d 173, 177 (D.D.C. 2012) (the “fundamental flaw” of the parent’s argument was the underlying assumption that the student’s educational placement is the physical school the student attends).

Petitioners contended that DCPS did not fully discuss the Student’s educational placement during the September 2, 2020, IEP meeting. Petitioners contended that they must be part of an IEP team that discusses the proposed placement in greater detail. Petitioners argued that the meeting, and the Student’s IEP, should have addressed the number of students in the placement; the student-to-teacher ratio in the placement; the profiles of the other students in the placement; whether the Student’s classes would be taught at, above, or below grade level; and what types of teachers would be in the

placement. Petitioners also contended that the IEP team, and the IEP, failed to describe adequately how the Student's placement fit into the continuum of alternative placements.

The District of Columbia Circuit Court of Appeals recently issued a decision on parental participation in the IEP process. The court was presented with a fact pattern where DCPS went so far as to change a student's school without even meeting with that student's parent. Affirming the district court, the circuit court found that the failure to schedule an IEP meeting before changing the subject child's school was, at most, a procedural violation³ of the IDEA and ruled that DCPS did not deny the Student a FAPE, noting that DCPS actively worked to involve the parent in its decision-making process through visits and opportunities for meeting. Sanchez v. District of Columbia, 815 F. App'x 559, 561 (D.C. Cir. 2020), cert. denied sub nom. Z. B. By & Through Sanchez v. D.C., No. 20-205, 2020 WL 5883397 (U.S. Oct. 5, 2020).

Similarly, in J.T. v. District of Columbia, No. CV 19-989 (BAH), 2020 WL 5865243, at *7–8 (D.D.C. Oct. 1, 2020), an IEP meeting was not in full compliance with regulations requiring a representative of a recommended private school to be at the meeting. Even so, Chief Judge Beryl Howell ruled that the student was not denied a FAPE because the violation was procedural in nature, noting that the student's parents had substantial opportunity to participate, and did participate, in the subject IEP meeting. Id. at *9–10.

³Procedural flaws do not automatically render an IEP legally defective. Lesesne ex rel. B.F. v. District of Columbia, 447 F.3d 828, 832, 834 (D.C. Cir. 2006). A procedural defect in an IEP results in a denial of a FAPE if it "(i) impeded the child's right to a free appropriate public education; (ii) significantly impeded the parents' opportunity to participate in the decision-making process regarding the provision of a free appropriate public education to the parents' child; or (iii) caused a deprivation of educational benefits." 34 C.F.R. Sect. 300.513(a)(2).

Respondent provided Petitioners with substantial opportunity to participate in the decision-making process regarding the Student's educational placement. At the IEP meeting on September 2, 2020, Petitioners and DCPS engaged in a thorough discussion of the Student's goals with Petitioners' expert, Witness A, who provided DCPS with an extensive document listing proposed goals. The record suggests that these goals were carefully considered by the DCPS staff, and Petitioners did not contend otherwise. Indeed, the record establishes that DCPS made meaningful changes to the Student's IEP goals based on Witness A's many suggestions.

Petitioners suggested that DCPS should have agreed with all of Witness A's proposals, but a school district is under no duty to adopt all of the goals that a parent proposes at an IEP meeting. Petitioners also contended that they should have received more specific information at the meeting, such as the teachers that the Student would be assigned to, the students would be assigned to the proposed classrooms, and the grade levels that the proposed classes would be taught at. Though of course this kind of information could be helpful, Petitioners presented no authority from any jurisdiction supporting the proposition that school districts must provide parents with this degree of detail during an IEP meeting. To the contrary, a placement decision does not need to include a determination of the specific classroom within the Student's designated school, including information about the other students in the classroom or the teachers who might be assigned to that classroom. Letter to Wessels, 16 IDELR 735 (OSEP 1990).

It is relevant to note that in J.T., DCPS proposed a new school setting for the student that was not well known to the parents. In this case, however, there was no mystery about the school setting. The Student would again attend School B, and

Petitioners knew School B well from the Student’s instruction there during the 2019-2020 school year. Moreover, DCPS afforded Petitioners a great deal of attention, before and after the IEP meeting, to answer their additional questions about the IEP and the educational placement. The record in this case includes over 100 pages of email exchanges between the school district and Petitioners and establishes that Respondent’s staff communicated with Petitioners patiently and professionally, particularly regarding Petitioners’ concerns about the Student’s scheduling changes.

Petitioners failed to establish that DCPS “significantly impeded” their opportunity to participate in the decision-making process. 20 U.S.C. Sect. 1415(f)(3)(E)(ii)(II). Accordingly, this claim must be dismissed.

RELIEF

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.” 20 U.S.C. Sect. 1415(i)(2)(C)(iii).

Petitioners seeks compensatory education in the form of forty hours of tutoring. 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). 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.

The Student was denied specialized instruction and goals in mathematics during the 2020-2021 school year. The period of deprivation should run from the date of the IEP that denied the Student a FAPE (September 2, 2020) to the date that DCPS would have provided the Student with a new IEP that included mathematics goals and services. Since a new IEP was drafted for the Student on October 21, 2020, and since an IEP meeting had to occur before the IEP could be implemented, the Student missed approximately two months of specialized mathematics instruction during the 2020-2021 school year.

Witness B testified that, according to his calculation of harm to the Student, the Student should be entitled to forty hours of compensatory education to make up for the services missed because of the September 2, 2020, IEP. Witness B is an expert in compensatory education with years of experience in formulating compensatory education

plans for students. DCPS did not offer any testimony to contradict the statements of Witness B. DCPS contended that it has already offered the Student 100 hours of compensatory education and that no award is necessary, but there is no binding agreement between the parties on the amount of compensatory education due to the Student. DCPS also contended that Petitioners failed to present sufficient evidence in support of their proposal, but this Hearing Officer found the testimony of Witness B to be credible and consistent with the record. The Student will therefore be awarded forty hours of compensatory education, to be delivered in the subject of mathematics by a certified special education teacher at the Office of State Superintendent of Education (“OSSE”) rate. Additionally, as requested by Petitioners, the parties will be ordered to reconvene an IEP meeting within twenty calendar days to amend the Student’s IEP and provide the Student with goals and specialized instruction in mathematics. Petitioners also requested an order for a “facilitated” IEP meeting, but any such facilitated meeting must be arranged pursuant to an agreement between the parties.

VII. Order

As a result of the foregoing:

1. The Student is hereby awarded forty hours of compensatory education in mathematics, to be provided by a certified special education teacher at the OSSE rate;
2. Respondent shall reconvene the Student’s IEP team within twenty (20) calendar days of the date of this HOD and rewrite the Student’s IEP to include specialized instruction and goals in mathematics;
3. Petitioners’ other requests for relief are denied.

Dated: December 14, 2020

Hearing Officer Determination
Michael S. Lazan, Hearing Officer
Case # 2020-0160

Michael Lazan
Impartial Hearing Officer

cc: Office of Dispute Resolution
Attorney A, Esq.
Attorney B, Esq.
Attorney C, 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 days from the date of the Hearing Officer Determination in accordance with 20 U.S.C. Sect 1415(i).

Dated: December 14, 2020

Michael Lazan
Impartial Hearing Officer