District of Columbia
Office of the State Superintendent of Education
Office of Dispute Resolution
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Parent, on behalf of Student,[1]	)	
Petitioner,	)	
	)	**Hearing: February 12, 2019**
v.	)	**Decision Date: February 25, 2019**
	)	**Hearing Officer: Michael Lazan**
	)	**Case No.: 2018-0327**
District of Columbia Public Schools,	)	
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 District of Columbia Public Schools ("DCPS" or "Respondent") pursuant to the Individuals with Disabilities Education Act ("IDEA") on December 12, 2018. The Complaint was filed by Petitioner, who is the parent of the Student. On December 26, 2018, Respondent filed a response. The resolution period expired on January 12, 2019.

II. Subject Matter Jurisdiction

This due process hearing was held, and a decision in this matter is being rendered, pursuant to the Individuals with Disabilities Education Improvement Act ("IDEIA"), 20 U.S.C. Sect. 1400 et seq., its implementing regulations, 34 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 January 23, 2019, this Hearing Officer held a prehearing conference. Attorney A, Esq., counsel for Petitioner, appeared. Attorney B, Esq., counsel for Respondent, appeared. On February 1, 2019, a prehearing conference order was issued, summarizing the rules to be applied in this hearing and identifying the issues in the case.

There was one hearing date: February 12, 2019. This was a closed proceeding. Petitioner was represented by Attorney A, Esq. Respondent was represented by Attorney B, Esq. Petitioner moved into evidence Exhibits 1-48. There were no objections. Exhibits 1-48 were admitted. Respondent moved into evidence Exhibits 1-24; 27; 29-34; and 36. There were no objections. Exhibits 1-24; 27; 29-34; and 36 were admitted.

Petitioner presented as witnesses: herself; Witness A, an advocate; and Witness B, a relative. Respondent presented as witnesses: Witness C, a special education manager at School B. At the close of testimony, the parties presented oral arguments.

IV. Issues

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

1. Did Respondent fail to provide the Student with an appropriate Individualized Education Program ("IEP") in or about March, 2017, March, 2018, and December, 2018? If so, did Respondent violate 34 CFR Sect. 300.324 and the principles in 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 did not provide for necessary specialized instruction hours and behavioral support services, did not characterize the Student's behavioral issues accurately, did not provide for a dedicated aide, and did not provide appropriate goals. Petitioner further contended that the Student needed twenty hours of specialized instruction per week.

2. Did Respondent fail to provide the Student with a Functional Behavior Assessment ("FBA") and/or a Behavior Intervention Plan ("BIP") from December, 2016, to the date of the filing of the Complaint? If so, did Respondent violate 34 CFR Sect. 300.303(a) et seq. and the principles in 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?

3. Did Respondent fail to review and revise the Student's existing IEP from December, 2016, to the date of the filing of the Complaint? If so, did Respondent violate 34 CFR Sect. 300.324 and the principles in 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 IEPs should have been revised to include necessary specialized instruction hours and behavioral support services, to characterize the Student's behavioral issues accurately, to provide for a dedicated aide, and to provide appropriate goals and twenty hours per week of specialized instruction.

4. Did DCPS fail to provide Petitioner with educational records? If so, did the Local Educational Agency ("LEA") violate 34 CFR Sect. 300.501 and related provisions? If so, did DCPS deny the Student a FAPE?

As relief, as modified in her closing argument, Petitioner has requested a complete set of educational records, compensatory education, a dedicated aide, 240 minutes per month of behavioral support services, and twenty hours per week of specialized instruction for the Student.

V. Findings of Fact

1. The Student is an X-year-old who is eligible for services as a student with Other Health Impairment (Attention Deficit Hyperactivity Disorder ["ADHD"] or Attention Deficit Disorder). The Student has deficits in cognitive functioning and significant deficits in reading and writing, which makes it difficult for the Student to understand instructions or complete work in "general education" classes. In such classrooms, the Student lacks focus, elopes, does not take classwork seriously, and is rude to staff. P-11; Testimony of Witness A; Testimony of Petitioner; Testimony of Witness B.

2. The Student attended School A for the 2015-2016 school year, during which the Student was extremely distractible in class. The Student failed to complete his/her classwork most of the time and was often was unfocused and unmotivated. The Student also eloped and got into arguments with teachers and other students. As a result of this difficulty in school, Petitioner sought an evaluation of the Student. P-32-3; P-33; Testimony of Petitioner.

3. A psychological evaluation was written for the Student on April 16, 2016. The evaluation, administered by Respondent's staff, indicated that the Student's cognitive ability was at the 12th percentile on the Reynolds Intellectual Assessment Scale, though the evaluator indicated that the Student's cognitive test scores were not necessarily reliable. On the Wechsler Individual Achievement Test-3, the Student's scores reflected "extremely low" functioning in reading and spelling, and "borderline" functioning in mathematics. On the Attention Deficit Hyperactivity Disorder Test-Second Edition, reflecting teacher input, the Student was identified as very likely to have ADHD. A behavior modification plan was recommended to address the Student's inattentiveness, which plan was supposed to include the use of a token economy system and modified classwork. P-11; Testimony of Witness A.

4. An IEP was written for the Student on May 25, 2016. This IEP contained "Areas of Concern" and goals in mathematics and reading, and indicated that the Student had difficulty focusing and retaining information. Adopting figures from the Student's testing, the IEP indicated that the Student was at the borderline range in math and "extremely low"—at the first-grade level—in reading. The Student was recommended for five hours per week of specialized instruction outside general education, with preferential seating, extended time, and frequent breaks. This IEP indicated that the Student did not have behavioral issues that impacted on his/her education. P-6; P-11.

5. The Student's end-of-year report card for the 2015-2016 school year indicated that the Student had grown "seven reading levels," yet was still on the first-grade reading level, far below grade level. The report card indicated that the Student was behaving in class, but that the Student received "1" grades in reading, math, and writing

and language for every term during the year. P-11-3-4; P-22; Testimony of Petitioner; Testimony of Witness A.

6. The Student continued at School A for the 2016-2017 school year. Petitioner did not notice any improvement in the Student's academic skills during this period. Another IEP was written for the Student on March 27, 2017. This IEP again contained "Areas of Concern" and goals in mathematics and reading, and indicated that the Student had difficulty focusing and retaining information. This IEP again indicated that the Student did not have behavioral issues that impeded his/her learning. The IEP indicated that the Student had made significant gains in math, approaching the fourth-grade level. In reading, the Student was still below benchmark and needed frequent prompting to arrive at correct answers. The Student had difficulty with reading fluency, vocabulary, decoding, and reading comprehension. The Student was again recommended for five hours of specialized instruction per week outside general education, with preferential seating, extended time, and frequent breaks. This IEP repeated goal #1 in reading and virtually repeated goal #1 in math from the IEP of May, 2016. P-6; P-7.

7. For the 2016-2017 school year, the Student received "2" grades in reading and writing and language, and "1" grades in math. Throughout the year, the Student required frequent prompts for behavioral concerns such as following directions, completing work on time, and working well with others. The report card considered the Student to have made great progress in reading, reaching the second-grade level by the end of the year. Despite four "1" grades in math (indicating "below basic" skills), the report card indicated that the Student had also made very good progress in math, reaching the third-grade level after previously testing at the first-grade level. P-21.

8. The Student continued at School A for the 2017-2018 school year. An IEP meeting was held for the Student on March 7, 2018. An IEP was created that again contained "Areas of Concern" and goals in mathematics and reading, and indicated that the Student had difficulty focusing, retaining information, and processing verbal tasks. The IEP again indicated that the Student did not have behavioral issues that impeded his/her learning. The IEP also indicated that the Student had significantly regressed in math and was at a first-grade level, according to the "i-Ready" measure, though it also indicated that the Student rushed through the test. The IEP indicated that the Student was at the 2.2 grade level in reading, well below the benchmark. The Student was again recommended for five hours of specialized instruction per week outside general education, with preferential seating, extended time, and frequent breaks. This IEP again repeated goal #1 in math from the IEP of May, 2016. P-5.

9. On the Student's report cards for the 2017-2018 school year, s/he received three "2" grades and one "1" grade in reading, three "2" grades and one "0" grade in math, and three "1" grades and one "2" grade in writing and language. In other subjects the Student's grades were mostly "3" and "4." The end-of-year report card indicated that the Student was behaving in class, following directions, working well with others, and practicing self-control, and that the Student made great progress during the year. P-20.

10. For the 2018-2019 school year, the Student moved to School B, where s/he is having significant behavior problems. The Student often misses class and, when s/he does attend class, almost never stays in the classroom. When in class, the Student usually does not complete the required work and sometimes hurls objects and uses profanity. P-28; P-29.

11. Witness C, from School B, contacted staff at School A in or about October, 2018, to gather information about how to work with the Student. The School A staff said that the Student did not elope while at School A, and that they did not see any major problems with the Student's behaviors. Testimony of Witness C.

12. A draft BIP was written for the Student on November 14, 2018, and revised in January, 2019. The BIP indicated that the Student was defiant and disrespectful multiple times every day and recommended, among other things, 1-to-1 check-ins, modeling, reminders, a journal, praise, calls home, and a daily behavior chart. The BIP recommended that teachers and staff escort the Student during transitions. The BIP also indicated that the Student would have to follow the "KMMS" behavior ladder for consequences if s/he eloped and use a rewards system with "pride points" to keep the Student in class. P-9.

13. For the first term of the 2018-2019 school year, the Student received "F" grades in all academic subjects. For the second term of the 2018-2019 school year, the student received "F" grades in three of five subjects, with a "D-plus" in math concepts and science. The report card indicated that the Student had been absent for seventeen days, and that the Student's reading was at the second-grade level. P-12; P-19.

14. An IEP meeting was held for the Student on December 6, 2018. At this meeting, Petitioner requested an FBA and a new BIP, as well as direct behavioral support services and a "full-time" special education IEP with a dedicated aide. Petitioner also sought educational records at this meeting. Respondent resisted providing the behavioral support services, the "full-time" IEP, and the aide. Respondent was of the view that the Student's behaviors were new, and that they could be addressed through accommodations

in the classroom. A teacher told the IEP team that the Student told her than s/he does not understand the work at the school. The Student's amended IEP dated December 6, 2018, provides for ten hours of specialized instruction per week outside general education, with 240 minutes per month of consultative behavioral support services. The IEP states that the Student has issues with leaving the classroom setting, poor social skills, and work avoidance. The IEP says that DCPS has implemented strategies to address these issues through incentives. P-4-4-6; P-28; P-29; Testimony of Witness C; Testimony of Witness B; Testimony of Witness A.

15. Reading Inventory testing on December 11, 2018, indicated that the Student was reading at the 1st percentile—i.e., with less proficiency than 99 out of every 100 children taking the test. The Student was considered to be "below basic" level in reading. Math testing indicated that the Student had regressed in math, to the second-grade level. P-46; P-10; P-8; Testimony of Witness C.

16. The Student is given four passes per day so s/he can take breaks during class. This system is designed to prevent the Student from taking even more than four breaks during the day. When the Student uses these passes, the Student is supposed to go to a staff person in the building. Testimony of Witness C.

17. According to the Student's English language arts teacher, the Student has not handed in one page of work all year and has not been able to sit in class for an entire period for virtually the entire school year. Testimony of Witness C.

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 § 38-2571.03(6)(A)(i)

Issues #1, #2, and #3 (with the exception of the section of Issue #2 relating to the need for an FBA) challenge the Student's existing or proposed IEP or placement. Accordingly, Respondent bears the burden of persuasion on these issues, provided that Petitioner has presented a prima facie case. Issue #4, together with the section of Issue #2 relating to the need for an FBA, does not involve a direct challenge to the Student's existing or proposed IEP or placement. Accordingly, Petitioner bears the burden of persuasion on those issues. Schaffer v. Weast, 546 U.S. 49 (2005).

1. Did Respondent fail to provide the Student with an appropriate IEP in or about March, 2017, March, 2018, and December, 2018? If so, did Respondent violate 34 CFR Sect. 300.324 and the principles in 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?

3. Did Respondent fail to review and revise the Student's existing IEP from December, 2016, to the date of the filing of the Complaint? If so, did Respondent violate 34 CFR Sect. 300.324 and the principles in 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?

Because these two issues are similar and overlapping, they will both be addressed in this section.

Petitioner contended that the Student's IEPs did not provide for necessary specialized instruction hours and behavioral support services, did not characterize the Student's behavioral issues accurately, did not provide for a dedicated aide, and did not provide appropriate goals. Petitioner also contended that the May, 2016, IEP should have been revised in December, 2016, for the same reasons.

A school district's duty to create an IEP for students was explained in Hendrick Hudson Bd. of Educ. v. Rowley, 458 U.S. 176 (1982), where the United States Supreme Court found that an IEP must be reasonably calculated to enable the child to receive benefit. In the District of Columbia, this has meant that the IEP should be both comprehensive and specific, and targeted to the student's "unique needs." McKenzie v. Smith, 771 F.2d 1527, 1533 (D.C. Cir. 1985); 34 CFR Sect. 300.324(a)(1)(iv) (the IEP must address the academic, developmental, and functional needs of the child). 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 Cist. RE-I, 137 S. Ct. 988 (2017). The Court made it clear that the Rowley standard is "markedly more demanding than the 'merely more than *de minimis*' test" applied by many courts. Id. at 1000.

DCPS did not present any witnesses to defend the IEPs created at School A, even though Petitioner clearly met her burden to present a prima facie case through her own testimony and the testimony of Witness A, an expert in IEP programming. DCPS did not contend that Petitioner failed to meet her burden to present a prima facie case, but argued that the Student did well at School A, which some documents in the record reflected, especially the IEP of March, 2017, and the Student's end-of -year report card for the 2016-2017 school year. Indeed, at the resolution meeting, the Student's teacher from School A insisted that the Student was doing well at the school during both the 2016-2017 and 2017-2018 school years.

However, the IEP of March, 2017, and the end-of-year report card for the 2016-2017 and 2017-2018 school years were not consistent with each other or other documentation in the record. The March, 2017, IEP indicated that the Student was approaching the fourth-grade level in math, but the end-of-year report card for the 2016-2017 school year indicated that the Student had reached the third-grade level in math after "great growth." Then, the March, 2018, IEP indicated that the Student was on the *first*-grade level in math, even though the Student had been in the same special education program at the same school during the previous year. The March, 2017, IEP also indicated that the Student did not have behavioral issues that impacted the Student's education, even though the 2016-2017 end-of-year report card indicated that, at times, the Student needed frequent prompts to follow directions, complete work on time, work well with others, use time wisely, complete homework, and make an effort. Additionally, the Student's end-of-year report card for the 2017-2018 school year was inconsistent with the March, 2018, IEP. While the March, 2018, IEP reported that the Student regressed

significantly in math, the 2017-2018 report card indicated that the Student made great progress during the year in all subjects.

For the foregoing reasons, DCPS did not meet its burden to show that the IEPs of May, 2016 (after December, 2016), March, 2017, and March, 2018, offered the Student a FAPE.

The Student's IEP dated December, 2018, was supported by testimony from DCPS's lone witness, Witness C. This IEP acknowledged the Student's behavioral issues and recommended ten hours per week of specialized instruction outside general education. However, this program still placed the Student in general education academic classes during much of the week, without any additional teacher or aide support. Witness C did not explain how this Student, who reads on a first-grade level, could possibly understand or complete the bulk of the work in a general education classroom, even with differentiation of instruction. In fact, the Student told his/her ELA teacher that classwork was too difficult, as the teacher reported at the Student's most recent IEP meeting.

Furthermore, the December, 2018, IEP did not contain writing goals, though the Student has deficits in writing, as stated in the Student's IEP progress report for the first term of the 2018-2019 school year. P-48-2. Additionally, Petitioner correctly noted that math goal #1 in the December, 2018, IEP was the very same goal that was in every one of the Student's other IEPs. In fact, the amended IEP of December, 2018, indicated that the Student's first math goal should be mastered by March 6, 2018—a date preceding not only the amendment date but also the date of the March, 2018, IEP. Nowhere in the record did DCPS establish why there was a need to repeat this goal in every IEP.

Additionally, DCPS did not show that the December, 2018, IEP (or the recently created BIP) provides behavioral interventions to address the Student's main problem, which is elopement from class. There was troubling testimony in the record that the Student rarely, if ever, sits in class during an entire period at School B. The Student's BIP, which indicated that the Student is defiant and disrespectful multiple times a day, recommended, among other things, 1-to-1 check-ins, modeling, reminders, a journal, a points system, calls home, and a daily behavior chart, as well as a teacher/staff escort for the Student during transitions. The sheer number of these interventions is impressive, but they are mainly generic, and it is unclear how many of them have were already tried unsuccessfully. Also, Witness C did not explain how these interventions would realistically work to solve the Student's elopement problem. Witness C did testify that the school provided the Student with four passes per day, so s/he could leave class to take a break. When using the passes, the Student was supposed to exit the classroom and go to a designated staff person. But Witness C did not explain how School B ensured that the Student actually traveled to a designated staff person after using the pass to exit the classroom. Based on the facts in this record, it seems more likely that the Student would use these passes to elope from the classroom more easily, then wander the halls on his/her own.

Further, the Student was not recommended for any direct behavioral support services for the 2018-2019 school year, even though the recently-created BIP stated that the Student was rude and disrespectful throughout the day. The BIP indicated that "100 percent of teachers reported [his/her] lack of emotional regulation and social skills significantly hinders [his/her] ability to remain focused in the classroom and be

successful." P-9-2. Witness A credibly testified that these facts suggest that the Student would benefit from at least some counseling during the week. But instead of direct behavioral support services, Respondent recommended "indirect" behavioral support services, or services to be provided to teachers and staff in lieu of services to the Student. DCPS never explained why "indirect" services were preferable for this Student, or even which indirect behavioral support services were specifically contemplated by the IEP team in December, 2018.

At the December, 2018, IEP meeting, DCPS also denied Petitioner's request for a dedicated aide to address the Student's elopement and related issues. Witness A testified that the Student needs a dedicated aide to ensure that s/he stays in class and does not wander the halls of the school. Witness A posited that the aide's presence would discourage the Student from leaving class because the Student would not be free to wander the halls at his/her own discretion. Rather, the aide would accompany the Student on his/her excursions from class and encourage the Student to return to class promptly and get back to work. Since a 1-to-1 aide could also help the Student focus in the classroom and, given his/her extremely low reading level, help the Student better understand assignments, Petitioner's proposal for a dedicated aide is reasonably calculated and should have been adopted by the IEP team in December, 2018.

As a result of the foregoing, DCPS failed to meet its burden of persuasion and therefore denied the Student a FAPE in the IEPs dated March, 2017, March, 2018, and December, 2018. Additionally, DCPS failed to meet its burden of persuasion and therefore denied the Student a FAPE by failing to revise the Student's May, 2016, IEP in

December, 2016, by adding more specialized instruction and behavioral support services, describing the Student accurately, and providing appropriate goals.

2. Did Respondent fail to provide the Student with an FBA/BIP from December, 2016, to the date of the filing of the Complaint? If so, did Respondent violate 34 CFR Sect. 300.303(a) et seq. and the principles in 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?

A school district is required to use a variety of assessment tools and strategies to gather relevant functional, developmental, and academic information, including information provided by the parent, that may assist in determining (i) whether the child is a child with a disability; and (ii) the content of the child's individualized education program, including information related to enabling the child to be involved in and progress in the general education curriculum, or, for preschool children, to participate in appropriate activities. The school district should not use any single measure or assessment as the sole criterion for determining whether a child is a child with a disability or determining an appropriate educational program for the child and use technically sound instruments that may assess the relative contribution of cognitive and behavioral factors, in addition to physical or developmental factors. 28 U.S.C. Sect. 1414(b)(2); 34 C.F.R. Sect. 300.304(b). The LEA must provide a student with an evaluation if requested by the parent and there has been no evaluation of the student in the past year. 34 CFR Sect. 300.303(a)(2); 34 CFR Sect. 300.303(b)(1).

Some courts in the District of Columbia have held that it is "essential" for the LEA to develop an FBA when students have behavioral issues. The FBA's role is to determine the cause, or "function," of the behaviors and then the consequences of those behaviors. Harris v. Dist. of Columbia, 561 F. Supp. 2d 63, 68 (D.D.C. 2008); see also Long v. Dist. of Columbia, 780 F. Supp. 2d 49 (D.D.C. 2008) (in ruling the district failed

to provide an FBA/BIP for a student, the court stated that "the quality of a student's education is inextricably linked to the student's behavior"); Shelton v. Maya Angelou Charter School, 578 F.Supp.2d 83 (D.D.C. 2008) (FBA/BIP required where learning disabled student was suspended). Other courts have expressed a different point of view, indicating that an FBA is simply not required as part of an evaluation. E.L. Haynes Pub. Charter Sch. v. Frost, 66 IDELR 287 (D.D.C 2015). Moreover, courts agree that an FBA may not be required if existing behavioral approaches meet a student's needs. A.C. v. Chappaqua Central School Dist., 553 F.3d 165 (2d Cir. 2009) (FBA not needed where IEP provided specific interventions that would address behavioral needs).

Petitioner bears the burden in regard to the Student's need for an FBA, and Petitioner did not meet that burden insofar as the 2016-2017 and 2017-2018 school years are concerned. While the record indicates that the Student did have focus issues that required interventions during this period, an FBA is not required every time a Student has such issues. Petitioner did not present any witnesses with personal knowledge in support of the contention that the Student's behaviors were so severe at that time as to warrant an FBA. It is further noted that the DCPS psychologist's evaluation of the Student in 2016, which recommended a BIP, did not specifically recommend an FBA.

However, by December, 2018, the Student's behavior had become extreme, with the Student eloping from virtually every class. At about the same time, the Student specifically told a teacher that classwork was too difficult for him/her. An FBA was therefore necessary at that time to determine whether the Student's behavior was triggered by an inability to understand the work in classes at the new school. It is also

noted that the Student's BIP of November, 2018, as revised in January, 2019, specifically referenced an FBA, though an FBA was apparently never conducted.

As previously stated, DCPS's own psychologist recommended in April, 2016, that the Student should receive a BIP. However, no BIP was written for the Student until November, 2018—more than two years later. Moreover, while the BIP of November, 2018, as revised in January, 2019, was well-written, DCPS did not show that this BIP was reasonably calculated to address the Student's severe elopement issues. The BIP indicated that teachers would escort the Student to a desired location "to ensure transition," but this language appears to refer to transitions *between* classes, not to elopement *during* class. The BIP also indicated that the Student would have to follow the "KMMS" behavior ladder for consequences if the Student eloped, but Witness C did not clearly explain what the "KMMS" ladder is, or how it would address the Student's elopement issues. The BIP also indicated that teachers would use praise, verbal reminders, and a rewards system with "pride points" to keep the Student in class. But Witness C did not clearly explain how these interventions would help the Student stay in class, and there was no testimony from Witness C to explain what "pride points" are.

Accordingly, DCPS denied the Student a FAPE by failing to conduct an FBA for the Student in December, 2018, and by failing to show that it provided the Student with an appropriate BIP from December, 2016, to present.

4. Did DCPS fail to provide Petitioner with educational records? If so, did the LEA violate 34 CFR Sect. 300.501 and related provisions? If so, did DCPS deny the Student a FAPE?

20 U.S.C. Sect. 1232g(a)(1)(A) requires each educational agency or institution to grant parents access to the educational records of their children no more than forty-five

days after the request. The IDEA regulations provide in pertinent part: "(t)he parent of a child with a disability must be afforded, in accordance with the procedures of Sects. 300.613 through 300.621, an opportunity to inspect and review all education records with respect to -- the identification, evaluation, and educational placement of the child and the provision of FAPE to the child." 34 C.F.R. Sect. 300.501(a). The term "education records" means the type of records covered under the definition of "education records" in 34 C.F.R. Part 99 (the regulations implementing the Family Educational Rights and Privacy Act of 1974, 20 U.S.C. Sect. 1232g (FERPA)). 34 C.F.R. Sects. 300.611-300.625. Education records as defined under FERPA are "directly related to a student" and "maintained by an educational agency or institution or by a party acting for the agency or institution." The term does not include: "records that are kept in the sole possession of the maker, are used only as a personal memory aid, and are not accessible or revealed to any other person except a temporary substitute for the maker of the 'record'". "Record" means any information recorded in any way, including, but not limited to, handwriting, print, computer media, video or audio tape, film, microfilm and microfiche. 34 C.F.R. Sect 99.3.

There is no dispute that Petitioner requested records in the December, 2018, IEP meeting, or that Petitioner did not receive all of the requested records, including beginning-of-year, mid-year, and end-of-year reports, as well as certain progress reports and behavioral or incident reports. Still, Petitioner's argument that this failure amounted to FAPE denial was not convincing. Petitioner did not explain how the lack of such records caused the Student's parent to fail to participate in any IEP meeting, and Petitioner did not provide any authority for the proposition that a failure to produce

records can amount to a claim that a parent was denied the opportunity to participate in the IEP process. As stated by the D.C. Circuit: "(a)n IDEA claim is viable only if those procedural violations affected the student's substantive rights." Lesesne ex rel. B.F. v. D.C., 447 F.3d 828,834 (D.C. Cir. 2006); Kruvant v. District of Columbia, 99 Fed. App'x. 232, 233 (D.C. Cir. 2004).

This claim must therefore 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 USC 1415(i)(2)(C)(iii).

During closing argument, Petitioner requested twenty hours per week of specialized instruction in a small class setting, a dedicated aide, and a program consisting of 240 minutes per month of direct behavioral support services for the Student. The record supports all these requests, as discussed in the previous section of this decision. The Student does need specialized instruction in all academic subjects, with a teacher trained in approaches to modifying instruction and addressing student behavior. A small classroom is also necessary for every academic subject, so the Student's behavioral issues can be monitored, and the Student can receive additional attention in math, reading, and writing. Additionally, given the Student's tendency to elope from every class, a 1-to-1

dedicated aide is necessary for the Student to keep him/her in the classroom and help him/her begin to make some academic progress. The presence of a competent, dedicated aide, solely assigned to the Student, should discourage the Student from eloping and allow the Student to get a full day's worth of instruction. Finally, the modest request for 240 minutes per month of behavioral support services outside general education is clearly appropriate given the uncontested testimony that the Student is experiencing severe emotional issues at School B that have not been addressed by any other interventions.

Petitioner also requested compensatory education in the form of eighty hours of tutoring, 100 hours of counseling, and "wraparound services." Under the theory of compensatory education, courts and hearing officers may award "educational services to be provided prospectively to compensate for a past deficient program." Reid v. District of Columbia, 401 F.3d 516, 521-23 (D.C. Cir. 2005). In every case, however, the inquiry must be fact-specific and, to accomplish IDEA's purposes, the ultimate award must be reasonably calculated to provide the educational benefits that likely would have accrued from special education services the school district should have supplied in the first place. Id., 401 F. 3d at 524; see also Friendship Edison Public Charter School v. Nesbitt, 532 F. Supp. 2d 121, 125 (D.D.C. 2008) (compensatory award must be based on a "'qualitative, fact-intensive' inquiry used to craft an award tailored to the unique needs of the disabled student").

Since the Student was denied a FAPE for the last two years, from December, 2016, through the present, the requested compensatory education proposal, supported by a written plan authored by an expert, is appropriate. In fact, the Student missed instruction over the course of two school years, which amount to far more school hours

than the eighty hours of tutoring instruction requested as compensation. However, the proposal to provide the Student with "wraparound services" is not appropriate compensatory relief in this case. Petitioner did not contend that the Student was denied "wraparound services" during the school years in question, and compensatory education awards must correspond to services that the Student should have received but did not. Moreover, Petitioner never defined exactly what "wraparound services" are, and did not provide any authority for the proposition that hearings officers have the authority to order "wraparound services" as part of a compensatory education award. Accordingly, Petitioner's request for compensatory relief is granted, but for the request for "wraparound services."

VII. Order

As a result of the foregoing:

1. The Student is hereby awarded eighty hours of compensatory tutoring, to be delivered on an individual basis by a special education teacher at a usual and customary rate in the community;

2. The Student is hereby awarded 100 hours of mentoring, to be delivered by a professional with at least five years of experience in mentoring, at a usual and customary rate in the community;

3. The Student's IEP is hereby amended to require: that the Student receive specialized instruction from a certified special education teacher outside general education during all class time involving academic subjects; that the Student be educated in a small classroom setting during every academic period of the school day; that the Student be required to receive 240 minutes per month of direct behavioral support

services outside general education; and that the Student be assigned a 1-to-1 dedicated aide during the entire school day;

4. All other requests for relief are hereby denied.

Dated: February 25, 2019

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: February 25, 2019

Michael Lazan
Impartial Hearing Officer