District of Columbia
Office of the State Superintendent of Education
Office of Dispute Resolution
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Parent, on behalf of Student,[1]	)	
Petitioner,	)	
	)	
v.	)	
	)	**Hearing Officer: Michael Lazan**
	)	**Case No.: 2018-0238**
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 Emotional Disturbance (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 20, 2018. On September 28, 2018, Respondent filed a response. The resolution period expired on October 19, 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 November 1, 2018, this Hearing Officer held a prehearing conference. Attorney A, Esq., counsel for Petitioner, appeared. Attorney B, Esq., counsel for Respondent, appeared. A prehearing conference order was issued on November 6, 2018, summarizing the rules to be applied in this hearing and identifying the issues in the case. On December 4, 2018, a continuance order was issued at the request of Petitioner, extending the due date for the Hearing Officer Determination to February 2, 2019.

There was one hearing date: January 22, 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 1-40. Objections to exhibits 18, 19, and 22 were sustained. Exhibits 1-17, 20-21, and 23-40 were admitted. Respondent moved into evidence Exhibits 1-22. There were no objections. Exhibits 1-22 were admitted.

Petitioner presented as witnesses: herself; Witness A, a psychologist; and Witness B, an advocate. Respondent presented as witnesses: Witness C, a teacher; Witness D, a psychologist; and Witness E, a social worker. After the end of testimony on January 22, 2019, the parties presenting closing arguments.

IV. Issues

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

1. Did Respondent fail to provide the Student with an appropriate Individualized Education Program ("IEP") in March, 2018, and September, 2018? If so,

did Respondent violate 34 CFR Sect. 300.324, 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 Free and Appropriate Public Education ("FAPE")?

Petitioner contended that the Student's IEP should have provided the Student with a full-time special education program in a separate day school.

2. From January, 2018, to the present, did Respondent fail to assess the Student in all areas of suspected disability and fail to comply with Petitioner's request for assessments? If so, did Respondent violate 28 U.S.C. Sect. 1414(b)(3), 34 C.F.R. Sect. 300.304(c), 300.303(a)(2), and related provisions? If so, did Respondent deny the Student a FAPE?

Petitioner contended that Respondent failed to conduct a Functional Behavior Assessment ("FBA"), Comprehensive Psychological Assessment, Psychiatric Evaluation, and/or a Neuropsychological Evaluation of the Student.

3. Did Respondent fail to provide the Student with an appropriate IEP in January, 2018? If so, did Respondent violate 34 CFR Sect. 300.324, 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 was not based on comprehensive assessments and did not provide an accompanying Behavior Intervention Plan ("BIP").

V. Findings of Fact

1. The Student is an X-year-old who is eligible for services as a student with Emotional Disturbance. The Student has run away from home several times since

summer, 2017, and has issues in class with attendance, truancy, directions, working with peers, and attention span. The Student feels that s/he is being "passed along" in school. R-9-4; Testimony of Witness D; Testimony of Witness B; Testimony of Petitioner.

2. For the 2014-2015 school year, the Student attended School A, in a "BES" classroom with about seven other students. A meeting on March 24, 2015, provided the Student with an IEP that included goals in mathematics, reading, written expression, and emotional, social, and behavioral development. The IEP recommended 26.5 hours per week of specialized instruction outside general education (10.0 hours in reading, 7.5 hours in written expression, and 9.0 hours in mathematics), with 240 minutes per month of behavior support services. A location with minimal distractions was also indicated for the Student. P-14; Testimony of Witness B.

3. For the 2015-2016 school year, the Student attended School B. Psychological testing in October, 2015, found the Student to have a Full Scale IQ of 83, with a weakness in verbal comprehension. The Student's achievement testing reflected weaknesses, particularly in reading fluency. The evaluator concluded that the Student's academic success was likely being impaired because of emotional issues, including Attention Deficit Hyperactivity Disorder ("ADHD"). The evaluator then recommended an intense "therapeutic" scholastic environment to address the Student's needs. The Student was diagnosed with ADHD, Combined Type, Anxiety Disorder, Depressive Disorder, and Oppositional Defiant Disorder. P-7-1; P-5-4-5.

4. The Student received an FBA in October, 2015. This FBA found that the Student's negative behaviors had occurred since elementary school and become more intense in middle school. It indicated that the Student's behaviors could be triggered by a

classroom with a large number of students, assignment of tasks with unclear instructions, classroom activities that were not "chunked," and a school with lapses in pupil management. Verbal redirection was deemed to draw negative attention to the Student and reinforce the Student's negative attitude toward school and him/herself. P-5.

5. The Student continued to attend School B for the 2016-2017 school year. In September, 2016, the Student was deemed to be at the fifth grade level in math and fourth grade level in reading. The Student received some "A" and "B" grades during the school year and did not have a significant issue with attendance. The Student required 1:1 attention and a rewards system to thrive, and the Student especially responded to rewards. P-6-2; P-16.

6. An IEP meeting was held for the Student on February 27, 2017. The new IEP provided the Student with goals in mathematics, reading, written expression, and emotional, social, and behavioral development. The IEP recommended twenty-five hours per week of specialized instruction outside general education, with 240 minutes per month of behavior support services. A location with minimal distractions was again indicated for the Student. P-15.

7. Another FBA of the Student was performed on April 11, 2017. This FBA indicated that the Student struggled with responsibility for actions, was easily frustrated, and should not be confronted publicly. The FBA also stated that the Student could engage in attention-seeking behavior, be dishonest, and avoid taking responsibility for his/her actions. Still, the Student's attendance was considered to be "excellent," and a teacher indicated that the Student was a pleasure to have in class. This FBA indicated that the Student responded positively to rewards, as well as positive affirmations and 1:1

attention. It recommended that teachers should respond quickly to the Student's concerns. The FBA further indicated that that the Student should receive counseling, positive reinforcement, time-outs, breaks, parental contacts, and an opportunity to earn incentives, as well as having consequences, such as removal from class, imposed for negative behavior. Classroom observations revealed that the Student exhibited appropriate behavior ninety-five percent of the time, and exhibited self-control eighty-nine percent of the time. A Behavior Intervention Plan ("BIP") was recommended for the Student. P-7-2-3.

8. A comprehensive psychological evaluation of the Student was conducted on April 14, 2017. This Behavior Assessment System for Children-3 ("BASC-3") indicated that the Student had poor self-control, was manipulative, got in trouble, was easily stressed, and did not adjust well to new teachers. The testing indicated that the Student would tease or hit others. Other testing indicated that the Student was easily frustrated, gave up easily, and was defiant to people in authority. P-8.

9. The Student's report card for the 2016-2017 school year revealed "A" and "B" grades in all academic subjects (inclusive of "plus" or "minus" grades). R-14.

10. The Student started to run away from home in or about summer, 2017. The Student was sometimes gone for a week at a time. Generally, the Student went to his/her father's house. The Student always ran away with other children or adults. Testimony of Petitioner.

11. For the 2017-2018 school year, the Student began attending School C, where the Student started to have more issues with behavior. Petitioner received phone

calls from the school to the effect that the Student was sleeping in class, roaming the hallways, and spending a lot of time in the school's bathrooms. Testimony of Petitioner.

12. An IEP meeting was held in or about January, 2018, with school staff, the Student, and Petitioner. The IEP from this meeting again provided the Student with goals in mathematics, reading, written expression, and emotional, social, and behavioral development. The IEP again recommended twenty-five hours per week of specialized instruction outside general education, with 240 minutes per month of behavior support services and a location with minimal distractions. P-17; Testimony of Petitioner.

13. During the 2017-2018 school year, the Student ran away from home from approximately February, 2018, to July, 2018. A Multi-disciplinary Team ("MDT") meeting was held for the Student on March 22, 2018. However, since the Student could not be located, there were no changes to the Student's educational program. The Student received all "F" grades for the 2017-2018 school year. Testimony of Petitioner; Testimony of Witness B; P-20.

14. The Student briefly attended summer school in 2018, but was asked to leave the program because the Student was not completing the work. Testimony of Petitioner.

15. The Student was evaluated by the Superior Court of the District of Columbia, Family Court, in connection to a hearing on July 3, 2018. The evaluation report was issued on July 2, 2018. The Student was at that time subject to charges of being a habitual runaway. The report indicated that the Student had not been taking medications since June, 2017, which had impacted the Student's behavior. The Student ran away from home in June, 2017, when his/her mother kicked his/her friend out of the

house. The Student told the evaluator that s/he had once been kidnapped and had once attempted suicide, when s/he was thirteen years old. The Student's Full-Scale IQ was deemed to be 70, at the 2nd percentile, which is considered "very low" on the Wechsler Intelligence Scale for Children, Fifth Edition. On the Woodcock-Johnson Test of Achievement, the Student's "broad achievement" was at the 4th percentile, and the Student's "academic skills" were at the 6th percentile. The Student's broad reading was found to be at the 3rd percentile, broad math at the 2nd percentile, and broad written language at the 16th percentile. The evaluator suggested that the Student had symptoms consistent with Unspecified Disruptive, Impulse-Control, and Conduct Disorder; Specific Learning Disability with Impairments in Reading (comprehension and fluency), Moderate; Specific Learning Disability with Impairments in Mathematics (calculation and fluency), Moderate; and Academic or Educational Problems (truancy). The evaluator also noted that the Student had been involved in serious behavioral incidents throughout his/her life. This evaluator recommended special education services for reading and math, a small classroom environment with minimal distractions, instructions provided in visual modalities and verbally, simplified instructions, extracurricular tutoring, counseling, a behavior plan, and extended time on assignments. P-9.

16. A court-ordered psychiatric evaluation of the Student dated August 21, 2018, indicated that the Student's presentation was consistent with mood disorder, specifically bipolar disorder, and that the Student's ADHD could also be part of a mood disorder. The evaluation diagnosed the Student with Bipolar Disorder and Cannabis Abuse, with a guarded prognosis. This evaluation stated that the Student was averse to medication. P-11.

17. For the 2018-2019 school year, the Student has remained at School C, repeating his/her grade from the previous year. The Student's classroom has eight students assigned to it, though there are usually about five students in the class. The Student has been living at a group home which arranges to take the Student to and from the school. Still, the Student has managed to avoid school by leaving the school site or hiding inside the school. Testimony of Witness B; Testimony of Witness C; Testimony of Petitioner.

18. The Student's "Student Support Team Meeting Attendance Plan," dated September 10, 2018, indicated that the Student was to be "referred to the grade level social worker" and that a counselor should use an attendance card for class attendance monitoring. P-28.

19. An MDT meeting was held for the Student on September 11, 2018, wherein the team reviewed the D.C. Superior Court evaluation. Respondent's staff said that they would request a more restrictive educational setting for the Student, but believed that the Student was properly placed. Petitioner asked for a variety of evaluations, and Respondent agreed to provide a parent survey on the BASC-3, a "GAIN" assessment, adaptive skills testing, and an updated FBA/BIP. DCPS declined to provide a psychiatric or neuropsychological evaluation at that time. P-21; Testimony of Witness B; Testimony of Witness D.

20. A "Level II" BIP was created for the Student on September 17, 2018. This plan mentioned the Student's significant attendance issues and stated that the Student's lack of academic progress was related to the Student's attendance and truancy. The BIP suggested that the Student's academic environment should be very structured

and supportive, and that teachers and/or staff should use positive language when interacting with the Student, intervene when the Student became frustrated, provide opportunities for the Student to gain positive attention, and provide the Student with acceptable outlets for stress. The BIP recommended an attendance/behavior contract, parent contact, an attendance plan/court referral, breaks (inside and outside class), "crisis intervention," snacks, behavior support services, the SNEAKERS group, and "Live School Points." If there was negative behavior, such as poor attendance, the staff was to "closely monitor" the attendance, contact the Student's parent, and seek support from a Social Worker and a Behavior Technician. P-12.

21. By correspondence on September 17, 2018, Petitioner requested an independent psychiatric or neuropsychiatric evaluation, FBA, BIP, and compensatory education for the Student. P-24.

22. An "LRE review" dated October 18, 2018, recommended that the school district should meet with the student and discuss ways to improve his/her attendance, including a check-in/check-out system with an individual of the Student's choice to encourage him/her to return to school. P-13-5.

23. The Student and Witness E have met during the 2018-2019 school year to address the Student's attendance issues. The Student has also been in a "SNEAKERS" group, which addresses leadership skills and developing positive academic habits and peer relationships. The Student has also been in a "SPARKS" group, which teaches how to manage emotions in a positive manner. Testimony of Witness E.

24. The draft IEP dated January 9, 2019, and January 15, 2019, again provided the Student with goals in mathematics, reading, written expression, and emotional, social,

and behavioral development. The IEP again recommended twenty-five hours per week of specialized instruction outside general education, with 240 minutes per month of behavior support services and a location with minimal distractions. P-17; R-9.

25. Petitioner will no longer take calls from the school district because she had a disagreement with various staff members at the school. Testimony of Petitioner.

VI. Conclusions of Law

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

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

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

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

Since Issues #1 and #3 involve a challenge to IEPs, the burden of persuasion is on Respondent with respect to those issues. Through the testimony of Petitioner and her witnesses, Petitioner clearly presented a *prima facie* case on Issues #1 and #3, and Respondent did not argue otherwise. Issue #2 does not involve a direct challenge to the

Student's IEP, program, and/or placement. On this issue, therefore, Petitioner bears the burden. Schaffer v. Weast, 546 U.S. 49 (2005).

1. Did Respondent fail to provide the Student with an appropriate IEP in March, 2018, and September, 2018? If so, did Respondent violate 34 CFR Sect. 300.324, 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 provide the Student with an appropriate IEP in January, 2018? If so, did Respondent violate 34 CFR Sect. 300.324, 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?

Since Issue #1 and Issue #3 involve the Student's IEPs in 2018, and since the IEPs from 2018 are similar, both of these issues will be addressed in this section.

Petitioner contended that the January, 2018, IEP was not based on comprehensive assessments and did not provide the Student with an accompanying BIP. Petitioner contended that the March and September IEPs should have provided the Student with a full-time special education program in a separate day school.

For many years, the main authority framing a school district's duty to create an IEP has been 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). As stated in S.S. ex rel. Shank v. Howard Road Academy, 585 F. Supp.2d 56, 66-67 (D.D.C. 2008), the measure and adequacy of an IEP should be determined as of the time it was offered to the student.

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 keeping with Rowley, 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 Student's January IEP recommended that the Student receive twenty-five hours per week of specialized instruction outside general education, with 240 minutes per month of behavior support services and a location with minimal distractions. This was the same IEP mandate the Student had received for years, which was reasonably calculated, and reasonably successful, when the Student attended School B. Even Petitioner conceded that the Student did well at School B, where s/he spent virtually all day in a self-contained setting with small classes consisting of special education students. The Student's report card at School B for the 2016-2017 school year revealed "A" and "B" grades in all academic subjects (inclusive of "plus" or "minus" grades).

But the Student did not do well at School C. At the new school setting, the Student's behavior, which was never excellent, deteriorated. The Student began to associate with poorly behaved students who had their own attendance issues, which, at least in part, led to the Student's own attendance problems. By the date of the January, 2018, IEP, the Student had accrued fifty-nine absences and received first-term grades of "D+" in English and "D" in World History, Government, Algebra 1, Fitness and Lifetime

Sports, and Physical Science. Respondent therefore had to consider the use of positive behavioral supports and other strategies in conformance with the IDEA and its implementing regulations. 20 U.S.C. Sect. 1414(d)(3)(B)(i); 34 C.F.R. Sect. 300.324(a)(2)(i); 5-E DCMR Sect. 3007.3; Middleton v. District of Columbia, 312 F. Supp. 3d 113, 146 (D.D.C. 2018) (duty to provide for a plan to address disabled student's attendance issues).

This behavioral support should have included a BIP, since the April, 2017, FBA specifically recommended a BIP. However, a BIP was not written for the Student until September, 2018, more than a year after the FBA team recommended it, in April, 2017. A BIP should have been annexed to the Student's IEP of January, 2018, per 5-E DCMR Sect. 5-3007.3, especially since School C's IEP in January, 2018, had no specific interventions to address the Student's recent behavioral issues, including attendance.[2]

As for the March, 2018, IEP referenced in Issue #1, there was, in fact, no March IEP. The Student's March, 2018, MDT meeting did not result in a new IEP because the Student, at that time, had run away from home and was not going to school. At that March MDT meeting, the team could therefore do little except inquire into the Student's whereabouts. The Student was not even in the District of Columbia at the time. Petitioner argued that, nevertheless, Respondent should have then made changes to the Student's educational placement,[3] or "location of services." Petitioner contended that the Student needed a separate day school, i.e., a private school, at that time. But this change

[2] School districts should not be held liable in a case where a student simply will not go to school, Garcia v. Bd. of Educ. of Albuquerque Pub. Sch., 520 F.3d 1116, 1130 (10th Cir. 2008), or when the school has done everything it could do address a student's attendance issues. Presely v. Friendship Pub. Charter Sch., No. 12-0131, 2013 WL 589181, *8–9 (D.D.C. Feb. 7, 2013).

[3] The term "placement" means more than the school, as defined by courts. It is somewhat confusing that the word "placement" does not really amount to its "plain meaning" as a "place" in this analysis, as noted by Judge Howell. Eley v. District of Columbia, 47 F.Supp.3d 1, 9-10 (D.D.C., 2014).

would have had no effect on the Student, who was then somewhere in Virginia. Petitioner's claims regarding the March, 2018, MDT meeting therefore lack merit.

By September, 2018, the Student was back in the District of Columbia, living in a group home. Also in September, 2018, Respondent created a BIP for the Student. Although this BIP provided for some generic interventions, such as "sit with the student to discuss ways to improve his/her attendance" and "teacher will monitor closely student's daily attendance," Petitioner did not challenge this BIP. With respect to the September, 2018, IEP, Petitioner's only contention was that the Student needed a "full-time" program in a separate day school. However, the record does not necessarily indicate that the Student's poor performance at School C was due to the lack of a separate day school. Apparently, once the Student is dropped off at School C, s/he leaves the site or hides inside the school. There is nothing in the record to suggest that the Student's school attendance would be any better if s/he were assigned to a separate day school, i.e., a private school, merely because the school is "separate" or "private." It is worth pointing out that the District of Columbia Circuit Court of Appeals has held that "it would be plainly illogical to say that a public school is, simply because it is public, dissimilar to a private school in any way relevant to its capacity to provide an appropriate education to a learning disabled child." Knight by Knight v. District of Columbia, 877 F.2d 1025, 1028 (D.C. Cir. 1989).

Further, there is nothing in the record to suggest that the Student, whether at a private or public school, would especially benefit in an environment where there are no "general education" students. To the contrary, federal law clearly states that special education students should be integrated into an environment with general education

students if at all feasible. 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").

Finally, it must be noted that the Student's psychological evaluation, conducted by the psychologist assigned by the Superior Court of the District of Columbia, Family Court, did not recommend a separate special education day school for the Student.

Accordingly, Respondent denied the Student a FAPE only through the January, 2018, IEP. Petitioner's other IEP claims must be dismissed.

2. From January, 2018, to present, did Respondent fail to assess the Student in all areas of suspected disability and fail to comply with Petitioner's request for assessments? If so, did DCPS violate 28 U.S.C. Sect. 1414(b)(3), 34 C.F.R. Sect. 300.304(c), 300.303(a)(2), and related provisions? If so, did DCPS deny the Student a FAPE?

Petitioner contended that DCPS failed to conduct an FBA, Comprehensive Psychological Assessment, Psychiatric Evaluation, and/or a Neuropsychological Evaluation of the Student. Petitioner requested such evaluations through a correspondence to Respondent on or about September 17, 2018.

A public agency must ensure that a reevaluation of a child with a disability is conducted if the agency determines that the child's educational issues warrant a reevaluation, or if the child's parent or teacher requests a reevaluation. 34 CFR Sect. 300.303(a).

A Local Educational Agency ("LEA") is required to use a variety of assessment tools and strategies to gather relevant functional, developmental, and academic information, including information provided by a 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 LEA 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 is further required to ensure that a child is assessed in all areas of suspected disability and that the chosen assessment tools and strategies provide relevant information that directly assists in determining the educational needs of the child. 28 U.S.C. Sect. 1414(b)(3); 34 C.F.R. Sect. 300.304(c).

As noted previously, the Student ran away from home from February, 2018, through July, 2018. As a result, an evaluation of the Student was not possible during that time. When the Student returned in July, 2018, the Superior Court of the District of

Columbia, Family Court, arranged for a psychoeducational evaluation of the Student. The evaluator interviewed the Student, Petitioner, and the Student's probation officer. The evaluator conducted seven norm-referenced tests of the Student, including intelligence testing, achievement testing, personality testing, and behavioral testing. The evaluator also reviewed the Student's court file and a social assessment of the Student. Additionally, the record contains a psychiatric evaluation dated August 22, 2018, which was also apparently conducted as a result of court proceedings against the Student.

However, no FBA was written for the Student at that time, even though it was vital for Respondent to understand exactly why the Student would not attend school regularly. 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, 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).

It is true that an FBA was written for the Student in April, 2017. However, this FBA was written before the Student began to have attendance issues and before the Student attended School C. The court-administrated evaluation of the Student, while well-written, did not clearly address the causes of the Student's attendance issues, and Respondent's own witness, Witness D, admitted that the court-administered evaluation

was not sufficient for educational purposes. Additionally, the BIP created for the Student in September, 2018, did not address the "function," or causes, of the Student's attendance issues. Middleton, 312 F. Supp.3d at 146-147 (finding FAPE denial even though there was a BIP, because the problem was that the student refused to go to a particular school due to the classes being too difficult).

Respondent contended that it could not conduct an FBA for the Student because the Student has not been available, but the Student was assessed multiple times during the summer and is now living in a group home where s/he can be located for an interview. Respondent indicated that it needs to record data to conduct an FBA, but did not point to any legal requirement that an FBA must be based on observational data. Parenthetically, an FBA that addresses attendance would likely have to go beyond observational data and involve interviews with teachers, staff, counselors, and the Student to determine the cause of the behavior.

Accordingly, Respondent denied the Student a FAPE by failing to conduct an FBA (or to otherwise assess the reasons behind the Student's resistance to going to school) from July, 2018, through to the filing of the Complaint.

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). 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"). 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). Some students may require only short, intensive compensatory programs targeted at specific problems or deficiencies. Reid, 401 F.3d at 524.

As supported by testimony and a plan from an expert, Petitioner is seeking 275 hours of specialized tutoring and ninety hours of counseling for the Student. However, this plan does not account for the fact the Student was unavailable for instruction for at least five months during the 2017-2018 school year. As a result, a reduction in the award is appropriate. A fairer compensatory education award shall provide the Student with 100 hours of specialized tutoring and fifty hours of counseling, premised on the Student's regular attendance at tutoring and/or counseling.

Petitioner also seeks an FBA, and this Hearing Officer has already found that a new FBA is important for this Student's needs. Accordingly, Respondent shall make all

reasonable efforts to conduct an FBA of the Student within thirty days of this order. Such FBA shall consider whether the cause of the Student's attendance issues is the Student's placement at School C. It is worth noting that School C does not appear to be a "location with minimal distractions," as it is supposed to be per the Student's September, 2018, IEP. Nor does School C appear to be a "structured" setting, as it is supposed to be per the September, 2018, BIP.

Petitioner also requests a neuropsychological evaluation, a psychiatric evaluation, a psychological evaluation, and a separate day school for the Student. These requests are denied for the reasons already stated in this Hearing Officer Determination.

VII. Order

As a result of the foregoing, the following is ordered:

1. The Student shall receive 100 hours of compensatory tutoring, to be provided by an experienced special education teacher, at a usual and customary rate in the community;

2. The Student shall receive fifty hours of compensatory counseling, to be provided by a qualified professional, at a usual and customary rate in the community;

3. If the Student misses more than three sessions of tutoring without the provision of a medical note excusing attendance at the sessions, Respondent's obligation to provide such services shall cease;

4. If the Student misses more than three sessions of counseling without the provision of a medical note excusing attendance at the sessions, Respondent's obligation to provide such services shall cease;

5. Respondent shall conduct a comprehensive new FBA of the Student within thirty days of this order, which FBA shall determine, in detail, the reasons behind the Student's failure to attend school;

6. After completion of the FBA, the Student's IEP team shall reconvene within twenty days to review the FBA and consider whether a new school is appropriate for the Student;

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

Dated: February 2, 2019

Michael Lazan
Impartial Hearing Officer

cc: Office of Dispute Resolution
Petitioner's Representative: Attorney A, Esq.
Respondent's Representative: 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).

Date: February 2, 2019

Michael Lazan
Impartial Hearing Officer