District of Columbia
Office of the State Superintendent of Education
Office of Dispute Resolution
1050 First Street, NE, 2nd Floor, Washington, DC 20002
(202) 698-3819 www.osse.dc.gov

Parent, on behalf of Student,[1]	)	
Petitioner,	)	
	)	**Hearing: January 28, 2019**
v.	)	**Date: February 9, 2019**
	)	**Hearing Officer: Michael Lazan**
	)	**Case No.: 2018-0304**
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 November 26, 2018. The Complaint was filed by the Student's parent ("Petitioner"). On December 4, 2018, Respondent filed a response. The resolution period expired on December 26, 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 January 4, 2019, 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 January 9, 2019, summarizing the rules to be applied in the hearing and identifying the issues in the case. The Hearing Officer Determination was due on February 9, 2019.

There was one hearing date: January 28, 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 1-94. There were no objections. Exhibits 1-94 were admitted. Respondent moved into evidence Exhibits 1-109. Objections were sustained in regard to exhibits 5, 17, 23, 25, 47, 86, and 90-92. Exhibits 1-109 were admitted except for Exhibits 5, 17, 23, 25, 47, 86, and 90-92.

After the hearing on January 28, 2019, the parties agreed to present closing statements on January 31, 2019. On that date, the parties presented oral closing statements, on the record.

Petitioner presented as witnesses: Petitioner; Witness F, a Program Director at School D; Witness B, an advocate; and Witness C, an advocate. Respondent presented as witnesses: Witness D, a social worker; Witness E, a teacher and case manager; and Witness A, a teacher and case manager.

IV. Issues

As identified in the Prehearing Conference Summary and Order and in the Due Process Complaint, the Free and Appropriate Public Education ("FAPE") 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 April, 2017, December, 2017, June, 2018, and November, 2018? If so, did Respondent violate 34 CFR Sect. 300.324 and Endrew F. v. Douglas County School District, 137 U.S. 988 (2017), and Hendrick Hudson Bd. of Educ. v. Rowley, 458 U.S. 176 (1982)? If so, did Respondent deny the Student a FAPE?

Petitioner contended that the Student needed more specialized instruction hours and, in the IEP of December, 2017, a full-time therapeutic setting, including revised goals. Petitioner also argued that the Student's goals should have been revised in the IEPs of June, 2018, and November, 2018. Petitioner also contended that, in all IEPs, the Student should have received additional behavioral support services and a dedicated aide. Petitioner further contended that the Student required Extended School Year ("ESY") services in the summer of 2018.

2. Did Respondent fail to review and revise the Student's IEP in April, 2018? If so, did Respondent violate 34 CFR Sect. 300.324 and Endrew F. v. Douglas County School District, 137 U.S. 988 (2017), and Hendrick Hudson Bd. of Educ. v. Rowley, 458 U.S. 176 (1982)? If so, did Respondent deny the Student a FAPE?

Petitioner contended that the Student's IEP goals and hours needed to be updated by April, 2018.

3. Did Respondent violate "Child Find" when it failed to evaluate the Student by September, 2016? If so, did DCPS violate 20 U.S.C. Sect. 1412(a)(3)(A), 34 C.F.R. Sect. 300.111(a), and related provisions of the IDEA? If so, did DCPS deny the Student a FAPE?

4. Did Respondent fail to produce any or adequate Functional Behavior Assessments ("FBA") and/or Behavior Intervention Plans ("BIP") for the Student from November, 2016, to November, 2018? If so, did Respondent violate 28 U.S.C. Sect. 1414(b)(3), 34 C.F.R. Sect. 300.304(c), and related provisions, in addition to Endrew F. and Rowley? If so, did DCPS deny the Student a FAPE?

Petitioner contended that the Student's November, 2016, BIP was inadequate, and that there should have been an FBA prior to the creation of the current BIP.

5. Did Respondent fail to implement the Student's BIPs during the 2016-2017 and 2017-2018 school years? If so, did Respondent violate the principles in cases like Van Duyn v. Baker Sch. Dist. 5J, 502 F.3d 811, 822 (9th Cir. 2007)? If so, did Respondent deny the Student a FAPE?

6. Did Respondent change the Student's educational placement in December, 2018, without adequate parental participation? If so, did Respondent violate 34 CFR Sect. 300.501 and related provisions? If so, did Respondent deny the Student a FAPE?

7. Did Respondent 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 Respondent deny the Student a FAPE?

V. Findings of Fact

1. The Student is an X-year old who is currently eligible for services as a student with Multiple Disabilities (Emotional Disturbance, Other Health Impaired). The Student likes attention, whether positive or negative. If the Student experiences frustration with academics, the Student may become verbally and physically confrontational. The Student has a longstanding history of not sustaining his/her attention on tasks and not following through on instructions. The Student also has difficulties with transitions. Though the Student has leadership abilities, the Student has difficulty relating with peers and often gets into confrontations with them. P-5-7; R-24-51-52; Testimony of Witness A.

2. Earlier in the Student's academic career, the Student attended School A PCS, without specialized instruction services or an IEP. At that time, the Student had difficulty with math and reading, but was engaged during the school day and would complete classroom assignments. The Student engaged with classmates and some staff, though there were also behavioral concerns with rudeness and profanity. The Student responded positively to rewards at that time. P-15; Testimony of Petitioner.

3. The Student changed schools and began attending School B, where the Student's behavior deteriorated. The Student was diagnosed with Attention Deficit Hyperactivity Disorder ("ADHD") in April, 2015, by a physician at Hospital A. Petitioner sought an IEP from School B for the Student at the time, but did not get a response from the school. R-11; P-15-2; Testimony of Petitioner.

4. The Student had difficulties with behavior, math, writing, and reading during the 2015-2016 school year. The Student would leave class, destroy objects, and

be verbally and physically aggressive toward staff members. The Student was suspended on numerous occasions during this school year. An FBA dated October 16, 2015, found that the Student was distracted in class, displayed opposition and defiance, had poor concentration skills, and had difficulty working with transitions and working in groups. The FBA suggested that these issues were a function of the Student's ADHD and Oppositional Defiant Disorder ("ODD"). On April 8, 2016, the Student was referred for special education services. R-3; P-15; P-17; Testimony of Petitioner.

5. An "Analysis of Existing Data" document produced by Respondent in May, 2016, found that the Student did not do work in math, was significantly below grade level in reading, and consistently engaged in negative behaviors in class, including verbal aggression, refusal, elopement, roaming around the classroom, bothering others, and physical aggression. R-4.

6. In the 2016-2017 school year, the Student repeated a grade at School B. Although the Student had been referred for special education, s/he was not evaluated at that time, and was not provided with an IEP. Instead, a Section 504 plan was created for the Student, dated November 14, 2016, which provided the Student with accommodations including seating in a place where s/he is alone, positive feedback, intermittent breaks, verbal reminders to stay on task, a behavior tracker, and 120 minutes per month of behavioral support services, with corresponding goals. P-9; P-15.

7. A BIP was written for the Student in September, 2016. This BIP indicated that the Student should be seated near less distractible peers, that teachers should stand near him/her to prevent him/her from misbehaving, that s/he should be given assignments

in smaller increments, and that the school should use a "behavior tracker" for the Student. P-16; Testimony of Witness B.

8. Despite the BIP and Section 504 Plan, the Student's behaviors worsened during the 2016-2017 school year. The Student began to engage in theft, and sometimes left the school building without permission. The Student was distractible and did not complete or comprehend homework. Academically, the Student struggled in all areas. The Student performed at "below benchmark" levels on DIBELS testing and "i-Ready" testing that year. R-24; P-15; Testimony of Witness B.

9. The Student was again referred for special education services in December, 2016. R-7.

10. A psychological evaluation of the Student was conducted on April 4, 2017. This evaluation found that the Student was unable to self-regulate, frequently eloped, and that his/her negative behaviors in school had intensified. The Woodcock-Johnson IV Test of Achievement ("Woodcock") found that the Student's reading was at the "deficient" range, with broad math and written language only slightly better. The Student's scores on intelligence testing were at the sixth percentile or below in all areas. The Behavior Assessment Scale for Children-2 ("BASC-2") revealed elevated scores in Externalizing Problems, Hyperactivity, Aggression, Conduct Problems, Depression, Somatization, Atypicalitv, and Attention Problems. The evaluation recommended that an FBA and BIP be written for the Student. Testimony of Witness C; P-13.

11. The Student was determined to be eligible for services on April 6, 2017, on two different bases, since s/he was deemed to be a student with Multiple Disabilities (Emotional Disturbance, Other Health Impairment). The IEP dated April 6, 2017, found

that the Student needed constant prompting and support for behaviors and other areas of weakness, provided for 120 minutes per month of behavioral support services, and provided for three hours per week of specialized instruction outside general education. The IEP included math goals, reading goals, and emotional, social and behavioral goals, with a location with minimal distractions, extended time, and frequent breaks. The Student's parent agreed with this IEP. P-8; P-37.

12. An "LRE review" by DCPS in June, 2017, recommended that the IEP team "consider" additional services for the Student in the general education setting, as well as arrange for a new FBA and BIP. R-39-98.

13. The Student's report card for the 2016-2017 school year showed that the Student received "1" grades in math for all four terms, and "1" grades for writing and reading in the third and fourth term (with "2" grades in first two terms). The report card indicated that the Student was a great "helper," but that the Student's reading comprehension did not improve during the year. P-34.

14. The Student continued in the same setting at School B for the 2017-2018 school year. Testimony of Petitioner.

15. An observation of the Student dated November, 2017, conducted by Respondent's staff, again indicated that the Student required a new FBA and BIP. In December, 2017, an FBA was written, indicating that the Student's behaviors were most likely to occur when s/he was asked to come into the classroom, complete an assignment, or perform a non-preferred task. The FBA found that the Student's behaviors were more prevalent when the Student had an audience, the teacher was distracted, or there was a high noise volume. It also found that the Student engaged in profanity and elopement.

The FBA determined that the function of the Student's behavior was primarily to gain an item or activity, but also served as a means of escaping classwork or the directive of an adult. R-58; P-32.

16. An IEP meeting was conducted for the Student on December 14, 2017. The ensuing IEP provided for 120 minutes per month of behavioral support services and twenty hours per week of specialized instruction outside of general education, with math goals, reading goals, and emotional, social and behavioral goals, as well as a location with minimal distractions, extended time, and frequent breaks. Petitioner agreed with this IEP. P-7; Testimony of Witness C.

17. The Student was transferred to the BES program at School C. The letter sent to the Student's parent indicating the name of the new school did not use the parent's correct address, and the parent did not see the letter. However, the parent did receive a phone call over Christmas break, 2017, informing her of the move. The Student started at School C on January 3, 2018. Testimony of Petitioner; R-60.

18. The Student's performance did not improve significantly at School C. The Student often eloped and received behavioral referrals. The counselor at School C decided to provide the Student with 240 minutes per month of behavioral support services, more than the IEP mandate. The Student's report card for the fourth term of the 2017-2018 school year assigned the Student "2" grades in reading, writing, and math, but indicated that the Student was not taking school seriously, lost focus, and eloped from class. The Student's IEP progress reports for 2017-2018 indicated no progress on math goals during the third or fourth term, though progress was noted in reading and emotional, social and behavioral goals. DIBELS testing indicated that the Student was

not making gains in reading skills. P-25; P-26; Testimony of Witness D; Testimony of Witness C; P-23.

19. Petitioner formally requested a wide variety of educational records from Respondent in June, 2018. Petitioner sought a dedicated aide for the Student in or about August, 2018. P-75, P-80; Testimony of Witness D.

20. The Student continued in the "BES" program at School C for the 2018-2019 school year. Testimony of Petitioner.

21. An FBA and BIP were written for the Student by Witness D in September, 2018. The FBA, dated September 25, 2018, indicated that some interventions for the Student had met with limited success, such as the use of points, praise, computer time, and extended recess. The Student's "Level II" BIP, dated September 25, 2018, indicated that the Student's behaviors were triggered by being in a large setting, and that removal was appropriate in such instances. The BIP recommended self-regulating coping strategies, immediate assistance during disruptive behavior, breaks, visual cues, repeated and simplified directions, and rewards such as praise, computer time, and extended recess. The BIP also suggested giving the Student a choice between behavioral strategies, alternative means of communication, calming strategies, and using behavior data sheets for the Student. P-10; P-11.

22. An IEP meeting was held for the Student on November, 2018. The IEP team agreed that the Student needed ESY services for the summer of 2019, and required that the Student receive 240 minutes per month of behavioral support services and twenty-five hours per week of specialized instruction, with math goals, reading goals, writing goals, and emotional, social and behavioral goals, as well as a location with

minimal distractions, extended time, and frequent breaks. The IEP indicated that the Student's math and reading skills were still at the first grade level. P-5; P-68; Testimony of Witness C; Testimony of Witness D; P-68.

23. The Student is doing better this year with his/her current teacher, Witness A, who does not have elopement issues with the Student and is able to get the Student to "reset." The Student has expressed that class is "fun" this year and that s/he is learning. School C has helped the Student by giving him/her more time to deescalate, a choice between two behavioral management strategies, and more visuals. Testimony of Witness D; Testimony of Witness A; Testimony of Witness E.

24. The Student received "1" grades in reading, math, and written language for the first term of the 2018-2019 school year, though in other classes, such as science, the Student received a "2." The Student was deemed to have made adequate progress during the first term. The Student's progress report for first term of the 2018-2019 school year also indicated that the Student has progressed toward some of his/her reading, math, writing, and emotional, social and behavioral goals. R-100; P-18.

25. Petitioner has not received records for the Student from the 2015-2016 school year, as well as daily behavioral trackers for the 2017-2018 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).

Issue #1 and Issue #2 directly involve the Student's existing IEP or program. For both of these issues, the burden of proof therefore lies with Respondent. There is no dispute that Petitioner presented a prima facie case on Issue #1 and Issue #2. For Issues #3, #4, #5, #6, and #7, the burden of persuasion is on Petitioner. Schaffer v. Weast, 546 U.S. 49 (2005).

Given the chronology of events in this case, this section will begin with a discussion of Issue #3.

3. Did Respondent violate "Child Find" when it failed to evaluate the Student by September, 2016? If so, did DCPS violate 20 U.S.C. Sect. 1412(a)(3)(A), 34 C.F.R. Sect. 300.111(a), and related provisions of the IDEA? If so, did DCPS deny the Student a FAPE?

Petitioner contended that the Student should have been evaluated in 2016 and deemed to be eligible for services by September, 2016.

The Child Find provisions of the IDEA require each state to have policies and procedures in effect to ensure that "[a]ll children with disabilities residing in the State... who are in need of special education and related services, are identified, located, and

evaluated." 20 U.S.C. Sect. 1412(a)(3)(A); 34 C.F.R. Sect. 300.111(a). Child Find must include any child "suspected of being a child with a disability under Section 300.8 and in need of special education, even though they are advancing from grade to grade." 34 C.F.R. Sect. 300.111(c)(1). Federal caselaw indicates that these provisions impose an affirmative duty to identify, locate, and evaluate all such children. Reid v. District of Columbia, 401 F.3d 516, 518-19 (D.C. Cir. 2005); Hawkins v. District of Columbia, 539 F. Supp. 2d 108 (D.D.C. 2008). Consistent with the statutory language, the Child Find obligation "extends to all children suspected of having a disability, not merely to those students who are ultimately determined to have a disability." N G. v. District of Columbia, 556 F. Supp. 2d 11 (D.D.C. 2008).

Through the testimony of Petitioner, Witness B, and Witness C, Petitioner presented convincing evidence that this Student should have been determined to be eligible for special education by the 2016-2017 school year, at the latest. The Student was having a great deal of trouble during the 2015-2016 school year, a year in which the Student was repeating a grade. An "Analysis of Existing Data" by Respondent in May, 2016, found that the Student did not do work in math, was significantly below grade level in reading, and consistently engaged in negative behaviors in class during that time, including verbal aggression, refusal, elopement, roaming around the classroom, bothering others, and physical aggression. The Student would leave class, destroy objects, and be verbally and physically aggressive toward staff members. The Student was suspended on numerous occasions during the school year. An FBA dated October 16, 2015, found that the Student was distracted in class, displayed opposition and defiance, had poor concentration, and had difficulty working with transitions and working in groups. The

FBA suggested that these issues were a function of the Student's ADHD and ODD, and made it clear that the Student should have been considered eligible for services as a student with an Emotional Disturbance[2] and as a student with Other Health Impairment.[3]

DCPS did not conduct an evaluation of the Student at that time, contending that Petitioner did not cooperate. However, DCPS did not substantiate this claim with any witnesses, or with any emails or letters to the Student's parent. The record suggests that DCPS decided not to determine the Student to be eligible, and then provided the Student with a Section 504 plan instead, even though eligibility pursuant to the IDEA cannot be avoided because a Student is also eligible for services through Section 504. Yankton Sch. Dist. V. Schramm, 93 F.3d 1369, 1376 (8th Cir. 1996) ("the School District is not free to choose what statute it prefers"). Notably, Respondent did not provide any witnesses from School B to support its contentions in regard to Child Find. Therefore, Petitioner has met her burden on Issue #3.

1. Did Respondent fail to provide the Student with an appropriate IEP in April, 2017, December, 2017, June, 2018, and November, 2018? If so, did Respondent violate 34 CFR Sect. 300.324 and Endrew F. v. Douglas County School District, 137 U.S. 988 (2017), and Hendrick Hudson Bd. of Educ. v. Rowley, 458 U.S. 176 (1982)? If so, did Respondent deny the Student a FAPE?

[2] "Emotional Disturbance" is defined as "a condition [1] exhibiting one or more of the following characteristics [2] over a long period of time and [3] to a marked degree that [4] adversely affects a child's educational performance: (A) an inability to learn that cannot be explained by intellectual, sensory, or health factors; (B), an inability to build or maintain satisfactory interpersonal relationships with peers and teachers; (C) inappropriate types of behavior or feelings under normal circumstances; (D) a general pervasive mood of unhappiness or depression; (E) a tendency to develop physical symptoms or fears associated with personal or school problems." 34 CFR Sect. 300.8 (c) (4) (i); 5-E DCMR Sect. 3001.1.

[3] "Other health impairment" is an appropriate classification if a student has limited strength, vitality or alertness with respect to the educational environment which adversely affects the child's educational performance. This classification requires identification of chronic or acute health problems such as: Asthma; Attention Deficit Disorder or Attention Deficit Hyperactivity Disorder; Diabetes; Epilepsy; a heart condition; Hemophilia; Lead poisoning; Leukemia; Nephritis; Rheumatic fever; or Sickle cell anemia. 34 C.F.R. Sect. 300.8(c)(9); 5-E DCMR Sect. 3001.1.

2. Did Respondent fail to review and revise the Student's IEP in April, 2018? If so, did Respondent violate 34 CFR Sect. 300.324 and Endrew F. v. Douglas County School District, 137 U.S. 988 (2017), and Hendrick Hudson Bd. of Educ. v. Rowley, 458 U.S. 176 (1982)? If so, did Respondent deny the Student a FAPE?

Since Issue #1 and Issue #2 overlap, they will be discussed together. Petitioner contended that the Student needed more specialized instruction hours when the Student was determined to be eligible for services in April, 2017. Petitioner argued that the IEPs of December, 2017, June, 2018, and December, 2018, all provided the Student with insufficient specialized instruction and that, by December, 2017, the Student required a full-time therapeutic setting, including revised goals. Petitioner also contended that the Student's special education goals should have been revised in the IEPs of June, 2018, and November, 2018; that all of the Student's IEPs should have provided additional behavioral support services and a dedicated aide; and that the Student required ESY services in the summer of 2018. Petitioner further contended that the Student's IEP should have been revised in April, 2018, to add specialized instruction, goals, behavioral support services, and a dedicated aide.

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 clear that the Rowley standard is "markedly more demanding than the 'merely more than *de minimis*' test" applied by many courts. Id. at 1000.

Even though it has the burden of persuasion in this instance, Respondent did not present any witnesses in support of its April, 2017, IEP, which was developed at School B. All of Respondent's witnesses were from School C, not School B. In fact, Respondent's witnesses, together with Petitioner's witnesses and the extensive documentation admitted into the record, makes it clear that this Student needed more than three hours of specialized instruction per week in April, 2017. The program set forth in the April, 2017, IEP placed the Student in a large general education classroom for most of the week, even though there was no evidence before the IEP team that the Student could manage a large academic classroom for any period of time. To the contrary, the record establishes that, in every such classroom, the Student engaged in extreme, sometimes violent behaviors, and that the Student was not progressing in reading, math, or writing. Moreover, the Student was taking advantage of the large class size by leaving the classroom when s/he wanted, and even leaving the building. By December, 2016, the Student was performing at well below grade level in math, reading and writing.[4]

[4] In regard to the April, 2017, IEP, Petitioner did not meet her burden with respect to the provision of behavioral support services or a dedicated aide. At that point, the Student was recommended for 120 minutes per month of behavioral support services. Petitioner's witnesses did not clearly explain why this was an unreasonable amount at the time, especially given that this was the Student's first IEP, and because the Student was receiving additional counseling through the Section 504 plan. Additionally, there was no convincing testimony that the Student's program was unreasonable because there was no dedicated aide assigned to the Student. The Student was just entering specialized instruction at the time, and Respondent could not have then known whether the Student's behaviors were so extreme that even a program with self-contained classes would have been inadequate for him/her.

The December, 2017, and June, 2018, IEPs provided the Student with twenty hours per week of specialized instruction outside general education, with 120 minutes of behavioral support services. Since the Student had not been educated in a self-contained special education classroom previously, and given a school district's duty to maintain students in their least restrictive environment,[5] this amount of specialized instruction was reasonably calculated in December, 2017, when the Student was also about to move to a new school. This amount of services should have allowed the Student to receive all academic instruction in a small classroom, with a special education teacher.

However, the psychological evaluation of April, 2017, the LRE review of June, 2017, and the FBA of November, 2017, all specifically recommended that the Student receive a BIP. Since no BIP was created for the Student during the 2016-2017 school year or the 2017-2018 school year, it was incumbent on the IEP team to include new interventions in the IEP to address the Student's behaviors. A.C. ex rel. M.C. v. Bd. of Educ. of the Chappaqua Cent. Sch. Dist., 553 F.3d 165, 172 (2d Cir. 2009) (IEP interventions can be placed on an IEP in lieu of a BIP). Without any such interventions, the Student's behavior was poor during the remainder of the 2017-2018 school year, with frequent elopement from class. It is noted that the IDEA statute states that a school district is required to "consider the use of positive behavioral supports and other

[5] 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").

strategies" if a student's behavior impedes the student's learning. 20 U.S.C. Sect. 1414(d)(3)(B)(i); 34 C.F.R. Sect. 300.324(a)(2)(i).[6]

Petitioner is also correct that Respondent should have modified the Student's emotional, social and behavioral goals in these IEPs. The December, 2017, IEP contained only two generic, broad goals that related generally to staying on task and complying with directives, just like the unsuccessful goals in the April, 2017, IEP. Additionally, these IEPs contained no writing goals, even though there is no dispute in this record that the Student had a deficit in writing. While Petitioner did not convincingly establish that there was a problem with keeping the Student's math and reading goals the same at the time, overall the goals in the December, 2017, and June, 2018, IEPs must be considered to be defective.

Finally, Petitioner is correct that, given the Student's significant issues and the possibility of regression during the summer, the Student should have been recommended for ESY services in the June, 2018, amended IEP. Witness D specifically indicated this during her credible testimony, and there was no testimony in the record to the contrary. Respondent therefore denied the Student a FAPE with the IEPs of December, 2017, and June, 2018.

The IEP in November, 2018, made improvements to the Student's program. This IEP provided the Student with twenty-five hours per week of specialized instruction outside general education, which put the Student in a self-contained special education

[6] Petitioner argued that the December, 2017 and June, 2018 IEPS were inappropriate because Witness D admitted that the Student needed twice the amount of behavioral support services that the IEP required. However, since the counselor, Witness D, ended up providing an additional 120 minutes per month of services on her own, there was no substantive impact to the failure of the IEP to provide the services. Lesesne ex rel. B.F. v. D.C., 447 F.3d 828,834 (D.C. Cir. 2006)("(a)n IDEA claim is viable only if those procedural violations affected the student's substantive rights")

setting for most of the school day. The IEP also provided the Student with ESY services, and set a formal legal requirement for 240 minutes per month of behavioral support services. Petitioner contended that the Student required even more specialized instruction, or "full-time" special education, but the record does not clearly suggest that the Student had issues in lunch, recess, or "specials." Additionally, Petitioner did not factor in the school district's obligation to provide the Student with an education in his/her least restrictive environment, or the fact that, by this time, Respondent had created a detailed FBA and BIP for the Student, as written by Witness D. The FBA listed the behavioral interventions that had been tried unsuccessfully for the Student, and the BIP recommended more successful approaches, including self-regulating coping strategies, immediate assistance during disruptive behaviors, breaks, visual cues, and rewards such as praise, computer time, and extended recess, as well as giving the Student a choice between behavioral strategies. The November, 2018, IEP also provided teachers with much more information about the Student's behavioral issues, including the results of a "Strength and Difficulties" questionnaire, and added another goal to reduce hostile behavior. While there was nothing in the IEP or the BIP that specifically addressed elopement, by that time the Student's elopement issues had ceased, at least in part due to the presence of the Student's new teacher, Witness A. The Student has recently stated that the current school year has been "fun" and that s/he is learning this year, which seems clearly attributable to Witness A and the new IEP, FBA, and BIP.

It is noted that this most recent IEP changed the Student's math and reading goals and added writing goals, allowing the IEP to be a complete plan for the Student. It is further noted that Petitioner did not show that the Student needed a dedicated aide at this

time, given that Respondent just created a fairly detailed BIP and that Teacher A has had apparent success in controlling and educating the Student at School C.

Accordingly, the November, 2018, IEP was appropriate and reasonably calculated to provide meaningful educational benefit at the time it was created. 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).

4. Did Respondent fail to conduct any or adequate FBAs and/or BIPs for the Student from November, 2016, to November, 2018? If so, did Respondent violate 28 U.S.C. Sect. 1414(b)(3), 34 C.F.R. Sect. 300.304(c), and related provisions, in addition to Endrew and Rowley? If so, did DCPS deny the Student a FAPE?

Petitioner contended that the November, 2016, BIP was inadequate, and that there should have been an FBA prior to the creation of the current BIP.

Courts in the District of Columbia have held that it is "essential" for the LEA to develop an FBA for a child with behavioral problems. The FBA's role is to determine the cause, or "function," of the behaviors and then their consequences. 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). The FBA should focus on the antecedents to the behaviors, on the theory that a change in the antecedents can lead to a change in the behaviors. C.F. ex rel. R.F. v. New York City Dep't of Educ., 2011 WL 5130101 at *9 (S.D.N.Y. 2011); R.K. ex rel. R.K. v. New York City Dep't of Educ., 2011 WL 1131492 at *19 (S.D.N.Y. 2011). The information

gleaned from the assessment is central to formulating an IEP tailored to the needs of individual disabled children. Harris, 561 F. Supp. 2d at 68.

In addition, as previously noted, federal regulations require that the IEP team shall consider necessary behavioral strategies for students, including, if necessary, an individual behavior plan. 34 C.F.R. Sect. 300.324(a)(2)(i). Local regulations go further, requiring that a copy of the individual behavior plan be "incorporated into the IEP" and provided to the child's parents and to each teacher and service provider. 5-E DCMR Sect. 3007.3.

While a detailed FBA was written for the Student in October, 2015, and while that FBA was "in effect" as of November, 2016, Witness D specifically testified that the BIP created for the Student in November, 2016, was inadequate because it was developed as a "Level 1" BIP, which is designed for a student with learning disabilities, not a student with emotional disturbance. As a result, the Student's behavioral issues intensified, and the psychological evaluation of April, 2017, specifically recommended that the Student receive a new FBA and a BIP. Respondent's LRE review of June, 2017, and classroom observation report of November, 2017, made the same recommendation. And yet, although an FBA was written for the Student in December, 2017, no BIP was written until September, 2018. Respondent therefore denied the Student a FAPE by failing to provide the Student with a BIP from November, 2016, to September, 2018.

5. Did Respondent fail to implement the Student's BIPs during the 2016-2017 and 2017-2018 school years? If so, did Respondent violate the principles in cases like Van Duyn v. Baker Sch. Dist. 5J, 502 F.3d 811, 822 (9th Cir. 2007)? If so, did Respondent deny the Student a FAPE?

"Failure to implement" claims are actionable if a school district cannot materially implement an IEP. A party alleging such a claim must show more than a *de minimis*

failure, and must show that material, or "substantial or significant," portions of the IEP could not be implemented. Savoy v. District of Columbia, 844 F. Supp. 2d 23 (D.D.C. 2012) (holding no failure to implement where school setting provided ten minutes less of specialized instruction per day that was in the IEP); see also Van Duyn ex rel. Van Duyn v. Baker School Cist. 5J, 502 F.3d 811 (9th Cir. 2007). Courts applying the materiality standard have focused on the proportion of services mandated to those actually provided, and the goal and import (as articulated in the IEP) of the specific service that was withheld. Garmany v. Dist. of Columbia, 935 F. Supp. 2d 177, 181 (D.D.C. 2013).

The only BIP in place for the Student at the time was the BIP from November, 2016, which stated that the Student should be seated near less distractible peers, that teachers were to stand near him/her to prevent him/her from misbehaving, that s/he should be given assignments in smaller increments, and that the school should use a "behavior tracker" for the Student. However, Petitioner did not call any witnesses to clearly establish that these interventions were not tried or used during these two school years. Moreover, behavior trackers were included in the evidence. Exh. R-48. While the record contains no behavior trackers for the 2016-2017 school year, there is nothing to suggest that behavior trackers were not used during that school year, or that the failure to complete such behavior trackers had any material effect on the Student.

This claim must therefore be dismissed.

6. Did Respondent change the Student's educational placement in December, 2017, without adequate parental participation? If so, did Respondent violate 34 CFR Sect. 300.501 and related provisions? If so, did Respondent deny the Student a FAPE?

A change in "location" is not always a change in "placement." However, a change in location may give rise to a change in placement if the change in location

substantially alters the student's educational program. 71 Fed. Reg. 46,588 (2006); Letter to Fisher, 21 IDELR 992 (OSEP 1994). The determination as to whether a change in placement has occurred must be made on a case-by-case basis. The following factors are relevant in this analysis: whether the educational program set out in the child's IEP has been revised; whether the child will be able to be educated with nondisabled children to the same extent; whether the child will have the same opportunities to participate in nonacademic and extracurricular services; and whether the new placement option is the same option on the continuum of alternative placements. Letter to Fisher. Substantive changes in placement should be preceded by an IEP meeting, whereas an IEP meeting is not necessary for mere location changes. Letter to Lott, 213 IDELR 274 (OSERS 1989); Letter to Fisher, 21 IDELR 992 (OSEP 1994); 34 CFR Sect. 300.501(b)(1)(i); 34 CFR Sect. 300.501(c)(1).

Petitioner contended that Respondent changed the Student's placement to the BES program at School C in December, 2017, without a meeting. However, the Student's educational program was significantly changed at the IEP meeting on December 14, 2017, where the parent signed in as a meeting participant. The subsequent school assignment to the BES program at School C merely implemented that IEP. There is nothing in the record to indicate that the BES program at School C provided the Student with a different school setting than was suggested at the IEP meeting or incorporated into the December, 2017, IEP (except that Witness D ended up providing the Student with more counseling than was required by the IEP, which is hardly a FAPE violation).

Moreover, applying Letter to Fisher, none of the four factors in the OSEP letter apply here. The educational program set forth in the Student's IEP was not otherwise

revised. There was no showing that the Student's ability to be educated with nondisabled children changed, or that the Student had fewer opportunities to participate in nonacademic and extracurricular services, or that the new placement option was different on the continuum of alternative placements.

This claim must therefore be dismissed**.**

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

20 U.S.C. 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 they request them. 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 CFR 300.501(a). Through her attorney, Petitioner requested a wide variety of educational records in or about June, 2018, and there is testimony in the record that Petitioner did not receive certain documents from the 2015-2016 school year, in addition to behavior trackers for 2018. However, Petitioner did not mention the records issue during her testimony, nor did Petitioner explain how the lack of records had any substantive impact on the Student's education, the parent's ability to participate in the educational process, or this litigation. Lesesne, at 834; see also 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 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). 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.

Petitioner seeks 160 hours of academic tutoring as compensatory education, together with eighty hours of mentoring and sixty hours of counseling. Petitioner presented a written, credible compensatory education plan that is consistent with Reid, and she offered support of this plan through credible testimony. Given that the Student was deprived of a FAPE for over two years, from November, 2016, through the date of the November, 2018, IEP (including the summer of 2018), this is a reasonable award. Indeed, this award would provide the Student far fewer hours of service than the Student actually missed, considering that during the two years of FAPE denial the Student made no real progress in math or reading, had no writing goals, and deteriorated emotionally. Considering all the factors in Reid, this Hearing Officer will therefore award the Student 160 hours of compensatory tutoring, to be provided by a certified special education teacher; eighty hours of mentoring, to be provided by a professional with at least five years of experience in mentoring; and sixty hours of counseling about school and related issues, to be provided by a licensed social worker or psychologist.

Petitioner also seeks placement of the Student at School D. In Branham v. District of Columbia, 427 F.3d 7 (D.C. Cir. 2005), the circuit court laid forth rules for determining when it is appropriate for hearing officers to order funding of non-public placements. First, the court indicated that "(i)f no suitable public school is available, the [school system] must pay the costs of sending the child to an appropriate private school." Id. At 9 (citing to Jenkins v. Squillacote, 935 F.2d 303, 305 (D.C.Cir.1991)). The court then explained that such relief "must be tailored" to meet a student's "unique needs." Id. at 11-12 (citing to Florence County School Dist. v. Carter, 510 U.S. 7, 16 (1993)). To inform this individualized assessment, courts must consider "all relevant factors"

including the nature and severity of the student's disability, the student's specialized educational needs, the link between those needs and the services offered by the private school, the placement's cost, and the extent to which the placement represents the least restrictive educational environment. Id. at 12.

Witness F, from School D, articulately explained that the school would be a good fit for the Student, and indeed it might. The school offers small classrooms, a school-wide behavior system, a behavior support area, two behavior specialists, and four behavior managers, together with counselors who would provide individual and group counseling. However, this Hearing Officer finds that the Student's current placement is appropriate. In this setting, the Student him/herself stated that s/he has been having fun and learning. The Student appears to have benefited from the new FBA and BIP, and has clearly benefitted from the presence of a teacher, Witness A, whom the Student respects and listens to. Though the Student has misbehaved during this school year, his/her behaviors have improved considerably from the 2017-2018 school year, in particular with regard to elopement. Also considering that the Student does not transition well from class to class, much less from school to school, it would not be wise to order the Student to go to a new school in the middle of the school year.

VII. Order

As a result of the foregoing, this Hearing Officer hereby orders the following:

1. Respondent shall pay for 160 hours of tutoring services for the Student, to be provided by a certified special education teacher, at a rate that is usual and customary in the community;

2. Respondent shall pay for eighty hours of mentoring services for the Student, by a qualified, professional provider with at least five years of experience, at a rate that is usual and customary in the community;

3. Respondent shall pay for sixty hours of counseling services for the Student, by a licensed social worker or psychologist, at a rate that is usual and customary in the community;

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

Dated: February 9, 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 9, 2019

Michael Lazan
Impartial Hearing Officer