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 Dates: 12/12/19, 12/16/19**
	)	**Hearing Officer: Michael Lazan**
	)	**Case No. 2019-0263**
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 Intellectual Disability (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 October 28, 2019. The Complaint was filed by a parent of the Student ("Petitioner"). On November 14, 2019, Respondent filed a response. The resolution period expired on November 27, 2019.

II. Subject Matter Jurisdiction

This due process hearing was held, and a decision in this matter is being rendered, pursuant to the IDEA, 20 USC 1400 et seq., its implementing regulations, 34 CFR 300 et

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

seq., Title 38 of the D.C. Code, Subtitle VII, Chapter 25, and the District of Columbia Municipal Regulations, Title 5-E, Chapter 30.

III. Procedural History

A prehearing conference was held on November 21, 2019. Attorney A, Esq., counsel for Petitioner, appeared. Attorney B, Esq., counsel for Respondent, appeared. A prehearing conference order was issued on November 26, 2019, summarizing the rules to be applied in the hearing and identifying the issues in the case. The Hearing Officer Determination ("HOD") due date was January 11, 2020.

The hearing proceeded on December 12, 2019. Petitioner was represented by Attorney A, Esq. Respondent was represented by Attorney B, Esq. At the start of the hearing, Respondent informally applied for a continuance, indicating that it was willing to look for a new non-public school for the Student. Petitioner opposed the application and sought to proceed with the hearing. This Hearing Officer determined that it was appropriate to proceed since, among other things, the parties had sufficient time to settle the case prior to the hearing date, and the parties were ready to go forward. A second hearing date was held on December 16, 2019. At the December 12, 2019, hearing, Respondent had been given the option to present additional witnesses on a third hearing date, in light of objections to the testimony of Witness B, but elected not to do so after the hearing on December 16, 2019. Closing arguments were presented to this Hearing Officer on January 6, 2020.

This was a closed proceeding. Petitioner moved into evidence exhibits 1-162. Respondent filed objections to exhibits 14-21, 75-82, 153-154, 159-160, and 162. Exhibits 153 and 154 were withdrawn. The objection to exhibit 160 was sustained.

Exhibits 1-152, 155-159, and 162 were admitted. Respondent moved into evidence exhibits 1-94. There were no objections. Exhibits 1-94 were admitted. Petitioner presented as witnesses: herself; Witness A, a speech and language pathologist (expert: speech and language pathology); Witness B, DCPS special education teacher (expert: special education); Witness C, the Student's stepmother; Witness D, an educational advocate (expert: school psychology, behavior analysis, Individualized Education Program ("IEP") development and placement); and Witness E, an educational advocate (expert: special education programming and placement). Respondent presented as witnesses: Witness F, a teacher, and Witness G, a compliance case manager.

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 develop inappropriate IEPs (in April, 2018, and March, 2019) by failing to provide/include appropriate/any: 1) 1:1 dedicated aide; 2) Applied Behavioral Analysis ("ABA") services (during school hours); 3) direct speech and language pathology; 4) goals; and 5) supplemental aids and services? If so, did Respondent act in contravention of 34 C.F.R. Sect. 300.320, 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 Appropriate Public Education ("FAPE")?

2. Did Respondent fail to provide an appropriate educational placement for the Student? If so, did Respondent act in contravention of 34 C.F.R. Sect. 300.116, related laws and provisions, and the principles articulated in cases such as Gellert v. District of Columbia, 435 F. Supp. 2d 18 (D.D.C. 2006)? If so, did Respondent deny the Student a FAPE?

Petitioner contended that the Student's placement did not provide sufficiently trained behavioral staff.

3. Did Respondent fail to implement the Student's IEPs for the 2017-2018 school year? If so, did Respondent violate principles of law established 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?

Petitioner contended that the Student did not get sufficient specialized instruction, speech and language therapy, behavior support services, or occupational therapy.

4. Did Respondent fail to provide for any/an appropriate Functional Behavior Assessment ("FBA") and/or Behavior Intervention Plan ("BIP") from October 28, 2017, to present? If so, did Respondent act in contravention of 34 C.F.R. Sect. 300.320, 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?

5. Did Respondent fail to consider the Student's neuropsychological evaluation of May, 2018? If so, did Respondent violate 34 C.F.R. Sect. 300.502(c)(1) and related provisions? If so, did Respondent deny the Student a FAPE?

6. Did Respondent fail to provide Petitioner with educational records? If so, did Respondent violate 34 Sect. C.F.R. Sect. 300.501 and related provisions? If so, did Respondent deny the Student a FAPE?

As relief, Petitioner is seeking placement of the Student at a therapeutic day school, a revised IEP, and compensatory education.

V. Findings of Fact

1. The Student is an X-year-old who is eligible for services as a student with Intellectual Disability. The Student's medical history is significant for seizure disorders, which started in May, 2017. Concurrent with the onset of seizures, the Student began to exhibit internal distractions and self-injurious behavior. The Student has extreme behavioral difficulties which are sometimes manifested by the Student talking to his/her hand as if it were a person. When s/he talks to the hand, it is "like a psychosis" and the Student can get into an argument with the hand. It is difficult to get the Student's attention on a 1:1 basis. The Student also repeats the same conversations over and over, and has issues with "personal boundaries." The Student has severe deficits in cognitive

ability, academic skills, and expressive and receptive language skills (except for articulation skills). The Student is able to communicate with others, but to understand the Student, one has to listen closely. When the Student is not behaving in a manner that manifests or suggests psychosis, the Student can learn and function in a classroom through slow, step-by-step instruction. Testimony of Witness A; Testimony of Witness D; Testimony of Witness F; P-2-2.

2. The Student can count by rote to twenty and read numerals up to twenty. The Student can count up to ten one-dollar bills but cannot identify a five-dollar bill. The Student is able to name some words and common signs and can name all eleven colors. The Student requires Applied Behavioral Analysis to function and learn appropriately in class. The Student also requires a proper de-escalation room for an educational setting to be appropriate. Testimony of Witness B; Testimony of Witness D; P-11.

3. The Student started at School A, a DCPS public school for students with disabilities, in or about 2015. Petitioner believed that School A was the right school for the Student when s/he started at the school. After IEPs in November, 2015, and October, 2016, a new IEP was written for the Student on April 5, 2017, and amended on April 10, 2017. The IEP contained goals in mathematics, reading, written expression, adaptive/daily living skills, and motor skills/physical development. It recommended thirty-two hours per week of specialized instruction, with 120 minutes per week of occupational therapy. The IEP contained numerous classroom accommodations such as "human scribe," "speech to text," "human signer," and "external assistive technology." The IEP also requires a location with minimal distractions, preferential seating, and frequent breaks. The IEP indicated that the Student did not need any positive behavioral

interventions. Extended School Year ("ESY") instruction was recommended. The IEP contained a Post-Secondary Transition Plan indicating that, after graduation, the Student could enroll in a vocational training program or work in an assisted-living community for the elderly. The plan provided for one hour per month of training on independent living skills, one hour per month of vocational training, one hour per day of transition training for employment, and two hours of transition services for independent living and post-secondary education and training. Testimony of Petitioner; P-15; P-16; P-17; P-21.

4. A request for the Student's records for the preceding two school years was sent to Respondent by written correspondence dated August, 2017. P-147-1.

5. A psychological evaluation of the Student was conducted in October, 2017, and amended on January 3, 2018, and January 9, 2018. The evaluation showed that the Student was functioning below the 1st percentile on almost all measures. None of the Student's academic teachers were consulted for this evaluation. Adaptive functioning scores also showed that the Student was functioning on a very low level in communication, daily living skills, and socialization. A speech and language evaluation of the Student was conducted in November, 2017. The report corresponding to that evaluation, dated November 10, 2017, revealed that the Student was tested through a variety of measures, including the Clinical Evaluation of Language Fundamentals-5 ("CELF-5"). Except for articulation (where the Student scored at the 25th percentile), the Student's scores were below the 1st percentile on every measure. The evaluator did not recommend direct speech and language therapy because of the Student's difficulty with attention and oppositional defiant behaviors. The evaluator suggested that the Student

participate in a "well-structured" "Transdisciplinary Model" of service delivery. P-7; P-8; R-25; R-26.

6. The Student attended School A for the 2017-2018 school year. Through approximately January, 2018, the Student's teacher was Teacher A. From the start, it was obvious that the Student had significant behavioral issues. To address the difficulties, a "safety contract" was created for the Student and an individual safety plan was written for the Student on November 29, 2017. The plan was signed by Teacher A on December 18, 2017. The plan provided a list of locations where the Student might be in the school building and recommended permitting the Student to go to a designated cool-down spot. It also recommended teaching the Student self-calming strategies, teaching the Student's peers how to use appropriate language with him/her, being calm and positive with him/her, being close in proximity to him/her, moving him/her to another location or removing other students when s/he displayed self-injurious behavior, and giving the Student a clear statement of two choices. The plan also advised staff to be on alert when the Student experienced academic frustration or had poor interactions with other students. The plan discouraged "forcing the Student" to comply with expectations. These interventions, in addition to attempts to provide the Student with a token economy system, met with some success. However, throughout the year, the Student engaged in violent self-injurious behavior, such as biting him/herself in the face. The Student also sometimes grabbed others, refused to follow directions, cried uncontrollably, talked to nonexistent persons, talked to his/her hand, and threw objects around the room. When the Student experienced these behaviors, the Student was sometimes placed in a de-escalation room, which was also the school store. This room was not appropriately

private and was not suitable as a de-escalation room. Teacher A left School A in the middle of the school year. Her replacement, Witness F, was not certified as a teacher by the District of Columbia (or any state). Witness F focused on implementing the school's Edmark program and sometimes allowed the Student to occupy him/herself with a tablet or phone. The Student was offered the following amounts of occupational therapy during the school year: sixty minutes in August, 2017; 120 minutes each in September and October, 2017; 150 minutes in November, 2017; ninety minutes each in December, 2017, and January, 2018; 200 minutes in May, 2018; and ninety minutes in June, 2018. Testimony of Witness B; Testimony of Witness F; P-13-10; P-45; P-47; P-60; P-107; P-108; P-109; P-110; P-111; P-112; P-13-10; R-94.

7. On January 26, 2018, another request for the Student's records for the preceding two school years was sent to Respondent through written correspondence. The request was for virtually all possible documents relating to the Student for that time period in the possession of Respondent. P-143-1.

8. An FBA was created for the Student on or about March 12, 2018. The FBA found that the Student's behaviors occurred across all settings and came about unpredictably, though the Student would show signs that s/he was becoming upset. It suggested positive reinforcers in the form of 1:1 attention, books, time with preferred staff, pretzels, music, dancing, and basketball. The FBA reported that the Student's incidents were more likely to occur just before lunch or just before the end of the school day. It concluded that the Student's tantrums and self-injurious behavior were sensory in nature, and that the Student's non-compliant behavior was aimed at gaining access to desired items or avoiding non-preferred activities. The FBA concluded that behavior

interventions had been effective, and that the Student had responded to proximity, calming breaks, and related measures. However, the FBA indicated that the Student's issues with respect to "talking to the hand" were not addressed and stated that the school district needed additional information about the "etiology" of these issues. P-5.

9. The Student's Level II BIP dated March 19, 2018, as amended on March 23, 2018, indicated that the Student engaged in tantrums, self-injurious behavior, and non-compliance when unable to get attention from peers, when performing a non-preferred activity, when not feeling well, and at unpredictable times. According to the BIP of March 23, 2018, these behaviors occurred two to three times weekly (tantrums), one to two times weekly (self-injurious behavior), and nine percent of the time (noncompliance). The plan recommended redirection, time-outs, removal from the group or class, in-class support from a behavioral technician, redirection, and in-class support from a behavior team for noncompliance. The plan also recommended checks for understanding, coaching, modeling, simplified presentations and instruction, sensory and/or movement breaks, consistent positive feedback, individual support, verbal encouragement, shortened tasks, and prompts to get back on task. R-37; R-39.

10. The Student's IEP dated April 3, 2018, recommended positive behavior interventions and supports, and contained goals in mathematics, reading, written expression, adaptive/daily living skills, communication/speech and language, emotional, social and behavioral development, and motor skills/physical development. The IEP recommended 31.25 hours per week of specialized instruction, with 120 minutes per week of occupational therapy and 180 minutes per week of behavioral support services. The IEP contained the same kind of classroom accommodations as the prior IEP. ESY

instruction was again included, and the IEP again contained a Post-Secondary Transition Plan indicating that the Student could enroll in a vocational training program or work in an assisted-living community for the elderly. The plan provided for one hour per month of training on independent living skills, one hour per month of vocational training, and one hour per day of vocational guidance and counseling. P-12.

11. A neuropsychological evaluation of the Student was conducted in May, 2018, by staff at Hospital A. The subsequent report found that the Student was well below level in visual motor testing and fine motor testing, and functioned well below level in attention, inhibitory control, executive functioning, learning and memory deficits, and adaptive functioning. The Student was considered to be Intellectually Disabled on the Diagnostic and Statistical Manual of Mental Disorders ("DSM-V"), in the moderate range. The evaluator recommended an educational environment with 1:1 programming and assistance, stressed the importance of daily living tasks, and recommended a wide range of other strategies for home and school. Petitioner presented DCPS with hand-delivered and emailed copies of the neuropsychological report in August, 2018. Testimony of Witness E; P-2.

12. The Student continued at School A for the 2018-2019 school year, and Witness F continued as the Student's teacher. In October, 2018, the Student's IEP was amended, in part, to change the Student's transition plan to address physical illness at school. R-34 @ 380-1.

13. During the 2018-2019 school year, the Student was in classes with students who were largely non-verbal. This distressed the Student, who told Petitioner and Witness C that the other students in the classroom did not talk to him/her. The

Student did not totally understand that the other students could not communicate with him/her. The Student also began mimicking the misbehavior of the other students in the class. The Student was usually unable to maintain clear thought processes, which, in combination with other factors such as impulsivity, hindered the Student's progress in academics and behaviors. The Student's behavior worsened, including eloping and wanting to go home. The Student continued to hit him/herself and continued to talk to his/her hand. Nothing was used regularly to measure or document his/her behaviors. To address these behaviors, the school relied heavily on interpersonal relationships, wherein a handful of people would offer the Student incentives when s/he was in a state of extremis. Most of the day, the Student would spend time by him/herself, in a corner, watching music or videos on an iPad or the teacher's phone. As a result of the Student's behavioral issues during this year, Petitioner would be called at home. Testimony of Witness B; Testimony of Witness F; Testimony of Witness C; Testimony of Petitioner; P-12-9.

14. The Student's Level II BIP was revised on March 22, 2019, and slightly modified on March 29, 2019. The BIP indicated that the Student continued to engage in tantrums, self-injurious behavior, and non-compliance when unable to get attention from peers, when performing a non-preferred activity, when not feeling well, and at unpredictable times. One part of the BIP indicated that the Student's behaviors occurred one to two times weekly (tantrums), less than once weekly (self-injurious behavior), and two to three times weekly (noncompliance). Another part of the BIP determined that the Student had tantrums two percent of the time, was engaged in self-injurious behavior two percent of the time, and was noncompliant three percent of the time. The plan

recommended redirection, time-outs, removal from the group or class, in-class support from a behavioral tech during tantrums, redirection, removal of a preferred item, checks for understanding, coaching, modeling, simplified presentations and instruction, sensory and/or movement breaks, consistent positive feedback, individual support, verbal encouragement, shortened tasks, and prompts to get back on task. R-36; R-38.

15. The Student's IEP dated March 29, 2019, recommended positive behavior interventions and supports, and contained goals in mathematics, reading, written expression, adaptive/daily living skills, communication/speech and language, emotional, social and behavioral development, and motor skills/physical development. The IEP again recommended 31.25 hours per week of specialized instruction, with 120 minutes per week of occupational therapy and 180 minutes per week of behavioral support services. The IEP contained the same kind of classroom accommodations as prior IEPs. ESY instruction was again recommended, and the IEP again contained a Post-Secondary Transition Plan indicating that the Student could enroll in a vocational training program or work in an assisted-living community for the elderly. The plan provided for one hour per month of training on independent living skills, one hour per month of vocational training, and one hour per day of vocational guidance and counseling. P-12.

16. Another request for the Student's records for the preceding two school years was sent to Respondent through written correspondence dated March 29, 2019. Again the request was for virtually all possible documents relating to the Student for that time period in the possession of Respondent. P-141-1.

17. Another speech and language evaluation of the Student was conducted on or about May 13, 2019. The evaluator found that the Student's receptive and expressive

vocabulary was below the 1st percentile on both the Receptive One-Word Picture Vocabulary Test-4th Ed. and the Expressive One-Word Picture Vocabulary Test-4th Ed. Testing on other measures was also extremely low, with relative strengths displayed in spontaneous use of eye contact, the ability to use and respond to greetings and body language, and the use of socially polite words. Again, as a result of the Student's difficulties with attention and oppositional behaviors, direct service was not suggested, and the Student was recommended for a "well-structured" "Transdisciplinary Model" of service. P-1.

18. Another request for the Student's records was sent to Respondent through written correspondence dated July 3, 2019. Once again, the request was for virtually all possible documents in the possession of Respondent relating to the Student for the last two school years. P-139-1.

19. The Student continued at School A for the 2019-2020 school year, with Witness F again leading the classroom. The Student experienced multiple behavior issues during this school year. The Student threw chairs, flipped desks over, and threw him/herself into walls and cabinets. Witness F tried to talk to the Student, offer water, and use other strategies. If these efforts did not work, Witness F would remove the other children from the classroom for safety, before calling the main office. A speech and language pathologist "pushed" into the classroom to provide whole group and small group instruction. Witness F continued to give the Student an iPad or a phone to "calm [him/her] down." Testimony of Witness F; R-10 @71; P-11-3; R-28; R-39.

20. The Student's BIP was revised on November 22, 2019, with much of the same language as the previous BIP. The Student's tantrums were reported to occur twice

weekly (three percent of the time), and noncompliance was reported to occur three times weekly (six percent of the time). Self-injurious behavior was reported to occur less than once a week. R-40.

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 persuasion for District of Columbia special education cases was changed by the local legislature through the District of Columbia Special Education Student Rights Act of 2014. With the passage of this law, in special education due process hearings initiated by a parent, the burden of persuasion falls on the public agency, if the dispute concerns "the appropriateness of the child's individual educational program or placement, or of the program or placement proposed by the public agency" (provided that the party requesting the due process hearing shall establish a *prima facie* case). The burden of persuasion must be met by a preponderance of the evidence. D.C. Code 38-2571.03(6)(A)(i).

Issue #1, Issue #2, and Issue #3 directly involve the appropriateness of the Student's educational program or placement. As a result, the burden of persuasion must be on Respondent for these issues, provided that Petitioner presents a *prima facie* case. Issue #4, Issue #5, and Issue #6 do not directly involve the appropriateness of the Student's educational program or placement. As a result, the burden is on Petitioner for these issues. Schaffer v. Weast, 546 U.S. 49 (2005).

1. Did Respondent develop inappropriate IEPs (in April, 2018, and March, 2019) by failing to provide/include appropriate/any: 1) 1:1 dedicated aide; 2)

ABA services (during school hours); 3) direct speech and language pathology; 4) goals; and 5) supplemental aids and services? If so, did Respondent act in contravention of 34 C.F.R. Sect. 300.320, 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?

For many years, the main authority framing a school district's duty to create an IEP was 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). 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.

Petitioner presented no clear evidence that the Student needed a dedicated aide, or that the supplemental aids and services portion of the Student's IEPs needed to be altered.

Indeed, Petitioner did not address these issues at closing. As a result, Petitioner failed to present a *prima facie* case on these issues.

However, on all other IEP issues, Petitioner presented a thorough case explaining why the Student needed changes to the IEPs[2] to receive a FAPE. The contention that the Student required ABA therapy to address his/her behavioral issues was amply supported by the testimony of Witness D, an expert in school psychology, behavior analysis, and IEP development and placement. This witness, who has a background in delivering ABA instruction to students, explained that the Student would not benefit from cognitive behavioral therapy ("CBT"), as recommended in the IEP, because the Student is not capable of the kind of self-analysis that CBT requires. Witness D explained that ABA is the appropriate form of behavioral intervention for this sort of student, an opinion corroborated by the testimony of Witness E, an expert in special education programming and placement, and by the testimony of Witness B, a special education teacher employed by DCPS who has taught the Student. DCPS did not present any witnesses to rebut this testimony, even though it bears the burden of persuasion on this issue. In closing, DCPS argued that ABA had been tried for the Student and had not been successful, but the record does not support this contention. Petitioner has shown that both IEPs were deficient because they failed to recommend ABA instruction for the Student.[3]

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[2]Both IEPs at issue provided for similar programs. The IEPs provided for the Student to be housed in a highly restrictive program of classes with 31.25 hours per week of specialized instruction, with occupational therapy (120 minutes per month) and behavior support services (180 minutes per month), but no direct speech and language therapy.

[3]School districts are not required to put a particular methodology in the IEP. Rowley, 458 U.S. at 204. However, as stated in the comments to the 1999 IDEA regulations, there are circumstances where a particular teaching methodology is an integral part of what is ''individualized'' about a student's education and needs to be discussed at the IEP meeting and incorporated into the student's IEP. Fed. Reg. Vol. 64, No. 48 (March 12, 1999) at 12552.

Similarly, Petitioner presented convincing testimony and evidence explaining why the Student, who has severe expressive and receptive speech delays, should have been provided direct speech and language therapy in both IEPs. Witness A, an expert in speech and language pathology, explained that the Student's behavior issues were not a barrier to direct speech, and that additional services were necessary for the Student to make appropriate progress in speech. DCPS submitted written evaluations explaining that the Student's speech services should instead be delivered through a "well-structured" "Transdisciplinary Model" of service, but the IEPs said nothing about this type of service being delivered in the Student's classroom. Moreover, DCPS did not even present a witness to explain what this model of service is. Indeed, DCPS did not present any witness with expertise in speech and language issues to explain how the Student progressed in speech while at School A. On this record, it must be concluded that the Student's IEPs needed to include direct speech and language services.

Finally, with respect to the goals on the IEPs, Petitioner again presented witnesses and evidence explaining why the goals in the respective IEPs were inappropriate. Witness A, an expert in speech issues, testified that the Student's sole speech goal, to improve language and social skills, was very broad and not measurable. Both IEPs had the exact same speech goal. Witness C, the Student's stepmother, complained that the goals were not realistic and did not match the Student's skill set. She contended that the goals should have been oriented to the Student's daily living skills and adaptive skills. Witness D testified that there should have been more than one adaptive skills goal for this Student, noting that each IEP had only one adaptive goal (one IEP's goal related to putting items back, the other IEP's goal related to typing). Witness D pointed out that the

Student needed additional goals to address issues such as food preparation and cleaning. Witness D also testified that the Student's social and emotional goals were inappropriate because they were premised on the viability of CBT for the Student, who cannot benefit from such therapy. Witness E testified that the Student's math, reading, and writing goals were unrealistic in light of his/her severe deficits. For example, she pointed out that a goal related to understanding the main idea of a reading selection (in the IEP of April, 2018, P-13-6) did not make sense because the Student can only read one-syllable words.

Even though it has the burden of persuasion, DCPS did not contest any of this testimony, whether through witnesses, documents, or argument. DCPS did argue that Petitioner did not object to the IEP of April, 2018, but a parent's assent to an inappropriate IEP does not protect a school district from liability, especially where, as here, there is nothing in the record to show that Petitioner had any expertise in public education. Letter to Lipsitt, 52 IDELR 47 (OSEP Letter December 11, 2008).

As a result of the foregoing, DCPS denied the Student a FAPE through its IEPs of April 3, 2018, and March 29, 2019.

2. Did Respondent fail to provide an appropriate educational placement to the Student? If so, did Respondent act in contravention of 34 C.F.R. Sect. 300.116, related laws and provisions, and the principles articulated in cases such as Gellert v. District of Columbia, 435 F. Supp. 2d 18 (D.D.C. 2006)? If so, did Respondent deny the Student a FAPE?

Petitioner contended that the Student's placement at School A did not provide sufficiently-trained behavioral staff for the Student. Petitioners may bring claims based

upon an inappropriate placement[4] in certain situations. Although the local education agency ("LEA") has some discretion with respect to school selection,[5] that discretion cannot be exercised in such a manner as to deprive a student of a FAPE, even if the school placement can implement the Student's IEP. Gellert v. District of Columbia, 435 F. Supp. 2d 18 (D.D.C. 2006); Holmes v. District of Columbia, 680 F. Supp. 40 (D.D.C. 1988).

There is ample testimony that School A was inappropriate for the Student, particularly from Teacher B, who testified that School A staff were not properly trained on how to address the Student's extreme behaviors. Teacher B explained that the Student needed his/her behaviors to be documented and that little or no documentation was compiled by school staff. Teacher B indicated that the Student spent most of his/her time on an iPad or the teacher's phone, instead of working. Indeed, Witness F, during her testimony, admitted that she is not a certified teacher and did not clearly explain how she implemented behavioral interventions in the Student's IEPs and BIPs. Instead, Teacher F admitted that she gave the Student an iPad or phone when the Student misbehaved, to calm him/her down. Teacher B, who testified without rebuttal that she is considered to be a "highly effective" teacher, also indicated that the school did not have an appropriate de-escalation room, and instead placed the Student in a space that was not private when s/he needed time alone.

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[4]As pointed out in Eley v. District of Columbia, 47 F. Supp. 3d 131 (D.D.C. 2014), a student's educational placement includes the school, or location of services.

[5]See Jalloh v. District of Columbia, 968 F. Supp. 2d 203 (despite complaints about, among other things, the school's use of computers for instruction, the school was deemed able to implement the IEP and placement claims were denied).

Respondent was surprised by the testimony of Witness B and contended that it needed additional time to respond to her contentions. This Hearing Officer gave Respondent a full opportunity to respond by scheduling an extra day of hearing. However, Respondent did not use that extra day and did not call any witnesses from School A except Teacher F, whose testimony was not as credible as Teacher B's. Respondent denied the Student a FAPE by failing to provide the Student with an appropriate educational placement at School A during the 2017-2018 school year, the 2018-2019 school year, and the 2019-2020 school year.

3. Did Respondent fail to implement the Student's IEPs for the 2017-2018 school year? If so, did Respondent violate principles of law established 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 District's school setting provided ten minutes less of specialized instruction per day that was on the IEP); see also Van Duyn ex rel. Van Duyn v. Baker School Dist. 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).

Petitioner argued that "service trackers" relating to behavior support services, speech and language therapy consultation services, and occupational therapy services

establish a *prima facie* case. However, the prehearing order that Petitioner was aware of and agreed to (and indeed sought revisions to) limits this claim to the 2017-2018 school year. Petitioner only submitted two service trackers describing the Student's behavioral support services for the 2017-2018 school year. Moreover, the service tracker of May, 2018, indicated that the Student received his/her mandate of 180 minutes per month of behavioral support services that month.

No service trackers were submitted for speech and language therapy consultation for the 2017-2018 school year. Petitioner did submit service trackers for occupational therapy services corresponding to part of the 2017-2018 school year. These service trackers indicated that the Student did not receive his/her mandate of occupational therapy during three months of the school year, and that one session was missed during each such month. There is nothing in the record to suggest that this shortfall had any impact on the Student.

Petitioner also argued that the Student did not receive his/her specialized instruction hours during the 2017-2018 school year. Petitioner argued that the Student did not receive his/her "IEP blocks" during the school year, but Witness B testified that the Student did receive such instruction for the 2017-2018 school year. However, the record indicates that Witness F, the teacher assigned to the Student after January, 2018, was not a certified teacher and did not have any educated-related degrees or certificates. As a result, Witness F's instruction to the Student cannot be deemed "specialized instruction." Turner v. District of Columbia, 952 F. Supp. 2d 31, 41–42 (D.D.C. 2013) (the assistance of a "paraprofessional in special education" without any qualification beyond a B.S. in English does not establish that the student received specialized

instruction). The Student was therefore denied a FAPE when Respondent failed to provide the Student with his/her mandate of 31.25 hours per week of specialized instruction after January, 2018, during the 2017-2018 school year.

4. Did Respondent fail to provide for any/an appropriate FBA and/or BIP from October 28, 2017, to present? If so, did Respondent act in contravention of 34 C.F.R. Sect. 300.320, 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?

There is no specific requirement to write an FBA or a BIP in the regulations. The school district is only required to "consider the use of positive behavioral supports and other 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). Nevertheless, District of Columbia courts have held it is "essential" for the LEA to address the behavioral issues of a student. 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) (an FBA/BIP was required where a learning-disabled student was suspended).

In this case, the record indicates that the Student did receive an FBA on March 23, 2018. This thorough, professionally-written, twelve-page document found that the Student's behaviors appeared to come from resistance to non-preferred activities, access to preferred items, and peer issues. The FBA also indicated that some behaviors came about unpredictably and suggested specific positive reinforcers. The FBA reported that the incidents were more likely to occur just before lunch or just before the end of the school day. It concluded that the Student's tantrums and self-injurious behavior were

sensory in nature, and that the Student had responded to calming breaks. Petitioner criticized language in the FBA suggesting that further analysis was needed to determine the etiology of the Student's behaviors. However, Petitioner presented no authority to support the proposition that an FBA must answer every single question about the source of a student's issues.

The record also establishes that several versions of a BIP were written for the Student in or about March, 2018, March, 2019, and November, 2019. These BIPs focused on understanding the "nature" of the Student's behavior, discussed the antecedents to that behavior, discussed strategies to address the behavior, and reported on the frequency of the behavior. The only significant criticism of the BIPs from Petitioner's experts came from Witness E, who noted that the Student could not employ "verbal" replacement behaviors because of his/her communication deficits. While this is a valid critique, the remainder of the BIP reads appropriately in light of the Student's significant deficits. Petitioner also suggested that the BIPs did not focus on sensory interventions for the Student. However, all of the BIPs did call for sensory interventions for the Student, though the BIPs may not have been specific in this regard. Petitioner also contended that the BIPs were not used appropriately by School A, which may be true. But Petitioner's Complaint did not allege that Respondent failed to implement the Student's BIPs. This claim must therefore be dismissed.

5. Did Respondent fail to consider the Student's neuropsychological evaluation of May, 2018? If so, did Respondent violate 34 C.F.R. Sect. 300.502(c)(1) and related provisions? If so, did Respondent deny the Student a FAPE?

If a parent shares with a public agency an evaluation obtained at private expense, the results of the evaluation must be considered by the public agency in any decision made with respect to the provision of FAPE to the child. 34 C.F.R. Sect. 300.502(c)(1).

Petitioner arranged for a private neuropsychological evaluation of the Student, which occurred on or about May 25, 2018. In or about August, 2018, Witness C presented DCPS with hand-delivered and emailed copies of the neuropsychological report. This evaluation should have been reviewed by the IEP team in March, 2019, but the record indicates that this evaluation was not reviewed by the team. The IEP did not refer to the document, and the "Analysis of Existing Data" document in the record that corresponds to the IEP meeting (P-28) also does not refer to the document.[6]

However, "(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). Though Petitioner bears the burden on this claim, Petitioner did not clearly show how review of this evaluation by DCPS would have materially changed the decision of the IEP team on March 29, 2019. This evaluation did not recommend that the Student should go to a therapeutic, non-public day school, as Petitioner now requests. The Student was already in a highly restrictive setting at the time of the IEP meeting and, indeed, the neuropsychological evaluation itself stated that the Student required "*continued* placement in a specialized education classroom with a high level of support and structure." (P-2-5) (emphasis added). Accordingly, while DCPS should have

[6]Respondent contended that it did not receive a complete copy of the evaluation in August, 2018, but did not present the incomplete copy at the hearing to prove this. Moreover, if Respondent did receive an incomplete copy of an evaluation of the Student, it surely should have asked Petitioner for a complete copy to properly analyze the document. There is nothing in the record to suggest it did so.

reviewed this evaluation at the March, 2019, IEP meeting, the failure to do so did not deny the Student a FAPE. This claim must be dismissed.

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

An LEA must grant parents access to the educational records of their children no more than forty-five days after the request. 20 USC 1232g(a)(1)(A). 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).

On or about August 30, 2017, January 26, 2018, March 29, 2019, and July 3, 2019, Petitioner sought a wide range of educational records from Respondent, as supplemented by a number of emails. (P-139-P-147). Petitioner obviously received many of these records. Most of the 162 exhibits moved into evidence were created by DCPS, not Petitioner or third parties. A court recently opined on a similar case where a parent contended that DCPS's failure to produce educational records amounted to FAPE denial under the IDEA. The court ruled that a parent must be more specific when alleging that a denial of educational records amounts to a denial of FAPE. The court held that the parent "has not explained how, precisely, the other missing evidence—progress reports, additional report cards, counseling tracking forms, and the like—were necessary to her preparation for the due process hearing. Rather, she paints in the broadest of strokes, asserting that the evidence 'would have provided the basis for services' and that

they 'related to the identification, evaluation, and educational placement.'" Simms v. District of Columbia, No. 17-CV-970 (JDB/GMH), 2018 WL 4761625, at *23 (D.D.C. July 26, 2018), report and recommendation adopted, No. CV 17-970 (JDB) (GMH), 2018 WL 5044245 (D.D.C. Sept. 28, 2018); compare Amanda J. v. Clark Cty Sch. Dist, 267 F.3d 877, 894 (9th Cir. 2001) (records revealed that the student was autistic, a diagnosis not known by the parents or IEP team). This claim must be dismissed.

RELIEF

As relief, Petitioner is seeking placement of the Student at an appropriate therapeutic, non-public day school that provides ABA therapy, groups the Student with other peers who are verbal, and provides the Student with individualized instruction. Petitioner also seeks a compensatory education package consisting of 940 hours of tutoring and 240 minutes of ABA services per month, together with sixty minutes of ABA consultative services per month, in the school setting.

Hearing officers have wide discretion to ensure that students receive a FAPE. As the United States Supreme Court has stated, the statute directs a hearing officer to "grant such relief as [he or she] determines is appropriate." Sch. Comm. of Town of Burlington v. Dep't of Educ. of Mass., 471 U.S. 359, 371 (1985). The ordinary meaning of these words confers 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).

In Branham v. District of Columbia, 427 F.3d 7 (D.C. Cir. 2005), the 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.

It is clear from the record that the Student should not remain at School A. During closing argument, Respondent did not contend that the Student should remain at the school. Indeed, DCPS indicated on the record that it is willing to look for a therapeutic, non-public day school for the Student in light of his/her difficulties. Accordingly, it is appropriate for this Hearing Officer to order that the Student be placed in a therapeutic, non-public day school, provided that the Student receives: 1) a significant amount of instruction through the ABA methodology throughout the school day; 2) a setting where most of the students in the Student's classes are verbal; 3) a significant amount of 1:1 instruction throughout the school day; and 4) access to a de-escalation room.

Petitioner also seeks compensatory education. 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"). 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, 750 F. Supp. 2d 94, 98 (D.D.C. 2010).

The Student has been denied a FAPE for over two school years, during which time the Student has spent too much time on tablets and phones instead of actually learning. Moreover, the Student too frequently engaged in dangerous, self-injurious behavior at School A, which assigned this vulnerable Student to an uncertified teacher. There is nothing in the record to suggest that the Student has made any meaningful academic progress during his/her time at School A. However, Petitioner did not clearly explain how this deprivation should result in an award of 940 hours of tutoring and 300 minutes per month of ABA instruction. Petitioner also did not clearly explain how such a severely disabled Student could possibly go to school for five days a week and then, during evenings and weekends, handle a significant amount of additional instruction. As a result, this Hearing Officer will modify the tutoring request and instead order that the Student receive 300 hours of tutoring, to be provided by a certified special education teacher who is experienced in providing educational services to students with severe disabilities.

Petitioner's other proposal, for 300 minutes per month of additional ABA instruction at school (consisting of 240 minutes per month of services and 60 minutes per month of consultation), together with one hour per day of ABA instruction during ESY

services, is an appropriate award for this Student. Witness B, Witness D, and Witness E all testified that the Student needs ABA instruction at school to control his/her behavior and allow him/her to make progress on academic goals. DCPS did not contest the testimony of these witnesses and did not strongly oppose Petitioner's request for such an award. Accordingly, this request for services will be ordered in full through to the end of the 2020-2021 school year.

VII. Order

As a result of the foregoing:

1. Respondent shall immediately place the Student in a therapeutic, non-public day school that can ensure the Student receives: 1) a significant amount of instruction through the ABA methodology throughout the school day; 2) a setting where most of the students in the Student's classes are verbal; 3) a significant amount of 1:1 instruction throughout the school day; and 4) a de-escalation room;

2. The Student is hereby awarded 300 hours of academic tutoring, to be provided by a certified special education teacher with experience in providing educational services to students with severe disabilities;

3. All of the Student's academic tutoring services shall be used by the end of the 2020-2021 school year;

4. The Student is hereby awarded 240 minutes per month of additional ABA instruction, and one hour per day of additional ABA instruction during ESY instruction, to be provided in the educational setting by an experienced provider of ABA instruction;

5. The Student is hereby awarded sixty minutes per month of ABA consultative instruction, to be provided in the educational setting by an experienced provider of ABA instruction;

6. All ABA instruction shall be used by the end of the 2020-2021 school year and shall be provided in addition to the ABA instruction provided by the Student's therapeutic, non-public day school;

7. The Student's current IEP shall be revised to require that the Student receive classes with ABA instruction, 1:1 instruction, classes with a majority of verbal peers, access to a de-escalation room, and at least sixty minutes per week of direct speech and language therapy services;

8. All of Petitioner's other requested relief is hereby denied.

Dated: January 11, 2020

Michael Lazan
Impartial Hearing Officer

cc: Office of Dispute Resolution
Attorney A, Esq.
Attorney B, Esq.
OSSE Division of Specialized Education
[redacted]/DCPS
[redacted]/DCPS

VIII. Notice of Appeal Rights

This is the final administrative decision in this matter. Any party aggrieved by this Hearing Officer Determination may bring a civil action in any state court of competent jurisdiction or in a District Court of the United States without regard to the amount in controversy within ninety days from the date of the Hearing Officer Determination in accordance with 20 USC §1415(i).

Date: January 11, 2020

Michael Lazan
Impartial Hearing Officer