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,	)	
	)	**Hearings: 6/27/18; 7/10/18**
v.	)	**Date: July 30, 2018**
	)	**Hearing Officer: Michael Lazan**
	)	**Case No.: 2018-0114**
District of Columbia Public Schools,	)	
	)	
Respondent.	)	

HEARING OFFICER DETERMINATION

I. Introduction

This is a case involving a student who is currently eligible for services as a student with 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 April 24, 2018. The Complaint was filed by Petitioner, who is the parent of the Student at issue. On May 3, 2018, Respondent filed a response. The resolution period expired on May 24, 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 Improvement Act ("IDEIA"), 20 U.S.C. Sect. 1400 et seq., its implementing regulations, 34 C.F.R. Sect. 300 et seq., Title 38 of

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

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

III. Procedural History

On May 25, 2018, the Hearing Officer held a prehearing conference. Attorney A, Esq., counsel for Petitioners, appeared. Attorney B, Esq., counsel for Respondent, appeared. A prehearing conference order was issued on May 30, 2018, summarizing the rules to be applied in this hearing and identifying the issues in the case. This order was revised on June 19, 2018.

On June 20, 2018, Respondent moved to dismiss on claim preclusion grounds. The motion was received after the motion filing deadline set in the prehearing conference order. As a result, the Hearing Officer reserved judgment on the motion until this Hearing Officer Determination ("HOD").

The original HOD due date was July 8, 2018. Because of the need for a second hearing date, and because the parties needed a copy of the transcript in an earlier case to properly argue the motion to dismiss, a motion for continuance by DCPS, on consent, was granted on July 5, 2018, extending the timeline to July 30, 2018.

There were two hearing dates: June 27, 2018, and July 10, 2018. These were closed proceedings. Petitioner was represented by Attorney A, Esq. Respondent was represented by Attorney B, Esq. Petitioner moved into evidence Exhibits 1-77. There were no objections. Exhibits 1-77 were admitted. Respondent moved into evidence Exhibits 1-8. There were no objections. Exhibits 1-8 were admitted. On July 23, 2018, the parties presented closing briefs.

Petitioner presented as witnesses: Petitioner; Witness A, a program supervisor; Witness B, a psychologist; and Witness C, an advocate. Respondent presented as witnesses: Witness D, a dean at School B; Witness E, a social worker at School B; Witness F, a teacher at School B; Witness G, an occupational therapist at School B; Witness H, an assistant principal at School B; and Witness I, a speech and language therapist at School B.

IV. Issues

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

1. Did DCPS fail to offer the Student a FAPE for the 2017-2018 school year? If so, did DCPS act in contravention of 34 CFR 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 DCPS deny the Student a FAPE?

Petitioner indicated that the Student's Individualized Education Program ("IEP") of September, 2017, lacked appropriate present levels of performance, baseline data, and appropriate goals, and provided for insufficient behavioral support services and special education hours. Petitioner also alleged that the September IEP was not based on valid evaluations. Petitioner also contended that at the April 3, 2018, Multidisciplinary Team ("MDT") meeting, Respondent failed to increase the number of specialized instruction hours in the IEP, even though they agreed to the hours at the meeting, and failed to review or revise the Student's Behavior Intervention Plan ("BIP"), as ordered by a hearing officer.

Finally, Petitioner contended that the location of services at School B was inappropriate for the Student.

2. Did DCPS fail to implement the Student's IEP dated September, 2017? If so, did DCPS violate the principles in cases like Van Duyn v. Baker Sch. Dist. 5J, 502 F.3d 811, 822 (9th Cir. 2007)? If so, did DCPS deny the Student FAPE?

The parent indicated that DCPS failed to provide occupational therapy and speech and language therapy per the IEP.

3. Did DCPS fail to revise and/or monitor the Student's BIP after the issuance of an HOD in December, 2017? If so, did DCPS violate 34 CFR 300.324(a)(2)(I) and related provisions? If so, did DCPS deny the Student a FAPE?

V. Findings of Fact

1. The Student is an X-year-old who is eligible for services as a student with Multiple Disabilities. The Student has been diagnosed with Attention Deficit Hyperactivity Disorder and Oppositional Defiant Disorder. The Student has exhibited disinterest in school. When the Student is frustrated s/he will shut down and not cooperate. The Student has little insight into the magnitude of his/her problems. The Student can be motivated by being allowed to participate in sports. The Student does best when the Student receives individualized attention. (Testimony of Petitioner; Testimony of Witness B; Testimony of Witness C; Testimony of Witness F)

2. The Student failed virtually all classes at School A during the 2016-2017 school year, largely because of poor behavior and excessive absences. The Student was not eligible for special education during this school year. Nevertheless, the Student was

promoted and moved to School B, a large public high school, for the 2017-2018 school year. (P-52; P-56; P-57; Testimony of Petitioner)

3. Because of the Student's difficulties, Petitioner requested that the Student be evaluated for special education services. A psychological evaluation was conducted by DCPS in or about July, 2017. This evaluation determined that the Student's "Composite Intelligence Index" was significantly below average, at the 2nd percentile. The Student was also tested on the Woodcock-Johnson Tests of Achievement-IV ("Woodcock-IV"). The Student scored in the "low average" range in Broad Math, the "low" range in Broad Reading, and the "average range" in Broad Written Language. The Student was also administered the Behavior Assessment Scales for Children-III measure ("BASC-III"). The Student scored in the "at-risk range" in the "adaptive composite," as determined by the Student's science teacher. (P-21; Testimony of Petitioner)

4. A Functional Behavior Assessment ("FBA"), dated July 13, 2017, indicated that the Student was unpredictable, non-compliant, and disruptive, avoided assignments daily, and had been suspended numerous times. These behaviors tended to occur in large groups, with adults, and when the Student was given academic tasks. (P-22)

5. Additional testing was conducted on the Student on September 12, 2017, also through the Woodcock-IV. The Student scored at a 5.3 grade level equivalent in "Math," 3.5 grade level equivalent in "Reading," and 7.5 grade level equivalent in "Writing." (P-6; P-19)

6. An IEP meeting was held for the Student on September 27, 2017. At this meeting, school staff indicated the Student did not work unless prompted and was defiant

"but not disrespectful." It was also indicated that the Student would walk out of class, shout in class, and distract other students. The IEP team referenced the most recent Woodcock-IV testing from September, 2017, but not the Woodcock-IV testing that had been administered to the Student a few months earlier. The Student was recommended for fifteen hours of specialized instruction per week, with sixty minutes per month of occupational therapy, ninety minutes per month of behavioral support services, and ninety minutes per month of speech-language pathology. DCPS felt that this would be an appropriate number of hours "for a student we had just received." At this meeting, some of the data that was reviewed related to a different student. As a result, DCPS agreed to reconvene the IEP team when it got the correct evaluation from School A. (P-6; P-7; Testimony of Witness C; Testimony of Witness C; Testimony of Witness H)

7. The Student attended School B, a large public high school, for the 2017-2018 school year. The IEP team never reconvened to discuss the evaluation from School A, as had been promised. (Testimony of Witness H)

8. The Student had attendance and behavioral issues at School B. The Student was particularly disengaged when the Student was embarrassed because of difficulties with academic material. The Student also acted out when challenged by peers and during transitions. (P-5)

9. A BIP was written for the Student on or about October 31, 2017. The BIP indicated that the Student needed a calm, structured, supportive environment with minimal chaos and disruption. Breaks, "mindfulness" exercises (ninety minutes a month), "restorative justice circles," and a behavior tracker were recommended. (P-5)

10. For the first reporting period of the 2017-2018 school year, the Student was determined to be making progress in IEP goals in math, reading, writing, and two emotional, social and behavioral development goals, including a goal to improve attendance to task. (P-39)

11. The Student was "likable" and did not come across as angry or sad, but would "play around a lot" and "avoid work at all costs." The Student was performing on a fourth grade level in math and reading, was often late or absent, did not show interest in completing assignments, and fed off of negative influences in the classroom. The Student would put his/her head down and not work unless prompted. The Student would shout and walk out of, or around, the class without permission. The Student brought home homework "every so often," and the homework tended to be in math. The Student was also involved in physical altercations at the school, which resulted in suspensions during the year. (P-1; P-32; Testimony of Witness F; Testimony of Petitioner)

12. An HOD was issued by Impartial Hearing Officer ("IHO") Coles Ruff on December 28, 2017. IHO Ruff ordered that DCPS provide for an independent clinical psychological evaluation, conduct an IEP meeting to review that evaluation and the effectiveness of the Student's BIP, and to provide the Student with compensatory education. (P-69)

13. By the second reporting period of the 2017-2018 school year, no progress was reported for the Student in academic goals, though "slight" progress was noted in certain emotional, social and behavioral development goals. The Student continued to show little interest in school. The Student could understand the work, but did not do enough work to earn a grade. The Student was often not in class after the new year.

When the Student came to class, the Student would leave shortly thereafter. The strategies in the BIP that were tried by teachers were ineffective, especially after one of the Student's friends was shot and killed. After this incident, the Student became particularly depressed and had difficulty waking up for school. (P-39; Testimony of Witness F)

14. A psychological evaluation through the Wechsler Individualized Achievement Test – III was conducted for the Student in or about March, 2018. The evaluation found that the Student was functioning at the 5th percentile in "Reading," 6th percentile in "Writing," and 13th percentile in "Math." On the BASC-III teacher rating scale, the Student was now determined to be "at-risk" in many areas, including hyperactivity, attention problems, aggression, and conduct problems, and was considered to have clinically significant issues in school problems and learning problems. The Student was also determined to be "at-risk" in adaptive skills and social issues such as leadership and functional communication. (P-17)

15. An IEP meeting was held on April 3, 2018, to review the Student's evaluations. DCPS agreed to increase the Student's specialized instruction hours and revise the Student's FBA, but agreed to address only "work avoidance" and tardiness in the FBA. At this meeting, Petitioner sought a full-time IEP and a non-public school, with 240 minutes of Behavioral Support Services. (P-4; Testimony of Witness C)

16. The Student's FBA of May 17, 2018, focused on the Student's lack of attendance. It also indicated that the Student did not like the curriculum at the school and engaged in attention-seeking behavior, including avoiding academic challenges. (P-16-2)

17. Another IEP meeting was held in May, 2018. The Student's IEP dated May 29, 2018, provided for twenty hours per week of specialized instruction, with related services of occupational therapy for sixty minutes per month, behavioral support services for ninety minutes per month, and speech-language pathology for ninety minutes per month. The Student was recommended for a classroom with minimal distractions, preferential seating, and frequent breaks. (P-1-15, 17)

18. The Student's academic grades for the 2017-2018 school year were entirely "D" and "F" grades. (P-32; P-33; P-34; P-35; P-36; P-38)

19. In regard to occupational therapy in the 2017-2018 school year, the Student was offered sixty minutes per month in September, 120 minutes per month in October, sixty minutes per month in November, 120 minutes per month in December, 120 minutes per month in January, 120 minutes per month in February, sixty minutes per month in March, 150 minutes per month in April, 210 minutes per month in May, and 120 minutes per month in June. In regard to speech and language therapy in the 2017-2018 school year, the Student was offered ninety minutes of services in November, December, and January, and 180 minutes in February, March, April, and May. However, the Student was often unavailable for occupational therapy and speech and language therapy. (P-42; P-43; R-1; R-2; Testimony of Witness G; Testimony of Witness I)

20. School C provides services for students who are multiply disabled, including counseling and small class sizes. The school "monitors" attendance issues closely. All teachers in the school are certified in special education. (Testimony of Witness A)

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:

Initially, it is appropriate to address Respondent's motion to dismiss, which is predicated on the notion that the earlier decision by IHO Ruff has preclusive effect here. Claim preclusion seeks to protect litigants from the burden of re-litigating the same issue with the same party and promote judicial economy. Parklane Hosiery Co. v. Shore, 439 U.S. 322, 326 (1979). The doctrine focuses on whether the same cause of action is implicated in both the initial and subsequent lawsuits, meaning that the two lawsuits share the same "nucleus of fact." Serpas v. Dist. of Columbia, 2005 WL 3211604, *4, (D.D.C.2005). In determining whether the same "nucleus of fact" is at issue, "the court should consider 'whether the facts are related in time, space, origin, or motivation, whether they form a convenient trial unit, and whether their treatment as a unit conforms to the parties' expectations of business understanding or usage.'" Id. (quoting I.A.M. Nat'l Pension Fund v. Indus. Gear Mfg. Co., 723 F.2d 944, 949 n. 5. (D.C.Cir.1983)). Ultimately, the successful application of the claim preclusion doctrine requires three things: "(1) the presence of the same parties or privies in the two suits; (2) claims arising from the same cause of action in both suits; and (3) a final judgment on the merits in the previous suit." Friendship Edison Public Charter School v. Suggs, 562 F.Supp.2d 141, 148 (D.D.C.2008) (citing Apotex, Inc. v. FDA, 393 F.3d 210, 217 (D.C.Cir.2004)).

Here, the same parties are engaged in the second litigation, and there was a final claim on the merits in the first litigation. However, the claims here can be distinguished from the issues that were decided by IHO Ruff. In his HOD, IHO Ruff ruled on "Child

Find" issues, evaluation issues, and an allegation that there was a failure to implement the September, 2017, IEP (which was characterized as a full-time IEP). IHO Ruff ruled against the Student's parents on the implementation issue and offered *obiter dicta* on the quality of the IEP, but did not issue a finding on the appropriateness of the IEP. Here, Petitioner is alleging that the IEP was inappropriate, and also that the placement at School B was inappropriate regardless of whether it could implement the IEP, a distinct claim that is similar to the claim in Gellert v. District of Columbia, 435 F. Supp.2d 18 (D.D.C. 2006). Accordingly, this Hearing Officer decided to hear all issues raised in the Due Process Complaint.

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

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

See D.C. Code § 38-2571.03(6)(A)(i)

Issues #1 and #3 involve a challenge to the Student's existing or proposed IEP or placement. Accordingly, on those issues, the burden of persuasion is with Respondent. Issue #2 does not directly relate to the Student's existing or proposed IEP or placement. For that issue, the burden of proof lies with Petitioner. Schaffer v. Weast, 546 U.S. 49 (2005).

A FAPE is offered to a student when (a) the school district complies with the procedural requirements set forth in the IDEA, and (b) the IEP developed through the IDEA's procedures is reasonably calculated to enable the student to receive educational benefits. While school districts are required to comply with all IDEA procedures, not all procedural errors render an IEP legally inadequate under the IDEA. Pursuant to the IDEA, when procedural violations are alleged, an administrative officer may find that a child did not receive a FAPE only if the procedural inadequacies (a) impeded the child's right to a FAPE, (b) significantly impeded the parents' opportunity to participate in the decision-making process regarding the provision of a FAPE to the child, or (c) caused a deprivation of educational benefits. 20 U.S.C. Sect. 1415(f)(1)(E)(ii); 34 C.F.R. Sect. 300.513(a)(2).

1. Did DCPS fail to offer the Student a FAPE for the 2017-2018 school year? If so, did DCPS act in contravention of 34 CFR 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 DCPS deny the Student a FAPE?

An IEP developed through the Act's procedures must be reasonably calculated to enable the child to receive additional benefits. Hendrick Hudson Bd. Of Educ. v. Rowley, 458 U.S. 176 (1982). 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); N.S. ex rel. Stein v. District of Columbia, 709 F.Supp.2d 57, 60 (D.D.C. 2010); 34 CFR Sect. 300.320(a)(2)(B)(the IEP must contains goals that meet each of the child's educational needs that result from the child's disability); 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 Dist. RE-I, 137 S. Ct. 988 (2017). In Endrew F., the Court held that an IEP must be "reasonably calculated to enable a child to make progress appropriate in light of the child's circumstances." Id. at 1001. The Court made clear that the standard is "markedly more demanding than the 'merely more than de minimis' test" applied by many courts. Id. at 1000.

In S.S. ex rel. Shank v. Howard Road Academy, 585 F. Supp.2d 56, 66-67 (D.D.C. 2008), the Court found that the measure and adequacy of an IEP decision must be determined as of the time it was offered to the student. Citing to circuit court decisions, the Court found that an IEP should be judged prospectively to avoid "Monday morning quarterbacking." See Thompson R2-J Sch. Dist. v. Luke P., 540 F.3d 1143, 1149 (10th Cir. 2008); Adams v. Oregon, 195 F.3d 1141, 1149 (9th Cir. 1999); Carlisle Area Sch. V. Scott P., 62 F.3d 520, 530 (3d Cir. 1995); Roland M. v. Concord Sch. Comm., 910 F.2d 983, 992 (1st Cir. 1990).

Most cases involving FAPE denial focus on the IEP, the "centerpiece" of the Act. Honig v. Doe, 484 U.S. 305, 311 (1988). Nevertheless, Petitioners may bring claims based upon an inappropriate placement in certain situations. Although the local education agency ("LEA") has some discretion with respect to school selection, that discretion cannot be exercised in such a manner as to deprive a student of a FAPE. 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). Courts can accordingly rule that school assignments violate the IDEA if, for instance, the school contains an environment that allows bullying. Shore Regional High School Board of Education v. P.S., 381 F.3d 194

(3d Cir. 2004)(denial of FAPE based on the likelihood that a proposed placement would subject a student with an emotional disability to continued bullying because of his perceived effeminacy); M.L. v. Federal Way School District, 394 F.3d 634 (9th Cir. 2005)(if a teacher is deliberately indifferent to the teasing of child with a disability and the abuse is so severe that the child can derive no benefit from the services that he or she is offered by the school district, the child has been denied FAPE).

Petitioner indicated that the IEP of September, 2017, lacked appropriate present levels of performance, baseline data, and appropriate goals, and provided for insufficient behavioral support services and special education hours. Petitioner also alleged that the September IEP was not based on valid evaluations. Petitioner also contended that at the April 3, 2018, MDT meeting, Respondent failed to increase the number of specialized instruction hours in the IEP, even though they agreed to the hours at the meeting. Finally, Petitioner contended that the location of services at School B was inappropriate for the Student.

The testimony of Witness H was notable in regard to these issues. Witness H testified that the recommendation of fifteen hours of specialized instruction was an appropriate IEP for a student that the school had just received, but it is unclear why this should have been a factor for the IEP team. The Student was not a new student to DCPS. The IEP team should have known that the Student had done poorly at School A and factored that into their calculation of the Student's program. Witness H suggested that DCPS was not really considering the Student's experience at School A when it calculated the IEP. Further to this point, the IEP team relied on the Student's second Woodcock-IV testing, but, as pointed out by Witness B, this testing was a repeat of the testing that had

been conducted at School A just a few months before, creating the possibility of a "practice effect." DCPS did not rebut the contention of Witness B that this "practice effect" invalidated the testing from September, 2017.

Moreover, and tellingly, DCPS admitted that it reviewed the wrong student's evaluation from School A at the September, 2017, IEP meeting. DCPS promised to get the correct evaluation and reconvene the IEP team, but did not. Since the present levels of performance and goals in the IEP were premised on the September, 2017, evaluation and the evaluation of the other student, Petitioner is correct that the present levels of performance and the goals were invalid, and the Student was denied a FAPE.

The school district contended, in effect, that the Student does not want to go to school, and courts do find that school districts are not liable where students simply do not want to go to school. Garcia v. Albuquerque Public Schools, 520 F.3d 1116, 1127 (10th Cir. 2008)(student's pattern of misbehavior would have prevented her from getting an educational benefit no matter what the District did). This issue is concerning given the Student's poor motivation, which includes disinterest in even getting out of bed in the morning. Still, DCPS's argument was not supported by some of its own witnesses. For example, Witness F, who taught the Student during the 2017-2018 school year, said that the Student "needed someone outside helping" him/her, that "you have to give [him/her] individualized instruction to get [him/her] to start and to keep doing it," and that "instructions needed to be given carefully." That is not the language of a teacher who believes that the Student cannot be motivated. There is also testimony throughout the record that the Student can be motivated by sports, which was not fully addressed in the Student's IEP or BIP.

As a result of the foregoing, DCPS denied the Student a FAPE.[2]

2. Did DCPS fail to implement the Student's IEP dated September, 2017? If so, did DCPS violate the principles in cases like Van Duyn v. Baker Sch. Dist. 5J, 502 F.3d 811, 822 (9th Cir. 2007)? If so, did DCPS 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 DCPS failed to provide occupational therapy and speech and language therapy per the IEP. However, the Student was consistently unavailable because of poor attendance. DCPS offered the Student the promised hours of related services in occupational therapy and speech and language therapy every single month

[2] In regard to the contention that the Student did not receive sufficient behavior support services, at the time of the IEP there was little evidence that the Student needed more behavior support services than the ninety minutes per month offered. Though the Student had serious behavior issues, the school district did create a BIP for the Student the following month. Petitioner's contention that the April, 2017, IEP recommendation was not implemented was not persuasive, since the services were in fact increased in the following month. Additionally, there is nothing in the record to suggest that it was unreasonable for DCPS to assign the Student to School B at the start of the 2017-2018 school year.

except June, 2018 (speech and language therapy only). In fact, the Student was offered *more* services than were required in occupational therapy during October, December, January, February, April, May, and June. The Student was also offered more services than were required in speech and language pathology during February, March, April, and May. These claims are therefore without merit.

3. Did DCPS fail to revise and/or monitor the Student's BIP after the issuance of an HOD in December, 2017? If so, did DCPS violate 34 CFR 300.324(a)(2)(I) and related provisions? If so, did DCPS deny the Student a FAPE?

Though not noted by DCPS, there is some question about whether hearing officers can find FAPE violations where other hearing officer orders are violated. A similar issue was discussed extensively by the United States Court of Appeals for the District of Columbia in 2016, when parents sought, among other things, to enforce an HOD[3] order in federal court. In B.D. v. District of Columbia, 813 F.3d 792 (D.C. Cir. 2016), in the concurring opinion, Judge Millett noted that the United States Department of Education, which has responsibility for the federal administration and enforcement of the IDEA, suggested that a hearing officer does have the authority to enforce another hearing officer's decision. Id., at 803-804.

Applying this concept to the facts here, IHO Ruff ordered that DCPS conduct an IEP meeting within ten days of receipt of the Independent Educational Evaluation ("IEE") completed by Witness B to review the effectiveness of the Student's BIP. The IEE was sent to DCPS in or about March 16, 2018. However, the Student's BIP was not revised during the remainder of the school year, during which the Student behaved very poorly. DCPS argued that this did not matter because the Student often did not attend class, but attendance is a behavioral issue that could have, and should have, been

[3] The hearing officer in B.D. was the undersigned.

addressed in the BIP. In fact, DCPS later indicated that it wanted to conduct an FBA of the Student with respect to attendance issues. DCPS therefore denied the Student a FAPE when it failed to comply with IHO Ruff's HOD and conduct an IEP meeting to revisit the Student's BIP within ten days of the order.

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).

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.

The record in this case does not sufficiently establish that there is a need for the Student's placement at the suggested non-public school, School C. Witness A did not describe in any meaningful detail why the Student would do any better at School C than in a "full-time" program in a public school. There was vague testimony that School C makes it difficult for students to skip classes, but no meaningful discussion of *how* it would implement such a strategy. There was also little testimony to describe how School C staff might motivate the Student to take education more seriously. The record also indicates that the Student needs a quiet setting with a considerable amount of individualized instruction. The record is unclear on the classroom environment at School C, and on how much individualized instruction School C would provide to the Student. Finally, there is nothing in the record to clearly establish that School C contains appropriate athletic programs, which appear to be one of the only ways to motivate the Student. Accordingly, the IEP team must revise the Student's IEP to reflect a program that will: 1) provide the Student with quiet, calm classroom settings with minimal distractions; 2) provide the Student with access to individualized instruction throughout the school day; 3) implement a significant new strategy to foster the Student's attendance at school and address the issue of skipping classes; and 4) contain athletic programs that might be attractive to the Student.

Petitioner also seeks compensatory education in the form of mentoring (fifty hours), counseling (twenty-four hours), attendance at a basketball camp, and credit recovery tutoring (seventy-two hours). 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 mentoring and a basketball camp for the Student, both of which, no doubt, would be good for him/her. Nevertheless, compensatory education is supposed to act as compensation for the services that a student missed. Compensatory education should not be viewed as a blanket entitlement to programs that might in some way benefit a student. While this Hearing Officer strongly encourages the provision of these services for the Student, they are not compensatory in nature, and these requests must therefore be denied. Additionally, this Hearing Officer does not agree with the request for compensatory counseling, since there was no finding of FAPE denial on this basis.

Witness B's recommendation for seventy-two hours of tutoring and placement in a credit recovery program is a perfectly appropriate, and modest, form of compensatory relief that is clearly connected to the Student's 2017-2018 program and consistent with the standard established by Reid.

VII. Order

As a result of the foregoing:

1. Within twenty calendar days of the date of this order, the IEP team shall revise the Student's IEP to reflect a program that shall: 1) provide the Student with quiet, calm classroom settings with minimal distractions; 2) provide the Student with access to individualized instruction throughout the school day; 3) implement a significant new strategy to get the Student to attend school, and to attend classes on time; and 4) contain athletic programs that might be attractive to the Student;

2. Within thirty calendar days of the date of this order, DCPS shall select a location of services for the Student that fully complies with the requirements in the IEP;

3. DCPS shall pay for a credit recovery program of Petitioner's choice, at a reasonable and customary rate in the community, that will allow the Student to make up all credits missed during the 2017-2018 school year;

4. DCPS shall pay for tutoring services, to be provided by a certified special education teacher, that will assist the Student in accessing the credit recovery program;

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

Dated: July 30, 2018

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

XIII. Notice of Appeal Rights

This is the final administrative decision in this matter. Any party aggrieved by this Hearing Officer Determination may bring a civil action in any state court of competent jurisdiction or in a District Court of the United States without regard to the amount in controversy within ninety (90) days from the date of the Hearing Officer Determination in accordance with 20 USC §1415(i).

Dated: July 30, 2018

Michael Lazan
Impartial Hearing Officer