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

Parent, on behalf of Student,[1]	)	
Petitioner,	)	
	)	**Hearing Dates: 6/12/19 (Room 112);**
	)	**6/18/19 (Room 112); 7/15/19 (Room**
v.	)	**423**
	)	**Hearing Officer: Michael Lazan**
	)	**Case No.: 2019-0105**
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 autism (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 17, 2019. An amended Complaint was filed on May 17, 2019. The Complaint was filed by the parent of the Student ("Petitioner"). On May 22, 2019, Respondent filed a response. The resolution period expired on June 16, 2019.

II. Subject Matter Jurisdiction

This due process hearing was held, and a decision in this matter is being rendered, pursuant to the Individuals with Disabilities Education Improvement Act ("IDEIA"), 20

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

U.S.C. Sect. 1400 et seq., its implementing regulations, 34 CFR 300 et 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 May 22, 2019. Attorney A, Esq., counsel for Petitioner, appeared. Attorney B, Esq., counsel for Respondent, appeared. A prehearing conference order was issued on May 23, 2019, summarizing the rules to be applied in the hearing and identifying the issues in the case. The hearing proceeded on June 12, 2019. Additional hearings were held on June 18, 2019, and July 15, 2019. Written closing arguments were presented to this Hearing Officer on July 26, 2019. This was a closed proceeding. Petitioner was represented by Attorney A, Esq., and Attorney C, Esq. Respondent was represented by Attorney B, Esq. Petitioner moved into evidence exhibits 1-97. Objections were made to exhibits 1-6, 9-22, 24-45, 50, 59, 72, 74, 77, 82-88, 92-95, and 96-97. All objections were overruled. Exhibits 1-97 were admitted. It is noted that exhibit 97 was disclosed by Petitioner as exhibit P-S-4, but this designation was changed at the suggestion of this Hearing Officer. Respondent moved into evidence exhibits 1-15. Objections made to exhibits 14 and 15 were overruled. Exhibits 1-15 were admitted.

Petitioner presented as witnesses: herself; Witness I, a psychologist (expert: clinical psychology with a focus on school psychology); Witness J, an investigator; Witness K, an investigator; Witness F, an educational and behavioral consultant (expert: special education placement and programming, including IEP development); and Witness B, a physician (expert: child psychiatry, medical diagnosis and treatment). Respondent

presented as witnesses: Witness E, a Local Educational Agency ("LEA") representative (expert: special education programming and placement); Witness C, a speech and language pathologist (expert: speech language pathology and communication disorders); Witness H, a teacher (expert: special education programming and placement); Witness L, an educational director at School B; Witness M, a manager (expert: special education programming and placement); Witness D, a manager (expert: special education programming and placement); and Witness N, a psychologist (expert: school psychology, evaluation and eligibility).

IV. Issues

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

1. Did Respondent fail to offer the Student a Free Appropriate Public Education ("FAPE") in the Individualized Education Programs ("IEPs") issued by Respondent since May, 2017? If so, did Respondent 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 Respondent deny the Student a FAPE?

Petitioner contended that the Student's IEPs of November, 2016, November, 2017, April, 2018, and March, 2019 lacked appropriate and updated information about the Student, appropriate goals and baselines for the Student, a recommendation for extended school year ("ESY") services for the Student, and/or a recommendation for an appropriate amount of behavior support services for the Student.

2. Did Respondent fail to provide the Student with an appropriate educational placement/location/school since May, 2017? If so, did Respondent violate the principles in such cases as Gellert v. District of Columbia, 435 F. Supp. 2d 18 (D.D.C. 2006)? If so, did Respondent deny the Student a FAPE?

3. Did Respondent fail to reevaluate the Student? If so, did Respondent violate 34 C.F.R. Sect. 300.303, 34 CFR Sect. 300.304, and related provisions? If so, did Respondent deny the Student a FAPE?

Petitioner contended that the Student was not provided with a necessary psychological evaluation (11/15/17 to date), adaptive assessment (4/18/18 to date), assistive technology assessment (4/18/18 to date), and/or functional behavior assessment ("FBA") (11/17/16 to date).

4. Did Respondent fail to allow the Student's parent to meaningfully participate in the IEP process? If so, did Respondent violate 34 CFR 300.501(b) and related statutes and regulation? If so, did Respondent deny the Student a FAPE?

Petitioner contended that she was denied the right to meaningfully participate because: 1) Respondent did not review the Student's Individualized Education Evaluation ("IEE") at an IEP meeting for eight months; 2) Respondent refused to discuss issues relating to the Student's placement at the March, 2019, IEP meeting (Respondent said that such issues needed to be resolved by staff at its central offices); and 3) Respondent changed the Student's educational placement to School D without giving the parent a chance to attend an IEP meeting.

5. Did Respondent fail to allow the Student to attend his/her neighborhood school for the 2019-2020 school year? If so, did Respondent deny 34 CFR 300.116(c)? If so, did Respondent deny the Student a FAPE?

As a remedy, Petitioner seeks: the evaluations referenced above, all by independent providers; a placement in the "CES" program at School F or an appropriate non-public school; compensatory education in the form of ten hours of social skills programming, twenty hours of tutoring, and ten hours of speech and language therapy; and extended school year services.

V. Findings of Fact

1. The Student is an X-year-old who is currently eligible for services as a student with autism. The Student is unique, and very shy, with severe articulation issues that make the Student hard to hear and understand. The Student also has receptive

language delays, motor skills issues, issues with rigidity, repetitive behaviors, and engages in hand flapping. Testimony of Witness A; Testimony of Witness B; Testimony of Witness C; Testimony of Witness D.

2. The Student has monthly sessions with Witness B, a psychiatrist at Hospital A who also meets monthly with the Student's siblings. The Student also receives home-based Applied Behavior Analysis ("ABA") services for fifteen to twenty hours per week, which started about September or October 2018. The ABA therapy has focused on behavioral issues, not academic, cognitive or language issues. Testimony of Witness B.

3. For the 2016-2017 school year, the Student attended School A. The Student's IEP dated November 22, 2016, found the Student to be eligible for services as a student with developmental delay. The IEP contained goals in mathematics, reading, written expression, speech and language, and motor skills/physical development. The Student was recommended for 21.75 hours per week of specialized instruction outside general education, with four hours per week of speech-language pathology and one hour per month of occupational therapy. During this school year, the Student made progress in mathematics, reading, and writing, mastered a goal in each of these three areas, and was able to follow simple one-step directions. The Student "enjoyed" the Wilson reading program, "Fundations," and was cooperative and engaged in activities. The Student had limited reading, mathematics, and writing skills at the time. P-61; P-62.

4. Petitioner was concerned about the Student's behavior during the 2016-2017 school year and sought testing of the Student on behavioral issues. School A staff did not see the same issues and declined to provide such testing. Petitioner also told

School A staff that Hospital A staff suspected that the Student was autistic and required specific educational programming to address his/her unique needs as a child with autism. School staff felt that the Student was not autistic, and did not arrange to evaluate the Student to determine whether s/he could be diagnosed with Autism Spectrum Disorder. Testimony of Petitioner.

5. The Student continued at School A for the 2017-2018 school year, in the Early Learning Support ("ELS") program, which is designed to provide full-time early intervention for students with developmental delays or other health impairments. At the IEP meeting on November 15, 2017, Petitioner requested a comprehensive evaluation of the Student to include assessments for Attention Deficit Hyperactivity Disorder ("ADHD"), an FBA, and ESY services. The IEP again found the Student to be eligible as a student with developmental disability and again included goals in mathematics, reading, written expression, speech and language, and motor skills/physical development. This IEP increased the Student's specialized instruction hours to 25.75 hours per week outside general education, with six hours per week of speech-language pathology, representing a two-hours-per-week increase from the previous IEP. The Student was again recommended for one hour per month of occupational therapy. The Student was not deemed eligible for ESY services because s/he was deemed to be able to recoup skills quickly, because summer school only lasted for a short period of time, and because the change in environment would outweigh any benefit. P-63, P-64, P-65; P-68; P-93-18.

6. The Student was given a triennial evaluation in or about January-March, 2018. Teacher A, from School A, tested the Student on January 30, 2018, with the Woodcock-Johnson Tests of Achievement, Fourth Edition, Form A and Extended

("Woodcock-IV"). The Student scored in the 8th percentile in broad reading, the 1st percentile in broad math, and the 12th percentile in broad writing. At the time, DCPS informed Petitioner that it did not require a full psychological evaluation for triennial evaluations. P-9-1; P-13-3; P-15-2; P-55.

7. A "Confidential Triennial Evaluation Reevaluation" was written for the Student on February 25, 2018, by Evaluator A. The evaluator reviewed documents and conducted an observation on February 22, 2018. The Student was engaged throughout the observation. The evaluator also conducted a teacher interview, wherein the teacher indicated that the Student was a "joy" in the classroom, worked hard and made gains in reading, but sometimes had difficulty with word attack and recognition, and had trouble with math computation and math word problems. P-56.

8. A speech and language evaluation of the Student was conducted by Witness A on or about February 16, 2018. The evaluator concluded that the Student could not be tested in receptive vocabulary on the Peabody Picture Vocabulary Test-4 ("PPVT-4,"). The Student scored in the 32nd percentile on the Expressive Vocabulary Test, Second Edition ("EVT-2"). The Student's scores on the Clinical Evaluation of Language Fundamentals, 5th edition ("CELF-5"), indicated that s/he was in the 30th percentile in receptive language index and the 50th percentile on the expressive language index. The evaluator's report indicated that the Student's main speech and language issue was articulation, which was a severe problem. P-57.

9. An IEP meeting was held for the Student on April 18, 2018. At the meeting, the recent DCPS assessments were reviewed, and concerns were raised by Petitioner about the testing not being comprehensive enough. Petitioner was particularly

concerned that the testing did not relate to the Student's autism spectrum disorder. After the meeting, Petitioner therefore sought an IEE, which DCPS approved. Petitioner also requested an FBA and an assistive technology assessment. DCPS expressed interest in the assistive technology assessment but did not agree to conduct an FBA at the time. Petitioner also sought ESY services, but DCPS denied the request. P-65; P-67; P-68; Testimony of Witness A.

10. In or about spring, 2018, Petitioner enrolled the Student at School B through the DCPS public school lottery. The Student did not attend School B at this time and continued at School A for the remainder of the 2017-2018 school year. Testimony of Petitioner.

11. A comprehensive psychological evaluation of the Student was conducted on May 18, 2018, and June 8, 2018, by Witness I. The evaluation indicated that the Student was shy and did not answer all the questions. The Student scored a 65 in Full Scale IQ on the Wechsler Intelligence Scale for Children, Fifth Edition ("WISC-V"), scoring at the "extremely low" level overall, though the Student's level of effort was inconsistent, which contributed to the low scoring. On the Woodcock-Johnson Tests of Achievement, 4th Edition ("WJ-IV"), the Student scored in the "very low" category in all areas, with a percentile rank of four in broad reading, ten in broad mathematics, and twelve in broad written language. The Student was in the low range in adaptive functioning on the Adaptive Behavior Assessment System, Third Edition ("ABAS-3"). On the Childhood Autism Rating Scale, Second Edition ("CARS-2"), an "observation tool," the Student scored as a child with mild to moderate autism. The Behavior Assessment Scale for Children, Third Edition ("BASC-3") and Conners-3 testing, based

on the answers of Petitioner, indicated that the Student was in the clinically significant range, suggesting a relatively high level of maladjustment, with issues relating to hyperactivity, impulsivity, defiance, aggression, and peer relations. The Student was diagnosed with autism spectrum disorder "requiring substantial support accompanying intellectual impairment" and ADHD, moderate. Witness I recommended that there should be a "rule out" of intellectual disability for the Student. P-59.

12. The Student was diagnosed with autism on or about June 18, through the Autism Diagnostic Observation Schedule-2 ("ADOS-2") measure, which is considered the "gold standard" for determining whether a child has Autism Spectrum Disorder. Genetic testing confirmed that the Student has a genetic variation correlated with autism. Testimony of Witness B.

13. During the 2017-2018 school year, the Student was not a behavior concern at school and school staff did not feel that the Student should be diagnosed as having Autism Spectrum Disorder. Even so, the Student was unable to work independently without redirection, and needed scaffolding, "visual representation," and a long wait period to answer questions. The Student continued to present with severely delayed articulation, was hard to understand, and needed intensive 1:1 instruction in a small setting. The Student progressed on goals during this school year, and mastered two goals in mathematics, two goals in reading, and one goal in written expression. P-63; P-66; Testimony of Witness E.

14. On July, 2018, DCPS continued to propose an "ELS" program for the Student. DCPS therefore declined to place the Student at School B, which had accepted the Student in the DCPS school lottery, because School B did not have an ELS program.

Petitioner disagreed and sought a Communication and Education Support ("CES") placement for the Student at School B for the 2018-2019 school year. A CES placement is for students who have been identified with autism spectrum disorder or other learning needs and require an ABA environment. P-16-2; P-17-1-2; P-21-1; P-22-1; P-93-18.

15. On August 27, 2018, Witness L sent Petitioner a Location of Service ("LOS") letter, identifying an ELS classroom at School C for the 2018-2019 school year. P-23-1.

16. On or about August 31, 2018, Petitioner sent DCPS a letter from Witness B indicating that the Student was diagnosed with autism, showed signs of ADHD, and needed the least restrictive supportive and structured classroom, a behavior intervention plan ("BIP), a safe space to regulate emotions, access to a school counselor, a 1:1 aide, and related interventions. P-24; P-25.

17. The Student attended School B at the start of the 2018-2019 school year, in a general education setting with a special education teacher in the room for two hours per day. Testimony of Witness L.

18. On September 6, 2018, DCPS held an eligibility meeting at School B and reviewed the reports of Hospital A and Evaluator B. Petitioner again pressed for the Student to be determined to be eligible as a student with autism. DCPS indicated that the IEP could not be implemented at School B and that more information was needed to determine the Student's classification and setting. Petitioner again sought an assistive technology assessment at the meeting. P-71, P-72.

19. Evaluator B of DCPS reviewed the report of Witness I in or about October, 2018. Evaluator B conducted his own testing and observation of the Student,

who was compliant but did not understand some of the questions and needed assistance with the work. The evaluator felt that the Student's testing was artificially low because the Test of Nonverbal Intelligence-4 ("TONI-4") would have been a better choice given the Student's speech and language issues. On the TONI-4, the Student scored in the 17th percentile, in the below average range. Conners-3 scales from the Student's teacher at School B, where the Student was in an inappropriate general education program, found the Student had elevated scores only in executive functioning, learning problems, functional communication, and probability of autism, with very elevated scores in peer relations. ABAS-3 testing, with scores from a teacher, indicated a low overall score, with very low "conceptual" scores in communication, functional academics, and self-direction. The evaluator recommended functional communication training, modeling, explicit instruction, use of manipulatives, and minimizing the need for verbal responses. P-60; Testimony of Witness D.

20. A Multidisciplinary Team ("MDT") meeting was held on December 11, 2018. The Student's eligibility category was changed to autism. P-74, P-75; Testimony of Witness D.

21. An IEP meeting was held for the Student on March 28, 2019. The Student was found eligible as a student with autism. The IEP included goals in mathematics, reading, written expression, speech and language, and motor skills/physical development. Services were not changed on this IEP. At the meeting, Petitioner requested that the Student receive ABA-based education programming and that the Student be placed in a CES classroom. Petitioner also requested that ESY services be added to the Student's

IEP, and that DCPS conduct an FBA and assistive technology evaluation. Testimony of Petitioner; Testimony of Witness D; P-76.

22. In or about April 1, 2019, Petitioner notified DCPS that the Student had been "matched" with School F and intended to attend School F for the 2019-2020 school year. On May 2, 2019, DCPS provided Petitioner with a letter indicating that the Student was being placed in a CES classroom at School D for the 2019-2020 school year. On May 24, 2019, DCPS notified Petitioner that the CES classroom for the Student at School F was full. P-41; P-46; P-49.

23. For the 2018-2019 school year, the Student made progress in mathematics, but was still functioning two years below grade level and required 1:1 instruction in a small setting, with extra time to complete tasks. In reading, the Student made significant progress and was determined to be reading on grade level. The Student "blossomed" as a reader and was able to complete writing assignments independently with positive reinforcement, though the assignments would have errors. In math, the Student was functioning well below grade level, and on the i-Ready measure, the Student was deemed to be at the kindergarten level. With respect to written expression, the Student was considered a reluctant writer with poor handwriting. However, the Student had only one "meltdown" during the school year and generally behaved well in class. Testimony of Witness F; Testimony of Witness H. P-3-33.

24. The CES classroom contains many non-verbal students, and the Student's academic levels are higher than the other students in this kind of classroom. The Student's neighborhood school is School E. Testimony of Witness D.

25. The proposed classroom for the Student for the 2019-2020 school year is a CES program at School D. This classroom has a wide range of students who are functioning at a lower level than the Student. Some students have difficulty speaking and communicating and may use communication devices. Testimony of Witness M.

VI. Conclusions of Law

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

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

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

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

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

1. Did Respondent fail to offer the Student a FAPE in the IEPs issued by Respondent since May, 2017? If so, did Respondent 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 Respondent deny the Student a FAPE?

Petitioner contended that the November, 2016, November, 2017, April, 2018, and March, 2019, IEPs lacked appropriate and updated information about the Student; appropriate goals and baselines for the Student; a recommendation for ESY services; and/or a recommendation for an appropriate amount of behavior support services.

November, 2016, IEP.

Petitioner contended that the November 22, 2016, IEP failed to include appropriate "present levels data" and baselines because DCPS did not have the appropriate assessment data necessary at the time the IEP was developed. Petitioner pointed out that, at the time the November 22, 2016, IEP, the only formal assessment or evaluation data that DCPS had were the 2014 evaluations from Early Stages. Petitioner contended further that the IEP did not contain any social, emotional, or behavioral goals, and did not include a recommendation for ESY services.

However, the November, 2016, IEP was written more than two years prior to the date of filing of the Complaint, which was April 19, 2019. In the District of Columbia, due process complaints must be filed within two years of the alleged violation. 34 CFR § 300.511(e). Petitioner contended that the November, 2016, IEP claim is within the statute of limitations period because that IEP was in effect through to November 22, 2017. But caselaw indicates that a due process complaint must be filed within two years of the date the parent or agency knew or should have known about the alleged action that formed the basis of the complaint. Damarcus S. v. District of Columbia, 190 F. Supp. 3d 35 (D.D.C. 2016). Since the action that forms the basis for this claim was the issuance of

the IEP, which was on November 22, 2016, and since Petitioner did not argue or suggest that she did not know her rights as a parent when this IEP was issued, Petitioner needed to file her claims with respect to this IEP within two years of November 22, 2016, for a hearing officer to consider those claims. This claim must therefore be dismissed.

November, 2017, IEP and April, 2018, IEP.

These two IEPs increased the Student's specialized instruction hours to 25.75 hours per week outside general education, representing a four-hours-per-week increase. These IEPs also required six hours per week of speech-language pathology, representing a two-hours-per-week increase from the November, 2016 IEP. The Student was also recommended for one hour per month of occupational therapy on these IEPs, which did not recommend ESY services.

The regulations state that an IEP must include: "(a) statement of the child's present levels of academic achievement and functional performance," including "(h)ow the child's disability affects the child's involvement and progress in the general education curriculum (i.e., the same curriculum as for nondisabled children)." 34 CFR 300.320(a)(1). The November, 2017, IEP did not contain sufficient information about the Student's academic achievement through norm-referenced, formalized testing. DCPS argued that it had sufficient information to create the IEPs at the time, but the only evaluations available to DCPS at the time were outdated evaluations conducted when the Student was very young. There was no cognitive testing, no meaningful academic testing, and no current speech and language testing of the Student, who was and is unable to communicate clearly. The main testing of the Student was through the Battelle Developmental Inventory, Second Edition, which was conducted more than three years

earlier when the Student was a toddler. Additional evaluations were surely necessary to provide DCPS with a complete profile of the Student for the IEP of November, 2017.

By April, 2018, several new assessments of the Student had been conducted: Teacher A's achievement testing to determine the Student's academic levels, a speech and language evaluation, and an occupational therapy evaluation. But DCPS was informed by Petitioner about the Student's possible autism at the time, yet did not conduct testing in connection to the Student's possible autism. Moreover, although no cognitive testing of the Student was available to DCPS, it did not test the Student in regard to adaptive skills, even though the Student with autism should ordinarily be tested for adaptive skills, as suggested by the report of Witness I. As discussed also in connection to Issue #3, these evaluations were needed to create a full profile for this "unique" student, who has been diagnosed with ADHD, has extreme difficulty in communicating, and may need services to address his/her issues with autism and adaptive functioning. Since both of these IEPs were written without enough information to fully determine the Student's needs, these IEPs must be considered defective because they were not based on sufficient evaluative data.

Petitioner also contended that the November, 2017, and April, 2018, IEPs did not provide the Student with ESY services, which are necessary to the provision of a FAPE when the benefits a disabled child gains during a regular school year will be jeopardized during the summer months. Johnson v. D.C., 873 F. Supp. 2d 382, 386 (D.D.C. 2012). DCPS has the burden of persuasion on this issue (since Petitioner has presented a *prima facie* case through the expert testimony of Witness F) but did not present any evidence, one way or another, about whether the Student experiences regression during school

breaks. Indeed, the form that DCPS filled out in connection with ESY services indicated that the Student may regress in speech over breaks, which was corroborated by the testimony of Witness F, an expert in special education placement and programming, including IEP development. DCPS did argue that School A has twenty more days than the traditional school year, which overlap with the start of the ESY services time frame. DCPS posited that starting the ESY program late at a different school would have caused a "negative impact" on the Student. However, DCPS did not explain what that negative impact might be, or why the Student would have had a negative reaction to transitioning between schools during the summer. Moreover, DCPS did not explain why the Student's ESY program over the summer could not have consisted of merely speech and language services. It is noted that the Student has such expressive language delays that s/he ordinarily cannot be understood by a person who does not know her/him, and that the Student has a strong work ethic. ESY services should therefore have been recommended for this Student, who is in fact receiving such services for the summer of 2019.

Parenthetically, Petitioner's contention that the IEPs did not contain social, emotional and behavioral goals lacks merit. Petitioner pointed to the reports of Witness F and Witness G to the effect that the Student was experiencing significant behavioral issues at the time, but these reports and Petitioner's testimony indicated that the Student was having behavioral issues at home, not in school. All DCPS witnesses with personal knowledge of the Student praised him/her as well-behaved and attentive to instruction, and this was certainly the case at the time of the November, 2017, and April, 2018, IEPs, when Teacher B was the Student's classroom teacher. Teacher B told a DCPS evaluator that the Student was a "joy to have in the classroom," respectful toward adults, and

motivated to learn. Teacher B also said the Student was easily "engaged in the classroom" and "enjoys learning." Further, this teacher called the Student "persistent and…a hard worker." Under the circumstances, DCPS denied the Student educational benefit, and therefore a FAPE, when it failed to base the Student's IEPs of November, 2018, and April, 2018, on appropriate evaluations, and when it failed to provide the Student with ESY services for the summer of 2018.

March, 2019, IEP.

Petitioner again contended that this IEP lacked social, emotional and behavioral goals, but, as with the prior IEPs, there is nothing in the record to indicate that the Student had significant behavior problems in school at the time. Witness H, who was especially credible, said that the Student was "sensitive" but manageable in class, and had only one "meltdown" during the 2018-2019 school year. She described the Student as a "very well behaved, compliant" student who loved helping and passing out pencils.

Petitioner also contended that this IEP did not provide the Student with ESY services. However, the Student has been provided with ESY services for the summer of 2019, making this issue moot. It is noted that the standard for determining whether a case has been mooted by a respondent's voluntary conduct is dependent on the possibility of the conduct recurring. Friends of the Earth, Inc. v. Laidlaw Environmental Servs., Inc., 528 U.S. 167, 189 (2000). But there is nothing in the record to suggest that this ESY issue will recur going forward, especially given this HOD, which orders that the Student's next IEP must require ESY services.

Petitioner also challenged the lack of data in the IEPs, pointing out that the March, 2019, IEP included two baselines that were identical to those in the previous

IEPs. But the March, 2019, IEP did contain new information about the Student's levels. In mathematics, the "Present Levels of Academic Achievement and Functional Performance" section was completely rewritten from the prior IEP to reflect i-Ready testing, teacher observations, and updates on the Student's behavior. In reading, the "Present Levels of Academic Achievement and Functional Performance" section was completely rewritten to describe the Student's blossoming as a reader. The "Present Levels of Academic Achievement and Functional Performance" section for communication/speech and language was also rewritten, and incorporated test results from the Goldman-Fristoe Test of Articulation ("Goldman Fristoe") and the CELF-V. It is true that this section did not include the Student's test scores compiled by Witness I and Evaluator B, and that at least one baseline was the same as the baseline in the prior IEP. But the team could have considered that information if it so chose, and an IEP does not have to reference all of a student's testing as long as it provides enough information for a teacher to be able to instruct that student. The Student's academic levels in this case can reasonably be gleaned from the Present Levels of Academic Achievement and Functional Performance sections of the March, 2019, IEP. This claim must be dismissed.

In sum, Petitioner is correct that the November, 2017, and April, 2018, IEPs denied the Student a FAPE by failing to rely on sufficient evaluative data, and by failing to recommend ESY services. Petitioner's other contentions regarding the IEPs are dismissed.

2. Did Respondent fail to provide the Student with an appropriate educational placement/location/school since May, 2017? If so, did Respondent violate the principles in such cases as Gellert v. District of Columbia, 435 F. Supp. 2d 18 (D.D.C. 2006)? If so, did Respondent deny the Student a FAPE?

Virtually all 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[2] in certain situations. Although the 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); D.C. ex rel E.B. v. New York City Dep't of Educ., 950 F. Supp. 2d 494 (S.D.N.Y. 2013) (placement offer denied student a FAPE because an employee of the school during the parent visit indicated to the parent that the school could not address student's seafood allergy as per IEP requirements); B.R. v. New York City Dep't of Educ., 910 F. Supp. 2d 670 (S.D.N.Y. 2012) (placement offer denied student a FAPE because the parent was told during the school visit that the school could not accommodate the Student's occupational therapy mandate).

[2] 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.

Petitioner contended that the Student's ELS classrooms at School A and School B did not meet the Student's unique adaptive, communication, social, emotional, and behavioral needs as a child with autism. Petitioner contended that the Student required a CES classroom, which provides ABA-based programming and uses "evidence-based" models of instruction specific to the needs of students with autism. Petitioner also contended that the Student's upcoming placement at School D for the 2019-2020 school year will deny the Student a FAPE, even though that placement is in a CES program (which Petitioner has been seeking).

Yet there is no dispute that School A and School B were able to implement the Student's IEPs, and the DCPS witnesses, especially Witness H, indicated that the Student made academic and social progress during his/her time at those schools. The record indicates that the Student made particularly strong progress in reading in the ELS classroom, and Witness H indicated that the Student made appropriate progress in math in the ELS classroom as well. The record also establishes that the Student behaved well in the ELS classrooms and appeared to enjoy his/her time at those schools. While DCPS should have conducted additional evaluations during this time, particularly to determine if the Student could have benefitted from additional autism-based interventions in the classrooms, it cannot be said, on this record, that the Student *must* have ABA instruction in order to be placed at an appropriate school, or must have a classroom that is entirely dedicated to students with autism. It is noted that the CARS testing by Witness I indicated that the Student was functioning in the mild to moderate range of Autism Spectrum Disorder, suggesting that the Student could function appropriately in both the ELS classroom and the CES classroom.

With respect to School D, which the Student is scheduled to attend for the upcoming school year, DCPS changed the Student's placement to put him/her in a CES classroom, as Petitioner desired. Still, Petitioner objected to School D because, she contended, the school uses a "non-formal" system of ABA, and the staff in the CES classroom are not highly qualified. Witness F testified that the CES classroom at School D uses worksheets, that staff in the classroom do not collect data, and that the CES program at School F is superior. But Witness D testified that the CES program at School D contains the exact same approach as the CES program at School F. Witness F seemed to suggest, in effect, that the staff at School F are more competent than the staff at School D; i.e., that School F is a "better school" than School D. Petitioner did not support this contention with any authority, and in fact successful claims challenging a student's "educational placement" tend to relate to specific problems at the school that cannot be captured in an IEP, such as schools with a bullying problem, schools with a chaotic atmosphere, or schools that put a student in danger in some way. None of those issues are present here. It is noted that Petitioner is interested in placing her child at School F, at least in part, because some of her other children go there. Under the circumstances, DCPS has shown that the Student's educational placements at the assigned schools pass muster under the IDEA.

3. Did Respondent fail to reevaluate the Student? If so, did Respondent violate 34 C.F.R. Sect. 300.303, 34 CFR Sect. 300.304, and related provisions? If so, did Respondent deny the Student a FAPE?

Petitioner contended that the Student was not provided with a necessary psychological evaluation (November 15, 2017, to date), adaptive assessment (April 18, 2018), assistive technology assessment (April 18, 2018, to date), and/or functional behavior assessment (November 17, 2016, to date).

The LEA is required to use a variety of assessment tools and strategies to gather relevant functional, developmental, and academic information, including information provided by the parent, that may assist in determining (i) whether the child is a child with a disability; and (ii) the content of the child's individualized education program, including information related to enabling the child to be involved in and progress in the general education curriculum, or, for preschool children, to participate in appropriate activities. The LEA should not use any single measure or assessment as the sole criterion for determining whether a child is a child with a disability or determining an appropriate educational program for the child, and use technically sound instruments that may assess the relative contribution of cognitive and behavioral factors, in addition to physical or developmental factors. 28 U.S.C. Sect. 1414(b)(2); 34 C.F.R. Sect. 300.304(b).

As indicated previously, there was no cognitive data or norm-referenced achievement testing data available for the Student in November, 2017. The only tests available to DCPS were outdated evaluations from the Student's time at Early Stages, and academic tests from the Battelle Developmental Inventory, Second Edition, which is for very young children. Certainly by November, 2017, DCPS should have conducted a comprehensive psychological evaluation to get a better sense of the Student's abilities and levels, compared to other students his/her age.

Additionally, the record establishes that DCPS should have assessed the nature of the Student's autism spectrum disorder by April, 2018. By that time, Petitioner had informed DCPS that the Student might be autistic according to staff at Hospital A. But DCPS staff simply said that the Student was not autistic, even though they had no special expertise to determine whether a student is autistic or not. The Student was later formally

diagnosed with autism spectrum disorder by Witness B, and the Student is currently eligible for services as a student with autism.

As noted earlier, the record also supports Petitioner's claim that adaptive testing should have been conducted at this time. Witness I's report indicated that adaptive testing gives an evaluator information on a child's safety skills, ability to relate to others, and typical day-to-day skills, all of which are important issues for children suspected of having autism. Through an IEE, Witness I completed adaptive testing of the Student in May, 2018. But that testing was conducted after the April, 2018, IEP meeting. This testing should have been conducted before the meeting so that the IEP team could have considered the information on adaptive functioning when writing the Student's IEP.

Petitioner is also correct that the Student should have received an assistive technology evaluation at this time, given the Student's speech articulation issues. Witness A indicated that the Student was communicating well enough and did not need assistive technology, but the record makes clear that the Student could not be understood by people who were unfamiliar to him/her and might need another approach to communicate with people s/he did not know. This Hearing Officer agrees with Witness I that the Student may be able to benefit from an assistive technology evaluation, which will be so ordered in this HOD. It is noted that Witness A appeared to be interested in pursuing an assistive technology evaluation at the IEP meeting in April, 2018, and agreed to send staff to conduct an assistive technology observation of the Student at that time.

Finally, as previously indicated, the Student has not manifested significant behavioral issues at school. As a result, while assessing the Student's social, emotional and behavioral functioning may have been appropriate in the triennial evaluation of 2018,

the record does not establish that an FBA was necessary for the Student, and the failure of DCPS to create an FBA for the Student does not rise to the level of FAPE denial. Nevertheless, DCPS did deny the Student a FAPE by failing to evaluate the Student in all areas of suspected disability from November, 2017, to present.

4. Did Respondent fail to allow the Student's parent to meaningfully participate in the IEP process? If so, did Respondent violate 34 CFR Sect. 300.501(b) and related statutes and regulation? If so, did Respondent deny the Student a FAPE?

Petitioner contended that she was denied the right to meaningfully participate in the process of creating an IEP for the Student because: 1) Respondent did not review the Student's IEE at an IEP meeting for eight months; 2) Respondent refused to discuss issues relating to placement at the March, 2019, IEP meeting (Respondent said that such issues needed to be resolved by staff at its central offices); and 3) Respondent changed the Student's educational placement to School D without giving the parent a chance to attend an IEP meeting.

The regulations state that "parents must be afforded an opportunity to participate in meetings with respect to the identification, evaluation and educational placement of the child, and the provision of FAPE to the child." A meeting does not include informal or unscheduled conversations on issues such as teaching methodology, lesson plans, or coordination of service provision, or preparatory activities that public agency personnel engage in to develop a proposal or response to a parent proposal that will be discussed at a later meeting. Parents also must be a member of any group that makes decisions on the educational placement of the child. 34 CFR 300.501(b)-(c).

Petitioner's main point is that she was not afforded an opportunity to meet with the school district when the Student was assigned to the CES program School D, and that

assignment was not discussed at the March, 2019, IEP meeting. A change in a student's school, or "location," is not always a change in "placement." However, a change in location may give rise to a change in placement if the change in location substantially alters the student's educational program. 71 Fed. Reg. 46,588 (2006); Letter to Fisher, 21 IDELR 992 (OSEP 1994). The District of Columbia Circuit Court of Appeals has explained that if a parent can identify a "fundamental change in, or elimination of" a basic element of the education program, there is a change in educational placement. Lunceford v. Dist. of Columbia Bd. of Educ., 745 F.2d 1577, 1582 (D.C.Cir.1984). Substantive changes in placement should be preceded by an IEP meeting, whereas an IEP meeting is not necessary for mere location changes. See also Letter to Lott, 213 IDELR 274 (OSERS 1989).

The record supports the contention that the transfer of the Student from the ELS program at School C to the CES program at School D was a change of placement. Witnesses from both sides testified that there was a significant difference between the two programs, in particular in regard to the academic functioning of the students in the classes. Witness D suggested that the CES program is designed for students who are non-verbal and contains children who function at a lower level than the Student. Witness D said that the CES program was inappropriate for the Student and that the Student needed to be in the ELS program, which has higher-functioning students. This testimony is an admission that the student composition in the two programs is so different that DCPS made a fundamental change to the Student's placement when changing his/her program from ELS to CES. DCPS should have conducted an IEP meeting with Petitioner before changing the Student's educational placement to the CES program at School D.

Parenthetically, Petitioner did not make clear how DCPS's failure to "review" the Student's IEE for eight months implicated the subject regulation, which relates to meetings and placement decisions. An evaluation is not a meeting, and a school district's duty to review evaluations provided by a parent is not mentioned in 34 CFR 501 (b)-(c). Even so, DCPS denied the Student a FAPE by changing the Student's placement from an ELS classroom to a CES classroom without inviting Petitioner to attend an IEP meeting.

5. Did Respondent fail to allow the Student to attend his/her neighborhood school for the 2019-2020 school year? If so, did Respondent deny 34 CFR Sect. 300.116(c)? If so, did Respondent deny the Student a FAPE?

34 CFR 300.116(c) indicates that, unless the IEP of a child with a disability requires some other arrangement, the child should be educated in the school that he or she would attend if nondisabled. But Witness D made clear that the Student's neighborhood school is School E, which is not being sought by Petitioner. Instead, Petitioner is seeking placement at School F, contending that the DCPS lottery turned School F into the Student's neighborhood school. Petitioner appears to be complaining about DCPS's lottery system, which unfortunately led Petitioner to believe that the Student could be placed at School F. But the appropriateness of the lottery system was not pleaded in the complaint and is not before this Hearing Officer, and the rules for the lottery system make it clear that a parent is not guaranteed a spot for their children in the lottery. P-93-21. It is noted that DCPS tried to accommodate Petitioner on this issue, but that the CES classroom at School F was full. Petitioner did not meet her burden on this claim, which must be dismissed.

RELIEF

As relief, Petitioner seeks placement of the Student in the CES program at School F, an FBA, an assistive technology evaluation, and compensatory education. Petitioner also seeks a new IEP meeting.

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." Burlington, 471 U.S. at 371. 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).

Petitioner wants the Student to be in the CES program, and she urged this Hearing Officer to order DCPS to place the Student in the CES classroom at School F. School D also offers the CES program, but Petitioner objected to School D, apparently because Witness F did not recommend it. However, the record indicates that School D is able to implement the Student's IEP and provide the Student an educational placement in the CES program. There was no finding that the assignment of the Student to School D, by itself, denied the Student a FAPE. Petitioner's request to change the Student's school setting to School F must therefore be denied.

Petitioner also seeks an FBA and an assistive technology evaluation. Since this Hearing Officer has found that the Student does not have behavioral issues at school, there is no need to conduct an FBA for the Student. Since this Hearing Officer has also found that the Student should receive an assistive technology evaluation, such an evaluation will be ordered, to be conducted by a provider of the Petitioner's choice at a usual and customary rate in the community.

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

It is possible for hearing officers to order placement at a school as compensatory education, but this is rarely ordered absent a situation where the school district has abdicated its responsibility to educate a child over a long period of time. Draper v. Atlanta lndep. Sch. Sys., 518 F. 3d 1275, (11th Cir. 2008). There is no such situation here, where the school district is offering the Student a school that can provide a program that Petitioner seeks. Petitioner's request for compensatory education in the form of placement at School F, or placement at a non-public school, must therefore be denied.

However, Petitioner is entitled to compensatory education in the form of instruction as a result of DCPS's failure to conduct an appropriate, timely evaluation of the Student. Certainly, Petitioner's modest request for ten hours of social skills

programming, twenty hours of academic tutoring/ABA programming, and ten hours of speech and language services must be granted. In addition, since Petitioner's request for compensatory education is not extensive enough to cover the time period corresponding to FAPE denial in this case, the Student shall be awarded an additional 100 hours of ABA services, to be delivered by a qualified service provider at the usual and customary rate in the community.

After the completion of the assistive technology evaluation, the IEP team shall reconvene to further assess the Student's assistive technology needs and to recommend assistive technology for the Student consistent with such evaluation. The IEP team shall also require that the Student receive ESY services for the summer of 2020.

VII. Order

As a result of the foregoing:

1. Respondent shall pay for 100 hours of ABA services, to be delivered to the Student by a qualified provider(s), at a usual and customary rate in the community;

2. Respondent shall pay for ten hours of social skills programming, twenty hours of academic tutoring, and ten hours of speech and language services, all to be delivered to the Student by qualified provider(s), at a usual and customary rate in the community;

3. The above services must be delivered to the Student by December 31, 2021;

4. Respondent shall pay for an assistive technology evaluation for the Student, to be conducted by a qualified provider at a usual and customary rate in the community;

5. After completing the assistive technology evaluation, Respondent shall reconvene an IEP team and review the assistive technology evaluation. In the Student's new IEP, Respondent shall require that the Student receive ESY services for the summer of 2020;

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

Dated: July 31, 2019

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 (90) days from the date of the Hearing Officer Determination in accordance with 20 USC §1415(i).

Date: July 31, 2019

Michael Lazan
Impartial Hearing Officer