

District of Columbia
Office of the State Superintendent of Education
Office of Dispute Resolution
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Petitioner, on behalf of Student,¹)	
Petitioner,)	
)	Hearing Dates: 6/15/20; 6/16/20
)	Hearing Officer: Michael Lazan
)	Case No. 2020-0080
)	
District of Columbia Public Schools,)	
Respondent.)	

HEARING OFFICER DETERMINATION

I. Introduction

This case involves an X-year-old student who is currently eligible for services as a student with Other Health Impairment (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 March 31, 2020. The Complaint was filed by the Student’s parent. On April 1, 2020, this Hearing Officer was assigned to this case. On April 10, 2020, Respondent filed a response. A resolution meeting was held on April 13, 2020. The resolution period expired on April 30, 2020.

II. Subject Matter Jurisdiction

This due process hearing was held, and a decision in this matter is being rendered, pursuant to the IDEA, 20 U.S.C. 1400 et seq., its implementing regulations, 34 C.F.R.

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

Sect. 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 6, 2020. Attorney A, Esq., counsel for Petitioner, appeared. Attorney B, Esq., counsel for Respondent, appeared. A prehearing conference order was issued on May 11, 2020, summarizing the rules to be applied in the hearing and identifying the issues in the case. Due to witness and counsel availability, as well as issues relating to the COVID-19 pandemic, the parties selected June 15, 2020, and June 16, 2020, as hearing dates. To accommodate these hearing dates, Petitioner moved to extend this Hearing Officer Determination (“HOD”) due date from June 14, 2020, to July 13, 2020. Accordingly, an order was issued on June 14, 2020, extending the HOD due date to July 13, 2020.

The matter proceeded to hearing on June 15, 2020, and June 16, 2020. Oral closing arguments were presented on June 16, 2020. The hearing was conducted through the Microsoft Teams videoconferencing platform, without objection. Petitioner was again represented by Attorney A, Esq. Respondent was again represented by Attorney B, Esq. This was a closed proceeding. During the proceeding, Petitioner moved into evidence exhibits P-1 to P-71. There were no objections. Exhibits P-1 to P-71 were admitted. Respondent moved into evidence exhibits R-1 through R-30. There were no objections. Exhibits R-1 through R-30 were admitted.

Petitioner presented as witnesses, in the following order: herself; Witness A, a clinical and forensic psychologist (expert in clinical psychology and neuropsychology related to special education); Witness B, principal of School C; the Student; and Witness

C, an educational advocate (expert in special education and individualized education programming). Respondent presented Witness D, director of specialized instruction at School B (expert in special education programming, placement, and school psychology). Petitioner presented rebuttal testimony after the close of Respondent's case.

IV. Issues

As identified in the revised Prehearing Order and in the Complaint, the issues to be determined in this case are as follows:

1. Did the Local Educational Agency ("LEA") fail to offer the Student an appropriate Individualized Education Program ("IEP") corresponding to the 2019-2020 school year? If so, did the LEA act in contravention of 34 C.F.R. Sect. 300.320, Andrew F. v. Douglas County School District, 137 U.S. 988 (2017), Hendrick Hudson Bd. of Educ. v. Rowley, 458 U.S. 176 (1982), and related authority? If so, did the LEA deny the Student a Free Appropriate Public Education ("FAPE")?

Petitioner contended that the Student's IEP failed to provide an appropriate amount of specialized instruction and/or behavioral support services, and did not offer the Student a "therapeutic" setting. Petitioner also contended that the Student's placement in an "ILS" classroom did not address his/her behavioral issues.

2. Did the LEA fail to offer the Student an appropriate Functional Behavior Assessment/Behavior Intervention Plan ("FBA"/"BIP") from October, 2018 through the date of filing? If so, did the LEA act in contravention of 34 C.F.R. Sect. 300.320, Andrew F. v. Douglas County School District, 137 U.S. 988 (2017), Hendrick Hudson Bd. of Educ. v. Rowley, 458 U.S. 176 (1982), and related authority? If so, did the LEA deny the Student a FAPE?

3. Did Respondent fail to implement the Student's IEPs that were/are in effect during the 2019-2020 school year? If so, did Respondent's act or omission violate principles of law established in cases like Van Duyn v. Baker Sch. Dist. 5J, 502 F.3d 811, 822 (9th Cir. 2007)? If so, did Respondent deny the Student a FAPE?

Petitioner contended that Respondent did not provide the Student with his/her mandate of speech-language pathology, occupational therapy, and/or behavioral support

services. As relief, Petitioner seeks an order placing the Student at School C for the 2020-2021 school year. Additionally, Petitioner seeks an order directing the LEA to provide the Student with compensatory education in the form of tutoring and counseling, and to change the Student's IEP so that it requires additional specialized instruction and behavioral support services. Petitioner also seeks an FBA and BIP and related relief.

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 currently attends School B, a DCPS public school. S/he is an energetic, social child who wants to succeed both academically and socially. The Student can be a hard worker at times but has significant cognitive and behavioral issues, resulting in poor academic performance. The Student's IQ has dropped significantly over the last several years. Testimony of Witness A; P-38-8.

2. Though the Student has spent years in school, s/he is still reading at a first-grade level. P-51-4. The Student constantly gets out of his/her seat and sometimes walks out of class or yells profanity at peers. School staff often find the Student in the hallway saying s/he does not want to go to class. P-31-2. The Student's behavior is, at least in part, a function of his/her frustration with academics. P-33-1. The Student benefits from pairing with a partner and small-group or individual instruction. Testimony of Witness D; Testimony of Petitioner; P-51-4. However, even with repetition and exposure to different modalities, the Student may not retain what s/he has learned. P-31-2.

3. The Student had academic problems early in his/her schooling, across all disciplines, and was diagnosed with Attention Deficit Hyperactivity Disorder ("ADHD"). The Student continued to have significant learning and behavioral problems at School A,

where the Student started the 2018-2019 school year. The Student constantly got out of his/her seat and walked out of class whenever s/he wanted. The Student was in general education classes at the time. Testimony of Petitioner; Testimony of Witness D.

4. Psychological testing of the Student was conducted in February, 2017, as reported on March 5, 2017. On the Wechsler Intelligence Scale for Children-V (“WISC-V”), the Student scored a Full-Scale IQ of 58. On the Woodcock-Johnson Tests of Achievement-III (“WJ-III”), the Student performed in the “extremely low” to “borderline” range on academic tasks. The evaluator concluded that the Student had the capacity to respond to instruction at only an elementary school level, and had weaknesses in applied problems, writing fluency, and reading comprehension. The evaluator also found the Student to have deficits in working memory and processing speed, as well as difficulty understanding abstract information and applying rules to solve complex problems. The evaluator concluded that the Student was impacted by ADHD, combined type, across varied environments. The evaluator further indicated that the Student had conduct problems, hyperactivity, relationship problems, impulsivity, defiance, and aggression. P-38-18-22.

5. An FBA was written for the Student on March 9, 2017, by an evaluator who conducted interviews with school staff, teachers, and Petitioner, and observed the Student’s classroom. The evaluator indicated that the Student was unable or unwilling to remain in his/her seat during instruction, displayed disrespectful behavior, and was verbally and physically aggressive with peers and adults. The evaluator concluded that the Student was distractible, had poor focus, sometimes walked or danced around the classroom, refused to work, eloped, and had screaming outbursts. P-36-1. The evaluator

noted that, despite many attempted interventions, including multiple breaks, redirection, 1:1 conferences, preferential seating, and peer-to-peer instruction, the Student behaved appropriately in class only approximately ten percent of the time. However, the Student misbehaved less in classes with less structure, such as gym. P-36-2-3. The evaluator posited that the Student's behaviors manifested when s/he wanted to gain an item or participate in an activity, and that the behaviors did not have antecedents. A BIP was written for the Student in March, 2017, which recommended that teachers address the Student's issues through reassurance, clear instruction, "ensuring undivided attention," small group or 1-1 instruction, and calls home to address behaviors. P-37-4.

Additionally, the BIP recommended "verbal and physical touches," allowing the Student to move around in a pre-determined area, lunch in a different setting, seating away from peers, no recess, speaking to the Student in an emotionally flat manner, giving the Student two choices, avoiding addressing the Student in front of others, avoiding power struggles, and sending the Student off for an in-class break when his/her behavior escalated. P-37-7.

6. Witness A conducted a neuropsychological assessment of the Student on November 28, 2017. Witness A's findings were similar to the findings of the March, 2017, psychological assessment, suggesting that the Student might be considered Intellectually Disabled, and that an adaptive behavior assessment was needed to either confirm this or rule this out. P-40-18. Witness A's neuropsychological assessment showed moderate to severe executive functioning issues, consistent with the Student's ADHD profile, with significantly elevated scores in attention, hyperactivity, mood, and dysregulation. Testimony of Witness A.

7. The Student's amended IEP dated May 15, 2018, stated that the Student's ADHD and sensory deregulation interfered with his/her learning and frequently caused off-task behavior. This behavior affected the Student and his/her classmates, requiring positive behavior intervention supports. The amended IEP contained goals in mathematics, reading, written expression, and communication/speech and language, and recommended fifteen hours of specialized instruction per week outside general education, plus five hours of specialized instruction per week inside general education, sixty minutes of occupational therapy per month, 120 minutes of speech-language pathology per month, sixty minutes of behavioral support services per month, an extended school year, a location with minimal distractions, and small-group testing. P-5.

8. On November 12, 2018, and again on March 27, 2019, the Adaptive Behavior Assessment System 3rd Edition ("ABAS 3") was administered to the Student. The ABAS-3 is a standardized scale that measures a child's adaptive and daily living skills. In administering ABAS-3 in November, 2018, the Student's former teachers found that s/he demonstrated adaptive behaviors in the "extremely low" range on the General Adaptive Composite ("GAC") Index. P-43-1. By March, 2019, the Student had improved; teachers rated him/her in the "low" or "below average" range in the GAC Index. P-44-4-5.

9. An HOD from Impartial Hearing Officer ("IHO") Coles Ruff, dated October 20, 2018, ordered DCPS to amend the Student's IEP to prescribe at least twenty hours of specialized instruction per week outside general education, in addition to the Student's then-current related services, and to place the Student in an "SLS" classroom. P-1-21. The HOD also requested an adaptive assessment of the Student and a meeting to

review the Student's progress in the SLS program, to determine whether further changes to the Student's IEP, programming, and placement were warranted. That meeting was to be held no more than ninety calendar days after the Student first attended the SLS classroom. The HOD also authorized 125 hours of independent tutoring and thirty hours of independent counseling at OSSE-approved rates. P-1-21.

10. In accord with IHO Ruff's HOD, Respondent amended the Student's IEP on October 26, 2018, and sought to perform new adaptive testing. Respondent emailed Petitioner to make her aware of an "adaptive scales form" that had been sent home in the Student's backpack. Petitioner did not complete the form. At around the same time, Respondent attempted to change the Student's location of services to School B. Petitioner did not consent to this transfer, however, due to concern about changing the Student's school during the school year. As a result, the Student continued at School A through the end of the 2018-2019 school year. P-8-2; Testimony of Petitioner.

11. The Student's June 4, 2019, IEP contained the same language as the prior IEP about the need for positive behavioral interventions and supports. The IEP again recommended that the Student receive twenty hours of specialized instruction per week outside general education, with the same related services and Area of Concern sections as the prior IEP. The IEP reported that the Student had difficulty "holding on" to information in the short term for solving problems and responding to prompts. P-9-4. It also indicated that the Student struggled to pay attention, rarely completed his/her assigned work, and required individualized assistance. P-9-6. On a Scholastic Reading Inventory ("SRI") test conducted on June 5, 2019, the Student scored at Lexile level 272, equating to first grade. P-51-4.

12. In August, 2019, the Student started attending the SLS program at School B. The large building that houses School B includes other schools. The Student's SLS classroom contained children from two different grades who traveled in a cohort of about ten children. The children had three academic teachers and an aide who followed them throughout the day. School B did not use the Student's BIP from 2017. Testimony of Witness D. Petitioner felt that the Student's education was "going pretty good" in the SLS program, though s/he was "still struggling" and Petitioner was getting calls from the school. Testimony of Petitioner. The Student felt that the SLS classes were "okay" but lacked structure. The Student understood the mathematics work and felt English was "easy." Still, s/he sometimes left class in the middle of a lesson because the work was "too much." The Student also frequently came to class late and resisted going to related services, particularly speech-language pathology, because s/he did not want peers to know about his/her speech issues. Testimony of Student. The Student would elope from classes with teachers that s/he did not like, such as the Student's mathematics teacher. A plan was developed whereby the Student was granted up to three minutes to check in with a staff member between classes. Testimony of Witness D.

13. After the Student had spent ninety days at School B, school staff knew the Student's program was not working and wondered if the building was too large for the Student, or if the Student was eloping due to the difficulty of the work. Testimony of Witness D. Petitioner and representatives of School B met on December 17, 2019. At this meeting, the Student's mathematics teacher and other teachers indicated that the Student was always tardy to class. The teachers also told Petitioner that the Student constantly got out of his/her seat. P-31-2-3; Testimony of Petitioner. Witness D told

Petitioner and her representative that the Student could not retain information, despite repetition, and that the Student had been receiving direct behavioral support services, which s/he needed. Witness D also said that she saw the benefit of behavioral support services for the Student, and that the Student's IEP should be amended accordingly.

Testimony of Witness C; Testimony of Witness D; P-31. Also, at this meeting, Respondent decided not to formulate a BIP for the Student because of a "reclassification" issue. P-31-2.

14. After winter break in the 2019-2020 school year, the Student's IEP team initiated a trial period for the Student in School B's ILS program, with Petitioner's consent. The ILS classroom is a self-contained setting with a maximum of eight students. However, the Student did not attend the ILS program even half the time, and School B did not implement the program with complete fidelity. It was a struggle to get the Student to participate in the program, though when one of the Student's peers entered the program, the Student became more interested. Testimony of Witness D; P-26-1.

15. The Student was assessed through an FBA interview in February, 2020. The interview indicated that the Student does better with 1:1 instruction and that the Student's behavior functions in part to avoid completing assignments. P-45-2. The interviewer suggested that the Student would do better with a pattern of fifteen minutes of work followed by five minutes of break, with personalized incentives for appropriate behavior. The interviewer also recommended a behavior chart with consequences for various infractions (with the Student's input), making the Student part of the process so s/he can "own" the behavior. P-45-3.

16. The parties met to discuss the Student on February 25, 2020. The Student's teachers sought to place the Student in the ILS classroom, in part because it allowed for fewer transitions between rooms. Petitioner agreed that the Student should not remain in the SLS program but did not agree with him/her being placed on a certificate track. P-26-1

17. A BIP was written for the Student on February 26, 2020, recommending general measures such as redirecting inappropriate behavior immediately, check-ins, positive feedback, and breaks. As a consequence for negative behaviors, the BIP recommended that the Student spend his/her break time alone. The plan was to be reviewed on April 29 2020, and behavior management logs were to track the Student's behavior. The Student was also supposed to be reprimanded as needed according to policy. P-46-1.

18. The Student was placed in the ILS program. Testimony of Petitioner; P-32. The Student did not participate in lessons and left the room when finished with his/her work. The Student was often late to class and worked only if s/he was in the mood. The Student frequently stated that s/he was sick and had to go to the bathroom or the nurse's office, then never returned to class. The Student was placed on a reward system, but only occasionally participated in that system. The Student refused supports such as an iPad, tablets, and graphic organizers, as well as an aide to assist him/her in class. R-6 at 59. The Student expressed a distaste for the students in the ILS classroom. The Student seeks a high school diploma, wants to go to college, and wants to be a hairdresser. Testimony of Student.

19. Since the start of the COVID-19 pandemic, the Student has received speech-language pathology at home. Testimony of Petitioner. The Student has been more receptive to participating in therapy through videoconferencing, because his/her peers do not know about it. Testimony of Student.

20. SRI testing indicates that the Student has declined in reading skills during the 2019-2020 school year, even though the Student was only at the first-grade level at the end of the 2018-2019 school year. At the beginning of the 2019-2020 school year, the Student's Lexile score was 215, a decrease from the prior score of 272 (which was at the first-grade level). On February 7, 2020, the Student's Lexile score dropped further to 146. P-51-4; P-54-1; Testimony of Witness C.

21. A resolution meeting was held for the Student on April 13, 2020. The draft IEP from that meeting contained the same language as the prior IEPs relating to positive behavioral interventions, as well as goals for the same Areas of Concern. The IEP again recommended twenty hours of specialized instruction per week outside general education, with sixty minutes per month of occupational therapy and speech- language pathology, and sixty minutes per month of behavioral support services on a consultation basis. The parties agreed to reevaluate the Student through an FBA to determine if the behaviors were due to impulsivity, ADHD, or frustration. A BIP was also recommended. Testimony Witness C; Testimony of Witness D; P-29.

22. The Student's IEP Progress Reports for the first reporting period of the 2019-2020 school year indicated that the Student progressed on some goals, while other goals were just being introduced. P-17. For the second reporting period, the progress reports again indicated progress in some areas, but noted that cutting class and in-class

behaviors were still a problem. P-22. The Student's first term report card for the 2019-2020 school year indicated grades ranging from a D in Spanish to Bs in English 1, Reading Workshop, and World History and Geography. Teachers reported cutting class and tardiness. P-51-2-3. On the second term report card, the Student's grades declined in several classes and the Student received an F in algebra. Teachers indicated that the Student needed to study more, did not do homework, and had poor behavior. P-53-3.

VI. Conclusions of Law

The burden of persuasion in District of Columbia special education cases was changed in 2014. The District of Columbia code now states that “(w)here there is a dispute about the appropriateness of the child’s individual educational program or placement, 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 establishes “a prima facie case.” D.C. Code Sect. 38-2571.03(6)(A)(i). The burden of persuasion for Petitioner’s IEP claims (Issue #1 and the BIP issue in Issue #2) should therefore be on Respondent, provided that Petitioner presents a prima facie case. It is noted that a BIP is supposed to be annexed to the Student’s IEP. 5-E DCMR 3007.2. The remainder of Petitioner’s claims do not directly address the appropriateness of the Student’s IEP. For these issues, the burden of persuasion must therefore be on Petitioner. Schaffer v. Weast, 546 U.S. 49 (2005).

1. Did the LEA fail to offer the Student an appropriate IEP corresponding to the 2019-2020 school year? If so, did the LEA act in contravention of 34 C.F.R. Sect. 300.320, Andrew F. v. Douglas County School District, 137 U.S. 988 (2017), Hendrick Hudson Bd. of Educ. v. Rowley, 458 U.S. 176 (1982), and related authority? If so, did the LEA deny the Student a FAPE?

Petitioner contended that the Student’s IEP failed to provide for an appropriate amount of specialized instruction and/or behavioral support services, and did not offer the Student a “therapeutic” setting. Petitioner also contended that the Student’s placement in an ILS classroom did not (and will not) address his/her behavioral issues.

In Hendrick Hudson Bd. of Educ. v. Rowley, 458 U.S. 176 (1982), the Court explained that an IEP must be reasonably calculated to enable the child to receive benefit. Id. at 204. The Court’s decision in Endrew F. v. Douglas County School District, 137 U.S. 988 (2017), elaborated on the doctrine established in Rowley. The student in Endrew F. was provided with a largely unchanged IEP after making little progress. The Court reasoned that “a student offered an educational program providing merely more than de minimis progress from year to year can hardly be said to have been offered an education at all.” Id. at 1001. Finding that “instruction that aims so low” would be tantamount to “sitting idly...awaiting the time when they were old enough to drop out,” the Court held that IDEA “demands” a higher standard—“an educational program reasonably calculated to enable a child to make progress appropriate in light of the child’s circumstances.” Id. The Court stated that its ruling “should not be mistaken for an invitation to the courts to substitute their own notions of sound educational policy for those of the school authorities.” Id. Still, the Court stated that courts should fairly expect those authorities to offer a “cogent and responsive explanation” for their decisions. Id. at 1002.

The Student has cognitive and behavioral issues, with a reading level considered to be at the first-grade level, despite many years in school. However, Witness C, Petitioner’s expert witness for special education and IEP programming, did not clearly

contend that there was a problem with the June, 2019, IEP's recommendation to provide the Student with twenty hours of specialized instruction hours per week. Indeed, this amount of specialized instruction was set in IHO Ruff's HOD of October, 2018. Moreover, IHO Ruff's HOD was not implemented for the full 2018-2019 school year because Petitioner did not want to move the Student from school to school in the middle of the school year. DCPS therefore, understandably, recommended an IEP in June, 2019, that was in line with IHO Ruff's order.

Additionally, Petitioner did not adequately show that the Student needed a "therapeutic" setting in June, 2019. Witness C did not define this term during testimony, and in his HOD, IHO Ruff did not require a "therapeutic" setting when he ruled that the Student receive twenty hours of specialized instruction per week, although this was Petitioner's contention at the time. Furthermore, Petitioner failed to show that Respondent's choice to provide the Student with sixty minutes of behavioral support services per month, on a consultative basis, was unreasonable. IHO Ruff's HOD rejected claims that the Student's IEP required more intensive behavioral support services. IHO Ruff concluded that it was appropriate for Respondent to provide the Student with sixty minutes of behavioral support services per month, on a consultative basis. Accordingly, it was not unreasonable for Respondent to conclude that the June, 2019, IEP should include sixty minutes of behavioral support services per month on a consultative basis. This claim must therefore be dismissed in its entirety.

2. Did the LEA fail to offer the Student an appropriate FBA/BIP from October, 2018, through the date of filing? If so, did the LEA act in contravention of 34 C.F.R. Sect. 300.320, Andrew F. v. Douglas County School District, 137 U.S. 988 (2017), Hendrick Hudson Bd. of Educ. v. Rowley, 458 U.S. 176 (1982), and related authority? If so, did the LEA deny the Student a FAPE?

Some courts in the District of Columbia have held that it is “essential” for the LEA to develop an FBA when students have behavioral issues. The FBA’s role is to determine the cause, or “function,” of the behaviors and then the consequences of those behaviors. Harris v. Dist. of Columbia, 561 F. Supp. 2d 63, 68 (D.D.C. 2008). Other courts have expressed a different point of view, indicating that an FBA is simply not required as part of an evaluation or reevaluation. E.L. Haynes Pub. Charter Sch. v. Frost, 66 IDELR 287 (D.D.C 2015). Courts agree that an FBA may not be required if existing behavioral approaches meet a student’s needs. A.C. v. Chappaqua Central School Dist., 553 F.3d 165 (2d Cir. 2009) (FBA not needed where IEP provided specific interventions that would address behavioral needs).

Even if there is no requirement for an FBA, Respondent must consider the use of “positive behavioral supports” and other strategies in conformance with the IDEA and its implementing regulations. 20 U.S.C. Sect. 1414(d)(3)(B)(i); 34 C.F.R. Sect. 300.324(a)(2)(i); 5-E DCMR Sect. 3007.3; Middleton v. District of Columbia, 312 F. Supp. 3d 113, 146 (D.D.C. 2018) (duty to provide for a plan to address disabled student’s attendance issues). In the District of Columbia, this means that the IEP may be required to contain a specific strategy to address a student’s behavioral issues, or that a BIP should be annexed to a student’s IEP. Long v. Dist. of Columbia, 780 F. Supp. 2d 49 (D.D.C. 2008) (in ruling the district failed to provide an FBA/BIP for a student, the court stated that “the quality of a student’s education is inextricably linked to the student’s behavior”). A BIP should be annexed to a student’s IEP. 5-E DCMR Sect. 5-3007.3.

IHO Ruff's HOD expressly found that DCPS failed to write an appropriate FBA and BIP for the Student during the 2017-2018 school year. IHO Ruff's HOD did not specifically order DCPS to create a new FBA and BIP, but Respondent should have created a new FBA and BIP after IHO Ruff decided that the existing FBA and BIP were inadequate. Respondent did not argue otherwise.

Respondent did not address this issue until February, 2020, when an "FBA Interview" was conducted with the Student. This interview, which did not result in a formal FBA, indicated that the Student did better with 1:1 instruction and suggested that the Student would do better with a pattern of fifteen minutes of work followed by five minutes of break, with personalized incentives for appropriate behavior. The interviewer also recommended a behavior chart with consequences for various infractions. A BIP was then written, but it did not provide for 1:1 instruction or stipulate that the Student should receive fifteen minutes of work, then five minutes of break time. Instead, the brief BIP recommended general measures that had already been tried unsuccessfully, such as immediately redirecting inappropriate behavior, check-ins, positive feedback, and breaks. Witness D, the only witness for DCPS, effectively admitted that this BIP was inadequate when she testified that it was not what she would have written. Witnesses A and C also testified that the BIP was inadequate because it was too brief, it recycled old strategies that had not worked, and it did not address the Student's main issues, particularly his/her tendency to elope from class. Accordingly, Respondent denied the Student educational benefit, and therefore a FAPE, when it failed to create an FBA/BIP, or adjust behavior interventions on the Student's IEP, after IHO Ruff's order of October, 2018.

3. Did Respondent fail to implement the Student's IEPs that were/are in effect during the 2019-2020 school year? If so, did Respondent's act or omission violate principles of law established in cases like Van Duyn v. Baker Sch. Dist. 5J, 502 F.3d 811, 822 (9th Cir. 2007)? If so, did Respondent deny the Student a FAPE?

Petitioner contended that the Student was not provided with his/her mandate of speech-language pathology, occupational therapy, and/or behavioral support services. "Failure to implement" claims may be brought if an LEA cannot "materially" implement an IEP. The parent "must show more than a de minimis failure to implement all elements of that IEP, and, instead, must demonstrate that the school board or other authorities failed to implement substantial or significant provisions of the IEP." Beckwith v. District of Columbia, 208 F. Supp. 3d 34, 39 (D.D.C. 2016) (citing to Houston Indep. Sch. Dist. v. Bobby R., 200 F.3d 341, 349 (5th Cir. 2000); 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 than was required by 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's claim here is based on services trackers presented in evidence. The Student's mandate for speech-language pathology during the 2019-2020 school year was for 120 minutes of speech-language pathology per month. But the record makes clear that the Student was not interested in attending speech-language pathology sessions because s/he did not want peers to know that s/he required such sessions. Moreover, the

service trackers submitted by Petitioner indicate that the Student was offered the required amount of speech-language pathology for all months prior to the closing of schools due to the COVID-19 pandemic, except for August and September, 2019. DCPS submitted its own service trackers indicating that the Student was offered a full 120 minutes of speech-language pathology in September, 2019. The DCPS service trackers also show that, after schools were closed, the Student was not offered speech-language pathology in April, 2020, but was offered 155 minutes of speech-language pathology through videoconferencing in May, 2020.

It is noted that if an LEA continues to provide educational opportunities to the general student population during a school closure, the school must ensure that students with disabilities have equal access to the same opportunities, including the provision of FAPE. Questions and Answers on Providing Services to Children With Disabilities During A COVID-19 Outbreak, United States Dep't of Educ. Memorandum, March 2020, Question A-1, <https://www2.ed.gov/policy/speced/guid/idea/memosdcltrs/qa-covid-19-03-12-2020.pdf>. Petitioner did not show that general education students regularly received services in April, 2020. Even if those services were delivered to general education students, the loss of one month of services, under these circumstances, was not material and did not deny the Student a FAPE, especially since Respondent made up for some of the missed services in May, 2020, when the Student was offered 155 minutes of speech-language pathology.

Petitioner also contended that the Student did not receive his/her mandate of sixty minutes of occupational therapy services per month during the 2019-2020 school year. The record shows that the Student resisted receiving these services as well. Petitioner's

service trackers indicate that the Student was offered at least sixty minutes per month of services until school closure (with thirty minutes of services in March), except for August and September, 2019. Respondent's services trackers indicate that the Student was offered fifteen minutes of occupational therapy in August, 2019 (school started late that month), and seventy minutes of occupational therapy in September, 2019. Respondent's service trackers also indicate that it did not offer occupational therapy services for the Student in April, 2020, but made up for most of those missed services by offering the Student 100 minutes of occupational therapy through videoconferencing in May, 2020. In addition, per the DCPS service trackers, the Student was offered ninety minutes of occupational therapy in December, 2019. Altogether, then, the Student was offered approximately the same amount of occupational therapy services in the 2019-2020 school year as was promised in the June, 2019, IEP.

Petitioner also argued that Respondent failed to provide the Student with the appropriate amount of behavioral support services. The June, 2019, IEP recommended sixty minutes of behavioral support services per month for the Student, on a consultative basis. The record indicates that the Student was offered 135 minutes of behavioral support services in November, 2019, sixty minutes in December, 2019, and 285 minutes in February, 2020. Additionally, Witness D testified that the Student was receiving direct behavioral support services in the 2019-2020 school year, and that these services just needed to be added to the Student's IEP. P-31-2. In accord, the Student stated that a social worker would push into the classroom while s/he was there. While the IEP did recommend "consultation" services only, the direct services provided were more intense than the indirect consultation services recommended by the Student's IEP. To this

Hearing Officer, this suggests that the Student may have received more behavioral support services than the IEP required, albeit in a different form. Corpus Christi Indep. Sch. Dist. v. C.C., No. 2:11-CV-00224, 2012 WL 2064846, at *3 (S.D. Tex. June 7, 2012) (no FAPE violation where the student received more specialized instruction per day than required).

In sum, Petitioner did not meet the burden of persuasion to show that Respondent failed to implement the Student's IEP, and this claim must therefore be dismissed.

RELIEF

When school districts deny students a FAPE, courts have wide discretion to ensure that students receive a FAPE going forward. As the Supreme Court stated, the statute directs the court to “grant such relief as [it] determines is appropriate.” School Committee of the Town of Burlington v. Dep't of Education, Massachusetts, 471 U.S. 359, 371 (1985). The ordinary meaning of these words confer broad discretion on a hearing officer, since the type of relief is not further specified, except that it must be “appropriate.”

As relief, Petitioner seeks an order that places the Student at School C, a private school, for the 2020-2021 school year, and that directs Respondent to provide an FBA and a BIP for the Student, change the Student's IEP to require additional specialized instruction and behavioral support services, and provide the Student with compensatory education in the form of tutoring and counseling. Petitioner also requests that all meetings for the Student be convened through counsel, which was not mentioned in the closing argument and is therefore deemed withdrawn.

Petitioner's witness, Witness B, the principal of School C, supported Petitioner's proposal to transfer the Student to the school. Witness B testified that School C is "therapeutic" and focuses on "engagement" and "personalized instruction" with no more than seven students in the classroom, and that the school's personalized behavior system requires frequent student check-ins. Witness B also testified that the Student would get frequent breaks. But these kinds of approaches have already been tried for this Student in the ILS classroom, with limited success, and Witness B did not specifically explain why School C's behavior system would work any better for this challenging Student. While a more detailed, personalized behavior system could well be of some benefit to the Student, such a system could be employed at a public school through a meaningful BIP. Such a system would also need specific programming to address what may be the Student's biggest issue: getting out of his/her seat and eloping from the classroom. Witness B did not testify about any specific measures School C employs to make it difficult for students to elope. Petitioner contended that the Student would not feel stigmatized if s/he were to attend School C, because all the children in the school are students with disabilities. But the Student's academic classes at School B consisted entirely of children with disabilities, so the classes at School C would be no different in that respect.

The real stigma problem is that the Student is reluctant to go to related service providers at school because his/her peers would know about it, resulting in embarrassment. This can be addressed by providing the Student with related services through videoconferencing, even after schools reopen. Under the circumstances, it is not necessary for this social student (who has friends in the general education environment) to attend school in a more restrictive private school setting.

This Hearing Officer will therefore order that Respondent fund a comprehensive FBA and BIP, to be written by a service provider with at least ten years of experience in writing FBAs and BIPS, to assess and plan for the Student's behavioral needs, most particularly in regard to the Student's tendency to get out of his/her seat and elope from class. This Hearing Officer will also order that the Student remain in the SLS program, because this program can provide the Student with the diploma s/he desires, and because Witness D testified that the Student can manage the work in this program. That SLS program shall be in a building housing no more than 250 children, which can capably enforce a policy against allowing children to be in the hallways during class (unless those children have a pass or specific right to be in the hallway). Additionally, since the Student is comfortable receiving behavioral support services through videoconferencing, the Student's behavioral support services mandate shall be changed to thirty minutes weekly.

Petitioner also seeks compensatory education. Under the theory of compensatory education, courts and hearing officers may award "educational services to be provided prospectively to compensate for a past deficient program." Reid v. District of Columbia, 401 F.3d 516, at 521-23. An award of compensatory education aims to put a student in the position s/he would have been in absent the FAPE denial and "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. at 524. The District of Columbia Circuit Court of Appeals has "explicitly disavowed" compensatory education in the form of "cookie-cutter" lump-sum awards when a hearing officer does not explain how the remedy is tailored to provide the services the student

was denied. Branham v. District of Columbia, 427 F.3d at 7, 11 (D.C. Cir. 2005).

Moreover, the circuit court has emphasized that, in determining the “complicated work” of fashioning such a remedy, a hearing officer should pay close attention to the question of assessment. B.D. v. District of Columbia, 817 F.3d 792, 800 (D.C. Cir. 2017).

Petitioner did not present a compensatory education plan in this case, and Petitioner’s witnesses did not testify in support of a compensatory education proposal. As a result, this case is ripe for an independent assessment to determine the extent to which the Student was denied a FAPE from October, 2018, to present. This approach was explicitly adopted by the District of Columbia Circuit Court of Appeals in B.D., where the court stated that if further assessments are needed, “the district court or Hearing Officer should not hesitate to order them.” Id. Such assessment shall be conducted by an evaluator with at least ten years of professional experience in assessing students with disabilities. The parties shall work together to select such expert, who must not have an actual or perceived bias that might favor one party.

VII. Order

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

1. The Student shall be placed in Respondent’s SLS program during the 2020-20201 school year. The Student shall attend classes at a school within a building that houses no more than 250 students. The school shall capably enforce a policy against allowing children to be in the hallways of the building during class, unless those children have a pass or specific right to be in the hallway;
2. A comprehensive FBA and BIP shall be created for the Student. The FBA and BIP shall be written by an independent provider with at least ten years of experience

in writing FBAs and BIPs, at the usual and customary rate in the community. The Student's BIP shall include a detailed positive behavior system for the Student, which includes personalized incentives, and a well-reasoned plan to address the Student's tendency to get out of his/her seat and elope from class;

3. The Student's related services, for the entirety of the 2020-2021 school year, shall be delivered through videoconferencing in a discreet manner;

4. The Student's IEP is hereby amended to include thirty minutes per week of behavioral support services;

5. Respondent shall pay for an assessment of the Student to determine an appropriate compensatory education award. Payment shall be at the usual and customary rate in the community. Such assessment shall be conducted by an evaluator with at least ten years of professional experience in assessing students with disabilities. The parties shall work together to select such expert, who must not have an actual or perceived bias that might favor one party. Such expert shall then recommend an appropriate compensatory education award for the FAPE deprivation from October, 2018, to present;

6. All other requests for relief are denied.

Dated: July 13, 2020

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

Hearing Officer Determination
Michael Lazan, Hearing Officer
Case # 2020-0080

[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 U.S.C. Sect 1415(i).

Dated: July 13, 2020

Michael Lazan
Impartial Hearing Officer