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

Parent, through Student,[1]	)	
Petitioner,	)	**Rooms: 112 (June 4) and 111 (June 13)**
	)	**Hearings: June 4 and June 13, 2018**
v.	)	**Hearing Officer: Michael Lazan**
	)	**Case No.: 2018-0131**
School A PCS,	)	**Issue Date: June 28, 2018**
Respondent.	)	

HEARING OFFICER DETERMINATION

I. Introduction

This is a case brought by Petitioner, who is the parent of the student (the "Student"). A Due Process Complaint ("Complaint") was received by School A PCS ("Respondent" or "LEA") pursuant to the Individuals with Disabilities Education Act ("IDEA") on May 18, 2018. A response was filed by Respondent on May 29, 2018. The resolution period ended on May 25, 2018, since this is an "expedited" case pursuant to 34 CFR Sect. 300.532(a).

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" or "IDEA"), 20 U.S.C. Sect. 1400 et seq., its implementing regulations, 34 C.F.R. 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.

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

III. Procedural History

On May 29, 2018, this Hearing Officer held a prehearing conference. Attorney A, Esq., and Attorney B, Esq., counsel for Petitioner, appeared. Attorney C, Esq., counsel for Respondent, appeared. A prehearing conference order was issued on May 31, 2018, summarizing the rules to be applied in this hearing and identifying the issues in the case. There were two hearing dates: June 4, 2018, and June 13, 2018. These were closed proceedings. Petitioner was represented by Attorney A, Esq., and Attorney B, Esq. Respondent was represented by Attorney C, Esq. Petitioner moved into evidence Exhibits 1-32. There were no objections. Exhibits 1-32 were admitted. Respondent moved into evidence Exhibits 6, 7, 8, 10, 13-18a, 20-27, 29-44, 54, and 55. There were no objections. Exhibits 6, 7, 8, 10, 13-18a, 20-27, 29-44, 54, and 55 were admitted. Closing arguments followed witness testimony on June 13, 2018. Respondent emailed a list of citations to the Hearing Officer on June 14, 2018. Petitioner provided an email correspondence to the Hearing Officer in support of her contentions on June 18, 2018. There were no objections to either submission.

Petitioner presented as witnesses: herself; and Witness A, a law clerk. Respondent presented as witnesses: Witness B, a director of student support services at School A PCS; and Witness C, the owner of a firm that provides educational consulting.

IV. Credibility.

None of the witnesses in this proceeding had credibility issues.

V. Issues

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

1. Did Respondent provide inappropriate services/employ inappropriate procedures in regard to the Student after the manifestation determination review ("MDR") of November 7, 2017? If so, did the LEA violate provisions within 34 CFR Sect. 300.530-532 and related provisions? If so, did the LEA deny the Student a Free and Appropriate Public Education ("FAPE")?

Petitioner contended that Respondent failed to provide an appropriate interim alternative educational setting ("IAES") since the services diverged from the Student's Individualized Education Program ("IEP"); that the IEP team failed to determine the Student's IAES and Petitioner therefore had no say in the selection of the placement; and that, after the MDR, Respondent failed to conduct a Functional Behavior Assessment ("FBA"), adjust the Student's Behavior Intervention Plan ("BIP"), or suggest changes to the Student's IEP.

2. Did Respondent provide the Student with inappropriate IEPs and/or BIPs for the two years prior to the filing of the Due Process Complaint? 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 the LEA deny the Student a FAPE?

Petitioner contended that Respondent's IEPs and BIP(s) provided for inadequate behavior support services.

As relief, Petitioner is seeking compensatory education for the time period from two years prior to the filing of the Due Process Complaint to January 26, 2018. The amount and types of compensatory education would be determined after a study to be funded by Respondent.

VI. Findings of Fact

1. The Student is an X-year-old who is eligible for services as a student with Emotional Disturbance. The Student has long-term, persistent, behavioral issues. As a result, the Student has been through the juvenile justice system several times in the last few years. The Student's Full Scale IQ was tested at 71 in December, 2017. Academic testing revealed higher scores, particularly in "academic fluency," where the Student tested above the average range in all four subtests. Also in December, 2017, the Student was tested in the average range in broad reading, broad mathematics, and broad written language. In passage comprehension, however, the Student's scores were extremely low, in the first percentile. (Testimony of Witness A; R-26)

2. The Student's behavioral problems extend as far back as 2012, when the Student received an FBA while the Student was attending School A PCS. A BIP was written for the Student in or about 2013-2014 to address the Student's behavioral issues, which included ignoring redirection, not completing work, and engaging in disruptive behavior with peers. The Student's IEP from May 22, 2014, provided the Student with 22.5 hours of specialized instruction per week, with one hour per week of behavioral support services. Another BIP was written for the Student on January 20, 2015, which required, among other things, that the Student be assigned to classes with two adults, receive a differentiated schedule of reinforcement, and get "tally marks" when behavior was positive. A "tiered" behavior system was proposed at the time. The Student was also required to transition with an adult. Another BIP was created for the Student on March 25, 2015, which provided for consequences when the Student would invade another student's personal space, be physically aggressive, get out of his/her seat, and/or

be late. At least in part because the Student's social and emotional state had gradually improved during the 2014-2015 school year, the Student's IEP dated April 9, 2015, reduced the Student's specialized instructional hours to fifteen hours per week inside general education, and reduced the Student's behavior support services to 45 minutes per week. However, the Student still engaged in negative behaviors, such as being disrespectful and oppositional. Another BIP was issued on April 24, 2015, which started to allow the Student to transition without an adult but provided additional consequences for engaging in target behavior. (P-1; P-2-9; P-3; P-4; P-5-5, 8; P-7; P-8; P-9)

3. Another BIP was created for the Student in or about November, 2015, which provided for the Student's participation in the school's "BASE" program. The Student's IEP dated March 11, 2016, provided for seven hours per week of specialized instruction inside general education, with thirty minutes per week of behavioral support services. The IEP provided for goals in math, emotional, social, and behavioral development, and motor skills/physical development. The IEP noted that the Student had failed four classes during the first semester, earned multiple detentions, had attentional issues, and was disrespectful and oppositional. It also indicated that the Student had made recent improvements in the ability to remain in class and avoid behavioral incidents. (P-11; P-12; P-13; R-7; Testimony of Witness B)

4. The next IEP, dated February 14, 2017, provided for the same services as the prior IEP. The IEP noted, among other things, that the Student was not keeping track of assignments, received "D" and "F" grades in the first semester, and was non-compliant and distractible. (R-10; P-17)

5. Another BIP was provided for the Student on June 23, 2017. The plan provided the Student with added "check-ins" and continued to provide structured breaks, positive reinforcement, and assistance through the "BASE" program throughout the day. (R-13; P-17; Testimony of Witness B)

6. The Student's behavioral issues escalated during the 2017-2018 school year, even though the Student was taught in a class with a special education teacher and a paraprofessional, plus a behavior intervention coordinator in the class every week. (P-16; Testimony of Witness B)

7. On November 6, 2017, the Student engaged in a fight with another student, which started when the Student stole the other student's drink. When the other student asked the Student to give it back, the Student started punching the other student in the face. The student victim was left with a concussion and suffered memory loss. As a result of this fight, the Student was suspended as of November 7, 2017. On the same date, an MDR was conducted for the Student, during which it was determined that the Student's behavior was a manifestation of his/her disability. The MDR team discussed providing the Student with six hours of tutoring per week until a setting could be located as an IAES. All the individuals at the MDR agreed with this proposal. (Testimony of Witness A; Testimony of Petitioner; Testimony of Witness B; R-17 R-35-15)

8. On November 14, 2017, school staff met with Petitioner to inform her that the Student would not be returning to School A PCS. At this meeting, Organization A was discussed as a potential provider of services to the Student. Petitioner said that she would not sign any paperwork at this time. (Testimony of Witness A; Testimony of Petitioner; Testimony of Witness B; R-6-6-7; R-17)

9. Petitioner toured Organization A on November 30, 2017, and then signed paperwork to enroll the Student in the setting at Organization A. However, Organization A was not on the "transportation list" of the Office of the State Superintendent of Education. School A PCS therefore indicated that the Student could not attend school at Organization A and that, instead, the tutoring hours for the Student would increase as of December, 2017. Petitioner's representative requested two-and-one-half to three hours of tutoring per day. School A PCS offered the Student four hours per day, plus services over the Winter break. No formal meeting was held to discuss this offer. Petitioner consented to these services, which she felt were appropriate. (Testimony of Witness A; Testimony of Petitioner; R-24)

10. The Student attended some tutoring sessions, but did not like the tutoring services. At a meeting between Petitioner and School A PCS on January 11, 2018, the participants discussed a request by School A PCS to place the Student in a non-public school. Also at this meeting, Petitioner told School A PCS about the difficulty that the Student was having with the tutoring. (Testimony of Witness A; Testimony of Petitioner; R-28)

11. After returning to School A PCS in February, 2018, the Student continued to receive tutoring because the Student had not used all the tutoring hours that were to be provided during the Student's period of suspension. A new IEP was written on April 13, 2018. The IEP provided the Student with goals in mathematics, reading, motor skills/physical development, and social, emotional, and behavioral development. The Student's specialized instruction hours were increased to twelve hours per week inside general education, with ninety minutes per month of behavioral support services. A

dedicated aide was recommended. An FBA and a BIP were written for the Student on April 23, 2018, suggesting that positive peer interactions would be the most effective reinforcer. School A PCS then issued its own BIP, which again recommended use of the BASE program with specific reinforcers, a behavior tracker, movement breaks, check-ins, and application of a points system. (R-35; R-36; R-38; R-39)

VII. 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 relates to the appropriateness of Respondent's program after the Student's suspension. Though Respondent argued that Petitioner did not present a *prima facie* case on this issue, the testimony of Petitioner and Witness A, together with the documentation submitted, supported Petitioner's contention that the Student was denied

an appropriate program after the suspension. The burden of persuasion therefore falls on Respondent for Issue #1.

Issue #2 relates to the appropriateness of the Student's IEPs and BIPs in the two years prior to the filing of the Due Process Complaint. Respondent moved to dismiss this claim, contending that Petitioner failed to present a *prima facie* case. This motion is discussed *infra*, in the section of this decision relating to Issue #2.

1. Did Respondent provide inappropriate services/employ inappropriate procedures in regard to the Student after the manifestation determination review ("MDR") of November 7, 2017? If so, did the LEA violate provisions within 34 CFR Sect. 300.530-532 and related provisions? If so, did the LEA deny the Student a FAPE?

Petitioner contended that Respondent failed to provide an IAES since the services diverged from the Student's IEP; that the IEP team failed to determine the Student's IAES and Petitioner therefore had no say in the selection of the placement; and that, after the MDR, Respondent failed to conduct an FBA, adjust the Student's BIP, or suggest changes to the Student's IEP.

Generally, students whose actions are deemed to be a manifestation of their disability must be returned to their original placement after ten days of suspension. 34 CFR Sect. 300.530(f)(2). However, school personnel may remove a student to an IAES, without regard to whether the behavior is determined to be a manifestation of the child's disability, if the child: (1) carries a weapon to or possesses a weapon at school, on school premises, or to or at a school function under the jurisdiction of an SEA or an LEA; (2) knowingly possesses or uses illegal drugs, or sells or solicits the sale of a controlled substance, while at school, on school premises, or at a school function under the jurisdiction of an SEA or an LEA; or *(3) has inflicted serious bodily injury upon another*

person while at school, on school premises, or at a school function under the jurisdiction of an SEA or an LEA. 34 CFR. Sect. 300.530(g) (emphasis added).

The term "serious bodily injury," as referenced in this regulation, is defined in Section 1365(h)(3) of Title 18, U.S. Code. See 34 CFR Sect. 300.530(i)(3). According to the provision, "serious bodily injury" means a bodily injury that involves a substantial risk of death, extreme physical pain, protracted and obvious disfigurement, or protracted loss or impairment of the function of a bodily member, organ, or mental faculty.

Here, the testimony is that the Student caused the student victim to suffer a serious injury, specifically a concussion with some corresponding memory loss. Significantly, there is undisputed testimony that the student victim also ended up suffering from epileptic seizures due to this incident. As a result, it is determined that the student victim suffered "protracted impairment" of a bodily function and therefore suffered "serious bodily injury" pursuant to the applicable regulations. Student with a Disability, 115 LRP 44815 (SEA NH 12/17/14) (finding that a student who struck his paraprofessional inflicted "serious bodily injury" when the paraprofessional suffered a severe concussion, which included symptoms such as intense headaches, nausea, light sensitivity, lack of energy, difficulty focusing, and impaired thought processes).

It was therefore appropriate for Respondent to send the Student to an IAES after the incident in question. Petitioner contended that the IAES designated by Respondent was inappropriate because it did not allow the Student to access the services promised in the Student's IEP. However, in an IAES, a school district does not have to provide a student with all of the services in an IEP; it only has to provide educational services that "enable the child to continue to participate in the general education curriculum, although

in another setting, and to progress toward meeting the goals set out in the child's IEP." 34 CFR Sect. 300.530(d)(1)(i). This regulation does not require the school to provide "typical" classroom instruction. 64 Fed. Reg. 12,623 (1999). A variety of settings may be used to deliver the curriculum, including alternative schools and homebound instruction. See, e.g., Ocean Twp. Bd. of Educ. v. E.R., No. CIV. 13-1436, 2014 WL 936738, at *1 (D.N.J. Mar. 10, 2014) (ruling that a district properly placed a high schooler in home instruction as an IAES after he brought a knife to school); Freeport Pub. Schs., 26 IDELR 1251 (SEA ME 1997) (student had access to the general education curriculum through tutoring based on his regular education classes); Regional Sch. Unit No. 72, 114 LRP 13097 (SEA ME 09/19/13) (noting that a student's "shortened" school day was appropriate because he received direct instruction for four-and-a-half hours, which was equivalent to a full school day).

There is undisputed testimony from Witness B that the offer of four hours of tutoring per day was aligned with the Student's IEP and the general curriculum. Additionally, this tutoring was agreed to by Petitioner, who had asked for only two-and-one-half to three hours of tutoring per day. Under the circumstances, the IAES offered to the Student must be deemed to be appropriate.

However, this finding does not end the inquiry. Petitioner is correct that she should have been at an IEP team meeting where these services were discussed and mandated. 34 CFR Sect. 300.531. Even more importantly, Petitioner is correct that the Student needed to "receive, as appropriate, a functional behavioral assessment, and behavioral intervention services and modifications, that are designed to address the behavior violation so that it does not recur." 34 CFR Sect. 300.530(d)(1)(ii). There was

no reasonably current FBA prior to the incident leading to the Student's suspension. As a result, after the MDR, Respondent had a duty to create a new FBA and then implement a new BIP to ensure that the Student's behaviors did not recur. Respondent did not create a new FBA and BIP until well after the suspension was over. A new FBA and BIP might have allowed the Student to access the tutoring that was offered. Without the FBA and BIP, the record suggests that the tutoring was of little benefit to the Student because of the Student's behavioral issues.

As a result, Respondent denied the Student a FAPE by failing to include Petitioner in an IEP meeting to select the IAES, and by failing to create an FBA and BIP for the Student after the MDR meeting in November, 2017.

2. Did Respondent provide the Student with inappropriate IEPs and/or BIPs for the two years prior to the filing of the Due Process Complaint? 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 the LEA deny the Student a FAPE?

To trigger the school district's burden of persuasion, Petitioner has the responsibility to present a *prima facie* case on this issue. However, Petitioner, in her testimony, mentioned virtually nothing about the Student's education prior to the subject behavioral incident in November, 2017. Moreover, Petitioner presented no witnesses, expert or otherwise, to provide testimony on the quality of the Student's education prior to the behavioral incident. Petitioner simply relied on the documents in this record, which showed that the Student's services were reduced in the 2014-2015 and 2015-2016 school years, culminating with the IEP of March, 2016, which provided the Student with seven hours of specialized instruction per week, with an additional thirty minutes per week of behavioral support services. A subsequent IEP, in February, 2017, did not

change the mandated level of specialized instruction or behavioral support services for the Student.

Petitioner argued that the behavioral support services in the March, 2016, and February, 2017, IEPs were deficient because they did not change. However, the Student's behavior services did change during this time because a BIP was written for the Student in June, 2017. This BIP provided additional services for the Student, in particular brief "check-ins" with a behavior intervention coordinator. This BIP also stipulated that the Student receive modeling of appropriate behavior and "firm, unemotional redirection" when the Student engaged in unacceptable physical contact.

Without any testimony stating that the behavioral support services provided in the IEP and additional services provided in the BIPs were inadequate, Petitioner's argument here is based only on the speculation of counsel. Accordingly, Petitioner has not presented a *prima facie* case on Issue #2, which must therefore be dismissed.

Remedy

When school districts deny students a FAPE, courts have wide discretion to ensure that students receive a FAPE going forward. As the Supreme Court stated, the statute directs the Court to "grant such relief as [it] determines is appropriate." School Committee of the Town of Burlington v. Dep't of Education, Massachusetts, 471 U.S. 359, 371 (1985). The ordinary meaning of these words confer broad discretion on a hearing officer, since the type of relief is not further specified, except that it must be "appropriate." 20 U.S.C. Sect. 1415(i)(2)(C)(iii).

Under the theory of compensatory education, courts and hearing officers may award "educational services to be provided prospectively to compensate for a past

deficient program." Reid v. District of Columbia, 401 F.3d 516, 521-23 (D.C. Cir. 2005). In every case, however, the inquiry must be fact-specific and, to accomplish IDEA's purposes, the ultimate award must be reasonably calculated to provide the educational benefits that likely would have accrued from special education services the school district should have supplied in the first place. Id., 401 F. 3d at 524; see also Friendship Edison Public Charter School v. Nesbitt, 532 F. Supp. 2d 121, 125 (D.D.C. 2008) (compensatory award must be based on a "'qualitative, fact-intensive' inquiry used to craft an award tailored to the unique needs of the disabled student").

A Petitioner need not "have a perfect case" to be entitled to a compensatory education award. Stanton v. District of Columbia, 680 F. Supp. 201 (D.D.C. 2011). Under the IDEA, if a Student is denied a FAPE, a hearing officer may not "simply refuse" to grant one. Henry v. District of Columbia, 55 IDELR 187 (D.D.C. 2010). Some students may require only short, intensive compensatory programs targeted at specific problems or deficiencies. Reid, 401 F.3d at 524.

Recently, the United States Court of Appeals for the District of Columbia clarified the scope of FAPE deprivation in the context of FAPE denial. In B.D. v. District of Columbia, 817 F.3d 792, 797 (D.C. Cir. 2016), Judge Tatel goes to some lengths to explain that a student should be compensated not only for a FAPE denial's "affirmative harm" but also for "lost progress" that the student would have made.

The only witness who discussed compensatory education was called by Respondent. Witness C's credible, reasonable proposal of fifty hours of compensatory tutoring for the FAPE deprivation after the suspension is consistent with the letter and spirit of Reid. Witness C also indicated that ten to twenty hours of compensatory

behavior support services would be appropriate for the Student. This request is also acceptable under the Reid standard.

Petitioner objected to this approach, contending that, instead, it would be more appropriate for an expert to be hired by the school district to devise an appropriate compensatory education award. However, this is not the approach employed in the majority of reported cases, no doubt because, among other things, this approach involves the determination of a compensatory education award by an individual who is not necessarily impartial. It is preferable for an Impartial Hearing Officer to determine an appropriate compensatory education award, especially where, as here, a credible witness testified in favor of an appropriate award.

VIII. Order

As a result of the foregoing:

1. Petitioner is hereby awarded fifty hours of individual tutoring for the Student, to be provided by a licensed special education teacher with experience in working with students with behavior issues, at the usual and customary rate in the community;

2. Petitioner is hereby awarded twenty hours of counseling for the Student, to be provided by a licensed practitioner at the usual and customary rate in the community;

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

Dated: June 28, 2018

Michael Lazan
Impartial Hearing Officer

cc: Office of Dispute Resolution
Attorney A, Esq.
Attorney B, Esq.

Attorney C, Esq.
OSSE Division of Specialized Education
Contact.resolution@dc.gov

IX. 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: June 28, 2018

Michael Lazan
Impartial Hearing Officer