District of Columbia
Office of the State Superintendent of Education
Office of Dispute Resolution
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Parent, through Student,[1]	)	
Petitioner,	)	**Room: 112**
	)	**Hearings: May 16, 2018/June 7, 2018**
v.	)	**Hearing Officer: Michael Lazan**
	)	**Case No.: 2018-0065**
DCPS,	)	**Issue Date: June 20, 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 District of Columbia Public Schools ("DCPS" or "Respondent") pursuant to the Individuals with Disabilities Education Act ("IDEA") on March 7, 2018. A response was filed by Respondent on March 19, 2018. The resolution period ended on April 6, 2018.

II. Subject Matter Jurisdiction

This due process hearing was held, and a decision in this matter is being rendered, pursuant to the Individuals with Disabilities 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.

III. Procedural History

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

On April 25, 2018, this Hearing Officer held a prehearing conference. Attorney A, Esq., counsel for Petitioner, appeared. Attorney B, Esq., counsel for Respondent, appeared. A prehearing conference order was issued on May 1, 2018, summarizing the rules to be applied in this hearing and identifying the issues in the case. There were two hearing dates: May 16, 2018, and June 7, 2018. These were closed proceedings. Petitioner was represented by Attorney A, Esq. Respondent was represented by Attorney B, Esq. Petitioner moved into evidence Exhibits 1-76. There were no objections. Exhibits 1-76 were admitted. Respondent moved into evidence Exhibits 1-15. There were no objections. Exhibits 1-15 were admitted. Two continuance orders were granted in this case. The first continuance order, dated May 21, 2018, granted Petitioner's unopposed request to extend the case timeline to June 15, 2018, to allow for the second hearing date, which was not initially anticipated by the parties. At the end of the second hearing, Respondent indicated that it might call additional witnesses. Closing arguments were therefore not presented at the second hearing. After the second hearing date, Respondent indicated that it would not call additional witnesses, and Petitioner indicated that she wanted to file a written closing argument. As a result, Petitioner filed a second motion for continuance, dated June 11, 2015. A second continuance order was granted on June 15, 2018, extending the case timeline to June 20, 2018.

Petitioner presented as witnesses: herself; Witness A, an advocate; Witness B, a neuropsychologist; and Witness C, a behavior specialist at School A. Respondent presented as witnesses: Witness D, a special education coordinator at School D; Witness E, a social worker at School C; and Witness F, a special education supervisor. Both sides presented written closing arguments on June 14, 2018.

IV. Credibility.

Petitioner, though credible in some respects, was an inconsistent witness. At one point, Petitioner indicated that the Student would take his/her medication. At another point, Petitioner indicated that the Student would not always take his/her medication. Witness B's compensatory education proposal was reasonable and thorough. Witness D's presentation was candid, especially her discussion of the Student's September, 2017, Individualized Education Program ("IEP"). Witness F appeared to overstate the extent to which the Student made academic progress during the 2016-2017 and 2017-2018 school years, both in her reports and during testimony.

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 DCPS fail to offer the Student a Free and Appropriate Public Education ("FAPE") and/or revise the Student's existing IEP and/or provide the Student with an appropriate location of services in connection to the IEPs dated October, 2016, November, 2016, and September, 2017? If so, did DCPS act in contravention of 34 CFR 300.320, Endrew F. v. Douglas County School District, 137 U.S. 988 (2017), and Hendrick Hudson Bd. Of Educ. v. Rowley, 458 U.S. 176 (1982)? If so, did DCPS deny the Student a FAPE?

Petitioner contended that the Student needed: 1) a dedicated aide; 2) preferential seating; 3) a "full-time" special education program through a therapeutic day school by at least March, 2017; and 4) appropriate IEP goals, including math goals.

2. Did DCPS fail to develop/revise/implement the Student's Functional Behavior Assessments ("FBAs") and Behavior Intervention Plans ("BIPs") from March, 2016, onward? If so, did DCPS deny the Student a FAPE?

3. Did DCPS fail to assess the Student in all areas of suspected disability in connection to the 2016-2017 school year? If so, did DCPS violate 28 U.S.C. Sect. 1414(b)(3), 34 C.F.R. Sect.300.304(c), and related provisions? If so, did DCPS deny the Student a FAPE?

4. Did DCPS fail to develop/amend an FBA and BIP after the Student's Manifestation Determination Review? If so, did DCPS violate 34 CFR Sect. 300.530(f)? If so, did DCPS deny the Student a FAPE?

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

VI. 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 A, a non-public special education school. The Student's educational history is dominated by extreme behaviors, which the Student has exhibited the entire time he/she has been in school. The Student engages in explosive behaviors, is frequently off-task, and often gets into serious verbal altercations with peers. The Student goes into crisis "several times" per day and is a safety concern for others at the school, including staff. (Testimony of Petitioner; Testimony of Witness E; P-4-3)

2. After a behavior plan written for the Student in the 2014-2015 school year was unsuccessful, the Student first started receiving special education services through an IEP dated September 1, 2015. The IEP was created because, in the prior school year, the Student was reading below level and had engaged in physical and verbal aggression, including the destruction of property and elopement from class. The Student was recommended for 7.5 hours of specialized instruction outside of special education, with 120 minutes per month of behavioral support services. The IEP deemed that the Student was eligible for services as a Student with Multiple Disabilities, and provided for reading, emotional, social, and behavioral development goals. Services were delivered at School B, a public elementary school. (P-8; P-17-1)

3. An FBA was written for the Student in September, 2015, which identified the Student as having behavioral episodes: when staff attended to other students; when the Student was in the cafeteria; when the Student was in special subjects; and also at "any time during the school day." The FBA also indicated that the Student responded to positive feedback and praise, and that previous interventions had been tried without success, including counseling, time outs, a points system, loss of privileges, and verbal redirection. (P-11-1-2)

4. On October 1, 2015, the Student's then existing Safety/Behavior Intervention Plan was updated. The updated plan directed staff, among other things, to instruct the Student to follow adult instructions and demonstrate appropriate behavior. Staff was also directed to provide additional interventions, such as giving the Student breaks, providing specific rewards for good behavior, providing controlled breathing, and allowing the Student to express an opinion. When the Student continued to exhibit

extreme behaviors, Respondent increased the Student's specialized instruction hours. The Student's IEP dated November 12, 2015, recommended twenty hours of specialized instruction per week outside general education and behavior support services for 240 minutes per week, with preferential seating and a location with minimal distractions. (P-7; P-17)

5. Even with this additional specialized instruction, as well as additional in-school services from community support workers, the Student was noncompliant, easily angered, oppositional, and verbally and physically aggressive. The Student threw chairs and other objects, pushed over tables, and screamed and cried, making the classroom unsafe for the Student and other children. The Student was then transferred, in the middle of the school year, into a "BES" classroom at School C. The Student continued in this classroom for the 2016-2017 school year. On October 12, 2016, an IEP team again recommended twenty hours of specialized instruction per week outside general education and behavior support services for 240 minutes per week. (P-6; Testimony of Witness E)

6. At the BES program at School C, the Student was in a classroom with approximately ten to twelve children. The Student was given movement breaks at the school, and outside therapists came into the school to assist the staff. Staff at the school used the behavior plan created at School B to assist the Student, who did reasonably well in group counseling sessions. However, when group counseling was over, the Student went back to inappropriate, aggressive, destructive behaviors. Accordingly, the Student's specialized instruction hours were increased further. The Student's IEP amendment dated November 1, 2016, recommended the Student for twenty-five hours of specialized instruction per week outside general education, again with behavior support services of

240 minutes per week. The Student also received "Child Centered Play Therapy" and ad hoc 1:1 crisis assistance. (P-4-3; P-5-6; P-16-3; P-40-11; Testimony of Witness E)

8. Though the Student seemed to benefit from Child Centered Play Therapy, the Student continued to be explosive and unpredictable, sometimes angering very quickly about minor issues. There was constant yelling, screaming, flipping over furniture, throwing books and folders, "kicking the window," and running out of the classroom. The Student refused to do work, even when instructed individually. The Student was a "huge" safety concern. Additionally, the Student regressed during the 2016-2017 school year in reading. The Student was therefore evaluated through an "LRE Classroom Observation" in December, 2017. A more restrictive placement was not recommended for the Student, since Respondent believed the Student had the potential to be a top performer, and the Student had made some progress according to certain indicators. A list of recommendations, most if not all of which had already been tried with the Student, were suggested. (P-6-4; P-30; P-40-11)

9. For the 2016-2017 school year, the Student's grades were mostly "2" and "1" in academics, though the Student did get grades of "3" in math for three of four terms. The Student's progress reports for the 2016-2017 school year indicated that the Student made progress in reading and in emotional, social, and behavioral development, including in the goal of learning and utilizing appropriate ways to cope with frustration, anger, and irritability (except for the third term). The Student mastered a goal on "WH" questions during this school year. (P-39-1; P-40)

10. The Student moved to another school, School D, for the 2017-2018 school year. This school, like School C, put the Student into a "BES" classroom, albeit with

additional adult staff. An IEP was then written for the Student at School D. The DCPS staff who created the IEP did not know that the Student had been in a BES classroom the prior year, and also were not privy to the "LRE Classroom Observation" that had been conducted the prior school year. The Student's IEP for the 2017-2018 school year was therefore not changed much from the prior school year's IEP. For example, all of the social, emotional, and behavioral development goals were repeated. (P-4-7; Testimony of Witness D)

11. The BES classroom at School D had areas specifically designated for dealing with the Student's outbursts, including a cool-off area. Interventions attempted for the Student included offering tangible incentives when participating in group therapy, providing the incentive of playing music, allowing the Student to play in the gym or the playground during an episode, and "teaching about emotions." (P-10-2)

12. "DIBELS" reading assessments administered during this time showed incremental, but not substantial, progress. On the DIBELS, the Student was "far below proficient" in reading at both the start of the 2015-2016 school year and the start of the 2017-2018 school year. In fact, at the start of the 2017-2018 school year, the Student was reading on "Level H," the same level that the Student was reading at two school years prior. (P-4-3; P-35)

13. The BES program for the Student at School D was not a success. Indeed, the Student's behaviors spiked during the 2017-2018 school year, as Witness F acknowledged. As a result, another "LRE Classroom Observation" of the Student was conducted. The written report corresponding to this observation indicated, among other things, that the Student's behaviors had escalated, that the Student often came to school

in a rage, and that the Student had urinated on him/herself. Still, the observer did not feel the Student required a more restrictive setting because IEP progress reports and testing showed academic progress. (P-29-7)

14. A Crisis Plan and a Safety Plan were created for the Student during the 2017-2018 school year to allow for interventions, such as a morning check-in, setting clear expectations, creating an incentive plan based on twenty minute increments, determining consequences for not completing work, chunking work, giving the Student reminders, sending the Student to a de-escalation room, and contacting a crisis team called "CHAMPS." Staff were told to address the Student in calm and encouraging tones, sit to the left of the Student, sit the Student farthest from the door, give the Student choices, and allow the Student to share feelings. (P-14; P-15)

15. A BIP was created for the Student in January, 2018, which repeated interventions mentioned previously, suggested replacement behaviors, and indicated that the adults in the Student's environment needed to collaborate on effective consequences for positive and negative behavior. (P-13)

16. In or about February, 2018, the Student attacked a teacher at the school. A Manifestation Determination Review meeting on February 12, 2018, indicated that the Student's behaviors were a manifestation of the Student's disability. The Student was suspended for at least three days in February, 2018, because the Student attacked a teacher, resulting in an intentional teacher injury. (P-34; P-47)

17. Petitioner sent records requests to Respondent on February 12, 2018, February 13, 2018, and February 22, 2018, all relating to the 2016-2017 and 2017-2018

school year, and further requests on April 3, 2018, April 5, 2018, and April 12, 2018. (P-59; P-60; P-62; P-65; P-68; P-69).

18. An FBA dated March 28, 2018, again described the Student's behavioral issues, such as demanding that a teacher respond even when the teacher was with another student, and reacting negatively to being asked to do things that the Student did not want to do. (P-10-1-2)

19. A March, 2018, psychological evaluation by DCPS indicated that the Student was functioning at the 33rd percentile in broad math, but at the 11th percentile in reading fluency. (P-9-15)

20. Preferential seating was added to the Student's IEP through an amendment on March 5, 2018. (P-33-1)

21. The Student changed schools again in April, 2018, moving to School A, a non-public special education school. The Student's behaviors have not improved despite this more restrictive setting. The Student has shown more signs of aggression, eloped, cursed, cried, and continued to lack coping skills. (Testimony of Witness B)

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 directly relates to the Student's IEPs and placements. As a result, the school district bears the burden of persuasion on Issue #1. There is no dispute that Petitioner has presented a *prima facie* case on this issue. On all other issues, the burden of persuasion is on Petitioner, since those issues do not directly relate to the Student's IEPs and placements.

1. Did DCPS fail to offer the Student a FAPE and/or revise the existing IEP and/or provide an appropriate location of services in connection to the IEPs dated October, 2016, November, 2016, and September, 2017? If so, did DCPS act in contravention of 34 CFR 300.320, Endrew F. v. Douglas County School District, 137 U.S. 988 (2017), and Hendrick Hudson Bd. Of Educ. v. Rowley, 458 U.S. 176 (1982)? If so, did DCPS deny the Student a FAPE?

An IEP developed through the Act's procedures must be reasonably calculated to enable the child to receive additional benefits. Hendrick Hudson Bd. Of Educ. v. Rowley, 458 U.S. 176 (1982). The IEP should be both comprehensive and specific, and targeted to the Student's "unique needs." McKenzie v. Smith, 771 F.2d 1527, 1533, D.C. Cir. 1985); N.S. ex rel. Stein v. District of Columbia, 709 F.Supp.2d 57, 60 (D.D.C. 2010); 34 CFR Sect. 300.320(a)(2)(B)(the IEP must contains goals that meet each of the child's educational needs that result from the child's disability); 34 CFR Sect. 300.324(a)(1)(iv)(the IEP must address the academic, developmental, and functional needs of the child). In 2017, the Supreme Court addressed a split amongst the circuit courts regarding what the IDEA means when it requires school districts to provide an

"appropriate" level of education to children with disabilities. Endrew F. ex rel. Joseph F. v. Douglas County School Dist. RE-I, 137 S. Ct. 988 (2017). In Endrew F., the Court held that an IEP must be "reasonably calculated to enable a child to make progress appropriate in light of the child's circumstances." Id. at 1001. The Court made clear that the standard is "markedly more demanding than the 'merely more than de minimis' test" applied by many courts. Id. at 1000.

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

The Student's October, 2016, IEP provided that the Student receive twenty hours of specialized instruction per week outside general education and behavior support services of 240 minutes per week. However, this was the same amount of specialized instruction and behavior support services recommended for the previous school year, during which the Student engaged in extreme behaviors that impeded the Student's instruction in the classroom. Additionally, Respondent did not add any additional accommodations or services to the October, 2016, IEP. To the contrary, this IEP removed some accommodations, including for preferential seating and locations with minimal distractions.

The IEP itself stated that the Student had been noncompliant and verbally and physically aggressive, with almost daily incidents that disrupted the classroom. In light of this, Respondent should have provided this challenging Student with a new program, including a significant increase in services, in order to create an IEP that was "reasonably calculated" to provide the Student with an educational program designed to produce "markedly more demanding" than "more than *de minimis"* progress.

Respondent suggested that the Student's educational placement in the 2016-2017 school year was to be implemented in a "BES" classroom, to provide more intense and/or previously untried services for the Student. However, this classroom assignment was not indicated in this IEP, directly or indirectly. An IEP should be thorough, discussing the entirety of the educational program, so that a parent can participate in determining the educational placement. Moreover, the record is not clear on how the "BES" program ended up addressing the Student's extreme behaviors.

Respondent also suggested that the "BES" program was appropriate because Student was doing well in academics. However, there is no credible evidence in the record to establish that the Student was making meaningful academic progress. In fact, the Student was below grade level in reading at the start of the 2016-2017 school year, and the IEP indicated that the Student's progress in reading was affected by "explosive" behaviors that make the Student "unavailable" for instruction. Even if, *arguendo*, the Student was performing well academically, the Student's social and emotional issues were so significant that the Student's IEP had to be modified to address those issues. This concept is explained further in Letter to Anonymous, 55 IDELR 172 (OSEP 2011), where the U.S. Department of Education stated that the IDEA and its regulations do

provide protections for students with "high cognition and disabilities who require special education and related services to address their individual needs." In Letter to Anonymous, the U.S. Department of Education restated its "longstanding position" that the educational needs of a child with a disability include nonacademic as well as academic areas, and that the "educational performance," as used in the IDEA, "means more than academic standards as determined by standardized measures."

Petitioner is also correct that the goals in the October, 2016, IEP were largely the same goals that were in the Student's prior IEP. The emotional, social, and behavioral development goals were exactly the same as the goals in the September, 2015, IEP. Also, the reading goals were only slightly different from the goals in the Student's initial IEP of September, 2015 (the only difference being citations to the Common Core Standards). While it can be permissible for some of a Student's IEP goals to be repeated, if there is sufficient justification, there is no evidence that Respondent carefully deliberated before writing the goals in the October, 2016, IEP. See Damarcus S. v. District of Columbia, 190 F.Supp.3d 35, 52-53 (D.D.C. 2016)("the wholesale repetition" of goals and objectives "indicates an ongoing failure to respond to [a student's] difficulties").

Petitioner also contended that the Student needed preferential seating, which, as noted, was omitted from this IEP, even though it had been in the Student's prior IEP and was recommended in the Student's 2015 FBA. Respondent never explained why preferential seating was not in the October, 2016, IEP and instead argued that the Student ended up receiving preferential seating anyway. The record is not entirely clear on the extent to which the Student received preferential seating during the 2016-2017 school year, but even if the Student did receive preferential seating, Petitioner is correct that the

preferential seating should have been in the Student's IEP, so that Petitioner could have participated in a discussion of the Student's seating arrangements with the school district.[2]

The November, 2016, IEP provided five additional specialized instructional hours for the Student, an improvement from the IEP developed a month prior. Still, no witness explained how the five hours would change the Student's behavioral issues, especially since it had the exact same emotional, social, and behavioral development goals as the October, 2016, IEP. As it turned out, the November, 2016, IEP ended up providing the Student with limited educational benefit. During the remainder of the school year, the Student "constantly" engaged in yelling, screaming, flipping over furniture, throwing books and folders, "kicking the window," and running out of the room. The Student also refused to work, even when instructed individually. As indicated in the LRE Classroom Observation of March, 2017, the Student's elopement from the classroom caused the Student's academic performance to suffer "tremendously." (P-30-1)

Nevertheless, the Student's September, 2017, IEP largely repeated the November, 2016, IEP. Moreover, Respondent implemented the IEP by placing the Student in the same kind of "BES" program that the Student had done poorly in during the prior school year. Respondent argued that the Student made academic improvements during the 2016-2017 school year, but the Student's program cannot be deemed appropriate, particularly after Endrew F., when the Student eloped so much that his/her academic performance suffered "tremendously." Moreover, the Student's IEP stated that the

[2] Petitioner also contended that the Student needed a dedicated aide as of October, 2016. While this Hearing Officer did conclude that the Student should have had a dedicated aide during the 2017-2018 school year, at the time of the October, 2016 IEP, it was not clear that the aide was yet needed.

Student *regressed* in reading during the previous school year, and that the Student's reading level was the same in September, 2017, as it was at the end of the 2015-2016 school year. If Respondent had no other choice than to place the Student in another BES program, at this point Respondent should have adopted Petitioner's suggestion of a 1:1 aide, especially given the extreme safety risks that the Student posed (which resulted, unfortunately, in a teacher getting hurt in February, 2018).[3]

Parenthetically, Witness D admitted the September, 2017, IEP was not reasonably calculated when she said, in effect, that the IEP team did not have enough information relating to the prior school year when it created the IEP.

As a result of the foregoing, Respondent denied the Student a FAPE through its IEPs in October, 2016, November, 2016, and September, 2017.

2. Did DCPS fail to develop/revise/implement the Student's Functional Behavior Assessments ("FBAs") and Behavior Intervention Plans ("BIPs") from March, 2016, onward? If so, did DCPS deny the Student a FAPE?

Courts in the District of Columbia have held that it is "essential" for the local education agency ("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 that behavior. Harris v. Dist. of Columbia, 561 F. Supp. 2d 63, 68 (D.D.C. 2008); see also Long v. Dist. of Columbia, 780 F. Supp.2d 49 (D.D.C. 2008)(in ruling the district failed to provide an FBA/BIP for a student, the court stated that "the quality of a student's education is inextricably linked to the student's behavior"); Shelton

[3] There were changes to the reading goals in the September, 2017, IEP, with two new goals added. However, again, the emotional, social, and behavioral development goals did not change at all from the prior IEP (and were the same goals as those written in September, 2015). Given how important these goals were for this Student, it must be concluded that the unchanged goals themselves were enough to determine that the IEP denied the Student a FAPE.

v. Maya Angelou Charter School, 578 F.Supp.2d 83 (D.D.C. 2008)(FBA/BIP required where learning disabled student was suspended). An FBA may not be required if the IEP provides for interventions that 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 interventions that would address behavioral needs).

In addition to an FBA, if behavior impedes a student's learning, the IEP team shall consider the use of positive behavioral supports and other strategies to address that behavior 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). A BIP may not be needed if a student's classroom includes behavioral interventions that would address the student's behavioral needs. E.Z.-L. v. New York City Department of Educ., 763 F. Supp.2d 584 (S.D.N.Y. 2011), aff'd 694 F.2d 167 (2d Cir. 2012)(no BIP required where classroom included significant behavioral interventions to address the student's behavioral needs).

Respondent did create an FBA and BIP(s) for the Student in 2015, but Petitioner is correct that these plans were not updated until the Crisis and Safety Plan and BIP created in the middle of the 2017-2018 school year.[4] Petitioner is also correct that the FBA and BIP should have been revised earlier, since the documents created in 2015 were ineffective in addressing the Student's extreme behaviors. It is noted that the staff of both School C and School D were not clear on the reasons for some of the Student's

[4] This BIP proposed new interventions when compared to the BIP from 2015. For instance, the BIP proposed removing peers from the room to make sure that the Student did not engage in "face-saving" aggression.

outbursts, making an FBA particularly necessary to determine the "function" of the behaviors.[5]

As a result of the foregoing, Respondent denied the Student a FAPE by failing to revise the Student's FBA and BIP from March, 2016, through January, 2018.

3. Did DCPS fail to assess the Student in all areas of suspected disability in connection to the 2016-2017 school year? If so, did DCPS violate 28 U.S.C. Sect. 1414(b)(3), 34 C.F.R. Sect. 300.304(c), and related provisions? If so, did DCPS deny the Student a FAPE?

An LEA is required to ensure that a child is assessed in all areas of suspected disability, and that the chosen assessment tools and strategies are provided to present relevant information that directly assists persons in determining the educational needs of the child. 28 U.S.C. Sect.1414(b)(3); 34 C.F.R. Sect.300.304(c).

Petitioner argued that the Student did not master his/her IEP goals, and was behind grade level in "all" academic areas. Petitioner therefore suggested that additional assessments were needed for the Student. Petitioner also contended that, generally, the Student should have been evaluated in the 2016-2017 school year because the Student was having so much difficulty in school.

However, the Student's difficulty in school was largely due to behavioral issues. Clearly, service changes were required to address these issues, together with a revised FBA and BIP. However, aside from an FBA/BIP, it is not clear in this record why any additional data was needed to allow the school district to create a reasonably calculated IEP for the Student during the time period in question. While below-grade-level work and/or the failure to master goals *may* trigger a need for additional interventions, students do not have to be evaluated every time they do not perform well in a classroom.

[5] In the LRE Classroom Observation dated March 17, 2017, Witness F indicated that the Student's outbursts could be triggered "by anything" and that the Student's behaviors were unpredictable. (P-30-2)

Petitioner contended that the Student was never "consistently" tested in math, but the Student was comprehensively evaluated in math in June, 2015. The report created as a result of this testing showed that the Student scored in the average range for broad math. (P-12-15) Moreover, the Student received math grades of "3" for much of the 2016-2017 school year, and Petitioner herself did not testify about the Student's need for more testing in math.

Accordingly, Petitioner did not meet the burden of persuasion on this issue. This claim must therefore be dismissed.

4. Did DCPS fail to develop/amend an FBA and BIP after the Student's Manifestation Determination Review? If so, did DCPS violate 34 CFR Sect. 300.530(f)? If so, did DCPS deny the Student a FAPE?

A child with a disability who is removed from the child's current placement because of behavior that is a manifestation of a disability must 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)(ii). A "removal" under this section must result in a "change of placement," which is deemed to have occurred only after a student is suspended for ten days or more. 34 CFR Sect. 300.530(b)(ii).

There is nothing in the record to establish that this Student was ever suspended for ten or more days during the 2017-2018 school year. Accordingly, the requirement to provide an FBA and/or a BIP did not take effect after the Student's suspension in February, 2018. Moreover, after the Student's behavior resulted in a three day suspension in February, 2018, Respondent wrote a new FBA on March 28, 2018. No BIP was created after the suspension, but Respondent had just written a BIP for the Student in

January, 2018. Petitioner did not point to any caselaw that says that a school district must revise an existing BIP every single time there is a removal leading to a decision that a student's behavior was a manifestation of his/her disability. Petitioner argued that an FBA must be created before a BIP, suggesting that the January, 2018, BIP was invalid since it was not based on an FBA. However, Petitioner did not point to any caselaw that holds that an FBA must be created prior to the creation of a BIP.

This claim must be dismissed.

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

20 U.S.C. Sect. 1232g(a)(1)(A) requires each educational agency or institution to grant parents access to the educational records of their children no more than forty-five days after the request. The IDEA regulations provide in pertinent part: "(t)he parent of a child with a disability must be afforded, in accordance with the procedures of Sects. 300.613 through 300.621, an opportunity to inspect and review all education records with respect to -- the identification, evaluation, and educational placement of the child and the provision of FAPE to the child." 34 C.F.R. Sect. 300.501(a). The term "education records" means the type of records covered under the definition of "education records" in 34 C.F.R. Part 99 (the regulations implementing the Family Educational Rights and Privacy Act of 1974, 20 U.S.C. Sect. 1232g (FERPA)). 34 C.F.R. Sects. 300.611-300.625. Education records as defined under FERPA are "directly related to a student" and "maintained by an educational agency or institution or by a party acting for the agency or institution." The term does not include "records that are kept in the sole possession of the maker, are used only as a personal memory aid, and are not accessible

or revealed to any other person except a temporary substitute for the maker of the "record." "Record" means any information recorded in any way, including, but not limited to, handwriting, print, computer media, video or audio tape, film, microfilm, and microfiche. 34 C.F.R. Sect 99.3.

Through her attorney, Petitioner requested educational records relating to the 2016-2017 and 2017-2018 school years on February 12, 2018, February 13, 2018, and February 22, 2018, and then again on April 3, 2018, April 5, 2018, and April 12, 2018. DCPS provided Petitioner with sets of records on April 24, 2018, May 1, 2018, and May 13, 2018. Petitioner argued that these responses were not full and complete, but did not present any testimony to support this contention.

Since Petitioner bears the burden on this claim and failed to show how the withholding of records caused any substantive harm, Respondent's response to Petitioner's requests for records is, at most, a procedural violation, which should not be the basis of a finding of FAPE denial. Lesesne ex rel. B.F. v. D.C., 447 F.3d 828, 834 (D.C. Cir. 2006); see also Kruvant v. District of Columbia, 99 Fed. App'x. 232, 233 (D.C. Cir. 2004). Accordingly, this claim must 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.

As compensatory education, Petitioner seeks 160 hours of tutoring, forty hours of group therapy, and eighty hours of individual therapy for the Student. The tutoring request is modest and reasonable in view of the fact that the FAPE violation in this case extends back two years, and given the credible testimony and thorough report of Witness B. The requests for group and individual therapy are also reasonable in view of the Student's behaviors during the period of FAPE denial. It is noted that Witness B is a neuropsychologist who is qualified to offer an opinion on the counseling that may be necessary to remediate the Student's FAPE denial during the 2016-2017 and 2017-2018 school years.

Petitioner also seeks a new and appropriate IEP and BIP, which is also a reasonable request, given the findings in this case and the testimony of Witness B that the Student is not performing well at School A.

Finally, Petitioner seeks the release of all of the Student's educational records. While Petitioner should have access to all of the Student's educational records, it would not be appropriate to provide a remedy on this issue here, since Issue #5, relating to records denial, did not result in a finding of FAPE denial.

VIII. Order

As a result of the foregoing:

1. Petitioner is hereby awarded 160 hours of individual tutoring, 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 forty hours of group counseling and eighty hours of individual counseling, to be provided by a licensed practitioner at the usual and customary rate in the community;

3. Respondent shall arrange for an IEP meeting within thirty calendar days to review the Student's IEP and BIP and to make necessary changes;

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

Dated: June 20, 2018

Michael Lazan
Impartial Hearing Officer

cc: Office of Dispute Resolution
Attorney A, Esq.
Attorney B, 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 20, 2018

Michael Lazan
Impartial Hearing Officer