

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

OSSE
Office of Dispute Resolution
June 12, 2019

Parent, on behalf of Student,¹)	
Petitioner,)	
)	
)	Hearing Dates: 5/13/19 (Room
)	432); 5/16/19 (Room 432); 5/31/19
v.)	(Room 432)
)	Hearing Officer: Michael Lazan
)	Case No.: 2019-0030
District of Columbia Public Schools,)	
Respondent.)	

HEARING OFFICER DETERMINATION

I. Introduction

This is a case involving an X-year-old student who is currently eligible for services as a student with autism (the “Student”). A Due Process Complaint (“Complaint”) was received by District of Columbia Public Schools (“DCPS” or “Respondent”) pursuant to the Individuals with Disabilities Education Act (“IDEA”) on January 31, 2019. The Complaint was filed by the parent of the Student (“Petitioner”). On February 11, 2019, Respondent filed a response (one day late). A resolution meeting was held on February 14, 2019. The initial resolution period expired on March 3, 2019.

II. Subject Matter Jurisdiction

This due process hearing was held, and a decision in this matter is being rendered, pursuant to the Individuals with Disabilities Education Improvement Act (“IDEIA”), 20 U.S.C. Sect. 1400 et seq., its implementing regulations, 34 C.F.R. Sect. 300 et seq., Title

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

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

On March 11, 2019, Petitioner filed a motion to amend the Complaint, on consent. The amended Complaint was filed on March 14, 2019. This Hearing Officer granted the motion and ordered the amendment through an order filed on March 18, 2019. The resolution period for the amended Complaint expired on April 13, 2019.

A prehearing conference was held on April 17, 2019. Attorney A, Esq., counsel for Petitioner, appeared. Attorney B, Esq., counsel for Respondent, appeared. A prehearing conference order was issued on April 29, 2019, summarizing the rules to be applied in the hearing and identifying the issues in the case. Hearings proceeded on May 13, 2019, and May 16, 2019, but testimony and evidence took longer than expected. As a result, Respondent moved for a continuance on May 24, 2019. An order was issued granting the continuance on May 28, 2019, extending the decision date for the Hearing Officer Determination to June 12, 2019. A final hearing was conducted on May 31, 2019, during which the parties presented closing arguments.

This was a closed proceeding. Petitioner was represented by Attorney A, Esq. Respondent was represented by Attorney B, Esq. Petitioner moved into evidence exhibits 1-24. There were no objections. Exhibits 1-24 were admitted. Respondent moved into evidence Exhibits 1-116. There were no objections. Exhibits 1-116 were admitted.

Petitioner presented as witnesses: herself; Witness G, an advocate (an expert in clinical Psychology as it relates to special education); Witness K, a speech and language pathologist (an expert in speech and language pathology); Witness L, a director of

operations; Witness H, a board certified behavior analyst (an expert in Applied Behavior Analysis and IEP programming and placement for students with autism); Witness I, a case manager; and Witness M, the principal of School B. Respondent presented as witnesses: Witness A, a psychologist (an expert in school psychology); Witness E, a special education teacher; Witness B, a special education teacher; Witness F, a speech and language pathologist; Witness C, a case manager; Witness D, a speech and language pathologist (an expert in speech and language pathology); Witness N, a special education teacher (an expert in special education); and Witness J, a special education coordinator.

IV. Issues

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

1. Did DCPS fail to offer the Student a Free and Appropriate Public Education (“FAPE”) in the Individualized Education Programs (“IEPs”) corresponding to the 2017-2018 and 2018-2019 school years? 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 IEPs lacked sufficient services to develop the Student’s daily living skills and did not provide for sufficient adaptive goals, speech and language therapy, transition services, behavior support services, and services to address the Student’s autism disorder, including Applied Behavioral Analysis (“ABA”). Petitioner also contended that the Student needed a “full-time” therapeutic special education program.

2. From approximately July, 2017, to November, 2018, did DCPS fail to reevaluate the Student? If so, did DCPS violate 34 C.F.R. Sect. 300.303 and related provisions? If so, did DCPS deny the Student a FAPE?

Petitioner contended that the Student was due a triennial reevaluation in July, 2017, but that no reevaluation was completed until November, 2018.

3. Did DCPS fail to provide Petitioner with educational records? If so, did DCPS violate 34 CFR Sect. 300.501, D.C. Code Sect. 38-2571.03 and related provisions? If so, did DCPS deny the Student a FAPE?

As a remedy, Petitioner seeks a new IEP recommending services to address daily living skills and containing adaptive goals. Petitioner requests an IEP that includes sufficient speech and language therapy, transition services, behavior support services, and services to address the Student's autism disorder including ABA, as well as providing the Student with a "full-time" therapeutic special education program. Petitioner also requests placement at School B and compensatory education.

V. Findings of Fact

1. The Student is an X-year-old who is currently eligible for services as a student with autism. The Student is well-behaved but has delays in all academic domains. The Student also has difficulty with daily living activities: s/he does not know how to operate appliances, prepare meals, turn off the water, make change with money, or transport him/herself. Testimony of Petitioner; Testimony of Witness G.

2. A comprehensive psychological evaluation of the Student was conducted on July 1, 2014, by Evaluator A, a private evaluator. The evaluator reviewed the Student's history and reported on an observation and testing. On the Behavior Assessment for Children, 2nd Edition ("BASC-2") Teacher Scale, the Student's reading

teacher determined that the Student had elevated scores in school problems, behavioral symptoms, and adaptive skills, and was at-risk in developmental and social disorders, attention problems, learning problems, atypicality, withdrawal, leadership, study skills, and communication. The teacher also deemed the Student to be “clinically significant” in the area of Social Skills and Depression. The Student’s science teacher also found the student to be elevated in school problems, behavioral symptoms, and adaptive skills. The teacher had significant concerns about the Student’s ability to learn, indicating that the Student had difficulty comprehending and completing assignments. This teacher also indicated that the Student had weak study skills, poor organizational skills, difficulty handing in assignments on time, and communication difficulties. The teacher indicated that the Student’s expressive and receptive communication skills were unusually poor. The Student’s scores on the Gilliam Autism Rating Scale, Second Edition (“GARS-2”) indicated that s/he was “possibly” autistic, according to teachers. On the Wechsler Intelligence Scale for Children-Fourth Edition (“WISC-IV”), the Student scored a 71 in Full Scale IQ, in the borderline range. On the Woodcock-Johnson Test of Achievement, Third Edition-Form A (“WJTA-3”), the Student scored at 2.9 grade level equivalent in total achievement, with a 2.9 for broad reading, 2.6 for broad math (considered “very limited”), and a 3.3 in broad writing. P-13.

3. In the 2016-2017 school year, the applicable IEP, dated May 16, 2016, recommended that the Student receive 27.5 hours of specialized instruction inside general education, with one hour per month of speech language pathology outside general education. This was to be provided in a “CES” classroom. R-4; Testimony of Witness J.

4. The other students in the CES classroom functioned at a lower level than the Student. After about thirty days, school staff decided to change the Student's program to a "diploma track" program for the rest of the 2016-2017 school year.

Testimony of Witness J.

5. During the 2016-2017 school year, school staff noticed that the Student would sometimes come to school with dirty clothing. Additionally, the Student told school staff that his/her mother had hit him/her and attempted to set his/her clothes on fire while s/he was wearing them. As a result, school staff contacted child protective services in regard to Petitioner's care of the Student. Testimony of Witness J.

6. Testing during the 2016-2017 school year established that the Student was functioning well below grade level. The Student's scored a 182 on the NWEA Map assessment in mathematics in the fall of 2016, putting him/her on the mid-second grade level. On the Scholastic Reading Inventory ("SRI") in September, 2016, the Student's Lexile level score was 226, which is "below basic." S/he took the NWEA MAP assessment again in January, 2017, and scored 189, putting him/her on the end-second grade level. According to the Brigance Inventory, the Student could read words "fluently and correctly" at the third to fourth grade level, and was able to fill a correct word into a sentence on the fourth to fifth grade level. P-4.

7. The Student's IEP dated March 22, 2017, indicated that the Student was a good citizen at the school and had been able to access some content. Though reading comprehension was a relative strength for the Student, s/he seemed to have significant memory deficits and trouble paying attention in class. The Student needed help in expressive speech, drawing inferences, and putting words on paper. The IEP had goals in

mathematics, reading, written expression, and communication/speech and language, and recommended twenty hours per week of specialized instruction, with sixty minutes per month of speech-language pathology. The transition plan in the IEP reported on the results of the “O-Net Interest Profiler” and the Casey Life Skills test, and identified goals in the areas of attending a college or trade school, being employed full-time, and living independently. The Student was to receive assistance from a counselor for six hours during the school year in regard to graduation requirements, building a resume, and learning how to read bills. P-4.

8. Another IEP was created for the Student on April 14, 2017, when the team met to review the Student’s eligibility. This IEP was largely the same as the IEP issued the previous month. P-5; R-63.

9. On or about April 13, 2017, Witness A filled out a form relating to the Student’s triennial evaluation. The form indicated that the Student had had difficulty finding classes and completing work early in the school year, but that s/he had become more comfortable later in the year as a result of support from his/her parent. The form also indicated that the parent was concerned with the Student’s academic and social progress. P-14.

10. The Student continued at School A for the 2017-2018 school year. SRI testing in September, 2017, indicated that the Student was on a first grade level in reading, with a Lexile level score of 383. On MAP testing in August, 2017, the Student scored 196, a mid-third grade level, improving from the prior score of 189. R-74.

11. For the first two terms of the 2017-2018 school year, the Student received grades ranging from “A-” (Geometry, term 2) to “C” (Anatomy and Physiology, terms 1

and 2). The Student's English teacher indicated that the Student did not do homework. The Student attended an "inclusion" classroom with general education peers for Anatomy and Physiology. All of the Student's other classes were self-contained special education classes, except health and art, which were scheduled every other day for eighty-minute periods. Students in these self-contained classes included children with specific learning disabilities, autism, other health impairment and intellectual disability. R-74; R-69; R-71; Testimony of Witness B; Testimony of Witness C.

12. Another IEP meeting was held for the Student in March, 2018. The Student's resultant IEP, dated March 7, 2018, indicated that the Student had recently received a 457 Lexile level score on the SRI, an improvement from the prior score of 383. The IEP indicated that the Student made progress in asking for help. However, the Student had not been "using strategies" and was missing crucial information and completing his/her work incorrectly. As with the prior IEP, this IEP had goals in mathematics, reading, written expression, and communication/speech and language, and recommended twenty hours per week of specialized instruction, with sixty minutes per month of speech-language pathology. The Student's transition plan was updated as a result of the Brigance Transition Skills Inventory, which the Student took on February 26, 2018. The transition plan indicated that the Student planned to study mathematics and graduate from Michigan State University, and would like to play professional sports or be involved in digital media or gaming. Post-secondary goals were listed as graduating from Michigan State University, studying mathematics, pursuing a career in gaming design, and managing personal finances independently. Seven hours per year of counseling services were provided in connection with these goals. P-6; R-69.

13. During the 2017-2018 school year, the Student improved in expressive speech, but made only limited progress in receptive speech. A speech and language pathologist worked on improving the Student's ability to understand inference.

Testimony of Witness D.

14. The Student continued at School A for the 2018-2019 school year. An IEP meeting was held for the Student on August 29, 2018, wherein Petitioner requested updated psychological testing. Respondent agreed to this request. R-98.

15. The Student made progress on goals for the first reporting period of the 2018-2019 school year, but did not make any progress in regard to transition goals. For the second reporting period of the 2018-2019 school year, progress was again reported in most academic areas, but no progress was reported on transition goals (except for the goal to use a budgeting app). R-103.

16. A psychological evaluation of the Student was completed by Witness A in November, 2018. Interviews were conducted of the Student's English teacher, Witness E, who reported slow but steady progress. On the Comprehensive Test of Nonverbal Intelligence-Second Edition ("CTONI-2"), the Student scored 85, in the sixteenth percentile. Testing on the Wechsler Intelligence Scale for Children-Fifth Edition ("WISC-5") showed a decline in Full Scale IQ to 63, in the extremely low range. Testing on the Woodcock-Johnson Test of Achievement, Fourth Edition ("WJ-IV") indicated that the Student scored at the 4.5 grade level equivalent in broad reading, and at the 3.3 grade level equivalent in broad mathematics. Other scores and subtests ranged from a 6.3 grade level equivalent in passage comprehension to a 2.1 grade level equivalent in word attack. On the Behavior Assessment for Children, Third Edition ("BASC-3"), two of the

Student's teachers indicated that his/her social and emotional skills were typical, and they did not report any behavioral problems. Testing on the Gillian Autism Rating Scales, Third Edition, indicated that the Student was very likely on the autism spectrum and needed substantial support. P-15.

17. The Student's IEP was amended on November 27, 2018, to add a section on emotional, social and behavioral development, with corresponding goals. However, this section indicated that the Student did not have any emotional, social or behavioral problems. The amended IEP added thirty minutes per month of counseling, with thirty minutes per month of behavior support services, consultation. This IEP was not sent to Petitioner until approximately two months after the meeting. P-7; Testimony of Witness L.

18. For the 2018-2019 school year, the Student has made progress in reading fluency, reading comprehension, and writing longer essays. The Student has also performed well in math, where s/he has received good grades. Testimony of Witness F; Testimony of Witness E.

19. A speech and language reevaluation by Witness F on January 31, 2019, indicated that the Student's last testing on speech and language issues was in November, 2011. Testing on the Receptive One-Word Picture Vocabulary Test-Fourth Edition ("ROWPVT-4") indicated that the Student's receptive vocabulary skills were at the first percentile, whereas his/her expressive language skills were at the sixth percentile. Testing on the Clinical Evaluation of Language Fundamentals-Fifth Edition ("CELF-5"), indicated that the Student's core language skills were in the low range to moderate range, but with a higher percentile rank in receptive language (eighth percentile) than in

expressive language (fourth percentile). The Student had particular difficulty recalling sentences on semantic relationship subtests. P-17; Testimony of Witness F.

20. The Student's report card for the first two terms of the 2018-2019 school year showed academic grades ranging from "A" (United States History, term 2) to "D+" (English III term 2). The Student was praised for initiative and behavior, but the Student's English teacher indicated that the Student did not complete assignments. R-11.

21. In or about January, 2019, the Student indicated, in writing, that s/he did not understand science, liked math, and needed to be taught in a small group of students who were willing and ready to learn. R-67.

22. The parties met to discuss the Student's educational program on February 14, 2019. The speech and language pathologist discussed her evaluation, but no changes were made to the Student's IEP. R-13.

23. During the 2017-2018 and 2018-2019 school years, the Student experienced some bullying, in particular in the cafeteria. Additionally, during this time, there were incidents involving criminal conduct in or near the school. The Student is therefore concerned about his/her safety at the school and has come home upset. Testimony of Petitioner; Testimony of Witness G; Testimony of Witness H.

24. The Student enjoys his/her after-school program, where s/he is grouped only with autistic children. Testimony of Witness I.

VI. Conclusions of Law

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

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

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

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

Issue #1 involves the appropriateness of the Student's IEP and placement. Therefore, on Issue #1, the burden of persuasion is on Respondent, provided that Petitioner meets the burden to present a *prima facie* case. Issue #2 and Issue #3 involve evaluations and records, respectively, and do not directly involve the appropriateness of the Student's IEP and placement. Accordingly, the burden of persuasion must be on Petitioner for these two issues. Schaffer v. Weast, 546 U.S. 49 (2005).

1. Did DCPS fail to offer the Student a FAPE in the IEPs corresponding to the 2017-2018 and 2018-2019 school years? If so, did DCPS act in contravention of 34 CFR 300.320, Andrew 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 IEPs lacked sufficient services to develop the Student's daily living skills and did not provide for sufficient adaptive goals, speech and language therapy, transition services, behavior support services, and services to address the Student's autism disorder, including ABA. Petitioner also contended that the Student needed a "full-time" therapeutic special education program.

An IEP must be “reasonably calculated” to enable the child to receive educational benefit. Hendrick Hudson Bd. of Educ. v. Rowley, 458 U.S. 176 (1982). As stated in S.S. ex rel. Shank v. Howard Road Academy, 585 F. Supp. 2d 56, 66-67 (D.D.C. 2008), the measure and adequacy of an IEP should be determined as of the time it was offered to the student. In 2017, the Supreme Court addressed a split amongst 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 keeping with Rowley, 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.

Petitioner contended that the Student needed additional autism-related services on his/her IEP, referencing the testimony of Witness H, who is an expert in ABA and IEP programming and placement for students with autism. Witness H testified that, based on a records review, ABA would benefit the Student, who has had issues with communication, emotional regulation, bullying, social skills, self-advocacy, academic skills, his/her transition plan, and his/her fine motor skills. Witness H explained that ABA would especially help the Student with respect to social and communication skills. Witness H further explained that, with ABA, tasks are broken up into tiny parts, then repeated until the child learns the lesson.

However, DCPS was within its rights as a school district to write an IEP without specifically requiring ABA instruction. School districts generally do not have to place

instructional methodologies in an IEP, though there may be exceptions where other methodologies are tried and do not work. The United States Department of Education has stated that “there is nothing in the [IDEA] that requires an IEP to include specific instructional methodologies.” 71 Fed. Reg. 46,665 (2006). Courts and administrative officers generally agree. As the United States Supreme Court stated in Rowley:

Congress’ intention was not that the Act displace the primacy of States in the field of education, but that States receive funds to assist them in extending their educational systems to the handicapped. Therefore, once a court determines that the requirements of the Act have been met, questions of methodology are for resolution by the States.

458 U.S. at 208; see also Fairfax Cty. Sch. Bd. v. Knight, No. 1:05CV1472 (LMB), 2006 WL 6209927, at *8 (E.D. Va. Aug. 23, 2006), aff’d, 261 F. App’x 606 (4th Cir. 2008) (“it is not the place of this Court to pass upon the relative merits of educational theories and methodologies”); S.M. v. Hawai’i Dep’t of Educ., 808 F. Supp. 2d 1269, 1279 (D. Haw. 2011) (IEP did not specifically need to require the ABA methodology to pass muster under the IDEA) (quoting R.P. ex rel. C.P. v. Prescott Unified Sch. Dist., 631 F.3d 1117, 1122 (9th Cir. 2011)). Moreover, this Hearing Officer was persuaded by the testimony of Witness A (who is an expert in school psychology) that the Student would be bored by ABA instruction. It is notable that Witness A knows the Student well, whereas Witness H mainly reviewed the Student’s records. This Hearing Officer cannot agree with Petitioner that the IEPs failed to provide the Student with necessary interventions to address the Student’s autism.

Petitioner also contended that the Student needed a “full-time” special education placement, arguing that the Student does not like to associate with non-disabled peers. But Petitioner did not acknowledge the importance of placing students in the least

restrictive environment. In enacting the IDEA, “Congress was concerned about the apparently widespread practice of relegating handicapped children to private institutions or warehousing them in special classes.” Sch. Comm. of Town of Burlington v. Dep’t of Educ. of Mass., 471 U.S. 359, 373 (1985). Accordingly, in formulating an appropriate IEP, an IEP team must “be mindful of IDEA’s strong preference for ‘mainstreaming,’ or educating children with disabilities ‘[t]o the maximum extent appropriate’ alongside their non-disabled peers.” Gagliardo v. Arlington Cent. Sch. Dist., 489 F.3d 105, 108 (2d Cir. 2007) (quoting 20 U.S.C. § 1412(a)(5)); Lachman v. Ill. State Board of Educ., 852 F.2d at 295 (“[IDEA’s] requirement that mainstreaming be provided to the maximum extent appropriate indicates a very strong congressional preference”); Oberti v. Board of Educ., 995 F.2d 1204 (3d Cir. 1993) (setting forth stringent standards for school districts in connection to their duties to provide an education to students with disabilities in the Least Restrictive Environment). Moreover, Petitioner did not present any authority to establish that a student’s reluctance to engage with non-disabled peers should lead to an IEP that excludes the student’s association with such peers, and Petitioner did not conclusively establish the Student’s need for such an exclusion, since DCPS presented testimony through Witness C to the effect that the Student did have a friend in the “lunch bunch” group who was not disabled. Finally, Petitioner did not present sufficient evidence to suggest that the Student is struggling in classes with non-disabled peers. In fact, Witness C testified that the Student has done well in Anatomy and Physiology, which is in an “inclusion” setting. Under the circumstances, therefore, the Student does not need a full-time educational program.

Petitioner also contended that the Student did not receive sufficient speech and language services. Respondent called Witness D and Witness F to support its contention that the sixty minutes per month of services were appropriate, but no speech and language evaluations of the Student had been conducted since 2011 (until the recent evaluation in January, 2019). Moreover, neither Witness D nor Witness F were specific about how the IEP team decided to provide the Student with sixty minutes per month of speech and language therapy. Instead, they indicated that they try to wean students off speech services to prepare them for the world outside. More convincing was the testimony of Petitioner's speech and language expert, Witness K, who pointed out that the Student's recent speech evaluation indicated that the Student's expressive and receptive language skills were low, and that the Student required at least 120 minutes per month of services. In fact, the recent evaluation found that the Student's receptive vocabulary skills were lower than ninety-nine percent of students in his/her cohort, and the March, 2018, IEP spoke to speech and language concerns in class. That IEP indicated that the Student had not been "using strategies" and as a result was missing crucial information and not completing work correctly. Moreover, Respondent did not show that the Student's special education teachers were working on speech and language issues in class. To provide the Student with the appropriate amount of assistance in speech, Respondent should have provided the Student with at least 120 minutes per month of speech and language therapy during the time period at issue.

Similarly, the Student should have received behavior support services in all of his/her IEPs during the 2017-2018 and 2018-2019 school years. As with the Student's speech and language issues, DCPS was on notice that the Student had emotional issues,

even though the Student may not have presented that way in class. In the Student's psychological evaluation of July, 2014, BASC-2 testing indicated that the Student had elevated scores in school problems, behavioral symptoms, and adaptive skills, and was at-risk in developmental and social disorders, attention problems, learning problems, atypicality, withdrawal, leadership, study skills, and communication. The Student was also deemed to be "clinically significant" in the area of social skills and depression. Moreover, during the 2016-2017 school year, the school staff noticed that the Student would sometimes come to school with dirty clothing, and the Student told school staff that his/her mother had hit him/her and attempted to set his/her clothes on fire while s/he was wearing them. As a result, school staff contacted child protective services in regard to Petitioner's care of the Student. Yet there is no evidence that Respondent even considered giving the Student behavior support services at that time, most likely because the Student is pleasant and does not cause trouble in class.

In fact, the Student has been experiencing emotional issues at school, as discussed by Petitioner in her credible testimony. The Student has been subjected to bullying and has been very concerned about criminal incidents that occurred in or around the school. Courts have been clear that schools must be vigilant when it comes to student bullying. T.K. v. New York City Dep't of Educ., 779 F. Supp. 2d 289, 316 (E.D.N.Y. 2011) ("under IDEA the question to be asked is whether school personnel was deliberately indifferent to, or failed to take reasonable steps to prevent bullying"); Shore Regional High School Board of Education v. P.S., 381 F.3d 194 (3d Cir. 2004) (denial of FAPE based on the likelihood that a proposed placement would subject a student with an emotional disability to continued bullying because of perceived effeminacy); M.L. v.

Federal Way School District, 394 F.3d 634 (9th Cir. 2005) (if a teacher is deliberately indifferent to the teasing of a child with a disability and the abuse is so severe that the child can derive no benefit from the services that he or she is offered by the school district, the child has been denied FAPE). Under the circumstances, the testimony of Witness H, to the effect that the Student required behavior support services, was convincing. Respondent should have considered, and provided, counseling to the Student during the 2017-2018 and 2018-2019 school years.

Petitioner also contended that the IEP should have had goals to address the Student's adaptive functioning needs and daily living skills. The Student does not know how to operate appliances, prepare meals, turn off the water, make change with money, or transport him/herself. Respondent did not clearly present evidence that these goals would have been inappropriate for the Student, and did not clearly address this issue during closing argument. Moreover, there is nothing in the record to suggest that the Student received any such training in the classroom.

Finally, in regard to the Student's Post-Secondary Transition Plan, transition services are defined as "a coordinated set of activities for a child with a disability" that is a "results oriented process" that is in turn "based on the individual child's needs." 34 CFR Sect. 300.43. The focus of transition services is to "improve the academic and functional achievement of a child with a disability, to facilitate the child's movement from school to post-school activities." Id. Services must be "based on an individual child's needs, taking into account the child's strengths, preferences and interests" and including instruction, related services, community experiences, employment and other post-school adult living objectives, and "if appropriate" acquisition of daily living skills

and provision of a functional vocational evaluation. Id.; see also 71 Fed. Reg. 46579 (2006) (definition of transition services is written broadly). Beginning when a student is 16, or younger if determined to be appropriate by the IEP team, the IEP must include appropriate measurable post-secondary goals based upon appropriate transition assessments relating to training, education, employment, and where appropriate independent living skills. 34 CFR Sect. 300.320(b); 20 U.S.C. Sect. 1414(d)(1)(A)(i)(VII).

Petitioner is correct that the Student's Post-Secondary Transition Plans should not have had a goal that the Student should try to obtain a mathematics degree from Michigan State University, as was included in the plans of March, 2018, and November, 2018. This kind of language is unrealistic and not helpful. Still, Petitioner did not clearly criticize the bulk of the Student's Post-Secondary Transition Plan, which was otherwise appropriately designed as a result of appropriate assessments. Petitioner argued that the plan was premised on skills that the Student does not in fact have, apparently referring to a statement that the Student made that was reported in the plans contained in the IEPs of March, 2017, and April, 2017 (see, e.g., P-5-19, paragraph beginning with "I know what my legal permanency goal is"). However, this language in the Post-Secondary Transition Plans was not presented as a statement of fact. Rather, it was presented as the Student's own perspective on his/her skills. Moreover, the transition plans in the IEPs of March, 2018, and November, 2018, did not include this language and indicated that the Student "does not know what accommodations and adaptations are needed to be successful in the post-second setting."

In sum, the Student's IEPs for the 2017-2018 and 2018-2019 school year provided the Student with insufficient adaptive functioning goals, speech and language therapy, and behavior support services (until November, 2018).² As a result, Respondent denied the Student educational benefit, and therefore a FAPE.

2. From approximately July, 2017, to November, 2018, did DCPS fail to reevaluate the Student? If so, did DCPS violate 34 C.F.R. Sect. 300.303 and related provisions? If so, did DCPS deny the Student a FAPE?

Petitioner contended that the Student was due a triennial reevaluation in July, 2017, but that no reevaluation was completed until November, 2018.

Pursuant to 34 CFR 300.303(a), a public agency must ensure a reevaluation of each child with a disability if the public agency determines that the child's educational or related services needs, including improved academic achievement and functional performance, warrant a reevaluation, or if the child's parent or teacher requests a reevaluation. A reevaluation conducted under 34 CFR 300.303(a) may occur not more than once a year, unless the parent and the public agency agree otherwise, and must occur at least once every three years, unless the parent and the public agency agree that a reevaluation is unnecessary. 20 USC 1414 (a)(2). During such a reevaluation, the failure to go beyond merely reviewing existing data can constitute a denial of FAPE if more information is needed to develop an appropriate IEP. James v. D.C., 194 F. Supp. 3d 131, 142 (D.D.C. 2016) (the "Summary of Existing Data" that the District of Columbia prepared in response to a guardian's request for an updated psychological assessment of a teenager with an intellectual disability did not fulfill the district's obligation to reevaluate

²It is noted that, in District of Columbia, the IEP must be comprehensive, and that IEPs that do not provide appropriate related services mandates can be considered inappropriate. McKenzie v. Smith, 771 F.2d 1527, 1533 (D.C. Cir. 1985); 34 CFR Sect. 300.324(a)(1)(iv) (the IEP must address the academic, developmental, and functional needs of the child).

the student). In the wake of Endrew F., it is especially important for districts to monitor students and be alert to indications that a student needs to be reevaluated (even when a triennial evaluation is not due and the parent has not requested a reevaluation) to ensure the student's IEP continues to be reasonably calculated to enable the child to make progress that is appropriate in light of the child's circumstances. Questions and Answers on Endrew F. v. Douglas County Sch. Dist. Re-1, 71 IDELR 68 (U.S. Dep't of Educ. 2017). Still, for there to be a FAPE denial on this issue, a parent should show that the failure to evaluate resulted in a substantive harm to the student. Suggs v. District of Columbia, 679 F. Supp. 2d 43 (D.D.C. 2010).

Here, as suggested in the analysis of Issue #1, Respondent failed to conduct either a speech and language evaluation or an assessment of the Student's behaviors during the triennial evaluation. In fact, the record indicates that the Student had not been formally assessed in regard to speech and language issues since 2011. Respondent therefore was not aware that the Student's receptive vocabulary functioning was as low as the first percentile, as reported in the speech and language assessment of January, 2019. If a student has severe speech issues, it is appropriate to give formal assessments more than once every eight years.

Moreover, the school district was on notice that the Student may have had behavioral issues through the psychological evaluation of 2014, but did not assess the Student's behavioral issues until the psychological evaluation of November, 2018. DCPS also should have suspected that the Student may have had some behavioral or emotional issues since s/he reported to teachers that his/her mother had tried to set his/her clothes on fire while s/he was wearing them. (Petitioner testified, in response, that the Student tends

to make things up at the behest of his/her father). After the psychological evaluation of November, 2018, DCPS provided the Student with behavioral support services, but those services should have been on the Student's IEP from March, 2017, onward.

Additionally, Respondent should have conducted a comprehensive psychological evaluation of the Student earlier than November, 2018, when it did so only at the request of Petitioner. The Student's psychological evaluation of November, 2018, indicated that the Student's full scale IQ had declined, which is unusual since IQ scores tend to be stable over time. This is information that the IEP team should have considered when it formulated the Student's educational program in March, 2018. Respondent's view was that teacher reports were sufficient in determining the Student's needs. In fact, Witness A testified that new assessments are not needed in a triennial reevaluation unless there is a major event, such as a car accident or a seizure. But teachers are not qualified to assess a student's IQ, and Witness A's approach to reevaluations is not necessarily consistent with cases such as James. Under the circumstances, Respondent denied the Student educational benefit, and therefore a FAPE, by failing to conduct a thorough triennial evaluation in March, 2018.

3. Did DCPS fail to provide Petitioner with educational records? If so, did DCPS violate 34 CFR Sect. 300.501, D.C. Code Sect. 38-2571.03 and related provisions? If so, did DCPS deny the Student a FAPE?

20 USC 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 CFR 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 USC 1232g (FERPA)). 34 CFR 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 CFR 99.3.

Petitioner’s main issue in this regard was that the Student’s November, 2018, IEP was not provided to her timely, and of course school districts should promptly provide parents with copies of their child’s IEP. However, Petitioner herself did not mention the records issue during testimony. Petitioner also did not present any argument that the records issue had any substantive impact on the Student’s education. Kruvant v. District of Columbia, 99 Fed. App’x. 232, 233 (D.C. Cir. 2004). Moreover, Petitioner did not present any authority to support this claim, which must therefore be dismissed.

RELIEF

Petitioner seeks a new IEP that recommends services to address daily living skills, contains adaptive goals, provides sufficient speech and language therapy, includes sufficient behavior support services, and provides compensatory education.³

When school districts deny students a FAPE, courts have wide discretion to ensure that students receive a FAPE going forward. As the Supreme Court stated, the statute directs the Court to “grant such relief as [it] determines is appropriate.”

Burlington, 471 U.S. at 371. The ordinary meaning of these words confer broad discretion on a hearing officer, since the type of relief is not further specified, except that it must be “appropriate.” 20 U.S.C. Sect. 1415(i)(2)(C)(iii).

Petitioner’s request for adaptive functioning goals and services is appropriate, as indicated earlier in this HOD, but the record is not clear on how those goals should be written, or how the corresponding services should be delivered. Accordingly, Respondent will be ordered to update the Student’s IEP to add adaptive functioning goals and services to allow the Student to make appropriate progress on daily living skills.

As also indicated earlier in this HOD, it is appropriate to increase the Student’s speech and language services. Witness K was credible on this issue, indicating that the Student should receive at least 120 minutes of speech and language therapy per month, which will be so ordered. Respondent already added behavioral support services to the IEP, and Petitioner did not clearly indicate that the existing behavior support services

³It is not appropriate for hearing officers to consider requests for relief that do not correspond to FAPE denial. As a result, the requests for a new transition plan, additional autism interventions, full-time therapeutic placement at School B, and an order to produce educational records must be denied.

were inappropriate. Accordingly, there is no need to adjust the Student's behavior support services mandate going forward.

Finally, Petitioner is seeking 100 hours of tutoring and seventy-five hours of mentoring as 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, 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). Some students may require only short, intensive compensatory programs targeted at specific problems or deficiencies. Reid, 401 F.3d at 524.

Petitioner's compensatory education plan is supported by the testimony of Witness G, who created a plan that is premised on FAPE deprivation from March, 2017, to present. Witness G's testimony in favor of compensatory mentoring services corresponds to the lack of behavior support services for the Student. However, the Student received appropriate behavior support services when his/her IEP was amended in November, 2018. As a result, at least in regard to compensatory mentoring, the time

period in the proposed compensatory education plan goes beyond the time period of FAPE denial in this HOD. As a result, the request for seventy-five hours of mentoring will be reduced to fifty hours of mentoring, to be provided by a person with at least five years of experience in the professional mentoring of students.

Petitioner also seeks 100 hours of tutoring to compensate the Student for the failure to provide him/her with adequate instruction. There was no finding that the Student did not receive enough specialized instruction during the time period in question. However, there was a finding that the Student did not receive appropriate adaptive functioning goals during this time period. Additionally, there was a finding that the Student did not receive sufficient speech and language therapy. At least in part due to Respondent's failure to provide enough speech therapy, the Student had difficulty understand materials in class during this time period. Under the circumstances, this Hearing Officer will order that the Student receive seventy-five hours of academic tutoring, to be provided by a special education teacher, at a usual and customary rate in the community.

VII. Order

As a result of the foregoing:

1. Respondent shall pay for fifty hours of compensatory mentoring for the Student, to be provided by an individual with at least five years of experience in professional mentoring, at a usual and customary rate in the community;
2. Respondent shall pay for seventy-five hours of compensatory tutoring for the Student, to be provided by a licensed special education teacher, at a usual and customary rate in the community;

3. Respondent shall reconvene the IEP team within thirty days to revise the Student's IEP to add goals and services relating to adaptive functioning;

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

Dated: June 12, 2019

Michael Lazan
Impartial Hearing Officer

cc: Office of Dispute Resolution
Attorney A, Esq.
Attorney B, Esq.
OSSE Division of Specialized Education
[REDACTED]/DCPS
[REDACTED]/DCPS

VIII. Notice of Appeal Rights

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

Date: June 12, 2019

Michael Lazan

Impartial Hearing Officer