

**DISTRICT OF COLUMBIA
OFFICE OF THE STATE SUPERINTENDENT OF EDUCATION**

Office of Dispute Resolution
1050 First Street, N.E., Third Floor
Washington, D.C. 20002

OSSE
Office of Dispute Resolution
June 09, 2020

<i>Student</i> , ¹)	Case No.: 2020-0099
through <i>Parent</i> ,)	
<i>Petitioner</i> ,)	Date Issued: 6/9/20
)	
v.)	Hearing Officer: Keith L. Seat, Esq.
)	
Public Charter School)	Hearing Dates: 6/4/20 & 6/5/20
("PCS"),)	Video Platform: Microsoft Teams
Respondent.)	
)	

HEARING OFFICER DETERMINATION

Background

Petitioner, Student's Parent, pursued a due process complaint alleging that Student had been denied a free appropriate public education ("FAPE") in violation of the Individuals with Disabilities Education Improvement Act ("IDEA") due to PCS's failure to meet its Child Find obligations and provide education documents. PCS responded that it had no reason to suspect Student of being a child with a disability in need of special education, so provided a Section 504 Plan,² and that it timely provided all documents.

Subject Matter Jurisdiction

Subject matter jurisdiction is conferred pursuant to the IDEA, 20 U.S.C. § 1400, *et seq.*; the implementing regulations for IDEA, 34 C.F.R. Part 300; and Title V, Chapter E-30, of the District of Columbia Municipal Regulations ("D.C.M.R.").

Procedural History

Following the filing of the due process complaint in this matter on 5/4/20, the case was assigned to the undersigned on 5/5/20. Respondent filed a timely response on 5/12/20, which did not challenge jurisdiction. Petitioner had filed a prior due process complaint

¹ Personally identifiable information is provided in Appendix A, including terms initially set forth in italics.

² See Section 504 of the Rehabilitation Act of 1973, 29 U.S.C. § 701, *et seq.*

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raising the same issues on 2/3/20, which was amended on 2/25/20 and withdrawn without prejudice due to problems with disclosures on 5/4/20. A resolution meeting was held only in the original case. The 30-day resolution period ended on 6/3/20. A final decision in this matter must be reached no later than 45 days following the end of the resolution period, which requires a Hearing Officer Determination (“HOD”) by 7/18/20.

The prehearing conference was held on 5/13/20 and the Prehearing Order issued on 5/16/20 and amended on 5/29/20 to incorporate clarifications requested by Petitioner. The due process hearing took place on 6/4/20 and 6/5/20 and was closed to the public. Petitioner was represented by *Petitioner’s counsel*. PCS was represented by *Respondent’s counsel*. Petitioner was present by videoconference for the hearing.

Petitioner’s Disclosures, submitted on 5/28/20, contained documents P-1 through P-66, all of which were admitted into evidence without objection except for P-61, which was not admitted based on PCS’s objection. Respondent’s Disclosures, submitted on 5/28/20, contained documents R-1 through R-29, all of which were offered into evidence except for R-18, R-19 and R-25, which were withdrawn; all remaining documents were admitted into evidence without objection.³

Petitioner’s counsel presented 3 witnesses in Petitioner’s case-in-chief (*see* Appendix A):

1. Parent
2. *Psychologist* (qualified over objection as an expert in School Psychology)
3. *Educational Advocate* (qualified without objection as an expert in Special Education)

Respondent’s counsel presented 1 witness in Respondent’s case (*see* Appendix A): *Director of Student Support Services* at PCS (qualified without objection as an expert in Special Education and School Psychology)

Petitioner’s counsel did not present any rebuttal witnesses.

Petitioner filed a Motion for Partial Summary Judgment on Failure to Transmit Records to Local Education Agency (“LEA”) on 5/27/20; PCS filed a Cross-Motion and Opposition to Petitioner’s Motion for Partial Summary Judgment on 5/28/20, and Petitioner filed an Opposition to PCS’s Cross-Motion and Reply on Partial Summary Judgment on 6/2/20. After a discussion on the record on the merits at the due process hearing, the undersigned denied Petitioner’s Partial Summary Judgment and granted PCS’s Cross-Motion on Failure to Transmit Records to LEA which resolved a significant portion of Issue 2, below. The decision to grant PCS’s cross-motion was based on 34 C.F.R. § 300.323(g)

³ Both Petitioner’s and Respondent’s documents have pages numbered sequentially and are cited herein without leading zeroes as P1, P2, P3 for Petitioner and R1, R2, R3 for Respondent; pages in the same exhibit are indicated as P1,3 or if a page range, R1-3.

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which requires transmittal of documents only for children with disabilities, which is defined in 34 C.F.R. § 300.8 as a child who is evaluated and found to have autism, among other conditions, “who by reason thereof, needs special education and related services.” Since Student had been found not to need special education in March 2017, Student no longer came within § 300.323(g) when transferring to *Current School* and PCS had no obligation to transfer documents as a matter of law. (PCS was prepared to present other defenses to the claim as well.)

The issues to be determined in this Hearing Officer Determination are:

Issue 1: Whether PCS denied Student a FAPE by failing to identify, locate and evaluate Student beginning as early as 5/4/18 pursuant to its Child Find obligations based on Student’s deteriorating grades and behavior after PCS exited Student from special education and related services. (*Petitioner has the burden of persuasion on this issue.*)

Issue 2: Whether PCS denied Student a FAPE by failing to provide education records upon request to Petitioner.⁴ (*Petitioner has the burden of persuasion on this issue.*)

The relief requested by Petitioner is:

1. A finding that Student was denied a FAPE.
2. Within 7 days, Respondent shall provide a copy of all remaining educational records from Student’s enrollment with Respondent to (a) Parent, and (b) Student’s current LEA.
3. Respondent shall fund (a) independent Behavioral Support Services, and (b) other independent compensatory education, all by providers chosen by Parent.⁵
4. Any other appropriate relief.

⁴ As stated above, PCS’s Cross-Motion on Failure to Transmit Records to LEA was granted on the record at the due process hearing, which eliminated half of Issue 2 with deletion of the phrase from Issue 2 “and/or to Student’s current LEA.”

⁵ Petitioner’s counsel was put on notice at the prehearing conference that, at the due process hearing, Petitioner must introduce evidence supporting the requested compensatory education, including evidence of the educational deficits resulting from Student’s alleged denial of FAPE and the compensatory measures needed to best correct those deficits, i.e., to elevate Student to the approximate position Student would have enjoyed had Student not suffered the alleged denial of FAPE. Respondent was encouraged to be prepared at the due process hearing to introduce evidence contravening the requested compensatory education in the event a denial of FAPE was found.

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Findings of Fact

After considering all the evidence, as well as the arguments of counsel, the Findings of Fact⁶ are as follows:

1. Student is a resident of the District of Columbia; Petitioner is Student's Parent.⁷ Student is *Age*, *Gender* and in *Grade* at Current School.⁸ Student is a bright student and does well academically, although sometimes has disruptive behavior in the academic setting.⁹

2. IEPs. Student's IEPs were based on the disability classification of Autism Spectrum Disorder ("ASD").¹⁰ Student's 3/13/15 IEP provided 1 hour/week of specialized instruction inside general education and 1 hour/week of specialized instruction outside general education, along with 180 minutes/month of Behavioral Support Services ("BSS") outside general education and specialized instruction consultation for 120 minutes/month, BSS consultation for 60 minutes/month, and Occupational Therapy ("OT") consultation for 15 minutes/month, and a dedicated aide for 7 hours/day inside general education.¹¹ Student's IEP was amended on 8/31/15 to decrease the dedicated aide from 7 hours/day to 3.5 hours/day.¹² Parent agreed to the reduction, not realizing she had a choice.¹³

3. Student's 3/10/16 IEP reduced Student's services to 30 minutes/week of specialized instruction inside general education and 30 minutes/week of written expression outside general education, along with 120 minutes/month of BSS outside general education and 60 minutes/month of BSS consultation, and a dedicated aide for 3.5 hours/day.¹⁴ Student's preferred dedicated aide no longer was with Student by 3/10/16.¹⁵ Student's 3/7/17 IEP was a "hold-over" IEP which continued the same level of services until Student's eligibility review on 3/17/17.¹⁶

⁶ Footnotes in these Findings of Fact refer to the sworn testimony of the witness indicated or to an exhibit admitted into evidence. To the extent that the Hearing Officer has declined to base a finding of fact on a witness's testimony that goes to the heart of the issue(s) under consideration, or has chosen to base a finding of fact on the testimony of one witness when another witness gave contradictory testimony on the same issue, the Hearing Officer has taken such action based on the Hearing Officer's determinations of the credibility and/or lack of credibility of the witness(es) involved.

⁷ Parent.

⁸ Parent; P134.

⁹ P134.

¹⁰ P71; P108; P156.

¹¹ P71,77.

¹² P85,90.

¹³ P90; Parent.

¹⁴ P108,113.

¹⁵ Parent.

¹⁶ P156,162; Educational Advocate.

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4. Dedicated Aide. Prior to receiving a dedicated aide, Student had numerous disruptive and self-injurious behavior issues, from banging Student's head on the desk to near daily elopement.¹⁷ Student did not listen to the teacher; the dedicated aide needed to redirect Student.¹⁸ Student's first two dedicated aides were not effective; Student's third dedicated aide clicked and was very effective with Student over a significant period, although Student's dedicated aide support was reduced from 7 hours/day (full-time) to 3.5 hours/day on 8/31/15.¹⁹ Student's preferred dedicated aide could calm Student and keep Student in the classroom to learn, which impacted Student's academics greatly, but the positive impact was only when the dedicated aide was present.²⁰ A dedicated aide can be included in a Section 504 Plan when needed, but was not discussed for Student.²¹

5. Cognitive Abilities. A comprehensive psychological evaluation of Student was conducted in February 2017, with a report dated 3/1/17.²² Based on the Wechsler Intelligence Scale for Children – Fifth Edition (“WISC-V”), Student had a Full Scale IQ (“FSIQ”) scale score of 111, which was in the Average Range at the 77th percentile (compared to peers), with indices ranging from a Verbal Comprehension Index score of 133, in the Extremely High Range at the 99th percentile, to a Processing Speed Index score of 80, in the Low Average Range at the 9th percentile.²³

6. Academics. Based on Woodcock-Johnson IV (“WJ-IV”) data, Student's academic skills ranged from Low Average to Superior; Student's performance on achievement measures was commensurate with Student's abilities based on the WISC-V and suggested that Student had acquired appropriate skills for success in the classroom.²⁴

7. Grades/PARCC. Student's grades declined in the 4th quarter of 2016/17,²⁵ the first quarter without an IEP; Student's preferred dedicated aide was still at PCS but had not been regularly working with Student.²⁶ Student's grades in academic courses declined further in 2017/18.²⁷ Student's English Language Arts (“ELA”) PARCC score for 2017/18 was 721, at performance level 2; Student scored better than 68% of peers at PCS.²⁸ Student's math PARCC score for 2017/18 was 714, at performance level 2; Student scored better than 43% of peers at PCS.²⁹

¹⁷ Parent.

¹⁸ *Id.*

¹⁹ Parent; P90.

²⁰ Parent.

²¹ Director of Student Support Services.

²² P134.

²³ P138.

²⁴ P146.

²⁵ All dates in the format “2016/17” refer to school years.

²⁶ P219; Parent; Educational Advocate; Psychologist.

²⁷ P231; Educational Advocate; Psychologist.

²⁸ P243-44.

²⁹ P245-46.

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8. Exit from Special Education. Student's symptomatology did not appear to have an adverse effect on learning; Student occasionally presented behavioral issues which did not impede Student's ability to function to full academic potential.³⁰ On 3/17/17, an Evaluation Summary Report noted that reading and math were not areas of concern for Student; in written expression, both Parents noted that Student's production of writing had improved; Student was able to write developmentally appropriate sentences and did not demonstrate any areas of concern in written expression.³¹ The 3/1/17 evaluation noted that Student did not continue to meet criteria for special education services as a student with a disability under the IDEA, although final decisions were to be made by the Multi-disciplinary Team ("MDT").³² The MDT met on 3/17/17 and determined that Student should be exited from special education services, specifically specialized instruction for academic needs, and noted that a Section 504 Plan may be the next step for Student.³³

9. Behavior/Section 504 Plan. Student had significant behavior issues; PCS sought to address Student's behaviors through a Behavioral Intervention Plan ("BIP") on 11/4/16 and then a draft BIP on 11/16/17.³⁴ Student's behavior challenges and deficits resulted in the team recommending a Section 504 Plan.³⁵ Student was at or above grade level; Student didn't need special education, just the support of a Section 504 Plan.³⁶ Student had the skills needed and didn't need to be taught by a special educator, just someone to motivate Student to complete tasks; the team concluded that Student did not need specialized instruction.³⁷

10. The comprehensive psychological evaluation stated that Student's ongoing behavior challenges and deficits in social functioning could be accommodated with a Section 504 Plan, which would offer ongoing behavior support services to Student.³⁸ A Section 504 Plan for Student was developed on 3/28/17 which Parent said resulted in more calls from PCS about Student.³⁹ The 3/28/17 Section 504 Plan did not include goals, but had 120 minutes/month of behavioral/counseling supports outside general education.⁴⁰

11. Need for Special Education in 2018. Parent disagreed with removing Student's IEP in March 2017 due to concerns that Student would regress.⁴¹ Parent met with the PCS principal about her concerns and the principal said that the "educational part" was not

³⁰ P147; Director of Student Support Services.

³¹ P181-85.

³² P147-48.

³³ P193; P197.

³⁴ Parent; P123; P223.

³⁵ Director of Student Support Services.

³⁶ *Id.*

³⁷ *Id.*

³⁸ P147-48.

³⁹ P212; Parent.

⁴⁰ P213.

⁴¹ Parent.

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present for putting Student back on an IEP.⁴² PCS did not call for an IEP meeting, consider whether Student needed to be back on an IEP, or conduct an initial evaluation.⁴³ Psychologist believed an MDT meeting should have been called late in 2017/18 to reassess Student's need for special education.⁴⁴

12. Student had no problem with reading; Student was on level Z, the highest level and well above Student's Grade.⁴⁵ Student was often reluctant to work during the math block, but Student understood the math concepts when Student did the work; Student needed a more positive attitude and to be ready to work in math.⁴⁶ Director of Student Support Services explained that Student was not struggling with content in written expression, but was simply refusing to produce work most of the time during the writing block, and was not turning in work.⁴⁷ In social studies, Student was offered multiple opportunities to complete work and continually refused.⁴⁸

13. Behavior issues continued with fewer incidents in 2017/18 than in 2016/17; logs kept by PCS indicated that Student had about 24 incidents from 2/8/17 through 6/6/17 and about 10 incidents from 8/30/17 through 3/7/18.⁴⁹ At a 6/13/18 MDT meeting, PCS developed a more robust Section 504 Plan for Student to take to Current School in the Fall, which doubled behavioral/counseling supports to 240 minutes/month, added 30 minutes of behavioral/counseling consultation, added 3 goals, and added other accommodations.⁵⁰

14. Parent did not raise concerns about special education at the 6/13/18 meeting and had not raised special education concerns previously; nor had Student's counselors or teachers raised special education concerns at PCS.⁵¹ PCS had no reason to believe that Student needed special education on or after 5/4/18.⁵² It was reasonable for PCS to make Student's Section 504 Plan more robust and not to consider re-evaluation since Student had been evaluated fairly recently.⁵³

15. Current School. Student began Current School at the beginning of 2018/19; on 9/28/18 Current School developed its own Section 504 Plan for Student, cutting back on the Section 504 Plan that Student brought from PCS, even though Student's behaviors were more severe and more frequent at Current School.⁵⁴ By April 2019, Parent sought more

⁴² *Id.*

⁴³ *Id.*

⁴⁴ Psychologist.

⁴⁵ P228.

⁴⁶ P228; P232.

⁴⁷ Director of Student Support Services; P228.

⁴⁸ P229.

⁴⁹ P132; P239-41; Psychologist; Educational Advocate.

⁵⁰ P248-50; Psychologist; Director of Student Support Services; Parent.

⁵¹ Director of Student Support Services.

⁵² *Id.*

⁵³ *Id.*

⁵⁴ P67; P266-67; Educational Advocate.

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support on the Section 504 Plan at Current School.⁵⁵ Student received suspensions at Current School for unsafe and aggressive behaviors in 2018/19, and continued to deteriorate in 2019/20.⁵⁶ A Current School team met on 5/28/20 and found that Student was suspected of having a disability under IDEA and needed a full initial evaluation.⁵⁷ Parent had not asked Current School for an evaluation earlier as she did not know she could.⁵⁸ Parent believed Current School's evaluation of Student should have occurred soon after Student began there in 2018/19; Parent has a due process complaint pending against Current School.⁵⁹

16. Documents. On 1/14/20, Educational Advocate requested documents on behalf of Parent for the past 3 years: 2016/17, 2017/18 and 2018/19.⁶⁰ In response, Respondent's counsel provided documents on 2/11/20 and additional documents on 2/12/20.⁶¹ Educational Advocate and Petitioner's counsel requested more documents from 2014/15 and 2015/16 at the resolution meeting, which Respondent's counsel provided the same day; Respondent's counsel offered further help if Petitioner needed anything else, but no further documents were requested on behalf of Petitioner and no documents were claimed to be missing.⁶²

Conclusions of Law

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

The overall purpose of the IDEA is to ensure that "all children with disabilities have available to them a free appropriate public education that emphasizes special education and related services designed to meet their unique needs and prepare them for further education, employment, and independent living." 20 U.S.C. § 1400(d)(1)(A). *See Boose v. Dist. of Columbia*, 786 F.3d 1054, 1056 (D.C. Cir. 2015) (the IDEA "aims to ensure that every child has a meaningful opportunity to benefit from public education").

"The IEP is 'the centerpiece of the statute's education delivery system for disabled children.'" *Andrew F. ex rel. Joseph F. v. Douglas County Sch. Dist. RE-1*, 137 S. Ct. 988, 994, 197 L. Ed. 2d 335 (2017), *quoting Honig v. Doe*, 484 U.S. 305, 311, 108 S. Ct. 592, 98 L.Ed.2d 686 (1988). "The IEP is the means by which special education and related services are 'tailored to the unique needs' of a particular child." *Andrew F.*, 137 S. Ct. at 994,

⁵⁵ Parent.

⁵⁶ R67.

⁵⁷ P69.

⁵⁸ Parent.

⁵⁹ *Id.*

⁶⁰ P297-98; Educational Advocate.

⁶¹ P300-06.

⁶² P308; Educational Advocate.

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quoting *Bd. of Educ. of Hendrick Hudson Cent. Sch. Dist. v. Rowley*, 458 U.S. 176, 181, 102 S. Ct. 3034, 73 L. Ed. 2d 690 (1982).

Once a child who may need special education services is identified and found eligible, Respondent must devise an IEP, mapping out specific educational goals and requirements in light of the child's disabilities and matching the child with a school capable of fulfilling those needs. See 20 U.S.C. §§ 1412(a)(4), 1414(d), 1401(a)(14); *Endrew F.*, 137 S. Ct. at 994; *Sch. Comm. of Town of Burlington, Mass. v. Dep't of Educ. of Mass.*, 471 U.S. 359, 369, 105 S. Ct. 1996, 2002, 85 L. Ed. 2d 385 (1985); *Jenkins v. Squillacote*, 935 F.2d 303, 304 (D.C. Cir. 1991); *Dist. of Columbia v. Doe*, 611 F.3d 888, 892 n.5 (D.C. Cir. 2010).

The IEP must be "reasonably calculated to enable a child to make progress appropriate in light of the child's circumstances." *Endrew F.*, 137 S. Ct. at 1001. The Act's FAPE requirement is satisfied "by providing personalized instruction with sufficient support services to permit the child to benefit educationally from that instruction." *Smith v. Dist. of Columbia*, 846 F. Supp. 2d 197, 202 (D.D.C. 2012), citing *Rowley*, 458 U.S. at 203. The IDEA imposes no additional requirement that the services so provided be sufficient to maximize each child's potential. *Rowley*, 458 U.S. at 198. In its decision, the Supreme Court made very clear that the standard is well above *de minimis*, however, stating that "[w]hen all is said and done, a student offered an educational program providing 'merely more than *de minimis*' progress from year to year can hardly be said to have been offered an education at all." *Endrew F.*, 137 S. Ct. at 1001.

In addition, the LEA must ensure that to the maximum extent appropriate, children with disabilities are educated with children who are nondisabled, and special classes, separate schooling, or other removal of children with disabilities from the regular educational environment occurs only if the nature or severity of the disability is such that education in regular classes with the use of supplementary aids and services cannot be achieved satisfactorily. 34 C.F.R. § 300.114; *Endrew F.*, 137 S. Ct. at 1000 (children with disabilities should receive education in the regular classroom to the extent possible); *Montuori ex rel. A.M. v. Dist. of Columbia*, No. 17-cv-2455, 2018 WL 4623572, at *3 (D.D.C. 9/26/18).

A Hearing Officer's determination of whether a child received a FAPE must be based on substantive grounds. In matters alleging a procedural violation, a Hearing Officer may find that a child did not receive a FAPE only if the procedural inadequacies (i) impeded the child's right to a FAPE; (ii) significantly impeded the parent's opportunity to participate in the decision-making process regarding the provision of a FAPE to the parent's child; or (iii) caused a deprivation of educational benefit. 34 C.F.R. § 300.513(a). In other words, an IDEA claim is viable only if those procedural violations affected the child's *substantive* rights. *Brown v. Dist. of Columbia*, 179 F. Supp. 3d 15, 25-26 (D.D.C. 2016), quoting *N.S. ex rel. Stein v. Dist. of Columbia*, 709 F. Supp. 2d 57, 67 (D.D.C. 2010).

Petitioner carries the burden of production and persuasion, except on issues of the appropriateness of an IEP or placement on which Respondent has the burden of persuasion, if Petitioner establishes a *prima facie* case. D.C. Code Ann. § 38-2571.03(6); *Z.B. v. Dist. of*

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Columbia, 888 F.3d 515, 523 (D.C. Cir. 2018) (party seeking relief bears the burden of proof); *Schaffer ex rel. Schaffer v. Weast*, 546 U.S. 49, 62, 126 S. Ct. 528, 537, 163 L. Ed. 2d 387 (2005). “Based solely upon evidence presented at the hearing, an impartial hearing officer shall determine whether . . . sufficient evidence [was presented] to meet the burden of proof that the action and/or inaction or proposed placement is inadequate or adequate to provide the student with a FAPE.” 5-E D.C.M.R. § 3030.3.

Issue 1: *Whether PCS denied Student a FAPE by failing to identify, locate and evaluate Student beginning as early as 5/4/18 pursuant to its Child Find obligations based on Student’s deteriorating grades and behavior after PCS exited Student from special education and related services. (Petitioner has the burden of persuasion on this issue.)*

Petitioner failed to meet her burden of persuasion on this issue despite the importance of Child Find, by failing to show that Student needed special education services and not just a Section 504 Plan to deal with Student’s behavior following the ending of Student’s IEP by the MDT. The U.S. Court of Appeals for the District of Columbia emphasized in *DL v. Dist. of Columbia*, 860 F.3d 713, 717 (D.C. Cir. 2017), that Child Find is among the most important IDEA requirements, in order to identify, locate and evaluate every child in need of special education. *See* 34 C.F.R. § 300.111. As discussed below, whether Student needed special education on or after 5/4/18 is the key issue in this case.

The Child Find obligations of an LEA are triggered either by awareness of the child’s circumstances or by parental request. *See Long v. Dist. of Columbia*, 780 F. Supp. 2d 49, 57 (D.D.C. 2011). Here, Petitioner objected to the ending of special education services on 3/17/17 but did not expressly make a later request for a new evaluation of whether Student qualified based on the need for special education. Instead, Petitioner’s case is based on Student’s decline in grades and behavior that Petitioner asserts should have triggered a new initial evaluation of Student on or after 5/4/18.

The evidence is clear that Student is very bright, with an FSIQ score of 111 (in the 77th percentile compared to peers) and a Verbal Comprehension score of 133 (in the 99th percentile). Student was performing at or above grade level, with academics in the Average to Superior range. This was the foundation for PCS’s perspective that Student did not need special education, but only behavioral supports that could be provided with a Section 504 Plan. As discussed above, to be eligible under the IDEA as a “child with a disability” as defined in 34 C.F.R. § 300.8, Student must not only have autism (or another listed condition), but “by reason thereof” need special education and related services. “Special education” is defined in turn in 34 C.F.R. § 300.39(a) as “specially designed instruction” to meet the unique needs of a child with a disability. *See Q.C-C. v. Dist. of Columbia*, 164 F. Supp. 3d 35, 51 (D.D.C. 2016). Further, “specially designed instruction” means adapting “the content, methodology, or delivery of instruction” to address the unique needs of the child to ensure access to the general curriculum, so the child can meet the educational standards. 34 C.F.R. § 300.39(b)(3). *See Leggett v. Dist. of Columbia*, 793 F.3d 59, 63 (D.C. Cir. 2015).

The law is clear that if Student is entitled to an IEP it must be provided and substituting a Section 504 Plan will not suffice. “[W]hether or not a child is entitled to

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receive services under IDEA is statutorily defined and not a matter of educational policy. While school authorities are better situated than courts to determine what educational practices and materials to include in a child's IEP, they may not choose to exclude qualified children from receiving IDEA services.” *Yankton Sch. Dist. v. Schramm*, 93 F.3d 1369, 1376 n.9 (8th Cir. 1996), *quoting Rowley*, 458 U.S. at 208, 102 S. Ct. at 3052. Specifically, “the requirements of the IDEA cannot be met through compliance with Section 504 because the IDEA requires an individualized program while Section 504 is a broad anti-discrimination statute.” *N.L. ex rel. Mrs. C. v. Knox Cnty. Sch.*, 315 F.3d 688, 696 n.5 (6th Cir. 2003). *See also N.G. v. Dist. of Columbia*, 556 F. Supp. 2d 11, 29 (D.D.C. 2008). On the other hand, if an IEP is not appropriate, a “Section 504 Plan ‘is designed to assist students with learning or behavior problems even if they do not qualify for an Individualized Education Plan (IEP) under the IDEA.’” *Z.B. v. Dist. of Columbia*, 202 F. Supp. 3d 64, 68 (D.D.C. 2016) , *aff’d in part, vacated in part, remanded*, 888 F.3d 515 (D.C. Cir. 2018) (D.C. Cir. 2018), *quoting Horne v. Potomac Preparatory P.C.S.*, 209 F. Supp. 3d 146, 149 (D.D.C. 2016).

Here, Petitioner considered Student’s declining grades and challenging behavior to be clear indicators that PCS needed to move forward with another initial evaluation on or after 5/4/18 to seek to remedy those concerns. Petitioner asserted that Student’s behaviors and grades worsened when the IEP ended, but the evidence in the case suggests that Student’s IEP success was much more about working well with a particular dedicated aide – once rapport was developed – who could get Student to stay in the classroom and focus on the work. This sounds to the undersigned much more like assistance with behavior rather than the favored dedicated aide providing “specially designed instruction.” But for an extended period the dedicated aide did provide the calming influence and repetition of the teachers’ directions in a way that was helpful to Student and kept Student engaged with academics.

After Student no longer had a dedicated aide or an IEP beginning in mid-March 2017, teachers’ notes on Student’s report card indicated no need for special education and specially designed instruction, but highlight behavioral issues. Specifically, Student had no problem with reading, as Student was on the highest reading level and well above Student’s Grade. Student was often reluctant to work during the math block, but Student understood math concepts when Student did the work. Similarly, Student was not struggling with content in written expression, but simply refused to produce work. In the view of the undersigned, these do not suggest the need for a new initial evaluation, but confirm PCS’s decision to rely on a robust Section 504 Plan to focus on Student’s behavior.

Petitioner also raised concerns about Student’s behavioral incidents at PCS, yet the logs on which Petitioner relied to show the extent of Student’s incidents also suggest that the incidents were common before Student’s IEP ended and appeared to decline over time. Student had about 24 incidents from 2/8/17 through 6/6/17 but only about 10 incidents during the longer period from 8/30/17 through 3/7/18. This Hearing Officer does not consider these behavior concerns to show a need for special education and specially designed instruction for Student.

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Whether PCS made a reasonable or proper decision to end Student's IEP in March 2017 is not at issue in this case. Nor is there information in the record about when – much less why – the preferred dedicated aide stopped working with Student. The question at hand is simply whether, after the team at PCS ended Student's IEP on 3/17/17, PCS should have later recognized it had a Child Find duty to again begin an initial evaluation within the 2 year statute of limitations period beginning on 5/4/18. But as PCS asserted during the hearing, even if action had been taken as soon as 5/4/18, PCS had 120 days to complete the initial evaluation, and additional time to complete and implement an IEP, putting the outcome of the evaluation and possible provision of special education services well into 2018/19.⁶³ But by 2018/19 Student was at Current School and an IEP team from Current School would have met and made the decision about the need for a new IEP, and borne the responsibility for the outcome. This presents an independent basis on which the undersigned rules that PCS could not have denied Student a FAPE and that no compensatory education would be due from PCS.

As noted in the comprehensive psychological evaluation and found by Student's MDT, Student had acquired appropriate skills for success in the classroom and didn't need special education and specially designed instruction, or to be taught by a special educator, but needed support and motivation to complete tasks which could be achieved through the Section 504 Plan. Student's situation was no different late in 2017/18. Accordingly, this Hearing Officer concludes that Parent did not meet her burden of showing a denial of FAPE due to PCS not finding and evaluating Student on or after 5/4/18.

Issue 2: *Whether PCS denied Student a FAPE by failing to provide education records upon request to Petitioner. (Petitioner has the burden of persuasion on this issue.)*

Turning to education records, Petitioner made clear at the due process hearing that this claim relates only to the request for documents from PCS on 1/4/20. That request was satisfied by PCS within the 45-days permitted for providing education records in these circumstances, so Petitioner failed to meet her burden of persuasion.

As a general matter, parents of a child with a disability have the right to examine all education records that pertain to the identification, evaluation, and educational placement of the child, and provision of a FAPE. 20 U.S.C. § 1415(b)(1); 34 C.F.R. § 300.501(a), 34 C.F.R. § 300.613(a) (parents must be permitted to inspect and review any education records relating to their child that are collected, maintained, or used by an agency). *See also Jalloh ex rel. R.H. v. Dist. of Columbia*, 535 F. Supp. 2d 13, 21 (D.D.C. 2008) (“parents have the

⁶³ The District of Columbia provided 120 days for an initial evaluation prior to 7/1/18, but only 60 days beginning 7/1/18; however, initiating an initial evaluation on or after 7/1/18 would also have put the results into 2018/19 at Current School. D.C. Code § 38-2561.02(a)(2); 5-E D.C.M.R. § 3005.2; *see DL v. Dist. of Columbia*, 860 F.3d 713, 727 (D.C. Cir. 2017).

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right to examine records and DCPS must give parents the opportunity to inspect, review, and copy records”).

Here, Petitioner requested documents for 2016/17, 2017/18 and 2018/19 on 1/4/20 that PCS provided by 2/12/20, which was within the 45 days the regulation permits in 300 C.F.R. § 613(a) if there was no IEP meeting, hearing or resolution session sooner, which there were not in this case and Petitioner did not assert otherwise. PCS must comply with a request without “unreasonable delay,” which Petitioner did not assert in this case. Petitioner requested more documents from 2014/15 and 2015/16 at the resolution meeting, which Respondent’s counsel provided the same day. Respondent’s counsel then offered further help if Petitioner needed anything else, but received no further request for documents from Petitioner nor any assertion that any documents had not been provided.

Accordingly, this Hearing Officer concludes that there was no violation of Issue 2 by Respondent. Moreover, even if there were a procedural violation, Petitioner did not demonstrate any substantive harm from failure to provide education records. By the time of the initial request for documents, Student had been at Current School for nearly 1-1/2 school years and had the support of advocates to assist in seeking an evaluation at Current School.

ORDER

Petitioner did not prevail on either Issue in this case. Accordingly, **it is hereby ordered** that any and all claims and requests for relief are **dismissed with prejudice**.

IT IS SO ORDERED.

Dated in Caption

/s/ *Keith Seat*

Keith L. Seat, Esq.
Hearing Officer

NOTICE OF RIGHT TO APPEAL

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

Copies to:

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