

District of Columbia
Office of the State Superintendent of Education

Office of Dispute Resolution
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Parent, on behalf of Student,¹)	
Petitioner,)	
)	Hearing Dates: 1/23/23; 2/7/23
v.)	Hearing Officer: Michael Lazan
)	Case No. 2022-0203
District of Columbia Public Schools,)	
Respondent.)	

HEARING OFFICER DETERMINATION

I. Introduction

This is a case involving an X-year-old student (the “Student”) who is currently eligible for services as a student with Other Health Impairment (Attention Deficit Disorder or Attention Deficit Hyperactivity Disorder). 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 November 21, 2022. The Complaint was filed by the Student’s parent (“Petitioner”). On December 2, 2022, Respondent filed a response. A resolution meeting was held on December 8, 2022, without an agreement being reached. The resolution period expired on December 21, 2022.

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

II. Subject Matter Jurisdiction

This due process hearing was held, and a decision in this matter is being rendered, pursuant to the IDEA, 20 U.S.C. 1400 et seq., its implementing regulations, 34 C.F.R. Sect. 300 et seq., Title 38 of the D.C. Code, Subtitle VII, Chapter 25, and the District of Columbia Municipal Regulations (“DCMR”), Title 5-A, Chapter 30.

III. Procedural History

On January 5, 2023, a prehearing conference was held. Attorney A, Esq., counsel for Petitioner, appeared. Attorney B, Esq., counsel for Respondent, appeared. On January 6, 2023, a prehearing conference order was issued, summarizing the rules to be applied in the hearing and identifying the issues in the case. On January 10, 2023, a revised prehearing conference order was issued. A hearing date scheduled for January 19, 2023, was cancelled because of the illness of counsel. The matter then proceeded to trial on January 23, 2023. On February 2, 2023, Petitioner moved, on consent, to extend the deadline for a Hearing Officer Determination (“HOD”) to March 3, 2023. This motion was granted by an order of this Hearing Officer issued on February 3, 2023. Testimony concluded on February 7, 2023. The hearing was conducted through the Microsoft Teams videoconferencing platform, without objection. After the completion of testimony and evidence on February 7, 2023, the parties presented oral closing statements. On February 8, 2023, the parties presented a list of citations in support of their closing statements.

During the proceeding, Petitioner moved into evidence exhibits P-1 through P-41, without objection. Respondent moved into evidence exhibits R-2 through R-4 and R-6 through R-17, without objection. Petitioner presented as witnesses, in the following

order: Witness A, a psychologist (expert in clinical and forensic psychology); Petitioner; and Witness B, a special education advocate (expert in special education as it relates to Individualized Education Program development and placement). Respondent presented as witnesses: Witness C, a school psychologist (expert in school-based psychology); Witness D, a social worker from School D (expert in school social work); and Witness E, assistant principal and Local Educational Agency (“LEA”) representative from School D (expert in special education programming and placement).

IV. Issues

As identified in the prehearing conference order and in the Complaint, the issues to be determined in this case are as follows:

1. Did Respondent fail to provide the Student with an appropriate occupational therapy evaluation (since spring 2021) and Functional Behavior Assessment (“FBA”) (prior to the formation of the November 2021 Behavior Intervention Plan and thereafter)? If so, did Respondent act in contravention of 34 C.F.R. Sect. 300.304, and related provisions? If so, did Respondent deny the Student a Free Appropriate Public Education (“FAPE”)?

2. Has Respondent failed to provide the Student with an appropriate Individualized Education Program (“IEP”) and placement since November 2021? If so, did Respondent deny the Student a FAPE?

Petitioner contended that the Student’s IEPs contained goals and baselines that were inappropriate and that the Student’s IEPs and placements were not reasonably calculated to allow him/her to make progress, due to his/her placement in the Behavioral and Education Support (“BES”) program. Petitioner asserted that the Student has not been able to progress in the BES program because it has failed to address his/her behavioral issues. Petitioner contended that the Student needed a more restrictive setting, including 27.5 hours of specialized instruction per week.

3. Did Respondent fail to determine the Student to be eligible for services as a Student with Emotional Disturbance?

V. Findings of Fact

1. The Student is an X-year old who is currently eligible for services as a student with Other Health Impairment (Attention Deficit Disorder or Attention Deficit Hyperactivity Disorder). The Student's Attention Deficit Hyperactivity Disorder ("ADHD") significantly impacts his/her ability to focus. The Student touches people inappropriately, elopes from class, hits other children, and generally struggles with controlling his/her impulses and emotions. Conflicts with peers tend to occur in the hallways when the Student elopes. Reprimands, suspensions, and legal issues have accordingly resulted. Testimony of Witness A; Testimony of Petitioner; Testimony of Witness E. Academically, the Student functions between the second and third grade level, well below the Student's grade level. Testimony of Witness E.

2. DCPS conducted a Confidential Psychological Evaluation of the Student in February 2016 and issued a corresponding report on March 15, 2016. The assessment found that the Student was aggressive and had anxiety, conduct problems, peer and adult interaction problems, and clinically significant levels of hyperactivity, inattention, behavior problems, and school problems. These behaviors negatively impacted his/her ability to access the curriculum in the regular education setting. The evaluator also found symptoms of ADHD that frequently impacted the Student in the classroom. The Student's academic achievement was at the kindergarten level, well below his/her grade level. Overall achievement was considered to be "very limited." Still, the Student's overall cognitive ability was estimated to be in the "average range," with better developed nonverbal intelligence. The evaluator said that the Student required ongoing

individual and small-group instruction for most classroom activities, close and frequent teacher attention, guidance, multiple repetitions, feedback, and encouragement. The evaluator contended that, without such close teacher attention, the Student was liable to become overwhelmed by the pace of classroom instruction and withdraw his/her attention. P-5-69-71.

3. The Student's IEP dated April 19, 2018, recommended that the Student receive four hours of specialized instruction per day inside general education. At the time, the Student attended School A, a DCPS school. P-15. The Student's next IEP, dated December 13, 2018, increased the Student's services. The Student then moved schools and school districts. The new school, School B PCS, which constituted its own LEA, recommended that the Student receive ten hours of specialized instruction per week outside general education and ten hours of specialized instruction per week inside general education. School B PCS was located in the District of Columbia. P-16.

4. The Student quickly left School B PCS in January 2019 and attended School C, a DCPS school. Testimony of Witness E. The Student's IEP dated March 20, 2019, recommended a decrease in services. This IEP recommended that the Student receive 2.5 hours of specialized instruction per week inside general education and 2.5 hours of specialized instruction per week outside general education. The IEP included accommodations such as extended time, redirection, preferential seating, location with minimal distractions, and movement breaks. "Area of Concern" sections, with corresponding goals, were written for math, reading, and emotional, social and behavioral development. At the time, the Student's i-Ready math score was reported to be 407 in middle-of-the-year ("MOY") testing. P-17.

5. The Student's math i-Ready testing from September 4, 2019, revealed a score of 410, a small increase from the prior score. This score was considered to reflect performance at the first grade level. P-18-161. The Student's i-Ready diagnostic test in reading from October 8, 2019, revealed a score of 524, at the third grade level. On another i-Ready test in reading, administered on November 21, 2019, the Student scored 654, demonstrating progress. P-18-162.

6. The Student's IEP dated December 13, 2019, increased the Student's services and recommended that the Student receive five hours of specialized instruction per week inside general education and five hours of specialized instruction per week outside general education, together with 240 minutes per month of behavioral support services. The IEP included accommodations such as extended time, preferential seating, location with minimal distractions, and frequent breaks. "Area of Concern" sections with goals were written for math, reading, and emotional, social and behavioral development. At this time, the Student still attended School C. P-18.

7. During the 2019-2020 school year, the Student's behavioral issues continued, and s/he continued to perform well below grade level in academics. P-18. Still, the Student's IEP progress reports for the 2019-2020 school year indicated that s/he had made progress in math, reading and, during the final two reporting periods, in emotional, social and behavioral development as well. P-24.

8. An FBA of the Student was conducted on or about October 23, 2019. The FBA indicated that the Student engaged in verbal and physical aggression and impulsive actions, disregarded directives, walked in and out of class, and destroyed property, among other things. Generally, the behaviors were exhibited either because the Student wanted

attention, wanted to escape, could not get his/her way, or perceived that someone was bothering him/her. The issues did not arise as much when the Student was with his/her math teacher or on the computer. Redirection and attempts to calm the Student were tried but usually did not work. Other interventions were also tried, mostly unsuccessfully, including redirection, a reward system, differentiated instruction, “planned ignoring” of undesirable behaviors, scheduled breaks, breaking assignments into smaller parts, and 1:1 instruction. The Student was considered to be on-task only 40% of the time. The Student was considered to be off-task about 52% of the time. The Student was considered to exhibit verbally aggressive or physically aggressive behaviors about 8% of the time. Three observations of the Student were conducted as part of this FBA. During one observation, s/he was off-task 85% of the time. A Strengths and Difficulties Questionnaire (“SDQ”) was filled out by the Student’s teacher in connection to the FBA. The SDQ disclosed that the Student scored in the very high range in overall stress, behavioral difficulties, hyperactivity, concentration difficulties, and getting along with other children. P-6.

9. For the 2020-2021 school year, the Student attended a new school, School D. As of September 23, 2020, the Student was reading at the Lexile level of 640 on the Reading Inventory measure, at the third grade level, well below the Student’s grade level. P-33. The Student’s IEP dated November 12, 2020, again increased the Student’s services, recommending that s/he receive twenty hours of specialized instruction per week outside general education, with 240 minutes of behavioral support services. No “other classroom aids and services” were recommended. The IEP again included accommodations such as extended time, preferential seating, location with minimal

distractions, and frequent breaks. “Area of Concern” sections with goals were again written for math, reading, and emotional, social and behavioral development. P-19. This recommendation returned the Student to DCPS’s BES program, which provides children with classes of approximately ten students, with a 3:1 student-to adult ratio. Adults include the teacher, a paraprofessional, and a behavior technician. The BES program includes instruction in two general education “specials” classes, though an adult from the BES classroom accompanies the BES students when they go to the general education classes. During lunch and recess, BES students may move freely with non-disabled peers. Testimony of Witness E; R-6.

10. During the 2020-2021 school year, in which instruction was delivered virtually, the Student had difficulties following directives and was functioning well below what was expected of children his/her grade and age. Often, the Student exhibited poor behavior during instruction, did not complete assignments, and would shut off the computer instead of participating in class. Testimony of Witness A; Testimony of Witness B; P-19.

11. The Student’s IEP progress report for the first reporting period of the 2020-2021 school year indicated that s/he made no progress in math or reading (one reading goal was not introduced) and no progress in emotional, social and behavioral development (goals were just introduced). P-25. The Student’s IEP progress report for the second reporting period of the 2020-2021 school year indicated that s/he made progress in math and reading, as well as in emotional, social and behavioral development (one goal was not introduced). P-26. The Student’s IEP progress report for the third reporting period of the 2020-2021 school year indicated that s/he made progress in math,

reading, and emotional, social and behavioral development. The Student's social worker commented that the Student got in trouble when staff asked him/her to do tasks that s/he was not familiar with. The Student would then display oppositional behavior. Despite the reported progress in emotional, social and behavioral development, the IEP progress report noted that, when the Student was "escalated," s/he was only able to use calming strategies about 65% of the time (with adult reminders), which represented a regression compared to earlier data. P-27. The Student's IEP progress report for the fourth reporting period of the 2020-2021 school year again indicated that s/he made progress in math, reading, and emotional, social and behavioral development. P-28.

12. The Student's grades for the 2020-2021 school year at School D indicated that the Student "audited" classes or received "NM" (no mark) for classes multiple times. Where the Student was graded, s/he received grades ranging from "A-" (in English in Term 3 and in Concepts of World Geography and Cultures in Term 4) to "F" (in World Geography and Cultures, Science, and Reading Resource in Term 1). In Science, the Student was considered to have excellent behavior, and in math, the Student was considered to have good participation and excellent initiative. P-33.

13. During the 2021-2022 school year, the Student continued at School D. On i-Ready testing on September 16, 2021, the Student scored 429, putting him/her at the second grade level in math. P-8-90. Instruction was in-person during this school year, which allowed the Student to exhibit more serious behavioral problems, including violence and physical aggression. The Student also had difficulty transitioning to in-person instruction. Testimony of Witness D. The Student was suspended multiple times, and teachers would often call his/her parent. Testimony of Petitioner.

14. An Analysis of Existing Data (“AED”) meeting was held for the Student in autumn 2021. The AED meeting team determined that no additional formal testing was needed to make an eligibility determination. Testimony of Witness C. DCPS reevaluated the Student from September 2021 to November 2021. The reevaluation process consisted of speaking to teachers, a records review, and an observation. On November 4, 2021, Witness C wrote a document called Psychological Triennial Reevaluation, which included comments from Teacher A, the Student’s teacher. Teacher A expressed to Witness C that the Student was extremely hyperactive, and that it was difficult to get him/her to remain still, though “there were moments” when s/he could complete assignments if an adult was close to him/her. Also according to Teacher A, the Student had a “high activity level” and the teacher could not accurately assess the Student’s academic skills or deficits. The teacher reported that it took much redirection to get the Student to comply with simple directions, such as sitting in his/her seat, and that the few moments when the Student was seated calmly and appeared to be on-task were short-lived. Witness C accordingly found that the Student was often a distraction, walking in and out of the classroom, talking off-topic, or blurting out words or phrases, many of which were not school-appropriate. Witness C’s observation was consistent with the teacher’s report. Witness C observed that the Student did not sit in his/her assigned seat and instead walked aimlessly around the room with his/her uniform shirt off. After much redirection and warning of serious consequences, the Student sat at his/her desk correctly and began to write something, but just a few moments later, s/he was out of his/her seat again. Eventually, the Student left the room completely and went into another classroom. During transition, in the hallways, the Student ran ahead of the

paraprofessional assigned to his/her class and then entered a cafeteria where s/he did not belong. After being reprimanded and told to return to class by several adults on duty, the Student left the cafeteria and resumed running in the hallway. The Student provoked several other students in the hallway as they lined up to transition upstairs. Throughout the observation, the Student remained unphased by adult directives. Testimony of Witness C; P-8.

15. At the time of DCPS's reevaluation, the Student was receiving "C" grades. However, the Student was cutting, did not complete assignments, and needed to study more. P-8. At the time of the reevaluation, Witness C felt that the Student's progress in school had been minimal. Testimony of Witness C.

16. A Behavior Intervention Plan ("BIP") was written for the Student on November 1, 2021. The BIP recommended flexible seating to get the Student to complete assignments, social skills training with a social worker to address outbursts in the classroom and elopement, and seating near an adult to receive praise, earn checks, and stay on task. The BIP stated that the Student immediately left his/her seat and tried to leave the room when an assignment was given, that the Student tried to leave the room three to four times during the school day, and that the Student had several verbal and nonverbal outbursts during a single class (cursing, walking around the room, yelling, and throwing objects). P-7.

17. On November 4, 2021, a team met to determine the Student's eligibility for services. The eligibility team determined that the Student continued to meet the criteria for "Other Health Impairment." A Prior Written Notice was issued, indicating that there was no suspected change in the Student's eligibility category. R-8. No one at

the meeting expressed any concerns that the Student should be determined to be eligible as a student with Emotional Disturbance. Testimony of Witness C.

18. An IEP meeting was held on November 4, 2021. The Student's IEP reported that, in math, the Student rarely participated, did not turn in work, was often a distraction in the class, and walked away from his/her computer instead of paying attention during instruction. The IEP again recommended that the Student receive twenty hours of specialized instruction per week outside general education, with 240 minutes of behavioral support services. It was understood that this recommendation was for the BES program. No other classroom aids and services were recommended. The IEP again included accommodations such as extended time, preferential seating, location with minimal distractions, and frequent breaks. "Area of Concern" sections with goals were again written for math, reading, and emotional, social and behavioral development. The emotional, social and emotional development goals were selected because Witness D wanted to continue to work on the goals that had already been written. The "Area of Concern" section for emotional, social and behavioral development used much of the same language as the corresponding section of the prior IEP. P-20; Testimony of Witness D.

19. During the 2021-2022 school year, the Student received behavioral interventions, including 1:1 attention, behavior plans, and behavior contracts. Testimony of Witness A. However, the interventions did not work, and on March 28, 2022, a staff member wrote that the Student's behavior was "really getting out of control." P-9-100. Another BIP was written for the Student on March 30, 2022. This BIP recommended flexible seating, social skills training, and 1:1 adult correction. The BIP discussed the

Student's tendency to engage in verbal and nonverbal outbursts, walk around the room, throw objects, and try to leave the room. The BIP indicated that the Student tried to leave the room three to four times during the school day and had several verbal and nonverbal outbursts during a single class (cursing, walking around the room, yelling, and throwing objects). R-11; Testimony of Witness D.

20. On April 29, 2022, the Student knocked another student unconscious in an unprovoked attack at a bus stop. P-9-99. The Student was then targeted by parents of schoolmates. P-11-109. On May 24, 2022, the principal of School D asked the DCPS Office of Youth Engagement to involuntarily transfer the Student because of the attack and the reprisals. The principal reported that the Student had been suspended three times, had ten "SBT" referrals, had several in-school disciplinary actions, bullied peers, threatened peers and adults, skipped class, was tardy, and missed a lot of instruction. Other students did not feel safe in his/her presence, despite School D having provided the Student with interventions such as behavioral contracts, parent phone calls, referrals, schedule changes, and mediations. P-11. On June 2, 2022, the Student was transferred to School E. P-12.

21. The Student's IEP progress report for the first reporting period of the 2021-2022 school year indicated that s/he progressed in math and reading. Emotional, social and behavioral development goals were just introduced. P-29. The Student's IEP progress report for the second reporting period of the 2021-2022 school year indicated that s/he progressed in math and reading. No progress was noted with respect to emotional, social and behavioral development goals. P-30. The Student's IEP progress report for the third reporting period of the 2021-2022 school year indicated that s/he was

regressing in one math goal, made progress in another math goal, and was progressing in reading goals. Again, no progress was made with respect to emotional, social and behavioral development goals. P-31. The Student's IEP progress reports for the fourth reporting period of the 2021-2022 school year indicated that the Student was regressing in one math goal, made no progress in another math goal, and made no progress in reading goals or emotional, social and behavioral development goals. P-32.

22. The Student's report card for the first and second terms of the 2021-2022 school year, from School D, again indicated that s/he received "NM" grades multiple times, including for English, Extended Literacy, Reading Workshop, and Science. In Science, the Student was considered a pleasure to have in class and received "B+" and "A" grades, though in a second section of the report card relating to Science, the Student was marked "NM." In math, Teacher A indicated that the Student was a pleasure to have in the class but needed to study more. In English and Extended Literacy, the Student was reported to have been cutting class. In World History and Geography, the Student participated well but was excessively absent. P-34.

23. The Student then attended school in Maryland in an effort to find a better educational fit. However, the Student's educational experiences in Maryland were similar to his/her educational experiences in the District of Columbia. The Student then returned to the District of Columbia and attended School E in November 2022.

Testimony of Witness E.

24. The Student's behavior has been poor during the 2022-2023 school year at School E. The Student has engaged in similar behavior as s/he did at School D, including fighting, running out of the classroom, and acting in threatening ways. Testimony of

Witness A. School E tried to help the Student with counseling, but s/he resisted the counseling. Witness D tried to engage the Student, with limited success, working on strategies to communicate. The Student wanted to leave the session with Witness D before the end of the session. Testimony of Witness D.

25. To address the Student's behavioral issues, School D provided the Student with a modified schedule. Though periods are typically seventy-two minutes, School D attempted to provide the Student with five-minute breaks after every fifteen minutes of instruction in English, math and social studies. These interventions have not been especially successful. The Student wanted more significant incentives. As a result, the Student has continued to leave the classroom, particularly in math, where the Student tends to elope daily. When the Student is out of location, School D uses a "behavioral technician" and an educational aide to stay close to the Student and try to engage him/her in discussions about returning to class. Testimony of Witness E.

VI. Conclusions of Law

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." D.C. Code Sect. 38-

2571.03(6)(A)(i). Accordingly, on Issue #1 and #3, the burden of persuasion is on Petitioner. On Issue #2, the burden of persuasion is on Respondent if Petitioner presents a *prima facie* case.

1. Did Respondent fail to provide the Student with an appropriate occupational therapy evaluation (since spring 2021) and FBA (prior to the formation of the November 2021 BIP and thereafter)? If so, did Respondent act in contravention of 34 C.F.R. Sect. 300.304, and related provisions? If so, did Respondent deny the Student a FAPE?

Pursuant to 34 CFR 300.303 (a) and (b), a public agency must ensure that a reevaluation of each child with a disability is conducted in accordance with 34 CFR 300.304 through 34 CFR 300.311 at least once every three years. The reevaluation should involve assessments in “all areas of suspected disability.” 20 U.S.C. Sects. 1414(b)(3)(B), (c)(1); 34 C.F.R. Sect. 300.304(c)(4). The child’s reevaluation must consist of two steps. First, the child’s evaluators must “review existing evaluation data on the child,” including any evaluations and information provided by the child’s parents, current assessments and classroom-based observations, and observations by teachers and other service providers. 34 C.F.R. Sect. 300.305(a)(1). Based on their review of that existing data, the evaluators must “identify what additional data, if any, are needed” to assess whether the child has a qualifying disability and, if so, “administer such assessments and other evaluation measures as may be needed.” Sect. 300.305(a)(2), (c). The school district is required to “[u]se a variety of assessment tools and strategies to gather relevant functional, developmental, and academic information about the child, including information provided by the parent.” Sect. 300.304(b). All the methods and materials used must be “valid and reliable” and “administered by trained and knowledgeable personnel.” Sect. 300.304(c)(1). Still, for there to be a finding of 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).

During her testimony, Witness B expressed concerns about the autumn 2021 DCPS reevaluation of the Student. She contended that the reevaluation was inadequate because the Student's behaviors had worsened, which should have resulted in a new FBA. Witness B explained that the FBA should consist of observations and interviews and include recommendations to address the Student's behavior. Witness B also contended that a formal occupational therapy assessment should have been conducted for the Student to assess his/her sensory processing and related issues.

An FBA is not necessarily intended to propose interventions to address a student's behavioral issues. Instead, it is supposed to provide educators with information about the "function" of a student's behavior. Though the Student's behaviors escalated during the first few months of the 2021-2022 school year at School D, there is nothing in the record to suggest that there was any reason to question the conclusion of the Student's FBA that the "function" of his/her persistent misbehavior was to escape, avoid tasks, and gain attention. Petitioner suggested that an FBA must be written before a BIP is written, and that an FBA should have been written for the Student prior to his/her November 2021 BIP. But there is no such rule in the IDEA, its regulations, the D.C. Code, or the D.C.M.R. Indeed, an FBA is not specifically required for special education students in the District of Columbia, except for some discipline cases brought pursuant to 34 C.F.R. Sect. 300.532(a). Moreover, there is some question, at least in this jurisdiction, whether an FBA should be considered an assessment for the purposes of determining the

completeness of an evaluation. E.L. Haynes P.C.S. v. Frost, 66 IDELR 287 (D.D.C. 2015) (“Behavioral concerns” are not one of the enumerated disabilities identified in the IDEA); 20 U.S.C. Sect. 1401(3). Accordingly, this Hearing Officer does not find Petitioner’s claim that the Student’s reevaluation was incomplete because it lacked an FBA to be convincing.

On the issue of whether an occupational therapy assessment was required for the Student’s reevaluation in the autumn of 2021, DCPS indicated that such an assessment was unnecessary, pointing in part to the testimony of Witness C, who said that the Student did not need such an assessment because s/he had executive functioning issues. However, there is no dispute in the record that an occupational therapy assessment can go beyond issues relating to executive functioning. Witness B testified that a formal occupational therapy assessment would examine whether the Student might have sensory processing issues. Witness B said that the Student might benefit from the use of sensory integration techniques, which could possibly alleviate the Student’s persistent behavioral issues. DCPS did not clearly contest Petitioner’s proposition that the Student might have sensory processing issues, or that sensory integration techniques might help address the Student’s behavior.

DCPS claimed that it was effectively blindsided by the request for the formal occupational therapy assessment in the Complaint, pointing to the fact that Petitioner never asked for a formal occupational therapy assessment at an IEP meeting or any other meeting. However, most parents are not in the position to request an occupational therapy assessment to effectuate a complete educational reevaluation of their child.

Petitioner is not an educator and has no background in addressing the special education needs of children.

DCPS also argued, through Witness C, that there was no need for an occupational therapy assessment (or any formal assessment) during the Student's triennial reevaluation because his/her performance had not changed. The record indicates otherwise. As stated by Witness A and Witness D, the Student's behavior worsened when the Student went back to school in-person. The Student was "extremely" hyperactive and it was difficult to get him/her to remain still. Teacher A told Witness C that the Student was so distracted in school that s/he learned only at certain "moments," and then only with an adult close by. Under these circumstances, it would have been appropriate and reasonable to conclude that new approaches to the Student's behavioral issues should be considered, such as a sensory-based approach. As a result, this Hearing Officer must agree with Petitioner that the Student's reevaluation in autumn 2021 should have included an occupational therapy assessment.

Parenthetically, Petitioner also argued that there was not enough academic testing or behavioral testing conducted on the Student. While this Hearing Officer agrees with Petitioner that testing relating to academic achievement and behavior would not be inappropriate, this issue was not raised at the prehearing conference or incorporated into the prehearing conference order. This Hearing Officer therefore declines to rule on this issue. Nevertheless, this Hearing Officer finds that DCPS denied the Student educational benefit, and therefore a FAPE, when it failed to conduct an occupational therapy assessment of the Student during the autumn 2021 reevaluation.

2. Has Respondent failed to provide the Student with an appropriate IEP and placement since November 2021? If so, did Respondent deny the Student a FAPE?

Petitioner contended that the November 4, 2021, IEP contained inappropriate goals and baselines, and that the IEP and corresponding placement were not reasonably calculated to allow the Student to make progress, because the Student was placed in the BES program, where s/he has not been able to progress due to the failure of the program to address the Student's behavioral issues. Petitioner contended that the Student needed a more restrictive setting, including 27.5 hours of specialized instruction per week.

The IEP is the “centerpiece” of IDEA. Honig v. Doe, 484 U.S. 305, 311 (1988). In Endrew F. v. Douglas County School District, 580 U.S. 386 (2017), the Court held that an IEP must be reasonably calculated “in light of the child’s circumstances.” Id. at 399. The Court also held that parents can fairly expect school authorities to offer a “cogent and responsive explanation” for their decisions, and that its ruling “should not be mistaken for an invitation to the courts to substitute their own notions of sound educational policy for those of school authorities, to whose expertise and professional judgment deference should be paid.” Id. at 404. However, the “educational program must be appropriately ambitious in light of...circumstances, just as advancement from grade to grade is appropriately ambitious for most children in the regular classroom. The goals may differ, but every child should have the chance to meet challenging objectives.” Id. At 402. An IEP that fails to satisfy these statutory directives may be remedied through an IDEA claim to the extent that the IEP “denies the child an appropriate education.” Z.B. v. District of Columbia, 888 F.3d 515, 519 (D.C. Cir. 2018).

There is no dispute that the Student's behaviors were disruptive in the classroom and in the school during the first few months of the 2021-2022 school year. DCPS's Psychological Triennial Evaluation of the Student included Witness C's interview with the Student's teacher, Teacher A. This teacher told the evaluator that the Student was doing very poorly in school. Teacher A indicated that, due to the Student's high activity level, it took much redirection to get the Student to comply with simple directions, such as to sit down. According to Teacher A, there were only "a few moments" during the year when the Student was seated calmly and on-task, and those moments were "short-lived."

No other teachers were interviewed for the Psychological Triennial Evaluation, and no teachers (including Teacher A) were called by DCPS to rebut the contentions made by Witness A and Witness B that the Student was improperly placed in the BES program. To the contrary, Witness E could not say that the Student has made academic progress in the BES classroom. Witness E testified that the Student is easily distracted, has a limited ability to focus, and has not progressed at the rate they hoped s/he would. When asked whether a new placement would be appropriate, Witness E said that she did not know, pointing out that the Student likes to be with non-disabled peers.

The Student's November 4, 2021, IEP did not indicate that the Student was making much academic or emotional progress. Nor did the Student's BIP, dated November 1, 2021, indicate that the Student was making any academic or emotional progress. The BIP indicated that the Student eloped from class three to four times a day and had several verbal and nonverbal outbursts during a typical class period, which included cursing, walking around the room, yelling, or throwing debris.

The observation conducted by Witness C was also consistent with the notion that the BES program was inappropriate for the Student. While Witness C was watching the Student, the Student did not sit in his/her assigned seat and instead walked aimlessly around the classroom. Eventually, the Student left the room completely and entered another classroom. During transition, in the hallways, the Student ran ahead of the paraprofessional assigned to his/her class. The Student then entered a cafeteria where s/he did not belong. After being reprimanded and told to return to class by several adults on duty, the Student left the cafeteria and resumed running in the hallway. The Student then provoked several students in the hallway.

Witness D contended that the Student's behaviors were not unusual for students in the BES classroom, but no evidence was presented to support this contention, which presupposes that students in the BES classroom would slap other students without provocation, then walk from door to door "assaulting students and teachers." This is what the Student did, including hitting a [REDACTED] student, on September 8, 2021, less than two months before the IEP meeting. Some DCPS staff argued that the Student's main problem was elopement, suggesting, without any details, that no school could stop the Student from eloping. This Hearing Officer agrees with Witness B that the Student's persistent elopement issues could well improve in a more structured, therapeutic educational setting that is designed for students who have issues relating to elopement. In fact, according to un rebutted testimony in the record, the Student's current DCPS social worker (who did not testify) also feels that the Student needs a more therapeutic placement.

Petitioner also claimed that the goals in the Student's November 4, 2021, IEP were inappropriate. Petitioner argued mainly that there was a lack of accurate baselines for the goals. 34 C.F.R. Sect. 300.320(4)(i) requires that an IEP include "a statement of the special education and related services and supplementary aids and services, based on peer-reviewed research to the extent practicable, to be provided to the child, or on behalf of the child, and a statement of the program modifications or supports for school personnel that will be provided to enable the child to advance appropriately toward attaining the annual goals." However, this section does not mention baselines, which are not required for goals in the IDEA statute, nor are they required in the IDEA regulations, the D.C. Code, or the D.C.M.R. Additionally, Petitioner's argument was not based on any on-point caselaw establishing, in any jurisdiction, that the absence of baselines can result in a finding of FAPE denial.

Petitioner also argued that the Student did not master the IEP goals, pointing to the Student's IEP progress reports issued after the creation of the IEP. The IEP progress reports confirm that the Student did not master any of the goals in the November 4, 2021, IEP. However, Petitioner did not present any authority to support the argument that goals can be deemed to be defective because they were not mastered during the school year. Goals and other IEP terms should be judged at the time they were created. Z. B., 888 F.3d at 522; S.S. ex rel. Shank v. Howard Road Academy, 585 F. Supp. 2d 56, 66-67 (D.D.C. 2008) (warning against "Monday morning quarterbacking"). Moreover, in this record, it is fair to conclude that the main problem for the Student was the inappropriateness of the BES program, not the inappropriateness of the IEP goals. Petitioner did not convincingly rebut the testimony of Witness E that the IEP goals were

measurable and could be scaffolded to suit the Student, and that the Student could have made progress on the goals.

In sum, this Hearing Officer finds that Respondent denied the Student educational benefit, and therefore a FAPE, when it recommended the BES program for the Student through the November 4, 2021, IEP.

3. Did Respondent fail to determine the Student to be eligible for services as a Student with Emotional Disturbance?

According to the applicable regulations, “emotional disturbance” means a condition exhibiting one or more of the following characteristics over a long period of time and to a marked degree that adversely affects a child’s educational performance:

- a) An inability to learn that cannot be explained by intellectual, sensory, or health factors;
- b) An inability to build or maintain satisfactory interpersonal relationships with peers and teachers;
- c) Inappropriate types of behavior or feelings under normal circumstances;**
- d) A general pervasive mood of unhappiness or depression; or e) A tendency to develop physical symptoms or fears associated with personal or school problems. 34 C.F.R. Sect. 300.8(c)(4) (emphasis added).

To this Hearing Officer, the main issue here is whether the Student should be deemed eligible under subcategory (c), “Inappropriate types of behavior or feelings under normal circumstances” over a long period of time. The Student’s April 18, 2018, IEP stated that s/he had a history of physical aggression, throwing tantrums, non-compliance, mood instability, and disruptive behaviors. Four years later, the Student’s inappropriate physical behavior had worsened, as underscored by the incident where the Student punched another student, without provocation, at a bus stop. There is nothing in the record to suggest that the Student’s violent, physical behavior at school ended after 2018,

even for a brief period of time. There is no question that this behavior impeded the Student's ability to learn. The April 18, 2018, IEP, from School A, stated that the Student's mood instability and disruptive behaviors significantly impacted his/her ability to successfully access the grade-level curriculum, and the same language appeared on the Student's November 4, 2021, IEP.

Witness C argued that the Student's behavior was typical for an adolescent, but it is not typical or appropriate for a child to regularly get physical and violent with other children over a long period of time. Indeed, even Witness C did not clearly argue that the Student should not be deemed eligible as a student with Emotional Disturbance. Instead, Witness C stated that a "deeper dive" was required, though it was not clear why this kind of inquiry was necessary after years of disciplinary reports relating to the Student.

DCPS argued that the eligibility issue was not raised by the parent at the Student's eligibility meeting in November 2021. However, a parent's assent to an IEP does not necessarily inoculate a school district from liability, especially where, as here, the record suggests that the parent did not clearly understand issues relating to eligibility at the time of the eligibility meeting. Letter to Lipsett, 52 IDELR Sect. 47 (OSEP 2008). DCPS also argued that the Student's behaviors were consistent with ADHD, which was the basis for the Student's current eligibility category, Other Health Impairment. DCPS's witnesses, especially Witness C, supported this argument, pointing out that ADHD children can be off-task and have poor executive functioning and impulsiveness. Petitioner's witnesses did not really dispute that at least some of the Student's behaviors were consistent with ADHD.

However, there is no reason why the Student cannot be considered to be eligible for services in more than one category. This is why the regulations include a category called “Multiple Disabilities.” 34 C.F.R. Sect. 300.8(a)(1). As a result, this Hearing Officer finds that the Student should have been deemed eligible for services under the eligibility category “Multiple Disabilities.”

RELIEF

When school districts deny students a FAPE, courts have wide discretion to ensure that students receive a FAPE going forward. As the Supreme Court stated, the statute directs the Court to “grant such relief as [it] determines is appropriate.” School Committee of the Town of Burlington v. Dep’t of Education, Massachusetts, 471 U.S. 359, 371 (1985). These words confer broad discretion on a hearing officer, since the type of relief is not further specified, except that it must be “appropriate.” Here, Petitioner seeks compensatory education for the failure to implement the Student’s speech and language pathology services during the 2021-2022 school year. Courts and hearing officers may award “educational services to be provided prospectively to compensate for a past deficient program.” Reid ex Rel. Reid v. District of Columbia, 401 F.3d 516, 521-23 (D.C. Cir. 2005). Compensatory education aims to put a student in the position s/he would have been in absent the FAPE denial and “must be reasonably calculated to provide the educational benefits that likely would have accrued from special education services the school district should have supplied in the first place.” B.D. v. District of Columbia, 817 F.3d 792, 797-798 (D.C. Cir. 2016) (quoting Reid, 401 F.3d at 524).

Petitioner, through Witness B, presented a compensatory education plan that included seventy-two hours of 1:1 tutoring “to close the gap” and thirty-six hours of

counseling to work on the Student's violent and aggressive behavior. This compensatory education plan did not clearly explain how Witness B came up with the numbers, and Witness B could have explained further about how the tutoring and counseling would address what the Student may have missed during the approximately sixteen months of FAPE denial. However, in light of this relatively long period of FAPE denial (November 2021 to present), this Hearing Officer finds Petitioner's modest request reasonable and consistent with the "flexible" Reid standard. B.D. v. District of Columbia, 817 F.3d 792, 799 (D.C. Cir. 2016) (compensatory education awards require a "flexible approach").

Petitioner also requested a "full-time" therapeutic placement for the Student. The Student's current social worker apparently agrees with this proposition, and the DCPS witnesses did not express any enthusiasm for any other option, including the BES program, which the Student has experienced in at least three different schools, including School D and School E. The "Area of Concern" sections in the Student's most recent IEPs and the corresponding IEP progress reports did not indicate that the Student has made much progress in the BES program. In fact, IEP progress reports from the fourth reporting period of the 2021-2022 school year indicated that the Student was regressing in math, making no progress in reading, and making no progress in emotional, social and behavioral development. This Hearing Officer agrees with the testimony of Witness B to the effect that the Student needs a smaller, more structured setting where it would be more difficult for the Student to elope. This contention makes sense in light of the testimony of Witness E to the effect that the Student engaged in less horseplay when s/he was in a self-contained setting. As a result, this Hearing Officer will order that the Student be placed in a full-time therapeutic setting that can provide the Student with

specific, new strategies to address the Student's issues with elopement and physical violence.

Finally, in regard to Petitioner's request for an updated FBA and an occupational therapy assessment, since no FAPE denial was found due to the lack of an FBA, this Hearing Officer will not order a new FBA for the Student, but will order the requested occupational therapy assessment.

VII. Order

As a result of the foregoing:

1. Respondent shall pay for seventy-two hours of 1:1 academic tutoring for the Student, to be provided by a certified special education teacher at a reasonable and customary rate in the community, with transportation to and from the tutoring;
2. Respondent shall pay for thirty-six hours of counseling for the Student, to be provided by a qualified social worker or psychologist at a reasonable and customary rate in the community, with transportation to and from the counseling;
3. The Student shall receive an occupational therapy assessment within thirty days of this HOD;
4. The Student's IEP team shall meet within sixty days to determine a new school for the Student;
5. Such school shall provide the Student with a full-time therapeutic setting, which can provide the Student with specific, new strategies to address the Student's issues with elopement and physical violence;
6. The Student is hereby considered to be eligible for services as a student with Multiple Disabilities;

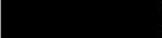
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7. All other requests for relief are denied.

Dated: March 3, 2023

Michael Lazan
Impartial Hearing Officer

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

 DCPS
 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 days from the date of the Hearing Officer Determination in accordance with 20 USC Sect. 1415(i).

Date: March 3, 2023

Michael Lazan
Impartial Hearing Officer