

District of Columbia
Office of the State Superintendent of Education

Office of Dispute Resolution
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OSSE
Office of Dispute Resolution
March 03, 2025

Parent, on behalf of Student,¹)	Hearing Officer: Michael Lazan
Petitioner,)	
)	Hearing Dates:
v.)	2/13/25; 2/14/25; 2/24/25
)	
District of Columbia Public Schools,)	Case No. 2024-0241
Respondent.)	

HEARING OFFICER DETERMINATION

I. Introduction

This is a case involving an X-year-old student (the “Student”) who is currently eligible for services. A due process complaint pursuant to the Individuals with Disabilities Education Act (“IDEA”) was filed by the Student’s parent (“Petitioner”) and received by District of Columbia Public Schools (“DCPS” or “Respondent”) on December 18, 2024. The resolution meeting was held on January 3, 2025. The matter did not settle.

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.

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

III. Procedural History

On January 17, 2024, a prehearing conference was held. Attorney A, Esq., and Attorney B, Esq., counsel for Petitioner, appeared. On January 24, 2024, a prehearing conference order was issued, summarizing the rules to be applied in the hearing and identifying the issues in the case.

The matter proceeded to trial on February 13, 2025, February 14, 2025, and February 24, 2025. The hearing was conducted through the Microsoft Teams videoconferencing platform, without objection. A language interpreter was available to Petitioner at all times during all three hearing dates. During the proceeding, Petitioner moved into evidence exhibits P-1 through P-15 without objection, and Respondent moved into evidence R-1 through R-22 without objection.

Petitioner presented as witnesses, in the following order, herself and Witness A, an educational expert (expert in special education, autism, and applied behavior analysis [“ABA”]). Respondent presented as witnesses: Witness B, a special education teacher (expert in special education); Witness C, a Local Educational Agency (“LEA”) representative (expert in special education programming); Witness D, a social worker (expert in school-based social work); and Witness E, a DCPS manager.

After the completion of testimony and evidence, the parties presented oral closing statements on February 24, 2025.

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 DCPS deny the Student a Free Appropriate Public Education (“FAPE”) by refusing to include ABA services in his/her October 2024

Individualized Education Program (“IEP”)? If so, did DCPS deny the Student a FAPE?

2. Did DCPS fail to implement the Student’s October 2024 IEP and the corresponding behavior intervention plan (“BIP”)? If so, did DCPS deny the Student a FAPE?

Petitioner contended that DCPS did not provide the necessary resources to implement the Student’s IEP and BIP with, among other things, trained and licensed providers or the equivalent.

3. Did DCPS deny Petitioner’s right to participate in the Student’s IEP process by refusing to consider the request for ABA services at the IEP meeting? If so, did DCPS deny the Student a FAPE?

V. Findings of Fact

1. The Student is an X-year-old who is eligible for services as a student with autism. The Student has significant behavioral concerns in school. The Student has low frustration and distress tolerance. When the Student perceives academic work as unpreferred, s/he tends to become easily distracted and may need frequent redirection. When perceiving a lack of attention from others or when not in control, the Student is more inclined to exhibit disruptive and physically or verbally aggressive behaviors. When feeling threatened by other peers or competing for adults’ attention, the Student is more likely to become emotionally dysregulated and agitated. P-8-2. The Student gets ABA therapy three times a week out of school, which helps to address the Student’s behavioral issues. Testimony of Petitioner.

2. The Student’s learning environment needs to be highly structured, with a clear routine. The learning environment also needs to be predictable, with preferred choices, time limits, and clear boundaries. When emotional distress is observed in the Student, s/he benefits from time set aside for emotional reflection. P-8-2.

3. For the 2023-2024 school year, the Student attended School B, a DCPS public school. The Student made progress in reading during this school year, according to the Dynamic Indicators of Basic Early Literacy Skills (“DIBELS”) measure. The Student’s score went from 324 (benchmark) to 510 (above level). R-12-85. The Student presented with a great deal of elopement during this school year and was hard to redirect. Testimony of Witness C. A functional behavior assessment (“FBA”) was written for the Student on December 7, 2023. The FBA said that the Student engaged in elopement, physical aggression toward peers and staff (including biting), property destruction, and tantrums/outbursts with excessive crying. The FBA said that these behaviors reportedly occurred daily, multiple times a day, and specifically when the Student did not get his/her way. This behavior was prevalent in the Student’s main classroom and during specials and lunch. The FBA said that when the behaviors ceased, the Student could deregulate and become extraordinarily affectionate. Most of the behaviors were considered to be attention-getting, except for elopement, which was deemed to be for avoidance. The FBA underscored that the Student’s positive behaviors and replacement behaviors must be acknowledged routinely, that negative behaviors must be met with consequences routinely, and that negative behaviors should increase in severity as the behaviors became more egregious. The FBA said that consequences included revocation of privileges, such as recess, being required to have lunch supervised in a classroom, as opposed to in the cafeteria with classmates, and denying the Student the ability to participate in enjoyable activities. The Student’s behaviors were least likely to occur in small groups. P-2.

4. The FBA also reported that the Student learned to raise his/her hand when s/he desired attention; that a staff member was able to provide more individualized

attention to the Student to avoid disruptions and poor peer engagement; that a teacher found that ignoring the Student's distractions/poor behavior had a minimizing effect, because the Student did not receive the attention that s/he sought; and that the Student benefitted from using effective communication skills to express displeasure, as opposed to his/her routine outbursts, physical aggression, and tantrums. The FBA also suggested that the Student's negative behaviors should be met with consequences consistently and should increase in severity as the behaviors became more egregious. P-2.

5. The corresponding BIP, also written on December 7, 2023, said that the Student eloped from class five days a week. The BIP targeted eloping, physical aggression, destruction of property, and tantrums/outbursts. Positive and negative reinforcement was recommended, including rewards, revocation of privileges, planned ignoring, and related interventions to encourage the Student to communicate. The BIP also recommended that additional staff be assigned to the Student. P-2.

6. For the 2024-2025 school year, the Student attends a new school, School A. The Student is currently in a self-contained, "non-categorical" classroom, which includes a "behavior technician" and an aide. Testimony of Witness C. The placement focuses on behavioral issues. The Student is placed with approximately four students, though the classroom started with two students. Social workers, a psychologist, and counselors also service the room if a crisis occurs. The classroom uses the "Eureka" program for math, the "Foundations" program for phonics, positive reinforcement through a "dojo," praise, and rewards. The main rules in the class are to follow directions, raise your hand to speak, raise your hand to leave your seat, make smart choices, and make the group stronger. The classroom has clear rules and expectations and uses visual timers,

hand signals, chunking, differential reinforcement techniques, modeling and shaping.

The Student tries and wants to do his/her best, and s/he incorporates some strategies that DCPS encourages, such as using the timer. The Student completes grade-level work.

Testimony of Witness B.

7. In DIBELS testing at the beginning of the school year, the Student was above the benchmark, scoring above average in all domains except for phonological awareness. In i-Ready testing in reading at the beginning of the year, the Student was at the kindergarten level. The score report indicated that the Student's actual performance was higher, and that the Student needed to strengthen his/her decoding skills, as s/he had memorized many words and had learned to read that way. R-12-85.

8. At the start of the school year, the Student frequently engaged in physical aggression and excessive crying in the classroom. The Student engaged in physical aggression about three times a day and cried excessively about six times a day. R-8-66. The Student enjoyed reading out loud and answering questions about the text orally, but when tasked with working independently, s/he struggled to stay focused. R-1-2. The Student's reading work was a focus of instruction. The Student did not always make sufficient effort. Writing was difficult and resulted in excessive crying. The Student had difficulty in the afternoon, after lunch. Testimony of Witness B.

9. On September 23, 2024, an occupational therapy evaluation was written for the Student. The evaluation stated that the Student presented with average fine, visual, and sensory motor skills. Due to the Student's struggles with self-regulation in the classroom setting, and based on the results of a sensory processing measure, the evaluator found that the Student may experience challenges with planning that may lead

to difficulty learning or trying new tasks in the classroom. Additionally, the Student's challenges with body awareness may cause excessive force on writing utensils, which may lead to difficulty completing written work. The Student also exhibited differences in processing auditory and visual input, which, according to the evaluator, could lead to increased distractions in the classroom. P-3.

10. On September 20, 2024, an FBA was written for the Student. The FBA assessed the Student's tantrum/aggression and crying behaviors. As of September 24, 2024, the tantrum/aggression behaviors occurred six times a day for about five minutes each, and the crying behaviors occurred three times a day for about five minutes each. The majority of these behaviors occurred during less-structured parts of the day, such as recess, lunch, and specials. In the classroom, the Student's behaviors often occurred during transitions, or when s/he was required to complete an assignment (especially if the assignment involved writing, required "deep thinking," or was otherwise challenging), or during a change in routine (such as a teacher being out, a change in schedule, or a change in typical activities in a lesson). The Student might lose "dojo" points if these behaviors occurred. The behaviors occurred less often when the Student was working 1:1 with preferred teachers. The FBA indicated that, after his/her behavior, the Student responded well to distraction and was ready to discuss and reflect on what had happened. S/he did not always take the conversation seriously in the moment, but could sometimes reflect at the end of the day with a teacher, 1:1. The FBA also said that distraction and 1:1 conversations helped the Student transition back to class, and that the s/he needed many movement breaks. R-8.

11. The corresponding BIP, dated September 23, 2024, indicated that, to address the Student's behaviors, his/her classroom should display visual posters of "Zones of Regulation" coping skills, hold weekly small-group targeted lessons on the "Zones of Regulation" curriculum, conduct mindfulness training, and develop conflict resolution skills through a social worker. The BIP also said that the classroom should provide a "calm down" corner space (with sensory tools, relaxation visuals, and a timer), breaks as needed, and frequent opportunities for "Zones of Regulation" check-ins to determine the Student's emotional state throughout the day. The classroom was to use "dojo" points to provide incentives for such behaviors as exhibiting appropriate coping skills, using a calm and safe body, participating in an activity, using respectful and kind words when speaking, and raising a hand to ask for permission or to participate. The BIP also suggested "first/then" strategies, "I" messages, and lead time. R-9.

12. Pursuant to the BIP, the Student could lose "dojo" points up to twice per day for not using an appropriate coping strategy to calm down or for engaging in excessive crying/tantrums. Active ignoring was recommended if the Student engaged in a minor tantrum, like whining, complaining, or beginning to cry with no danger to self or others. The BIP, unlike the FBA, stated that the Student exhibited tantrum behaviors five times per day, on average, and that each behavior could last from two to fifteen minutes. As a consequence for excessive crying, the Student was first supposed to get a verbal warning and a reminder of the rule, and then, if that did not work, the Student would get a choice of coping skills. R-9; Testimony of Witness D.

13. Witness A added "suggestions/preventative measures" to the BIP, including that the school should, among other interventions: provide the Student with a

visual/written schedule to review when s/he first arrived at school; review the entire day's scheduled activities with the Student; communicate with the Student about any potential changes; be generous with praise; use a first/then "mini- schedule"; provide the Student with a visual choice board; provide him/her with specific verbal praise; and ensure that the Student knew exactly how s/he could earn points. Witness A's suggestions also indicated that if the Student gained "dojo" points, the points should not be taken away. The language warned against a punishment consequence. P-6-7.

14. An IEP meeting was held for the Student on or about October 1, 2024. Petitioner asked for an ABA therapist to provide ABA therapy for the Student's classroom. The meeting did not proceed because of the lack of a language interpreter. Testimony of Petitioner. On October 25, 2024, another IEP meeting was held, which an interpreter attended. DCPS said that the Student's assigned classroom uses "ABA approaches" but that "we do not have an ABA therapist." Witness C said that "DCPS does not allow ABA therapists on the property." Then DCPS staff said that DCPS would have to pay for an outside ABA therapist to come in, because DCPS does not have an ABA therapist as an employee, but that bringing in an outside ABA therapist would be a violation of the Family Educational Rights and Privacy Act ("FERPA"). DCPS staff also said that the Student did not need ABA therapy. R-2; Testimony of Witness C.

15. The IEP that was issued recommended that the Student receive twenty hours per week of specialized instruction outside general education, with related services as follows: two hours per month of speech-language pathology, one hour per month of occupational therapy, and one hour per month of behavioral support services. The IEP also recommended a visual schedule for classroom routines, a sensory diet, access to a

“calm down”/sensory corner, use of headphones as needed, movement breaks as needed, extended time for written assignments, timers, alternative seating, breaking tasks into smaller components, a quiet space to work with minimal distractions, small-group work, and the use of specific verbal praise and positive reinforcement. The IEP recommended a highly structured environment, with time limits, clear boundaries, and time set aside for emotional reflection when emotional distress was observed. The IEP indicated that when the Student was assigned unpreferred tasks, was not in control, or perceived a lack of attention, s/he was more inclined to exhibit disruptive and physically or verbally aggressive behaviors. These behaviors occurred multiple times daily and varied in duration. The IEP also indicated that the Student’s preferred method of calming down was to take a break in the “calm down” corner. P-8.

16. Witness A observed the Student in or about October 2024 in both special education and general education settings. During the observations, the Student exhibited significant issues. S/he got very upset when not on the computer and yelled when s/he wanted something. When asked if s/he wanted to do anything away from the computer, the Student refused. S/he had a difficult time with writing, and ran around the aisles. The Student also switched away from the school programs when on the computer. At one point, the Student went under a table, asked for Play-Doh, and then rubbed it all over his/her pants and clothes. The Student also went to the wrong areas of the classroom and refuse to comply with staff. Testimony of Witness A.

17. An IEP progress report dated November 13, 2024, said that, on average, the Student exhibited tantrum behaviors five times daily, that each behavior lasted from two to fifteen minutes, and that the Student typically required at least three adult prompts

to support him/her in identifying a coping skill to calm down. The Student's preferred method of calming down was to take a break in the "calm down" corner. The Student mastered two speech and language goals and one goal to begin a non-preferred task paired with the use of self-regulation strategies and reward systems. But s/he did not progress on one math goal related to number sequences. R-4.

18. On November 18, 2024, DCPS issued a Prior Written Notice ("PWN") for the Student. The PWN said that during the October IEP meeting, Petitioner proposed ABA therapy for the Student, which was rejected because DCPS does not permit private/independent service providers, including those funded by health insurance, to provide services on DCPS property. The PWN said that DCPS must ensure the safety, security, and confidentiality of all students and comply with FERPA. Therefore, DCPS could not fulfill Petitioner's request for an outside provider to service the Student. Petitioner and her legal team then expressed interest in pursuing ABA therapy in the classroom to be provided and funded by DCPS, from DCPS's approved provider list rather than from an outside private provider. The LEA representative then reiterated the LEA's position against this request, citing current data reviewed by the IEP team, which indicated that the Student did not require in-classroom ABA therapy. DCPS said that the in-classroom behavior supports currently in place were informed by ABA principles and effectively met the Student's needs in the current classroom setting. R-3.

19. On the Student's first-term report card for the 2024-2025 school year, s/he received mainly "2" grades (approaching standard) in reading, with a "1" grade in writing (below standard) and a "3" grade in reading foundational skills (at standard). The Student received all "3" grades in math. R-6.

20. During the 2024-2025 school year, Witness D, a school social worker, has spent a lot of extra time with the Student in the classroom, getting him/her accustomed to the environment, and Witness D would be called if the Student had an emergency.

Testimony of Witness D. On January 15, 2025, Petitioner received a text from the Student's teacher that the Student was engaging in behaviors in school. The teacher said that the Student was very rude to his/her teachers and fought with his/her peers. P-12-1. Petitioner has frequently received messages from the Student's teachers because of the Student's misbehavior in school. Testimony of Petitioner. To address the Student's crying, tantrums, and physical aggression, deep breathing can work, as can a walk or a break. As of the dates of testimony, the school has seen less excessive crying from the Student: about one to two times a day, with each crying episode lasting about one to two minutes. The Student's physical aggression has still been impulsive and explosive, and the antecedent has often been an unpreferred task or other students who got to use something that the Student wanted. Testimony of Witness D.

21. Based on i-Ready testing, the Student progressed to a middle first-grade level on January 15, 2025, from a kindergarten level on September 4, 2024. R-13-86. By the middle of the 2024-2025 school year, the Student's DIBELS score for reading was 425, above the benchmark level. R-12-85.

22. A progress report on the Student's BIP was issued on January 24, 2025. In week one of the chart, the Student engaged in tantrums/crying and physical aggression to others eight times or more each. By week six of the chart, the Student engaged in tantrums/ crying and physical aggression to others one to three times a week. The report also showed progress in the use of regulation, language, and coping strategies. The

Student showed a decrease in the frequency of physical aggression towards others, as evidenced by his/her using learned coping strategies. R-10.

23. The Student's IEP progress report dated January 27, 2025, indicated that s/he was regressing on the goal of reading grade-level informational text independently, given a graphic organizer and a verbal prompt, and then verbally stating the main idea and two key details. Progress was reported on the Student's other academic goals, and one math goal was mastered. The report said that the frequency and duration of the Student's tantrums and excessive crying had decreased. Over the most recent six-week period, the Student went from average of five tantrums/excessive crying episodes per day to an average of two per day. The Student also showed a greater ability to use coping strategies, needing no more than one adult prompt/support, on average. P-9.

24. The Student's second-term report card for the 2024-2025 school year indicated that s/he earned mostly "2" grades in reading, a "3" grade in writing, and "3" grades in math. R-7.

VI. Conclusions of Law

The burden of proof in District of Columbia special education cases was changed in 2014. The law states that "(w)here there is a dispute about the appropriateness of the child's individual educational program or placement, 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 establishes "a *prima facie* case." D.C. Code Sect. 38-2571.03(6)(A)(i). As a result, for Issue #1, which directly relates to the appropriateness of the Student's proposed program or placement,

the burden of persuasion is on Respondent if Petitioner presents a *prima facie* case. For Issues #2 and #3, the burden of persuasion is on Petitioner.

1. Did DCPS deny the Student a FAPE by refusing to include ABA services in his/her October 2024 IEP? If so, did DCPS deny the Student a FAPE?

In Hendrick Hudson Bd. of Educ. v. Rowley, 458 U.S. 176 (1982), the United States Supreme Court found that an IEP must be “reasonably calculated” to enable the child to receive benefit. In the District of Columbia, this has meant that the IEP should be both comprehensive and specific, and targeted to the Student’s “unique needs.” McKenzie v. Smith, 771 F.2d 1527, 1533 (D.C. Cir. 1985); 34 C.F.R. Sect. 300.324(a)(1)(iv) (the IEP must address the academic, developmental, and functional needs of the child). In 2017, the Supreme Court addressed a split amongst the circuit courts regarding what the IDEA means when it requires school districts to provide an “appropriate” level of education to children with disabilities. Endrew F. ex rel. Joseph F. v. Douglas County School Dist. RE-I, 580 U.S. 386 (2017). The Court held that parents can fairly expect school authorities to offer a “cogent and responsive explanation” for their decisions, but 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, a child’s “educational program must be appropriately ambitious in light of [his/her] 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).

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). As the Supreme Court has stated, “once a court determines that the requirements of the Act have been met, questions of methodology are for resolution by the States.” Rowley, 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, 1278 (D. Haw. 2011) (IEP did not specifically need to require the ABA methodology).

The commentary to the 1999 IDEA regulations does give hearing officers some leeway to require a methodology in an IEP where “there are circumstances in which the particular teaching methodology that will be used is an integral part of what is ‘individualized’ about a student’s education” and “will need to be discussed at the IEP meeting and incorporated into the student’s IEP.” Fed. Reg. Vol. 64, No. 48 (March 12, 1999) at 12552. The commentary explains that, “(f)or a child with a learning disability who has not learned to read using traditional instructional methods, an appropriate education may require some other instructional strategy.” Id.

Consensus is an important factor in determining whether an instructional methodology is required for a student’s IEP. For instance, in R.E. v. N.Y.C. Dep’t of Educ., 694 F.3d 167, 193-94 (2d Cir. 2012), almost all of the available reports in the

record found that the subject student needed continued ABA therapy or the like. Though some of the reports did not mention a specific teaching methodology, the court found that an IEP with “no guarantee of ABA therapy” was not sufficient. Id. at 194.

In E.E. by & through Hutchinson-Escobedo v. Norris Sch. Dist., No. 1:20-CV-1291 AWI CDB, 2023 WL 3124618, at *12 (E.D. Cal. Apr. 27, 2023), parents argued that a student’s IEP should have specified that the student receive services from personnel trained in ABA. Each of the subject student’s four independent assessors indicated that the IEP team should consider a 1:1 aide trained in ABA. And a school psychologist, who the school district itself hired to evaluate the student, testified that to acquire appropriate behavior skills, the student required daily, explicit instruction and systematic teaching using ABA from an appropriately trained aide. As a result, the court reversed the hearing officer and found that the student required ABA services on the IEP.

In this case, which involves a complex, autistic Student with severe behavioral issues, Petitioner wanted to add ABA therapy to the Student’s IEP. Petitioner’s expert Witness A, who came across credibly, testified that the Student must get ABA therapy to make progress in the classroom, both behaviorally and academically. Petitioner underscored that the Student has made little progress with respect to behavioral issues, that Petitioner still gets calls from the school all the time, and that something new must be tried to get the Student to learn.

However, there was no consensus of opinion that the Student must be taught through ABA therapy. Both Witness B and Witness D credibly testified that, though the Student still engages in tantrums and crying, s/he is behaving better and progressing academically. None of the school district’s witnesses supported Petitioner’s view that the

Student needed direct ABA therapy in school to receive a FAPE. Nor was the IEP team given any written report indicating that the Student needed ABA services or explaining why ABA therapy would help the Student more than his/her current program.

Moreover, while the Student continues to have behavioral issues, the Student has had fewer behavioral issues than s/he had during the 2023-2024 school year. The December 2023 FBA was written to address, among other things, the Student's biting, elopement, physical aggression to peers and staff, and destruction of property. The September 2024 FBA did not mention any of these issues; it was written to address the Student's tantrums/aggression and crying. The record also indicates that the Student has made good progress in reading, completes assignments even if behavioral issues occur, and has also made progress in math and writing.

Additionally, this Hearing Officer can find no caselaw in this or any jurisdiction supporting a claim that a student should be deemed to require ABA therapy where that student's behavior and academics show improvement. This claim must be dismissed.

2. Did DCPS fail to implement the Student's October 2024 IEP and the corresponding BIP? If so, did DCPS deny the Student a FAPE?

Petitioner contended that DCPS did not provide the necessary resources to implement the Student's IEP and BIP with, among other things, trained and licensed providers or the equivalent.

"Failure to implement" claims may be brought if a school district cannot "materially" implement an IEP. Turner v. District of Columbia, 952 F. Supp. 2d 31, 40–41 (D.D.C. 2013). A petitioner "must show more than a *de minimis* failure to implement elements of the IEP, and, instead, must demonstrate that the school board or other authorities failed to implement substantial or significant provisions of the IEP."

Beckwith v. District of Columbia, 208 F. Supp. 3d 34, 39 (D.D.C. 2016) (citing to Houston Indep. Sch. Dist. v. Bobby R., 200 F.3d 341, 349 (5th Cir. 2000); Savoy v. District of Columbia, 844 F. Supp. 2d 23 (D.D.C. 2012) (holding no failure to implement where the district's school setting provided ten minutes less of specialized instruction per day than was required by the IEP).

This approach affords LEAs some flexibility in implementing IEPs, but it still holds those agencies accountable for material failures. Houston Independent Sch. Dist. v. Bobby R., 200 F.3d 341, 349 (5th Cir. 2000); Van Duyn v. Baker Sch. Dist. 5J, 502 F.3d 811, 822 (9th Cir. 2007) ("A material failure occurs when there is more than a minor discrepancy between the services a school provides to a disabled child and [those] required by the child's IEP."); see also S.S. ex rel. Shank v. Howard Rd. Acad., 585 F. Supp. 2d 56, 67–68 (D.D.C. 2008); Wilson v. District of Columbia, 770 F. Supp. 2d 270, 274 (D.D.C. 2011).

In almost every instance, failure to implement claims involve allegations that are specific. Generally, the claims involve contentions that a school district did not meet a mandate to provide a specific amount of services over an extended period of time. Turner, 952 F. Supp.2d at 40-41 (no specialized instruction provided for three plus months). In Sumter Cnty. Sch. Dist. 17 v. Heffernan ex rel. TH, 642 F.3d 478, 486 (4th Cir. 2011), in a case involving ABA, the court did find that the school district failed to implement a student's IEP. However, that IEP required a specific amount of ABA therapy, and the district admitted that it provided only about half of that ABA therapy.

Petitioner's claim here is that the Student's program was not implemented by DCPS staff with enough experience in ABA. However, the Student's IEP and BIP did

not require the use of ABA, though the school district contended that the documents, and the Student's program generally, were influenced by ABA principles. Petitioner's closing argument appears to be that, since the school district contended that the Student's program was infused with ABA principles, the Student's educators needed to be better-versed in ABA to implement the program properly. Petitioner also appeared to focus on the language that Witness A added to the Student's BIP. Witness A's additions suggested, among other things, that the Student should not be punished for his/her behavioral issues and that the "Zones of Regulation" strategy was not always appropriate when s/he was upset. Petitioner suggested that the language that Witness A added was based on ABA, and that the school team did not implement those recommendations appropriately.

But the approaches that Witness A referenced in the Student's BIP were not mandates. In the draft IEP that contained Witness A's comments (P-6), Witness A stated, "My input can be inserted for all the behaviors being addressed so I am adding my suggestions for preventative measures, teaching, and response to behaviors here."

Moreover, the record suggests that the school team implemented the Student's BIP as written. Witness B, a credible witness who said that she used ABA principles in her class with the Student, specifically mentioned the use of "dojo" points, visuals, and the "calm down" corner, all of which the BIP mentions. Witness B also said that the Student's behavioral issues used to take much more time in class. Witness D, who came across as a thoughtful witness, said that her approaches were consistent with ABA principles and that the Student showed tremendous growth in behavior. Corroborating this testimony, a BIP progress report in January 2025 indicated that the Student's

behavior had decreased significantly while the BIP was in effect. In week one of the BIP, the Student engaged in tantrums/excessive crying and physical aggression to others eight times each, but by week six, s/he engaged in tantrums/crying and physical aggression one to three times a week.

Additionally, the Student's IEP progress reports have indicated progress on most goals and mastery of some goals. The Student's teacher testified that the Student could complete work even after behavioral incidents. The Student's report cards indicated that s/he has approached or met standards in all academic areas. And on both i-Ready and DIBELS testing, the Student has demonstrated substantive growth in reading.

This claim must be dismissed.

3. Did DCPS deny Petitioner's right to participate in the Student's IEP process by refusing to consider the request for ABA services at the IEP meeting? If so, did DCPS deny the Student a FAPE?

Petitioner alleged that DCPS effectively predetermined the result of the IEP meeting by refusing Petitioner's request for ABA services.

Districts must afford parents an opportunity to participate in meetings with respect to the identification, evaluation, educational placement of their child and the provision of FAPE to their child. 34 CFR 300.501 (b). Evidence must show that the school district had an "open mind" and might be swayed by the parents' opinions of and support for IEP provisions that they believe are necessary for their child. R.L. v. Miami-Dade Cnty. Sch. Bd., 757 F.3d 1173, 1188 (11th Cir. 2014) (request for 1:1 instruction predetermined by school district).

Petitioner argued that this case involves the same claim that the parents made in Deal v. Hamilton County Bd. of Educ., 392 F.3d 840, 857-858 (6th Cir.2004), where the

school district determined that an autistic student should be placed in a school program but refused to consider the 1:1, in-home, ABA program that the parents advocated. In Deal, the evidence showed that the school district “had an unofficial policy of refusing to provide one-on-one ABA programs” and that the school district did not have an open mind and was not willing to consider the provision of such a program. See also Schoenbach v. D.C., No. CIV.A.05-1591(RMC), 2006 WL 1663426, at *5 (D.D.C. June 12, 2006) (discussing Deal).

This Hearing Officer agrees. The record indicates that DCPS was not receptive to Petitioner’s request for ABA services and did not really consider whether such services were necessary for the Student. As Petitioner pointed out, DCPS changed its explanations for the denial of ABA services. First, DCPS said that it did not employ an ABA therapist and so could not provide ABA services to the Student. When Petitioner said that she wanted an outside therapist, DCPS said that it could not allow an outside therapist into the school because of FERPA, without explaining more. Then, DCPS said that the Student did not need an ABA therapist because his/her program was sufficient. Nowhere in the record is there any hint that DCPS genuinely contemplated the possibility of the Student receiving ABA instruction in school, even though ABA is an accepted methodology with many years of application, and even though the Student has had severe behavioral issues. Similarly, in J.E. v. New York City Dep’t of Educ., 229 F. Supp. 3d 223, 237 (S.D.N.Y. 2017), FAPE denial was found when a parent requested 1:1 services but the school district did not genuinely consider the request. The court found that, while it is true that parental disagreement with a school district’s IEP and placement

recommendation does not amount to a denial of meaningful participation, an IEP team still has a procedural obligation to consider whether a student requires more services.

DCPS maintained that it eventually did discuss the Student's need for ABA services and concluded that no such services were needed, in light of the DCPS program offer and the Student's response to the program during the school year. But this Hearing Officer was more convinced by Petitioner's suggestion that this discussion was not meaningful, and that it was clear at the outset of the IEP meeting that the Student was not going to receive ABA services. Indeed, the minutes from the IEP meeting, taken by DCPS, did not even mention a discussion of whether ABA services were needed for the Student. Instead, the minutes stated, in dialogue form:

Counsel for Petitioner: Witness A, can you talk about the difference in doing what a therapist does and having an ABA therapist?

Witness A: An ABA therapist will be highly trained, there are different levels of ABA therapists.

Witness C: Currently approaches are being used. DCPS does not allow ABA therapists on the property. DCPS must provide FAPE.

Counsel for Petitioner: Just to confirm we are not [asking for] an outside therapist, we are asking DC to provide a therapist.

Witness A: Just having a person do it isn't good enough because most do it wrong. While the support of a counselor is great, but the approaches are rooted in different causes. The counselor's approaches are different for someone with a social work degree or background. It would be really hard.

LEA: DCPS will still have to pay for an outside ABA therapist to come in because DC does not have an ABA therapist as an employee. To do so is a violation of FERPA. Also the current data we have does not support that the Student would benefit from in class ABA therapy.

R-2-40.

Not every procedural violation by a school district amounts to a denial of FAPE.

A hearing officer may find that a child did not receive a FAPE only if the procedural

inadequacies impeded the child's right to a FAPE, significantly impeded the parent's opportunity to participate in the decision-making process regarding the provisions of a FAPE to the parent's child, or caused a deprivation of educational benefits. 34 CFR 300.513 (a)(2). Here, this Hearing Officer finds that the failure to genuinely discuss this serious issue with any meaningful deliberation did significantly impede Petitioner's opportunity to participate in the decision-making process regarding the provisions of FAPE to the Student. This Hearing Officer therefore finds that DCPS denied the Student a FAPE.

RELIEF

As relief, Petitioner seeks direct ABA therapy for the Student from an ABA therapist at the Student's school, and an order for the school district to provide the Student with ABA-trained and experienced staff members to work with him/her on directly implementing his/her BIP. Though Petitioner initially asked for compensatory education in the Complaint, Petitioner did not ask for compensatory education during opening or closing argument. Because Petitioner mentioned that the Student received compensatory education in a previous litigation, and it does not appear that Petitioner's failure to mention compensatory education was inadvertent, this Hearing Officer will not consider compensatory education here.

When a student is denied a FAPE, the statute directs the Court to "grant such relief as [it] determines is appropriate." School Committee of the Town of Burlington v. Dep't of Education, Massachusetts, 471 U.S. 359, 371 (1985). The Supreme Court has indicated that due process decision-makers have as much discretion as that of courts in IDEA cases. Forest Grove Sch. Dist. v. T.A., 557 U.S. 230, 243 n.11 (2009).

This Hearing Officer has not found that the Student required ABA therapy in school, or that DCPS failed to implement the Student's IEP by using staff who did not know or understand ABA therapy and techniques. This Hearing Officer has only found that FAPE denial occurred because DCPS did not meaningfully address Petitioner's request for ABA services at the Student's IEP meeting. As a result, it would be inappropriate to order the relief that Petitioner requests. However, in view of the finding that DCPS significantly impeded Petitioner's opportunity to participate in the IEP decision-making process, this Hearing Officer will order an IEP meeting to again discuss Petitioner's request to provide this Student with ABA interventions. 34 CFR 300.513(a)(3). It is noted that Witness A stated that the Student should not be subject to punishment when s/he does something wrong, but the BIP indicates that the Student should be punished for certain actions. The IEP team should reconvene and discuss whether such language in the BIP is appropriate in light of Witness A's representations.

VII. Order

As a result of the foregoing:

1. Respondent shall reconvene the IEP team within twenty days to discuss Petitioner's requests that pertain to ABA therapy and services;
2. Petitioner's other requests for relief are denied.

Dated: March 3, 2025

Michael Lazan
Impartial Hearing Officer

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

Hearing Officer Determination
Michael Lazan, Hearing Officer
Case # 2024-0241

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).

Dated: March 3, 2025

Michael Lazan
Impartial Hearing Officer