District of Columbia
Office of the State Superintendent of Education
Office of Dispute Resolution
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Parent, through Student,[1]	)	
Petitioner,	)	**Room: 111**
	)	**Hearing: May 2, 2018**
v.	)	**Hearing Officer: Michael Lazan**
	)	**Case No.: 2018-0054**
DCPS,	)	**Issue Date: May 14, 2018**
Respondent.	)	

HEARING OFFICER DETERMINATION

I. Introduction

This is a case brought by the Petitioner, who is the parent of the student (the "Student"). A Due Process Complaint ("Complaint") was received by District of Columbia Public Schools ("DCPS" or "Respondent") pursuant to the Individuals with Disabilities Education Act ("IDEA") on February 28, 2018. A response was filed by Respondent on March 7, 2018. The resolution period ended on March 30, 2018.

II. Subject Matter Jurisdiction

This due process hearing was held, and a decision in this matter is being rendered, pursuant to the Individuals with Disabilities Education Improvement Act ("IDEIA" or "IDEA"), 20 U.S.C. Sect. 1400 et seq., its implementing regulations, 34 C.F.R. Sect. 300 et seq., Title 38 of the D.C. Code, Subtitle VII, Chapter 25, and the District of Columbia Municipal Regulations, Title 5-E, Chapter 30.

III. Procedural History

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

On April 19, 2018, this Hearing Officer held a prehearing conference. Attorney A, Esq., counsel for Petitioner, appeared. Attorney B, counsel for Respondent, appeared. A prehearing conference order was issued on April 25, 2018, summarizing the rules to be applied in this hearing and identifying the issue in the case.

There was one hearing date: May 2, 2018. This was a closed proceeding. Petitioner was represented by Attorney A, Esq. Respondent was represented by Attorney B, Esq. Petitioner moved into evidence Exhibits 1-37. There were no objections. Exhibits 1-37 were admitted. Respondent moved into evidence Exhibits 1-24. There were no objections. Exhibits 1-24 were admitted. Petitioner presented as witnesses: Witness A, a school psychologist; Witness B, a representative of School A; Witness C, an advocate; Witness D, a center director; and herself. DCPS presented: Witness E, an LEA representative; Witness F, a special education teacher; and Witness G, a social worker. At the close of testimony, both sides presented oral closing statements. Both sides were given an opportunity to present written statements supplementing their closing statements. Petitioner submitted such a written statement on May 7, 2018.

IV. Credibility.

The witnesses for both sides were credible. The witnesses for Petitioner presented credible testimony that was consistent with documentation in the record. Respondent's witnesses also presented credible testimony that was consistent with the documentation in the record.

V. Issues

As identified in the Prehearing Conference Summary and Order and in the Due Process Complaint, the issue to be determined is as follows:

Did DCPS fail to offer the Student a Free Appropriate Public Education ("FAPE") in the Student's Individualized Education Program ("IEP") dated January 10, 2018? If so, did DCPS act in contravention of 34 CFR 300.320, Endrew F. v. Douglas County School District, 137 U.S. 988 (2017), and Hendrick Hudson Bd. Of Educ. v. Rowley, 458 U.S. 176 (1982)? If so, did DCPS deny the Student a FAPE?

Petitioner contended that: 1) the Student needs a specialized reading program, in particular the Lindamood-Bell program; 2) the Student needs a smaller school building in which to be educated; and 3) the Student needs a therapeutic, non-public placement.

As relief, Petitioner is seeking a therapeutic, non-public placement and 400 hours of compensatory education in the form of Lindamood-Bell instruction. The alleged period of FAPE denial is from January, 2018, through the date of the HOD.

DCPS's position is that Petitioner agreed with the program recommended in January, 2018, and has not given it a full chance to work. DCPS maintained that the recommended program is appropriate and that the Student has been making progress in it.

VI. Findings of Fact

1. The Student is an X-year-old who is eligible for services as a Student with a Specific Learning Disability. The Student is currently in the Z grade, and the Student attends School B, a DCPS middle school. (P-15)

2. Based on testing conducted in early 2016, the Student has a full scale IQ of 78. The Student's cognitive test scores indicate deficits in short term memory and in processing speed. The Student's achievement scores show a significant learning disability which has caused the Student to function about six years behind grade in terms of reading "fluency" and decoding. The Student is well-liked at School B and is on the

cheerleading team. The Student frequently interacts with non-disabled students at the school. Still, the Student has said that s/he is "drowning" academically at the school. (Testimony of Petitioner; Testimony of Witness A; Testimony of Witness D; Testimony of Witness G)

3. The Student requires a small, structured educational program that is specifically designed to address severe reading disabilities in reading, writing, and math. (Testimony of Witness A; Testimony of Witness C)

4. During the 2015-2016 school year, the Student was in elementary school at School A. The Student received instruction through the SpellRead/LexiaCore 5 Reading program at the time. (P-11)

5. The Student was tested through the Gray Oral Reading Test-5 on September 15, 2015. The Student was found to function at the first-grade level or below in all four sub-test domains. The Student tested at below first-grade level in "rate," 1.0 grade level in "accuracy," 1.0 grade level in "fluency," and 1.4 grade level in "comprehension." (P-11-4)

6. The psychological evaluations for the Student from January and February, 2016, indicated that the Student needed 1:1 or small group instruction in math and was reading at the first-grade level. The Student was experiencing some behavioral issues at the time. On the Woodcock-Johnson IV Tests of Achievement Fourth Edition, the Student was determined to be well below level in all academic areas, with a very low standard score of 41 in broad reading. The Student's scores in spelling, sentence writing, letter-word identification, word reading fluency, sentence reading fluency, passage comprehension, oral reading, reading recall, and reading "rate" were all very low. At the

time, the Student was in the first percentile rank, more than four years behind grade in reading, according to the age equivalent that was reported. (P-5; P-6)

6. At the Student's IEP meeting on March 25, 2016, the Student was recommended for 22.5 hours of specialized instruction per week, an increase from the fifteen hours of specialized instruction provided previously. The Student also received thirty minutes of behavioral support services weekly. (P-7-1; P-11)

7. Testing conducted in June, 2016, indicated slight improvements in oral reading on the Slosson Oral Reading Test, at the second percentile, and in "word attack" on the Woodcock Reading Mastery Tests – III, Form A, at the third percentile, but the Student scored at the 1.8 grade level equivalent in paragraph reading, per the Gray Oral Reading Test-5, Form A. (P-8-2)

8. For the 2016-2017 school year, the Student attended School B, a public school. The school has 300 students, fifty-five of whom are eligible for special education instruction. The Student continued to receive daily instruction in a group, through the SpellRead/Lexia program. However, even with the additional specialized instruction hours, the Student was not making sufficient progress. In reading, the Student continued to function on the first-grade level, and the Student's scores dropped on the SRI measure. In math, the Student was doing the work, but made little progress. Testing conducted in December, 2016, showed only a slight increase in math scores in the i-Ready measure. Accordingly, on February 6, 2017, the IEP team added even more specialized instruction hours. The team recommended that the Student receive an increase of 2.5 hours per week, bringing the total hours of specialized instruction to twenty-five hours per week. The Student also received 120 minutes per month of behavioral support services because

the Student had received eight referrals for class disruptions, leaving class without permission, and physical aggression. (P-14-3, 7, 12; Testimony of Witness E)

9. The Student completed approximately sixty hours of Lindamood-Bell instruction during the 2016-2017 school year. Most of this instruction came during the spring of 2017. Testing conducted in May, 2017, indicated improvement in "word attack" on the Woodcock Reading Mastery Tests-III, Form A, at the tenth percentile, and also improvement on the Slosson Oral Reading Test, at the fourth percentile. There was minimal improvement in paragraph reading on the Gray Oral Reading Test-5, Form A, with the Student still at the 1.9 grade level equivalent. (P-8-2)

10. For the 2017-2018 school year, the Student has continued at School B in a program consisting of self-contained special education classes for academics. Again, the Student received SpellRead/Lexia instruction in a group, though at the start of the year, the Student also received instruction through the Read 180 program. The instruction in the Read 180 program was unsuccessful. The SpellRead/Lexia instruction was provided with about eight children in the classroom, who were divided into two groups. Half of the students would work on their own at computer terminals, while the other half would work with a teacher. (Testimony of Petitioner; Testimony of Witness E)

11. During this 2017-2018 school year, the Student's emotional issues have subsided as a result of skills that the Student has learned through behavioral support services. (Testimony of Witness G)

12. The Student was tested by a special education teacher on the Gray Oral Reading Test-5 on January 5, 2018. The Student's scores represented an increase in reading comprehension to 3.4 grade level equivalent. However, the Student's scores in

regard to "rate," "accuracy," and "fluency" continued to be at the first-grade level. In "rate," the Student scored at the 1.7 grade level equivalent. In "accuracy," the Student scored at the 1.2 grade level equivalent. In "fluency," the Student scored at the 1.4 grade level equivalent. (R-5; R-6)

13. An IEP meeting was held for the Student in January, 2018. The IEP team kept the level of services the same and virtually repeated the Student's reading goals from the prior year. The lone writing goal from the prior year was repeated as well, though other writing goals were added. The IEP indicated that the Student had not progressed in math per the i-Ready test, where the Student was still on "level 3." The IEP did not clearly state that any meaningful progress was made in reading. The SRI scores on the IEP, in fact, showed a decline in the Student's reading levels. The parent, accordingly, asked for a different reading program, but the team indicated that they did not have anything else to offer. At the meeting, a teacher indicated that the Student had made "some progress." Witness E said that none of the Student's reading goals or written expression goals had been mastered, that the Student still had trouble forming coherent sentences, and that the Student was still on a beginning reading level. (P-14; P-15-3, 6, 11; P-18-1; P-16 1-3; Testimony of Petitioner)

14. Additional testing in April, 2018, found that the Student has regressed to the first percentile in "word attack" on the Woodcock Reading Mastery Tests-III, to below the first percentile on the Slosson Oral Reading Test, and to the 2.8 grade level equivalent in paragraph reading on the Gray Oral Reading Test-5. (P-10-2)

15. Currently, the Student "really does struggle" with reading. The Student still cannot read very common words, still mixes up the letters "b" and "d," and still reads

at approximately the first-grade level. To help the Student progress, School B could offer the Student additional reading instruction, on an individual basis, for thirty minutes per day, three days a week. This instruction could be provided through the Wilson methodology, but this might not be helpful since SpellRead/Lexia instruction and Wilson instruction are very similar. The additional instruction could also come in the form of "guided reading." (Testimony of Witness E; R-6)

16. School C provides classes with an average ratio of eight students per teacher. The students receive reading intervention through the Lindamood-Bell program, supported by a reading specialist who creates a learning plan for each student. The intervention could be 1:1 or in a small group. Were the Student to attend School C, the Student would likely receive instruction through a phonics-based strategy called "Seeing Stars," which involves "air writing" and sensory exercises, and supports phonemic awareness, vocabulary, reading comprehension, and writing. The school also offers a daily reading intervention class involving "fluency" and comprehension. (Testimony of Witness B; Testimony of Witness D)

VII. Conclusions of Law

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

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

> Where there is a dispute about the appropriateness of the child's individual educational program or placement, or of the program

> or placement proposed by the public agency, the public agency shall hold the burden of persuasion on the appropriateness of the existing or proposed program or placement; provided, that the party requesting the due process hearing shall retain the burden of production and shall establish a prima facie case before the burden of persuasion falls on the public agency. The burden of persuasion shall be met by a preponderance of the evidence.

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

The sole FAPE issue in this case involves Respondent's failure to provide an appropriate IEP. Accordingly, Petitioner is obligated to establish a *prima facie* case. Thereafter, if the *prima facie* case is established, the burden of persuasion is on Respondent. On this record, it cannot be fairly argued that Petitioner did not present a *prima facie* case, since all of Petitioner's witnesses and many of her documents support her claim. DCPS does not argue that Petitioner did not present a *prima facie* case. Accordingly, the burden is on the school district in this proceeding.

An IEP developed through the Act's procedures must be reasonably calculated to enable the child to receive additional benefits. Hendrick Hudson Bd. Of Educ. v. Rowley, 458 U.S. 176 (1982). The IEP should be both comprehensive and specific, and targeted to the Student's "unique needs." McKenzie v. Smith, 771 F.2d 1527, 1533, D.C. Cir. 1985); N.S. ex rel. Stein v. District of Columbia, 709 F.Supp.2d 57, 60 (D.D.C. 2010); 34 CFR Sect. 300.320(a)(2)(B)(the IEP must contains goals that meet each of the child's educational needs that result from the child's disability); 34 CFR Sect. 300.324(a)(1)(iv)(the IEP must address the academic, developmental, and functional needs of the child). In 2017, the Supreme Court addressed a split amongst the circuit courts regarding what the IDEA means when it requires school districts to provide an "appropriate" level of education to children with disabilities. Endrew F. ex rel. Joseph F. v. Douglas County School Dist. RE-I, 137 S. Ct. 988 (2017). In Endrew F., the Court

held that an IEP must be "reasonably calculated to enable a child to make progress appropriate in light of the child's circumstances." Id. at 1001. The Court made clear that the standard is "markedly more demanding than the 'merely more than de minimis' test" applied by many courts. Id. at 1000.

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

School districts are not required to put a particular methodology in the IEP. Rowley, 458 U.S. at 204. However, as stated in the comments to the 1999 IDEA regulations:

> In light of the legislative history and case law, it is clear that in developing an individualized education 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, in those circumstances will need to be discussed at the IEP meeting and incorporated into the student's IEP. For example, for 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.

Fed. Reg. Vol. 64, No. 48 (March 12, 1999) at 12552.

This case fits into the scenario contemplated by the above comments. The Student has been in public school for the Student's entire academic career, and for the

last three years, at least, the Student has been receiving the SpellRead/Lexia program, in a group, to assist with reading. The Student's IEP does not specifically recommend a reading program, but the understanding of the team was that the SpellRead/Lexia program was to continue, and the SpellRead/Lexia program did in fact continue after the IEP was written.

However, even though the Student is now in middle school, the Student remains on the first-grade level in reading in most areas. At the time the IEP was created, the IEP team reviewed the Student's SRI (or "RI") scores and found that they reflected a significant decline. The team also reviewed the Student's i-Ready testing in math and found that the Student appeared to have plateaued on a "level 3." There is nothing in the IEP about the Student making progress in reading, except in the Student's ability to sound out words. The IEP indicated that the Student "continues to perform significantly below (his/her) grade level" in reading.

DCPS argued that the parent never asked for changes to the Student's reading program, pointing to the testimony of Witness C, but Witness C was not at the January, 2018, IEP meeting. The parent was at the meeting, and she testified that she did ask for changes to the Student's reading program at the meeting. DCPS did not call any witnesses on rebuttal to contradict this testimony from the parent, who came across credibly.

DCPS also argued that Gray Oral Reading Test-5 results showed that the Student made progress prior to January, 2018, but the progress in the Gray Oral Reading Test-5 was minimal in "rate," "accuracy," and "fluency," with the Student still testing on the first-grade level. The Student did increase the score for reading comprehension to the 3.4

grade level equivalent, but the IEP team did not mention that in the IEP and there is no testimony to the effect that the team felt that was a major factor in assessing the Student's performance. In fact, later testing conducted in April, 2018, indicated that the Student was at the 2.8 grade level equivalent in reading comprehension on the Gray Oral Reading Test-5.

DCPS pointed to the testimony of Witness E, but this witness did not enthusiastically indicate that the SpellRead/Lexia program constituted an appropriate reading program for the Student. While this witness did indicate that it would be best for the Student to complete the year with the SpellRead/Lexia program, given how much time had been put into it, this witness also indicated that the Student needed individualized tutoring, and that she was willing to provide it herself, even though she functions as the LEA representative for the school. Witness E indicated that the Student "really does struggle" with reading, cannot read common words, still mixes up the letters "b" and "d," and still reads at approximately the first-grade level in most respects.

DCPS also argued that the Student had too many absences and was not participating enough, but the Student's January 10, 2018, report card indicated that the Student had "good participation" in three classes and was a "(p)leasure to have in the class" in the other four classes. There are no references to behavioral problems or attendance problems in this report card, which was the report card before the IEP team at the time of the IEP review.

It is important to note that, at the IEP meeting, a teacher indicated that the Student had made "some progress" in the current program. In Endrew F., the Supreme Court reversed the Tenth Circuit Court of Appeals which had determined that Endrew's IEP

allowed for "some progress." 132 S.Ct. at 997. In reversing the Tenth Circuit, the Supreme Court held that the IEP child should be "appropriately ambitious in light of his circumstances" and that to expect "some progress" is not "ambitious" enough. 137 S.Ct. at 992. Further to this point, at the IEP meeting, Witness E said that none of the Student's reading goals or written expression goals had been mastered, that the Student still had trouble forming coherent sentences, and that the Student was still on a beginning reading level.

Parenthetically, there is virtually no evidence in the record that the Student requires a "small school," as Petitioner contended at the pre-hearing conference. Nor is there testimony that the Student requires a "therapeutic" placement, since there is convincing testimony in the record from Witness G that the Student's behavioral concerns have ebbed during the current school year. Nevertheless, since the IEP failed to adequately address the Student's reading issues, DCPS denied the Student educational benefit, and therefore a FAPE, through its IEP dated January, 2018.

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). The ordinary meaning of these words confer broad discretion on a hearing officer, since the type of relief is not further specified, except that it must be "appropriate."

In Branham v. District of Columbia, 427 F.3d 7 (D.C. Cir. 2005), the Circuit laid forth rules for determining when it is appropriate for IHOs to order funding of non-public placements. First, the court indicated that "(i)f no suitable public school is available, the [school system] must pay the costs of sending the child to an appropriate private school." Id. at 9 (citing Jenkins v. Squillacote, 935 F.2d 303, 305 (D.C.Cir.1991)). The Circuit then explained that such relief "must be tailored" to meet a student's "unique needs." Id. at 11-12 (citing to Florence County School Dist. v. Carter, 510 U.S. 7, 16 (1993)). To inform this individualized assessment, courts must consider "all relevant factors," including the nature and severity of the student's disability, the student's specialized educational needs, the link between those needs and the services offered by the private school, the placement's cost, and the extent to which the placement represents the least restrictive educational environment. Id. at 12.

The record makes it clear that this Student has a severe learning disability and needs a new approach to be able to address reading issues. School C offers individualized reading through the Lindamood-Bell program, a new approach distinct from the SpellRead/Lexia program that the Student has been in for the past three years. The Student did receive instruction through the Lindamood-Bell program during spring, 2017, though the instruction was limited to sixty hours. This instruction appears to have resulted in some progress for the Student. Testing conducted in May, 2017, indicated improvement in "word attack" and oral reading, as reflected by the Slosson Oral Reading Test. DCPS argued in its closing that the Lindamood-Bell program is similar to the SpellRead/Lexia program, but the record does not indicate that. The record instead indicates that SpellRead/Lexia is a computer-based program, whereas the Lindamood-

Bell program uses a more phonics-based approach, including "air writing" and sensory interventions.

DCPS also argued that the Student needs additional testing before placement, pointing to the testimony of Petitioner's Witness, Witness A. However, Witness A was the only witness who made this point, and the record contains many test results pertaining to the Student's reading and math abilities, as discussed in this decision. Although there has not been a formal psychological evaluation of the Student in the past few years, there is enough data in this record to determine an appropriate program for the Student.

It is true that the Student is doing well socially in School B, and it is also true that the Student is benefitting from interactions with non-disabled peers. Where a parent seeks to place a student, the extent to which the placement constitutes the Student's Least Restrictive Environment ("LRE") can and should be considered by the hearing officer. N.T. v. District of Columbia, 839 F.Supp.2d 29, 35 (D.D.C. 2012). However, while the mandate for an LRE is an important one, it does not trump a student's right to a FAPE. Maintaining a less restrictive placement at the expense of educational benefit is not appropriate or required. Hartmann by Hartmann v. Loudoun County Bd. of Educ., 118 F.3d 996 (4th Cir. 1997); see also Clyde K. v. Puyallup Sch. Dist., 35 F.3d 1396 (9th Cir. 1994); MR v. Lincolnwood Bd. of Educ., 843 F. Supp. 1236 (N.D. Ill 1994).

Especially persuasive in this regard was the testimony of Petitioner, who was credible throughout. Petitioner indicated that the Student felt that s/he was "drowning" academically in the current placement. Witness E indicated that she could provide the Student with guided reading for thirty additional minutes per day, three days a week. However, Witness E did not indicate that "guided reading" represented any particular

methodology, and Witness E also did not suggest access to any new methodology except the Wilson methodology, which, she said, is similar to the SpellRead/Lexia methodology that has been unsuccessful. Moreover, Witness E did not indicate that the Student would receive daily reading instruction, even though, on this record, daily individual reading instruction is called for. In the judgment of this Hearing Officer, the appropriate remedy is to place the Student at School C, which must provide the Student with at least forty-five minutes per day of individualized reading instruction with the school's reading specialist.

Finally, in regard to compensatory education, the parties agreed on the appropriate compensatory education award in this case (assuming a finding of a FAPE violation) prior to the hearing, as stated below.

VIII. Order

As a result of the foregoing:

1. As a result of the agreement between the parties, the Student shall receive 26.0 hours of counseling at the OSSE rate of $104.64 and 26.5 hours of tutoring at the OSSE rate of $65 per hour as compensatory education;

2. The Student shall immediately be placed at School C;

3. DCPS shall reimburse the parent for all expenses incurred at School C, provided that School C provides the Student with at least forty-five minutes per day of individualized reading instruction by the school's reading specialist in the Lindamood-Bell methodology;

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

Dated: May 14, 2018
Revised: May 15, 2018

Michael Lazan
Impartial Hearing Officer

cc: Office of Dispute Resolution
Attorney A, Esq.
Attorney B, Esq.
OSSE Division of Specialized Education
Contact.resolution@dc.gov

IX. Notice of Appeal Rights

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

Date: May 14, 2018
Revised: May 15, 2018

Michael Lazan
Impartial Hearing Officer