District of Columbia
Office of the State Superintendent of Education
Office of Dispute Resolution
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Guardian, on behalf of Student,[1]	)	
Petitioner,	)	
	)	
v.	)	**Hearings: October 26 and 30, 2018**
	)	**Date: November 7, 2018**
	)	**Hearing Officer: Michael Lazan**
	)	**Case No.: 2018-0220**
District of Columbia Public Schools,	)	
	)	
Respondent.	)	

HEARING OFFICER DETERMINATION

I. Introduction

This is a case involving an X-year-old student who is currently eligible for services as a student with Intellectual Disability (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 August 24, 2018. The Complaint was filed by the grandmother and guardian of the Student ("Guardian" or "Petitioner"). On September 6, 2018, Respondent filed a response. The resolution period for this case expired on September 23, 2018.

II. Subject Matter Jurisdiction

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

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

III. Procedural History

On September 19, 2018, this Hearing Officer held a prehearing conference. Attorney A, Esq., counsel for Petitioner, appeared. Attorney B, Esq., counsel for DCPS, appeared. A prehearing conference order was issued on September 25, 2018, summarizing the rules to be applied in this hearing and identifying the issues in the case. On September 27, 2018, DCPS moved to dismiss Issue #3. The motion was denied by order dated October 18, 2018. There were two hearing dates: October 26, 2018, and October 30, 2018. These were closed proceedings. Petitioner was represented by Attorney A, Esq. Respondent was represented by Attorney B, Esq. Petitioner moved into evidence Exhibits 1-48. There were no objections. Exhibits 1-48 were admitted. Respondent moved into evidence Exhibits 1-39. There were no objections. Exhibits 1-39 were admitted.

Petitioner presented as witnesses: herself; Witness A, a psychologist; and Witness E, an advocate. Respondent presented as witnesses: Witness G, an expert in Applied Behavioral Analysis; Witness H, a program manager; Witness D, a special education teacher; Witness B, a teacher; Witness C, a director of special education; Witness F, a program specialist; and Witness I, a resolution specialist. The parties presented written closing arguments on November 2, 2018.

IV. Issues

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

1. From May, 2018, to present, did DCPS fail to assess the Student in all areas of suspected disability? If so, did DCPS violate 28 U.S.C. Sect. 1414(b)(3), 34 C.F.R. Sect. 300.304(c), and related provisions? If so, did DCPS deny the Student a Free and Appropriate Public Education ("FAPE")?

Petitioner contended that DCPS failed to provide the Student with an occupational therapy assessment, a Functional Behavior Assessment ("FBA"), and an Applied Behavioral Analysis ("ABA") assessment.

2. Did DCPS fail to offer the Student a FAPE in the Individualized Education Programs ("IEPs") dated May, 2018, and July, 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 the IEPs were not based on comprehensive assessments, failed to provide a behavior plan, failed to provide assistive technology, failed to provide a social skills group, failed to provide sufficient behavior support services, and failed to provide enough specialized instruction.

3. Is the Student due compensatory education as a result of the findings in the Hearing Officer Determination ("HOD") of Hearing Officer Peter Vaden, issued in November, 2018?

V. Findings of Fact

1. The Student is an X-year-old who has been diagnosed with Down Syndrome. The Student is eligible for services as a student with an Intellectual Disability. The Student functions on a very low level in all academic areas and can have trouble answering simple questions. The Student has great difficulty reading and writing, and can only do simple math activities. The Student requires a great deal of repetition to

learn. Though the Student does not have any major disruptive behaviors, the Student can be resistant to doing work. Prompts will ordinarily compel the Student to do work. The Student has significant speech and language issues. The Student rarely provides more than one word answers to questions, and the Student's articulation of language is difficult to understand. (Testimony of Witness A; Testimony of Guardian; Testimony of Witness B; Testimony of Witness C; Testimony of Witness D; P-39)

2. The Student attended School A Middle School, and then School B High School, for the 2014-2015 and 2015-2016 school years. Since the 2016-2017 school year, the Student has attended School C, a public high school in the District of Columbia. In the beginning of the Student's time at School C, the Student was very quiet, but the Student is now more verbal and engages in more social activities, such as taking photographs. The school has helped the Student to develop skills, including in speech. (Testimony of Witness C; Testimony of Guardian; P-17-2)

3. The Student's IEP dated April 25, 2017, contained goals in math, reading, adaptive/daily living skills, and communication/speech and language. The IEP provided for twenty hours per week of specialized instruction outside general education, with ninety minutes per week of speech and language pathology. The IEP also provided for preferential seating and a location with minimal distractions. The IEP did not recommend an extended school year, access to assistive technology, or small-group learning. The IEP also did not mention that the Student had behavioral issues. (P-6)

4. For the 2017-2018 school year, the Student was again assigned to the DCPS "ILS" program at School C. The Student was also assigned to an art class with general education students. The Student generally enjoyed the art class, which was

taught without a special education teacher, though an aide was in the room to help the Student and others. The Student also worked on reading, math, and writing activities during the 2017-2018 school year. Generally, the Student behaved in class, but there were times when the Student resisted doing work and put his/her head on the desk. Prompting would often get the Student to work, but sometimes the Student would refuse the prompts. (Testimony of Witness B; Testimony of Witness C; Testimony of Witness D)

5. A Due Process Complaint was filed by Petitioner on August 25, 2017, and the case was assigned to Hearing Officer Peter Vaden. An HOD was issued by Hearing Officer Vaden on November 28, 2017, which found that Petitioner: 1) did not meet her burden to show that the Student's October, 2015, triennial evaluation lacked an assistive technology evaluation, occupational therapy evaluation, vocational evaluation, and physical therapy evaluation; and 2) did meet her burden to show that the Student's October, 2015, triennial evaluation lacked a comprehensive psychological evaluation and adaptive assessment. Hearing Officer Vaden also found that the Student's 2015-2016 placement did not provide the Student with enough access to non-disabled peers. Hearing Officer Vaden also found that the Student's IEPs dated October 5, 2016, and April 25, 2017, were deficient since they were not based on sufficient evaluations, did not update the Student's present levels of performance, and lacked writing goals. Hearing Officer Vaden also found that the Student's IEP was not implemented in regard to transportation during the 2016-2017 school year. Hearing Officer Vaden did find that the IEPs appropriately reduced the Student's instructional hours from twenty-five to twenty hours per week, and appropriately reduced the Student's speech and language services

from 120 minutes per week to ninety minutes per week. Hearing Officer Vaden also denied claims that the Student was entitled to Extended School Year services. As relief, Hearing Officer Vaden ordered a comprehensive reevaluation of the Student through a comprehensive psychological evaluation, and an assessment of the Student's compensatory education needs as a result of the failure to provide appropriate IEPs and evaluations from October, 2015, to present. Hearing Officer Vaden also ordered that, if the parties were unable to then agree on a compensatory education award, Petitioner then would have the right to bring a second Due Process Hearing on this issue. Fifteen hours of academic tutoring were provided to the Student to address the failure to implement the Student's transportation needs. (R-3)

6. Pursuant to Hearing Officer Vaden's HOD, a compensatory education recommendation was made by Evaluator A. Witness A also conducted a psychological evaluation of the Student in a report dated approximately January, 2018. The report reflected an interview in which the Guardian indicated that the Student was speaking better than ever and was able to speak in sentences. The report also reflected that teachers told the evaluator that the Student enjoyed going to school and printed well, though the Student sometimes did not separate words properly. Teachers also told the evaluator that the Student could read some words, but it was not clear if the Student could comprehend any of the words. It was reported that the Student knew numbers but had difficulty performing addition or subtraction. One of the Student's teachers indicated to Witness A that the Student was happy to go to school but was "cranky" sometimes as a result of watching television at night. The Student would then yell at the staff, who would then have to tell the Student to be respectful. The report discussed an observation

conducted by Witness A, which revealed that the Student had difficulty understanding simple instructions. The testing results in the report showed that the Student functioned in the extremely low range in all domains, including in cognitive functioning, verbal comprehension, language skills, perceptual reasoning, memory, processing speed, visual motor abilities, non-verbal intelligence, reading, math, and written expression. Behavior Assessment Scales for Children-2 ("BASC-2") testing revealed that some teachers felt that the Student was "at-risk" for aggression, conduct problems, and hyperactivity, while other teachers did not. The evaluator's recommendations for the Student included a small student-to-teacher ratio, repetitious teaching, a "multi-modal" approach, visual cues, appropriate classroom pacing, and an occupational therapy evaluation, which was "highly" recommended. The evaluator also recommended an occupational therapy evaluation because the Student scored poorly on the Visual Motor Index, which required the Student to copy designs. A social skills group was also recommended as something the Student would "likely benefit" from "if available." (Testimony of Witness A; P-17)

7. An IEP meeting was held on April 23, 2018, to review the Student's psychological evaluation and speech and language evaluation. The Student's art teacher indicated that the Student was still working on pre-kindergarten artwork and not participating with peers in art class. Other teachers at the meeting said that the Student had exhibited some work avoidance behaviors during the past school year. Petitioner requested a "full-time" IEP, a dedicated aide, an increase in speech and language therapy, an assistive technology assessment, an "ABA evaluation" and an occupational therapy assessment. DCPS agreed to conduct an occupational therapy screening and an assistive

technology screening, but did not agree with any of the other requests. (Testimony of Witness E; P-2; R-12-2-3; P-2; P-4; P-1)

8. After the April, 2018, IEP meeting, a special education teacher observed the Student. This teacher concluded that the Student had work avoidance issues but not "behavioral" issues. An occupational therapy screening was conducted. The screening indicated that the Student's writing was legible, but that the Student needed help with spacing. An assistive technology screening was also conducted during this time period. An IEP meeting was then held on May 9, 2018, during which Petitioner expressed concern about the Student's performance during unstructured time. Petitioner also requested additional behavior support services and continued to request additional evaluations for the Student. (Testimony of Petitioner; Testimony of Witness E; Testimony of Witness C)

9. The Student's IEP dated May 9, 2018, recommended access to a computer, iPad, "read/aloud reader," calculator, and manipulatives. The IEP contained goals in math, reading, adaptive/daily living skills, and communication/speech and language. The IEP indicated that the Student occasionally yelled and pushed other students and then laughed, and worked best in a small class with a small teacher-to-student ratio. The IEP provided for twenty hours per week of specialized instruction outside general education, with ninety minutes per week of speech and language pathology. The IEP also provided for preferential seating, a location with minimal distractions, and an extended school year. This new IEP also added "spacer for writing purposes" as an assistive technology consideration. (P-1)

10. The Student's progress reports for the 2017-2018 school year reported slow progress in math, reading, and adaptive daily living skills. Some goals had not been introduced by the end of the school year, including in reading and math. (P-27; R-5; R-9; R-22)

11. An assistive technology assessment of the Student was conducted by Evaluator B on June 21, 2018. The evaluator interviewed the Student's teacher, who said that the Student had neat handwriting and was able to copy letters and numbers, and the Student's case manager, who indicated that the Student was not motivated by technology. The Student refused to be tested in several areas, pushed away a laptop, and was unable or unwilling to answer basic questions. The evaluator recommended trial assistive technology in view of the Student's resistance. The recommendation was for a trial of text-to-speech software, word banks, digital pictures, and a reading pen. (P-19)

12. A multidisciplinary team meeting was conducted on July 12, 2018, to review the assistive technology evaluation. At this meeting, Petitioner requested an ABA evaluation and a full occupational therapy evaluation. No changes were made to the Student's IEP as a result of this meeting. (P-9)

13. "FAST" testing of the Student was conducted on July 26, 2018. FAST is a screening tool used to identify the possible functions of a person's behavior. This tool revealed that the Student's negative behavior often occurred when the Student did not receive much attention. The FAST testing also established that the Student's negative behavior often occurred when the Student was given tasks that the Student did not prefer. (Testimony of Witness F; Testimony of Witness G; R-24, R-25)

14. During this approximate period of time, Witness F created a draft of a "Best Practices Behavior Management Guide," which indicated the Student's behavior was caused by, among other things, a lack of attention, lack of preferred activity, and being in an "undesired" environment. The guide recommended repeated prompts and reminders of the positive consequences of good behavior. (R-26; Testimony of Witness F)

15. The Student's IEP was amended on September 12, 2018, in connection to the resolution meeting for this case. The new IEP recommended a long term trial to determine if assistive technology supports would benefit the Student in the classroom. The IEP noted that, during an assistive technology assessment, the Student did not benefit from supports. (P-11)

16. During the first few months of the 2018-2019 school year, teachers kept data on the Student's behavioral issues. According to this data, the Student was only noncompliant a few times during this period. The Student was also tested through the Assessment of Basic Language and Learning Skills Revised ("ABBLS-R") and the Assessment of Functional Living Skills ("AFLS"). Though complete versions of the test were not given, the tests provided information on the Student's social interaction, self-management, and social awareness. The testing showed that the Student was able to demonstrate mastery of many social tasks, such as greeting peers without prompts, but was not able to demonstrate skills in other areas, such as responding appropriately to peers who attempted to interact. The testing indicated that the Student followed known directions seventy-six percent of the time, and returned greetings without prompts. (R-27; R-28; R-30; R-35; Testimony of Witness F)

17. Respondent authorized an occupational therapy evaluation for the Student on September 13, 2018, with a maximum cost of $782.28. (R-32)

VI. Conclusions of Law

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

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

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

See D.C. Code § 38-2571.03(6)(A)(i)

Issue #1, which involves a request for evaluations, does not involve a direct challenge to the Student's IEP, program, and/or placement. On this issue, Petitioner bears the burden. Schaffer v. Weast, 546 U.S. 49 (2005).

Issue #2 involves a direct challenge to the Student's IEPs. On this issue, the burden of persuasion is with Respondent, since there is no question that Petitioner put on a *prima facie* case through its three witnesses, all of whom testified about alleged issues with the IEPs.

Finally, since Issue #3 involves remedy only, analysis of the burden of persuasion is not appropriate for Issue #3.

1. From May, 2018, to present, did DCPS fail to assess the Student in all areas of suspected disability? If so, did DCPS violate 28 U.S.C. Sect. 1414(b)(3), 34 C.F.R. Sect. 300.304(c), and related provisions? If so, did DCPS deny the Student a FAPE?

Petitioner contended that Respondent failed to provide the Student with an occupational therapy assessment, an FBA, and an ABA assessment.

A Local Educational Agency ("LEA") is required to ensure that a child is assessed in all areas of suspected disability, and that the chosen assessment tools and strategies are provided to present relevant information that directly assists persons in determining the educational needs of the child. 28 U.S.C. Sect. 1414(b)(3); 34 C.F.R. Sect. 300.304(c). In matters alleging a procedural violation, a hearing officer may find that a child did not receive a FAPE only if the procedural inadequacies: (i) impeded the child's right to a FAPE; (ii) significantly impeded the parent's opportunity to participate in the decision-making process regarding the provision of a FAPE to the parent's child; or (iii) caused a deprivation of educational benefit. 34 CFR Sect. 300.513(a).

1. Occupational Therapy Evaluation.

Witness A's report indicated that an occupational therapy evaluation of the Student was "highly recommended" because the Student's scores on visual-motor testing suggested that the Student had issues with copying. Witness A was selected by Respondent, and her thorough report was capably written and reasoned. Witness A's testimony was consistent with her report, and she came across as credible.

Respondent's occupational therapist did conduct a "screening" of the Student in this area, but there is little in the record to explain what the screening consisted of, since

the occupational therapist was not called as a witness. Additionally, there is nothing in the record to indicate that the screener ever resolved the inconsistency between the testimony of Witness A on this issue (to the effect that the Student could not copy correctly) and the position of the Student's teachers on this issue (all of whom indicated that the Student wrote legibly). It is noted that, in assessing a Student, an LEA must use technically sound instruments that may assess the relative contribution of cognitive and behavioral factors, in addition to physical or developmental factors.[2] There is no evidence that the occupational therapy "screening" involved the use of any technically sound instruments at all.

It is true that Witness A herself is not an occupational therapist. Still, a professional psychological evaluation that "highly" recommends testing in a related area of disability should generally be viewed as evidence of a suspected disability in that area. It is noted that the applicable regulation has broad language, requiring an assessment "in all areas related to the suspected disability, including, if appropriate, health, vision, hearing, social and emotional status, general intelligence, academic performance, communicative status, and *motor abilities*. 34 CFR Sect. 300.304(c)(4)(emphasis added). Also considering that Respondent selected this psychologist, Respondent should have suspected that the Student had motor issues through Witness A's report and should have provided the Student with corresponding testing. It is noted that a failure to conduct an occupational therapy evaluation can amount to a FAPE violation. Orangeville Community School District 203, 112 LRP 12090 (IL SEA February 29, 2012).

2. Functional Behavior Assessment.

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[2] 34 C.F.R. § 300.304(b)(3).

Some courts in the District of Columbia have held that it is "essential" for the LEA to develop an FBA when students have behavioral issues. The FBA's role is to determine the cause, or "function," of the behaviors and then the consequences of those behaviors. Harris v. Dist. of Columbia, 561 F. Supp. 2d 63, 68 (D.D.C. 2008); see also Long v. Dist. of Columbia, 780 F. Supp.2d 49 (D.D.C. 2008)(in ruling the district failed to provide an FBA/BIP for a student, the court stated that "the quality of a student's education is inextricably linked to the student's behavior"); Shelton v. Maya Angelou Charter School, 578 F.Supp.2d 83 (D.D.C. 2008)(FBA/BIP required where learning disabled student was suspended). Other courts have expressed a different point of view, indicating that an FBA is simply not required as part of an evaluation. E.L. Haynes Pub. Charter Sch. v. Frost, 66 IDELR 287 (D.D.C 2015).

However, most courts agree that an FBA may not be required if existing behavioral approaches meet a student's needs. A.C. v. Chappaqua Central School Dist., 553 F.3d 165 (2d Cir. 2009)(FBA not needed where IEP provided specific interventions that would address behavioral needs). Here, the record indicates that the Student's behavioral issues are generally controllable by prompts in class, though the prompts might have to be repeated by the teacher or the service provider. The Guardian herself expressed little concern about the Student's behavior, indicating that the Student only had two behavioral episodes during the entire 2017-2018 school year. Also, there are many references to the Student's positive behavior in the record. In fact, the May, 2018, IEP states that the Student "demonstrates appropriate interactions" with both peers and adults. Witness A felt that the Student mostly behaved appropriately during her observation and testing of the Student. It is noted that, after the filing of the Due Process Complaint,

Respondent did conduct a variety of assessments that were, like an FBA, designed to determine the function of the Student's behavior, including FAST testing. Additionally, Witness A conducted BASC-2 testing, which assessed the Student's behavioral issues in detail. Under these circumstances, Respondent was under no obligation to conduct an FBA of the Student from May, 2018, to present.

3. ABA evaluation.

To address the Student's behavioral issues, Petitioner requested an ABA evaluation. However, none of the witnesses in the record, including Petitioner's two expert witnesses, made it clear that there is even such a thing as an "ABA evaluation." Instead, the record suggests that ABA is an educational methodology rather than a kind of evaluation. Witness H credibly testified that ABA is an evidence-based educational practice based on theories of learning, which can be used to work through many different areas, including improving social and learning skills and reducing maladaptive behaviors. Witness H and Witness G were both classified as ABA experts, and both witnesses testified impressively. Both said that there was no such thing as an ABA evaluation. Petitioner therefore cannot prevail in regard to this issue.

Petitioner did establish that Respondent failed to conduct an occupational therapy evaluation from May, 2018, to present, which impeded the Student's right to a FAPE. However, all other FAPE claims relating to assessments must be denied.

2. Did DCPS fail to offer the Student a FAPE in the IEPs dated May, 2018 and July, 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 the Student's IEPs were not based on comprehensive assessments, failed to provide a behavior plan, failed to provide assistive technology,

failed to provide a social skills group, failed to provide sufficient behavior support services, and failed to provide enough specialized instruction.

As noted in the analysis of Issue #1, DCPS has implemented a reasonable plan to address the Student's behaviors, *i.e.*, through the use of multiple teacher prompts. There is no pressing reason for the school district to conduct an FBA or implement a behavior plan for the Student. It is noted that there is no specific statutory or regulatory requirement for a behavior intervention plan ("BIP"), even if a student has severe behavioral issues. The relevant provision of the IDEA statute states that a school district is required to "consider the use of positive behavioral supports and other strategies" if a student's behavior impedes the student's learning. 20 U.S.C. Sect. 1414(d)(3)(B)(i); 34 C.F.R. Sect. 300.324(a)(2)(i).

Similarly, there is no reason DCPS should have recommended that the Student receive behavioral support services, such as counseling. Students with behavioral issues do not necessarily require counseling, which is appropriate only where the counseling would actually be helpful to a student. There is nothing in the record to suggest that the Student would benefit from counseling, and Witness A did not recommend counseling for the Student. Nor did the Guardian herself suggest counseling for the Student, who has had difficulty understanding simple instructions from adults.

Petitioner also contended that the Student requires assistive technology, and that the subject IEPs do not sufficiently specify the required assistive technology services. However, the IEP of May, 2018, does state that the Student should have access to computers and "other" technology devices, including a "read aloud/reader" and a "spacer for writing purposes." Moreover, Evaluator B's assistive technology evaluation indicated

that the Student was not especially responsive to assistive technology, and Petitioner did not call an assistive technology expert in response. In Evaluator B's report, it is notable that the Student resisted the use of assistive technology and even pushed away a laptop when it was provided. In addition, Witness A did not recommend any assistive technology for the Student, even though Witness A recommended twenty-nine different types of intervention for the Student. Nor did any of the Student's teachers indicate that any specific assistive technology was available to help the Student.

Petitioner also argued that a social skills group should have been recommended in the Student's IEPs. This argument does follow a qualified recommendation by Witness A, who indicated in her report that the Student should benefit from a social skills group "if available." However, there is nothing in the record to indicate that a social skills group was "available" at School C. Moreover, as Respondent pointed out, social skills work is embedded in the Student's school setting, which includes a self-advocacy class and speech and language therapy. The Guardian accordingly indicated that the Student has improved in speech since the Student has been at School C. In addition, Petitioner did not present any caselaw where the lack of a "social skills group" resulted in a finding of a denial of FAPE. In fact, there is no reported decision by a federal judge in the District of Columbia that even addresses the issue of social skills groups in this context. Also because there is no specific connection in this case between a social skills group and the Student's academic functioning, a finding of FAPE denial on this issue would be inappropriate.

Petitioner also alleged that the Student did not receive sufficient specialized instruction at School C, contending in particular that the Student should not have been

assigned to a general education art class. Petitioner argued that the Student continues to do the same work day after day in the art class, and does not associate with the general education peers in the class.

However, Petitioner had previously complained that School B did not provide enough access to general education peers, resulting in a finding of FAPE denial by Hearing Officer Vaden for the 2015-2016 school year. Respondent accordingly changed the Student's program to allow for more work with general education peers by decreasing the Student's specialized instruction to twenty hours per week.

Petitioner challenged the reduction of specialized instruction hours but Hearing Officer Vaden found that the reduction to twenty hours was appropriate in view of the requirement to place students in their least restrictive environment. The same conclusion must be drawn here, where Witness D testified that the Student enjoyed being with general education peers in classes such as art and used general education peers as models. Though the Student may not have actively engaged in conversation with these general education peers, the benefits of providing special education students with instruction in general education goes beyond the ability of the disabled students to communicate with general education peers. The United States Supreme Court has explained that, in enacting the IDEA, "Congress was concerned about the apparently widespread practice of relegating handicapped children to private institutions or warehousing them in special classes." Sch. Comm. of Town of Burlington v. Dep't of Educ. of Mass., 471 U.S. 359, 373 (1985). Accordingly, in formulating an appropriate IEP, an IEP team must "be mindful of IDEA's strong preference for 'mainstreaming,' or educating children with disabilities '[t]o the maximum extent appropriate' alongside their non-disabled peers."

Gagliardo v. Arlington Cent. Sch. Dist., 489 F.3d 105, 108 (2d Cir. 2007)(quoting 20 U.S.C. § 1412(a)(5)); Lachman v. Ill. State Board of Educ., 852 F.2d at 295 ("[IDEA's] requirement that mainstreaming be provided to the maximum extent appropriate indicates a very strong congressional preference"). Indeed, there is a fair amount of caselaw specifically involving the right of students with Down Syndrome to participate in general education. See, e.g., Oberti v. Board of Educ., 995 F.2d 1204 (3d Cir. 1993).

In sum, Petitioner is correct that the Student's IEPs were not based on comprehensive assessments, because no occupational therapy evaluation of the Student was conducted, and there must be a corresponding finding of FAPE denial on that basis. Otherwise, however, the Student's IEPs are deemed appropriate by this Hearing Officer.

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." 20 U.S.C. Sect. 1415(i)(2)(C)(iii). Under the theory of compensatory education, courts and hearing officers may award "educational services to be provided prospectively to compensate for a past deficient program." Reid v. District of Columbia, 401 F.3d 516, 521-23 (D.C. Cir. 2005). In every case, however, the inquiry must be fact-specific and, to accomplish IDEA's purposes, the ultimate award must be reasonably calculated to provide the educational benefits that likely would have accrued from special

education services the school district should have supplied in the first place. Id., 401 F. 3d at 524; see also Friendship Edison Public Charter School v. Nesbitt, 532 F. Supp. 2d 121, 125 (D.D.C. 2008)(compensatory award must be based on a "'qualitative, fact-intensive' inquiry used to craft an award tailored to the unique needs of the disabled student"). A Petitioner need not "have a perfect case" to be entitled to a compensatory education award. Stanton v. District of Columbia, 680 F. Supp. 201 (D.D.C. 2011). Some students may require only short, intensive compensatory programs targeted at specific problems or deficiencies. Reid, 401 F.3d at 524.

1. Compensatory Education: Hearing Officer Vaden's Decision.

Issue #3 in this case states:

Is the Student due compensatory education as a result of the findings in the HOD of Hearing Officer Peter Vaden, issued in November, 2018?

After Hearing Officer Vaden issued his decision, Evaluator A determined that the Student required compensatory education. There is no dispute between the parties that the Student is entitled at least some compensatory education as relief for the unresolved period of FAPE denial found in Hearing Officer Vaden's decision.

The parties indicated to this Hearing Officer that they agreed on a compensatory education award for social skills instruction and/or ABA instruction in the amount of 150 hours at a maximum rate of $125 per hour, to be completed by December 31, 2020. This Hearing Officer agrees that this is an appropriate amount of services to be provided as compensatory education in these areas.

However, the parties have not agreed on the extent to which tutoring hours should be provided to the Student in view of the FAPE denial found in Hearing Officer Vaden's decision. Petitioner argued that 498 hours of tutoring are appropriate, representing one

hour per week of services between October, 2015, and April, 2018, the time span of the FAPE denial. Respondent argued that its offer of 100 hours of tutoring services is appropriate, pointing out that the Student received an appropriate amount of specialized instruction during the time period in question.

Hearing Officer Vaden ruled that Respondent's failure to evaluate the Student was a procedural violation that significantly impeded Petitioner's opportunity to participate in the decision-making process. Compensatory education can be appropriate to remedy procedural errors. See, e.g., Pittston Area Sch. Dist., 45 IDELR 110 (SEA PA 2006)(finding that a student merited compensatory education because the district committed a series of procedural errors, such as unduly delaying the student's IEP meeting). However, most often, this kind of compensatory education award is premised on a finding that the procedural violation directly affected the Student's services. Board of Educ. of the Springville Griffith Inst. Cent. Sch. Dist., 47 IDELR 237 (SEA NY 2007) (holding that a three-month delay in developing a student's IEP did not merit an award of three months of compensatory education because it did not cause a significant denial of educational opportunities). As Respondent pointed out, there was no clear showing of such harm here.

Even so, in the District of Columbia, courts typically rule that a hearing officer may not "simply refuse" to grant compensatory education awards if a Student is denied a FAPE. Henry v. District of Columbia, 55 IDELR 187 (D.D.C. 2010). Moreover, the time period for FAPE denial in the case before Hearing Officer Vaden was about two and one-half school years, a lengthy period of time. That FAPE denial should not be considered to be benign in view of Evaluator A's suggestion that Respondent's failure to

conduct a triennial evaluation in 2015 had an impact on the Student. Evaluator A pointed out that the Student's levels of academic functioning in 2018 were largely the same as in 2015. Under the circumstances, the Hearing Officer will award the Student 150 hours of compensatory tutoring. Together with the 150 hours of social skills instruction and/or ABA that the parties have already agreed to, this represents a substantial award for the FAPE denial at issue. It is noted that Witness I testified that the "OSSE rate" of $65 per hour is accepted by many providers in the District of Columbia, and there was no rebuttal of this point. It is also noted that the tutoring services awarded here will be available to the Student for three years, through the end of the 2021 calendar year, since there are approximately two and one-half years of FAPE denial to be remedied in connection with the case before Hearing Officer Vaden.

2. Compensatory Education: May, 2018, to present.

This Hearing Officer has found that Respondent should have conducted an occupational therapy evaluation of the Student after the issuance of Witness A's report. Respondent did not authorize such an evaluation until October 16, 2018, when Respondent issued an occupational therapy evaluation authorization to Petitioner.

Given this authorization, there is no reason to order an occupational therapy evaluation in this HOD. However, compensatory education may be due the Student in regard to occupational therapy, depending on what the occupational therapy evaluation finds. If the occupational therapy evaluator recommends that the Student should receive occupational therapy services, the Student shall be entitled to fifteen hours of occupational therapy as compensatory education for missed occupational therapy services from May, 2018, to present. If the occupational therapy evaluator does not recommend

occupational therapy services for the Student, the Student shall not be entitled to compensatory occupational therapy services as a result of this HOD.

VII. Order

As a result of the foregoing, the following is ordered:

1. The Student shall receive 150 hours of compensatory tutoring, to be provided by a licensed special education teacher, at the rate of $65 per hour, to be used by December 31, 2021;

2. The Student shall receive 150 hours of social skills instruction/ABA instruction, at the rate of $125 per hour, to be used by December 31, 2020;

3. If the Student's forthcoming occupational therapy evaluation recommends occupational therapy, the Student shall receive fifteen hours of compensatory occupational therapy, to be provided by a qualified provider at a reasonable and customary rate;

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

Dated: November 7, 2018

Michael Lazan
Impartial Hearing Officer

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

VIII. Notice of Appeal Rights

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

Date: November 7, 2018

Michael Lazan
Impartial Hearing Officer