

District of Columbia
Office of the State Superintendent of Education
Office of Dispute Resolution
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Parent, on behalf of Student,¹)	
Petitioner,)	
)	Hearing Dates: 9/9/19, Room 423;
)	9/10/19, Room 423; 9/18/19, Room
)	111.
)	Hearing Officer: Michael Lazan
District of Columbia Public Schools,)	Case No. 2019-0182
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 Autism (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 July 22, 2019. The Complaint was filed by a parent of the Student (“Petitioner”). On August 1, 2019, Respondent filed a response. The resolution period expired August 21, 2019.

II. Subject Matter Jurisdiction

This due process hearing was held, and a decision in this matter is being rendered, pursuant to the IDEA, 20 USC 1400 *et seq.*, its implementing regulations, 34 CFR 300 *et*

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

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

A prehearing conference was held on August 26, 2019. Attorney A, Esq., counsel for Petitioner, appeared. Attorney B, Esq., counsel for Respondent, appeared. A prehearing conference order was issued on August 29, 2019, summarizing the rules to be applied in the hearing and identifying the issues in the case. The Hearing Officer Determination (“HOD”) due date was October 5, 2019. Respondent moved for partial dismissal by motion dated July 24, 2019. Petitioner submitted opposition to the motion on July 26, 2019. The motion was denied by the order of this Hearing Officer dated September 4, 2019.

The hearing proceeded on September 9, 2019 and continued on September 10, 2019. Closing arguments were presented, on the record, on September 18, 2019. This was a closed proceeding. Petitioner was represented by Attorney A, Esq. Respondent was represented by Attorney B, Esq. Petitioner moved into evidence exhibits 1-42. Objections were made to exhibits 1-3. These objections were overruled. Exhibits 1-42 were admitted. Respondent moved into evidence exhibits 1-4, 6-9, 11-13, 15-25, 27, 29, 31, 34, 35, and 38. There were no objections. Exhibits 1-4, 6-9, 11-13, 15-25, 27, 29, 31, 34, 35, and 38 were admitted.

Petitioner presented as witnesses: herself; the Student’s father; Witness C, an expert in Applied Behavioral Analysis (“ABA”) therapy; Witness H, a Service Coordinator; and Witness F, an advocate. Petitioner sought Witness F’s qualification as an expert witness, but this Hearing Officer denied this request. Respondent presented as

witnesses: Witness A, a Board Certified Behavior Analyst (“BCBA”) and consultant to School A (expert: autism and educational programming for students with autism); Witness E, a teacher; Witness G, a psychologist (expert: school psychology specifically in evaluating special education students); Witness B, a speech-language pathologist (expert: speech and language pathology for special education students); and Witness D, an Assistant Principal at School A.

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. Did DCPS fail to offer the Student a Free Appropriate Public Education (“FAPE”) in the Individual Education Program (“IEP”) and locations of services corresponding to the 2018-2019 school year? If so, did DCPS act in contravention of 34 CFR 300.320, Andrew 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 June, 2018 IEP failed to address the Student’s social, emotional and behavioral needs; did not provide for adequate speech services; did not provide for appropriate ABA services; did not provide for a safety plan; and did not include accurate and complete present levels of performance. Petitioner also contended that the proposed school, School A, was too big, too restrictive, and did not have appropriate dedicated aides for the Student.

2. Did DCPS fail to implement the Student’s IEPs during the 2017-2018 and the 2018-2019 school years? If so, did DCPS violate the principles in cases like Van

Duyn v. Baker Sch. Dist. 5J, 502 F.3d 811, 822 (9th Cir. 2007)? If so, did DCPS deny the Student a FAPE?

Petitioner contended that the Student should have been provided with the same dedicated aide for each day during each school year.

3. Did DCPS fail to reevaluate the Student from May, 2017 to present? If so, did DCPS violate 34 CFR 300.303, 34 CFR 300.304, and related provisions? If so, did DCPS deny the Student a FAPE? Petitioner contended that the Student was not provided with a necessary psychological evaluation.

4. Did DCPS fail to create an appropriate Functional Behavior Assessment (“FBA”) and Behavior Intervention Plan (“BIP”) from August, 2018 through May, 2019? If so, did DCPS deny the Student a FAPE?

V. Findings of Fact

1. The Student is a severely impaired X-year-old who is eligible for services as a student with Autism. The Student is not able to communicate through the use of words, though the Student may communicate through gestures. The Student has a “Go Talk” communication device and works on this device with a speech and language therapist at school. However, the Student does not independently use this device to communicate except to request to “dance.” The Student may engage in serious behaviors during the school day, including assaults on school staff. The Student is able to understand some words and phrases. The Student mainly benefits from 1:1 instruction to allow for modeling and because s/he has behaviors of concern. The Student is more productive when given solitary tasks that are structured with a clear beginning and end. P-4-3, 5, 7-8; R-8; Testimony of Witness A; Testimony of Witness B.

2. The Student benefits from instruction using the ABA methodology.

Through this methodology, among other things, skills are broken up into small components, reinforcers are used to encourage positive behavior, and data is taken to determine the Student's level performance and to plan for the Student going forward.

Testimony of Witness C.

3. For most of his/her academic career, the Student has attended School A, a school of about 250 students for students with severe disabilities. The school focuses on helping students learn functional life skills, and some of the instruction at the school is provided through the use of the ABA methodology. Teachers at the school take an online course on ABA, as supplemented by training from Witness A. The school has a behavior training "suite" which allows staff to work directly with students and provides "behavior technicians" who teach behavior reduction techniques, sign language, and will sometimes provide ABA-based instruction. Teachers have access to a BCBA, who may write an FBA or a behavior plan for a student. Testimony of Witness A; Testimony of Witness D; Testimony of Petitioner.

4. On February 25, 2010, a psychological report was written for the Student. The evaluator attempted to formally test the Student, but the Student was not able to complete the required tasks. The report discussed interviews with the Student and the parents, as well as observations of the Student. The report indicated that the Student needed continued placement in a highly structured special education environment with a multi-sensory approach to instruction. The evaluation stated that the Student's adaptive functioning should be formally assessed to identify areas of strength and weakness. P-14; Testimony of Witness B.

5. Vineland-II testing, consisting of a questionnaire to the Student's teacher, was administered to the Student in December, 2012. The testing revealed that the Student's functional levels were very low in all domains, below the first percentile. The Student's daily living skills and personal hygiene were considered to be at a toddler's level. P-10.

6. A Speech and Language Re-Evaluation Report was written for the Student by a staff member at School A on January 9, 2013. The report indicated that the Student was working on requesting items, answering "wh" questions, and following two step directions. At the time, the Student showed a limited understanding of basic concepts such as: colors, shapes, and emotions. The Student was functionally nonverbal and would attract attention by reaching for staff and peer's shoulders. P-13.

7. The Student continued to attend a full-time special education program at School A between 2013 and present. Throughout this period, the Student exhibited difficult behaviors in school. The Student had a dedicated aide during this time period. Testimony of Petitioner; P-6.

8. The Student's behaviors began to increase in or about December, 2016. A detailed Positive Behavior Support Plan was written for the Student on January 10, 2017, which was then revised in July, 2017. The plan determined that the Student's behaviors tended to occur when the Student was in a noisy or crowded environment, when the Student was waiting, when the environment is visually distracting, when a task-related demand is made, when a preferred activity is terminated, when the Student was hungry, or when the Student had to use the bathroom. Possible functions of the behavior were to escape demands, to gain control, to gain stimulation, or to gain access to a tangible

reinforcer. A list of potential reinforcers was recommended, as were behavioral approaches such as the use of visual supports, “establishing rapport,” giving the student a “non-contingent” fidget and teaching the student to “wait calmly.” At this point, the Student was engaging in .53 tantrums per day and .26 incidents involving the biting and scratching of others per day. P-35.

9. An IEP meeting was held for the Student on July 19, 2017. The resulting IEP provided mathematics goals, reading goals, adaptive/daily living skills goals, communication/speech and language goals, emotional, social and behavioral development goals, and motor skills/physical development goals for the Student. The IEP also provided the Student with 28.5 hours of specialized instruction per week, outside general education, with two hours per month of occupational therapy, outside general education, and four hours per month of speech-language pathology, outside general education, as well as a communication device, picture symbols, adapted and modified materials, a “name stamp,” and manipulatives. The IEP indicated that the Student uses a “Go Talk” voice output device. P-6.

10. An Augmentative and Alternative Communication Evaluation Report was written for the Student on February 9, 2017. The evaluator presented the Student with the Test of Aided-Communication Symbol Performance (“TASP”) but the Student was unable to participate in testing due to the interference of behaviors. The Student was also presented with a variety of assistive technology devices that were designed to help the Student’s ability to communicate. The Student was not motivated to use speech generating apps on a computer but tried to access the “Go Talk” device. The evaluation

recommended that the Student receive individual adaptive assistive communication therapy once a week for one hour to provide the Student with training on the device. P-8.

11. For the 2017-2018 school year, the Student continued at School A, where his/her behaviors spiked in September, 2017 (averaging over seven incidents involving aggression per day). These levels decreased to less than one such incident per day by March, 2018. An “Analysis of Existing Data” meeting was held for the Student on June 9, 2018. The participants examined the Student’s attendance records, the Student’s current progress reports, the speech and language evaluation from January, 2013, and a physical therapy evaluation from January, 2013. R-20; P-5; R-7.

12. An IEP meeting was held for the Student on or about June 15, 2018. At the meeting were the Student’s related services providers, Petitioner, a DCPS representative, a psychologist, and a “principal’s designee.” An IEP was written for the Student on June 15, 2018. This IEP did not change the Student’s hours of specialized instruction and related services and repeated language from the July, 2017 IEP in regard to behavior interventions, communications, and assistive technology. There was no change to the language describing the Student’s levels of performance in mathematics, and one sentence was changed in the language describing the Student’s level of performance in reading. It was determined that the Student had the most success when given 1:1 staffing support. Progress was reported in the single expressive speech goal, and it was reported that the Student was benefitting from the behavioral plan. P-5; R-7.

13. A new Positive Behavior Support Plan was written for the Student on June 15, 2018. The plan referenced the same antecedents and “possible functions” as the plan from July, 2017 and continued to recommend many of the interventions that were

suggested in the earlier plan. The plan reported that the Student was engaging in aggression .82 times per day and engaging in tantrums for .50 times per day. P-31, P-32.

14. The Student continued at School A for the 2018-2019 school year. The Student was assigned two different staff members to “rotate” and perform as his/her aide during this school year. The Student had a good relationship with the aides, who would take data on the Student’s behaviors. However, the aides had a difficult time getting the Student to do work. The Student worked on the “Go Talk” device during speech therapy but did not learn to use the device by him/herself except to dance. Behaviors spiked at the start of the school year, often at the end of the day, but then decreased by December, 2018. The classroom had twelve children in it, mostly children with intellectual disabilities, and there were approximately eight different staff members in the room at a given time. During this school year, the Student would elope from class, which was not as much of a concern previously. Testimony of Witness A; Testimony of Witness E; Testimony of Witness B; R-7.

15. An incident occurred at School A on February 7, 2019 involving the Student, who had Student eloped from the classroom because there was no aide or teacher in the room. Staff went to follow the Student, who ended up biting a staff member. The Student’s tooth chipped during this incident, and the Student ended up bleeding. As a result of this incident, Petitioner withdrew the Student from school until April 8, 2019. Testimony of Witness E; P-15; P-20-1.

16. An IEP meeting was held for the Student on May 15, 2019. At this meeting were a “Principal Designee,” the Student’s teacher, related services providers, a social worker, a “behavior change specialist,” Witness D, a DCPS representative,

Petitioner, and a case manager from a governmental agency. The team discussed how the Student's new behavior plan was going to add "elopement" as an issue, and also added the use of a "bathroom visual icon" and a calming space for the Student. Petitioner then sought to adjourn the meeting to review data that had been provided to her at the meeting. P-20; Testimony of Witness F.

17. The IEP meeting was continued on May 24, 2019, with the same people plus Petitioner's attorney and Witness F. The team discussed the Student's levels of speech, goals relating to money, goals relating to "functional literacy," and daily living skills. A new IEP was then written, dated May 24, 2019, which did not change the Student's hours of specialized instruction or related services, and contained much of the language that was used in prior IEPs. A new Positive Behavior Support Plan was written for the Student on May 25, 2019. The plan contained much of the language that was used in earlier plans and mentioned the Student's issues with elopement. P-4; P-17; P-19; Testimony of Witness F.

18. The Student made modest progress during the school year. The Student was sometimes able to be part of a group, would sometimes make lunch, and would be more engaged in class. The Student continued to have very limited expressive communication skills and was more successful when provided with a high level of predictability and consistency. The Student also did best when stimulation was minimized, work tasks were short in length, and s/he has the opportunity to take frequent breaks. Testimony of Witness D; P-17-3.

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.

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

Respondent argued that the burden of persuasion for Issue #2 should be on Petitioner because "implementation" issues do not involve the "appropriateness" of a program. However, if a school cannot substantially implement a student's valid IEP, that Student's educational placement must be deemed inappropriate since a student's school is an integral part of their educational placement. The burden of persuasion must be on Respondent for Issue #2 as well as Issue #1 and Issue #4, provided that Petitioner presents a *prima facie* case. Issue #3 does not directly involve the appropriateness of the Student's IEP and placement. For this issue, the burden of persuasion must be on Petitioner. Schaffer v. Weast, 546 U.S. 49 (2005).

1. Did DCPS fail to offer the Student a FAPE in the IEP(s) and locations of services corresponding to the 2018-2019 school year? If so, did DCPS act in contravention of 34 CFR 300.320, Andrew 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?**

4. Did DCPS fail to create an appropriate FBA and BIP from August, 2018 through May, 2019? If so, did DCPS deny the Student a FAPE?

In the District of Columbia, BIPs are supposed to be annexed to IEPs. 5-E DCMR 5-3007.3. As a result, both Issue #1 and Issue #4 will be discussed in this section.

Petitioner contended that the IEPs failed to address the Student's social, emotional and behavioral needs; did not provide for adequate speech services; did not provide for appropriate ABA services; did not provide for a safety plan; and did not include accurate and complete present levels of performance.² Petitioner also contended that the proposed school, School A, was too big, too restrictive, and did not have appropriate aides for the Student. Finally, Petitioner contended that DCPS failed to create an appropriate FBA and BIP for the Student because the Student's behavior plan did not address the Student's issues with elopement.

An IEP must be reasonably calculated to enable the child to receive additional benefits. Hendrick Hudson Bd. Of Educ. v. Rowley, 458 U.S. 176 (1982). It should be both comprehensive and specific and targeted to a 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 300.320(a)(2)(B) (the IEP must contain goals that meet each of the child's educational needs that result from the child's disability); 34 CFR 300.324(a)(1)(iv) (the IEP must address the academic, developmental, and functional needs of the child). 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

² Petitioners' contentions that the IEP did not contain appropriate present levels of performance because there were insufficient evaluations of the Student are discussed in connection to Issue #3.

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, e.g., Thompson R2-J Sch. Dist. v. Luke P., 540 F.3d 1143, 1149 (10th Cir. 2008).

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. Andrew F. ex rel. Joseph F. v. Douglas County School Dist. RE-I, 137 S. Ct. 988 (2017). In Andrew 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.

Petitioner contended that the Student’s June, 2018 IEP did not accurately report on the Student’s social and emotional levels, lacked a “safety plan,” and did not address the Student’s issues with elopement. Petitioner does not mention that the Student has regularly received Positive Behavior Support Plans while s/he has been educated at School A. The plan dated June 15, 2018, similar to the other plans that were issued and are in the record, is a highly detailed, professionally written twelve page document that goes through the Student’s social and emotional levels. The plan is so specific that it includes a report on the number of tantrums and aggressive behaviors that the Student was experiencing in May, 2018. The plan discusses the Student’s medications and medical conditions, provides behavioral goals, describes the Student’s history relating to current behaviors, and discusses the antecedents to the Student’s behaviors. The plan

also discusses the possible functions of the behaviors and suggests a wide variety of general approaches to address the Student's behaviors, including providing the Student with a "non-contingent" fidget, instructing the student to wait "calmly," and functional communication training.

Petitioner suggested that this plan does not address the Student's safety because it does not address the Student's issues with elopement. While the plan could have mentioned elopement, the plan lists many strategies that are designed to control the behaviors that lead to elopement. For instance, when the Student gets upset and tantrums, the plan suggests that teachers remain calm, make no comment, and try to redirect Student. Additionally, the testimony of Witness A reflects that the issues relating to elopement were not as prominent at the time of the drafting of the June, 2018 plan. It is noted that there is no requirement for a specific "safety plan" in the law or regulations. On this record, DCPS created an IEP together with a reasonably considered behavior plan which described and addressed the Student's behaviors.³

Petitioner also argued that the IEP should have including a requirement to provide instruction through the ABA methodology. 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). In S.M. v. Hawai'i Dep't of Educ., 808 F. Supp. 2d 1269, 1278 (D. Haw. 2011), for instance, the parents claimed that

³ There is no specific requirement in the IDEA for an FBA or BIP. Though a behavior plan is necessary in certain circumstances to address a Student's behavior, Harris v. Dist. of Columbia, 561 F. Supp. 2d 63, 68 (D.D.C. 2008), the requirement is actually that the IEP team *shall consider* the use of positive behavioral supports and other strategies to address that behavior in conformance with the IDEA and its implementing regulations. 20 USC 1414(d)(3)(B)(i); 34 CFR 300.324(a)(2)(i). The DCMR says the same. According to 5-E DCMR 3007.3, if a student's behavior impedes the child's learning or the learning of others, the IEP team *shall consider* strategies, including positive behavioral intervention, strategies, and supports, to address that behavior.

their child's IEP was defective because it did not specifically require the ABA methodology. The court held that the IEP did not specifically need to require the ABA methodology to pass muster under the IDEA. However, Local Educational Agencies (LEAs) *may* put an instructional methodology on an IEP, and there are cases where a student's IEP was deficient specifically because it lacked a requirement for ABA instruction. Deal v. Hamilton Cnty. Bd. of Educ., 392 F.3d 840 (6th Cir. 2004)(court emphasized the IDEA's goal of enabling children to obtain self-sufficiency and criticized any unofficial policy of always rejecting ABA services); A.M. v. New York City Dep't of Educ., 845 F.3d 523 (2d Cir. 2017)(rejecting an IEP that failed to call for continuing ABA services and 1:1 support); P.K. v. New York City Dep't of Educ., 819 F. Supp. 2d 90 (E.D.N.Y. 2011) (holding that termination of ABA therapy and other services denied child with autism appropriate education), *aff'd*, 526 F. App'x 135 (2d Cir. 2013).⁴

The record establishes that the Student benefits from the ABA methodology. Petitioner's witness, Witness C, an expert in ABA therapy, was convincing on this point. No witness from the LEA rebutted this contention. Indeed, when asked if the Student should get between 10-15 hours of ABA therapy per week, Witness A (a witness for Respondent) said that she "would not say no." However, Petitioner's argument sidesteps

⁴ 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.

the fact that Student received ABA-based instruction at School A during the 2017-2018 school year. At this school, teachers at the school take an online course on ABA and are trained by Witness A, who is an expert in autism and educational programming for students with autism. The program at the school involves providing students with specific verbal praise and a systematic use of prompts. Both of these interventions are features of instruction provided through the ABA methodology. The school has a behavior training “suite” which allows staff to work directly with the student, including for “discrete trial instruction,” which is a form of ABA-based instruction. The school also provides students with “behavior technicians” who provide ABA-based instruction and take data for ABA purposes. Petitioner appears to suggest that instruction that is delivered through the ABA methodology should be more intense than the approach that is employed by and at School A. But Witness C, Petitioner’s main witness on this point, was not entirely clear on how the additional ABA-based instruction would be delivered. Witness C also did not describe the skills that would be developed as a result of this additional ABA-based instruction. It is noted that Petitioners did not request ABA-based instruction at the June, 2018 IEP meeting.

Petitioner also contended that the Student’s educational placement⁵ was not appropriate, pointing to the Student’s education at School A. Petitioner’s contention here is that the school is too large for the Student, but Petitioner’s witnesses did not clearly explain why the Student needed a smaller school. Petitioner suggested that staff in the

⁵ Petitioners may bring claims based upon an inappropriate educational placement, even if a student’s IEP is appropriate. Gellert v. District of Columbia, 435 F. Supp. 2d 18 (D.D.C. 2006); Shore Regional High School Board of Education v. P.S., 381 F.3d 194 (3d Cir. 2004) (denial of FAPE based on the likelihood that a proposed placement would subject a student with an emotional disability to continued bullying because of his perceived effeminacy).

smaller school would react more quickly when the Student elopes. But the record does not establish that School A was slow to react when the Student eloped. To the contrary, the record indicated that School A usually has someone by the classroom door to make sure that Students do not elope. Petitioner also contended that School A was too “restrictive,” but the record shows that the Student needed such a level of restrictiveness given his/her behaviors and academic levels. Finally, Petitioner appeared to contend that the school hired incompetent aides, but there is no evidence supporting this contention in the record except for the issues relating to the incident on February 7, 2019. In fact, the record established that the Student got along well with his/her aides, who were competent. Petitioner understandably reacted when the Student was injured at the school on February 7, 2019, but the failure of School A to react properly to a single incident is not a sufficient basis for a finding of FAPE denial.

Finally, Petitioners argued that the IEP did not provide the Student with sufficient speech and language services. The Student is severely impaired and non-verbal, and the Student still cannot adequately communicate to staff that s/he has to go to the bathroom. Yet the Student was only recommended for one hour per week of speech and language services outside general education. Moreover, there is only one speech and language goal on the Student’s IEP. The speech mandate appears to come from the Student’s Augmentative and Alternative Communication report, which recommended that the Student receive one hour per week of speech and language therapy to learn how to work the “Go Talk” device. But the report does not say or suggest that the Student’s entire speech and language therapy mandate should be limited to one hour per week. Moreover, the one hour per week of speech and language therapy that was delivered in the 2017-

2018 school year was inadequate. The instruction was provided inside a classroom in a group, and the group often had nine or more students. The service trackers for speech and language therapy sessions that were conducted during this school year do not explain anything about the Student making meaningful progress. In fact, though the instruction would almost always relate to the use of the “Go Talk” device, by the end of the 2017-2018 school year the Student could not independently use the Go Talk at all except to “dance.”

DCPS presented Witness B to establish that the four hours per month of services were appropriately calculated. Witness B said that one hour per week of services was as much as the Student “could handle.” But Witness B does not know the Student well and did not explain how she knew that this non-verbal Student could only manage one hour a week of speech and language therapy. Witness B also never explained why the Student’s services were being delivered in a large group within a classroom, since the record makes clear that the Student needs individual instruction in order to benefit from his/her services.⁶ In Endrew F., the United State Supreme Court stated that IEPs for severely disabled children should be “appropriately ambitious” and that “every child should have the chance to meet challenging objectives.” 137 S. Ct. at 992. It is noted that the record does not establish that the Student is incapable of learning language. Indeed, the Student’s teacher from 2018-2019, Witness E, said that there was a “great chance” that s/he could end up being able to read. DCPS consequently denied the Student educational

⁶ When asked whether she would be concerned that the Student could only use the “Go Talk” to “dance,” Witness B said that she was not concerned with this because “that is the one word that s/he is drawn to.”

benefit, and therefore a FAPE, when it failed to recommend adequate speech and language therapy in the Student's June, 2018 IEP.

2. Did DCPS fail to implement the Student's IEPs during the 2017-2018 and the 2018-2019 school years? If so, did DCPS violate the principles in cases like Van Duyn v. Baker Sch. Dist. 5J, 502 F.3d 811, 822 (9th Cir. 2007)? If so, did DCPS deny the Student a FAPE?

Petitioner contended that the Student should have been provided with the same dedicated aide for each day of the 2017-2018 and 2018-2019 school years.

"Failure to implement" claims may be brought if an LEA cannot materially implement an IEP. Savoy v. District of Columbia, 844 F. Supp.2d 23 (D.D.C. 2012)(holding no failure to implement where District's school setting provided ten minutes less of specialized instruction per day than was required by the IEP); see also Van Duyn ex rel. Van Duyn v. Baker School Dist. 5J, 502 F.3d 811 (9th Cir. 2007). Courts applying the materiality standard have focused on the proportion of services mandated to those actually provided, and the goal and import (as articulated in the IEP) of the specific service that was withheld. Garmany v. Dist. of Columbia, 935 F.Supp.2d 177, 181 (D.D.C. 2013).

The Student's IEPs from July 19, 2017 and June 15, 2018 contain a box that, if checked, indicates that the Student requires an aide in the classroom for thirty hours per week. In both IEPs, this box is checked, but there is no requirement in either IEP that the Student have the same staff member serve as the Student's aide during every day of the school year. Nor is there any reference in the record to the parties agreeing, at IEP meetings or otherwise, that the same aide had to work with the Student during every day of the school year. Moreover, Petitioner's contention that it was inappropriate for the Student to have more than one staff member serve as his/her aide was not persuasive.

Petitioner relied on the testimony of Witness F, who indicated that the Student needed consistency with respect to staff, and in fact the record does suggest that the Student benefits from consistency, as do many students with significant disabilities. But School A did implement these IEPs by providing the Student with a consistent course of service, albeit with two different employees. There is nothing in the record to suggest that School A was confusing or disturbing the Student by providing him/her with rotating aides during the school year, or that the Student reacted negatively to either of the aides in question. Petitioner points to data indicating that the Student's behaviors spiked in September, 2018, when the aide rotation "officially" started. But by December, 2018, per a chart in the record, the Student's behaviors had dropped to the lowest levels that had been recorded by the school since January, 2017. This claim is without merit.

3. Did DCPS fail to reevaluate the Student from May, 2017 to present? If so, did DCPS violate 34 CFR 300.303, 34 CFR 300.304, and related provisions? If so, did DCPS deny the Student a Free and Appropriate Public Education ("FAPE")?

Petitioner contended that the Student was not provided with a necessary psychological evaluation. Pursuant to 34 CFR 300.303(a), a public agency must ensure a reevaluation of each child with a disability if the public agency determines that the child's educational or related service needs, including improved academic achievement and functional performance, warrant a reevaluation, or if the child's parent or teacher requests a reevaluation. A reevaluation conducted under 34 CFR 300.303(a) may occur not more than once a year, unless the parent and the public agency agree otherwise, and must occur at least once every three years, unless the parent and the public agency agree that a reevaluation is unnecessary. 20 USC 1414 (a)(2). During such a reevaluation, the failure to go beyond merely reviewing existing data can constitute a denial of FAPE if

more information is needed to develop an appropriate IEP. James v. D.C., 194 F. Supp. 3d 131, 142 (D.D.C. 2016) (“Summary of Existing Data” prepared in response to request for an updated psychological assessment did not fulfill the district’s obligation to reevaluate the student). Still, for there to be a finding of FAPE denial on this issue, a parent should show that the failure to evaluate resulted in a substantive harm to the student. Suggs v. District of Columbia, 679 F. Supp. 2d 43 (D.D.C. 2010).

Petitioner contended that the last psychological evaluation of the Student was in 2010, and that the Student was a completely different person so many years ago. Moreover, Petitioner criticized the testimony of Witness G, a DCPS psychologist, who erroneously explained that no assessments need be conducted during a reevaluation unless questions are raised about the Student’s continued eligibility for services. But Petitioner was not able to rebut DCPS’s contention that further assessment of the Student would not have been fruitful because the Student was too impaired to be tested. Moreover, Petitioner was unable to present a witness who specifically identified a test that could be, and needed to be, conducted on the Student to determine his/her levels for the IEPs in question. Hart v. District of Columbia, 323 F. Supp. 3d 1, 4 (D.D.C. 2018)(testimony that a new assessment would have shown “stressors” was “too generic” to be of much probative value in determining whether a new evaluation would have translated into actual educational opportunities....”).

It is noted that the record does suggest that the Student could have been assessed on the Vineland-II measure, which assesses the extent to which the Student has developed in terms of adaptive skills. This kind of assessment requires only a teacher or parent interview. In fact, the Student was assessed through this measure in 2013. But

there is nothing in the record to establish how the administration of the Vineland-II would have resulted in any substantive changes to the Student's IEP or the Student's education at School A. This claim must be dismissed.

RELIEF

Petitioner seeks 1040 hours of instruction through the ABA methodology as compensatory education. 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 Hearing Officer to “grant such relief as [it] determines is appropriate.” Sch. Comm. of Town of Burlington v. Dep’t of Educ. of Mass., 471 U.S. 359, 371 (1985). The ordinary meaning of these words confers broad discretion on a hearing officer, since the type of relief is not further specified, except that it must be “appropriate.” 20 USC 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.

Since Petitioner's compensatory education plan is premised (in part) on a finding that School A failed to provide the Student with ABA instruction, the amount of services recommended by the plan is not consistent with this decision. This Hearing Officer Determination has only sustained contentions that the Student was denied a FAPE because the Student's program did not address his/her speech and language needs. Nevertheless, it is appropriate to award the Student with compensatory education in the form of ABA-based instruction rather than speech and language therapy. The record suggests that the Student has not benefitted from more conventional forms of speech and language therapy, and the record also establishes that the Student does benefit from ABA services. Additionally, Witness C testified that that the ABA methodology can be used to address any of the Student's deficits, including the Student's speech and language deficit.

To this Hearing Officer, 200 hours of ABA-based instruction therapy is an appropriate award for the Student in this case. This amount of compensatory services is in sync with the amount of services that were missed by the Student as a result of the defective IEP. Moreover, DCPS apparently has proposed to Petitioner that the Student receive 200 hours of compensatory ABA-based instruction services. There are references to Petitioner initially accepting that number of hours to compensate the Student for the FAPE denial. Services should be delivered on a 1:1 basis, by a qualified provider of Petitioner's choice, at a reasonable and customary rate in the community.⁷

⁷ During closing argument, Respondent suggested that this case should be dismissed and/or that no relief is owed to the Student because Petitioner filed two similar cases previously. However, both such cases

VII. Order

As a result of the foregoing:

1. Respondent shall pay for 200 hours of individualized ABA-based instruction for the Student;
2. The services must be provided by a qualified, experienced provider at a reasonable and customary rate in the community;
3. The services must be used by the Student by December 31, 2021;
4. Petitioner's additional requests for relief are hereby denied.

Dated: October 5, 2019

Michael Lazan
Impartial Hearing Officer

cc: Office of Dispute Resolution
Attorney A, Esq.
Attorney B, Esq.
OSSE Division of Specialized Education
Nicholas Weiler/DCPS
Josh Wayne/DCPS

resulted in dismissals without prejudice. Respondent presents no authority to suggest that such dismissals should play any part in a Hearing Officer Determination.

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: October 5, 2019

Michael Lazan
Impartial Hearing Officer