

District of Columbia
Office of the State Superintendent of Education
Office of Dispute Resolution
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OSSE
Office of Dispute Resolution
October 19, 2019

Parent, on behalf of Student,¹)	
Petitioner,)	
)	Hearing Date: 10/1/19, Room 111;
)	10/3/19, Room 112
)	Hearing Officer: Michael Lazan
)	Case No. 2019-0181
School A PCS,)	
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 Other Health Impairment. A Due Process Complaint (“Complaint”) was received by School A PCS (“Respondent”) pursuant to the Individuals with Disabilities Education Act (“IDEA”) on July 19, 2019. The Complaint was filed by a parent of the Student (“Petitioner”). On July 29, 2019, Respondent filed a response. The resolution period expired on August 18, 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 seq., Title 38 of the D.C. Code, Subtitle VII, Chapter 25, and the District of Columbia Municipal Regulations, Title 5-E, Chapter 30.

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

III. Procedural History

A prehearing conference was held on August 27, 2019. Attorney A, Esq., counsel for Petitioner, appeared. Attorney B, Esq., counsel for Respondent, appeared. A prehearing conference order was issued on September 3, 2019, summarizing the rules to be applied in the hearing and identifying the issues in the case. The original Hearing Officer Determination (“HOD”) due date was October 2, 2019. On October 1, 2019, Respondent moved, on consent, for a continuance allowing the HOD to be issued on October 19, 2019. This Hearing Officer granted the motion on October 2, 2019.

The hearing proceeded on October 1, 2019, and continued on October 3, 2019. Petitioner was represented by Attorney A, Esq. Respondent was represented by Attorney B, Esq. After the hearing, oral closing arguments were presented, on the record. This was a closed proceeding. Petitioner moved into evidence exhibits 1-121. Respondent objected to exhibits 3-12², 9, 36-4-5, 37-20-29, 42, 53, 54, 58, 57, 94, and 119. Objections were sustained with respect to exhibits 3-12, 36-4-5, 37-20-29, 57, and 94. Other objections were overruled. Exhibits 1-56 (except for exhibits 3-12, 36-4-5, and 37-20-29), 58-93, and 95-121 were admitted. Respondent moved into evidence exhibits 1, 2, 3, 4, 6, 8-37, and 39-41. There were no objections. Exhibits 1, 2, 3, 4, 6, 8-37, and 39-41 were admitted.

Petitioner presented as witnesses: herself; Witness A, an occupational therapist (expert: occupational therapy); and Witness C, an advocate (expert: special education). Respondent presented as witnesses: Witness B, director of school design at School A

²The references to exhibits in this HOD may include reference to the page number(s) of the exhibit. The page number(s) of the exhibit are indicated after the initial number in the citation.

PCS; Witness D, dean of restorative justice at School A PCS; Witness E, senior director of student support at School A PCS; Witness F, an occupational therapist (expert: occupational therapy); Witness K, a mental health practitioner at School A PCS (expert: school social work); Witness G, a school psychologist at School A PCS (expert: school psychology); Witness H, a compliance manager at School A PCS (expert: special education); Witness I, vice principal at School A PCS; and Witness J, a teacher at School A PCS.

IV. Issues

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

1. Did Respondent violate “Child Find” because it should have identified, located, and evaluated the Student by the end of the 2016-2017 school year? If so, did Respondent violate 20 U.S.C. Sect. 1412(a)(3)(A), 34 C.F.R. Sect. 300.111(a), and related provisions of the IDEA? If so, did Respondent deny the Student a Free Appropriate Public Education (“FAPE”)?

Petitioner contended that the Student’s behavioral issues and grades should have led Respondent to suspect that the Student had a disability.

2. Did Respondent fail to provide the Student with an appropriate Individualized Education Program (“IEP”) in April, 2019? If so, did Respondent 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 Respondent deny the Student a FAPE?

Petitioner contended that the Student's IEP lacked a recommendation for extended school year ("ESY") services and did not provide sufficient services for behavior support, occupational therapy, and specialized instruction in reading. Petitioner seeks corresponding changes to the Student's IEP and compensatory education.

V. Findings of Fact

1. The Student is an X-year-old who is now eligible for services as a student with Other Health Impairment. The Student is a bright child who struggles in mathematics and benefits from a structured environment. The Student has had issues with behavior throughout his/her academic career, particularly relating to the Student not paying attention and/or acting disruptive in class. The Student received formal discipline more than fifty times in the year prior to his/her Functional Behavior Assessment ("FBA") of February 7, 2019. At least in part because of the Student's difficulties, the Student has generally received low grades, even though the Student has scored well on nationally normed school-wide measures such as "PARCC," "MAP," and "ANet." P-3-2; Testimony of Witness C; Testimony of Petitioner.

2. When the Student was in pre-school, the Student exhibited issues with sensory processing, auditory processing, and visual processing. The Student also often reacted to noise, needed to move, and perseverated on tasks. An occupational therapy report was issued for the Student on September 28, 2010. The evaluator assessed the Student though the Peabody Developmental Motor Scales, 2nd Edition ("PDMS-2") and the Beery-Buktenica Developmental Test of Visual-Motor Integration ("Beery VMI"). The evaluator assessed the Student on fine motor skills, bilateral coordination, visual motor skills, and sensory processing. The report indicated that the Student was in the

average range in visual motor skills, but also indicated that the Student hums, whistles, sings or makes noises in class throughout the day, frequently misses oral directions, is distressed at large gatherings, always looks away from tasks to notice other activity in the room, always runs and bumps into things, and always touches people and irritates them. The report indicated that the Student presented with difficulty in processing vestibular and multi-sensory information, and might benefit from classroom adaptations and activities to encourage body sense and motor planning. P-6; Testimony of Witness A.

3. The Student struggled when s/he began attending classes at School A PCS. The school told Petitioner that the Student was impulsive and fidgety in school, and had difficulty with directions, focus, and organization. In or about the 2013-2014 school year, the Student was placed on “early dismissal” because of his/her behavior. Testimony of Petitioner.

4. For the 2016-2017 school year, the Student continued at School A PCS. The Student’s grades in academic subjects ranged from “C” to “F.” The Student received an “F” grade in Trimester 1 in reading and mathematics. The Student’s final grades in academic subjects ranged from “C” to “D-”. School A PCS expressed concern to Petitioner about the Student’s academic skills. School A PCS tried to set up meetings with Petitioner and create a more extensive behavioral plan, but found it difficult to get in touch with Petitioner, who was reluctant to work with the school. In MAP testing conducted in June, 2017, the Student scored at the 59th percentile in reading and the 37th percentile in mathematics. ANet testing administered four times during this school year indicated that the Student was functioning at a level between the 20th and 52nd percentile. In reading, when compared to other students at School A PCS instead of a national pool

of students, the Student was functioning at a level ranging from the 37th percentile to the 45th percentile. In mathematics, two tests indicated that the Student was functioning at the 38th to 39th percentile. When compared to other students at School A PCS instead of a national pool of students, the Student was functioning at the 45th percentile in mathematics. In PARCC testing, the Student scored a 750, which is “Level 4,” in mathematics and 747, which is “Level 3,” in English language arts. R-019; R-1 at 02; R-3 at 014; R-4 at 019; Testimony of Petitioner; Testimony of Witness I; Testimony of Witness B.

5. The Student continued at School A PCS for the 2017-2018 school year. The Student exhibited behaviors that impacted his/her learning, and it was difficult to get in touch with Petitioner. In academic subjects, the Student’s grades ranged from “C-” to “F.” The Student received “F” grades in reading, science, and social studies in Trimester 1, “F” grades in reading and science in Trimester 3, and a final grade of “F” in science. MAP testing in May, 2018, indicated that the Student was at the 48th percentile in reading and the 27th percentile in mathematics. Three administrations of ANet testing indicated that the Student scored at the 25th to 53rd percentile in reading, corresponding to the 35th to 46th percentile when compared to other School A PCS students. In mathematics, the Student scored at the 21st percentile on each test, corresponding to the 40th to 45th percentile when compared to other School A PCS students. On PARCC testing during this school year, the Student scored a 703 in mathematics, which is “Level 2,” and a 745 in reading, which is “Level 3.” Scholastic Reading Inventory (“SRI”) testing during this school year indicated that the Student was at the “basic” level. P-1-02-04; P-5 at 026; Testimony of Witness B; P-3-2.

6. The Student continued at School A PCS for the 2018-2019 school year. Early in the year, Petitioner and school staff had a meeting to discuss the Student's behavior and a possible referral for specialized instruction. Petitioner was against the idea that the Student could be labelled a "special education" student and expressed that she did not want her child to be evaluated. The school felt that the Student would benefit from counseling in lieu of eligibility, but Petitioner did not assent to counseling. Testimony of Witness B; R-11 at 050; R-10 at 48; Testimony of Witness D.

7. In mathematics during the 2018-2019 school year, the Student would disrupt class by talking. The Student's mathematics teacher felt that the Student's issues were triggered by the assignment of work, rough transitions, and because the Student looks for reactions from peers. The teacher noted that the behaviors occurred particularly when the Student was in whole group instruction and not participating. P-3-5; P-1-3.

8. In English language arts during the 2018-2019 school year, the Student could be an active participant in class, but the participation was "sporadic." The Student exhibited behavioral issues in class early on, including issues with work avoidance, work completion, and accepting redirection. The teacher used behavior trackers, alternate seating, "private" and "public" redirection, behavior charts, and the ability to earn extra gym time, but the interventions did not work consistently. Even so, the Student was functioning at or above the level of other students in the class. Over the course of the school year, the Student grew more familiar with the class routine and his/her behaviors decreased. P-3-5; Testimony of Witness J.

9. In or about fall, 2018, Petitioner requested an evaluation of the Student. A meeting was held with Petitioner on January 11, 2019, during which the parties discussed

the need for additional evaluations. Petitioner signed a consented to the evaluations on this date. P-15, P-16; R-14 at 061; Testimony of Witness C.

10. A speech and language evaluation of the Student was reflected in a report dated February 7, 2019. The report stated that the Student's articulation, voice and fluency skills were within age expectations. The Student's expressive vocabulary was considered to be borderline average, and his/her receptive vocabulary and oral language were considered below average. P-1-5-6.

11. An occupational therapy evaluation of the Student was conducted on February 7, 2019. The Student was tested on the Beery VMI and the Developmental Test of Visual Perception, Adolescent and Adult ("DTVP-A"). The Beery VMI testing indicated that the Student was at the 6th percentile in vision motor integration and the 16th percentile in motor coordination. The "Motor-Reduced Visual Perception" score was at the 13th percentile, in the average range. The evaluator also conducted an interview with one of the Student's teachers, who reported that the Student had difficulties with organization, impulsiveness, and sensory integration and sought movement and tactile experiences. Observations of the Student also indicated difficulties with visual memory. The evaluator recommended that this information "be used to determine whether [the Student] requires the related service of occupational therapy within [his/her] special education program." The evaluator also recommended that the Student receive instruction in a quiet environment with a multi-sensory approach, and be given visual models, graphic organizers, guided notes, editing/proofreading checklists, access to a word processor, preferred seating close to the teacher, visual timers and schedules, extended time, visual supports such as color-coding, clear simple lines as images, more

white space on worksheets, lined paper, and instructions and mentoring on attaining and maintaining systems of organization. However, there were inconsistencies in this report. For instance, though the Student struggled to copy figures accurately with regard to straightness of lines and accuracy of angles/shapes, the report indicated that the Student copied well. The report also indicated that the Student had satisfactory perceptual skills, but the DTVP-A measure suggested that the Student had poor visual perceptual skills overall, with a visual motor integration composite score at the 1st percentile, in the very poor range. Testimony of Witness A; P-2.

12. A confidential FBA of the Student was conducted on February 22, 2019. The FBA stated that the Student logged fifty-two incidents during the prior year for disrupting the school environment, but that the number of incidences had recently been declining. Behavior trackers, incentives, and alternate seat assignments were tried, but there was no consistent, universal plan across all classrooms. The FBA recommended a standardized and consistent behavioral response system across classes, and suggested opportunities for the Student to be a leader in class and gain positive attention as well as a “success plan” to allow the Student to receive positive attention. P-3-1-3, 11.

13. A psychological evaluation report for the Student was issued on February 28, 2019. The report discussed the Student’s issues with work completion and accuracy, organization, and processing, as well as testing on the Wechsler Intelligence Scale for Children-Fifth Edition (“WISC-V”), the Woodcock-Johnson Tests of Achievement, Fourth Edition (“WJTA-4”), the Behavior Assessment System for Children-Third Edition (“BASC-3”), the Conners Third Edition-Teacher Short Form, and the Conners Third Edition-Parent Form. The tests indicated that the Student was functioning at the low

average range in broad reading but at the low range in reading comprehension. In “Sentence Reading Fluency,” the Student earned a standard score of 96, in the average range. In broad mathematics, the Student was functioning in the low average range. Broad written language scores were at the average range. A BASC-2 questionnaire filled out by one of the Student’s teachers suggested that the Student had clinically significant issues with externalizing problems, adaptive skills, hyperactivity, aggression, depression, atypicality, attention problems, adaptability, and social skills. Conners testing indicated that the Student’s scores were “very elevated” for attention, hyperactivity, and defiance/aggression, and “elevated” for learning problems/executive functioning. The psychological evaluation recommended that the Student would benefit from, among other things, chunking, verbal cues, lists, translation of visual/spatial concepts to verbal concepts, and repetition of information during learning. P-4.

14. A behavior plan, called a “FAIR plan,” was written for the Student on March 7, 2019. The plan indicated that the primary function of the behaviors was to seek attention and that antecedents to the behavior included playing with hair, fidgeting, playing with materials, and “staring into space.” The plan recommended specialized seating, frequent check-ins during independent work, the ability to earn gym time, a sensory break for five minutes in double block classes, and praise. P-5.

15. An eligibility meeting was held for the Student in March, 2019. The psychological evaluation, behavior plan, speech and language evaluation, and occupational therapy evaluation were reviewed. The Student was determined to be eligible for services. The occupational therapist who conducted the occupational therapy evaluation went over her report and expressed that she did not think it was appropriate for

the Student to get services outside the classroom, but that accommodations needed to be put in place. The occupational therapist stated that if the Student was younger, services would have been considered, but now that s/he was older, accommodations and modifications would be a better fit for him/her. P-14-4.

16. An IEP meeting was held for the Student on April 1, 2019. Petitioner was represented by counsel, and Witness C was also at the meeting. Petitioner sought five hours per week of specialized instruction in both reading and mathematics. Initially, School A PCS proposed sixty minutes per week of specialized instruction in mathematics, but then all parties agreed that the Student should receive 4.15 hours per week of specialized instruction in mathematics, inside general education. Respondent did not agree to increase the Student's specialized instruction hours in reading, however, given the Student's test scores and the reports of the Student's English language arts teacher, Witness J. There was a discussion of goals, the Student's present levels of performance, recent testing of the Student, and the Student's grades. The parties agreed to add a goal to the Student's IEP about advocating for him/herself. Respondent recommended that the Student receive sixty minutes of behavior support services per month inside general education, but Petitioner sought an additional 120 minutes per month of behavior support services outside the classroom. Respondent, through Witness K, then agreed with Petitioner. The occupational therapist proposed adding some accommodations. The team agreed to add language requiring access to the following classroom-based accommodations: graphic organizers, guided notes, spatially modified worksheets, editing/proofreading checklist(s), access to a word processor to complete lengthy written assignments, and visual timers. Thirty minutes per month of occupational

therapy consultation were also added. P-12; P-13; P-41; Testimony of Witness C; Testimony of Witness K.

17. The Student's academic grades for the 2018-2019 school year included an "F" in social studies for Trimester 2 and an "F" in both writing and science in Trimester 3. The Student failed science and writing for the year. MAP testing conducted on the Student in December, 2018, determined that s/he was at the 53rd percentile in reading and the 27th percentile in mathematics. Testing in May, 2019, indicated that the Student was at the 34th percentile in reading and the 19th percentile in mathematics. However, most students did poorly on the MAP testing of May, 2019, because there was "over testing" of the students at that time. In four different administrations of ANet testing, the Student scored in the 67th to 84th percentile in reading, though only in the 41st to 50th percentile when compared to School A PCS students. In mathematics, the Student's ANet test scores ranged from the 17th to 38th percentile, corresponding to the 33rd to 50th percentile when compared to School A PCS students. Testimony of Witness H; R-1; P-34-1.

18. Another IEP meeting was held for the Student on August 26, 2019. The Student's occupational therapy services were increased to 120 minutes of occupational therapy per month outside general education. Goals and present levels of performance were added for motor skills and physical development. Petitioner indicated that she was pleased with the Student's progress. Testimony of Witness C; R-31 at 186.

19. School A PCS is currently "going forward with testing" to determine whether the Student needs additional sensory services. Testimony of Witness F.

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 persuasion for District of Columbia special education cases was changed by the local legislature through the District of Columbia Special Education Student Rights Act of 2014. With the passage of this legislation, in special education due process hearings initiated by a parent, the burden of persuasion falls on the public agency if the dispute concerns "the appropriateness of the child's individual educational program or placement, or of the program or placement proposed by the public agency" (provided that the parent establishes a *prima facie* case). The burden of persuasion must be met by a preponderance of the evidence. D.C. Code 38-2571.03(6)(A)(i).

Issue #1, relating to "Child Find," does not directly involve the appropriateness of the Student's educational program or placement. As a result, the burden of persuasion must be on Petitioner. Schaffer v. Weast, 546 U.S. 49 (2005). Issue #2, relating to the IEP of April, 2019, does involve the appropriateness of the Student's educational program. As a result, the burden of persuasion is on Respondent, provided that Petitioner presents a *prima facie* case.

1. Did Respondent violate "Child Find" because it should have identified, located, and evaluated the Student by the end of the 2016-2017 school year? If so, did Respondent violate 20 U.S.C. Sect. 1412(a)(3)(A), 34 C.F.R. Sect. 300.111(a), and related provisions of the IDEA? If so, did Respondent deny the Student a FAPE?

Petitioner contended that the Student's behavioral issues and grades should have led Respondent to suspect that the Student had a disability. The Child Find provisions of the IDEA require each state to have policies and procedures in effect to ensure that "[a]ll

children with disabilities residing in the State...who are in need of special education and related services, are identified, located, and evaluated.” 20 U.S.C. Sect. 1412(a)(3)(A); 34 C.F.R. Sect. 300.111(a). Child Find must include any child “suspected of being a child with a disability under Section 300.8 and in need of special education, even though they are advancing from grade to grade.” 34 C.F.R. Sect. 300.111(c)(1). These provisions impose an affirmative duty to identify, locate, and evaluate all such children. Reid v. District of Columbia, 401 F.3d 516, 518-19 (D.C. Cir. 2005). The Child Find obligation “extends to all children suspected of having a disability, not merely to those students who are ultimately determined to have a disability.” N.G. v. District of Columbia, 556 F. Supp. 2d 11 (D.D.C. 2008). Procedural violations of the child find obligation are actionable only if they affect a student’s substantive rights. Simms v. D.C., No. 17-CV-970 (JDB/GMH), 2018 WL 4761625, at *12 (D.D.C. July 26, 2018), report and recommendation adopted, No. CV 17-970 (JDB)(GMH), 2018 WL 5044245 (D.D.C. Sept. 28, 2018).

Petitioner did not present a witness with personal knowledge of the Student’s education and relied on documentation to establish that the Student should have been suspected of having a disability in regard to the 2016-2017 school year. Certainly, the Student was having behavioral issues at that time. In the first semester of the 2016-2017 school year, the Student had been sent to the school office from one class, reading, no less than fourteen times in one trimester. Several of the Student’s teachers, especially for reading and mathematics, indicated that the Student’s behaviors affected his/her schoolwork. Petitioner also presented evidence of three “disciplinary actions” that resulted from the Student’s behavior during the 2016-2017 school year. However, the

only witness who actually observed the Student in class during this school year was Witness I, who credibly testified that the Student did not need additional services during that school year and that Petitioner was difficult to reach and resistant to interventions from the school. Moreover, the Student's performance improved after the start of the school year. There were no "disciplinary actions" initiated against the Student during the 2016-2017 school year after the incident on October 31, 2016. Additionally, the Student's academic performance improved as the year went on. In the second and third trimesters, the Student did not receive a grade lower than "C" in any academic class, and by the end of the school year, the Student had passed all of his/her academic classes. The Student also performed relatively well on the school's testing instruments, scoring at "Level 4" (meeting standards) on the PARCC mathematics assessment and at the 59th percentile on a June 1, 2017, MAP reading assessment.

Finally, the Student's behaviors in 2016-2017 were not especially unusual, or violent, or a manifestation of a particular disorder. The record suggests that the Student's behaviors were, to an extent, of the sort that many typically developing peers manifest at the Student's age. On the whole, the preponderance of the evidence does not establish that Respondent violated the Student's Child Find obligations during the 2016-2017 school year, though Respondent should have been closely monitoring the Student to make sure the Student's issues did not get worse.

Unfortunately, the issues did get worse. For Trimester 1 of the 2017-2018 school year, the Student received "F" grades in reading, science, and social studies, and a "D-" in mathematics. For Trimester 3, the Student again failed reading and science. The Student ended up failing science and received a "D-" in reading, a "D" in mathematics,

and a “D-” in social studies for the year. The Student’s standardized test scores also decreased during this time period, especially in mathematics. The Student’s PARCC mathematics score dropped to a “Level 2” (from “Level 4”), his/her MAP mathematics score fell to the 27th percentile (from the 37th percentile), and his/her ANet mathematics score dropped to the 21st percentile (from the 38th percentile).

Respondent argued that it tried to evaluate the Student during the 2017-2018 school year but that Petitioner did not want the Student to be evaluated.³ Petitioner testified that she repeatedly tried get Respondent to evaluate the Student and that it was Respondent that was at fault. But Petitioner presented no documentation supporting her contention that she sought a special education evaluation during the 2017-2018 school year. And Respondent presented several witnesses, including Witness B, Witness D, and Witness K, to support its contention that Petitioner did not want the Student to be evaluated during the 2017-2018 school year. All these witnesses suggested that Petitioner was concerned that the Student would be “labelled” if s/he was determined to be eligible for special education services and expressed this to school staff. Furthermore, Respondent presented a compelling document supporting its contentions. Exhibit R-10, at 048, reflected conversations in a “family meeting” between Petitioner and school staff. This document indicated that the staff “discussed the importance of [Petitioner] being responsive with school and meeting with teachers regarding behavioral incidents” and “again” asked if the Student could be evaluated for special education. Petitioner refused to allow the Student to be evaluated. Indeed, when school staff asked if the Student could

³Petitioner changed her mind and assented to the special education evaluation during the 2018-2019 school year, and signed a consent for the evaluation on January 10, 2019.

receive “general education” counseling, Petitioner declined this request as well. Even a suggestion for outside counseling was met by parental resistance. At the time, Petitioner’s position was that “she did not want [the Student] to receive any services.”

Accordingly, this Hearing Officer concludes that Petitioner’s resistance was the cause of Respondent’s failure to evaluate the Student during the 2017-2018 school year. This kind of parental resistance is relevant to a hearing officer’s determination of a Child Find claim. A school district “may be excused in certain situations for its failure to make an eligibility determination, if it actively sought to locate the student and documented its efforts to do so or if a student’s parents refused to cooperate with school authorities.” Hawkins ex rel. D.C. v. District of Columbia, 539 F. Supp. 2d 108, 116 (D.D.C. 2008). Petitioner’s Child Find claims must be dismissed.

2. Did Respondent fail to provide the Student with an appropriate IEP in April, 2019? If so, did Respondent 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 Respondent deny the Student a FAPE?

Petitioner contended the Student’s IEP lacked a recommendation for ESY services and did not provide sufficient services for behavior support, occupational therapy, and specialized instruction in reading.

For many years, the main authority in determining a school district’s duty to create an IEP was Hendrick Hudson Bd. of Educ. v. Rowley, 458 U.S. 176 (1982), where the United States Supreme Court found that an IEP must be “reasonably calculated” to enable the child to receive benefit. In the District of Columbia, this has meant that the IEP should be both comprehensive and specific, and targeted to the Student’s “unique needs.” McKenzie v. Smith, 771 F.2d 1527, 1533 (D.C. Cir. 1985); 34 CFR

300.324(a)(1)(iv) (the IEP must address the academic, developmental, and functional needs of the child). In 2017, the United States 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 keeping with Rowley, 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. Further, the Supreme 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 suggested that the Student should receive ESY services because the Student missed a significant amount of instruction, but this is not the standard. ESY services are necessary to the receipt of a FAPE when the benefits that a disabled child gains during a regular school year *will be* “significantly jeopardized” if s/he is not provided with an educational program during the summer months. S.S. ex rel. Shank v. Howard Road Academy, 585 F. Supp. 2d 56, 66-67 (D.D.C. 2008); Johnson v. District of Columbia, 873 F. Supp. 2d 382, 386 (D.D.C. 2012). Even “likely” regression is not a sufficient basis to establish the need for ESY services. Johnson, 873 F. Supp. 2d at 386 (citing to MM ex rel. DM v. Sch. Dist. of Greenville Cnty., 303 F.3d 523, 537-38 (4th Cir. 2002)).

There is no evidence in the record that the Student regressed during extended breaks except for the Student’s ANet reading scores, which went down from the 70th percentile nationally in the 2018-2019 school year to the 41st percentile nationally in the 2019-2020 school year. However, this data was compiled after the IEP meeting of April,

2019. At the time of the meeting, the IEP team did not have the data to conclude that such regression was likely to occur. Moreover, the Student's ANet reading data for the 2018-2019 school year is suspect. The Student's national ANet reading percentile rank for 2018-2019 was higher than his/her percentile rank compared to other students at School A PCS. All other testing in the record, including ANet testing in mathematics and reading for other school years, suggests that the students at School A PCS score lower than the national average. Petitioner did not present a *prima facie* case in regard to the claim for ESY services, which must be dismissed.

The contention that the IEP did not provide for sufficient behavioral support services is also not supported by the record. At the IEP meeting in April, 2019, Petitioner asked for 120 minutes of behavior support services outside general education, and sixty minutes of behavioral support services inside the general education setting. This is exactly what she received in the IEP, which included a section devoted to Emotional, Social and Behavioral Development with three goals. Indeed, Witness C testified that she agreed with the amount of behavioral support services that were recommended in April, 2019. Additionally, a behavior plan, called a "FAIR Plan," was issued for the Student on March 7, 2019. This plan included an additional goal for the Student to comply with adult instruction and provided for five-minute sensory breaks in double block classes, specialized seating, and frequent check-ins, among other interventions. The contention that the Student did not receive sufficient behavioral support services in the April, 2019, IEP has no merit.

Petitioner also contended that the Student should have received more specialized instruction in reading than the 120 minutes per month recommended in the IEP of April,

2019. Petitioner pointed to psychological testing in 2019 indicating that the Student's passage comprehension skills were well below grade level. However, the bulk of the evidence indicated that the Student was functioning at or near grade level in reading at that time. On the four ANet measures administered during the 2018-2019 school year, the Student scored at the 41st, 43rd, 45th, and 50th percentile compared to other students at School A PCS. In the most recent MAP reading test from December 12, 2018, the Student scored at the 53rd percentile nationally. Moreover, Witness J, the Student's teacher in English language arts during the 2018-2019 school year, indicated to the team that the Student did not need any additional instruction in reading and that the Student's issues in class were solely behavioral. Even Witness C, Petitioner's expert, indicated that reading was not a major concern for the Student and that mathematics was the bigger concern. Given all of the data that was available to the team at the time, it was reasonable for Respondent to mandate 120 minutes per month of specialized instruction inside general education in reading for the Student in the April, 2019, IEP.

Finally, with respect to occupational therapy for the Student, Respondent's recommendation was for thirty minutes of "consultation services" per month. Witness F testified that the Student did not need any additional or direct services at the time, partly because the Student did not need the services due to his/her age, and partly because the Student's behavioral issues were not "constant." But Witness F did not clearly explain why a student's age should be a factor in determining whether the Student requires occupational therapy. Additionally, the record establishes that the Student's behaviors have regularly occurred over the course of the last several school years.

Moreover, occupational therapy testing conducted in February, 2019, showed that the Student had significant deficits. The Student scored at the 4th percentile in the general visual perception composite on the DTVP-A, in the “poor” range, and scored even lower in visual motor integration, at the 1st percentile, in the “very poor” range. Far from indicating that the Student’s occupational therapy needs were minor, the occupational therapy report contained thirteen different recommendations, some of which were not included in the Student’s IEP (including the suggestion for a multi-sensory approach to visual motor tasks and the “opportunity to work on independent work in a quiet environment”).

Additionally, the IEP did not address the Student’s need for sensory interventions, although the Student’s teacher reported to the occupational therapy evaluator that the Student “always” seeks out excess movement and sometimes seeks out tactile “experiences.” Witness A, who came across credibly for Petitioner, suggested that the Student’s behavioral issues could have been ameliorated in part if s/he had received additional occupational therapy that focused on a diet of sensory intervention. Respondent did not disagree and indicated that it is currently conducting sensory testing on the Student.

Respondent did not explain why this testing was not conducted in its evaluation of February, 2019. Nor did Respondent did not rebut contentions by Witness A that the February, 2019 occupational therapy evaluation contained discrepancies. For instance, the evaluation indicated that the Student struggled to copy figures accurately, but also indicated that the Student copied well. The evaluation also reported that, according to the

DTVP-A measure, the Student had “poor” visual perceptual skills, but then concluded that the Student had a relative strength in visual perceptual skills.

Parenthetically, the failure of an otherwise appropriate educational program to include direct occupational therapy services is considered to be a substantive deprivation of education benefit that denies a student a FAPE. D.L. v. St. Louis City Pub. Sch. Dist., 326 F. Supp. 3d 810, 824 (E.D. Mo. 2018) (citing to Endrew F., court ruled that reduction of occupational therapy denied student a FAPE); B.R. ex rel. K.O. v. New York City Dep’t of Educ., 910 F. Supp. 2d 670, 678 (S.D.N.Y. 2012) (where school district provided occupational therapy inside general education in a group instead of individually, student denied a FAPE). Accordingly, Respondent denied the Student a FAPE when it did not provide the Student with direct occupational therapy in the April, 2019, IEP.

RELIEF

As relief, Petitioner is seeking compensatory education for the Student. Petitioner also seeks an increase in the occupational therapy mandate to 240 minutes per month. Hearing officers have wide discretion to ensure that students receive a FAPE. As the United States Supreme Court has stated, the statute directs a hearing officer to “grant such relief as [he or she] 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).

Petitioner’s request for direct occupational therapy services was eventually granted by Respondent, which provided the Student with 120 minutes per month of occupational therapy on the August, 2019, IEP. Witness A said that “she thinks” the

Student needs still more occupational therapy per month, but she was not specific as to why the additional time was needed. Also, reports from School A PCS, including from Witness K and Witness J, indicated that the Student is doing well at this moment and that his/her schedule should not be changed. As a result, the request to increase the Student's occupational therapy mandate to 240 minutes per month must be denied.

In regard to the request for compensatory education, 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). Every case is "fact specific" and the 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. Under the IDEA, if a student is denied a FAPE, a hearing officer may not simply refuse to grant a compensatory education award. Henry v. District of Columbia, 750 F. Supp. 2d 94, 98 (D.D.C. 2010).

Petitioner's compensatory education proposal requested 100 hours of tutoring, fifty hours of counseling/behavior support, eighty hours of occupational therapy, and fifty hours of mentoring. Since Petitioner did not allege a lack of mentoring services in her due process complaint, it is unclear why such services would be ordered as relief in this case. Additionally, since this Hearing Officer did not uphold Petitioner's claims relating to behavior support services and specialized instruction, relief should not include an order to provide compensatory behavioral support services and/or specialized instruction. Under these circumstances, Petitioner's relief must be limited to occupational therapy services. Petitioner asked for eighty hours of services but premised the request on a

claim of FAPE denial during the two-year period preceding the filing of the due process complaint. However, the FAPE denial in this case corresponds to the time period of April 1, 2019, to August 27, 2019. Under the circumstances, this Hearing Officer will order that the Student receive thirty hours of occupational therapy services, to be delivered by a qualified provider of Petitioner's choice at a reasonable and customary rate in the community.

VII. Order

As a result of the foregoing:

1. Respondent shall pay for thirty hours of occupational therapy for the Student, to be delivered by a qualified provider at a reasonable and customary rate in the community;
2. Petitioner's requests for relief are otherwise denied.

Dated: October 19, 2019

Michael Lazan
Impartial Hearing Officer

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

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 19, 2019

Michael Lazan
Impartial Hearing Officer