

District of Columbia
Office of the State Superintendent of Education
Office of Dispute Resolution
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<hr/> Parent, on behalf of Student,¹)	
Petitioner,)	
)	Hearing Dates: 10/8/19, Room 111;
)	10/9/19, Room 111
)	Hearing Officer: Michael Lazan
District of Columbia Public Schools,)	Case No. 2019-0201
Respondent.)	
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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 Multiple Disabilities (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 9, 2019. The Complaint was filed by a parent of the Student (“Petitioner”). On August 19, 2019, Respondent filed a response. The resolution period expired on September 8, 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

¹Personally 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 September 12, 2019. Attorney A, Esq., counsel for Petitioner, appeared. Attorney B, Esq., counsel for Respondent, appeared. A prehearing conference order was issued on September 17, 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 23, 2019.

The hearing proceeded on October 9, 2019, and continued on October 10, 2019. On October 10, 2019, Respondent moved for a directed verdict on some of the claims corresponding to Issue #1, as well as Issue #2 and Issue #3. This motion was denied. Closing arguments were presented, on the record, on October 10, 2019. This was a closed proceeding. Petitioner was represented by Attorney A, Esq., and Attorney C, Esq. Respondent was represented by Attorney B, Esq. Petitioner moved into evidence exhibits 1-62. There were no objections. Exhibits 1-62 were admitted. Respondent moved into evidence exhibits 1-160. Objections were filed for exhibits 7-34, 38-40, 48, 51-52, 57, 61-63, 65-69, 74-75, 92, 105, 106-108, 112, 142, and 152-3. Objections were sustained in regard to exhibits 20, 38-40, 51-52, 105, 112, and 142. Exhibits 1-19, 21-37, 41-50, 53-104, 106-111, 113-141, and 143-160 were admitted.

Petitioner presented as witnesses: herself; Witness A, an advocate (expert: special education as it relates to Individualized Education Program (“IEP”) programming and implementation); and Witness B, a clinical and forensic psychologist (expert: clinical psychology). Respondent presented as witnesses: Witness C, a special education teacher

and Local Educational Agency (“LEA”) representative (expert: special education and programming); and Witness D, a psychologist (expert: school psychology).

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 provide the Student with an appropriate IEP in May, 2018? 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 Free Appropriate Public Education (“FAPE”)?

Petitioner contended that the May, 2018, IEP: a) did not provide an accurate description of the Student’s present levels of performance; b) did not provide for enough specialized instruction; c) did not reference a current and/or appropriate Functional Behavior Assessment (“FBA”) and Behavior Intervention Plan (“BIP”); d) was not based on sufficient evaluative data (in particular a psychological report requested by Petitioner prior to the IEP meeting); and e) did not provide the Student with appropriate goals.

2. Did DCPS fail to implement the IEPs in effect from August, 2017, to June, 2019? 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 did not receive enough behavior support services or occupational therapy services during this time.

3. Did DCPS fail to revise the Student’s IEP after it received a psychoeducational evaluation report in September, 2018? If so, did DCPS violate 34 CFR Sect. 300.324(b)(1)(i) and (ii), and related provisions? If so, did DCPS deny the Student a FAPE?

V. Findings of Fact

1. The Student is an X-year-old who is currently eligible for services as a student with Multiple Disabilities (specific learning disability, other health impairment). The Student is significantly behind other students in reading and has stated that s/he does not know how to read. The Student is not able to understand many phonemes and not able to write, except to write his/her name. In mathematics, the Student is able to identify the numbers one through ten, and can add and subtract to a limited extent, but does not understand the concept of place value. Testimony of Witness A; Testimony of Petitioner.

2. The Student has difficulty with communication, requiring verbal models, visual aids, and supports to assist with his/her communication needs. Directions and instructions need to be simplified, repeated, and restated. The Student also needs extra time to process presented information and formulate responses. Much of the Student's instruction needs to come through 1:1 support. P-7-3; P-16-5; Testimony of Witness B.

3. The Student attended School A during the 2016-2017 school year, during which the Student exhibited many off-task behaviors, including disturbing other children and putting his/her hands on other children. By the end of the school year, the Student regressed on all math goals. P-7-3, 6.

4. An FBA was written for the Student on March 3, 2017. The FBA identified two major "behaviors of concern": distractibility behaviors (such as easy distraction, overstimulation from items in the classroom, failure to attend class, wandering around the classroom, attempts to crawl, and looking at other materials), and disruptive behaviors (such as the use of "unsafe hands," walking over others on the carpet, invasion of others' space, and getting close to the faces of others). The FBA

suggested that the overall function of the Student's behavior is the need for "social reinforcement," with "sub-motivators" of avoidance or escape from adults, escape from non-preferred, academically challenging tasks, and escape from peers. The FBA indicated that the Student benefits from: visual schedules and student checklists with picture support regarding assignment expectations; preferential seating; altering the physical arrangement of the classroom; reduced distractions in the classroom; use of a quiet "corner" of the room; modified materials; resource room instruction; 1:1 instruction in the classroom; varied methods of instruction; "alternative" assignments; extra visual and verbal cues and prompts; additional time for assignments; and "social stories." After the FBA was created, DCPS issued BIPs for the Student on April 4, 2017, May 1, 2017, and June 13, 2017. In addition to the interventions suggested by the FBA, the BIPs indicated that the Student needed academic interventions such as breaking down tasks with earned incentives, a daily behavior incentive chart, visual communication supports, and morning check in. P-13; P-19; P-20; P-21.

5. An IEP meeting was held for the Student on July 13, 2017. The resulting IEP determined that the Student was eligible as a student with Autism, and provided for goals in reading, written language, mathematics, communication/speech and language, emotional, social and behavioral development, and motor skills/physical development. The Student was offered fourteen hours per week of specialized instruction outside general education, plus six hours per week of specialized instruction inside general education. The Student was also offered four hours per month of speech-language pathology outside general education, 120 minutes per month of behavioral support services inside general education, 120 minutes per month of occupational therapy outside

general education, and 120 minutes per month of behavioral support services outside general education. The IEP also required clarification/repetition of directions, a visual schedule, visual supports, “noise buffers” such as headphones, preferential seating, a location with minimal distractions, and frequent breaks. The IEP also suggested that the Student would benefit from “social stories” and a behavior chart where the Student could earn stars for appropriate behavior. P-7.

6. The Student continued at School A for the 2017-2018 school year. The Student received fourteen hours of specialized instruction outside general education and six hours of specialized instruction inside general education. Occupational therapy was not provided for the Student from August through November, 2017, but the Student received some makeup hours for these services. The Student received “completely separate programming” from the other children in the school. The Student’s class had assistant teachers and/or “partner teachers” in the room at least part of the day. As of December, 2017, the Student worked with a paraprofessional who provided the Student with 1:1 support. This paraprofessional recorded data on the Student’s BIP goals and worked on a daily positive behavior chart for the Student. The Student made virtually no progress in reading during the year and had such difficulty with writing that the majority of the Student’s classwork was written by an adult (who would write down what the Student said). Testimony of Witness C; Testimony of Witness D; P-9.

7. The Student’s grades for the first three terms of the 2017-2018 school year reflected skills that were below grade level. The Student’s received “1” grades in all academic classes during the first two terms. In the third term, the Student’s grades increased to “2” in reading, speaking and listening, math, and science. The report card

indicated that the Student had “grown in many ways,” but that the Student was “not yet reading and writing ready” and still relied heavily on memory and picture cues. In mathematics, it was reported that the Student experienced some growth in distinguishing between tens and ones. The Student generally did not complete work on time during this year. P-9-2, 9; P-22; P-23; Testimony of Witness A; Testimony of Witness C; Testimony of Witness D.

8. DCPS conducted DIBELS testing on the Student during the 2017-2018 school year. Both middle-of-year and end-of-year testing showed no improvement at all in the Student’s reading ability. The Student scored at the Reading Behaviors (“RB”) level throughout the year, indicating that the Student was still working on learning all the letter sounds, rather than reading sentences. DCPS also conducted i-Ready testing on the Student to determine his/her mathematics skills. On this measure, the Student scored a 330 on September 21, 2017, a 359 on January 18, 2019, and a 412 on May 22, 2018. However, the Student was still at the early first grade level in mathematics at the end of the school year. Testimony of Witness A; P-25; P-26; R-99.

9. A meeting was held regarding the Student’s education and academic progress on April 10, 2018. Appearing were the Student’s grandmother and mother; a speech and language pathologist; a general education teacher; Teacher A, a special education teacher; a school social worker; an LEA representative; another special education teacher; and a paraprofessional. It was mentioned that the Student needed a scribe in writing, had a 1:1 paraprofessional for instructional support doing science and social studies, and was “accessing” “Level A” texts. The team noted that the Student was more successful with 1:1 support and did his/her best work with minimal distractions and

a quieter environment. At this meeting, Petitioner expressed that the Student needed more time being exposed to the general education curriculum and expressed concerns that, due to the Student's issues with distractibility, there were too many children in the classroom. Testimony of Witness C; Testimony of Petitioner; R-93 at 455, 460; P-49.

10. An IEP meeting was held for the Student on May 22, 2018. At the meeting were Petitioner; the Student's father; an occupational therapist; and the same DCPS staff who attended the April, 2019, meeting, except for the paraprofessional. The team determined that the Student continued to be eligible for services as a student with Autism and determined that the Student was on an "emerging kindergarten" to "beginning first grade" level in mathematics on the i-Ready measure. The team discussed the Student's poor phonological awareness and mentioned that the Student benefitted from using a scribe in writing. The team also discussed how the Student expressed anxiety and frustration during group work and/or collaborative work and considered whether the Student should receive more services outside general education, including for group work. The resulting IEP reduced the Student's specialized instruction hours to a total of thirteen per week (five outside general education and eight inside general education), with the same classroom aids, services and accommodations as the prior IEP. The IEP was then amended on June 15, 2018, to add language encouraging teachers to modify assessments using visual aids and to use an appropriate tone with the Student. The additional language also advised teachers to be positive with the Student when s/he misbehaved and to implement the BIP outside the classroom. P-9; P-10; Testimony of Witness D; Testimony of Petitioner; P-50

11. At or about the time of the May, 2018, IEP meeting, Petitioner mentioned

that she wanted the BIPs from 2017 to expire because they contained information that was no longer valid. DCPS staff felt that the last BIP from 2017 was still useful and decided to keep the document in full effect. Testimony of Witness A.

12. The Student's thirteen hours of specialized instruction per week (five outside general education and eight inside general education) were implemented through work on the Student's academic goals, including in reading, mathematics, and written expression. There were about 20-25 children in the Student's general education classes, though the Student was often taught in a small group within the classroom. Some of the Student's academic lessons were delivered by a general education teacher without a special education teacher in the room. The Student began to decline academically when his/her specialized instruction hours were reduced. Testimony of Witness C; Testimony of Witness B; P-16-5.

13. A comprehensive psychological evaluation of the Student was conducted by Witness B on July 1, 2018, as reflected by a report dated September 28, 2018. Testing on the Wechsler Intelligence Scale for Children-V ("WISC-V") showed that the Student's IQ was at the 5th percentile, in the very low range, with particular weaknesses in verbal comprehension. Testing on the Woodcock Johnson Test of Achievement-Fourth Edition (WJ-IV) showed that the Student's academic functioning was at the "below kindergarten" level overall, well below grade level, with slightly higher scores in calculation. Witness B noted that the Student's standard scores in 2014 testing were higher than the scores he calculated. Social and emotional testing was conducted through the Behavioral Assessment System for Children, Second Edition ("BASC-2"), Childhood Autism Rating Scale, Second Edition, Questionnaire for Parents or Caregivers ("CARS2-

QPC”), and Conners Comprehensive Behavior Rating Scales in conjunction with the Childhood Autism Rating Scale, Second Edition, Standard Form (“CARS2-ST”). This testing showed that the Student was moderately depressed and felt alienated to some degree. Witness B also interviewed the Student’s special education teacher, Teacher A, who indicated that the Student was not in the appropriate setting and would benefit from a small classroom. Teacher A, who had been the Student’s special education teacher for the past three years, completed rating scales on the BASC-2. Her ratings indicated that the Student displayed severe difficulty with reading, math, and writing, and had trouble keeping up in class. Teacher A also reported that the Student had difficulty with attention and displayed a degree of aggression (e.g., calling other children names, hitting, and teasing). P-16; Testimony of Witness B.

14. Petitioner sent DCPS Witness B’s report in September, 2018. DCPS then reached out to Petitioner and told her it wanted to review the report with her. However, Petitioner wanted to observe the Student first. Subsequently, Petitioner observed the Student a total of eleven times in all of his/her classes, including library, physical education, science, art, reading, and math. The last observation was January 11, 2018. The parties then set an April, 2018, date to review the evaluation. Testimony of Petitioner; Testimony of Witness C.

15. At the Student’s next IEP meeting, on April 25, 2019, the team agreed to provide the Student with twenty hours per week of specialized instruction outside general education. P-10-23; P-12-22.

16. The Student’s service trackers for behavioral support services from September, 2017, through April, 2019, revealed that the Student was offered the

following services: 120 minutes in August, 2017; 240 minutes in September, 2017; 210 minutes in October, 2017; 120 minutes in November, 2017; 210 minutes in December, 2017; 270 minutes in January, 2018; 240 minutes in February, 2018; 210 minutes in March, 2018; 240 minutes in April, 2018; 240 minutes in May, 2018; 120 minutes in September, 2018; 270 minutes in October, 2018; 150 minutes in November, 2018; 120 minutes in December, 2018; 180 minutes in January, 2019; 120 minutes in February, 2019; 210 minutes in March, 2019; 240 minutes in April, 2019; and 165 minutes in May, 2019. P-31; P-32; P-33; P-34; R-157.

17. The Student's service trackers for occupational therapy services from November, 2017, through April, 2019, revealed that the Student was offered the following services monthly: 90 minutes in December, 2017; 135 minutes in January, 2018; 165 minutes in February 2018; 135 minutes in March 2018; 195 minutes in April, 2018; 180 minutes in May, 2018; 105 minutes in June, 2018; 75 minutes in August, 2018; 120 minutes in September, 2018; 150 minutes in October, 2018; 135 minutes in November, 2018; 90 minutes in December, 2018; 120 minutes in January, 2019; 150 minutes in February, 2019; 150 minutes in March, 2019; 150 minutes in April, 2019; 120 minutes in May, 2019; and 60 minutes in June, 2019. P-35; P-36; P-37; P-38; R-157.

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 established 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).

1. Did DCPS fail to provide the Student with an appropriate IEP in May, 2018? 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 May, 2018, IEP: a) did not provide an accurate description of the Student’s present levels of performance; b) did not provide for enough specialized instruction; c) did not reference a current and/or appropriate FBA and BIP; d) was not based on sufficient evaluative data (in particular a psychological report which had been requested by Petitioner prior to the IEP meeting); and e) did not provide the Student with appropriate goals. During closing argument, Petitioner withdrew the contention that the IEP was not based on sufficient evaluative data.

In Hendrick Hudson Bd. of Educ. v. Rowley, 458 U.S. 176 (1982), the United States Supreme Court found that an IEP must be “reasonably calculated” to enable the child to receive benefit. In the District of Columbia, this has meant that the IEP should be both comprehensive and specific, and targeted to the Student’s “unique needs.” McKenzie v. Smith, 771 F.2d 1527, 1533 (D.C. Cir. 1985); 34 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 contended that some of the language in the “Areas of Concern” sections of the Student’s May, 2018, IEP was repeated from the Student’s June, 2017, IEP. But the vast majority of the language in the “Areas of Concern” sections of the May, 2018, IEP related to new information collected during the 2017-2018 school year. For instance, though the May, 2018, IEP repeated a small portion of the language describing the Student’s mathematics issues from the June, 2017, IEP, the bulk of the “Areas of Concern” section in mathematics discussed the Student’s progress in identifying numbers, the Student’s latest i-Ready testing results, and the Student’s mathematics fluency score from May, 2018. Similarly, the “Areas of Concern” section of the May, 2018, IEP relating to reading provided information on the Student’s latest phonological processing testing and progress with the Edmark Reading Program during the 2017-2018 school year. And the “Areas of Concern” section of the May, 2018, IEP relating to written expression indicated that the Student’s written assignments had been completed by an adult during the year.

Petitioner also contended that the Student’s goals were insufficient, but a close review of the May, 2018, IEP revealed that it contained detailed, well-written goals that were different than the goals in prior IEPs. For instance, Annual Goal 1 in mathematics

set as its target the Student's ability to quickly add and subtract one-digit numbers from memory. This goal was not mentioned in the June, 2017, IEP. Similarly, the Student's three reading goals in the May, 2018, IEP (which related to learning new words, asking "wh" questions, and identifying the main idea of a passage) were different than the single reading goal in the June, 2017, IEP (which related to reading high frequency words). In the May, 2018, IEP, the Student's two written expression goals were also different than the single writing goal in the June, 2017, IEP. And the Student's communication/speech and language goals, social, emotional and behavioral goals, and motor skills/physical development goals in the May, 2018, IEP were also all entirely different than the goals in the June, 2017, IEP.

Petitioner contended that some of the goals did not contain "baselines." But Petitioner did not point to any support for the proposition that a goal must have a "baseline" to pass muster under the IDEA. Additionally, all of the goals in the IEP did contain a section describing the Student's baseline. Petitioner specifically criticized Adaptive/Daily Living Skills Annual Goal 3 (claiming that the Student had already mastered this goal as shown by the goal's baseline), and Motor Skills/Physical Development Annual Goal 3 (which Petitioner contended was unmeasurable). However, school districts are not required to create a "perfect" plan for students. One or two imperfect goals in a detailed twenty-seven page IEP should not ordinarily result in a finding of FAPE denial. Moreover, while Motor Skills/Physical Development Annual Goal 3 (relating to choosing an appropriate sensory strategy) may be difficult to measure, the record suggests that this goal may have been important for the Student to master given his/her behavioral issues. Compare Damarcus S. v. District of Columbia, 190 F.

Supp. 3d 35, 52-53 (D.D.C. 2016) (“the wholesale repetition” of goals and objectives “indicates an ongoing failure to respond to [a student’s] difficulties”).

Petitioner also contended that the Student’s FBA and BIPs from 2017 needed to be updated by May, 2018, pointing to the fact that the BIPs mentioned that the Student was “crawling on the floor” and “walking over others on the carpet.” Petitioner contended that these issues were no longer a problem for the Student. However, the FBA and BIPs addressed far more than these two issues. The extensive FBA and BIPs spoke broadly on issues relating to disrupting class and distractibility, both of which continued to be issues for the Student as of May, 2018. It is also worth pointing out that the FBA and BIPs appear to have been successful, since Witness D stated (without rebuttal) that the Student’s behavioral issues lessened during the 2017-2018 school year. Similarly, Teacher A told Witness B that the Student was “polite, and generally exhibiting some social skills.” P-16-13.

Parenthetically, there is no specific requirement to write an FBA or a BIP in the regulations. The school district is only 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). Moreover, when assessing a student’s behavior plan, it is also important to consider interventions in the IEP. Cf. Long v. Dist. of Columbia, 780 F. Supp. 2d 49 (D.D.C. 2008) (“the quality of a student’s education is inextricably linked to the student’s behavior”). The Student’s May, 2018 IEP included goals relating to coping strategies and practicing interpersonal skills and provided the Student with 240 minutes per month of behavioral support services.

Petitioner also argued that the FBA and BIP did not address the Student's more recent behaviors. Petitioner pointed to Witness B's report, which referred to instances of the Student's aggression, and the service trackers for behavioral support services, which referred to the Student's elopement and non-compliant behavior. However, these behaviors are forms of "disruptive behavior," and the FBA and BIP specifically focused on addressing the Student's disruptive behaviors by, for instance, allowing the Student to speak to a preferred support person and/or reinforcing appropriate social interactions through modeling.

Petitioner's final claim related to the IEP team's choice to decrease the Student's specialized instruction hours in the May, 2018, IEP from twenty hours per week to thirteen. The record is clear, however, that even with twenty hours of specialized instruction per week in the 2017-2018 school year, the Student did not make appropriate progress. Tellingly, the Student started and ended the 2017-2018 school year at the "RB" level in reading on DIBELS testing. This means that, by the end of the school year, the Student still did not know all of his/her letter sounds. Nor can it be said that the Student made progress in writing during the 2017-2018 school year. The Student's May, 2018 says nothing about the Student making progress in writing during the 2017-2018 school year, and instead indicated that an adult had to complete most of the Student's writing assignments during the school year.

Some limited progress was reported in mathematics during the 2017-2018 school year. In i-Ready testing, the Student scored a 330 on September 21, 2017, a 359 on January 18, 2019, and a 412 on May 22, 2018. Even so, the Student was still at the early first grade level in mathematics at the end of the school year. Moreover, the May, 2018,

IEP stated that the Student's academic progress in mathematics "varies" and that the Student "is not able to demonstrate what [s/he] knows consistently." Similarly, the "Analysis of Existing Data" document written by DCPS at the same time as the IEP indicated that the Student "requires a much lengthier time period to learn math skills than [his/her] peers in general education" and that the Student would be two grade levels behind when s/he starts the 2018-2019 school year.

Witness C argued that the hours of specialized instruction were reduced because Petitioner said that she wanted the Student to have more exposure to general education peers. Though Petitioner denied that she said this at the April, 2018, meeting, notes from the meeting do confirm that Petitioner was concerned about the Student's lack of exposure to general education peers. However, given the Student's lack of progress in reading and writing, and low levels in mathematics, it was inappropriate to cut the Student's specialized instruction hours at that point.² As Teacher A later reported to Witness B, the Student needed a small classroom setting for the 2018-2019 school year, not a classroom with 20-25 students and one general education teacher for part of the academic day. While the IDEA, of course, does emphasize the importance of educating students in the least restrictive environment, maintaining a less restrictive placement at the expense of educational benefit is not appropriate or required. Hartmann by Hartmann v. Loudoun County Bd. of Educ., 118 F.3d 996 (4th Cir. 1997); see also Clyde K. v. Puyallup Sch. Dist., 35 F.3d 1396 (9th Cir. 1994); MR v. Lincolnwood Bd. of Educ., 843 F. Supp. 1236 (N.D. Ill 1994).

²It is noted that Respondent could have kept the Student's mandate at twenty hours of specialized instruction but recommended that the instruction be inside general education instead of outside general education. This would have satisfied any concerns that Petitioner would have had about exposure to general education peers.

Respondent appears to have been motivated, at least in part, by the Student's disability classification. Witness C testified that the Student's "Autism" designation drove the IEP in this case, and that the Student's more recent change to a Multiple Disabilities classification allowed the Student to receive twenty hours of instruction for the 2018-2019 school year. However, Respondent did not present any support for the proposition that a student's eligibility category should so strongly influence the services on an IEP for a student with special needs. Respondent therefore denied the Student a FAPE when it failed to provide the Student with sufficient specialized instruction in the May, 2018, IEP.

2. Did DCPS fail to implement the IEPs in effect from August, 2017, to June, 2019? 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 DCPS did not provide sufficient occupational therapy and behavioral support services during the time period referenced above. "Failure to implement" claims are actionable if a school district cannot materially implement an IEP. A party alleging such a claim must show more than a *de minimis* failure, and must show that material, or "substantial or significant," portions of the IEP could not be implemented. 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 that was on 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).

Petitioner argued that Respondent failed to provide the Student with 960 minutes of Behavioral Support Services during the time period in question. Taking into account months with a limited number of school days, such as August, December, and February, and giving Respondent credit for sessions that did not occur due to the Student's absence, this Hearing Officer calculates that the Student missed approximately 800 minutes of behavioral support services between August, 2017, and June, 2019. Respondent also failed to provide the Student any occupational therapy services between August, 2017, and November, 2017, which comes to approximately 400 minutes of missed services.

Unlike in Savoy, where the Student missed services for less than ten minutes a day, the Student here did miss a meaningful amount of services. Respondent argued that some of its providers did not keep good records and that the service trackers may not be entirely accurate, but Respondent did not call a behavioral support services provider or an occupational therapist to rebut the figures in the service trackers. Respondent also argued that the Student's occupational therapy services were made up during the rest of the 2017-2018 school year. The service trackers do indicate that the Student was provided with more minutes than required in January, 2018 (15 minutes more); February, 2018 (45 minutes more); March, 2018 (15 minutes more); April, 2018 (75 minutes more); and May, 2018 (60 minutes more). However, these hours, if they can be considered "make-up" hours, do not amount to even half of the minutes of service that the Student missed between August, 2017, and November, 2017. Additionally, the record does not establish that the Student would receive the same benefit from services provided in such an irregular manner during only part of the school year. Under the circumstances, this Hearing Officer agrees that Respondent failed to implement the Student's IEPs between

August, 2017, and June, 2019, with respect to behavioral support services and occupational therapy.

3. Did DCPS fail to revise the Student's IEP after it received a psychoeducational evaluation report in September, 2018? If so, did DCPS violate 34 CFR Sect. 300.324(b)(1)(i) and (ii), and related provisions? If so, did DCPS deny the Student a FAPE?

34 CFR Sect. 300.324(b)(1)(ii) provides that a school district must revise an IEP, as appropriate, to address any lack of expected progress toward annual goals, the results of any reevaluation, information about the child provided to or by the parents, the child's anticipated needs, and other matters. Districts have a duty to revise IEPs as appropriate. Kevin T. v. Elmhurst Comm. Sch. Dist. No. 205, 36 IDELR 153 (N.D. Ill. 2002).

The crux of this claim is that Respondent failed to respond appropriately when Petitioner sent Respondent Witness B's psychological report. But the record indicates that, to the contrary, Respondent's reaction to the report was appropriate. After receiving the report, DCPS reached out to Petitioner and told her it wanted to review the report with her. Petitioner, however, insisted on observing the Student in every one of his/her classes first, which delayed any formal review of the report by DCPS. Petitioner ended up observing the Student eleven times, including in library and physical education.

Moreover, there is no specific duty for an LEA to convene an IEP team any time a parent presents it with an evaluation. Petitioner argued that the evaluation in question presented important new information to DCPS, but most of the information it contained was consistent with the rest of the documentation in the record, which indicated that the Student was not progressing enough academically and was experiencing behavioral issues in class. This claim must therefore be dismissed.

RELIEF

Petitioner seeks 180 hours of compensatory tutoring, 20 hours of compensatory behavioral support services, and five hours of compensatory occupational therapy services. Where 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 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). 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.

Witness A testified that the Student is owed approximately 180 hours of compensatory tutoring to address the Student's lack of specialized instruction during the 2018-2019 school year. Witness A, an expert in special education, testified that this amount of services would bring the Student to the level where s/he would have been had s/he received twenty hours of specialized instruction per week during the 2018-2019 school year, through April, 2019. There is nothing in the record to suggest that Witness A's calculation is inappropriate. DCPS did not present a witness who disputed Witness A's figure and did not present their own compensatory education calculation for the Student. Therefore, 180 hours of compensatory tutoring will be ordered, to be provided by a qualified special education teacher at a reasonable and customary rate in the community. Similarly, Witness A's modest calculation of twenty hours of compensatory behavioral support services and five hours of compensatory occupational therapy services was not disputed or questioned by any DCPS witness. This Hearing Officer agrees with Witness A that such an award for related services should bring the Student to the level that s/he would have been if the services had been delivered as promised.

VII. Order

As a result of the foregoing:

1. Respondent shall pay for 180 hours of compensatory tutoring for the Student;
2. The tutoring services must be provided by a qualified, experienced special education teacher at a reasonable and customary rate in the community;
3. Respondent shall pay for twenty hours of behavioral support services and five hours of occupational therapy for the Student;

4. The services must be provided by a qualified, experienced provider at a reasonable and customary rate in the community;
5. All tutoring, behavioral support services, and occupational therapy services must be used by the Student by December 31, 2020;
6. Petitioner's additional requests for relief are hereby denied.

Dated: October 23, 2019

Michael Lazan
Impartial Hearing Officer

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

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 23, 2019

Michael Lazan
Impartial Hearing Officer