District of Columbia
Office of the State Superintendent of Education
Office of Dispute Resolution
1050 First Street, NE, Washington, DC 20002
(202) 698-3819 www.osse.dc.gov

Parent, on behalf of Student,[1] **Petitioner,**	)	
v.	)	**Hearings: July 25 and 27, 2018** **HOD Date: August 22, 2018** **Hearing Officer: Michael Lazan** **Case No.: 2018-0094**
X PCS,	)	
Respondent.	)	

HEARING OFFICER DETERMINATION

I. Introduction

This is a case involving a student who is currently eligible for services as a student with Multiple Disabilities (the "Student").

A Due Process Complaint ("Complaint") was received by X PCS ("X PCS" or "Respondent") pursuant to the Individuals with Disabilities Education Act ("IDEA") on March 30, 2018. The Complaint was filed by Petitioner, who is the parent of the Student. On April 9, 2018, Respondent filed a response. The resolution period expired on April 29, 2017.

II. Subject Matter Jurisdiction

This due process hearing was held, and a decision in this matter is being rendered, pursuant to the Individuals with Disabilities Education Improvement Act ("IDEIA" or "IDEA"), 20 U.S.C. Sect. 1400 et seq., its implementing regulations, 34 C.F.R. Sect. 300

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

et seq., Title 38 of the D.C. Code, Subtitle VII, Chapter 25, and the District of Columbia Municipal Regulations, Title 5-E, Chapter 30.

III. Procedural History

On May 15, 2018, this Hearing Officer held a prehearing conference. Attorney A, Esq., counsel for Petitioner, appeared. Attorney B, Esq., counsel for Respondent, appeared. A prehearing conference order was issued on May 23, 2018, summarizing the rules to be applied in this hearing and identifying the issues in the case.

The original Hearing Officer Decision ("HOD") due date was June 13, 2018. Because of unavailability of counsel and witnesses, a motion for continuance by Respondent, on consent, was granted on June 13, 2018, extending the timeline to August 3, 2018. On August 2, 2018, Respondent filed a motion for another continuance. This motion was to extend the timeline because Petitioner exercised her right to submit a written closing statement at the close of evidence. The parties agreed on a schedule to provide written closings, which extended past the scheduled decision date. This motion was granted on August 3, 2018, extending the timeline to August 22, 2018.

There were two hearing dates: July 25, 2018, and July 27, 2018. These were closed proceedings. Petitioner was represented by Attorney A, Esq. Respondent was represented by Attorney B, Esq. Petitioner moved into evidence Exhibits 1-40. All objections were overruled. Exhibits 1-40 were admitted. Respondent moved into evidence Exhibits 1-35. There were no objections. Exhibits 1-35 were admitted. Written closing statements were presented by both sides on August 10, 2018. Responsive statements were also presented by both sides, on August 15, 2018.

Petitioner presented as witnesses: Petitioner; Witness A, a speech and language pathologist; Witness B, an advocate; and Witness C, a psychologist. Respondent presented: Witness D, an owner of an educational services firm; Witness E, a director of student services at X PCS; Witness F, former teacher and principal at School A; and Witness G, an associate director at School B.

IV. Issues

As identified in the Prehearing Conference Summary and Order and in the Due Process Complaint, the Free and Appropriate Public Education ("FAPE") issues to be determined in this case are as follows:

1. Did the Local Educational Agency **("**LEA") fail to offer the Student a FAPE and/or revise the Student's existing Individualized Education Program ("IEP") and/or provide an appropriate location of services in connection to the IEPs dated November, 2016, and February, 2017? If so, did the LEA 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 the LEA deny the Student a FAPE?

Petitioner pointed to the fact that the Student was not being educated in an appropriate grouping of students at School A. In particular, the other students had more significant needs than the Student. The school was therefore not an appropriate location of services.

2. Did the LEA fail to discuss the Student's available options on the "continuum" and/or include a complete statement relating to the Student's Least Restrictive Environment ("LRE") in the Student's November, 2016, IEP? If so, did the

LEA act in contravention of some of the principles outlined in Brown v. District of Columbia, 179 F.Supp.3d 15 (D.D.C. 2015)? If so, did the LEA deny the Student a FAPE?

3. Did the LEA fail to assess the Student in all areas of suspected disability from August, 2016, through June, 2017? If so, did the LEA violate 28 U.S.C. Sect. 1414(b)(3), 34 C.F.R. Sect. 300.304(c), and related provisions? If so, did the LEA deny the Student a FAPE?

Petitioner contended that the Student requires a neuropsychological evaluation.

4. Did the LEA fail to implement the Student's IEP written in November, 2016? If so, did the LEA materially deviate from the terms of the IEP and thereby act in contravention of such precedent as Van Duyn v. Baker Sch. Dist. 5J, 502 F.3d 811, 822 (9th Cir. 2007)? If so, did the LEA deny the Student a FAPE?

Petitioner contended that the Student was not provided with an aide or specialized instruction to address the Student's specific learning disability, and that the LEA did not comply with graduation requirements in the IEP.

5. Did the LEA fail to provide an IEP or a Behavioral Intervention Plan ("BIP") from February 14, 2018, to present that: a) sufficiently addressed the Student's behavioral issues; b) provided appropriate "present levels of educational performance"; c) provided appropriate goals; and d) provided appropriate speech and language services? If so, did the LEA violate the tenets of caselaw such as Board of Education of the Hendrick Hudson Central School District v. Rowley, 458 U.S. 276 (1982), and related regulations? If so, did the LEA deny the Student a FAPE?

6. Did the LEA fail to provide the Student with an IEP after the IEP dated November, 2016, elapsed (through to the present time)? If so, did the LEA violate 34 CFR Sect. 300.324? If so, did the LEA deny the Student a FAPE?

V. Findings of Fact

1. The Student is an X-year-old who is eligible for services as a student with Multiple Disabilities. The Student is significantly delayed in all academic domains, as evidenced by psychological testing and other norm-referenced testing. Emotionally, the Student is detached and has difficulties with self-esteem, leading to behavioral incidents, defiance, and sadness. The Student also has underdeveloped receptive and expressive language skills, making it difficult for the Student to cope with stressors and develop peer relationships. (P-6-15-16; Testimony of Witness A; Testimony of Witness C)

2. The Student first attended elementary schools in the District of Columbia Public School system, then attended a District of Columbia Charter School. Thereafter, the Student attended School A, a non-public school, at its XYZ site ("School A-XYZ"). The Student was by that time in a "full-time" special education setting. In the Student's IEP dated March, 2015, the Student was recommended for twenty-eight hours per week of specialized instruction outside general education, with sixty minutes per week of behavioral support services, and sixty minutes per week of occupational therapy. The Student was functioning on approximately the fourth grade level in reading, writing, and mathematics. A dedicated aide was required for the Student, who needed the aide to complete assignments and address issues with frustration and distress. At the time, the Student's behavioral issues impacted on the Student's work and/or the work of other students. (P-12)

3. During the 2015-2016 school year, the Student continued to experience difficulty managing "stressors" in school. The Student displayed negative self-esteem and had difficulty establishing social relationships, and the Student would sometimes become overwhelmed and shut down under pressure. (P-14-2)

4. The Student was evaluated by a licensed, independent psychologist in August, 2016. The Student's Full Scale IQ was determined to be in the extremely low range, with a standard score of 59, at the 0.3 percentile. The Student's scores on achievement tests were also deemed to be in the extremely low range, with broad reading at the 0.4 percentile, broad math below the 0.1 percentile, and broad writing at the 0.4 percentile. The evaluation recommended a neurological and/or neuropsychological evaluation for the Student because of the Student's marked declines in memory and processing speed. (P-6)

5. The Student was enrolled at X PCS, which served as the Student's LEA, on October 31, 2016. However, the Student continued to attend School A, having transferred to its ABC site ("School A-ABC"). (Testimony of Witness E)

6. Another IEP was written for the Student in November, 2016. At the IEP meeting, Petitioner expressed concern with the easiness of the work in the Student's classes, as well as the Student's peer grouping in the classes. This IEP did not report any clear progress in reading, writing, or mathematics during the previous school year. The Student's specialized instruction was kept at the same level as the previous year, and the Student's behavioral support services and occupational therapy services were changed in form only, to reflect a monthly requirement of 240 minutes for each service. The Student continued to require a 1:1 dedicated aide, and again required 1:1 assistance to complete

academic tasks. Again, the IEP indicated that the Student's behavior affected the Student's learning or the learning of others. (P-16; Testimony of Petitioner; Testimony of Witness F; Testimony of Witness D)

7. During the 2016-2017 school year, the Student's classmates included one student who was on "grade level" and two others who could work on group assignments with the Student. Several students in the classroom were similar to the Student in terms of disability category and ability level. Each student in the classroom at School A-ABC had his/her own educational specialist, who was a paraprofessional, and individual lesson plans. There were a total of eight students in the classroom, including one student in a wheelchair. There were no nonverbal students in the classroom. The Student was unhappy because of the severity of the disabilities of the other students in the room. The Student was able to earn credits in these classes. (Testimony of Witness F)

8. Witness F, the Student's teacher, also functioned as the principal of School A at the time. Witness F missed ten to fifteen hours of class time per month while acting as principal, during which time the "educational specialists" in the classroom worked with the students. Witness F left specific lesson plans and textbooks with the educational specialists so that the students could complete their lessons and assignments. Witness F's absences from the classroom were most often due to IEP meetings, which would typically last for an hour-and-a-half, with a 40-minute commute. (Testimony of Witness F)

9. A meeting was held for the Student in February, 2017. At the meeting, Witness F said that the Student was doing better in school, but Petitioner indicated that she was not satisfied and did not believe the Student's goals were correct. She was also

concerned about whether the Student would be getting appropriate credits. Petitioner was further concerned about the communication difficulties of the other children in the classroom. Accordingly, Petitioner requested a new placement and evaluations. The parties then agreed on assessments for the Student. (Testimony of Witness B; Testimony of Petitioner; Testimony of Witness F)

10. A speech and language evaluation dated April, 2017, tested the Student on the Comprehensive Assessment of Spoken Language ("CASL"). The evaluation found that the Student was at the 5th percentile in terms of core language, with below average scores in expressive and receptive language. (P-7)

11. Adaptive testing was conducted on the Student in May, 2017. Notwithstanding the Student's low scores in other domains, the adaptive testing found that the Student was in the "adequate" range, at least according to Witness F. (P-9)

12. The Student's report card for the 2016-2017 school year indicated that the Student received three "D" grades and two "C" grades in academic classes during the year. (R-16)

13. There was a meeting on August 14, 2017, with Petitioner, Witness B, staff from School A, staff from X PCS, and a representative from the Office of the State Superintendent of Education. Witness F agreed with the parent that the Student did not like going to school at School A because the Student felt different from the other students. (Testimony of Witness B; Testimony of Witness F; P-15-1, P-15-2)

14. The Student then transferred to School B for the 2017-2018 school year. Initially, the Student was not happy at School B, in part because the Student realized that s/he was very far behind at the time. No dedicated aide was provided to the Student from

August, 2017, through early January, 2017. (Testimony of Witness G; Testimony of Petitioner)

15. A neuropsychological evaluation of the Student was conducted by Witness C in October, 2017. This evaluation measured the Student in regard to nonverbal intelligence, attention, and phonological processing. The test results were all well below average, and the Student was diagnosed with three variations of Specific Learning Disability, Unspecified Neurocognitive Disorder, and Persistent Depressive Disorder. Still, the evaluator concluded that the Student was at the right school. (Testimony of Witness C; P-10)

16. A Woodcock Reading Mastery Test, Third Edition, was administered to the Student on January 31, 2018. This evaluation indicated that the Student was functioning on the 2.5 grade level equivalent in reading. (P-25)

17. Another IEP meeting was held on February 8, 2018. At this meeting, the IEP team did not formally review the Student's August, 2016, psychological evaluation or October, 2017, neuropsychological evaluation. The IEP reported that the Student had behavioral issues that affected the Student's learning, or the learning of others, and again indicated that the Student had difficulty managing "stressors" in school. The IEP also indicated that the Student displayed negative self-esteem and had difficulty making social relationships. The IEP indicated that the Student had regressed in reading, per "i-Ready" testing, and demonstrated significant difficulty in regard to writing. The Student's specialized instruction hours and behavioral support services remained the same as the prior IEP. However, additional language was added to indicate that the Student required frequent breaks to attend to grade level assignments, and a highly structured behavioral

management system to assist the Student in remaining on task and focused during instructional periods. This language also established that the Student benefited from small class sizes, low student-teacher ratios, and grade level content modification in order to access the curriculum. It also indicated that the Student benefited from the use of graphic organizers, adult modeling, charts, and calculators during instruction, and from intensive reading support, which provides research-based programs specializing in phonics, fluency, and comprehension. (R-19; Testimony of Witness G)

18. The Student's "Key Math" assessment from February, 2018, indicated that the Student was functioning on the 2.1 grade level equivalent in math (composite score), though with increased grade level equivalent scores in addition and subtraction (3.8) and division and multiplication (4.6). (P-22-2)

19. Another IEP was developed for the Student in May, 2018. During the corresponding IEP meeting, there was a discussion about the Student's need for speech and language therapy. Representatives from School B indicated that the Student's goals needed to be more challenging, and adjustments to the goals were made accordingly. (Testimony of Witness B)

20. The Student's confidence has improved at School B, where the Student has become more responsive and engaged in class. Even so, during the 2017-2018 school year, the Student often needed prompting to stay on task. The Student required chunking and extended time. In reading, the Student sometimes withdrew out of fear of being embarrassed. The Student completed some tasks according to mood and preference, but also engaged in physical confrontations with peers. (R-19; R-26; Testimony of Witness D; Testimony of Witness G)

21. A BIP was written for the Student in May, 2018. This BIP provided for the use of prompts, the school-wide behavioral system, frequent praise, computer time, praise at home, and loss of privileges where there were behavioral episodes. (R-29)

VI. Conclusions of Law

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

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

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

See D.C. Code § 38-2571.03(6)(A)(i)

Issues #1, #2, #5, and #6 involve a challenge to the Student's existing or proposed IEP or placement. Accordingly, on those issues, the burden of persuasion is with Respondent, provided that Petitioner presents a *prima facie* case. Issues #3 and #4 do not directly relate to the Student's existing or proposed IEP or placement. For those issues, the burden of proof lies with the party seeking relief. Schaffer v. Weast, 546 U.S. 49 (2005).

1. Did the LEA fail to offer the Student a FAPE and/or revise the existing IEP and/or provide an appropriate location of services in connection to the IEPs dated November, 2016, and February, 2017? If so, did the LEA 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 the LEA deny the Student a FAPE?

The main role of a hearing officer is to determine if the IEP developed through the Act's procedures is reasonably calculated to enable the child to receive additional benefits. Hendrick Hudson Bd. Of Educ. v. Rowley, 458 U.S. 176 (1982). The IEP should be both comprehensive and specific and targeted to the Student's "unique needs." McKenzie v. Smith, 771 F.2d 1527, 1533, D.C. Cir. 1985); N.S. ex rel. Stein v. District of Columbia, 709 F.Supp.2d 57, 60 (D.D.C. 2010); 34 CFR Sect. 300.320(a)(2)(B) (the IEP must contains goals that meet each of the child's educational needs that result from the child's disability); 34 CFR Sect. 300.324(a)(1)(iv)(the IEP must address the academic, developmental, and functional needs of the child).

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

In 2017, the Supreme Court addressed a split amongst the circuit courts regarding what the IDEA means when it requires school districts to provide an "appropriate" level of education to children with disabilities. Endrew F. ex rel. Joseph F. v. Douglas County School Dist. RE-I, 137 S. Ct. 988 (2017). In Endrew F., the Court held that an IEP must

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

Petitioner points to no caselaw in support of claim #1, perhaps because there is little caselaw in support of FAPE claims based on an inappropriate peer grouping in a student's classroom. See, e.g., W.T. & K.T. ex rel. J.T. v. Bd. of Educ. of Sch. Dist. of New York City, 716 F. Supp. 2d 270, 291 (S.D.N.Y. 2010). Moreover, Witness F testified that some students in the Student's classroom were on the Student's academic level, and each student in the classroom received individual lesson plans so that grouping students as "academic equals" was not imperative. It is apparent from the record that the Student was unhappy that some students in the classroom had different disabilities than that of the Student, including autism and a physical disability. However, Witness F testified that the Student was able to be educated in this "mixed" classroom, which, it appears, was no different than the classrooms in which the Student had been placed previously at School A.

Issue #1 is dismissed.

2. Did the LEA fail to discuss the Student's available options on the "continuum" and/or include a complete statement relating to the Student's LRE in the Student's November, 2016, IEP? If so, did the LEA act in contravention of the some of the principles outlined in Brown v. District of Columbia, 179 F.Supp.3d 15 (D.D.C. 2015)? If so, did the LEA deny the Student a FAPE?

Petitioner contends that the IEP's LRE statement is inappropriate, citing to a case decided by Judge Lamberth in 2016. Brown v. District of Columbia, No. 15-0043 (RCL), 2016 WL 1452330 (D.D.C. April 16, 2016). In Brown, which is something of an

outlier in the caselaw, there was apparently no statement in the IEP describing how the recommended placement constituted the Student's LRE. Here, the IEP does contain an "LRE statement" that describes the recommended placement. (P-14-16). Moreover, there is no dispute that the Student's LRE is in a self-contained placement, and there is no testimony that the "LRE statement" in the IEP had any impact on the Student's right to a FAPE or the parent's right to participate in the IEP meeting. As a result, Petitioner did not meet her burden to present a *prima facie* case on this claim, which must be dismissed.

3. Did the LEA fail to assess the Student in all areas of suspected disability from August, 2016, through June, 2017? If so, did the LEA violate 28 U.S.C. Sect. 1414(b)(3), 34 C.F.R. Sect. 300.304(c), and related provisions? If so, did the LEA deny the Student a FAPE?

Petitioner's claim concerns only the need for a neuropsychological evaluation, which was specifically recommended in the psychological evaluation from August, 2016. An LEA is required to ensure that a child is assessed in all areas of suspected disability, and that the chosen assessment tools and strategies are provided to present relevant information that directly assists persons in determining the educational needs of the child. 28 U.S.C. Sect. 1414(b)(3); 34 C.F.R. Sect. 300.304(c).

In matters alleging a procedural violation, a hearing officer may find that a child did not receive a FAPE only if the procedural inadequacies: (i) Impeded the child's right to a FAPE; (ii) Significantly impeded the parent's opportunity to participate in the decision-making process regarding the provision of a FAPE to the parent's child; or (iii) Caused a deprivation of educational benefit. 34 CFR Sect. 300.513(a).

The psychological evaluation from August, 2016, is well written, comprehensive, and created by an independent company that has no affiliation with either of the parties.

There is nothing in the record to contradict the findings of this evaluation, which indicated, at P-16-18:

> Because of the clinically significant decline in [the Student's] working memory and processing speed, it is imperative that [the Student] undergo a neurological evaluation in order to determine if there is a specific neurological basis for such decline. If the neurological evaluation is inconclusive or determines that there is no specific neurological basis, then [the Student] should then undergo a neuropsychological evaluation. In either case, all results should be shared with the school to assist with future educational and behavioral planning.

Respondent argued that its failure to conduct a neurological or neuropsychological evaluation did not cause the Student any harm, referencing the doctrine, as stated by the D.C. Circuit: "(a)n IDEA claim is viable only if those procedural violations affected the student's substantive rights." Lesesne ex rel. B.F. v. D.C., 447 F.3d 828,834 (D.C. Cir. 2006). However, courts in this jurisdiction tend to find that the failure to evaluate is a substantive violation. See, e.g., Hill v. D.C., No. 14-CV-1893 (GMH), 2016 WL 4506972, at *18 (D.D.C. Aug. 26, 2016)(vocational assessment and speech and language assessment). Here, where the psychological evaluation uses the word "imperative" in describing the need for these evaluations, it must be determined that Respondent denied the Student a FAPE by failing to conduct the neurological or neuropsychological evaluations, particularly since Respondent did not present any rebuttal to the psychological evaluation.

Respondent correctly points out that it has been the Student's LEA only as of October 31, 2016. Still, on receipt of the Student, and upon review of the Student's psychological evaluation, the LEA should have conducted neurological and

neuropsychological evaluations of the Student, and certainly after Petitioner requested these evaluations in February, 2017. Issue #3 is sustained.

4. Did the LEA fail to implement the Student's IEP written in November, 2016? If so, did the LEA materially deviate from the terms of the IEP and thereby act in contravention of such precedent as Van Duyn v. Baker Sch. Dist. 5J, 502 F.3d 811, 822 (9th Cir. 2007)? If so, did the LEA deny the Student a FAPE?

"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).

During the time period when the November, 2016, IEP was in practical effect, Petitioner contends that the Student did not have a dedicated aide, did not receive the required specialized instruction, and did not receive classes that would provide credits to enable the Student to graduate on time.

Witness F's testimony indicated that the Student did have an aide at School A during the entire 2016-2017 school year. The testimony of Petitioner and Witness B was to the contrary, but those witnesses did not have personal knowledge of the classroom. There is, however, no question that the Student did not have a dedicated aide from

August, 2017, through early January, 2018. Respondent contends that the failure to have a dedicated aide in late 2017 did not impact the Student. However, as Petitioner pointed out, the "materiality" standard does not require that a child suffer demonstrable educational harm in order for a parent to prevail on a failure-to-implement claim. Wilson v. District of Columbia, 770 F. Supp. 2d 270, 275 (D.D.C. 2011). Moreover, Respondent presented no caselaw in support of the proposition that the failure to provide a student with a service like a dedicated aide for four months can be deemed a procedural violation. To the contrary, where a student has been deprived of educational services for a significant amount of time, courts have consistently found that a FAPE has been denied. Lofton v. District of Columbia, 7 F.Supp.3d 117 (D.D.C. 2013)(student was supposed to receive thirty minutes of occupational therapy per week, but a school official testified that "the school is currently unable to provide occupational therapy").

In regard to Petitioner's other arguments pertaining to the failure to implement the November, 2016, IEP, Respondent's position is stronger. As Respondent noted, Petitioner put forth no evidence to suggest that specialized instruction was not provided at School A, even though Petitioner bears the burden of persuasion on this issue. Petitioner's contention that Witness F could not have handled such a mixed class and therefore failed to provide services is not supported by the record. Additionally, as Respondent noted, Petitioner did not meet her burden in regard to the claim that the Student did not receive credits at School A. Witness F confirmed that the Student did take credit-bearing classes, and Petitioner did not present any clear testimony to the contrary.

However, Petitioner prevails on Issue #4 insofar as Respondent failed to implement the Student's then-existing IEP between August, 2017, and early January, 2018, by failing to provide the Student with a dedicated aide.

5. Did the LEA fail to provide an IEP or BIP from February 14, 2018, to present that: a) sufficiently addressed the Student's behavioral issues; b) provided appropriate "present levels of educational performance"; c) provided appropriate goals; and d) provided appropriate speech and language services? If so, did the LEA violate the tenets of caselaw such as Board of Education of the Hendrick Hudson Central School District v. Rowley, 458 U.S. 276 (1982), and related regulations? If so, did the LEA deny the Student a FAPE?

At the Student's IEP meeting in February, 2018, new evaluations had not been completed and recently-conducted evaluations, including by Witness C, were not reviewed. As a result, the IEP's "present levels of performance" sections did not reflect the Student's psychological testing. However, the IEP described measures that School B took to assess the Student, such as the i-Ready measure and the Key Math measure, and the IEP also referenced the Student's schoolwork. Though not as comprehensive as it could have been, the IEP provided a clear and meaningful overview of the Student's performance in reading, writing, mathematics, speech and language, emotional, social and behavioral development, and motor development.

However, some of the Student's IEP goals were not meaningful. The Student's writings, motor skills, and social, emotional and behavioral goals were reasonably well written, and while there was not a specific reference to the "common core" in these IEP goals, there is no requirement that the "common core" be specifically referenced in IEP goals. However, the Student's math and reading goals were copied entirely from the Student's earlier IEP from November, 2016. There is nothing in the record to justify these duplicative goals, which reflect a less-than-careful review of the Student's recent performance (including declines in reading, per the i-Ready testing). See 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 contends that the IEP lacked a behavioral plan. While not literally required by federal statute and regulation, "(i)f behavior impedes a student's learning, 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 U.S.C. Sect. 1414(d)(3)(B)(i); 34 C.F.R. Sect. 300.324(a)(2)(i).

But Respondent did consider a behavioral plan for the Student. While the Student did not receive a BIP until May, 2018, the IEP did add a paragraph in the section "Other Classroom Aids and Services," which detailed the Student's needs for frequent breaks, a highly structured behavioral management system, small class sizes, a low student-teacher ratio, graphic organizers, adult modeling, charts, calculators, and intensive reading support. This language was not in the Student's prior IEP, and should be deemed to satisfy the federal requirement to consider the use of positive behavioral supports, especially in view of the Student's behavioral progress at School B.

Finally, Petitioner argues that the IEP failed to provide the Student with speech and language therapy. Petitioner presented convincing testimony from Witness A that the Student had deficits in speech and language that required speech and language therapy. Witness A's expert testimony was that the Student should have received weekly services, from thirty minutes to an hour, since the Student had difficulty understanding what was going on in the classroom. The Student also had difficulty talking in the

classroom. Respondent did not call any expert witnesses in speech and language to rebut these contentions.

As a result of the foregoing, Respondent denied the Student a FAPE through the IEP dated February, 2018, by failing to provide updated goals, and by failing to provide speech and language therapy.

6. Did the LEA fail to provide the Student with an IEP after the IEP dated November, 2016, elapsed (through to the present time)? If so, did the LEA violate 34 CFR Sect. 300.324? If so, did the LEA deny the Student a FAPE?

Reviewing and revising a child's IEP is a critical step in the IEP process because the needs of a student with a disability often change over the course of the student's educational career. The IEP must be responsive to those changes to ensure a FAPE is provided. IEP teams must therefore meet at least once a year to formulate a new program, even in circumstances where it is clear that all of the services provided to the student will remain the same. 34 CFR 300.324(b)(1)(i).

Yet Respondent did not revise the Student's IEP until February, 2018, which is several months after the November, 2016, IEP had elapsed. Respondent contended that this was a procedural violation, indicating that the Student's IEP from February, 2018, was similar to the IEP from May, 2018. However, the failure to write an IEP yearly is not ordinarily considered to be a procedural violation. A.I. ex rel. Iapalucci v. District of Columbia, 402 F.Supp.2d 152, 163–64 (D.D.C.2005); see also Honig v. Doe, 484 U.S. 305, 311 (1988) (holding that IDEA requires the school district to create and implement an IEP, which is the "primary vehicle" for implementing the Act); Alston v. District of Columbia, 439 F.Supp.2d 86, 90 (D.D.C.2006) (holding that the IEP is the main tool for carrying out the Act). Respondent presented no cases to the contrary. Accordingly,

Respondent denied the Student a FAPE by failing to meet to revise the Student's IEP within one year of its formation in November, 2016.

RELIEF

Petitioner asserts the need for compensatory education in this case. 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). Under the IDEA, if a student is denied a FAPE, a hearing officer may not "simply refuse" to grant one. Henry v. District of Columbia, 55 IDELR 187 (D.D.C. 2010). Some students may require only short, intensive compensatory programs targeted at specific problems or deficiencies. Reid, 401 F.3d at 524.

Petitioner's request for compensatory education seeks 500 hours of tutoring, a mentoring program, the funding of an accredited barbering school, and hiring a full-time permanent aide who is also a certified teacher. Petitioner also requests a reasonable

amount of speech services to make up for the lack of speech and language services in the February, 2018, IEP.

The FAPE denial in this case relates to the time period from approximately February, 2017, through May, 2018. However, the record indicates that the Student did receive some educational benefit during this time period, particularly during the 2017-2018 school year at School B. In fact, the report of Witness C, a main witness for Petitioner and the author of Petitioner's compensatory education plan, opined that she was satisfied with School B. Petitioner also indicated satisfaction with School B in light of the Student's improvements at the school.

Nevertheless, some compensatory education must be awarded for the 2017-2018 school year. The Student was deemed to have had a fourth grade level in academics in March, 2015, but is currently functioning below that level in virtually all areas. For instance, the February, 2018, IEP and the May, 2018, IEP, noted that the Student had regressed in reading, according to the i-Ready measure. No progress was noted in either reading or writing in the February, 2018, IEP.

Respondent objected to the request for 500 hours of compensatory tutoring as excessive. Respondent pointed out, among other things, that Witness C's plan was conclusory and poorly reasoned, and this Hearing Officer agrees that Respondent's plan could have been more detailed. Moreover, the plan does not take into account the fact that the Student did receive educational benefit during the 2017-2018 school year, as evidenced by the May, 2018, IEP. Accordingly, it is appropriate to reduce the proposed award to 200 hours of tutoring, to be delivered by a qualified provider. Witness D indicated that the tutoring could be obtained at the rate of $65 per hour, the "going rate"

for tutoring. This testimony was credible and not contradicted by the record. It is therefore appropriate to limit the award to tutoring at the rate of $65 per hour.

Petitioner's requests for compensatory mentoring and a compensatory barbering school program appear to be good ideas for the Student. However, compensatory education is a function of educational deprivation, not an opportunity for new programs that might have some benefit for the Student. While this Hearing Officer encourages the parties to pursue these options, a barbering school and mentoring program do not constitute appropriate compensatory services. Similarly, Petitioner's request for a full-time, permanent, dedicated aide who is a certified educator is not supported by the record and cannot be characterized as a compensatory "service," as anticipated by Reid.

Petitioner also requests that the Student receive speech and language therapy that corresponds to the failure to provide speech and language therapy in the February, 2018, IEP. This issue was not addressed in the compensatory education plan, but Petitioner's request for compensatory speech services is valid. As a result, it is appropriate for this Hearing Officer to establish a number of hours for compensatory speech and language therapy *sua sponte*. It is accordingly determined that an award of twenty-five hours of speech and language therapy is appropriate.

VII. Order

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

1. Respondent shall provide the Student with 200 hours of academic tutoring, to be provided at the rate of $65 per hour by a qualified provider;

2. Respondent shall provide the Student with twenty-five hours of speech and language therapy at a rate that is customary in the community;

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

Dated: August 22, 2018

Michael Lazan
Impartial Hearing Officer

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

VIII. Notice of Appeal Rights

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

Date: August 22, 2018

Michael Lazan
Impartial Hearing Officer