

DISTRICT OF COLUMBIA
OFFICE OF THE STATE SUPERINTENDENT OF EDUCATION
Office of Dispute Resolution
1050 First Street, NE, 3rd Floor
Washington, DC 20002

PARENT,
on behalf of STUDENT,¹

Date Issued: September 16, 2018

Petitioner,

Hearing Officer: Peter B. Vaden

v.

Case No: 2018-0148

DISTRICT OF COLUMBIA
PUBLIC SCHOOLS,

Hearing Dates: August 16 and 31, 2018

Respondent.

Office of Dispute Resolution, Room 112
Washington, D.C.

HEARING OFFICER DETERMINATION

INTRODUCTION AND PROCEDURAL HISTORY

This matter came to be heard upon the Administrative Due Process Complaint Notice filed by Petitioner (MOTHER), under the Individuals with Disabilities Education Act, as amended (the IDEA), 20 U.S.C. § 1400, *et seq.*, and Title 5-E, Chapter 5-E30 of the District of Columbia Municipal Regulations (“D.C. Regs.”). In her due process complaint, Petitioner alleges that Respondent District of Columbia Public Schools (DCPS) has denied Student a free appropriate public education (FAPE) by not conducting timely comprehensive reevaluations, by not developing appropriate Individualized Education Programs (IEPs) and by failing to fully implement Student’s IEPs in the 2017-2018 school year.

¹ Personal identification information is provided in Appendix A.

Petitioner's Due Process Complaint, filed on June 11, 2018, named DCPS as respondent. The undersigned hearing officer was appointed on June 13, 2018. On June 20, 2018, I convened a telephone prehearing conference with counsel to discuss the issues to be determined, the hearing date and other matters. The due process hearing was set for August 16-17, 2018. At the close of the first day of the hearing, the parties agreed to suspend the hearing in order to resume settlement discussions. When those discussions were not successful, the second day of the hearing was rescheduled for August 31, 2018. To accommodate the continued hearing date, by order of August 23, 2018, I granted the parties' joint request to extend the final decision due date from August 25, 2018 to September 21, 2018.

The due process hearing was held before the undersigned impartial hearing officer on August 16 and 31, 2018 at the Office of Dispute Resolution in Washington, D.C. The hearing, which was closed to the public, was recorded on an electronic audio recording device. The Petitioner appeared in person and was represented by PETITIONER'S COUNSEL. Respondent DCPS was represented by TRANSITION COORDINATOR and by DCPS' COUNSEL.

Counsel for the respective parties made opening statements. Mother testified and called EDUCATIONAL CONSULTANT as an additional witness. DCPS called as witnesses Transition Coordinator, SPECIAL EDUCATION TEACHER and LEA REPRESENTATIVE. Petitioner's Exhibits P-1 through P-14, P-17, P-23, P-24 and P-26 were admitted into evidence without objection. Exhibits P-15, P-16, P-19, P-20A, P-21, P-22 and P-25 were withdrawn. There was no Exhibit P-18 offered. Exhibit P-20, which comprised multiple documents, was admitted in part. Pages 1 thorough 12 of Exhibit P-20 were not offered. Pages 13 through 19-1 and pages 36 through 52 were admitted

without objection. DCPS' objection to page 19-2 of Exhibit P-20 was sustained. DCPS' Exhibits R-1 through R-22 were admitted into evidence without objection. Counsel for the respective parties made closing arguments. There was no request to file post-hearing written briefs.

JURISDICTION

The hearing officer has jurisdiction under 20 U.S.C. § 1415(f) and D.C. Regs. tit. 5-E, § 3029.

ISSUES AND RELIEF SOUGHT

The issues for determination, as clarified by Petitioner's Counsel on the record on the first day of the due process hearing², are:

1. Whether District of Columbia Public Schools (DCPS) denied Student a free appropriate public education (FAPE) by failing to comprehensively evaluate Student in all areas of suspected disabilities since 2012, including failing to conduct required triennial evaluations;
2. Whether DCPS denied Student a FAPE by failing to develop appropriate Individualized Education Programs (IEPs) in March 2017 and March 2018, including, but not limited to providing insufficient Specialized Instruction in light of Student's level in math, vague and complicated annual goals, not individualized to Student and not measurable, and not addressing Student's attendance issues and
3. Whether DCPS denied Student a FAPE by failing to implement IEP Specialized Instruction services in the 2017-2018 school year.

For relief, the Petitioner requested in her due process complaint that the hearing officer order as follows:

- a. Order DCPS to either fund outright or reimburse the parent (by issuing a check to parent's counsel) for an independent comprehensive psychological evaluation by an evaluator of the parent's choice. The reimbursement rate will be the psychologist's usual and customary rate for this type of evaluation;

² Additional issues set forth in the June 20, 2018 Prehearing Order were withdrawn by Petitioner's Counsel, on the record on the first day of the hearing.

- b. Order DCPS to fund an independent functional behavioral assessment in the amount of \$1,200, that will include addressing Student's attendance issues;
- c. Order DCPS to fund an educational expert to develop a program for the student that will allow Student to remediate academic skills and progress toward receiving a high school credit in Algebra 2 (Trigonometry), Geometry and U.S. History;
- d. Order DCPS to ensure that an IEP is developed for Student that will allow Student to remain a DCPS student until such time as Student appropriately completes high school graduation requirements and
- e. Order DCPS to provide to Petitioner's Counsel any school records that have not already been provided;

The Petitioner also requested that the hearing officer craft an appropriate compensatory education plan for the denials of FAPE alleged or, at the option of the Petitioner, allow the Petitioner to reserve compensatory education until such time as all evaluations would be completed.

FINDINGS OF FACT

After considering all of the evidence, as well as the argument of counsel, my findings of fact are as follows:

1. Student, an AGE youth, resides in the District of Columbia with Mother.

Testimony of Mother.

2. At all times concerned in this matter, Student has been eligible for special education under the IDEA disability classification Specific Learning Disability (SLD).

Exhibits P-12, P-17.

3. Student's last comprehensive psychological reevaluation was completed in January 2013 by a DCPS school psychologist. In that assessment, the school psychologist reported that cognitively, Student demonstrated Average abilities in all areas assessed – verbal, nonverbal, and composite intelligence indices, along with the

composite memory index. These scores indicated that Student has the resources to successfully complete academic expectations. However, Student required additional instructional support in the areas of reading, writing and mathematics to foster a consistent access to grade-level curriculum and standards. On educational testing, Student's total achievement quotient was in the Borderline range. Student's scores on the listening, spoken language and receptive and expressive language abilities composites were in the Average range. Student's score on the speaking composite was in the Low Average range. Student's quotient scores on the reading and mathematics composites were in the Borderline range. Student's scores on the writing and written language composites were in the extremely low range. On the Behavior Assessment Scale for Children - Second Edition (BASC-2), the teacher's responses to the rating scales suggested that Student's behaviors were in the Clinically Significant range for aggression and conduct problems; that on the internalizing and school problems scales, Student was in the At Risk range. On the Behavioral Symptoms Index (Atypicality and Withdrawal scales), the teacher's ratings were in the Clinically Significant range. On The Behavior Rating Inventory of Executive Function (BRIEF), the teacher's responses suggested that Student exhibited difficulty with some aspects of executive functioning. The school psychologist concluded that Student required specialized instruction and individualized accommodations to assess the grade level curriculum. The evaluator concluded that the data supported the disability classification of Specific Learning Disability (SLD) for Student. Exhibit P-6.

4. In January 2016, SCHOOL PSYCHOLOGIST 2 completed an assessment of Student, titled "Psychological Triennial Reevaluation." This assessment included only a review of prior assessments and educational records, interviews of two teachers and

Student and a classroom observation. Based on her review of relevant data and Student's present levels of performance, School Psychologist 2 concluded that Student continued to meet eligibility criteria for SLD and that no further psychological testing was warranted at that time. Exhibit R-11.

5. Since the 2015-2016 school year, Student has been enrolled in City School 2, a DCPS school. Testimony of LEA Representative. For the 2015-2016 school year, Student failed all courses, except for obtaining a B- grade in Art and an A in Physical Education. That school year, Student accrued 74 days of unexcused absences. Exhibit P-7.

6. Student's April 19, 2016 IEP identified Mathematics, Reading, Written Expression and Emotional-Social-Behavioral Development as areas of concern. The April 29, 2016 IEP provided for Student to receive 12 hours per week of Specialized Instruction, including 4 hours outside general education, and 90 minutes per month of Behavioral Support Services. Exhibit P-7. At the end of the school year, Student was reported to be progressing on all IEP annual goals, "contingent after 4th advisory grades have been tallied." Exhibit R-21. For the 4th advisory of the 2015-2016 school year, Student failed all core academic courses. Exhibit P-7.

7. A "transition back to school" multidisciplinary team (MDT) meeting was held for Student at City School 2 on September 14, 2016. Mother, Student, GRANDMOTHER and FORMER ATTORNEY attended. The team discussed, *inter alia*, school transportation, a regular time for behavior support services, parental consent for a functional behavioral assessment (FBA) and consideration to changing Student's disability classification to Emotional Disturbance (ED), and after-school tutoring.

Mother did not immediately give consent to conduct the FBA or to change Student's disability classification from SLD to ED. Exhibit P-9.

8. An IEP annual meeting was convened at City School 2 on December 1, 2016. It does not appear that Mother attended the meeting or that Student's IEP was revised. Exhibit R-14.

9. For the first two terms of the 2016-2017 school year, Student was passing all courses. Exhibit P-13.

10. DCPS SOCIAL WORKER conducted an FBA of Student in March 2017. The behaviors addressed in the FBA were that Student had the tendency to shut down when faced with adversity, which Student exhibited by walking away from staff, being out of location and ignoring staff member inquiries about Student's well-being. In the classroom Student reportedly would become verbally aggressive and oppositional following incidents with peers. Student's negative emotions were reported to be usually triggered by the actions of others or internalizing "feelings of circumstance." Exhibit P-10.

11. Student's IEP team at City School 2 met on March 28, 2017 to review Student's IEP. Mother, Grandmother, Student and Former Attorney attended the meeting. The team discussed evaluating Student for an emotional disturbance and Mother withheld consent for the evaluation. The March 28, 2017 IEP provided for Student to continue to receive 12 hours per week of Specialized Instruction, including 4 hours outside general education, and 90 minutes per month of Behavioral Support Services. Exhibit P-12.

12. On March 29, 2017, a Behavior Intervention Plan - Level II (BIP) was developed for Student to attach to Student's IEP. The plan included a number of

incentives to encourage positive behavior, and progressive discipline and revoking of rewards to react to targeted negative behaviors, including shutting down, physical aggression and verbal aggression. Exhibit P-11.

13. Student's final grades for the 2016-2017 school year at City School 2 were B's and C's, except for F's in Geometry and Banking. Student accrued 44 days of unexcused absences for the school year. Exhibit P-13. Student was reported to be "Progressing" on all IEP goals. Exhibit R-20.

14. For the 2017-2018 school year, Student was in GRADE at City School 2. For the school year, Student failed Algebra II and U.S. Government. These courses are now the only remaining academic requirements Student needs to graduate. Student could have made up these credits in the 2018 summer school. Mother declined to send Student to summer school because she considered that after Student failed these courses over the regular school year, it would be a waste of time for Student to try to successfully complete the same courses in 5 to 6 weeks of summer school. Exhibit R-10, Testimony of LEA Representative, Testimony of Mother.

15. For the 2017-2018 school year, Student's pull-out (outside of general education) special education services were provided by SCIENCE SPECIAL EDUCATION TEACHER. Testimony of LEA Representative, Exhibit 20.

16. For the 2017-2018 school year, Student's push-in (general education classroom) special education services were provided, for only part of the year, in mathematics class by Special Education Teacher. Special Education Teacher did not see Student until the 3rd marking period, about February 2018. The evidence does not show that before then, Student received push-in Specialized Instruction, inside the general education setting, in the 2017-2018 school year. Testimony of Special Education

Teacher.

CONCLUSIONS OF LAW

Based upon the above Findings of Fact and argument of counsel, as well as this hearing officer's own legal research, my Conclusions of Law are as follows:

Burden of Proof

As provided in the D.C. Special Education Student Rights Act of 2014, the party who filed for the due process hearing, the Petitioner in this case, shall bear the burden of production and the burden of persuasion, except that where there is a dispute about the appropriateness of the student's IEP or placement, or of the program or placement proposed by the local education agency, in this case DCPS, the agency shall hold the burden of persuasion on the appropriateness of the existing or proposed program or placement; provided that the Petitioner shall retain the burden of production and shall establish a *prima facie* case before the burden of persuasion falls on the agency. The burden of persuasion shall be met by a preponderance of the evidence. *See* D.C. Code § 38-2571.03(6).

Analysis

1. Did DCPS deny Student a free appropriate public education by failing to comprehensively evaluate Student in all areas of suspected disabilities since 2012, including failing to conduct required triennial evaluations?

Petitioner first alleges that Student has not been comprehensively evaluated since 2012, when School Psychologist 1 conducted a comprehensive psychological reevaluation. DCPS responds that Student was reevaluated in January 2016 and that the reevaluation was adequate at the time the evaluation report was made. Mother has the burden of persuasion on this claim.

The IDEA requires that a special education reevaluation must occur at least once

every three years, unless the parent and the public agency agree otherwise. *See* 34 CFR § 300.303. In addition to conducting triennial reevaluations, the District must also reevaluate a child with a disability if the District determines that the educational or related services needs of the child warrant a reevaluation, or if the child’s parent or teacher requests a reevaluation. *See* 34 CFR § 300.303(a).

The IDEA regulations specify that in conducting an evaluation, the public agency must—

(1) Use a variety of assessment tools and strategies to gather relevant functional, developmental, and academic information about the child, including information provided by the parent, that may assist in determining—

(i) Whether the child is a child with a disability under §300.8; and

(ii) The content of the child’s IEP, including information related to enabling the child to be involved in and progress in the general education curriculum (or for a preschool child, to participate in appropriate activities);

34 CFR § 300.304(b). However, the IDEA does not mandate that a public agency administer additional testing as part of a reevaluation. *See Hart v. District of Columbia*, No. 17-CV-02494 (APM), 2018 WL 4078350 (D.D.C. Aug. 27, 2018), *citing* 20 U.S.C. § 1414(c)(4); 34 C.F.R. § 300.305(d); *Z.B. v. District of Columbia*, 888 F.3d 515, 523 (D.C. Cir. 2018) (“To be sure, [the individual educational plan (“IEP”)] evaluation does not always require a school to conduct additional testing.”).

In January 2016, School Psychologist 2 completed an assessment of Student, titled “Psychological Triennial Reevaluation.” This assessment included only a review of prior assessments and educational records, interviews of two teachers and Student and a classroom observation. Based on her review of relevant data and Student’s present levels of performance, School Psychologist 2 concluded that Student continued to meet eligibility criteria for SLD and that no further psychological testing was warranted. At

the time, Student was passing all courses. Student's MDT team met in September 2016 and March 2017. Former Attorney and Mother attended both meetings and there is no indication that the parent or her representative requested additional testing. At the March 2017 meeting, the IEP team discussed evaluating the Student for an Emotional Disturbance disability but Mother withheld her consent. On this evidence, I conclude that Mother did not meet her burden of persuasion that DCPS failed to reevaluate Student after 2012 or that the 2016 reevaluation was not sufficiently comprehensive to confirm Student's special education eligibility and to determine Student's educational needs.

2. Did DCPS deny Student a FAPE by failing to develop appropriate IEPs in March 2017 and March 2018, including, but not limited to providing insufficient Specialized Instruction in light of Student's level in math, vague and complicated annual goals, not individualized to Student and not measurable, and not addressing Student's attendance issues?

The parent next contends that Student's IEPs developed at City School 2 in March 2017 and March 2018 were inappropriate because the IEPs lacked appropriate annual goals, offered insufficient Specialized Instruction Services and did not address Student's attendance issues. The March 28, 2017 IEP provided for Student to receive 12 hours per week of Specialized Instruction, including 4 hours outside general education, and 90 minutes per month of Behavioral Support Services. The IEP team also adopted a Behavior Intervention Plan (BIP) to address Student's negative behaviors, including shutting down, physical aggression and verbal aggression. Mother, Grandmother, Student and Former Attorney attended the meeting and apparently agreed with the IEP's provisions and the BIP.

In *Moradnejad v. District of Columbia*, 177 F. Supp. 3d 260 (D.D.C. 2016), the Court adopted the Report and Recommendation of U.S. Magistrate Judge G. Michael

Harvey, which explained how a court or a hearing officer must assess an IEP:

The Supreme Court explained in [*Bd. of Educ. v. Rowley*, 458 U.S. 176, 102 S.Ct. 3034, 73 L.Ed.2d 690 (1982)] that a court's assessment of an IEP involves two inquiries:

First, has the State complied with the procedures set forth in the [IDEA]? And second, is the [IEP] developed through the [IDEA's] procedures [appropriate]? If these requirements are met, the State has complied with the obligations imposed by Congress and the courts can require no more.

Moradnejad at 274-75. Petitioner does not allege that DCPS failed to comply with IDEA procedural requirements when Student's March 2017 and March 2018 IEPs were developed. Therefore, I move to the second prong of the *Rowley* inquiry: Were the annual IEPs appropriate for Student? In *Andrew F. ex rel. Joseph F. v. Douglas Cty. Sch. Dist. RE-1*, — U.S. —, 137 S.Ct. 988, 197 L.Ed.2d 335 (2017), the U.S. Supreme Court elaborated on the standard, first enunciated in *Rowley*, for what constitutes an appropriate IEP. Discussing these decisions in *Z. B. v. District of Columbia*, 888 F.3d 515 (D.C. Cir. 2018), the D.C. Circuit Court of Appeals explained that in *Andrew F.*, the Supreme Court

raised the bar on what counts as an adequate education under the IDEA. *Andrew F.* held that the Act requires education “reasonably calculated to enable a child to make progress in light of the child’s circumstances”—a standard that the Court described as “markedly more demanding than the ‘merely more than *de minimis*’” standard the Tenth Circuit had applied. . . . In requiring more than merely some “educational benefits,” *id.* at 77 (quoting *Bd. of Educ. v. Rowley*, 458 U.S. 176, 207, 102 S.Ct. 3034, 73 L.Ed.2d 690 (1982)), the Court in *Andrew F.* stressed that “every child should have the chance to meet challenging objectives,” and that a student’s “educational program must be appropriately ambitious in light of his circumstances.” 137 S.Ct. at 1000.

Z. B., 888 F.3d at 517.

Substantively, the IDEA “requires an educational program reasonably calculated to enable a child to make progress appropriate in light of the child’s circumstances,” *Andrew F.*, 137 S.Ct. at 1001, even as it stops short of requiring public schools to provide the best possible education for the individual child,

Rowley, 458 U.S. at 200, 102 S.Ct. 3034, or an education “equal” to that of non-disabled peers, *Andrew F.*, 137 S.Ct. at 1001; *Rowley*, 458 U.S. at 198-99, 102 S.Ct. 3034.

Z. B., 888 F.3d at 519.

The IDEA calls on public schools throughout the United States to provide a free, appropriate education. Congress has not committed to educational perfection: “Any review of an IEP must appreciate that the question is whether the IEP is *reasonable*, not whether the court regards it as ideal.” *Andrew F.*, 137 S.Ct. at 999 (emphasis in original). If there is a gap between the best education that money can buy at a private school for a student with disabilities and the free and appropriate education at a public school that the IDEA promises, one might justly hope to close that gap for all students. Meanwhile, what Congress has required is that public schools be “ambitious” for every child, giving each the opportunity to “meet challenging objectives.” *Id.* at 1000. Disabilities can be subtle and complex. They may require expertise to identify accurately.

Z. B., 888 F.3d at 528.

Understanding the particulars of a child’s current skills and needs is critical to developing an “individualized” educational plan: “An IEP is not a form document. It is constructed only after careful consideration of the child’s present levels of achievement, disability, and potential for growth.” *Andrew F.*, 137 S.Ct. at 999 (citing 20 U.S.C. §§ 1414(d)(1)(A)(i)(I)-(IV), (d)(3)(A)(i)-(iv)).

Z. B., 888 F.3d at 522.

Applying the IDEA as interpreted in *Andrew F.*, we must ask whether, in developing the [contested IEP], the [education agency] adequately evaluated [the student’s] particular needs and offered her an IEP tailored to what it knew or reasonably should have known of her disabilities at the time. *See Andrew F.*, 137 S.Ct. at 999.

Z. B., 888 F.3d at 524.

The key inquiry regarding an IEP’s substantive adequacy is whether, taking account of what the school knew or reasonably should have known of a student’s needs at the time, the IEP it offered was reasonably calculated to enable the specific student’s progress. *See Andrew F.*, 137 S.Ct. at 999. . . . [T]hat standard calls for evaluating an IEP as of “the time each IEP was created” rather than with the benefit of hindsight. . . . At the same time, . . . evidence that post-dates the creation of an IEP is relevant to the inquiry to whatever extent it sheds light on whether the IEP was objectively reasonable at the time it was promulgated.

Z. B., 888 F.3d at 524 (internal quotations and citations omitted.) DCPS has the

burden of persuasion as to the appropriateness of the challenged IEPs.

Petitioner's expert witness, Educational Consultant, had little to say about the March 29, 2017 IEP. She offered no opinion regarding Student's need for goals of services to address school attendance. Educational Consultant testified that the IEP's provision of 4 hours of Specialized Instruction outside of general education might have been enough, but she opined that the IEP math goals were above the level of what Student could do. With regard to the appropriateness of the 2017 IEP, I find that Petitioner made a *prima facie* showing only that the IEP math goals were not suitable. DCPS' experts, LEA Representative and Special Education Teacher, testified that the IEP math goals were appropriate for Student. LEA Representative explained that the math goals reflected the skills being taught in Student's grade and that Student had done very well in the Probability and Statistics class. The Supreme Court teaches in *Andrew F.* that the IDEA requires ambitious IEP goals so that "every child should have the chance to meet challenging objectives." *Id.*, 137 S. Ct. at 992. I find that DCPS has met its burden of persuasion that the March 29, 2017 IEP, including the math goals, was reasonably calculated to enable Student's progress.

Although Student passed all courses for the 2016-2017 school year, except Geometry and Banking/Credit, Student's performance declined by the middle of the 2017-2018 school year. At the end of the 2nd term, Student was failing Chemistry, Algebra and Music, and Student had accrued 37 days of unexcused absences. Yet, for the March 16, 2018 IEP, the IEP team largely "cut and pasted" the present levels of performance and annual goals from the March 29, 2017 IEP and continued, unchanged, the Special Education and Related Services from the prior year IEP. On its face, this IEP fails to meet the IDEA's requirement that each IEP be individualized to the student

with a disability. “Understanding the particulars of a child’s current skills and needs is critical to developing an ‘individualized’ educational plan.” *Z. B., supra*, 888 F.3d at 522.

A focus on the particular child is at the core of the IDEA. The instruction offered must be “*specifically* designed” to meet a child’s “*unique* needs” through an “[i] *ndividualized* education program.” §§ 1401(29), (14) (emphasis added). An IEP is not a form document. It is constructed only after careful consideration of the child’s present levels of achievement, disability, and potential for growth. §§ 1414(d)(1)(A)(i)(I)-(IV), (d)(3)(A)(i)-(iv).

Andrew F., supra, 137 S. Ct. 988, 999, 197 L. Ed. 2d 335 (2017) (emphasis in original.) I find that DCPS’ March 16, 2018 IEP did not address Student’s worsening academic and behavioral challenges in the 2017-2018 school year and therefore, was not reasonably calculated to enable Student to make progress appropriate in light of Student’s circumstances. *See Andrew F.*, 137 S.Ct. at 1001.

3. Did DCPS deny Student a FAPE by failing to implement IEP Specialized Instruction services in the 2017-2018 school year?

Petitioner alleges that City School 2 did not implement the 12 hours per week of Specialized Instruction – 8 hours inside and 4 hours outside the general education setting – specified in Student’s IEPs for the 2017-2018 school year. Petitioner holds the burden of persuasion for this claim. According to Mother and Educational Consultant, Student told them that Student was not provided Specialized Instruction in the 2017-2018 school year. However LEA Representative, whom I found credible, testified that Student’s outside-of-general-education special education was provided in Student’s environmental science class, which was taught in a pull-out setting. Student’s Specialized Instruction in the general education setting was provided by Special Education Teacher. However, Special Education Teacher testified that Student was not on his student roll until the beginning of the third term. I find, therefore, that Petitioner

has met her burden of persuasion that for the first half of the 2017-2018 school year, DCPS failed to implement the 8 hours per week of Specialized Instruction services in the general education setting required by Student's March 29, 2017 IEP.

In *Beckwith v. District of Columbia*, 208 F. Supp. 3d 34 (D.D.C. 2016), the U.S. District Court analyzed when a failure to fully implement an IEP results in a denial of FAPE:

To establish a deprivation of educational benefits, a moving party "must show more than a *de minimis* failure to implement all elements of that IEP, and, instead, must demonstrate that the school board or other authorities failed to implement substantial or significant provisions of the IEP."

Beckwith, 208 F. Supp. 3d at 49 (quoting *Houston Indep. Sch. Dist. v. Bobby R.*, 200 F.3d 341, 349 (5th Cir.2000)). I find that DCPS' not providing push-in special education services for one-half of the school year, approximately 18 weeks, was a failure to implement a substantial provision of Student's IEP. This was a denial of FAPE.

Remedy

In this decision, I have determined that DCPS denied Student a FAPE by failing to implement push-in Specialized Instruction services for the first half of the 2017-2018 school year and by failing to ensure that an appropriate IEP was developed for Student at the March 16, 2018 IEP team meeting. The D.C. Circuit pronounced in *B.D. v. District of Columbia*, 817 F.3d 792 (D.C. Cir. 2016), that if a hearing officer concludes that the school district denied a student a FAPE, he has "broad discretion to fashion an appropriate remedy, which may include compensatory education." *Id.* at 800. "That inquiry requires "figuring out both [(1)] what position a student would be in absent a FAPE denial and [(2)] how to get the student to that position." *Butler v. District of Columbia*, 275 F. Supp. 3d 1, 6 (D.D.C. 2017), citing *B.D.* at 799.

Although the parent's expert did not propose a specific compensatory education program, during the course of the due process hearing, the parent repeatedly emphasized that what she seeks is for Student to remain at City School 2 and to receive the help Student needs to graduate from high school. I find that absent the FAPE denial in this case, Student would likely have graduated from high school at the end of the 2017-2018 school year. To get back to that position, Student needs to successfully complete the two courses – Algebra II and U.S. Government (Social Studies) – required to graduate.³ I find that an appropriate compensatory education remedy would be for DCPS to provide academic tutoring, for one hour per week, for each of the two courses which Student must pass to graduate. Petitioner also requested that DCPS be ordered to fund an Independent Educational Evaluation (IEE) psychological evaluation of Student. DCPS has agreed to conduct a psychological evaluation of Student, if the parent will give written consent, which the parent previously withheld. I, therefore, decline to order DCPS to fund an IEE evaluation of Student. *See, e.g., Johnson by Johnson v. Duneland Sch. Corp.*, 92 F.3d 554, 558 (7th Cir.1996) (“[B]ecause the school is required to provide the child with an education, it ought to have the right to conduct its own evaluation.”)

ORDER

Based upon the above Findings of Fact and Conclusions of Law, it is hereby

ORDERED:

1. Within 15 school days of the date of this decision, DCPS shall convene Student's IEP team to review and revise Student's IEP in accordance with this decision and 34 CFR § 300.320, *et. seq.* If the parent consents to DCPS' conducting a comprehensive psychological reevaluation of Student,

³ Petitioner's Counsel stated that Student needs to pass a U.S. History class to graduate. It appears from Student's transcript, Exhibit R-10, that the class Student failed in spring 2018 was U.S. Government. To avoid a misunderstanding, I will describe the required course as "Social Studies."

DCPS may defer holding the IEP team meeting until after the reevaluation is completed. Unless the parent requests otherwise, Student's location of services shall remain City School 2.

2. As compensatory education for the denials of FAPE in this case, beginning not later than 10 school days after the date of this decision, for the remainder of the 2018-2019 school year, DCPS shall provide Student 1 hour per school week, for a total of 2 hours per week, of one-on-one academic tutoring, each, in math and Social Studies, while Student is taking those courses. DCPS may discontinue the tutoring for the respective subject as soon as Student successfully completes the corresponding course required for graduation. DCPS may provide these services directly or provide funding authorization to the parent to obtain the services for Student and
3. All other relief requested by the Petitioner herein is denied.

Date: September 16, 2018

s/ Peter B. Vaden
Peter B. Vaden, Hearing Officer

NOTICE OF RIGHT TO APPEAL

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 U.S.C. § 1415(i).

cc: Counsel of Record
Office of Dispute Resolution
OSSE - SPED
DCPS Resolution Team