

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 21, 2018
Petitioner,	Hearing Officer: Peter B. Vaden
v.	Case No: 2018-0116
DISTRICT OF COLUMBIA PUBLIC SCHOOLS,	Hearing Dates: August 28, 2018 September 5, 2018
Respondent.	Office of Dispute Resolution Rooms 111 and 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) denied Student a free appropriate public education (FAPE) by not ensuring that Student was provided an appropriate Individualized Education Program (IEP) and behavior plan for the 2017-2018 school year.

¹ Personal identification information is provided in Appendix A.

Petitioner's Due Process Complaint, filed on April 24, 2018, named DCPS as respondent. The undersigned hearing officer was appointed on April 25, 2018. On April 27, 2018, I convened a telephone prehearing conference with counsel to discuss the issues to be determined, the hearing date and other matters. My final decision was originally due by July 8, 2018 and the due process hearing was set for June 21, 2018. Upon the unopposed motion of DCPS, due to witness unavailability, the hearing was rescheduled and the final decision due date was extended to July 20, 2018. Subsequently, the parent requested another continuance because counsel had conflicting obligations, and the final decision due date was continued to September 7, 2018. The due process hearing was convened on August 28, 2018. Due to the illness of one of Petitioner's witnesses, the hearing was carried over for a second day on September 5, 2018 and I granted Petitioner's unopposed motion to extend the final decision due date again to September 21, 2018.

The due process hearing was held before the undersigned impartial hearing officer on August 28 and September 5, 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 DCPS' COUNSEL.

Counsel for the respective parties made opening statements. Mother testified and called READING CENTER DIRECTOR, EDUCATIONAL ADVOCATE 1 and EDUCATIONAL ADVOCATE 2 as additional witnesses. DCPS called as witnesses SCHOOL SOCIAL WORKER, CASE MANAGER and SCHOOL PSYCHOLOGIST. Upon the objection of DCPS, I denied Petitioner's request to call PHYSICIAN as a witness,

because Physician had not been identified as a possible witness in Petitioner's prehearing disclosures. Petitioner's Exhibits P-1 through P-71, P-73 through P-75, P-78 and P-85 through P-89 were admitted into evidence without objection. Exhibits P-72 and P-83 were admitted over DCPS' objections. DCPS' objections to Exhibits P-76 and P-79 were sustained. The Petitioner withdrew Exhibits P-77, P-80, P-81, P-82 and P-84. DCPS' Exhibits R-1 through R-27 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 set forth in the April 27, 2018 Amended Prehearing Order, are:

1. Whether in the 2017-2018 school year, DCPS has failed to ensure that Student has been provided an appropriate IEP with sufficient services outside of general education, a suitable educational placement, adaptive goals, a dedicated aide and an adequate behavior plan;
2. Whether from April 2017 forward, DCPS failed to conduct an appropriate Functional Behavior Assessment and develop an appropriate Behavior Intervention Plan (BIP) for Student.

For relief in this case, Petitioner requested that DCPS be ordered to fund Student's placement at a full-time therapeutic day school, or, in the alternative, place the student in a Behavior and Education Support (BES) program; create an appropriate BIP within 10 days of receiving the Hearing Officer Determination; develop an appropriate IEP for Student within 15 days of receiving the Hearing Officer Determination; authorize

tutoring and counseling services to help Student improve with academic and behavioral challenges within 10 days of receiving the Hearing Officer Determination and fund compensatory education, as warranted.

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 child, resides in the District of Columbia with Mother.

Testimony of Mother.

2. Student is eligible for special education under the IDEA disability classification Other Health Impairment (OHI), based on the underlying disorders Attention Deficit-Hyperactivity Disorder (ADHD) and Seizure Disorder. Exhibit R-15.

3. From the beginning of the 2015-2016 school year, Student attended PUBLIC CHARTER SCHOOL (PCS). Exhibit P-37. At a May 13, 2016 IEP team meeting at PCS, the general education teacher reported that Student was doing very well and meeting classroom-wide expectations. The parent stated that she was happy with how well Student was doing and how much Student had grown academically. Exhibit P-36.

4. Student's PCS multidisciplinary team (MDT) met on October 14, 2016 to consider what reevaluations of Student were needed. The school staff reported that Student had difficulty attending to and persisting on academic tasks and that Student moved around a lot and had difficulty paying attention during carpet time. At times, Student's behavior escalated to climbing on furniture, throwing items and demonstrating aggression toward classmates. Student was then having difficulty at certain times when Student had been successful in the past. The social worker reported that Student was having a hard time keeping still, was having up and down moods, was

falling asleep or experiencing seizures in class and demonstrating more hyperactivity and aggression. Exhibit P-35.

5. In an Evaluation Summary Report compiled on December 6, 2016, Student's Case Manager reported that Student understood foundational skills in math and had strong language skills and a strong vocabulary; that Student's oral communication skills were sufficient, but that Student demonstrated a mild weakness in the ability to understand the relationship between vocabulary words and that Student had demonstrated progress toward Motor Skills goals. This Evaluation Summary Report did not address social/emotional/behavioral concerns. Exhibit P-23.

6. Student's IEP team at PCS convened on March 16, 2017 to review and revise Student's IEP. The March 16, 2017 PCS IEP identified Reading, Cognitive and Motor Skills/Physical Development as areas of concern. The IEP provided for Student to receive 5 hours per week of Specialized Instruction, including 2.5 hours outside general education, and 120 minutes per month of Occupational Therapy (OT). Exhibit P-13.

7. Student is followed at UNIVERSITY HOSPITAL. After a follow-up visit on February 6, 2017, the practitioner reported that Student had significant problems at home and at school with emotional lability, attention deficit, sleep difficulty and blank stares; that PCS had modified its approach giving Student a small class setting and behavioral modification; that Student had taken medicine prescribed by a psychiatrist since November 2016 with no effect on hyperactivity and concentration/focus; that Student was reported to have significant emotional lability with aggression and crying; that Student was currently on medications; that Student was waking up at least twice per night, to have sleep walk, nightmares and sleep talk. Exhibit P-68.

8. In April 2017, Student transferred to CITY SCHOOL. From the time Student enrolled in City School, there were a lot of behavior issues. Mother was receiving telephone calls from the school every day about behavior issues such as hitting other students and playing around in the hallways. On separate occasions in November and December 2017, the school called in CHAMPS (Child and Adolescent Mobile Psychiatric Service) to assist with Student, when the school staff was unable to calm student down after behavioral outbursts. Testimony of Mother.

9. Since the 2016-2017 school year, Student has received services from a Community Support Worker at BEHAVIORAL HEALTH. Behavioral Health was able to ensure that Student's medications were provided with more consistency. Since Student's medications have been consistent, Student's behaviors have gotten better. Testimony of Social Worker, Testimony of Mother. After Petitioner's Counsel and her law firm became involved in the case, in early December 2017, the parent was told that Student's behavior was improved. Testimony of Mother.

10. Beginning in November 2017, the City School social worker began providing Student 45 minutes per week of play therapy. These services were not added to Student's IEP. Exhibit P-31.

11. A Student Safety Plan was developed for Student on December 13, 2017. In the section of the plan describing Student's unsafe behaviors, it was reported that Student's challenges included emotional outbursts and tantrums when student was unable to engage in preferred activities and when Student became frustrated by peers and/or class work; that when student experienced frustration, Student yelled, screamed, cried, and fell out on the floor; that Student also threw objects such as papers, books, bins and had overturned a desk; that Student also hit and kicked peers; that Student had

left the classroom without permission and had attempted to run out of the building; that Student had recently set off the fire alarm; that Student exhibited difficulty following reasonable adult directives and became defiant when asked to do something Student did not want to do; and that Student exhibited difficulty transitioning from one activity to another even when given advance notice that the transition was about to occur. Exhibit P-44.

12. Student's MDT team met at City School on December 14, 2017. Mother, Petitioner's Counsel and Educational Advocate 1 attended the meeting. The classroom teacher reported that Student was known for screaming aloud and described an incident where Student went toward another student with scissors, but was responsive to the teacher's redirection and sat down. Educational Advocate 1 requested an Independent Educational Evaluation (IEE) neuropsychological evaluation of Student to address how Student's epilepsy impacts Student. Exhibit P-32.

13. In January 2018, School Social Worker conducted a Functional Behavioral Assessment - Level 1 of Student. Describing Student's problematic behavior, School Social Worker wrote, Student had difficulty following adult directives and established classroom procedures and routines; Student often talked during classroom instruction and crawled or ran around the room, which distracted peers; when Student did not want to follow established routines or procedures, Student often yelled, screamed and continued to engage in the distracting behaviors; when Student's behavior would escalate, often in response to a request to stop engaging in the distracting behaviors, Student threw objects and tore up items in the classroom; Student had difficulty initiating and sustaining positive interactions with peers, usually male classmates; Student often teased and insulted peers and when they would do the same, Student

yelled, screamed, kicked, hit, and pushed; and that if a peer said something that Student did not like, Student often screamed, kicked, hit, or pushed the peer. The social worker reported that these behaviors were triggered when Student was asked to engage in or to stop activities and Student was not in agreement or triggered by teasing or other statements by peers. Exhibit R-19, Testimony of School Social Worker. On January 9, 2018, the school adopted a Behavior Intervention Plan - Level 1 intended to address these behaviors. Exhibit R-20.

14. School Psychologist conducted a comprehensive psychological reevaluation of Student in January 2018. On cognitive testing, Student's full scale IQ score was in the very low range. However, on the Test of Nonverbal Intelligence (TONI 4), Student achieved a score of 96 which fell into the Average range. On testing of academic achievement, Student's Broad Reading score was within the Low range. Student's scores for Broad Math and Broad Written Language were in the Lower Average range. School Psychologist had Student's teacher complete the Behavior Assessment System for Children (BASC-3) behavior rating scales. The teacher's responses indicated Clinically Significant scores for Student for Aggression and Anger Control and At-Risk scores for most other areas. Mother also completed the BASC-3 rating scales after a February 26, 2018 MDT meeting. The parent's responses endorsed At-Risk scores for Student in almost all domains. School Psychologist concluded that her testing supported that Student continued to require specialized instruction with additional behavioral supports under the IDEA disability category OHI (ADHD and Epilepsy). Exhibit R-12.

15. Student's MDT team met on February 26, 2018 for School Psychologist to present her initial psychological reevaluation of Student. Mother, Educational Advocate

1 and Educational Advocate 2 participated in the meeting. The parent's representatives requested that School Psychologist supplement her report by having Mother complete the BASC-3 rating scales. Educational Advocate 1 requested that City School obtain a Least Restrictive Environment (LRE) observation by DCPS because Student's healthcare providers had recommended a small, specialized, school setting for Student. The school representatives agreed to obtain the LRE observation. Exhibit P-31.

16. Student's IEP team at City School reconvened on March 15, 2018. Mother Educational Advocate 1 and Educational Advocate 2 participated in the meeting. Educational Advocate 2 requested a dedicated aide and more Specialized Instruction hours on Student's IEP, as well as a neuropsychological evaluation of Student. The school representatives disagreed with Student's need for a dedicated aide. The March 15, 2018 IEP identified Mathematics, Reading, Cognitive, Emotional/Social/Behavioral Development and Motor Skills/Physical Development as areas of concern. For Special Education and Related Services, the March 15, 2018 IEP provided for Student to receive 5 hours per week of Specialized Instruction outside of general education and 2 hours per week inside general education, 60 minutes per month of OT and 120 minutes per month of Behavioral Support Services. Exhibits P-30, P-12.

17. Student's BIP was also revised at the March 15, 2018 IEP team meeting. Educational Advocate 1 requested specific changes which were made to the BIP. Neither Mother nor her representatives expressed disagreement with the January 2017 FBA or the revised BIP. Testimony of School Social Worker.

18. On March 20, 2018, DCPS LRE OBSERVER, made a classroom observation of Student at City School. In her April 13, 2018 report, DCPS LRE Observer reported that Student's behavior was compliant and engaged and she did not

recommend a more restrictive setting for Student. The observer did recommend that the school develop effective behavioral interventions for Student and develop and implement a full continuum of services that promoted inclusive practices and provided the instructional support that Student requires. Exhibit P-17.

19. On June 13, 2018, after the parent's due process complaint in this case was filed, Student's IEP was amended without a meeting to change the present levels of performance and annual goals in the Emotional, Social and Behavioral Development area of concern. Exhibit P-11, Testimony of Case Manager.

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. In the 2017-2018 school year, did DCPS fail to ensure that Student was

provided an appropriate IEP with sufficient services outside of general education, a suitable educational placement, adaptive goals, a dedicated aide and an adequate behavior plan?

From the beginning of the 2015-2016 school year until April 2017, Student was enrolled in Public Charter School (PCS), an independent local education agency (LEA) in the District of Columbia. In April 2017, the parent transferred Student to City School, for which DCPS is the LEA. Student's last PCS IEP, developed at the charter school on March 16, 2017, provided for Student to receive 5 hours per week of Specialized Instruction, including 2.5 hours outside general education, and 120 minutes per month of Occupational Therapy (OT). DCPS apparently implemented the PCS IEP for Student after Student transferred to City School.

City School did not revise Student's IEP until March 15, 2018, at which time The City School IEP team increased Student's Specialized Instruction to 7 hours per week, including 5 hours outside the general education setting, and added 120 minutes per month of Behavioral Support Services. The IEP team reduced OT services to 60 minutes per month.

The first issue raised by the parent has two aspects. First, whether the March 15, 2018 IEP was inadequate because it lacked adaptive goals, did not offer sufficient services outside of general education or a suitable educational placement, did not provide for a dedicated aide and lacked an adequate behavior plan. The second aspect is whether DCPS denied Student a FAPE by not ensuring that the IEP was revised sooner, following Student's transfer from PCS to City School in April 2017. I will consider the IEP appropriateness issue first.

In *Moradnejad v. District of Columbia*, 177 F. Supp. 3d 260 (D.D.C. 2016), U.S. District Judge Amy Berman Jackson 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. With regard the development of the March 15, 2018 IEP, the parent has not alleged a procedural violation. Therefore, I move to the second prong of the *Rowley* inquiry: Is the March 15, 2018 IEP 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 IEP.

Petitioner's expert, Educational Advocate 1, opined that, based on the responses of Mother and Student's teacher to the BASC-3 rating scales, the March 15, 2018 IEP should have also included Adaptive annual goals. The teacher's responses to the BASC-3 indicated Clinically Significant scores for Student for Aggression and Anger Control and At-Risk scores for most other areas. Mother's responses endorsed At-Risk scores for Student in almost all domains.

The IDEA requires that each child's IEP must include a statement of measurable annual goals, including academic and functional goals, designed to,

(A) Meet the child's needs that result from the child's disability to enable the child to be involved in and make progress in the general education curriculum; and

(B) Meet each of the child's other educational needs that result from the child's disability.

See 34 CFR § 300.320(a)(2)(i). The March 15, 2018 IEP included annual goals for Mathematics, Reading, Cognitive, Emotional/Social/Behavioral Development and Motor Skills/Physical Development.

The U.S. Supreme Court has explained that adaptive functioning is central to the framework followed by psychiatrists and other professionals in diagnosing an intellectual disability. *Hall v. Florida*, 572 U.S. 701, 134 S. Ct. 1986, 1991, 188 L. Ed. 2d 1007 (2014). In the *Hall* decision, the Supreme Court defined adaptive functioning, in the criminal law context, as "an individual's ability or lack of ability to adapt or adjust to the requirements of daily life, and success or lack of success in doing so." *Id.*, citing American Psychiatric Association, *Diagnostic and Statistical Manual of Mental Disorders* 33 (5th ed. 2013) (DSM-5.)

School Psychologist testified that Behavior Support Services were added to Student's March 15, 2018 IEP to address the behavior concerns reflected on the BASC-3 rating scales. Case Manager testified that the City School IEP team decided Student did not need Adaptive goals in the IEP because Student was able to manage daily living activities, such as toileting and feeding without assistance. Student has not been diagnosed with an Intellectual Disability and, although Student's January 2018 full-scale IQ score was very low, Student scored in the Average Range on the TONI 4 test of nonverbal intelligence. Educational Advocate 1 admitted that when she observed Student, she did not see Student having any problem with self-maintenance. I find that DCPS has met its burden of persuasion that Student did not require Adaptive goals in the IEP to enable Student to be involved in and make progress in the general education curriculum or to meet Student's other educational needs.

Petitioner argues that the March 15, 2018 IEP did not provide Student with sufficient Specialized Instruction outside of general education or a suitable educational placement. Petitioner's experts, Educational Advocate 1 and Educational Advocate 2, both opined that due to Student's behavior challenges, Student needed a full-time therapeutic special education setting, separate from nondisabled peers. However, Case Manager testified that since January or February Of 2018, Student had been able to self-regulate and school staff members were no longer seeing problem behaviors from Student. School Social Worker similarly testified that from January 2018 forward, City School staff saw Student making continual improvement behaviorally and in Student's ability to self-regulate. School Social Worker testified that with the City School BIP, Student was functioning quite well in the classroom setting, was re-directable, responded to positive support and interacted well with peers. School Social Worker

opined that Student did not need a higher level of support.

Educational Advocate 2 did not disagree with the assertions by DCPS that Student's behavior was under control due to the improved management of Student's medication. Educational Advocate 1 testified that she did not know whether Student's behavior had improved over the last few months of the 2017-2018 school year because she had not received all of Student's education records. On this evidence, I found DCPS' experts' opinions, that the services and setting in the March 15, 2018 IEP were appropriate for Student, more persuasive than the contrary opinions of the parent's experts. I conclude that DCPS has met its burden of persuasion, that in light of Student's improved behavior at school in the second half of the 2017-2018 school year, the provision for Specialized Instruction Services in Student's March 15, 2018 IEP – including 5 hours per week outside the general education setting, was reasonably calculated to enable Student's progress.

Parent's experts also argue that Student's IEP team should have provided for Student to have a dedicated aide. Under the IDEA, a dedicated aide is a "supplementary aid and service" that must be provided in an IEP, if required to assist a child with a disability to benefit from special education and to be educated with nondisabled children in regular classes to the maximum extent appropriate. *See* 34 CFR §§ 300.42, 300.114(b). The IEP team must include a dedicated aide in a child's IEP if required "to permit the child to benefit educationally from [his IEP personalized] instruction." *See Rowley, supra*, 458 U.S. at 203. *Cf. Cedar Rapids Cmty. Sch. Dist. v. Garret F. ex rel. Charlene F.*, 526 U.S. 66, 79, 119 S. Ct. 992, 1000, 143 L. Ed. 2d 154 (1999).

Case Manager, who was Student's inclusion special education teacher for the 2017-2018 school year, testified that around January or February of 2018, Student's

behavior in class changed and that Student was able to self regulate, remain seated and attend to the task at hand and that Student's academic performance began to improve at the same time. At the March 15, 2018 IEP team meeting, Mother and Educational Advocate 1 requested a dedicated aide for Student to help Student stay on task. However, it was reported that overall, Student's behavior had improved tremendously to the point that Student no longer needed a BIP, although Student's BIP, updated at the IEP team meeting, was left in place. On this evidence I find that at the time of the March 15, 2018 IEP team meeting, Student did not need a dedicated aide in order to remain in the general education classroom with nondisabled students or to benefit educationally from the revised IEP.

Lastly, with regard to the appropriateness of the March 15, 2018 IEP, Petitioner contends there was not an adequate behavior plan. In her testimony, Educational Advocate 1 stated, apparently erroneously, that Student's Behavior Intervention Plan (BIP) was not updated or modified after January 2018. In fact, Student's BIP was updated at the March 15, 2018 IEP team meeting, which Mother and Educational Advocate 1 attended. At the meeting, Educational Advocate 1 requested changes to the BIP, which were made. Mother and her representatives did not voice any other concerns about Student's BIP. I find that the March 15, 2018 IEP was appropriate without a behavior plan, because Student's separate BIP was reviewed and updated at the IEP team meeting. *See School Bd. School Dist. No. 11 v. Renollett*, 440 F.3d 1007, 1011 (8th Cir.2006) (The IDEA does not require that BIP be incorporated into the student's IEP.) In sum, I conclude that DCPS has met its burden of persuasion City School's March 15, 2018 IEP was reasonably calculated to enable Student to make progress appropriate in light of Student's circumstances. *See Andrew F.*, 137 S.Ct. at

1001.

As explained above, the second aspect of Petitioner's IEP appropriateness issue is whether DCPS denied Student a FAPE by not ensuring that the IEP was revised sooner, following Student's transfer from PCS to City School. In April 2017, Student transferred from one LEA (PCS) to another LEA (DCPS) within the same "state" (District of Columbia). For children who transfer between LEAs within the same state, the IDEA requires:

If a child with a disability (who had an IEP that was in effect in a previous public agency in the same State) transfers to a new public agency in the same State, and enrolls in a new school within the same school year, the new public agency (in consultation with the parents) must provide FAPE to the child (including services comparable to those described in the child's IEP from the previous public agency), until the new public agency either—

(1) Adopts the child's IEP from the previous public agency; or

(2) Develops, adopts, and implements a new IEP that meets the applicable requirements in §§300.320 through 300.324.

34 CFR § 300.323(e). In this case, Student transferred from PCS to City School in the 2016-2017 school year. Therefore, City School's decision to implement the PCS IEP, rather than initially develop a new IEP, complied with the IDEA's intrastate transferee provision. DCPS cannot be faulted for not revising Student's PCS IEP when Student first enrolled in City School in April 2017.

However, a child's IEP must be revised regularly in response to new information regarding the child's performance, behavior, and disabilities. *See, e.g., Pinto v. District of Columbia*, 938 F. Supp. 2d 25, 30 (D.D.C. 2013), citing 20 U.S.C. § 1414(d)(4). *See, also*, 34 CFR § 300.324(b)(ii). From the time Student enrolled in City School, there were a lot of behavior issues. Student's behavioral challenges include emotional outbursts and tantrums. Student would yell, scream, cry and fall out on the floor.

Student also reportedly hit and kicked other children and left the classroom without permission.

Student's MDT team met on December 14, 2017, after Mother retained legal counsel. At that meeting, Student's classroom teacher discussed Student's behavior issues in class, including screaming aloud and going toward a classmate with scissors. On separate occasions in November and December 2017, the school called in [REDACTED] ([REDACTED]) to assist with Student, when the school staff was unable to calm student down after behavioral outbursts. Beginning in November 2017, the City School social worker took on providing Student 45 minutes per week of play therapy. However, these services were not initially added to Student's IEP. Clearly, by November 2017, the new information on Student's behavioral challenges warranted a revision of Student's March 16, 2017 PCS IEP, which neither identified Emotional, Social and Behavioral Development as an area of concern nor provided for Behavioral Support Services.

The City School IEP team did revise Student's IEP on March 15, 2018. An additional area of concern for Emotional, Social and Behavioral Development was added to the IEP and 120 minutes per month of Behavioral Support Services were provided as a related services. Also, Student's Specialized Instruction was increased from 5 to 7 hours per week. I find that based on the new information regarding Students behavior challenges in fall 2017, DCPS had a duty to ensure that Student's PCS IEP was timely reviewed and appropriately revised. DCPS' failure to ensure that Student's IEP was revised to provide goals and services to address Student's behavior challenges, at least by November 2017, was a denial of FAPE.

2. From April 2017 forward, did DCPS fail to conduct an appropriate

Functional Behavior Assessment (FBA) and develop an appropriate Behavior Intervention Plan (BIP) for Student.

Petitioner alleges that from April 2017 forward DCPS did not conduct an appropriate FBA or develop an appropriate BIP for Student. Parent has the burden of persuasion on this claim. The hearing evidence establishes that School Social Worker conducted an FBA of Student in January 2018 and City School developed a BIP on January 9, 2018. The BIP was revised, with input for Educational Advocate 1, at the March 15, 2018 IEP team meeting. Neither the parent nor her representatives voiced any criticism of, or objection to the FBA or BIPs at the March 15, 2018 meeting. I find that Petitioner has not met her burden of persuasion that DCPS failed to conduct an appropriate Functional Behavior Assessment (FBA) and develop an appropriate Behavior Intervention Plan (BIP) for Student.

In March 2018, DCPS LRE Observer conducted a Least Restrictive Environment (LRE) classroom observation of Student at City School, in response to Mother's request for a smaller educational setting for Student. In her April 13, 2018 observation report, DCPS LRE Observer reported her observation that Student's behavior was compliant and engaged and that she did not recommend a more restrictive setting for Student. The observer did recommend that the school develop effective behavioral interventions for Student and develop and implement a full continuum of services that promoted inclusive practices and provided the instructional support that Student required. Student's BIP was not revised, because, as School Social Worker explained in her testimony, Student's FBA had been conducted as recently as January 2018 and Student's BIP, which had already been revised in March 2018 in collaboration with Mother and Educational Advocate 1, was working for Student. Since the preponderance of the

evidence shows that the March 15, 2018 BIP was effective for Student, I find that Petitioner did not meet her burden of persuasion that Student's BIP needed to be revised again after receipt of DCPS LRE Observer's report in April 2018.

Remedy

In this decision, I have determined that DCPS denied Student a FAPE by not ensuring that Student's IEP was timely revised after Student developed significant behavior challenges in the fall of 2018. 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.

The parent's expert, Educational Advocate 2, recommended *inter alia*, that Student be awarded tutoring and counseling services as compensatory education. Her recommendation for 200 hours of tutoring and 40 hours of counseling assumed that Student was denied a FAPE for the entire 2017-2018 school year and, possibly, back to when Student first enrolled in City School in April 2017. However, I have found in this decision that the denial of FAPE was for a much shorter period, from the worsening in Student's behavior in fall 2017 to March 14, 2018, when Student's IEP was revised to provide goals and services for behavioral support – a period of approximately 4 months. Therefore, in my discretion I will order DCPS to provide one-third of the compensatory services recommended by Educational Advocate 2, that is, 66 hours of academic tutoring and 13 hours of counseling, as compensatory education for the denial of FAPE

in this case.

DCPS, by counsel, stipulated at the due process hearing that it would authorize funding for the parent to obtain an Independent Educational Evaluation (IEE) neuropsychological evaluation of Student and that it would conduct Speech and Language and Occupational Therapy reevaluations of Student. When these evaluations are completed, DCPS must ensure that Student's IEP team is promptly convened to review and revise Student's IEP as appropriate.²

ORDER

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

ORDERED:

1. As compensatory education for the denial of FAPE in this case, beginning not later than 10 school days after the date of this decision, DCPS shall provide Student 66 hours of individual tutoring in academics and 13 hours of individual counseling for behavior support. DCPS may provide these services directly or provide funding authorization to the parent to obtain the services for Student.
2. Promptly upon receipt of the evaluation reports of the IEE neuro-psychologist and the Speech and Language and OT evaluators, DCPS shall convene Student's IEP team to review and revise Student's IEP, informed by the new assessments, in accordance with this decision and 34 CFR § 300.320, *et. seq.* and
3. All other relief requested by the Petitioner herein is denied.

Date: September 21, 2018

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

² In their testimony, Educational Advocate 1 and Educational Advocate 2 opined that the March 15, 2018 IEP, as amended on June 13, 2018, lacked baselines for some annual goals and included out of date present levels of performance for Emotional, Social and Behavioral Development. Although these alleged IEP shortcomings were not identified as issues for the due process hearing, DCPS must ensure that Student's entire IEP is carefully reviewed and appropriately revised in accordance with 34 CFR § 300.320, *et. seq.*

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