

District of Columbia
Office of the State Superintendent of Education
Office of Dispute Resolution
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Petitioner, on behalf of Student,¹)	
Petitioner,)	
)	Hearing Dates: 8/24/20; 8/28/20
)	Case No. 2020-0111
)	Hearing Officer: Michael S. Lazan
)	
District of Columbia Public Schools,)	
Respondent.)	

HEARING OFFICER DETERMINATION

I. Introduction

This is a case involving an X-year-old student who is currently eligible for services as a student with Intellectual Disability (the “Student”). A due process complaint (“Complaint”) was received by District of Columbia Public Schools (“DCPS” or “Respondent”) pursuant to the Individuals with Disabilities Education Act (“IDEA”) on May 29, 2020. The Complaint was filed by the Student’s parent (“Petitioner”). A resolution meeting was held on June 10, 2020. On June 18, 2020, Respondent filed a response. The resolution period expired on June 28, 2020.

II. Subject Matter Jurisdiction

This due process hearing was held, and a decision in this matter is being rendered, pursuant to the IDEA, 20 U.S.C. 1400 et seq., its implementing regulations, 34 C.F.R.

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

Sect. 300 et seq., Title 38 of the D.C. Code, Subtitle VII, Chapter 25, and the District of Columbia Municipal Regulations, Title 5-E, Chapter 30.

III. Procedural History

Respondent moved to dismiss on June 9, 2020, on the grounds that Petitioner could not bring this action because the Student was an adult and the holder of his/her own educational rights. Opposition was submitted by Petitioner on June 10, 2020. The motion was denied by order dated June 23, 2020.

A prehearing conference was held on July 30, 2020. Attorney A, Esq., counsel for Petitioner, appeared. Attorney B, Esq., counsel for Respondent, appeared. A prehearing conference order was issued on August 4, 2020, summarizing the rules to be applied in the hearing and identifying the issues in the case. The prehearing conference order was revised on August 14, 2020.

The Hearing Officer Determination (“HOD”) due date was originally August 12, 2020. On August 6, 2020, Respondent moved on consent to extend the timelines from August 12, 2020, to September 9, 2020. On August 12, 2020, the motion was granted and the HOD due date was changed to September 9, 2020. The matter proceeded to hearing on August 24, 2020, and August 28, 2020. Oral closing arguments were presented on August 28, 2020. The hearing was conducted through the Microsoft Teams videoconferencing platform, without objection. Petitioner was again represented by Attorney A, Esq. Respondent was again represented by Attorney B, Esq. This was a closed proceeding. During the proceeding, Petitioner moved into evidence exhibits P-1 to P-60. Respondent objected to exhibits P-1 through P-11, and P-54 through P-59. The objections were overruled. Exhibits P-1 through P-60 were admitted. Respondent moved

into evidence exhibits R-5, R-6, R-8, R-9 through R-19, R-26 through R-30, and R-32 without objection.

Petitioner presented as witnesses, in the following order: Witness B, an occupational therapist (expert in occupational therapy as it relates to evaluations and services for students with special needs); Witness C, a speech-language pathologist (expert in speech-language pathology as it relates to evaluations and services for students with special needs); Witness A, a special education advocate (expert in special education as it relates to Individualized Education Program (“IEP”) programming and placement); Witness D, an educational advocate (expert in school psychology as it relates to IEP programming, placement, and evaluations); herself; and the Student. Respondent presented as witnesses, in the following order: Witness E, a psychologist (expert in school psychology, specifically with respect to evaluating special education students); Witness F, a director of therapeutic services at School B (expert in special education with respect to evaluation in the area of occupational therapy); Witness G, an assistant principal at School B (expert in special education programming for students with disabilities); Witness H, a speech-language pathologist (expert in speech-language pathology, specifically for evaluating and making recommendations for students with disabilities); and Witness I, a director at DCPS (expert in special education, specifically with respect to secondary transitions).

IV. Issues

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

1. Did Respondent fail to provide the Student with appropriate IEPs on July 6, 2018, and June 26, 2019? If so, did Respondent act in contravention of 34 C.F.R. 300.320, Endrew F. v. Douglas County School District, 137 U.S. 988 (2017), and Hendrick Hudson Bd. of Educ. v. Rowley, 458 U.S. 176 (1982)? If so, did Respondent deny the Student a Free Appropriate Public Education (“FAPE”)?

Petitioner contended that the Student’s July 6, 2018, IEP was not based on sufficient evaluative data, did not contain appropriate educational goals, did not contain accurate or sufficient descriptions of the Student’s “present levels of performance,” and did not provide the Student with an education in his/her least restrictive environment (“LRE”). Petitioner contended that the Student’s June 26, 2019, IEP was not based on sufficient evaluative data and did not provide the Student with an education in the LRE.

2. Did Respondent fail to comprehensively and timely reevaluate the Student in or about July, 2018? If so, did Respondent violate 34 C.F.R. 300.303 and related provisions? If so, did Respondent deny the Student a FAPE?

Petitioner contended that the Student should have been thoroughly reevaluated at this time because his/her programming was outdated, and that the reevaluation should have included a comprehensive psychological assessment, an occupational therapy assessment, and a speech and language assessment.

As relief, Petitioner is seeking compensatory education in the form of tutoring and speech and language pathology and mentoring, as well as a comprehensive psychological assessment, a speech and language assessment, and an occupational therapy assessment (including an assessment of the Student’s sensory needs). Petitioner also seeks the right to reserve additional compensatory education after the completion of the assessments.

V. Findings of Fact

1. The Student is an X-year-old who is eligible for services as a student with Intellectual Disability. The Student’s cognitive ability is low, and the Student’s academic

functioning is in line with his/her cognitive ability. Testimony of Witness E. The Student has issues with visual motor integration, processing directions, writing, short-term memory, auditory comprehension, and receptive and expressive language skills. Testimony of Witness B; Testimony of Witness C. The Student also has difficulty with attention, which makes it difficult for the Student to gain skills. P-19-268. Nevertheless, the Student has the potential to earn a diploma if s/he were placed in DCPS's SLS or BES program. Updated assessments would be needed to determine if such a diploma would be feasible for the Student. Testimony of Witness I.

2. The Student attended School A PCS for the 2014-2015 school year. A speech and language assessment of the Student was written on October 11, 2014. The Student was assessed through an observation and testing pursuant to the Clinical Evaluation of Language Fundamentals-5 ("CELF-5"), the Expressive One-Word Picture Vocabulary Test ("EOWPVT"), and the Receptive One-Word Picture Vocabulary Test ("ROWPVT"). On the CELF-5, the Student scored in the average range in recalling sentences, though in the below average to borderline range in other subtests. On the EOWPVT, the Student scored in the below average range, and on the ROWPVT, the Student scored in the low average range. The evaluator recommended direct services to address the Student's issues with short-term memory, auditory comprehension, and expressive language. P-20.

3. A comprehensive psychological assessment of the Student was conducted in September, 2014, and a corresponding report was issued on October 22, 2014. The evaluator conducted, among other testing, the Wechsler Intelligence Scale for Children-Fourth Edition ("WISC-IV"); the Woodcock-Johnson Tests of Achievement-Third

Edition (“WJ-III”), Form A; the Beery-Buktenica Developmental Test of Visual-Motor Integration (“VMI”); the Behavior Assessment System for Children-2 (“BASC-2”), Self-Report Scales, Teacher-Rating Scales, and Parent-Rating Scales; the Adaptive Behavior Assessment System-Second Edition (“ABAS-II”), the Conners-3 (Teacher Rating Form and Parent Rating Form); the Children’s Incomplete Sentences Test; and the Children’s Depression Inventory. In cognitive testing on the WISC-IV, the Student scored a 56 for IQ, in the extremely low range, though certain subtests were in the low average range. In academic testing on the WJ-III, the Student scored below the 1st percentile in broad reading and broad mathematics, and at the 5th percentile in broad written language, with low average writing samples. On the VMI, the Student scored in the low range. On the ABAS-II, the Student scored in the extremely low range on the general adaptive composite. BASC testing (teacher scale) indicated that the Student was often worried, fearful, and easily distracted from work. BASC testing (self-report) indicated that the Student felt that s/he was not listened to, and that s/he never got anything right. Conners testing (teacher form) indicated that the Student had issues with attention, executive functioning, and peer relationships. The evaluator stated that the Student seemed to be in a learning environment where the Student felt “safe and comfortable.” P-21.

4. The Student’s February 20, 2015, IEP from School A PCS required that the Student receive fifteen hours per week of specialized instruction outside general education, eight hours per week of specialized instruction inside general education, and 1.5 hours per week of speech and language therapy. P-12-100. The Student was on a “certificate track” at the time. P-12 at 103. The Student’s special education teacher at School A PCS thought that the Student would be a good fit at School B. As a result,

Petitioner entered the Student into the lottery to attend School B. Testimony of Petitioner.

5. During the 2014-2015 school year at School A PCS, the Student's grades in academic subjects ranged from "C" (reading and language arts) to "F" (Science and Spanish). P-52.

6. The Student was accepted and admitted to School B for the 2015-2016 school year. School B functions as a Public Charter School with DCPS as its Local Educational Agency ("LEA"). The school is divided into "houses" for each broad age group. Each "house" has five classrooms with about twelve students in each classroom. The school tries to create classrooms where each child has at least one peer. The school is considered a functional life skills program, and the goal of the program is to increase the students' level of independence. Students at the school are not on a "diploma track." Testimony of Witness G.

7. A Brigance Transition Skills Inventory ("Brigance") was administered to the Student at School B on October 1, 2015. The Student was reported to be able to read words through the fourth-grade "word list," and could complete single- and double-digit addition and subtraction problems without regrouping using tally marks. The Student was also able to perform single-digit multiplication problems independently. The Student was unable to complete the mathematics and reading subtests. The Student had difficulty identifying equivalent values of coins and bills, and difficulty with questions about calendars. P-24.

8. An IEP meeting was held for the Student on October 27, 2015. The resulting IEP increased the Student's specialized instruction to twenty-nine hours per

week outside general education, with four hours of speech-language pathology per month. P-13-115. The IEP recommended extended school year services and classroom accommodations, including clarification/repetition of directions, human scribe, speech-to-text, human signer, preferential seating, location with minimal distractions, extended time, and frequent breaks. P-13-117.

9. The Student's day at School B included activities such as breakfast, morning meeting, work at a job site, meetings with a job coach, and "specials" such as music. The program provided students with "functional" academics for about three hours per day. Testimony of Witness G. Related services were provided, in part, in an "integrated" manner within the classroom. An occupational therapist and a speech-language pathologist spent time in the Student's classroom each week. Testimony of Witness F.

10. The Student continued at School B for the 2016-2017 school year. An IEP meeting was held for the Student on October 20, 2016. The resulting IEP provided for the same number and type of hours of specialized instruction per week and speech-language pathology per month as the October 27, 2015, IEP. The IEP also provided the Student with the same classroom accommodations as the prior IEP. P-14-140-142.

11. An Analysis of Existing Data report dated June 16, 2017, reviewed the Student's then-current IEP progress reports and the Student's 2014 speech and language assessment. P-42. A reevaluation meeting was held for the Student on June 27, 2017. At the meeting, a speech and language pathologist reviewed the Student's speech progress, and a social worker reviewed the Student's social and emotional issues and recommended social-emotional testing. The Student's special education teacher

determined that an updated educational assessment was not needed, and that the Student was making good progress in mathematics. Petitioner appeared and did not have any questions. At the meeting, Petitioner expressed interest in the Student receiving a GED, and the principal designee indicated that a Rehabilitation Services Administration (“RSA”) representative would reach out to Petitioner and inform Petitioner of the Student’s options upon graduation. P-45.

12. The Student was assessed through the Vineland-II measure on July 24, 2017. Per the teacher report, the Student’s composite scores for communication, daily living skills, and socialization skills were deemed to be “moderately low.” The Student scored in the average range on certain subdomains, such as “caring for self” and “relating to others.” P-22 at 314, 320.

13. The social work department at School B assessed the Student’s social and emotional skills on July 26, 2017. An evaluator found the Student to be social and outgoing, though the Student would sometimes engage in teasing. The evaluator noted that the Student would not always engage in class but would improve in small-group and 1:1 sessions. Teacher A, the Student’s special education teacher, was interviewed by the evaluator. Teacher A indicated that the Student had increased anxiety and depression, and would react out of proportion to an event. The teacher also indicated that the Student could get frustrated if the class was not moving fast enough and would then begin to engage in negative talk. The teacher also reported that the Student would work too quickly and make mistakes. P-23.

14. The Student continued at School B for the 2017-2018 school year. The Student was given Brigance testing on or about September 11, 2017. The corresponding

report indicated that the Student could read nine of ten words on the fifth-grade “word list,” and more than half of the words on the sixth- and seventh-grade “word lists.” The Student continued to have issues with identifying values of coins. Much of the testing report used the same language as the Brigance test report from October 1, 2015. P-25.

15. An IEP meeting was held for the Student on September 13, 2017. The resulting September 13, 2017, IEP repeated the Student’s “Present Levels of Academic Achievement and Functional Performance” sections for mathematics, reading and written expression, and adaptive/daily living skills from the October 20, 2016, IEP. The IEP of September 13, 2017, also added two “Areas of Concern” sections: “Communication/ Speech and Language,” and “Emotional, Social and Behavioral Development.” P-15-154-164. The section on “Emotional, Social and Behavioral Development” indicated that the Student had difficulty sustaining attention, was often frustrated in class, and had ongoing feelings of anxiety and sadness. This section also indicated that the Student needed assistance to manage his/her social relationships, would do anything to fit in, and would engage in teasing. P-15-163. This IEP slightly changed the Student’s specialized instruction hours outside general education, from twenty-nine hours per week to 28.5 hours per week, and it added two hours per month of behavioral support services, with the same classroom accommodations as the prior IEP. P-15-165-167.

16. The Student was again given Brigance testing on or about June 22, 2018. The ensuing report used most of the same language as the earlier Brigance testing reports. No progress was noted in this report, except that the Student could convert fractions into decimals. P-26. The Student’s IEP progress reports for the 2017-2018 school year showed that the Student mastered one mathematics goal, one reading goal, one

communication speech/language goal, the adaptive/daily living skills goal, and the emotional, social and behavioral development goal. The Student was deemed to be making progress on one mathematics goal, one reading goal, one written expression goal, and one communication/speech and language goal. P-31.

17. The Student continued at School B for the 2018-2019 school year. An IEP meeting was held for the Student on July 6, 2018. At this meeting, the Student's speech therapist discussed the Student's progress and recommended that the Student continue to receive four hours of speech-language pathology per month. A social worker discussed the Student's emotional issues and anxiety. The team decided that the Student's current placement was appropriate and that the Student had access to typically developing peers through outings and "best buddy" activities. P-46.

18. The IEP resulting from the July 6, 2018, meeting repeated the "Present Levels of Academic Achievement and Functional Performance" sections for mathematics, reading and written expression, and adaptive/daily living skills from the Student's September 13, 2017, and October 20, 2016, IEPs, but changed the "Present Levels of Academic Achievement and Functional Performance" sections for "Communication/Speech and Language" and "Emotional, Social and Behavioral Development." This IEP made no changes to the Student's specialized instruction hours, speech-language pathology hours, behavioral support services, or classroom accommodations. The IEP repeated one reading goal, one mathematics goal, and one written expression goal, except that the percentage of mastery for the goals was changed from eighty percent to one hundred percent. P-16.

19. The Student's IEP was amended on January 30, 2019, to change the "Present Levels of Academic Achievement and Functional Performance" in "Communication/Speech and Language." The Student's speech-language pathology services were also reduced to two hours per month. The amended IEP indicated that the Student was a "verbal communicator" who had mastered the current IEP goals, enjoyed helping other students in class, and had strong self-advocacy skills. The Student's speech-language pathologist recommended reduced speech-language pathology services because the Student had mastered goals and developed skills necessary to participate in his/her current educational setting and the vocational program. The speech-language pathologist also felt that the decrease in services would minimize the time the Student spent away from classroom tasks. P-17 at 216, 219; P-47; P-53; Testimony of Witness H. This IEP also slightly changed the Student's specialized instruction hours back to twenty-nine hours per week outside general education. P-17 at 219.

20. Brigance testing was again administered to the Student on or about June 11, 2019. The resulting report was identical to the Brigance testing report from June 22, 2018, except for four sentences relating to the Student's rate of accuracy. P-27. The Student's IEP progress reports for the 2018-2019 school year showed that the Student mastered all academic goals and emotional, social and behavioral development goals, and was progressing on the two communication/speech and language goals. P-31.

21. The Student continued at School B for the 2019-2020 school year. An IEP meeting was held for the Student on June 26, 2019. The speech-language pathologist indicated that the Student was progressing, and the Student's special education teacher and social worker both recommended keeping the Student's services the same for the

forthcoming school year. P-48. The IEP dated June 26, 2019, once again repeated the Student's "Present Levels of Academic Achievement and Functional Performance" in academic areas, but added sections on the Student's performance as of June 26, 2019, per the Student's teacher. The Student's "Present Levels of Academic Achievement and Functional Performance" in adaptive/daily living skills was unchanged from the prior IEP. The IEP updated the Student's speech and language levels and indicated that the Student continued to demonstrate growth, particularly in answering "why" questions (up to seventy-five percent, from forty percent in the prior IEP). No changes were made to the Student's specialized instruction hours, speech-language pathology, behavioral support services, or classroom accommodations. P-18.

22. The Student's IEP progress reports for the first three terms of the 2019-2020 school year indicated that the Student was progressing on his/her mathematics goals, reading goals, a written expression goal, and the communication/speech and language goals. The Student also had mastered an emotional, social and behavioral development goal and an adaptive/daily living skills goal. P-36; P-37; R-13.

23. On May 26, 2020, a multidisciplinary team met and recommended a speech assessment, occupational therapy assessment, psychological assessment, educational assessment, social-emotional assessment, and adaptive assessment for the Student. P-41-519.

24. The Student felt that his/her experience at School B was frustrating because the work was too easy. The Student felt that his/her experience at School A PCS was more challenging and appropriate. For instance, the Student was performing single-digit multiplication at School A PCS, but at School B, the Student was working on

addition and subtraction problems that s/he knew the answers to. A teacher and/or staff member at School B once told the Student that s/he did not belong in School B because s/he was on a different level than the other students at the school. Testimony of Student; Testimony of Petitioner; Testimony of Witness A.

25. Petitioner asked teachers and staff about the lack of difficulty in School B's instruction and was told that the Student would get extra work. Petitioner also asked School B staff if the Student could attend another school. Testimony of Petitioner.

VI. Conclusions of Law

The burden of persuasion in District of Columbia special education cases was changed in 2014. The District of Columbia Code now states that "(w)here there is a dispute about the appropriateness of the child's individual educational program or placement, 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 establishes "a *prima facie* case." D.C. Code Sect. 38-2571.03(6)(A)(i). The burden of persuasion for Issue #1 is therefore on Respondent, provided that Petitioner presents a *prima facie* case. The burden of persuasion for Issue #2 is on Petitioner since those issues do not directly involve the appropriateness of the child's IEP or placement. Schaffer v. Weast, 546 U.S. 49 (2005).

1. Did Respondent fail to provide the Student with appropriate IEPs on July 6, 2018, and June 26, 2019? If so, did Respondent act in contravention of 34 C.F.R. 300.320, Endrew F. v. Douglas County School District, 137 U.S. 988 (2017), and Hendrick Hudson Bd. of Educ. v. Rowley, 458 U.S. 176 (1982)? If so, did Respondent deny the Student a FAPE?

Petitioner contended that the Student's July 6, 2018, IEP was not based on sufficient evaluative data, did not contain appropriate educational goals, did not contain

accurate or sufficient descriptions of the Student’s “present levels of performance,” and did not provide the Student with an education in his/her LRE. Petitioner contended that the Student’s June 26, 2019, IEP was not based on sufficient evaluative data and did not provide the Student with an education in the LRE.

The IDEA was enacted to “ensure that all children with disabilities have available to them free appropriate public education that emphasizes special education and related services designed to meet their unique needs and prepare them for further education, employment, and independent living.” M.G. v. Dist. of Columbia, 246 F. Supp. 3d 1, 7 (D.D.C. 2017) (citing 20 U.S.C. Sect. 1400(d)(1)(A); 34 C.F.R. Sect. 300.300). School districts must develop a comprehensive plan, known as an IEP, for meeting the special educational needs of each disabled student. 20 U.S.C. Sect. 1414(d)(2)(A). In Hendrick Hudson Bd. of Educ. v. Rowley, 458 U.S. 176 (1982), the Court explained that an IEP must be formulated in accordance with the terms of the IDEA and “should be reasonably calculated to enable the child to achieve passing marks and advance from grade to grade.” Id. at 204. The IDEA also requires that children with disabilities be placed in the “least restrictive environment” so that they can be educated in an integrated setting with children who are not disabled to the maximum extent appropriate, that is, one that provides a program that “most closely approximates” the education a disabled child would receive if s/he had no disability. Leggett v. Dist. of Columbia, 793 F.3d 59, 74 (D.C. Cir. 2015).

The Court’s decision in Andrew F. v. Douglas County School District, 137 S. Ct. 988 (2017), elaborated on the doctrines established in Rowley. The Court stated that parents can fairly expect school authorities to offer a “cogent and responsive explanation”

for their decisions, and that the IEP should be “appropriately ambitious,” a standard “markedly more demanding than the ‘merely more than de minimis’ test applied by the Tenth Circuit.” Id. at 1000-1002. Finding that “instruction that aims so low” would be tantamount to “sitting idly...awaiting the time when they were old enough to drop out,” the Court held that IDEA “demands” a higher standard. Id. (citing to Rowley). Still, the Court cautioned that its ruling “should not be mistaken for an invitation to the courts to substitute their own notions of sound educational policy for those of school authorities, to whose expertise and professional judgment deference should be paid.” Id. at 1001.

An IEP must also comply with technical requirements. The IDEA defines an IEP as “a written statement for each child with a disability that is developed, reviewed, and revised in a meeting in accordance with 34 C.F.R. Sect. 300.320 through 34 C.F.R. Sect. 300.324.” 34 C.F.R. Sect. 300.22. Among other requirements, an IEP must include a statement of the child’s current educational performance, articulate measurable educational goals, and specify the nature of the special services that the district will provide. 34 C.F.R. Sect. 300.22; 34 C.F.R. Sect. 300.320(a).

A comparison of the Student’s IEPs from July 6, 2018, and September 13, 2017, reveals that the documents are quite similar. The July 6, 2018, IEP repeated the Student’s “Present Levels of Academic Achievement and Functional Performance” sections for mathematics, reading and written expression, and adaptive/daily living skills, even though the September 13, 2017, IEP also repeated the same sections from the Student’s October 20, 2016, IEP. School B did not meet its obligation to update the Student’s IEP with a description of the Student’s current level of functioning when it created the July 6, 2018, IEP.

For a hearing officer to issue a finding of FAPE denial, Petitioner must also show that this “procedural shortcoming led to some substantive denial in the form of a lower-quality education.” J.B. by & through Belt v. District of Columbia, 325 F. Supp. 3d 1, 6 (D.D.C. 2018); Lesesne ex rel. B.F. v. District of Columbia, 447 F.3d 828, 834 (D.C. Cir. 2006). In Belt, petitioners contended that an IEP did not document the student’s current achievement levels, but did not point to any specific prejudice to the student. The court, affirming a federal magistrate, found that the parent did “not show that any purported inattention to J.B.’s present performance led to J.B.’s halting academic progress.” Id. Here as well, Petitioner was unable to point to any specific reason why the July 6, 2018, IEP’s repeated descriptions of the Student’s present levels of academic performance had any impact on the Student’s academic progress. Though Witness A said that “knowing the Student is knowing the Student’s data,” the record suggests that the Student’s teacher at the time, Teacher A, knew the Student well and fully understood the Student’s academic levels and issues. For instance, during the Student’s reevaluation in 2017, Teacher A expressed that the Student had increased anxiety and depression, would react out of proportion to an event, and, if the class was not moving fast enough, would get frustrated, begin to engage in negative talk, work too quickly, and make mistakes. Teacher A also filled out many of the Student’s IEP progress reports in the record. By way of example, in the Student’s IEP progress reports for the third and fourth term of the 2017-2018 school year, Teacher A described how the Student was progressing on a goal relating to recording a weekly work schedule and attending training sites. Teacher A indicated that the Student had “gotten to the point where [s/he] anticipates going to [his/her] worksites without having to consult [his/her] planner,” and that the Student

“identifies and records [his/her] weekly work schedule with 90% accuracy.” P-31 at 399. Petitioner did not point to any reason why Teacher A would have been especially reliant on the “Present Levels of Academic Achievement and Functional Performance” sections of the Student’s July 6, 2018, IEP. Petitioner’s claim on this issue therefore does not rise to the level of FAPE denial.

Petitioner also contended that the goals in the Student’s July 6, 2018, IEP were defective. Witness D contended that this IEP contained goals that were not measurable, and both Witness A and Witness D pointed out that some of the goals were repeated from the previous IEP. Damarcus S. v. District of Columbia, 190 F.15 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”). However, a review of the Student’s goals indicates that the goals were in fact measurable, as Witness G stated. Each goal included language relating to the appropriate level of accuracy that the Student would have to achieve to master the goal. The goals also included baselines, a reference to grade level standards, and specific objectives with their own language relating to levels of accuracy. The IEP did repeat one reading goal, one mathematics goal, and one written expression goal from the September 13, 2017, IEP. However, the Student did not master these goals with one hundred percent accuracy during the 2017-2018 school year. As a result, the goals were reasonably repeated, except that the level of accuracy required for the goals increased from eighty percent to one hundred percent. This claim must be denied.

Finally, Petitioner alleged that the Student’s IEPs dated July 6, 2018, and June 26, 2019, both failed to provide the Student with instruction in the LRE. In enacting the IDEA, “Congress was concerned about the apparently widespread practice of relegating

handicapped children to private institutions or warehousing them in special classes.”

Sch. Comm. of Town of Burlington v. Dep’t of Educ. of Mass., 471 U.S. 359, 373

(1985). Accordingly, in formulating an appropriate IEP, an IEP team must “be mindful of IDEA’s strong preference for ‘mainstreaming,’ or educating children with disabilities

‘[t]o the maximum extent appropriate’ alongside their non-disabled peers.” Gagliardo v.

Arlington Cent. Sch. Dist., 489 F.3d 105, 108 (2d Cir. 2007) (quoting 20 U.S.C. Sect.

1412(a)(5)); Lachman v. Ill. State Board of Educ., 852 F.2d at 295 (“[IDEA’s]

requirement that mainstreaming be provided to the maximum extent appropriate indicates

a very strong congressional preference”); Oberti v. Board of Educ., 995 F.2d 1204 (3d

Cir. 1993) (setting forth stringent standards for school districts in connection to their

duties to provide an education to students with disabilities in the LRE).

In or about 2015, Petitioner requested School B for the Student, going so far as to apply for a space in School B through a lottery. However, Petitioner noted that she requested School B at the suggestion of one of the Student’s former teachers at School A PCS, not on her own. The Student continued at School B through July 6, 2018, when the IEP team again placed the Student at School B for the 2018-2019 school year. School B offers a vocational and life-skills curriculum and a “certificate” track, but does not offer opportunities for instruction with typically developing peers or a diploma track.

Petitioner and the Student both testified that they eventually realized that School B was inappropriate because the work at the school was too easy for the Student, who wanted a diploma. There is no dispute that Respondent did not discuss this issue at the IEP meetings on July 6, 2018, and June 26, 2019.

Courts express concern when LEAs decide a student's educational program based on an earlier decision about whether the student should receive education on the "diploma track." In Middleton v. District of Columbia, 312 F. Supp. 3d 113, 132–34 (D.D.C. 2018), the court found that "a default determination of the educational programming for a child with disabilities is antithetical to the letter and spirit of the IDEA" and that DCPS and the hearing officer did not appreciate the student's right to an individualized IEP, suggesting that a student can change his or her mind on their "track decision" well after it has first been made. The court stated that "few decisions are weightier than this one" and rejected the argument that the parent² failed to raise this issue at the IEP meeting, finding that "(t)he IDEA places affirmative obligations on each school district to design instruction to meet the child's unique needs." Id. at 133 (citing to Endrew F., 137 S. Ct. at 999).

Witness I, who works for Respondent and was called by Respondent as a witness, *testified in support of this position*. This witness, an expert in special education specifically with respect to secondary transition, stated that she believed it was possible that the Student could be placed in a less restrictive environment such as the "SLS" or "BES" program at DCPS. Witness I testified that while assessments needed to be

²There is documentation in the record to the effect that Petitioner at least indirectly discussed concern with the Student's "certificate track." At the reevaluation meeting in July, 2017, Petitioner asked about whether the Student would receive a GED, but the principal stated that "we are not a GED program" and that the placement was appropriate for the Student. It is also noted that a parent's assent to an improper IEP does not necessarily inoculate a school district from IDEA liability. Letter to Lipsett, 52 IDELR ¶ 47 (OSEP 2008).

conducted prior to the change in placement, the Student might well be able to receive a diploma if s/he received tutoring while taking classes that would lead to a diploma.

Such classes would likely be more appropriate for the Student than the classes at School B (which provide three hours of academic instruction per day). This Hearing Officer was persuaded by the Student's own testimony that the instruction at School B was too easy for him/her. For example, the Student testified that s/he spends time working on addition and subtraction problems that s/he already knows how to do, and that s/he would rather work on multiplication and division. The record confirms that the Student worked on multiplication and division in 2015 at School A PCS. P-24 at 331. Also considering the Court's mandate (in Endrew F.) for school districts to provide academic instruction that is "appropriately ambitious" for children with special needs, this Hearing Officer finds that Respondent denied the Student a FAPE when it failed to place the Student in the LRE in the July 6, 2018, IEP and the June 26, 2019, IEP.³

2. Did Respondent fail to comprehensively and timely reevaluate the Student in or about July, 2018? If so, did Respondent violate 34 C.F.R. Sect. 300.303 and related provisions? If so, did Respondent deny the Student a FAPE?

Petitioner contended that the Student should have been thoroughly reevaluated at this time because his/her programming was outdated, and that the reevaluation should have included a comprehensive psychological assessment, an occupational therapy assessment, and a speech and language assessment. An LEA must ensure that a

³Petitioner also contended that the July 6, 2018, and June 26, 2019, IEPs were not based on sufficient "evaluative data." Claims based on the failure of a school district to collect sufficient "evaluative data" are ordinarily alleged as claims of failure to evaluate or reevaluate the Student. Accordingly, this claim is addressed in the section of this HOD devoted to Issue #2, which involves the contention that the Student should have been reevaluated in July, 2018.

reevaluation of each child with a disability is conducted if there has been no evaluation within three years (unless the parties deem it unnecessary), if the child's parent or teacher requests such reevaluation, or if conditions warrant a reevaluation. 34 C.F.R. Sect. 300.303(a); 34 C.F.R. Sect. 300.303(b). A "reevaluation" is more than a single assessment. A reevaluation consists of a review of assessments of the child in all areas of suspected disability to assist in determining the educational needs of the child. 28 U.S.C. Sect. 1414(b)(3); 34 C.F.R. Sect. 300.304(c). When conducting a reevaluation, the LEA is directed to use a variety of assessment tools and strategies to gather "relevant functional, developmental, and academic information," including information from the parent, which may assist in determining (i) whether the child is a child with a disability and (ii) the content of the child's IEP. The failure to conduct a comprehensive reevaluation can amount to a procedural violation unless the student's substantive education is impacted. Lesesne ex rel. B.F. v. District of Columbia, 447 F.3d 828,834 (D.C. Cir. 2006) ("(a)n IDEA claim is viable only if those procedural violations affected the student's substantive rights"); Hill v. District of Columbia, No. 14-CV-1893 (GMH), 2016 WL 4506972, at *18 (D.D.C. Aug. 26, 2016) (failure to conduct vocational assessment and speech and language assessment).

The record indicates that the Student was reevaluated in 2017 through Vineland-II testing, an assessment of the Student's social and emotional skills, and a reevaluation meeting. This reevaluation appears to have been a "triennial" evaluation, which must be conducted every three years. 34 C.F.R. Sect. 300.303(b)(2). The Vineland-II testing indicated that the Student had emotional needs, which resulted in the recommendation for behavioral support services in the September 13, 2017, IEP.

No academic testing of the Student was conducted at this reevaluation. Petitioner contended that the Student needed updated academic testing at that time (as well as in July, 2018, the date that is the focus of the allegation). Witness D pointed out that the Student had not been tested since 2014, and that the 2014 testing then revealed variability in cognitive and academic subtests. But Witness D did not specifically explain how the updated academic testing would have changed the Student's program. Witness G, on the other hand, flatly stated that the updated achievement testing "would not have given them anything." Teacher A also indicated (at the meeting on June 26, 2017) that no academic testing was needed at the time of the reevaluation. As pointed out in the section of this HOD discussing Issue #1, Teacher A knew the Student very well, as he had taught the Student since the start of the 2017-2018 school year. This Hearing Officer agrees with Witness G that formal academic testing of the Student was not necessary in July, 2018.

Petitioner also contended that the Student needed updated speech-language pathology testing in July, 2018. Through Witness C, Petitioner suggested that the Student's speech and language issues should have been reassessed before the reduction in services in January, 2019. Witness C said that additional assessments would give a "better picture" of the Student, and that she prefers that students be formally assessed yearly to see if they are progressing. Witness C also suggested that the Student's 2014 speech and language assessment did not contain enough index scores, and that certain subtests were never administered.

However, Witness C did not specifically explain why a formal speech-language pathology assessment would have been beneficial to the Student in July, 2018. In fact, the Student's speech-language pathologist at the time did not recommend a reduction in

the Student's speech-language pathology. The Student's speech-language pathologist for the 2018-2019 school year made this decision later, after the Student had mastered speech-language pathology goals. This speech-language pathologist indicated that the Student would benefit from a reduction in hours so that the Student could spend more time in class. As a result, the IEP was amended on January 30, 2019, to require that the Student receive two hours of speech-language pathology per month. This speech-language pathologist credibly explained her reasoning in her memorandum of January 29, 2019, where she indicated that the Student has developed skills necessary to participate throughout his/her current educational setting and to participate in the vocational program. The memorandum suggests that the therapist knew the Student's needs well and did not need any further testing to be conducted in speech-language. This Hearing Officer agrees with Witness H that the Student did not need to be reassessed in speech-language pathology in July, 2018.

Petitioner also argued that the Student should have received an occupational therapy assessment in July, 2018, pointing to a reference in the Student's psychological evaluation from October, 2014. Witness B testified that the team should have conducted an occupational therapy assessment to "at least rule" out areas of weakness so that the Student's educational programming could meet the Student's needs. Witness B also indicated that the Student has sensory issues, visual motor deficits, and handwriting issues that might impact him/her in the educational setting.

This Hearing Officer found Witness B's testimony to be rather speculative, especially because Witness B did not specifically explain why additional testing in occupational therapy would help the Student's performance in the classroom.

Additionally, Witness F testified that the Student received occupational therapy in the classroom through an occupational therapist who did not indicate any need for an occupational therapy assessment of the Student. Witness F also stated that the Student was able to participate in writing activities, and the record contains no references to the Student's issues with penmanship or handwriting after the 2014-2015 school year. Nor does the record indicate that the Student had any significant sensory integration issues at School B. I agree with Respondent that an occupational therapy assessment of the Student was not necessary in July, 2018.

In sum, Petitioner did not show that Respondent's failure to reevaluate the Student in July, 2018, denied the Student a FAPE. This claim must be dismissed.

RELIEF

Petitioner seeks compensatory education for the Student in the form of 216 hours of tutoring to make up for lack of expected progress, 420 hours of tutoring to prepare the Student for a GED, seventeen hours of private speech and language services, fifty hours of community-based social skills group, and twenty hours of mentoring. 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).

Petitioner’s request for 216 hours of private tutoring was supported by the testimony and the compensatory education plan from Witness D, an expert in school psychology and special education as it relates to IEP programming, placement, and evaluations. The request for 216 hours of private tutoring was also supported by the testimony of Witness I, who indicated that the Student needed these hours to be prepared to get a diploma. Though Witness D’s approach to the compensatory education plan was somewhat formulaic, she did rely at least in part on assessments, as was suggested by the District of Columbia Circuit Court of Appeals in B.D. v. District of Columbia, 817 F.3d 792, 800 (D.C. Cir. 2016). This Hearing Officer finds that the request for 216 hours of tutoring is a reasonable award for the Student’s FAPE denial over the course of approximately two years.

Petitioner also seeks fifty hours of a community-based social skills group to “build skills lost” due to the placement at School B. Since the finding of FAPE deprivation directly relates to the Student’s lack of access to typically developing peers, This Hearing Officer will order such relief, provided that the community-based social skills group include typically developing peers.

Petitioner also requested 420 hours of tutoring to enable the Student to get a GED, seventeen hours of compensatory private speech and language services, and twenty hours of mentoring to assist the Student “with the frustrations and confusion of being in an

inappropriate and overly restrictive environment.” P-60-667. There is credible testimony in the record from Witness I indicating that the Student would not be able to achieve a GED, with or without the 420 hours of tutoring. Additionally, this HOD contains no finding that the Student was denied a FAPE because of Respondent’s failure to provide GED services, Respondent’s failure to assess the Student’s speech and language issues, or Respondent’s failure to mentor the Student. Since Petitioner was unable to connect this relief to the findings of FAPE denial in this HOD, these requests for relief must be denied.⁴

VII. Order

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

1. The Student is hereby entitled to 216 hours of compensatory tutoring, from a certified special education teacher, at a reasonable and customary rate in the community;
2. The Student is hereby entitled to fifty hours of services through the use of a professionally run community-based social skills group which includes the participation of typically developing peers;
3. Petitioner’s other requests for relief are denied.

Dated: September 9, 2020

Michael Lazan
Impartial Hearing Officer

cc: Office of Dispute Resolution

⁴Petitioner also seeks a psychological assessment, a speech and language assessment, and an occupational therapy assessment (including an assessment of the Student’s sensory needs). Since no FAPE denial was found due to a failure to evaluate the Student, these requests must be denied.

Hearing Officer Determination
Michael Lazan, Hearing Officer
Case # 2020-0111

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OSSE Division of Specialized Education
[REDACTED]/DCPS
[REDACTED]/DCPS

VIII. Notice of Appeal Rights

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

Dated: September 9, 2020

Michael Lazan
Impartial Hearing Officer