

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

PETITIONERS,
on behalf of STUDENT,¹

Date Issued: August 26, 2019

Petitioner,

Hearing Officer: Peter B. Vaden

v.

Case No: 2019-0155

DISTRICT OF COLUMBIA
PUBLIC SCHOOLS,

Hearing Dates: August 8 and 22, 2019

Respondent.

Office of Dispute Resolution, Room 423
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 the Petitioners (GRANDMOTHER and ATTORNEY-IN-FACT), 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 their due process complaint, Petitioners seek a nonpublic school placement for Student and other relief from Respondent District of Columbia Public Schools (DCPS) for alleged denials of a free appropriate public education (FAPE) to STUDENT in the 2018-2019 school year and failure to offer an appropriate educational placement for the current school year.

¹ Personal identification information is provided in Appendix A.

Petitioners' Due Process Complaint, filed on June 19, 2019, named DCPS as Respondent. The undersigned hearing officer was appointed on June 20, 2019. On July 18, 2019, I convened a telephone prehearing conference with counsel to discuss the issues to be determined, the hearing date and other matters. On June 27, 2019, the parties met for a resolution session and were unable to resolve the issues in dispute.

The due process hearing was convened before the undersigned impartial hearing officer on August 8 and 22, 2019 at the Office of Dispute Resolution in Washington, D.C. The hearing, which was open to the public, was recorded on an electronic audio recording device. Attorney-in-Fact and Student appeared in person for the first day of the hearing and were represented by PETITIONERS' COUNSEL. Respondent DCPS was represented by DCPS' COUNSEL.

Counsel for the parties made opening statements. Attorney-in-Fact and Student testified at the hearing and called as additional witnesses INDEPENDENT PSYCHOLOGIST and EDUCATIONAL ADVOCATE. DCPS called as witnesses SCHOOL SOCIAL WORKER, LEA REPRESENTATIVE and RESOLUTION SPECIALIST. Petitioners' Exhibits P-1 through P-66 and DCPS' Exhibits R-1 through R-47 were all admitted into evidence without objection. Counsel for the respective parties made oral closing arguments.

JURISDICTION

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

PRIOR CASE

Grandmother brought a prior due process proceeding on behalf of this student in February 2018 (Case NO. 2018-0048), which resulted in a Hearing Officer Determination issued by Impartial Hearing Officer Keith L. Seat on May 12, 2018 (the May 12, 2018 HOD). In the May 12, 2018 HOD, Hearing Officer Seat concluded, *inter alia*, that DCPS denied Student a FAPE by providing insufficient specialized instruction and behavioral support services in Student's 2015, 2016 and 2017 IEPs and by not adequately addressing Student's school attendance issues prior to October 2017. Hearing Officer Seat awarded Student compensatory education for these denials of FAPE, but also found that DCPS' CITY SCHOOL 2 was capable of fulfilling Student's IEP and denied Grandmother's request for a nonpublic school placement for Student. The parties, by counsel, have agreed that I may adopt the findings of fact made by Hearing Officer Seat, as relevant to the present case.

ISSUES AND RELIEF SOUGHT

The issues for determination in this case, as certified in the July 18, 2019 Prehearing Order, are:

- a.) Whether DCPS denied Student a FAPE by failing to provide Student with a location of services where Student's May 31, 2018 Individualized Education

Program (IEP) could be implemented during the 2018-2019 school year;

b.) Whether DCPS denied Student a FAPE by failure to update the student's Behavior Intervention Plan (BIP) and/or otherwise address attendance issues that are linked to Student's disability during the 2018-2019 school year;

c.) Whether DCPS denied Student a FAPE by failure to timely evaluate or re-evaluate Student based upon an agreement to do so at an MDT meeting in February 2018;

d.) Whether DCPS denied Student a FAPE by failing to provide Student with an appropriate IEP least restrictive environment or placement following meetings held on or about April 30, 2019 and June 11, 2019.

For relief, Petitioners request that the hearing officer order DCPS to fund an independent occupational therapy evaluation and vocational evaluation of Student and to place and fund Student in a separate therapeutic day school program with transportation for the 2019-2020 school year. The Petitioners also seek an award of compensatory education of the alleged denials of FAPE in this case.

FINDINGS OF FACT

PRIOR HOD FINDINGS

I adopt the following Findings of Fact from the May 12, 2018 HOD:

A. Student previously attended CITY SCHOOL 1. Student transferred to City School 2 in October 2017 due to a family loss.

B. Student is classified as a student with Multiple Disabilities ("MD"), with both Emotional Disturbance ("ED") and Other Health Impairment ("OHI") due to Attention Deficit Hyperactivity Disorder ("ADHD"); Student has behavior concerns, but at times

presents as capable of doing academic tasks.

C. Student has been eligible for special education and related services for many years; as of June 2014, Student received 8 hours/week of specialized instruction inside general education and 120 minutes/month of Behavioral Support Services (BSS). Student's specialized instruction hours were increased in a 11/6/14 IEP to 10 hours/week inside general education and 10 hours/week outside general education. On 2/23/15, the multidisciplinary team (MDT) requested a more restrictive environment for Student. Student's recent IEPs had each contained 15 hours/week of specialized instruction inside general education and BSS outside general education which declined from 120 minutes/month in the 10/26/15 IEP (the "2015 IEP") to 60 minutes/month in both the 10/20/16 IEP (the "2016 IEP") and the 10/18/17 IEP (the "2017 IEP"). A draft IEP dated 4/18/18 would have maintained 15 hours/week of specialized instruction inside general education and 60 minutes/month of BSS outside general education.

D. Student's 2015 and 2016 IEPs indicated that Student's academic abilities varied widely, with i-Ready scores from 2015 showing that Student was both on grade level and 7 years below grade level in the area of measurement and data, was 4 years below grade level in algebra, and 7 years below grade level in geometry and numbers and operations. The 2015 IEP stated that the discrepancies suggested Student's academic performance reflected Student's will rather than actual capabilities. Student could be an engaged student, but the biggest hindrance to classroom performance was

behavior.

E. A measurement of reading comprehension provided by Student's SRI score on 9/20/12 was 684, while in October 2016 was 848. In between, Student's SRI was 304 on 1/23/14, and reported as 316 in the 2015 and 2016 IEPs. In written expression, Student was 4 or more years below grade level (based on a Woodcock-Johnson III ("WJ-III")) in 2015 and 2016.

F. Based on the WJ-III on 10/26/14, Student's cluster standard scores ranged from 70 in Math Calculation Skills to 91 in Brief Reading. From teachers and staff, the evaluator concluded that Student is a bright young person who was capable of working on grade level, but whose behavior significantly impacts academic achievement.

G. Student has received poor grades in recent years. When transferring from City School 1 to City School 2 in October 2017, all of Student's grades were "Fs" except one. In the 2017/18 Term 2 Progress Report, Student received all "Fs" and all had comments related to excessive absences or tardiness.

H. Attendance Issues. Student enrolled at City School 2 on 10/10/17 and was immediately absent nearly every day, with only 2 days present and on time prior to a long term suspension on 11/16/17; 4 other days Student was present but tardy; Student was at school on some days marked absent, but missed 2 or more class periods and was marked absent.

I. Student was not attending school on a regular basis, so making no academic

progress in 2017/18. In 2017/18, Student had 27 unexcused absences by 10/18/17. By 2/22/18, Student had 69 absences in 2017/18, of which 34 were unexcused and 33 of the remaining 35 absences were excused because of the long term suspension. In 2017/18, Student had 92 unexcused absences as of 3/21/18; As of the spring 2018 due process hearing Student had over 100 absences.

J. Due to excessive absences, Student was not making progress toward any IEP goals in 2016/17. Student was failing all classes but one at the time of the 2016 IEP due to lack of attendance. In 2016/17 Student missed 32 days of school by 10/16/16.

K. A City School 2 student receiving 30 or more unexcused absences in a course receives a failing final grade in the course, known as "FA" (Failure due to Absence); Student saw no point in attending school after accumulating more than 30 absences and having "already failed."

L. Student's teachers noted excessive absences and the need to go to class at the October 2017 IEP team meeting. The triennial psychological evaluation on 10/19/17 recommended that Student be supported by the school attendance team, family and other community based supports that could address truant behaviors and encourage school attendance; and that City School 2 consider an incentive-based program that targeted attending school and completing assignments, among other things. The 10/19/17 evaluation concluded by again suggesting incentives to encourage school attendance.

M. School Social Worker spoke with Grandmother at least 4 times in the months Student was at City School 2 and attempted to reach Parent about 10 times, including 2/26/18, several times in March 2018, and in April concerning Student's absences.

N. Grandmother stated that she woke Student up in the morning and tried to get Student to school, but Student generally went back to bed rather than to school. A 9/8/15 neurological report on Student listed "Cannabis Abuse." A 2/8/17 report on Student referred to "Drug abuse (marijuana)" and stated that Student uses marijuana 1-2 times a week, has never tried to stop and would not like to stop. Student's CBI worker confirmed on 2/15/18 that Student was still using marijuana.

O. Student's most recent DCPS comprehensive psychological evaluation was completed in October 2014 when the team determined that Student met the criteria for ED classification. Student's general cognitive abilities were found to be in the borderline range with a Full Scale IQ ("FSIQ") of 73, based on a Wechsler Intelligence Scale for Children – Fourth Edition ("WISC-IV") on 10/26/14, with variability in Student's profile. The evaluator noted that Student's scores should be interpreted with caution because of Student's motivational level and reluctance to fully participate in the assessment, so Student's actual FSIQ may well be higher than 73. An unsuccessful attempt had been made to evaluate Student in June 2014, but Student did not attend any of the scheduled testing sessions.

P. For the October 2017 triennial, a Woodcock-Johnson IV ("WJ-IV") could not

be completed to obtain recent achievement scores due to Student's chronic absences. School Psychologist unsuccessfully attempted classroom observations of Student on 10/16/17, 10/17/17, and 10/19/17 and a student interview could not be completed as Student was absent; attempts to contact Parent were also unsuccessful; the 10/19/17 triennial psychological evaluation was limited to a review of records.

Q. Transition. Student took the O*NET Interest Profiler on 10/16/17, followed minutes later by the Casey Life Skills Assessment. Student's IEP transition plan was not implemented in 2017/18 due to Student's frequent and chronic absences.

R. FBA. Parent gave her consent to conduct an FBA of Student on 2/8/18 during a home visit. Student's advocates pressed on 2/15/18 for the FBA to begin immediately; Social Worker was concerned about Student refusing to participate, as the student should be present if at all possible. Direct observations of Student were attempted for the FBA without success on 2/22/18, 2/26/18, 3/8/18, 3/14/18, 3/15/18, 3/16/18 and 3/20/18. A student interview could not be completed for the FBA due to Student's absences, nor could Grandmother be reached for a parent interview and calls were not returned. The MDT reviewed the FBA and proposed BIP on 4/20/18. The 2018 FBA concluded that Student's maladaptive behaviors are related to feeling behind in classes due to absences from school; interventions to help are a challenge due to Student's absences.

S. Behavior Intervention Plans. A BIP was developed on 11/10/14. Student did

not have a BIP or attendance plan that was being implemented when Student began at City School 2. Student's 10/18/17 IEP referred to Student's BIP, repeating language from the 2016 IEP, which repeated language from the 2015 IEP. As of 10/19/17, Student's BIP was said to include a daily behavior tracker, weekly incentives, daily check-ins with the social worker and compliance with medication. A new BIP was developed on 3/23/18.

T. Behavioral Support Services. According to Student's 2015, 2016 and 2017 IEPs, Student is unable to make progress without "intensive behavioral support" in multiple areas of concern. Student's 2017 IEP provided BSS to improve social-emotional development and specifically self-regulation. Student's 10/19/17 triennial psychological evaluation recommended BSS to improve appropriate social interactions. BSS for Student is to include counseling, behavior management and consultation with teachers and parent.

U. Behavior. Student's impulsivity and hyperactive behavior prevented completion of tasks and remaining in class, as Student was often excused from class due to behavior disruption. Student's impulsivity sometimes led to physical aggression.

V. Ongoing Education. The 2016 and 2017 IEPs stated that Student "requires a small classroom setting" with support services that will assist Student in decreasing disruptive behavior and making academic gains. The 2016 IEP stated that a "small learning environment" is most beneficial for Student to be successful. City School 2

agreed that Student needed a more restrictive setting and proposed a Behavior & Education Support (“BES”) self-contained class. Student may need a program with flexibility in scheduling courses, very low student to teacher ratios, and an option for evening courses if that improves attendance. At the time of the prior due process hearing, Student wanted a vocational program. Grandmother testified that Student might be willing to attend a couple hours a day of outside tutoring.

Additional Findings of Fact

After considering all of the evidence received at the August 8 and 22, 2019 due process hearing in the present case, as well as the argument of counsel, my additional findings of fact are as follows:

1. Student, an AGE youth, is a legal resident of the District of Columbia. Since Grandmother has been ill, Student has been living off and on with Attorney-in-Fact, a friend of the family, in the Maryland suburbs. Testimony of Attorney-in-Fact.
2. Student is eligible for special education under the IDEA disability classification Multiple Disabilities (Emotional Disturbance, Other Health Impairment). Exhibit P-6.
3. In the May 12, 2018 HOD, Hearing Officer Seat ordered, *inter alia*, that within 30 days of the decision date, DCPS convene an IEP team meeting in order to revise Student’s IEP by (a) increasing specialized instruction to at least 20 hours/week outside general education, and (b) increasing the level of BSS to 240 minutes/month

outside general education. Hearing Officer Seat also stated in the HOD that DCPS had offered in February 2018 to complete a comprehensive psychological evaluation (including an adaptive assessment) of Student, a vocational assessment and an Occupational Therapy (OT) screening and that he expected those evaluations to be carried out if Grandmother provided her consent. Exhibit P-64.

4. On May 31, 2018, DCPS convened an IEP team meeting for the purpose, *inter alia*, to revise Student's IEP, as ordered in the May 12, 2018 HOD, to increase specialized instruction services to 20 hours per week outside general education and to increase BSS to 240 minutes per month. At the meeting, the DCPS representative stated that DCPS would move forward with the psychological evaluation, vocational assessment and OT screening discussed in the HOD. DCPS noted that Student had not been going to school at all since the May 1, 2018 due process hearing and that Student needed to attend class for the evaluations to be done. Petitioners' Counsel noted that Student had expressed interest in attending a DCPS STAY opportunity academy program. Resolution Specialist agreed to work on identifying a STAY program for Student for the 2018-2019 school year. Exhibit P-11. Student's May 31, 2018 IEP provided for Student to receive 20 hours per week of Specialized Instruction Services outside general education and 240 minutes per month of Behavioral Support Services. The IEP stated that Student did not require Special Education Transportation. Exhibit R-21.

5. Beginning May 31, 2018, Petitioners' Counsel wrote Resolution Specialist repeatedly to request that he identify a STAY program for Student, where there would be a vocational component available and Student's IEP could be implemented. Petitioners' Counsel explained this was because "the student is not buying into the program at [City School 2]." Exhibits P-35, P-36, P-38, P-39, P-40, P-41, P-42. Because it was summer vacation, Resolution Specialist was not able to confirm a STAY academy assignment for Student until August 16, 2018. Exhibit P-42.

6. On August 16, 2018, Resolution Specialist wrote Petitioners' Counsel and Educational Advocate by email that Student was "good to enroll at [STAY SCHOOL]" for the 2018-2019 school year. The same day, Educational Advocate responded with thanks and stated a need to arrange transportation to school for Student. On August 18, 2018, Resolution Specialist confirmed transportation for Grandmother and Student to visit STAY School on August 20, 2018 to enroll and meet with the special education coordinator there. Exhibit P-43.

7. School started for DCPS on August 20, 2018. On August 22, 2018, Educational Advocate wrote Resolution Specialist by email that Student had decided that Student wanted to return to City School 2 and that Student had emphatically stated that Student did not want to attend STAY School. Educational Advocate requested that Resolution Specialist arrange for Student to enroll at City School 2, "ideally" that same day. Exhibit P-43. There was approximately a 2 week delay in Resolution Specialist's

confirmation of Student's assignment back to City School 2 because Resolution Specialist had to be sure there was a space for Student in City School 2's Behavior and Education Support (BES) special education program. Testimony of Resolution Specialist. On Friday, September 7, 2018, DCPS issued a location of service letter identifying City School 2 as Student's location of service for the 2018-2019 school year. Exhibit R-31. By Monday, September 10, 2018, Student was attending City School 2. Exhibit R-32.

8. On or about August 17, 2018, Grandmother, by Petitioners' Counsel filed a prior due process complaint alleging that DCPS had failed to comprehensively reevaluate Student as DCPS had agreed to do in February 2018. For relief, Grandmother requested, *inter alia*, that DCPS be ordered to fund Independent Educational Evaluation (IEE) evaluations of Student, including a psychological evaluation, an adaptive assessment, an OT evaluation and a vocational evaluation. Exhibit R-26. On September 11, 2018, DCPS issued funding authorization for Grandmother to obtain an IEE comprehensive psychological evaluation of Student. Exhibit R-28. On October 19, 2018, Grandmother withdrew her August 2018 due process complaint without prejudice. Exhibits P-60, R-29.

9. In the 2018-2019 school year, Student reported that DC One public transportation card provided by the school was not working. School Social Worker told Student and Grandmother how to get a replacement card at City School 2. City School 2

offered to provide school transportation, but Student declined it. Testimony of School Social Worker.

10. On March 22, 2019, Independent Psychologist conducted an IEE comprehensive psychological evaluation of Student. Her report was completed on April 22, 2019. To assess Student's cognitive functioning, Independent Psychologist administered "shorter testing" using the Woodcock-Johnson IV Tests of Cognitive Abilities (WJ IV). This was because Student had variable attention and could not persist at the longer testing. Student's WJ IV Brief Intellectual Ability (BIA) score was 76, in the Low range when compared to others in Student's age range. On the Woodcock-Johnson IV Tests of Achievement, Student's standard scores were 82 in Reading (Low Average), 59 in Math (Very Low) and 99 in Spelling (Average). Student refused to complete the Written Expression subtest, because it was "too much work." Independent Psychologist obtained rating scales responses from Grandmother and Student on the Behavior Assessment System for Children, Third Edition (BASC-3) and from Grandmother on the Attention Deficit-Hyperactivity Disorder Test, Second Edition (ADHDT-2). Grandmother's responses on the BASC-3 scored in the Average range of functioning for Student, although she did report that Student loses control when angry and uses illegal drugs (sometimes). Grandmother's responses on the ADHDT-2 resulted in a score of 111 (ADHD Very Likely) for Student. Student's self-reporting on the BASC-3 rating scales resulted in Clinically Significant scores for School Problems Composite,

Attitude to School, Attitude to Teachers, and Locus of Control. Student's responses resulted in At-Risk scores on Sensation Seeking, Sense of Inadequacy, Inattention/Hyperactivity Composite, Attention Problems, Hyperactivity, Relations with Parents and Self-Reliance. Student reported to Independent Psychologist that the reason Student was habitually absent from school was because Student did not get the help needed, there was no reason to go to school. Student indicated that Student smoked marijuana every day. Based on the assessments administered, as well her review of records and her interview of Student, Independent Psychologist diagnosed Student with Bipolar Disorder - Moderate and ADHD, Combined Type. She recommended that unless Student were placed in an adequate therapeutic full-time special education school, Student's "habitual absences and disengagement" would continue. Exhibit P-1.

11. Student's 2018-2019 school year was unsuccessful. At the start of the 2018-2019 school year, after Student decided to return to City School 2, Student stated a willingness to do everything. But Student's attendance started to slip almost immediately. Testimony of School Social Worker. At the end of the last term, Student had failed all classes. Student was reported to have made no progress on IEP goals. Exhibits P-23, R-44. Although Student testified about having been at school on some of the days when reported as absent, school policy is that if a student misses more than 20% of the school day, the student is considered absent for the day. Grandmother has told School Social Worker that Student just does not want to go to school. Testimony of

School Social Worker.

12. Petitioners' Counsel argued that Student's attendance was acceptable for the first two quarters of the 2018-2019 school year. This is not borne out by the evidence. In the first two terms, Student accrued more than 200 unexcused class absences. Exhibit P-23. Student was also absent from the majority of the scheduled Behavioral Support Services sessions. Exhibit R-45.

13. School efforts to address Student's nonattendance included telephone calls to Grandmother and a home visit by School Social Worker and the Special Education Coordinator. On the home visit, Student hid in the closet and would not talk to the school staff. In the prior school year, School Social Worker also made a couple of fruitless attempts to persuade Student to return to school. Testimony of School Social Worker.

14. Student's City School IEP team met on April 30, 2019 for the annual review of Student's IEP. Student participated in the meeting. Petitioners' Counsel reported that Student now wanted to attend a therapeutic day school. The IEP Specialized Instruction Services and Behavioral Support Services provisions were left at 20 hours per week and 240 minutes per month respectively. Student's educational placement was not changed. Exhibits P-6, P-8.

15. On June 11, 2019, Student's IEP team met to consider Independent Psychologist's April 22, 2019 psychological evaluation report on Student. At that

meeting, Petitioners' representatives sought a change in Student's placement to PRIVATE SCHOOL. Student confirmed wanting to go to Private School because it was closer to where Student was living with Student's girlfriend in Maryland and, the private school had work programs and 1 to 1 counseling. Resolution Specialist responded that there was no indication that Student needed to only be with students with disabilities. Exhibit P-10. DCPS did not agree to change Student's educational placement to a nonpublic school. Testimony of Educational Advocate.

16. By June 2019, Student had gone to City School 2 to participate in a vocational assessment. Testimony of Educational Advocate. An O*NET Interest Profiler for Student was completed on June 4, 2019. Profiled users are instructed to use the O*NET Interest Profiler results "to explore the world of work and identify careers that may satisfy what is important to you in a job-your interests." Exhibit R-38.

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 Petitioners 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 Petitioners 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

- A. Did DCPS deny Student a FAPE by failing to provide Student with a location of service where Student's May 31, 2018 IEP could be implemented during the 2018-2019 school year?

In the May 12, 2018 HOD, Hearing Officer Seat ordered DCPS to revise Student's IEP by increasing specialized instruction to at least 20 hours per week outside general education and to increase the level of BSS to 240 minutes per month. This was done with Student's May 31, 2018 DCPS IEP, which provided for Student to receive 20 hours per week of Specialized Instruction Services outside general education and 240 minutes per month of Behavioral Support Services (BSS). The IEP stated that Student did not require Special Education Transportation.

The IDEA requires that every special education placement must be "based on the child's IEP," 34 C.F.R. § 300.116(b)(2), and be "capable of fulfilling the student's IEP." *Lofton v. District of Columbia*, 7 F.Supp.3d 117, 123 (D.D.C. 2013). *Joaquin v. Friendship Pub. Charter Sch.*, No. CV 14-01119, 2015 WL 5175885 (D.D.C. Sept. 3,

2015). “Once the IEP is developed, the school system must provide an appropriate placement that meets those needs or else enable the student to seek adequate private services. At a minimum, the placement must be ‘based on the child’s IEP,’ 34 C.F.R. § 300.116(b)(2), and be capable of fulfilling the student’s IEP, *see also Roark ex rel. Roark v. District of Columbia*, 460 F.Supp.2d 32, 44 (D.D.C. 2006) (explaining that appropriateness hinges on whether school “can provide” services mandated by IEP.)” *Joaquin, supra*, (citations and internal quotations omitted.) Hearing Officer Seat had determined in the May 12, 2018 HOD that City School 2 was capable of fulfilling Student’s IEP needs and Petitioners did not make a *prima facie* showing in the present case that, at the beginning of the 2018-2019 school year, City School 2 was not capable of providing the services required by Student’s May 31, 2018 IEP.

At the May 31, 2018 IEP team meeting, there was a request to place Student in an alternative education program. Thereafter, Petitioners’ Counsel repeatedly wrote Resolution Specialist to request that he identify a STAY program for Student, where there would be a vocational component available and Student’s IEP could be implemented. Petitioners’ Counsel explained this was because “the student is not buying into the program at [City School 2].” On August 16, 2018, Resolution Specialist wrote Petitioners’ Counsel and Educational Advocate by email that Student was “good to enroll” at STAY School for the 2018-2019 school year. However, on August 22, 2018, two days after the first day of school, Educational Advocate wrote Resolution Specialist

by email that Student wanted to return to City School 2 and did not want to go to STAY School. There was approximately a 2 week delay in changing Student's assignment back to City School 2.

Petitioners argue that the City School 2 placement was not appropriate because DCPS did not secure Student's placement there for two weeks after school started. This argument blames DCPS for Student's last minute decision not to attend STAY School. Petitioners' Counsel had advocated all summer for Student to be placed at an alternative STAY academy and DCPS honored that request. But two days after the 2018-2019 school year started, Educational Advocate notified DCPS that Student preferred to return to City School 2 rather than attend Stay School. It took two weeks for DCPS to make that change, because, as Resolution Specialist credibly explained in his testimony, he had to coordinate with City School 2 to ensure that there was space available in City School 2's BES program to accommodate Student's requirement for 20 hours per week of Specialized Instruction, as mandated by the May 31, 2018 IEP.

The IDEA regulations provide that an IEP must be implemented "as soon as possible following development of the IEP." 34 C.F.R. § 300.323(b)(2); *See Spiegler v. District of Columbia*, 866 F.2d 461, 466 (D.C. Cir. 1989). Under the circumstances in this case, that is, Student's last minute decision not to attend STAY School where Student had been placed at the request of Petitioners' Counsel and the time required to secure a place for Student in the City School 2 BES program, I find that Petitioners have

not met their burden of persuasion that DCPS did not timely provide Student with a location of service where the May 31, 2018 IEP could be implemented during the 2018-2019 school year.

- B. Did DCPS deny Student a FAPE by failing to update Student's Behavior Intervention Plan (BIP) and/or otherwise address attendance issues that are linked to Student's disability during the 2018-2019 school year?

Since at least the 2016-2017 school year, Student's lack of school attendance has been a severe problem. *See* May 12, 2018 HOD. In the 2016-2017 school year, Student missed 32 days of school by October 16, 2016. In the 2017-2018 school year, by May 2018, Student had over 100 absences. This pattern continued in the 2018-2019 school year, for which Student had 119 days of reported unexcused school absences. Petitioners blame DCPS for Student's absences, attributing Student's truancy to a failure by City School 2 to update Student's BIP or otherwise address attendance issues.

Hearing Officer Seat addressed Student's attendance issues in the May 12, 2018 HOD. Mr. Seat explained that Student had 119 days of reported unexcused school absences that year and that ultimately, so long as the school does its part, it is up to Student to do what is required and to be responsible for Student's own educational results. *Id.*, citing *Garcia ex rel. Garcia v. Bd. of Educ. of Albuquerque Pub. Sch.*, 2007 WL 5023652, at *14 (D.N.M. 2007), *aff'd in part sub nom. Garcia v. Bd. of Educ. of Albuquerque Pub. Sch.*, 520 F.3d 1116 (10th Cir. 2008) ("IDEA does not provide a remedy for this kind of case – where the access to a free and appropriate public

education is wide open, but the student refuses to attend school and refuses the numerous and extensive educational opportunities afforded to [the student]”); *S.J. ex rel. S.H.J. v. Issaquah Sch. Dist. No. 411*, 2007 WL 2703056, at *7 (W.D. Wash. 2007) (“School District is not responsible for the Parents’ failure to ensure the Student was at school in order to benefit from [the student’s] education”). In the prior decision, Hearing Officer Seat determined that in the 2017-2018 school year, City School 2 did take reasonable steps to try to address Student’s absences and disengagement from school, but that Student was making Student’s own choices about whether to go to school and attend classes.

I similarly find that in the 2018-2019 school year DCPS and City School 2 acted reasonably to address Student’s chronic absenteeism. Once a special education student’s truancy becomes excessive, a school district has an affirmative duty to take some sort of responsive action. *See Springfield Sch. Comm. v. Doe*, 623 F. Supp. 2d 150, 159 (D. Mass. 2009). However, each student’s case must turn on its own facts. *Id.* at 162.

The facts in this case are that Student is nearing adulthood. Student’s history of extreme school absenteeism has continued at least since the 2016-2017 school year. City School 2’s March 23, 2018 BIP targeted Student’s attendance as well as other behavior challenges. In spring 2018, when Student expressed an interest in attending an alternative school with a vocational component, DCPS arranged for Student to transfer

to STAY School for the 2018-2019 school year, but in the end, Student refused to make the school change. From nearly the beginning of the 2018-2019 school year, Student returned to not attending school regularly. During the 2018-2019 school year, School Social Worker spoke to Grandmother about Student's attendance and made a home visit, but Student would not talk with him. School representatives had also made home visits to discuss Student's attendance during the prior school year.

Even though Special Education Transportation was not a requirement of Student's IEP, Petitioners' representatives fault City School 2 for not fixing Student's DC One public transportation card when the card stopped working for Student although school staff told Student and grandmother the procedure for obtaining a new card. Moreover, even though Special Education Transportation was not part of Student's IEP, City School 2 offered to provide school transportation, but Student declined it. Counsel's argument that Student's poor attendance was due to DCPS' not assisting with school transportation is not persuasive.

Educational Advocate opined that Student's March 23, 2018 BIP should have been updated as early as October 2018, after Student's nonattendance continued into the 2018-2019 school year. However Educational Advocate, who qualified as an expert in IEP development and placement, did not identify any deficiencies with the then 6-month old BIP or what BIP changes would have been likely to overcome Student's chronic absenteeism. I did not find her opinion credible.

This is a case where the IEP program at City School 2 was “wide open” to Student for the 2018-2019 school year, but Student refused the educational opportunities afforded there. *Cf. Garcia, supra*. I conclude that DCPS took appropriate responsive action when Student’s failed to attend school for much of the 2018-2019 school year. Unfortunately, those efforts were unavailing and DCPS was not empowered to compel Student to go to school. *Cf. Springer v. Fairfax Cty. Sch. Bd.*, 134 F.3d 659 (4th Cir. 1998) (“[I]t is not intended to be the duty of special education to force socially maladjusted children to school by residentially placing them if they choose to remain truant.” *Id.* at 664 (citation omitted)).

- C. Did DCPS deny Student a FAPE by failure to timely evaluate or re-evaluate Student based upon an agreement to do so at an MDT meeting in February 2018?

In the May 12, 2018 HOD, Hearing Officer Seat reported that DCPS had offered in February 2018 to complete a comprehensive psychological evaluation (including an adaptive assessment), vocational assessment and an OT screening of Student. Hearing Officer Seat stated that he expected those evaluations to be carried out. Of these assessments, Petitioners assert that the vocational assessment has been conducted, but not reviewed by Student’s IEP team and the OT screener has not yet been performed. (Instead of conducting the psychological reevaluation, DCPS authorized funding for Grandmother to obtain an IEE psychological evaluation of Student.) DCPS offered no evidence that the OT screener has been done or that the vocational assessment had been

considered by Student's IEP team. I find that Petitioners met their burden of persuasion that DCPS did not timely complete these two assessments.

The failure to timely conduct special education evaluations is considered a procedural violation under the IDEA. *See, e.g., Hart v. District of Columbia*, 323 F. Supp. 3d 1, 3–4 (D.D.C. 2018). A procedural violation gives rise to a substantive violation of the IDEA only if the procedural deficiency “(i) [i]mpeded the child’s right to a FAPE; (ii) [s]ignificantly impeded the parent’s opportunity to participate in the decision-making process regarding the provision of a FAPE to the parent’s child; or (iii) [c]aused a deprivation of educational benefit.” *Hart, supra* (quoting 34 C.F.R. § 300.513(a)(2), other internal quotations omitted).

Student’s OT screener and vocational assessment were not completed in time to be considered by Student’s IEP team at its May 31, 2019 annual IEP review. It follows that the Petitioners’ opportunity to participate in the May 31, 2019 IEP annual review meeting was significantly impeded by DCPS’ failure to timely complete these assessments. Therefore this procedural violation constituted a denial of FAPE. For relief for these procedural violations, I will order DCPS to fund an IEE OT screener and an IEE vocational assessment of Student.

- D. Did District of Columbia Public Schools (DCPS) deny Student a FAPE by failing to provide Student with an appropriate IEP least restrictive environment or placement following meetings held on or about April 30, 2019 and June 11, 2019.

At the April 30, 2019 and June 11, 2019 IEP team meetings, Petitioners’

representatives sought placement for Student at a full-time special education therapeutic day school. The school representatives offered only a continuation of the services in the prior, May 31, 2018, IEP namely 20 hours per week of Specialized Instruction outside of general education and 240 minutes per month of BSS.

In *Endrew 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 *Bd. of Educ. v. Rowley*, 458 U.S. 176, 207, 102 S.Ct. 3034, 73 L.Ed.2d 690 (1982), for what constitutes an appropriate IEP. As explained by the D.C. Circuit in *Z. B. v. District of Columbia*, 888 F.3d 515 (D.C. Cir. 2018),

The Supreme Court . . . in *Endrew F.* . . . , raised the bar on what counts as an adequate education under the IDEA. *Endrew 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 *Endrew 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,” *Endrew 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, *Endrew F.*, 137 S.Ct. at 1001; *Rowley*, 458 U.S. at 198-99, 102 S.Ct. 3034.

...

Applying the IDEA as interpreted in *Endrew 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 519, 524 (some internal quotations and citations omitted.)

As noted above, in the May 12, 2018 HOD, Hearing Officer Seat determined that City School 2 was capable of fulfilling Student’s needs. Almost one year later, in spring 2019, Student was evaluated by Independent Psychologist, who recommended that Student needed a placement in a stand-alone, therapeutic full-time special education school. Independent Psychologist testified at the due process hearing and opined that Student’s school attendance issues are highly correlated to Student’s ED and ADHD disabilities and that Student would not do well in a public school self-contained setting, but needs the “containment” of a small setting, where Student would get caring attention. This expert’s opinion was not effectively rebutted by DCPS. Its expert, LEA Representative, testified that he attended the June 11, 2019 IEP team meeting, but he did not recall what he had said about a therapeutic setting for Student. He recalled that the school representatives believed STAY School (not City School 2) could meet Student’s needs. LEA Representative was not part of the team that developed the April 30, 2019 IEP and he had not spoken directly with Student. DCPS did not call any other

expert to explain its decision that Student's continue placement in the BES program at City School was reasonably calculated to enable Student to make progress appropriate in light of Student's circumstances.

In light of Independent Psychologist's strong recommendation that Student requires a therapeutic special education day school and lacking a "cogent and responsive" explanation from DCPS for its decision to continue Student's educational placement at City School 2, I find that DCPS has not met its burden of persuasion that the April 30, 2019 IEP placement was reasonably calculated to enable Student to make appropriate progress. *See Andrew F., supra.* (A reviewing court may fairly expect [school] authorities to be able to offer a cogent and responsive explanation for their decisions that shows the IEP is reasonably calculated to enable the child to make progress appropriate in light of his circumstances. *Andrew F.*, 137 S.Ct. at 1002.) This was a denial of FAPE.

At the due process hearing, Petitioners did not propose a specific nonpublic school placement for Student. (Petitioners' Counsel represented that the school they had in mind had declined Student's application for admission). Accordingly, I will order DCPS to identify an appropriate full-time therapeutic special education day school for Student, which offers small class size and a low student-to-teacher ratio. Furthermore, considering Student's age and long history of "habitual absences and disengagement," it is appropriate to make this initial nonpublic placement on a "probationary" basis.

Therefore, in my discretion, I will order DCPS, subject to obtaining Student's agreement, to fund Student's enrollment at an appropriate therapeutic special education day school for at least two quarters (*i.e.*, one semester) of a school year. If Student's attendance is not satisfactory during this initial period, DCPS shall not be required to continue to fund the nonpublic placement for Student.

ORDER

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

ORDERED:

1. Within 10 business days of the date of this decision, DCPS shall issue funding authorization for the Petitioners to obtain an IEE OT screener and vocational assessment of Student;
2. Within 20 school days of the date of this decision, subject to obtaining Student's written agreement, DCPS shall secure and fund Student's placement with transportation, for the remainder of the 2019-2020 school year, at a suitable therapeutic special education day school which is capable of implementing Student's IEP. If DCPS reasonably determines that Student's school attendance is not satisfactory by the end of the first two school quarters, DCPS shall not be required to continue to fund Student's nonpublic school placement; and
3. All other relief requested by the Petitioners herein is denied.

Date: August 26, 2019

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