

**DISTRICT OF COLUMBIA
OFFICE OF THE STATE SUPERINTENDENT OF EDUCATION**

Office of Dispute Resolution
810 First Street, N.E., 2nd Floor
Washington, D.C. 20002

OSSE
Office of Dispute Resolution
December 15, 2016

<i>Student</i> , ¹)	Case No.: 2016-0237
through his <i>Parent</i> ,)	
<i>Petitioner</i> ,)	Date Issued: 12/15/16
)	
v.)	Hearing Officer: Keith L. Seat, Esq.
)	
District of Columbia Public Schools)	Hearing Dates: 12/6/16 & 12/7/16
("DCPS"),)	ODR Hearing Rooms: 2004 & 2003
Respondent.)	
)	

HEARING OFFICER DETERMINATION

Background

Petitioner, Student’s Parent, pursued a due process complaint alleging that Student had been denied a free appropriate public education (“FAPE”) in violation of the Individuals with Disabilities Education Improvement Act (“IDEA”) because he was not provided appropriate support in his Individualized Education Programs (“IEPs”) and adequately evaluated to address his attendance problems. DCPS responded that Student’s IEPs and assessments were appropriate and he was simply making poor choices when truant.

Subject Matter Jurisdiction

Subject matter jurisdiction is conferred pursuant to IDEA, 20 U.S.C. § 1400, *et seq.*; the implementing regulations for IDEA, 34 C.F.R. Part 300; and Title V, Chapter E-30, of the District of Columbia Municipal Regulations (“D.C.M.R.”).

Procedural History

Following the filing of the due process complaint on 10/5/16, the case was assigned to the undersigned on 10/6/16. Respondent’s timely response to the complaint was filed on 10/14/16 and did not challenge jurisdiction apart from noting the statute of limitations. The resolution session meeting took place on 10/21/16, but the parties neither settled the case

¹ Personally identifiable information is provided in Appendix A, including terms initially set forth in italics.

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nor terminated the 30-day resolution period, which ended on 11/4/16. A final decision in this matter must be reached no later than 45 days following the end of the resolution period, which requires a Hearing Officer Determination (“HOD”) by 12/19/16.

The due process hearing took place on 12/6/16 and 12/7/16, and was closed to the public. Petitioner was represented by *Petitioner’s counsel*. DCPS was represented by *Respondent’s counsel*. Petitioner was present during the entire hearing.

Petitioner’s Disclosures, submitted on 11/29/16, contained documents P1 through P20, which were admitted into evidence without timely objection.

Respondent’s Disclosures, submitted on 11/28/16 (but dated 11/29/16), contained documents R1 through R59, which were admitted into evidence without objection. Respondent’s Supplemental Disclosures, submitted on 12/1/16, contained documents R61 through R65, to which Petitioner’s objection of untimeliness was sustained.²

Petitioner’s counsel presented 2 witnesses in Petitioner’s case-in-chief (*see* Appendix A):

1. *Clinical Psychologist* (qualified without objection as an expert in Clinical Psychology)
2. Parent

Petitioner’s counsel recalled Parent as the sole rebuttal witness.

Respondent’s counsel presented a single witness in Respondent’s case (*see* Appendix A): *School Psychologist* (qualified without objection as an expert in School Psychology).

The issues to be determined in this Hearing Officer Determination are:

Issue 1: Whether DCPS denied Student a FAPE by failing to develop an appropriate IEP on 10/23/14, 10/19/15, and/or in May 2016 because: (a) his hours of specialized instruction and other supports were insufficient to address his “learned helplessness” and were not reasonably calculated to allow Student to achieve passing marks and advance from grade to grade; (b) his IEPs failed to address his attendance problem and decreased his behavioral support services; and (c) his IEPs failed to include a description of his specific LRE and placement, denying Parent the opportunity to participate in his educational

² Respondent had scanner difficulties which prevented document R59 from being numbered and submitted on time, but the undersigned gave leave to file documents delayed by the scanning problems until 12/1/16. However, that did not permit the addition of documents not previously identified, which resulted in the exclusion of documents R61 through R65 at the due process hearing. (Respondent did not submit any document numbered R60.)

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decision-making. *Respondent has the burden of persuasion on this issue, if Petitioner establishes a prima facie case.*

Issue 2: Whether DCPS denied Student a FAPE by failing to comprehensively evaluate Student in all areas of suspected disability to address his persistent absences and tardiness by conducting FBAs and developing BIPs over the last two years. *Petitioner has the burden of persuasion on this issue.*

Petitioner seeks the following relief:

1. A finding that Student was denied a FAPE.
2. Within 14 days, DCPS shall convene an IEP team meeting and revise Student's IEP to (a) adequately address his attendance issues, (b) provide additional specialized instruction, (c) provide additional behavioral support services, and (d) provide an adequate description of his LRE and placement.
3. DCPS shall fund or provide compensatory education based on a plan developed from Petitioner's compensatory education study or from new assessments ordered to inform an appropriate compensatory education award.³
4. Any other just and appropriate relief.

The parties were permitted to submit legal citations and references after the hearing, which Respondent did on 12/7/16 and Petitioner did on 12/8/16.

Findings of Fact

After considering all the evidence, as well as the arguments of both counsel, the Findings of Fact⁴ are as follows:

³ Petitioner's counsel was put on notice at the prehearing conference that Petitioner must introduce evidence supporting the requested compensatory education, including evidence of specific educational deficits resulting from Student's alleged denial of FAPE and the specific compensatory measures needed to best correct those deficits, i.e., to elevate Student to the approximate position Student would have enjoyed had Student not suffered the alleged denial of FAPE. Respondent was similarly put on notice that it should be prepared to introduce evidence contravening the requested compensatory education in the event a denial of FAPE is found.

⁴ Footnotes in these Findings of Fact refer to the sworn testimony of the witness indicated or to an exhibit admitted into evidence. To the extent that the Hearing Officer has declined to base a finding of fact on a witness's testimony that goes to the heart of the issue(s) under consideration, or has chosen to base a finding of fact on the testimony of one witness when another witness gave contradictory testimony on the same issue, the Hearing Officer has

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1. Student is a resident of the District of Columbia; Petitioner is Student's Parent.⁵ Student is *Age* and in *Grade* for the fourth school year.⁶ Now at Public School, Student was at Prior Public School for 2014/15⁷ and 2015/16 and at Public Charter School in 2013/14.⁸

2. Student is classified as having Multiple Disabilities ("MD"), with Specific Learning Disability ("SLD") in reading, writing and math, as well as Other Health Impairment ("OHI") due to Attention Deficit Disorder ("ADD").⁹ Student was evaluated in February 2016 for school avoidance or school phobia, which comes within the classification of Emotional Disability ("ED"), but Student did not meet the criteria for ED.¹⁰ Student suffers from "learned helplessness," which is not an IDEA classification or clinical diagnosis, but describes becoming so discouraged that he has given up being able to do any better at school.¹¹ Student has been disengaged at school for more than 2 years; his attendance problems are directly related to his poor academic progress.¹²

3. Student was first identified as having an educational disability in 2007; in 2009 his IEP provided for 15 hours/week of specialized instruction outside general education and an hour a week of counseling.¹³ Student's 5/2/14 IEP at PCS provided for 10 hours/week of specialized instruction outside general education, 5 hours/week of specialized instruction inside general education, along with 240 minutes/month of Behavioral Support Services (and Speech-Language Pathology, which is not at issue).¹⁴

4. Three IEPs are challenged by Petitioner in this case: Student's 10/23/14 IEP at Prior Public School reduced Student's services to 10 hours/week of specialized instruction inside general education and 180 minutes/month of Behavioral Support Services (and some Speech-Language Pathology).¹⁵ Student's next IEP at Prior Public School on 10/19/15 continued with 10 hours/week of specialized instruction inside general education, but only 90 minutes/month of Behavioral Support Services (and Speech-Language Pathology).¹⁶ Student's current IEP on 5/18/16 added OHI as an additional disability classification, and continued services of 10 hours/week of specialized instruction inside general education, 90

taken such action based on the Hearing Officer's determinations of the credibility and/or lack of credibility of the witness(es) involved.

⁵ Parent.

⁶ Parent; P7-1.

⁷ All dates in the format "2014/15" refer to school years.

⁸ Parent; P1-1.

⁹ P4-1; P12-11,13; P15-11; R41; R43; R44; R45; School Psychologist.

¹⁰ P12-11,12; School Psychologist.

¹¹ P15-10; Clinical Psychologist; School Psychologist; R53.

¹² Clinical Psychologist; P16-1.

¹³ P12-2.

¹⁴ P1-10.

¹⁵ P2-9.

¹⁶ P3-7.

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minutes/month of Behavioral Support Services, and Speech-Language Pathology.¹⁷ DCPS proposed making the 5/18/16 IEP more restrictive by providing Math and English classes in a self-contained (outside general education) setting, but Petitioner's counsel expressly rejected that level of support after talking to Student.¹⁸ Each of the IEPs in issue, that is the 10/23/14 IEP, 10/18/15 IEP and 5/18/16 IEP (collectively, the "challenged IEPs"), makes clear that Student's behavior impedes his own learning or that of other children.¹⁹ None of the challenged IEPs address attendance; the only incentives provided are support in the classroom and Behavioral Support Services.²⁰ The challenged IEPs only specify the hours of specialized instruction and Behavioral Support Services and do not describe or set forth Student's Least Restrictive Environment ("LRE") or placement in any detail.²¹

5. Student's Behavioral Support Services were reduced to 90 minutes/month in his 10/19/15 IEP due to Student not using the services provided.²² The social worker assigned to Student at Public School stated in a 8/28/15 letter to Parent that in addition to the Behavioral Support Services hours specified in his IEP, the social worker was available to Student for other supports on an "as needed basis."²³ Clinical Psychologist credibly testified that Student needs 60 minutes/week of Behavioral Support Services.²⁴

6. Cognitive evaluations indicated that Student's Full Scale IQ was 86 on both 5/16/07 and 2/6/10, which is in the low average range.²⁵ A 3/11/16 cognitive evaluation using the Reynolds Intellectual Assessment Scales (RIAS) found that Student's Composite Intelligence Index was 85, which is below average, although his Verbal Intelligence Index was 66 and his Nonverbal Intelligence Index was 106.²⁶

7. Student is some 6 years behind others in his grade in Math, 7 years behind in Reading, and 4 years behind in Writing.²⁷ Given Student's attendance problems and low level of achievement, the expert opinion of Clinical Psychologist was that each of the challenged IEPs was deficient by not providing adequate special education services, as Student does not have a sufficient foundation to succeed inside general education and needs much support, with a "fulltime" IEP.²⁸

¹⁷ P4-9; School Psychologist.

¹⁸ R48; School Psychologist.

¹⁹ P2-3; P3-2; P4-3.

²⁰ School Psychologist.

²¹ P2; P3; P4.

²² R16-5; Clinical Psychologist; School Psychologist.

²³ R8-1.

²⁴ Clinical Psychologist.

²⁵ P12-3,4.

²⁶ P12-5,6,7.

²⁷ P4-4,5,6; P12-7,8.

²⁸ Clinical Psychologist.

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8. **Attendance Problems.** Student's school attendance problems have long been noted, beginning in 2009.²⁹ Parent regularly raised concerns about Student's attendance, as did his teachers.³⁰ Student missed 124 school days in 2014/15.³¹ As of 5/18/16, Student was still demonstrating poor school attendance, having missed over 130 days of school in 2015/16 (of which 103 were unexcused), and had not made himself available for Behavioral Support Services.³² Student has received few academic credits while in Grade, earning only 1 credit in 2013/14, 2.5 in 2014/15, and none in 2015/16, when he received all "Fs."³³ Student began an after-school credit recovery program on 10/19/15, but had not attended the program as of 1/13/16, and continued to skip as of 2/9/16.³⁴ Prior Public School permits up to 8 credits a year to be recovered, in addition to credits earned in regular classes.³⁵ Public School also has a credit recovery program, which focuses on older students.³⁶

9. Student goes to the school building regularly, but instead of going to class, often hangs out in the hallways with his buddies or goes to the gym, and has been seen leaving school in the middle of the day with his girlfriend, who lives nearby.³⁷ Student explained that he did not attend classes regularly because he never received the help he needed and did not understand the work; when in class he would sit at the back and do nothing because he "did not understand what was going on."³⁸ Student stated to Parent that he was not attending his classes because there was no point as the teachers were not helping him, although 1 or 2 had tried.³⁹

10. Student has been meeting with more success at Public School in 2016/17.⁴⁰ Student's attendance has improved in 2016/17; from his enrollment on 9/29/16 through 11/8/16, Student was absent only 13 days (of which 3 days were excused).⁴¹ Student's grades have notably improved, with 5 "Cs," only 1 "D" and no "Fs."⁴² School Psychologist stated that Students often have a positive initial "honeymoon" period at a new school when they do better than after they settle in.⁴³ Clinical Psychologist observed Student at Public

²⁹ P1-8; P12-2.

³⁰ R5-2; R16-2; P13-1; R12-2,3,4,5; R13-5; R16-6; R24-3.

³¹ P12-2.

³² P4-7.

³³ P7-1.

³⁴ R18-1; P20-2; R39.

³⁵ School Psychologist.

³⁶ *Id.*

³⁷ School Psychologist; Clinical Psychologist; Parent; R56-16; R38; P11-2.

³⁸ P15-3; Clinical Psychologist.

³⁹ Parent.

⁴⁰ School Psychologist.

⁴¹ P7-1, *cf.* P9-1 (absent 17 days, with 3 excused, through 11/8/16); P8-1; Clinical Psychologist; School Psychologist.

⁴² P8-2,3.

⁴³ School Psychologist.

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School in 2016/17 as he sat in the back of the general education class and was disengaged; the teacher came by to help him only once during the 30 minute observation.⁴⁴

11. Responses to Attendance Problems. Student had a Behavioral Intervention Plan (“BIP”) as long ago as 2009 and another had been developed and implemented at PCS prior to his 5/2/14 IEP.⁴⁵ The 10/17/13 Psychological Reevaluation of Student recommended that his team consider revising his BIP.⁴⁶ A Functional Behavioral Assessment (“FBA”) was conducted for the 11/8/13 eligibility meeting.⁴⁷ Student did not have an FBA/BIP in place as of 10/23/14.⁴⁸ A BIP was to be completed after the 1/13/16 meeting, but was apparently never done.⁴⁹ An FBA is needed to try to address Student’s attendance problems by looking at the antecedents to his behavior.⁵⁰ Clinical Psychologist did not recommend an FBA in her Comprehensive Psychological report or Compensatory Education Plan, which she testified was a mere oversight.⁵¹ School Psychologist testified that she did not believe Student needs an FBA as his lack of attendance is not related to his disability.⁵²

12. The 10/17/13 Psychological Reevaluation of Student recommended rewarding Student for communicating more as a good way to decrease problem behaviors.⁵³ Student’s IEP dated 5/2/14 at PCS noted that “positive reward systems” had been implemented in class, a statement copied into Student’s subsequent IEPs; there was no evidence at the due process hearing that positive reward systems have been used in the last 2 years.⁵⁴

13. The first of 3 Emotional-Social goals in Student’s 5/2/14 IEP included “coming to school” and turning in class work.⁵⁵ The challenged IEPs omitted any reference to coming to school and contained only a single Emotional-Social goal seeking to decrease oppositional and aggressive behaviors.⁵⁶

14. Prior Public School developed an Attendance Plan for Student on 1/13/16, the essence of which was a small number of handwritten lines on a 4 page long form, stating that Student hangs out in unauthorized areas or goes to the gym because he doesn’t like his teachers; Student was to “attend all classes” and get a document signed daily; Parent was to monitor attendance and respond to “robo calls”; and school personnel were to make

⁴⁴ Clinical Psychologist.

⁴⁵ P1-3; P12-2.

⁴⁶ R9-8.

⁴⁷ R18-1.

⁴⁸ R5-4.

⁴⁹ P20-2; School Psychologist.

⁵⁰ Clinical Psychologist.

⁵¹ *Id.*

⁵² School Psychologist.

⁵³ R9-8.

⁵⁴ P1-3; P2-3; P3-2; Administrative Notice.

⁵⁵ P1-9.

⁵⁶ P2-8; P3-6; P4-8.

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behavioral support available when Student was frustrated and provide support for classes in which Student had concerns.⁵⁷ The social worker stated on 1/13/16 that an attendance plan for Student had also been completed the previous year.⁵⁸

15. School Psychologist recommended in her 3/11/16 Comprehensive Psychological report that Student's Attendance Plan should be revised to try to improve Student's attendance in his classes; School Psychologist did not know at the due process hearing whether that had been done.⁵⁹ School Psychologist continues to believe that a revised attendance plan would be helpful, as they don't necessarily work initially; there was no evidence at the due process hearing that the Student's Attendance Plan had been updated since School Psychologist's recommendation on 3/11/16.⁶⁰

16. Several team members at the review of School Psychologist's Comprehensive Psychological report on 5/18/16 raised concerns about Student's attendance; the existence of his Attendance Plan was noted, along with the fact that Student "continues to struggle."⁶¹ Petitioner's counsel at the 5/18/16 meeting suggested that DCPS pay Student for each class he attended, which was strongly rejected at the meeting and again at the due process hearing; DCPS had previously tried paying students for attendance and the effort "failed miserably."⁶² Clinical Psychologist persuasively testified that DCPS's efforts to address Student's attendance problems were inadequate; among other things, DCPS could have conducted an FBA, since Student's behavior is the problem; tried a behavior contract; and provided a trusted staff person for regular check-ins.⁶³

17. As of 1/13/16, Student's attendance problems/truancy had resulted in a pending court referral, which Parent understood as merely a warning.⁶⁴ School Psychologist testified that Student was truant because of lack of motivation (due to his friends and girlfriend) and lack of consequences from Parent.⁶⁵ The only consequence to Student at school for his absences was failing his classes; students can't be compelled to attend detention any more than class and are rarely suspended for absences; nor can staff "put their hands on" students to force them to attend class.⁶⁶

⁵⁷ P11-1,2,3.

⁵⁸ P20-2; Administrative Notice taken that the earlier attendance plan was not in the record.

⁵⁹ School Psychologist; P12-14 (document states that attendance plan should be "developed," but School Psychologist clarified while testifying that she meant "revised").

⁶⁰ School Psychologist; Administrative Notice.

⁶¹ P13-1; P12-14.

⁶² School Psychologist; P13-1.

⁶³ Clinical Psychologist.

⁶⁴ Parent; P20-2; School Psychologist.

⁶⁵ School Psychologist.

⁶⁶ *Id.*

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18. “Attendance Interventions” were conducted on 10/19/15 by Parent meeting with a staff person in the attendance office.⁶⁷ Parent had previously spoken with the staff person in the attendance office by telephone on 4/30/15.⁶⁸ No other attempts to raise Student’s lack of attendance with Parent were logged in the DCPS Communications Log for Student until he could not be tested, after which there were 3 additional contacts during the next month.⁶⁹

19. The principal of Prior Public School met with Student, Parent and counsel (and others) at a multidisciplinary team (“MDT”) meeting on 12/7/15, and met with Student’s father and counsel on 12/21/15, informing them that Student would not be able to return to Prior Public School due to the truancy protocol for those attending out-of-boundary schools, as Student was.⁷⁰ The principal sent a letter to Parent on 1/13/16 formally stating that out-of-boundary children who have over 10 unexcused absences can be required to return to their neighborhood schools; at that time Student had over 50 unexcused absences.⁷¹

20. Compensatory Education. Clinical Psychologist’s expert opinion was that Student needs 20 hours/week of special education services outside general education, along with support inside general education for the remaining hours.⁷² Clinical Psychologist calculated that Student had missed over 1,000 hours of special education services, but should be provided 112 hours of academic tutoring in Reading, Writing and Math, and 96 hours with an independent male mentor instead of traditional talk therapy, to make the academic tutoring more effective and restore Student to where he should be but for the denial of FAPE.⁷³ Clinical Psychologist testified that 3 hours/week of tutoring would be optimal, along with 3 or more hours/week of mentoring.⁷⁴ Clinical Psychologist proposed an additional remedy of credit recovery since Student is so far behind, but did not suggest how much or in what form it should be provided.⁷⁵ School Psychologist testified that if Clinical Psychologist was correct about Student suffering from learned helplessness, he would need many more hours to overcome it than Clinical Psychologist recommended.⁷⁶

21. Student stated to Clinical Psychologist that he would use available tutoring this time, as he is motivated to do better in school, even though he had not used tutoring that was provided in the past.⁷⁷ Parent testified that Student would participate in compensatory education if awarded, as he is older and more mature and now cares about his education.⁷⁸

⁶⁷ R18-2.

⁶⁸ R56-4.

⁶⁹ R56-7,9,12,13,14,15,16.

⁷⁰ R24-3; R29-2; School Psychologist.

⁷¹ P10-1; P24-3.

⁷² P15-11,12.

⁷³ P16-2; Clinical Psychologist.

⁷⁴ Clinical Psychologist.

⁷⁵ P16-3; Clinical Psychologist.

⁷⁶ School Psychologist.

⁷⁷ Clinical Psychologist.

⁷⁸ Parent.

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Student came to the due process hearing, although he remained outside the hearing room (with his father) and did not testify, because it was too hard for him to hear negative things about himself.⁷⁹

Conclusions of Law

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

The overall purpose of the IDEA is to ensure that "all children with disabilities have available to them a 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." 20 U.S.C. § 1400(d)(1)(A). See *Boose v. Dist. of Columbia*, 786 F.3d 1054, 1056 (D.C. Cir. 2015) (the IDEA "aims to ensure that every child has a meaningful opportunity to benefit from public education").

"[T]o further Congress' ambitious goals for the IDEA, the Supreme Court has focused on the centrality of the IEP as 'the centerpiece of the statute's education delivery system for disabled children.'" *Harris v. Dist. of Columbia*, 561 F. Supp. 2d 63, 67 (D.D.C. 2008), quoting *Honig v. Doe*, 484 U.S. 305, 311, 108 S. Ct. 592, 98 L. Ed. 2d 686 (1988).

Once a child who may need special education services is identified and found eligible, DCPS must devise an IEP, mapping out specific educational goals and requirements in light of the child's disabilities and matching the child with a school capable of fulfilling those needs. See 20 U.S.C. §§ 1412(a)(4), 1414(d), 1401(a)(14); *Sch. Comm. of Town of Burlington, Mass. v. Dep't of Educ. of Mass.*, 471 U.S. 359, 369, 105 S. Ct. 1996, 2002, 85 L. Ed. 2d 385 (1985); *Jenkins v. Squillacote*, 935 F.2d 303, 304 (D.C. Cir. 1991); *Dist. of Columbia v. Doe*, 611 F.3d 888, 892 n.5 (D.C. Cir. 2010).

As discussed below, the Act's FAPE requirement is satisfied "by providing personalized instruction with sufficient support services to permit the child to benefit educationally from that instruction." *Smith v. Dist. of Columbia*, 846 F. Supp. 2d 197, 202 (D.D.C. 2012), citing *Bd. of Educ. of Hendrick Hudson Cent. Sch. Dist. v. Rowley*, 458 U.S. 176, 203, 102 S. Ct. 3034, 73 L. Ed. 2d 690 (1982). The IDEA imposes no additional requirement that the services so provided be sufficient to maximize each child's potential. *Rowley*, 458 U.S. at 198. Congress, however, "did not intend that a school system could discharge its duty under the [Act] by providing a program that produces some minimal academic advancement, no matter how trivial." *Hall ex rel. Hall v. Vance County Bd. of Educ.*, 774 F.2d 629, 636 (4th Cir. 1985).

A Hearing Officer's determination of whether a child received a FAPE must be based on substantive grounds. In matters alleging a procedural violation, a Hearing Officer may find that a child did not receive a FAPE only if the procedural inadequacies (i) impeded

⁷⁹ Parent.

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the child's right to a FAPE; (ii) significantly impeded the parent's opportunity to participate in the decision-making process regarding the provision of a FAPE to the parent's child; or (iii) caused a deprivation of educational benefit. 34 C.F.R. 300.513(a). In other words, an IDEA claim is viable only if those procedural violations affected the child's *substantive* rights. *Brown v. Dist. of Columbia*, 179 F. Supp. 3d 15, 25-26 (D.D.C. 2016), quoting *N.S. ex rel. Stein v. Dist. of Columbia*, 709 F. Supp. 2d 57, 67 (D.D.C. 2010).

Petitioner shall carry the burden of production and persuasion, except on issues of the appropriateness of an IEP or placement on which Respondent shall have the burden of persuasion, if Petitioner establishes a prima facie case. D.C. Code Ann. § 38-2571.03(6); *Schaffer ex rel. Schaffer v. Weast*, 546 U.S. 49, 62, 126 S. Ct. 528, 537, 163 L. Ed. 2d 387 (2005). "Based solely upon evidence presented at the hearing, an impartial hearing officer shall determine whether . . . sufficient evidence [was presented] to meet the burden of proof that the action and/or inaction or proposed placement is inadequate or adequate to provide the student with a FAPE." 5-E D.C.M.R. § 3030.3.

Issue 1: *Whether DCPS denied Student a FAPE by failing to develop an appropriate IEP on 10/23/14, 10/19/15, and/or in May 2016 because: (a) his hours of specialized instruction and other supports were insufficient to address his "learned helplessness" and were not reasonably calculated to allow Student to achieve passing marks and advance from grade to grade; (b) his IEPs failed to address his attendance problem and decreased his behavioral support services; and (c) his IEPs failed to include a description of his specific LRE and placement, denying Parent the opportunity to participate in his educational decision-making. (Respondent has the burden of persuasion on this issue, if Petitioner establishes a prima facie case.)*

Petitioner established a prima facie case on Issue 1, shifting the burden of persuasion to Respondent. Respondent failed to meet its burden of proving that Student's challenged IEPs were appropriate, because it did not take adequate steps to try to address Student's longstanding attendance problems.

The applicable legal standard is whether Student's challenged IEPs were "reasonably calculated to produce meaningful educational benefit" and permit him to access the general education curriculum. See *Damarcus S. v. Dist. of Columbia*, 2016 WL 2993158, at *12 (D.D.C. May 23, 2016); *A.M. v. Dist. of Columbia*, 933 F. Supp. 2d 193, 204 (D.D.C. 2013), quoting *Rowley*, 458 U.S. at 206-07. The measure and adequacy of the IEPs are to be determined as of the times they were offered to Student. See, e.g., *S.S. ex rel. Shank v. Howard Rd. Acad.*, 585 F. Supp. 2d 56, 66 (D.D.C. 2008). The appropriateness of Student's IEPs are analyzed by considering the concerns raised by Petitioner relating to insufficient hours of specialized instruction, failure to address Student's attendance problems, and the IEPs' lack of LRE/placement descriptions, each of which is considered in turn. See 34 C.F.R. 300.320(a)(4),(5); *Honig*, 484 U.S. at 311.

(a) Turning first to Petitioner's assertion that the challenged IEPs lacked sufficient hours of specialized instruction, the undersigned notes that it is quite remarkable for Student to be many years behind grade level – 7 years behind in Reading, 6 years in Math and 4

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years in Writing – and in the same Grade for the fourth school year and yet his challenged IEPs have not increased services, but uniformly provided only 10 hours/week of specialized instruction inside general education and no specialized instruction outside general education. *See* 34 C.F.R. 300.324(b)(1) (must revise IEP to address lack of expected progress). Without more, this would suggest that Student’s IEPs did not provide adequate support to enable him to obtain educational benefit, as he certainly has not been achieving passing marks (with all “Fs” in 2015/16) or progressing from grade to grade. *See, e.g., K.S. v. Dist. of Columbia*, 962 F. Supp. 2d 216 (D.D.C. 2013), *quoting Rowley*, 458 U.S. at 204. However, the story is not that simple. The uncontested evidence from the development of Student’s most recent IEP on 5/18/16 is that DCPS proposed increasing support for Student with self-contained Math and English classes outside general education, but that increase was firmly opposed by Petitioner’s counsel after checking with Student who did not want classes outside general education.

It is hard to fault DCPS for not including services in Student’s IEP that he expressly rejected, and the undersigned declines to do so as an equitable matter. While Petitioner’s counsel at the due process hearing boldly pursued the assertion that DCPS has the responsibility to provide appropriate IEPs with the level of specialized instruction needed, whether Student wants it or not, it is clear to this Hearing Officer that Student would have voted with his feet by simply not showing up at self-contained classes that he opposed. Indeed, Student’s attendance issues are at the heart of this case, as discussed next.

(b) Petitioner next asserts that Student’s IEPs were inappropriate because they did not adequately address Student’s attendance problems and reduced Student’s Behavioral Support Services over time, rather than providing more support. Student’s 240 minutes/month of Behavioral Support Services in his 5/2/14 IEP were reduced to 180 minutes in his 10/23/14 IEP and then further cut to only 90 minutes/month in his 10/19/15 and 5/18/16 IEPs. However, it is not disputed that Student did not use even the support that was provided in his IEPs, so DCPS quite reasonably asserts that there is no point in setting aside services for Student if he is not going to use them. *See Garcia v. Board of Educ. of Albuquerque*, 2007 WL 5023652, (D.N.M. 2007) (IDEA does not provide a remedy where access to a FAPE is wide open, but the student refuses the educational opportunities afforded).

However, Student’s lack of engagement only excuses DCPS if it has made reasonable efforts to work with Student and gain his participation, as the IDEA does require a school district to respond to frequent absences. *See, e.g., Springfield Sch. Comm. v. Doe*, 623 F. Supp. 2d 150, 159 (D. Mass. 2009). Congress recognized in the IDEA that “social and emotional problems are not *ipso facto* separable from the learning process.” *Indep. Sch. Dist. No. 284 v. A.C.*, 258 F.3d 769, 776-77 (8th Cir. 2001). In *Long v. Dist. of Columbia*, 780 F. Supp. 2d 49, 61 (D.D.C. 2011), *quoting Harris v. Dist. of Columbia*, 561 F. Supp. 2d 63, 68 (D.D.C. 2008), the Court stated “it is important to note that ‘the IDEA . . . recognizes that the quality of a child’s education is inextricably linked to that child’s behavior.’”

The IDEA requires, in the case of a student whose behavior impedes his own learning or that of others, that the IEP team consider the use of positive behavioral

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interventions and supports, and other strategies, to address that behavior. 34 C.F.R. 300.324(a)(2)(i). Here, each of Student's IEPs clearly indicated that his behavior was impeding his or others' learning. It could hardly be plainer that Student's behavioral issues relating to class attendance blocked his own learning, for he has earned a total of only 3.5 credits during more than 3 years in Grade. Student's attendance has been recognized as a problem for years. Parent regularly raised concerns about Student's attendance, as did his teachers. Student missed 124 school days in 2014/15 and over 130 days in 2015/16 by mid-May.

The Court in *Long*, 780 F. Supp. 2d at 61, quoting *Harris*, 561 F. Supp. 2d at 68, further explained that an FBA is "essential" in addressing behavioral difficulties, so plays an integral role in the development of an IEP. See also *Boyd v. Idea Pub. Charter Sch.*, 42 F. Supp. 3d 217, 223 (D.D.C. 2014) (same); *James v. Dist. of Columbia*, 2016 WL 3461185, at *10 (D.D.C. June 21, 2016) (evaluation is to contribute to the development of the IEP). Further, "where a school fails to draft a BIP for a student, that failure may render the student's IEP unreasonable" if the IEP team does not review the FBA and consider positive behavioral interventions and supports, and other strategies to address the behavioral problems. *Beckwith v. Dist. of Columbia*, 2016 WL 4990591, at *2 (D.D.C. Sept. 15, 2016).

Here, DCPS failed to provide either FBAs or BIPs for Student during the last 2 years. While an FBA was conducted for an 11/8/13 eligibility meeting and Student had a BIP in 2009 and another prior to his 5/2/14 IEP, Student did not have an FBA/BIP in place as of 10/23/14 or since. The lack of an FBA is a serious omission, as it is needed to address Student's attendance problems by looking at the antecedents in his behavior. A BIP was to be completed after the 1/13/16 meeting, which was never done.

Nor was there anything else included in the challenged IEPs to address Student's attendance, as School Psychologist acknowledged. While the first of 3 social-emotional goals in Student's 5/2/14 IEP at least included "coming to school" and turning in class work, the challenged IEPs each omitted any reference to coming to school, and contained only a single social-emotional goal seeking to decrease Student's oppositional and aggressive behaviors.

Nor did attendance plans make up any slack. The attendance plan developed for Student on 1/13/16 was not detailed or thoughtful and consisted of only a few handwritten lines on the 4-page form, stating that Student was to "attend all classes" and get a document signed daily; Parent was to monitor Student's attendance and respond to "robo calls"; and school personnel were to make behavioral support available when Student was frustrated and provide undefined support for classes in which Student had concerns. An attendance plan had reportedly been completed the previous year as well, but was not even included in the record. School Psychologist recommended in her 3/11/16 Comprehensive Psychological report that the 1/13/16 Attendance Plan should be revised to try to improve Student's attendance in his classes. School Psychologist forthrightly testified that she continues to believe that a revised attendance plan would be helpful, as such plans don't necessarily work initially. Other members of Student's IEP team on 5/18/16 raised concerns about

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Student's lack of attendance and continuing struggles, but DCPS took no disclosed steps to update Student's attendance plan.

In terms of positive interventions, Student's 5/2/14 IEP at PCS noted that "positive reward systems" had been implemented in class. That statement was copied into Student's subsequent IEPs, but there was no indication that positive reward systems have been used in the last 2 years. To the contrary, when Petitioner's counsel suggested at the 5/18/16 meeting that DCPS provide a monetary reward to Student for each class he attended, the suggestion was strongly rejected at the meeting and again at the due process hearing. Clinical Psychologist convincingly testified about other steps DCPS could have taken – but did not – to attempt to address Student's attendance problems, from provided a trusted staff person for regular check-in and using a behavior contract with Student, to conducting an FBA as discussed above.

DCPS's defense was that Student's lack of attendance was not directly related to his disabilities, as he was found not to have an Emotional Disability with school phobia or school avoidance. DCPS asserted that Student was simply truant because of his own poor choices and lack of motivation, due to the influence of his friends and girlfriend, and the lack of consequences from Parent. However, there is no dispute that Student was generally going to school, so Parent was doing her part to get Student there. The problem was that after arriving at school Student was not going to class and sometimes left school early. Student has been disengaged from school for more than 2 years.

Much attention at the due process hearing was given to "learned helplessness," a concept that Clinical Psychologist emphasized to explain Student's situation, although she acknowledged that it is not an IDEA classification or a clinical diagnosis. Learned helplessness is essentially becoming so discouraged that Student had given up on being able to do any better at school, so saw no point in going to his classes. The evidence in this case was that Student did not attend classes regularly because he did not receive the help he needed and did not comprehend the work. When he did go to class he would sit at the back and do nothing because he "did not understand what was going on." This Hearing Officer is persuaded that if Student had received the support in his IEPs that he needed for his Specific Learning Disability (and also ADD in his 5/18/16 IEP), his attendance problems would have been minimized.

In sum, this Hearing Officer concludes that DCPS's failure to provide updated FBAs and BIPs and take other steps to address Student's attendance problems violated the IDEA and deprived Student of educational benefit, so are a denial of FAPE. *Long*, 780 F. Supp. 2d at 61 ("DCPS' failure to complete a BIP/FBA constitutes denial of a FAPE"); 34 C.F.R. 300.513(a).

(c) The final aspect of Issue 1 is whether DCPS adequately discussed Student's LRE/placement and included the requisite detail about Student's LRE/placement in his IEPs, thereby providing Student a FAPE. The legal standard is set forth in the Court's decision in *Brown v. Dist. of Columbia*, 179 F. Supp. 3d 15 (D.D.C. 2016), which found a student's IEP legally deficient because it failed to include a discussion of student's LRE and

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type of placement needed along the continuum of alternative placements. *See also* 34 C.F.R. 300.320(a)(5),(7); *A.I. ex rel. Iapalucci v. Dist. of Columbia*, 402 F. Supp. 2d 152, 159 (D.D.C. 2005). The insufficient IEP in *Brown*, 179 F. Supp. 3d at 27 n.2, merely stated the hours per week of specialized instruction and behavioral support, but omitted a sufficient description of student's LRE and placement.

Here, Parent and counsel regularly participated in discussions at IEP meetings, but the challenged IEPs only included the hours per week of specialized instruction and behavioral support, just as in *Brown*, rather than a more thorough description of what Student required for a FAPE. This Hearing Officer thus concludes that the minimal statements in Student's IEP did not meet the legal standard set forth in *Brown*, but that is simply a procedural violation of the IDEA, *id.* at 28 n.3, and not an automatic denial of a FAPE. Thus, the question is whether that failure amounted to a substantive violation under 34 C.F.R. 300.513(a) by significantly impeding Parent's opportunity to participate in decision-making regarding a FAPE, by impeding Student's right to a FAPE, or by depriving Student of educational benefit. *Brown*, 179 F. Supp. 3d at 25-26. Here, there was no lack of understanding of the special education services and specific setting that DCPS was proposing for Student in the challenged IEPs, and Petitioner's counsel could articulate no substantive harm during the due process hearing. Thus, the undersigned concludes that the failure to include a more detailed description of Student's LRE/placement in the challenged IEPs had no impact on Parent's participation in decision-making or on Student's education, and thus was not a substantive violation or a denial of FAPE.

In sum, Petitioner prevails on Issue 1, due to the lack of attention by DCPS to Student's attendance issues, including the failure to conduct FBAs and develop BIPs during the last 2 years. Student's lack of attendance was related to his disabilities by DCPS not providing the necessary support to Student so he could break out of the cycle of failure and be willing to participate. Appropriate compensatory education is awarded below for this denial of FAPE, along with the requirement that DCPS promptly update Student's FBA and BIP.

Issue 2: *Whether DCPS denied Student a FAPE by failing to comprehensively evaluate Student in all areas of suspected disability to address his persistent absences and tardiness by conducting FBAs and developing BIPs over the last two years. (Petitioner has the burden of persuasion on this issue.)*

Petitioner met her burden of proving that Student was denied a FAPE by DCPS failing to provide updated FBAs and BIPs to address Student's attendance problems.

As the public agency, DCPS must ensure that a child is "assessed in all areas related to the suspected disability, including, if appropriate, health, vision, hearing, social and emotional status, general intelligence, academic performance, communicative status, and motor abilities." 34 C.F.R. 300.304(c)(4). Decisions on the areas to be assessed are to be made based on the suspected needs of the child. Office of Special Education and Rehabilitative Services, U.S. Department of Education, *Analysis of Comments and Changes*, 71 Fed. Reg. 46643 (2006). In *Harris*, 561 F. Supp. 2d at 67, the Court made clear that an

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FBA is an “educational evaluation” that comes within 300.304(c)(4). In addition, as discussed in detail above, an FBA, followed by development of a BIP, is essential to addressing behavioral difficulties which are impeding a student’s learning, such as Student’s attendance issues. *See* 34 C.F.R. 300.324(a)(2)(i). Accordingly, this Hearing Officer concludes that DCPS violated these provisions to the educational detriment of Student. *See Long*, 780 F. Supp. 2d at 60-61 (“failure to complete all necessary evaluations results in a substantive denial of FAPE”). This issue further supports the award of compensatory education and updated FBA and BIP as ordered below.

Remedies

Compensatory Education. The IDEA gives Hearing Officers “broad discretion” to award compensatory education as an “equitable remedy” for students who have been denied a FAPE. *See Reid ex rel. Reid v. Dist. of Columbia*, 401 F.3d 516, 522-23 (D.C. Cir. 2005); *B.D. v. Dist. of Columbia*, 817 F.3d 792, 797-98 (D.C. Cir. 2016); *Hill v. Dist. of Columbia*, 2016 WL 4506972, at *25 (D.D.C. Aug. 26, 2016) (IDEA prescribes broad discretion in fashioning relief for educational deprivation). The proper amount of compensatory education, if any, depends on how much more progress Student might have shown if he had received the required special education services, and the type and amount of services that would place Student in the same position he would have occupied but for DCPS’s violations of the IDEA. *See Walker v. Dist. of Columbia*, 786 F. Supp. 2d 232, 238-239 (D.D.C. 2011), *citing Reid*, 401 F.3d 516. In short, “compensatory education aims to put a student . . . in the position he would be in absent the FAPE denial.” *B.D.*, 817 F.3d at 798.

The Circuit Court for the District of Columbia recently made plain that “compensatory education awards require a ‘flexible approach’ tailored to the facts of each case, and, as we made clear in *Reid*, a mechanical award of services identical to those wrongly denied is inappropriate. *Reid*, 401 F.3d at 524.” *B.D.*, 817 F.3d at 799. While there is “difficulty inherent in figuring out both what position a student would be in absent a FAPE denial and how to get the student to that position,” *id.*, that does not permit the effort to be avoided. *See Henry v. Dist. of Columbia*, 750 F. Supp. 2d 94, 98 (D.D.C. 2010) (a disabled student who has been denied special education services is entitled to a tailored compensatory education award and limitations of the record are no excuse). Moreover, a student is not required “to have a perfect case to be entitled to compensatory education.” *Cousins v. Dist. of Columbia*, 880 F. Supp. 2d 142, 148 (D.D.C. 2012) (citations omitted). Indeed, “hearing officers are reminded that ‘[t]he essence of equity jurisdiction’ is ‘to do equity and to mould each decree to the necessities of the particular case.’” *Lopez-Young v. Dist. of Columbia*, 2016 WL 5485101, at *9 (D.D.C. Sept. 29, 2016), *quoting Reid*, 401 F.3d at 523-24.

Based on careful consideration of the facts and circumstances resulting in the denial of FAPE found above, this Hearing Officer awards (a) 125 hours of independent academic tutoring in Reading, Writing and/or Math, and (b) 100 hours of independent mentoring from a male mentor, if possible, as recommended by Clinical Psychologist. The undersigned bases this award on the Compensatory Education Plan offered by Petitioner, as adjusted slightly upward by the undersigned to take into account Student’s serious deficits as set

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forth in the findings and conclusions of this HOD. Finally, the hours awarded are to be used within 18 months from the date of this HOD in order to ensure that the remedial services Student needs are obtained without undue delay, along with minimizing any administrative burdens on Respondent that would result from a compensatory education award stretching over an excessively long timeframe.

FBA/BIP. As discussed above, this Hearing Officer concluded that updated FBAs should have been conducted and BIPs developed by DCPS to address Student's attendance problems. While Student is now meeting with more success at Public School in 2016/17, with better attendance and much improved grades, by no means does that mean that his problems have been resolved and his path will be easy. School Psychologist acknowledged that Students often have an initial "honeymoon" at a new school when they do better before settling back to their previous ways. Clinical Psychologist already observed Student at Public School in 2016/17 when he was sitting disengaged in the back of the class. While it is curious that Petitioner's counsel did not seek an FBA/BIP as a remedy, in an exercise of equitable discretion the undersigned orders below an updated FBA/BIP to be prepared.

Other Aspects. As ordered below, once the FBA is conducted and a draft BIP developed, Student's IEP team is to promptly meet to revise his IEP as appropriate to (a) add any further modifications needed to address Student's attendance issues, (b) increase specialized instruction as agreed by the IEP team (including Parent and Student), with consideration given to specialized instruction outside general education, (c) include at least 1 hour/week of behavioral support services, and (d) add an adequate description of Student's LRE/placement. Finally, while credit recovery was sought by Clinical Psychologist in her Compensatory Education Plan, it is not included as a remedy by the undersigned based on the prevarication of Clinical Psychologist on the issue at the due process hearing and the credible testimony of School Psychologist that credit recovery is available at Public School.

ORDER

Petitioner has prevailed as set forth above. Accordingly, **it is hereby ordered that:**

(1) Within 20 school days, DCPS shall conduct a Functional Behavioral Assessment (FBA) and develop a draft Behavioral Intervention Plan (BIP) based on the FBA and have the draft BIP available at the IEP team meeting required in paragraph (2) below for review and finalization.

(2) Within 10 school days after completing the draft BIP in paragraph (1) above, DCPS shall convene an IEP team meeting to review and finalize the BIP and to review and revise Student's IEP as appropriate, including (a) modifications to adequately address Student's attendance issues, (b) additional specialized instruction, as agreed by the IEP team (including Parent and Student), (c) at least 1 hour/week of behavioral support services, and (d) an adequate description of Student's LRE and placement.

(3) Compensatory education for the denial of FAPE in this case shall consist of DCPS funding (a) 125 hours of independent academic tutoring in Reading, Writing and/or

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Math, and (b) 100 hours of independent mentoring, all to be used within 18 months from the date of this HOD; any unused hours will be forfeited. DCPS shall authorize such services within 10 business days after Petitioner's written selection of service providers.

Any and all other claims and requests for relief are **dismissed with prejudice**.

IT IS SO ORDERED.

Dated in Caption

/s/ Keith Seat

Keith L. Seat, Esq.
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).

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