

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

OSSE
Office of Dispute Resolution
February 13, 2021

STUDENT, by and through
PARENT, Attorney in Fact,¹

Date Issued: February 13, 2021

Petitioner,

Hearing Officer: Peter B. Vaden

v.

Case No: 2020–0195

DISTRICT OF COLUMBIA
PUBLIC SCHOOLS,

Online Video Conference Hearing

Hearing Date: February 8, 2021

Respondent.

HEARING OFFICER DETERMINATION

INTRODUCTION AND PROCEDURAL HISTORY

This matter came to be heard upon the Administrative Due Process Complaint Notice filed by MOTHER, Attorney-in-Fact for the adult student, under the Individuals with Disabilities Education Act, as amended (the IDEA), 20 U.S.C. § 1400, *et seq.*, and Title 5-E, Chapter 5-E30 of the District of Columbia Municipal Regulations (“D.C. Regs.”). In her due process complaint, Petitioner alleges that Student has been denied a free appropriate public education (FAPE) by Respondent District of Columbia Public Schools’ (DCPS) failure to timely reevaluate Student for special education needs, failure to conduct a functional behavior assessment and develop a behavior intervention plan, failure to develop an appropriate Individualized Education Program (IEP) and failure to fully implement Student’s IEPs.

¹ Personal identification information is provided in Appendix A.

Petitioner's Due Process Complaint, filed on November 2, 2020, named DCPS as Respondent. The undersigned hearing officer was appointed on November 3, 2020. On November 16, 2020, I convened a telephone prehearing conference with counsel to discuss the issues to be determined, the hearing date and other matters. On November 12, 2020, the parties met for a resolution session and were unable to resolve the issues in dispute. My final decision in this case was originally due by January 16, 2021. The earliest due process hearing dates, mutually available to the parties and counsel, were February 8 and 9, 2021. On December 11, 2020, to accommodate the February hearing dates, I granted DCPS' unopposed motion to extend the final decision due date to February 19, 2021.

Due to the closing of the hearing rooms at the Office of Dispute Resolution in the wake of the COVID-19 virus outbreak, the due process hearing was held on line and recorded, using the Microsoft Teams video conference platform. The hearing, which was closed to the public, was convened before the undersigned impartial hearing officer on February 8, 2021. Mother appeared on line for the hearing and was represented by PETITIONER'S COUNSEL. Respondent DCPS was represented by LEA REPRESENTATIVE and by DCPS' COUNSEL. The hearing was completed in one day.

Counsel for Petitioner made an opening statement. Mother and Student testified and called as additional witnesses EDUCATIONAL ADVOCATE 1 and EDUCATIONAL ADVOCATE 2. DCPS waived making an opening statement and called no witnesses. Petitioner's Exhibits P-5 through P-32 were admitted into evidence, including Exhibits

P-30 and P-32 admitted over DCPS' objections. DCPS offered Exhibits R-1, R-3, R-4, R-6 and R-9 through R-18, which were admitted into evidence without objection. After Petitioner's case in chief was completed, DCPS made a motion for a partial directed finding which I took under advisement.

Following presentation of the evidence, counsel for the respective parties made oral closing arguments. Neither party requested leave to file written closings.

JURISDICTION

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

ISSUES AND RELIEF SOUGHT

The issues for determination in this case, as certified in the November 16, 2020 Prehearing Order, are:

- a. Whether District of Columbia Public Schools (DCPS) denied Student a FAPE by failing to timely comprehensively reevaluate Student in all areas of suspected disability from the start of the 2018-2019 school year through the date of the Resolution Session in this case;
- b. Whether DCPS denied Student a FAPE by failing to ensure that an appropriate IEP was timely developed for Student because the IEP dated May 2019 had expired by May 2020, and because the IEPs that were developed, including the May 2019 IEP and any amendments, were not reasonably calculated to enable Student to make progress in light of the fact that the Student 1) was not provided with updated testing to populate the IEP; 2) Student had failed to make academic or behavior progress since coming to CITY SCHOOL; and because 3) DCPS failed to address student's post-graduation or transition plan.
- c. Whether DCPS denied the Student a FAPE for the failure to conduct, create, and implement an appropriate functional behavior assessment (FBA), an

appropriate and corresponding BIP and/or an appropriate safety plan, from the time Student started at City School until the present.

- e. Whether for the last two school years, DCPS failed to fully implement Student's IEPs with fidelity.

For relief Petitioner originally requested that the hearing officer order as follows,

- a) Student shall be awarded compensatory education for the alleged denials of FAPE, including failing to reevaluate Student before the fall of 2020. (Petitioner requested to reserve the right to request additional compensatory education until after the completion of the requested evaluations);
- b) DCPS be ordered to ensure that Student's IEP be updated to include annual goals based on any findings and recommendations from the evaluations requested as well as an appropriate amount of specialized instruction and an appropriate amount of behavioral support services;
- c) DCPS be ordered to provide a guarantee of timely payment to providers for any independent evaluation conducted and any compensatory education awarded.

FINDINGS OF FACT

After considering all of the evidence received at the due process hearing in this case, as well as the argument of counsel, my findings of fact are as follows:

1. Student, an AGE young adult, resides in the District of Columbia with Mother. Testimony of Mother. Student has appointed Mother as Student's attorney-in-fact for educational matters. Exhibit P-32. Student is eligible for special education under the Specific Learning Disability (SLD) classification. Exhibit P-16.
2. For the 2020-2021 school year, Student is enrolled in City School, a DCPS public school. Mother initially enrolled Student in City School in late February 2019. Before enrolling in City School, Student was enrolled in PUBLIC CHARTER SCHOOL

(PCS), a separate local education agency (LEA) in the District of Columbia. Testimony of Mother.

3. Student was initially evaluated for special education eligibility in spring 2018 by PCS. At the time, Student has just completed GRADE and faced being retained due to poor academic progress. Mother, who was then represented by ATTORNEY A, requested a Comprehensive Psychological Evaluation of Student. Exhibit P-7.

4. PSYCHOLOGIST conducted a thorough psychological evaluation of Student in late June 2018. In her August 13, 2018 evaluation report, Psychologist reported, *inter alia*, that Student's general cognitive ability assessed within the Very Low range. Psychologist reported that Student's performance was impacted by low frustration tolerance, the tendency to give up easily, and impulsive responding. Psychologist held out that Student may show slightly better functioning when Student can persevere with challenging items and sustain attention and effort. Student's visual processing speed abilities measured within the Average range. Student's verbal comprehension and expressive abilities assessed in the Low Average range. Student's weakness in vocabulary knowledge will impact verbal comprehension and reading comprehension. Student's working memory abilities assessed in the Low Average range. Student's performance was suggestive of a marked weakness in fluid/nonverbal reasoning (Very Low range); Student performed well below the expected range on a task of visual-motor integration. On the educational achievement assessment (Woodcock-Johnson IV Tests of Achievement), Student's overall academic skills assessed well below

the expected range for the chronological age (approximately 6 to 8 years below chronological age). Psychologist concluded that Student met diagnostic criteria for a Specific Learning Disorder with Impairment in Reading and a Specific Learning Disorder with Impairment in Mathematics. Student's learning problems were compounded by low frustration tolerance, low self-esteem, anxiety, and fluctuating attention and effort. Based on a teacher's response to behavior rating scales, Student displayed several areas of concern with a high degree of both internalizing and externalizing behavior problems. The teacher reported that Student frequently came to class unprepared, was easily distracted from class work, was easily stressed and overly emotional, was irritable and argumentative, and seemed lonely. Student was reported to have considerable difficulty keeping up in class, finding information when needed, meeting deadlines, completing academic work, and bringing materials to class. On self-report measures of emotionality, Student self-rated within the "At-Risk" range for depression and anxiety. Taking all of the information together, Psychologist concluded that Student met criteria for Adjustment Disorder With Mixed Disturbance of Emotions and Conduct — Persistent (Chronic). There was also some evidence to suggest problems with attention, impulsiveness, and executive functioning, however Student did not meet the strict diagnostic criteria for Attention Deficit-Hyperactivity Disorder (ADHD). Psychologist diagnosed Student with Specific Learning Disorder with Impairments in Reading and Mathematics and Adjustment Disorder with Mixed Disturbance of Emotions and Conduct — Persistent (Chronic). Psychologist recommended that Student

appeared eligible for special education services under the IDEA classification of SLD.

Exhibit P-7.

5. On August 10, 2018, PCS determined that Student was eligible for special education under the SLD disability classification. Exhibit P-9. Student's initial September 11, 2018 PCS IEP identified Mathematics, Reading, Written Expression and Social-Emotional-Behavioral Development as areas of concern. The initial IEP provided for Student to receive 15 hours per week of Specialized Instruction focused on Mathematics and Reading, including 3 hours outside the general education setting, 2 hours per month of Specialized Instruction outside general education for other academic classes and 120 minutes per month of Behavioral Support Services. Petitioner was represented by Attorney A at the initial IEP meeting. All team members were in agreement for the September 11, 2018 IEP. Exhibits P-9, P-10.

6. Through the 2nd grading period of the 2018-2019 school year at PCS, Student was reported to be progressing on most IEP academic goals, but not progressing on behavior goals. Exhibit P-19.

7. According to a January 31, 2019 PCS Prior Written Notice (PWN), Student's PCS IEP team met on January 29, 2019 to discuss Student's progress under the initial September 11, 2018 IEP and discuss ways to increase Student's progress. Mother and Student requested a more restrictive learning environment for math and reading. Student also expressed anxiety managing frustration due to have to repeat Grade. The IEP team decided to amend Student's IEP to reduce Specialized Instruction

Services in the general education setting from 12 to 6 hours per week and to increase Specialized Instruction outside general education from 3.5 hours to 7 hours per week. The team also decided to increase Student's Behavioral Support Services from 120 minutes to 240 minutes per month. Exhibits P-24.

8. In the February 9, 2019 PCS amended IEP, Student's Specialized Instruction Services were changed to 6 hours per week in the general education setting and 3.5 hours per week outside general education. This discrepancy from the hours of services outside general education stated in the January 31, 2019 PCS PWN was not explained at the due process hearing. The February 9, 2019 amended IEP increased Student Behavioral Support Services to 240 minutes per month. Exhibit P-12.

9. In February 2019, Student and a sibling were allegedly "jumped" by a group of male PCS students. After that incident, Student did not feel safe at PCS. Testimony of Student. After investigating alternative school options, Mother transferred Student to DCPS and enrolled Student in City School. Testimony of Mother. The date of enrollment was February 26, 2019. Stipulation of Counsel.

10. After Student transferred to City School, DCPS did not develop a new IEP for Student until May 9, 2019. Exhibit P-13. Student was not enrolled in an English class at City School for the 2018-2019 school year. Exhibit P-19.

11. Student's class attendance was a chronic problem after Student enrolled in City School. From May 10 through June 19, 2019, Student accrued 21 unexcused absences. At the time of the May 9, 2019 IEP team meeting, Student had last attended

math class two weeks before the April 15, 2019 spring break. Exhibit P-14.

12. Student completed a Strengths and Difficulties Questionnaire (SDQ) for City School on April 9, 2019. Student's responses indicated Student was "Borderline" for Emotional and for Peer Problems. These responses indicated that Student may have some difficulties managing emotions and dealing with peer conflicts. Exhibit P-15.

13. City School convened an IEP team meeting on May 9, 2019 to review and revise Student's IEP. The hearing evidence does not show that DCPS conducted any formal assessments of Student prior to the meeting, except for the April 9, 2019 SDQ questionnaire. Due to Student's poor school attendance, incomplete assignments and lack of progress, the IEP team left Student's annual goals essentially unchanged from the February 11, 2019 PCS IEP. At the May 9, 2019 IEP meeting, the City School IEP team changed Student's Specialized Instruction Services to 10 hours per week, all in the general education setting, and reduced Behavioral Support Services from 240 minutes to 120 minutes per month. The team also added 120 minutes per month of Specialized Instruction consultation services. Exhibits P-12, P-13.

14. At the May 9, 2019 IEP team meeting, it was reported that Student has earned only 2 high school credits and needed 24 credits to graduate. Student stated a preference for fewer classes. The City School principal removed Student from Computer Science and Art classes. Exhibit P-14.

15. Student's City School IEP was amended on May 22, 2019 to change annual goals and present levels of performance for a single area of concern (apparently

Social, Emotional and Behavioral development). Exhibit P-15.

16. For the last term of the 2018-2019 school year at City School, Student was reported not to be progressing on IEP goals. This was attributed to Student's absenteeism. Student did not have an English class scheduled at City School for the second semester of the 2018-2019 school year. Exhibit P-19.

17. For the first term of the 2019-2020 school year, Student was reported to be progressing on Reading and Written Language IEP goals. Student did not have a math class scheduled for the first term of the 2019-2020 school year. Exhibit P-19.

18. In the 2019-2020 school year, Student accrued 42 unexcused school absences between September 4 and December 18, 2019. Exhibit P-21.

19. City School made a truancy referral for Student to the DC Superior Court on December 31, 2019. The truancy referral form stated that interventions attempted included phone call, letter, certified letter, in-person conference, attendance intervention plan, SST or Attendance Committee meeting, Referral to in-school resource (*i.e.*, counselor) and Referral to community organization. The truancy referral form states, erroneously, that Student was not a special education student. Exhibit P-21.

20. On February 7, 2020, DCPS issued a Prior Written Notice to inform the parent that Student had been withdrawn from City School for non-attendance and non-responsiveness to outreach efforts. The PWN stated that although Student had been withdrawn, special education services would be available until the end of the semester when Student turned 22 and that Student may enroll to receive the FAPE that was

offered in Student's IEP. Exhibit P-24. Mother did not re-enroll Student until August 2020. Testimony of Mother. (Whether DCPS' February 2020 involuntary non-attendance withdrawal of Student was unlawful, or resulted in a denial of FAPE, has not been pleaded as an issue in this case.)

21. DCPS schools have been closed, with some distance learning provided, since March 16, 2020 due to the COVID-19 Coronavirus emergency. Hearing Officer Notice.

22. In August 2020, Mother re-enrolled Student at City School for the 2020-2021 school year. At the request of Petitioner's Counsel, City School scheduled an IEP team meeting for October 13, 2020. Mother, Student, Petitioner's Counsel and Educational Advocate 2 attended the IEP team telephone meeting. At the meeting, the parent's representatives requested new assessments of Student including a full psychological battery, educational test, and possibly Occupational Therapy (OT), Speech and Language and FBA assessments. City School had provided a draft revised IEP to counsel shortly before the meeting, but the IEP team did not complete development of the revised IEP. Exhibit P-17.

23. On October 30, 2020, Educational Advocate sent a "dissent letter" by email to LEA Representative, stating the parent was requesting an increase of Student's hours in the resource setting for all core academic courses, that Student be provided a full schedule of courses each term, including English Language Arts, Math, Social Studies, Science and electives, that Student be provided 240 minutes per month of

Behavior Support Services and that Student receive evaluations to include a Comprehensive Psychological Evaluation, an OT evaluation, a Speech and Language evaluation, an FBA and a Vocational Level I or II evaluation. Exhibits P-18, P-30.

24. On October 27, 2020, DCPS issued funding authorization for the Student to obtain Independent Educational Evaluation (IEE) Comprehensive Psychological and Speech-Language evaluations. On January 14, 2021, DCPS issued funding authorization for the Student to obtain an OT evaluation. On February 1, 2021, DCPS issued funding authorization for the Student to obtain, independently, 355 hours of tutoring and 50 hours of counseling by a psychologist. Exhibits R-13, R-14, R-15.

25. DCPS' Counsel represented on the record at the due process hearing that DCPS was ready to conduct an FBA of Student upon Student's return to in-person classes after schools reopen.

CONCLUSIONS OF LAW

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

Burden of Proof

As provided in the D.C. Special Education Student Rights Act of 2014, the party who filed for the due process hearing, the Petitioner in this case, shall bear the burden of production and the burden of persuasion, except that where there is a dispute about the appropriateness of the student's IEP or placement, or of the program or placement proposed by the local education agency, in this case DCPS, the agency shall hold the

burden of persuasion on the appropriateness of the existing or proposed program or placement; provided that the Petitioner shall retain the burden of production and shall establish a *prima facie* case before the burden of persuasion falls on the agency. The burden of persuasion shall be met by a preponderance of the evidence. *See* D.C. Code § 38-2571.03(6).

Analysis

- a. Did DCPS deny Student a FAPE by failing to timely comprehensively reevaluate Student in all areas of suspected disability from the start of the 2018-2019 school year through the date of the Resolution Session in this case?

Student was initially evaluated for special education eligibility in August 2018, when Student was enrolled at PCS. PCS' initial evaluation of Student included a Comprehensive Psychological Evaluation completed by Psychologist. On August 10, 2018, PCS determined Student eligible for special education under the SLD disability classification. Student's initial IEP was developed by PCS' IEP team on September 11, 2018 and was revised at PCS on February 11, 2019. On February 26, 2019, Student transferred from PCS to DCPS and enrolled in City School, following an incident when Student and a sibling were allegedly jumped by PCS students. DCPS then became Student's LEA. Several months later, on May 9, 2019, City School convened an IEP team meeting to review and revise Student's IEP. Except for having Student complete a Strengths and Difficulties Questionnaire in April 2019, DCPS has not conducted any formal reevaluation of Student. Petitioner contends that by not conducting a

reevaluation, DCPS denied Student a FAPE. DCPS responds that Student is not due for a reevaluation before the August 2021 triennial reevaluation date. Petitioner has the burden of persuasion on this issue.

PCS' initial evaluation to determine if Student had a qualifying disability was completed on August 10, 2018. The IDEA requires that a special education reevaluation must occur at least once every three years, and not more frequently than once a year, unless the parent and the public agency agree otherwise. *See* 34 C.F.R. § 300.303. In the normal course, Student's triennial reevaluation would be due by August 2021. In addition to conducting triennial reevaluations, the District must also reevaluate a child with a disability if the District determines that the educational or related services needs of the child warrant a reevaluation, or if the child's parent or teacher requests a reevaluation. *See* 34 C.F.R. § 300.303(a); U.S. Department of Education, *Assistance to States for the Education of Children with Disabilities*, 71 Fed. Reg. 46540, 46640 (August 14, 2006). There was no evidence at the hearing in this case that the parent or a teacher requested a reevaluation of Student until a request was made by the parent's representatives at an October 13, 2020 IEP team meeting at City School.

Educational Advocate 1 opined that DCPS should have determined that a reevaluation of Student was warranted by May 2019, because Student had changed schools after a traumatic assault incident and because after enrolling in City School, Student had poor school attendance and showed no academic progress. I disagree. First, neither the IDEA nor applicable regulations require the new LEA to reevaluate a

student upon a transfer from another LEA in the same state. *Cf. Coleman v. Pottstown Sch. Dist.*, 983 F. Supp. 2d 543, 570 (E.D. Pa. 2013), *aff'd in part*, 581 F. App'x 141 (3d Cir. 2014) (District complied with federal regulations in relying on the evaluations from prior LEA in creating a new IEP for interstate transferring student with a prior IEP in place.)

Moreover, Student's challenges at City School, notably trauma-related anxiety and absenteeism, were similar to what Student was already experiencing when Student was evaluated at PCS in summer 2018. Psychologist reported in the July 2018 Comprehensive Psychological Report that Student had reported being jumped by peers outside of school and having endured bullying at a previous school. Psychologist reported that a PCS teacher's responses to behavior rating scales yielded the highest, "Clinically Significant", elevations in all behavior assessment ratings for Student, including hyperactivity, aggression, conduct problems, anxiety, depression, withdrawal, attention problems, externalizing problems, internalizing problems behavioral symptoms, learning problems and school problems. Based on these data and other information from Student and PCS, Psychologist diagnosed Student with Adjustment Disorder with Mixed Disturbance of Emotions and Conduct - Persistent (Chronic), in addition to having a Specific Learning Disability. Petitioner's expert, Educational Advocate 1, opined in her testimony that the PCS summer 2018 Comprehensive Psychological Evaluation of Student was very thorough and very good.

Because it does not appear that Student's challenges at City School – trauma

related anxiety, poor attendance and failing grades – differed significantly from how Student presented when evaluated at PCS, Petitioner has not shown that DCPS had cause to decide that Student’s educational or related services needs warranted a special education reevaluation after the transfer. *See* 34 C.F.R. § 300.303(a). Nor did the parent request a reevaluation at that time. I find that Petitioner has not met her burden of persuasion that DCPS denied Student a FAPE by failing to conduct a reevaluation of Student prior to the parent’s request in October 2020.

- b. Did DCPS deny Student a FAPE by failing to ensure that an appropriate IEP was timely developed for Student because the IEP dated May 2019 had expired by May 2020?

When Student transferred from PCS to DCPS in February 2019, DCPS did not develop a new IEP for Student. After the transfer, DCPS was, therefore, required to provide services comparable to those described in the PCS February 11, 2019 Amended IEP. *See* 34 C.F.R. § 300.323(e).² City School developed a new, DCPS, IEP for Student

² IEPs for children who transfer public agencies in the same State. If a child with a disability (who had an IEP that was in effect in a previous public agency in the same State) transfers to a new public agency in the same State, and enrolls in a new school within the same school year, the new public agency (in consultation with the parents) must provide FAPE to the child (including services comparable to those described in the child’s IEP from the previous public agency), until the new public agency either—

- (1) Adopts the child’s IEP from the previous public agency; or
- (2) Develops, adopts, and implements a new IEP that meets the applicable requirements in §§300.320 through 300.324.

34 C.F.R. § 300.323(e).

on May 9, 2019. City School next reviewed Student's IEP on October 13, 2020.

Petitioner contends that this 17-month interval between the City School IEP reviews was a denial of FAPE. Petitioner has the burden of persuasion on this issue.

The IDEA requires that a local education agency (LEA) must ensure that an IEP team reviews the child's IEP periodically, but not less than annually, to determine whether the annual goals for the child are being achieved. At the annual review meeting, the team must revise the IEP as appropriate to address annual goals, results of any reevaluation, information about the child, the child's anticipated needs, or other matters. 34 C.F.R. §§ 300.324(b)(1) (i)-(ii), 300.324(b)(2). Under the IDEA's annual review mandate, DCPS was obliged to ensure that Student's May 9, 2019 IEP was reviewed and revised, as appropriate by May 2020.

On February 7, 2020, DCPS unilaterally withdrew Student from City School for non-attendance and non-responsiveness to outreach efforts. The parent did not re-enroll Student in school until August 2020. Whether or not DCPS' February 2020 "unenrollment" of Student was lawful is not at issue in this case. However, DCPS' unilateral withdrawal of Student did not relieve the District of its obligation under the IDEA to continue to provide Student a FAPE. *See, e.g., District of Columbia v. Wolfire*, 10 F. Supp. 3d 89 (D.D.C. 2014) (The IDEA's basic rule is that the state must ensure that "[a] free appropriate public education is available to *all* children with disability residing in the State between the ages of 3 and 21." *Id.* at 93 (emphasis in original), *citing* 20 U.S.C. § 1412(a)(1)(A)). That obligation included holding an annual IEP review meeting.

I find, therefore, that DCPS' failure to convene an IEP review meeting for Student by May 2020 violated the IDEA's annual review requirement.

The failure to hold a timely IEP review meeting is a procedural violation of the IDEA. *See, e.g., D.R. ex rel. Robinson v. Government of District of Columbia*, 637 F.Supp.2d 11, 18 (D.D.C.2009) (DCPS' delay in convening the team meeting amounts to a failure to meet procedural deadline.) Procedural violations of the IDEA may only be deemed a denial of FAPE if the procedural inadequacies—

- (i) Impeded the student's right to a FAPE;
- (ii) Significantly impeded the parent's (or adult student's) opportunity to participate in the decision-making process regarding the provision of a FAPE to the student; or
- (iii) Caused a deprivation of educational benefit.

See 34 C.F.R. § 300.513(a)(2). In this case, Student's DCPS IEP was due for an annual review in May 2020, near the end of the 2019-2020 school year. At that time, DCPS schools were closed due to the COVID-19 virus. DCPS convened an IEP meeting for Student on October 13, 2020, after Student re-enrolled at City School for the 2020-2021 school year. In light of these circumstances, that is, the relatively short period of time, outside of summer break, that Student went without the IEP review and the unavoidable disruption to all children's education due to the COVID-19 school closing, I find that Petitioner has not met her burden of persuasion that the District's failure to review Student's May 9, 2019 IEP before October 2020 impeded Student's right to a FAPE, significantly impeded Mother's opportunity to participate in the decision making

process or caused a deprivation of educational benefit. In this case, DCPS' procedural violation of not timely conducting Student's annual IEP review did not rise to a denial of FAPE.

- c. Did DCPS deny Student a FAPE because the IEPs developed for Student, including the May 2019 IEP and any amendments, were not reasonably calculated to enable Student to make progress in light of the facts that 1) Student was not provided with updated testing to populate the IEP; 2) Student had failed to make academic or behavior progress since coming to City School; and 3) DCPS failed to address Student's post-graduation or transition plan?

On May 9, 2019, Student's IEP team at City School reviewed and revised the February 11, 2019 amended IEP which had been developed for Student at PCS. The PCS amended IEP had identified Mathematics, Reading, Written Expression and Social-Emotional-Behavioral Development as areas of concern for Student and provided for 9.5 hours per week of Specialized Instruction, including 3.5 hours outside the general education setting, and 240 minutes per month of Behavioral Support Services.

When the City School IEP team met on May 9, 2019, teachers reported that due to poor attendance, Student was not on track to pass. The school social worker stated that traumatic events at previous schools may impact Student's progress, that Student scored in the low range for peer relationships and that Student needed to learn to self-regulate emotions. Because of Student's lack of progress, the City School IEP team left Student's IEP annual academic goals unchanged. The IEP team changed Student's Specialized Instruction Services to 10 hours per week, all in the general education setting and cut Student's Behavioral Support Services to 120 minutes per month. I find

that through the testimony of her expert witnesses, Petitioner made a *prima facie* showing that this IEP was not adequate for Student. Therefore, DCPS must shoulder the burden of persuasion as to the May 9, 2019 IEP's appropriateness.

In *Endrew F. ex rel. Joseph F. v. Douglas Cty. Sch. Dist. RE-1, supra*, the U.S. Supreme Court elaborated on the standard, first enunciated *Bd. of Educ. v. Rowley*, 458 U.S. 176, 102 S.Ct. 3034, 73 L.Ed.2d 690 (1982), for what constitutes an appropriate IEP under the IDEA:

To meet its substantive obligation under the IDEA, a school must offer an IEP reasonably calculated to enable a child to make progress appropriate in light of the child's circumstances. *Endrew F.*, 137 S.Ct. at 999. . . . The 'reasonably calculated' qualification reflects a recognition that crafting an appropriate program of education requires a prospective judgment by school officials. *Id.* . . . Any review of an IEP must appreciate that the question is whether the IEP is *reasonable*, not whether the court regards it as ideal. *Id.* (emphasis in original.) . . . The IEP must aim to enable the child to make progress. . . . [T]he essential function of an IEP is to set out a plan for pursuing academic and functional advancement. *Id.* . . . A focus on the particular child is at the core of the IDEA. The instruction offered must be "*specially designed*" to meet a child's "*unique needs*" through an "*individualized education program.*" An IEP is not a form document. It is constructed only after careful consideration of the child's present levels of achievement, disability and potential for growth. *Id.* (emphasis in original.) . . . 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. *Id.*, 137 S.Ct. at 1002.

See, also, Z. B. v. District of Columbia, 888 F.3d 515 (D.C. Cir. 2018).

Despite Student's lack of academic progress prior to the May 9, 2019 IEP review meeting and Student's chronic absenteeism, the City School IEP team curtailed Student's specialized instruction services outside the general education classroom. The

IEP team also reduced Student's Behavioral Support Services from 240 minutes to 120 minutes per month. At the due process hearing DCPS failed to provide a "cogent and responsive explanation" for the IEP team's decision to cut back Student's IEP services. In fact, DCPS called no witnesses at all. I find that DCPS has not met its burden of persuasion that the services provided in the May 9, 2019 IEP were reasonably calculated to enable Student to make progress appropriate in light of Student's circumstances.

Petitioner also contends that in the May 9, 2019 IEP, DCPS failed to address student's post-graduation or transition plans. The IDEA's transition services provisions require that beginning not later than the first IEP to be in effect when the student turns 16, the IEP must include—

- (1) Appropriate measurable post-secondary goals based upon age appropriate transition assessments related to training, education, employment, and, where appropriate, independent living skills; and
- (2) The transition services (including courses of study) needed to assist the child in reaching those goals.

34 C.F.R. § 300.320(b). In the May 9, 2019 IEP, the City School IEP team largely repeated the transition plan goals and services from Student's February 11, 2019 PCS IEP. These included goals and services for post-secondary education and training, employment and independent living. Petitioner did not make a *prima facie* showing that the Post-Secondary Transition Plan in the May 9, 2019 IEP was not appropriate for Student. I find, therefore, that Petitioner has not met her burden of persuasion as to the inappropriateness of the IEP transition plan.

- d. Did DCPS deny Student a FAPE for the failure to conduct, create, and implement an appropriate functional behavior assessment (FBA), an appropriate and corresponding behavior intervention plan (BIP) and/or an appropriate safety plan, from the time student started at City School until the present?

The IDEA requires that, in the case of a student whose behavior impedes his or her learning or that of others, the IEP team consider the use of positive behavioral interventions and supports, and other strategies, to address that behavior. *See* 20 U.S.C. § 1414(d)(3); 34 C.F.R. § 300.324(a)(2)(i). *See, also*, Department of Education, *Assistance to States for the Education of Children with Disabilities*, 71 Fed. Reg. 46540, 46643 (August 14, 2006). (If a child's behavior or physical status is of concern, evaluations addressing these areas must be conducted.) An LEA's failure to complete an FBA and develop a Behavior Intervention Plan, when warranted, will constitute a denial of a FAPE. *See, e.g., Long v. District of Columbia*, 780 F.Supp.2d 49, 61 (D.D.C.2011). "FBA" refers to a systematic set of strategies that are used to determine the underlying function or purpose of a behavior so that an effective behavior management plan can be developed. *See Banks v. St. James Par. Sch. Bd.*, No. 2:65-CV-16173, 2017 WL 2554472 (E.D.La. Jan. 30, 2017).

Petitioner's expert, Educational Advocate 1, noted that Student's records for the 2018-2019 school year showed a host of behavior challenges, including emotional regulation, school avoidance, skipping classes and low frustration tolerance. She opined that Student needed an FBA after Student transferred to City School. Petitioner has the burden of persuasion on this claim.

The hearing record in this case is very clear that school attendance has been a major problem for Student both at PCS and at City School. During the period from May 10 through June 19, 2019 alone, Student accrued 21 unexcused absences at City School. School absenteeism continued in the following school year. In February 2020, DCPS “unenrolled” Student for excessive absences at City School. During this time frame, Student made no educational progress. I find that Petitioner has established that Student’s school avoidance behaviors impeded Student’s learning and that by the time of the May 9, 2019 IEP team meeting, an FBA of Student was warranted to enable the IEP team to develop an appropriate BIP.

DCPS’ Counsel argued at the due process hearing that in the 2018-2019 school year, Student was not in school regularly enough to conduct an FBA. This argument is unavailing because there was no evidence at the due process hearing that DCPS ever sought the parent’s consent to conduct an FBA or attempted to schedule a behavior assessment for Student.

The failure to conduct an FBA when warranted is a procedural violation of the IDEA, As the D.C. Circuit Court of Appeals explained *Z. B. v. District of Columbia*, 888 F.3d 515, 524 (D.C. Cir. 2018), “the failure to conduct an adequate functional behavior assessment is a procedural violation that can have substantive effects, ‘because it may prevent the [IEP team] from obtaining necessary information about the student’s behaviors, leading to their being addressed in the IEP inadequately or not at all. . . . [S]uch a failure seriously impairs substantive review of the IEP because courts cannot

determine exactly what information [a functional behavior assessment] would have yielded and whether that information would be consistent with the student's IEP.'" *Id.*, quoting *R.E. v. N.Y.C. Dep't of Educ.*, 694 F.3d 167, 190 (2d Cir. 2012).

In this case, I find that DCPS' failure to conduct an FBA of Student by the time of the May 9, 2019 IEP team meeting was a factor in the IEP team's not adequately addressing Student's absenteeism and other interfering behaviors in Student's IEP or in a Behavior Intervention Plan. Here, the omission of an FBA impeded Student's right to a FAPE and caused a deprivation of education benefit. This was a denial of FAPE.

- e. For the last two school years, did DCPS fail to fully implement Student's IEPs with fidelity.

For her last issue, Petitioner alleges that in the 2018-2019 and 2019-2020 school years, DCPS failed to fully implement the requirements of Student's February 11, 2019 and May 9, 2019 IEPs. In support of this claim, Petitioner cites Student's IEP progress reports for the 2019-2020 school year, which state that Student's IEP math goals were not introduced because Student did not have a math class. Petitioner has the burden of persuasion for the failure to implement claim.

U.S. District Judge Rudolph Contreras explained in *Middleton v. District of Columbia*, 312 F. Supp. 3d 113 (D.D.C. 2018), that a material failure to implement substantial or significant provisions of a child's IEP may constitute a denial of FAPE.

A school district "must ensure that . . . special education and related services are made available to the child in accordance with the child's IEP." 34 C.F.R. § 300.323(c)(2). A material failure to implement a student's IEP constitutes a denial of a FAPE. *Johnson v. District of*

Columbia, 962 F.Supp.2d 263, 268–69 (D.D.C. 2013). To meet its burden, the moving party “must demonstrate that the school board or other authorities failed to implement substantial or significant provisions of the IEP.” *Beckwith v. District of Columbia*, 208 F.Supp.3d 34, 49 (D.D.C. 2016) (quoting *Hous. Indep. Sch. Dist. v. Bobby R.*, 200 F.3d 341, 349 (5th Cir. 2000)). “Generally, in analyzing whether a student was deprived of an educational benefit, ‘courts . . . have focused on the proportion of services mandated to those actually provided, and the goal and import (as articulated in the IEP) of the specific service that was withheld.’ “ *Id.* (quoting *Wilson v. District of Columbia*, 770 F. Supp. 2d 270, 275 (D.D.C. 2011)).

Middleton at 144.

Student’s February 11, 2019 PCS amended IEP and the May 9, 2019 City School IEP established academic annual goals for student in Reading, Mathematics and Written Expression. However the provisions for special education services in the respective IEPs did not tie specialized instruction services to specific courses. Student’s City School IEP progress reports indicate that Student did not have an English course for the last semester of the 2018-2019 school year and did not have a Mathematics class for the first term of the 2019-2020 school year. The hearing evidence did not establish why Student’s academic schedule did not include English or Mathematics courses for these terms. Although Student testified about not receiving help at school, the IEP progress reports indicate that the special education teacher’s efforts to serve Student were hampered by Student’s chronic absenteeism. I find that Petitioner has not met her burden of persuasion that City School failed to offer the hours of specialized instruction specified by Student’s IEPs up to when DCPS unenrolled Student on February 7, 2020.

Following DCPS’ involuntary withdrawal of Student on February 7, 2020, DCPS

ceased providing any educational services to Student until Mother re-enrolled Student for the 2020-2021 school year. Under the IDEA, removal of a student with a disability from school for more than ten school days constitutes a change in placement, which may not be implemented without first determining that the student has engaged in misconduct which is not related to the student's disability. *See* 34 C.F.R. § 300.530. Even if the District properly removes a student for disciplinary reasons, the student must continue to receive educational services to be able to continue to participate in the general education curriculum and to progress toward meeting the goals set out in the student's IEP. *See* 34 C.F.R. § 300.530(d)(i).

In this proceeding, Petitioner did not challenge DCPS' decision to unenroll Student on February 7, 2020. However, without reaching the lawfulness of DCPS' unenrolling a special education student for attendance reasons, I find that DCPS' failure to provide IEP services to Student from February 7, 2020 through the end of the 2019-2020 school year was a material failure to implement Student's May 9, 2019 IEP and a denial of FAPE.

Remedy

In this decision, I have found that DCPS denied Student a FAPE by (1) not providing adequate special education and behavioral support services in the May 9, 2019 IEP; (2) failing to conduct an FBA of Student by the time of the May 9, 2019 IEP team meeting and (3) failing to provide Student IEP services February 7, 2020 through the end of the 2019-2020 school year. For relief in this case Petitioner initially

requested that DCPS be ordered to place Student in a non-public therapeutic day school; to conduct additional assessments, including a psychological or a neuropsychological evaluation, a Speech Language evaluation, an OT evaluation, an assistive technology evaluation and an FBA; and to revise Student's IEP. Petitioner also sought an award of compensatory education for the denials of FAPE to Student established in this case.

At the due process hearing, it was acknowledged that DCPS has issued Independent Educational Evaluation (IEE) funding authorizations for Student to obtain the assessments requested by Petitioner, except for the FBA. DCPS, by counsel, has represented that it will conduct an FBA of Student, subject to Petitioner's consent, after schools reopen and Student returns to in-person classes. I, therefore, decline to order additional evaluations.

DCPS' counsel also represented that before the hearing, DCPS agreed to revise Student's IEP to increase Student's Specialized Instruction Services to 20 hours per week outside the general education setting. It was not clear from the hearing record whether DCPS has also agreed to restore Behavioral Support Services to 240 minutes per month, as was provided in the February 11, 2019 amended PCS IEP. I will order DCPS to revise Student's IEP to provide for these enhancements of Specialized Instruction and Behavioral Support Services.

The Petitioner also seeks an award of compensatory education for Student. When a hearing officer finds denial of FAPE he has "broad discretion to fashion an appropriate remedy, which can go beyond prospectively providing a FAPE, and can

include compensatory education. . . . [A]n award of compensatory education must be reasonably calculated to provide the educational benefits that likely would have accrued from special education services the school district should have supplied in the first place.” *B.D. v. District of Columbia*, 817 F.3d 792, 797-98 (D.C. Cir. 2016) (internal quotations and citations omitted.)

The hearing evidence in this case establishes that in the February 11, 2019 PCS amended IEP, Student’s IEP team had determined that Student needed 9.5 hours per week of Specialized Instruction, including 3.5 hours per week outside the general education setting. In the May 9, 2019 DCPS IEP, the City School IEP team, without proven justification, changed all of Student’s Specialized Instruction to inclusion services in the the regular classroom. On February 7, 2020, DCPS unenrolled Student, resulting in denying Student some 14 weeks of IEP services through the end of the 2019-2020 school year. DCPS also failed to conduct an FBA of Student by May 9, 2019, which I have found was a denial of FAPE.

For a compensatory education award in this case, Petitioner’s expert, Educational Advocate 2, recommended that Student be awarded 710 hours of private academic tutoring. However, in his hearing testimony, Educational Advocate 2 was not able to state where Student would be now but for the denials of FAPE in this case, except that Student would have been “closer to graduation.” Nor did Educational Advocate 2 offer a credible explanation for how his compensatory education proposal would likely put Student in the position Student should now be in, absent the FAPE denials. See

B.D., supra, 817 F.3d at 798.

From February 2020 through end of the 2019-2020 school year, during the period of Student's unenrollment, Student was deprived of some 14 weeks or 140 hours of IEP Specialized Instruction Services. In addition, in the first half of the 2019-2020 school year and in the 2020-2021 school year, Student has only been offered Specialized Instruction in the inclusion setting. To its credit, on February 1, 2021, prior to the due process hearing, DCPS unilaterally issued funding authorization for Student to obtain, independently, 355 hours of academic tutoring.

Educational Advocate 2 also recommended that Student be awarded 50 hours of counseling services. In its February 1, 2021 authorization, DCPS also authorized the requested counseling services.

Upon consideration of the hearing evidence on the hours of Specialized Instruction and Behavioral Support services denied Student, DCPS' failure to offer Student pull-out services after May 2019 and DCPS failure to conduct an FBA of Student, I find that DCPS' February 1, 2021 independent services authorization for 355 hours of tutoring and 50 hours of counseling was reasonably calculated to put Student in the position Student would be absent the FAPE denials found in this decision. I decline Petitioner's request to award Student additional compensatory education.

DCPS Motion for Directed Finding/Request for Finding of Frivolousness

Following presentation of Petitioner's case at the due process hearing, DCPS moved for a directed finding against the Petitioner on the failure to implement claim. I

took that motion under advisement. In light of my conclusions in this decision, I deny DCPS' motion for a directed finding.

DCPS' Counsel also requested a finding of frivolousness as to Petitioner's claims that DCPS denied Student a FAPE by failing to conduct a comprehensive reevaluation, failing to conduct an FBA and failing to implement Student's IEPs with fidelity. *See* District of Columbia Rules of Professional Conduct, Rule 3.1.³ I have found in Petitioner's favor on the issues of failure to conduct an FBA and failure to implement Students' IEPs. I have found against the Petitioner on the failure to reevaluate issue, but I do not find that any claim by Petitioner or argument put forth by Petitioner's counsel was made in bad faith or without legal support, such that a finding a frivolousness is warranted. Accordingly, DCPS' request for a finding of frivolousness is denied.

ORDER

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

1. Within 10 school days of the date of this decision, DCPS shall ensure that Student's IEP is revised to provide for no less than 20 hours per week of Specialized Instruction Services outside the general education setting and 240 minutes per month of Behavioral Support Services. This is without prejudice to DCPS' right and obligation to review and revise, as appropriate, Student's IEP after a reasonable period of time has passed to evaluate Student's progress with these enhanced services;

³ Rule 3.1 of the D.C. Rules of Professional Conduct states that a "lawyer shall not bring or defend a proceeding, or assert or controvert an issue therein, unless there is a basis in law and fact for doing so that is not frivolous, which includes a good-faith argument for an extension, modification, or reversal of existing law." *Id.*

2. In light of DCPS' February 1, 2021 funding authorization to Student to obtain 355 hours of independent academic tutoring and 50 hours of counseling from a licensed psychologist, Petitioner's request for an award of additional compensatory education is denied and

3. All other relief requested by the Petitioner herein is denied, without prejudice to Student's right to have DCPS conduct a functional behavior assessment after DCPS' return to in-person classes.

Date: February 13, 2021

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
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