

**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 17, 2021

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

Date Issued: February 17, 2021

Petitioner,

Hearing Officer: Peter B. Vaden

v.

Case No: 2020–0203

DISTRICT OF COLUMBIA
PUBLIC SCHOOLS,

Online Video Conference Hearing

Hearing Dates: February 10 and 12, 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 develop an appropriate Individualized Education Program (IEP) on October 28, 2020 and failure to fully implement the October 2020 IEP.

Petitioner’s Due Process Complaint, filed on November 30, 2020, named DCPS as Respondent. The undersigned hearing officer was appointed on December 1, 2020.

¹ Personal identification information is provided in Appendix A.

On December 17, 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 February 13, 2021. The earliest due process hearing dates, mutually available to the parties and counsel, were in February 2021. On February 3, 2021, to accommodate the February hearing dates, I granted DCPS' unopposed motion to extend the final decision due date to February 23, 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 10 and 12, 2021. Mother appeared on line for the hearing and was represented by PETITIONER'S COUNSEL. Respondent DCPS was represented by DCPS' COUNSEL.

Counsel for Petitioner made an opening statement. Mother and Student testified and called as additional witnesses PSYCHOLOGIST and EDUCATIONAL ADVOCATE. DCPS waived making an opening statement. DCPS called as witnesses CASE MANAGER, SOCIAL WORKER, and SPECIAL EDUCATION COORDINATOR. Petitioner's Exhibits P-1 through P-20 were admitted into evidence, including Exhibit P-17 admitted over DCPS' objection. DCPS offered Exhibits R-1 through R-15, which were

admitted into evidence without objection.

After Petitioner presented her evidence, DCPS made a motion for a partial directed finding, which I took under advisement. Following completion of the taking of all of the evidence, counsel for the respective parties made oral closing arguments. Neither party requested leave to file a written closing.

PRIOR CASE

On August 26, 2020, Student, through Mother, filed a prior due process complaint which was assigned to Impartial Hearing Officer Keith Seat (Case No. 2020-0150). Following a hearing on October 14, 2020, Hearing Officer Seat issued a Hearing Officer Determination on October 31, 2020 (the October 31, 2020 HOD). In that determination, Hearing Officer Seat found that DCPS did not meet its child-find obligations under the IDEA to evaluate Student and determine Student eligible for special education and related services by August 2018. Hearing Officer Seat ordered DCPS to provide Student tutoring and counseling as compensatory education. In the present proceeding, counsel for the parties agreed at the prehearing conference that I may adopt Hearing Officer Seat's findings of fact from the October 31, 2020 HOD, to the extent I find them relevant to my decision.

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 December 17, 2020

Prehearing Order, are:

- a. Whether DCPS' October 28, 2020 IEP for Student is inappropriate because it lacks sufficient specialized instruction services and behavioral support services, does not provide an outside of general education setting and does not meet Student's need for a full time IEP in a private therapeutic day school;
- b. Whether DCPS denied the student a FAPE by predetermining the content of the October 28, 2020 IEP before the IEP meeting and without adequately considering the parent's input at the IEP meeting;
- c. Whether DCPS has denied Student a FAPE by not fully implementing the Specialized Instruction Services and Behavioral Support Services required by the October 28, 2020 IEP.

For relief Petitioner requested that the hearing officer (i) order that Student be awarded compensatory education for the denials of FAPE alleged in the complaint; (ii) order DCPS to ensure that Student's IEP is revised to provide for placement in a Behavior and Education Support (BES) classroom with 26.5 hours per week of specialized instruction services and 4 hours per month of BSS counseling; and (iii) order DCPS to fund Student's placement at an appropriate nonpublic therapeutic day school.

FINDINGS OF FACT

I adopt the following findings of fact made by Hearing Officer Seat in the October 31, 2020 HOD:

A. At the time of the October 2020 due process hearing, Student was AGE, GENDER and in GRADE for the fourth time, having returned to PUBLIC SCHOOL in

in the 2020-2021 school year after a few weeks at PUBLIC CHARTER SCHOOL and the 2019-2020 school year at PRIOR PUBLIC SCHOOL. October 31, 2020 HOD, Finding 1.

B. Student is well-mannered and demonstrates maturity in the academic environment when present, but is filled with anxiety about academic abilities and prospects. October 31, 2020 HOD, Finding 1.

C. Parent formally requested that Student, who had previously not been found eligible for special education, be evaluated again by letter of counsel dated September 11, 2019. DCPS authorized independent educational evaluations (“IEEs”) for a comprehensive psychological evaluation and a Functional Behavioral Assessment (“FBA”). The IEE comprehensive psychological evaluation was completed by Psychologist on June 25, 2020. The FBA was not completed due to the pandemic. October 31, 2020 HOD, Finding 3.

D. Public Charter School held an eligibility meeting on August 25, 2020 and found Student was eligible for special education and related services with the disability classification of Multiple Disabilities due to Emotional Disturbance (ED) and Other Health Impaired - Attention Deficit Hyperactivity Disorder (OHI-ADHD). October 31, 2020 HOD, Finding 4.

E. When Student transferred back to Public School in September 2020, Student’s advocates shared the IEE and recent Public Charter School documents and sought an IEP meeting as soon as possible. October 31, 2020 HOD, Finding 4.

F. In the 2020 comprehensive psychological evaluation, Student’s General

Intellectual Ability (“GIA”) was a standard score of 82, in the Low Average range, based on the Woodcock-Johnson IV (“WJ-IV”). October 31, 2020 HOD, Finding 6.

G. Student has been in the same Grade for 4 years: in 2017-2018, 2018-2019, 2019-2020 and 2020-2021 school years. At the time of the October 2020 hearing, Student’s cumulative Grade Point Average (“GPA”) was 0.56, with 10.50 total credits. In 2018, Student’s PSAT scores in reading and math were both in the 1st percentile. October 31, 2020 HOD, Finding 7.

H. Based on the Woodcock Johnson IV Tests of Achievement (WJ-IV ACH) reported in the 2020 comprehensive psychological evaluation, Student’s score for reading was 82 (Low Average); for math was 88 (Low Average); for written language was 83 (Low Average). The 2020 psychological evaluation further noted that Student’s reading was 5 years below Grade (now being taken for fourth time); math was 4 years below Grade; and writing was also 4 years below Grade. October 31, 2020 HOD, Finding 8.

I. In the 2017-2018 school year, Student had 120 unexcused absences at Public School. In the 2018-2019 school year, Student had over 160 unexcused absences at Public School. In the 2019-2020 school year at Prior Public School, Student had over 110 unexcused absences through March 13, 2020. October 31, 2020 HOD, Finding 9.

J. Student is a young person with an Emotional Disturbance based on an Unspecified Anxiety Disorder. Student’s anxiety disorder is related to Student’s lack of attendance at school. Student wants to go to school, but school brings out Student’s

weaknesses, specifically anxiety, and Student feels a lack of support from teachers. Student finds school overwhelming. Student has anxiety about graduation, academic abilities, how Student will turn out, and who Student will become. Student was filled with anxiety related to educational failure and lack of progress, which should be explored in counseling. Student has difficulties with anxiety, which relate to poor educational performance and exhibits depressed mood. Student feels Student can do the work, but is not receiving help needed from teachers. Student's anxiety manifests through nonattendance at school. October 31, 2020 HOD, Finding 13.

Findings from February 10 and 12, 2021 Due Process Hearing

After considering all of the evidence received at the February 10 and 21, 2021 due process hearing in this case, as well as the argument of counsel, my additional 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-2. Student is eligible for special education under the Multiple Disabilities (MD) classification based on the underlying impairments ED and OHI-ADHD. Exhibit R-1.

2. On October 28, 2020, a Public School IEP team meeting was convened by telephone to develop an initial IEP for Student. Mother, Student, Petitioner's Counsel and Educational Advocate participated in the meeting. The IEP team noted that Student had a history of truancy and exhibiting work avoidance behaviors; that teachers

reported that Student could call out or speak out of turn; that teachers reported that Student could be withdrawn and did not typically complete assignments even though Student may start them; and that Student's anxiety negatively impacts Student's class attendance and access to the general education curriculum. The IEP team affirmed that Student's behavior impedes Student's learning or that of other students. Exhibit R-2.

3. The IEP team reported that Student's ED and OHI-ADHD impairments negatively impact Student's progress in the general education curriculum and that Student has unspecified anxiety disorder and a history of ADHD that make it difficult for Student to attend school in a face-to-face setting and focus in class when Student does attend. The IEP team also reported that Student's constellation of emotional and learning difficulties, coupled with a significant history of poor attendance/tardiness to class, indicated that additional instruction and behavioral supports were warranted and that Student's high level of absences appeared "multiply controlled" but ultimately contribute to poor school performance, which seems to facility/exacerbate Student's anxiety and subsequent school avoidance. This "reciprocal interaction of symptoms/behaviors" severely limits Student's access to and progress in the general education curriculum. Exhibit R-2.

4. On the initial October 28, 2020 IEP, Reading, Mathematics, Written Expression and Social-Emotional-Behavioral Development were identified as areas of concern for Student. Based on the 2020 WJ-4 Ach. Scores, Student was reported to be performing approximately on the 6.9 grade level in Mathematics, on the 5.9 grade

equivalent in Reading and on the 6.2 grade equivalent in Written Expression. Exhibit R-2.

5. At the October 28, 2020 IEP team meeting, Petitioner's representatives advocated for Student to be placed in a Behavior and Education Support (BES) classroom. The school representatives decided that Student did not qualify for the BES program and would be best served in the general education classroom. The school members of the IEP team decided that Student would be provided 10 hours of Specialized Instruction Services in the general education setting and 90 minutes per month of Behavioral Support Services. Exhibits R-2, R-3.

6. At the October 28, 2020 IEP team meeting, Student, Mother and their representatives all spoke. Educational Advocate, particularly, advocated on behalf of Student. The IEP team made minor changes to the IEP requested by Educational Advocate, but did not make the changes Petitioner's representatives requested for special education and related services, notably the request to place Student in a BES classroom and to provide Student with 1 hour per week of Behavioral Support Services. Testimony of Educational Advocate, Exhibit R-3.

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

8. Student was been accepted for admission by NONPUBLIC SCHOOL. Because of Coronavirus restrictions, neither Student nor Mother has visited Nonpublic

School. No one from Nonpublic School testified at the due process hearing. It is not clear whether Nonpublic School is holding in-person classes. Testimony of Mother.

9. At some point after the October 28, 2020 IEP team meeting, Public School developed an Individualized Distance Learning Plan for Student intended to support Student during the virtual learning period until in-person classes are resumed. Exhibit P-10.

10. For Public School distance learning, instruction is offered from 9:30 a.m. to 4:00 p.m., with breaks. There is no school on Wednesday. Testimony of Student. Student has not participated regularly in distance learning and has only attended a handful of times. Testimony of Case Manager. From October 13, 2020 through January 27, 2021, Student had 33 unexcused absences. Exhibit R-9. Case Manager has invited Student to participate in small group sessions and to attend office hours, but Student has not attended. Case Manager has reached out to the parent and to the parent's representatives at LAW FIRM regarding Student's attendance and work not completed, but these efforts have been fruitless. Testimony of Case Manager.

11. Since the October 28, 2020 IEP was developed, Social Worker has attempted to provide Student behavioral support counseling virtually. Social Worker attempted to reach Student using multiple platforms – logging into Student's scheduled classes, reaching out by telephone and sending text messages. For the most part, Social Worker has not been successful in getting Student to attend counseling sessions. Testimony of Social Worker.

12. In the October 31, 2020 HOD, Hearing Officer Seat ordered, as compensatory education, that DCPS provide funding authorization for 500 hours of academic tutoring and 60 hours of counseling for Student, from independent providers chosen by Petitioner. The HOD provided that all hours were to be used within 2 years and any unused hours would be forfeited. Exhibit P-4. In November 2020, Psychologist's company received the referral for Student's tutoring and counseling. Psychologist returned the referral to DCPS, unused, because over a two month period, Psychologist was not successful in engaging with Mother to provide the services for Student. Testimony of Psychologist.

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. Was DCPS' October 28, 2020 IEP for Student inappropriate because it lacked sufficient specialized instruction services and behavioral support services, did not provide an outside of general education setting and did not meet Student's need for a full time IEP in a private therapeutic day school?
- b. Did DCPS deny the student a FAPE by predetermining the content of the October 28, 2020 IEP before the IEP meeting and without adequately considering the parent's input at the IEP meeting;

In the initial, October 28, 2020, IEP, the Public School IEP team provided Student 10 hours per week of Specialized Instruction in the general education inclusion setting and 90 minutes per month of Behavioral Support counseling services. Petitioner contends these services were not adequate to meet Student's needs. Through Petitioner's expert witnesses, Psychologist and Educational Advocate, Petitioner made a *prima facie* showing that the services and placement in the initial IEP were not appropriate. DCPS therefore holds the burden of persuasion as to the appropriateness of the October 28, 2020 IEP.

In *Moradnejad v. District of Columbia*, 177 F. Supp. 3d 260 (D.D.C. 2016), the Court adopted the Report and Recommendation of U.S. Magistrate Judge G. Michael Harvey, which explained how a hearing officer must assess an IEP:

The Supreme Court explained in [*Bd. of Educ. v. Rowley*, 458 U.S. 176, 102 S.Ct. 3034, 73 L.Ed.2d 690 (1982)] that a court's assessment of an IEP involves two inquiries:

First, has the State complied with the procedures set forth in the [IDEA]? And second, is the [IEP] developed through the [IDEA's] procedures reasonably calculated to enable the child to receive educational benefits? If these requirements are met, the State has complied with the obligations imposed by Congress and the courts can require no more.

Moradnejad at 274-75.

Petitioner alleges that the Public School IEP team violated IDEA procedures by predetermining the content of the October 28, 2020 IEP. Petitioner has the burden of proof on this issue. As the U.S. District Court explained in *Doyle v. Arlington Cty. Sch. Bd.*, 806 F. Supp. 1253 (E.D.Va. 1992), *aff'd*, 39 F.3d 1176 (4th Cir. 1994), “[the Education of the Handicapped Act’s (predecessor statute of the IDEA)] procedural requirements are designed to insure that parents participate meaningfully in the decision-making process for their handicapped child. *Rowley*, 458 U.S. at 205–06, 102 S.Ct. at 3050. Thus, if the school system has already fully made up its mind before the parents ever get involved, it has denied them the opportunity for any meaningful input.” *Id.*, 806 F. Supp at 1262. However, while school officials must come to the IEP table with an open mind, that does not mean they should come to the IEP table with a blank mind. *Id.* Parents’ participation does not mean control or veto power. *See Blackman v. District of Columbia*, No. CV 97-1629 (PLF), 2014 WL 12946244, at *4 (D.D.C. Jan. 8, 2014).

The evidence in this case is that Mother, Student and their legal representatives, especially Educational Advocate, were active participants in the October 28, 2020 IEP

team meeting. Educational Advocate lobbied for Student's placement in a BES classroom and for Student to receive 1 hour per week of Behavioral Support Services. The school members of the team disagreed and ultimately decided that Student would be served in the general education setting with 90 minutes per month of Behavioral Support Services. While the school team did not adopt Educational Advocate's recommendations for placement in a BES classroom and one hour per week of Behavioral Support Services, I find that Petitioner has not established that Student, Mother and their advocates did not have the opportunity for meaningful input. In light of this finding, I deny DCPS' oral motion made at the hearing for a directed finding on this issue.

I turn next to the second, substantive, prong of the *Rowley* inquiry: Was the October 28, 2020 initial IEP appropriate for Student? 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 in *Rowley, supra*, 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).

Student is eligible for special education under the MD classification, based on Emotional Disturbance and OHI-ADHD disabilities. At the October 28, 2020 IEP team meeting, Educational Advocate had sought full-time placement for Student in a BES classroom. In her testimony at the due process hearing, Educational Advocate opined that the initial IEP, with 10 hours of Specialized Instruction in the regular classroom, was clearly inappropriate. DCPS’ witness, Case Manager, explained that the school team set Student’s special education services at 10 hours per week in the general education setting in order to avoid limiting Student’s access to credits Student needed to graduate. Educational Advocate also opined that the initial IEP should have provided for Student to receive 1 hour per week of Behavioral Support Services. Social Worker testified that 90 minutes per month of Behavioral Support Services was an appropriate amount of time to meet on Student’s issues around anxiety and social emotional functioning.

I did not find the explanations advanced by DCPS’ witnesses persuasive as justification for the limited special education and counseling services in the October 28, 2020 IEP. At the time the initial IEP was developed for Student, Student was repeating

Grade for the *fourth* time. Student's cumulative Grade Point Average ("GPA") was 0.56, with 10.50 total credits. This dismal progress was not consistent with Student's cognitive abilities, which in summer 2020 tested in the Low Average range.

The hearing evidence indicates that Student's failing in school resulted from not attending regularly. In the 2017-2018 school year, Student had 120 unexcused absences. In the 2018-2019 school year, Student had over 160 unexcused absences at Public School. In the 2019-2020 school year, through March 13, 2020, Student had over 110 unexcused absences. According to Psychologist's June 2020 psychological evaluation report, upon which the October 28, 2020 IEP team relied, Student's abysmal school attendance is directly related to Student's feelings of impotence and poor self worth. The IEP team acknowledged in the initial IEP that Student's disabilities – unspecified anxiety disorder and a history of ADHD – make it difficult for Student to attend school in a face-to-face setting and to focus in class when Student does attend. The initial IEP also included a behavior goal for Student to attend 90 percent of classes.

The importance of adequately addressing Student's school attendance should have been paramount for the October 28, 2020 IEP team. Social Worker opined that 90 minutes per month of Behavioral Support Services sufficed to address Student's anxiety and social-emotional functioning. Even if that were correct, DCPS' experts did not offer a cogent and responsive explanation for how Student's full-time placement in the general education setting, with only 90 minutes per month of counseling services, was adequate to address Student's attendance issues. I find that DCPS has not met its

burden of persuasion that the October 28, 2020 IEP was reasonably calculated to enable Student to make progress appropriate in light of Student's circumstances.

- c. Did DCPS deny Student a FAPE by not fully implementing the Specialized Instruction Services and Behavioral Support Services required by the October 28, 2020 IEP?

The October 28, 2020 IEP provided for Student to receive 10 hours per week of Specialized Instruction Services and 90 minutes per month of Behavioral Support Services. Petitioner claims that DCPS has not fully implemented the special education and behavioral support services required by the IEP. Petitioner has the burden of persuasion on this 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.

Since March 2020, DCPS schools have been closed due to the COVID-19 pandemic. In its fall 2020 COVID-19 guidance, the U.S. Department of Education's Office of Special Education Programs (OSEP) wrote that in the current COVID-19 environment, LEAs may need to consider multiple options for delivering instruction, including special education and related services to children with disabilities. Those options could include remote/distance instruction, in-person attendance, or a combination of both remote/distance instruction and in-person attendance (hybrid model). OSEP emphasized that no matter what primary instructional delivery approach is chosen, LEAs and IEP Teams remain responsible for ensuring that a FAPE is provided to all children with disabilities and that if state and local decisions require schools to limit or not provide in-person instruction due to health and safety concerns, LEAs are not relieved of their obligation to provide FAPE to each child with a disability. *See U.S. Department of Education: Questions and Answers on IDEA Part B Service Provision* (September 28, 2020).

This school year, DCPS has only offered instruction and related services virtually through DCPS on line distance learning platform. Case Manager testified that he was the special education co-teacher for Student's English class. In virtual learning, he would hold class on the Microsoft Teams platform and would break into smaller groups at the end of class. He would send texts to students who needed additional support and would invite Student to participate in the breakout groups. However Student frequently would not log on to the small group instruction sessions. At other times, Student would

log on, but then not communicate and log off after a short time.

Social Worker testified that during the distance learning period, he has attempted to reach Student for counseling sessions using multiple platforms – logging into Student’s scheduled classes, reaching out by telephone and sending text messages. For the most part, Social Worker has not been successful in getting Student to attend counseling sessions.

Student testified that ■ has not been pulled out of class since the IEP was developed. However, Student has rarely attended class on line during the virtual learning period. I found Student’s testimony on the implementation of IEP services through distance learning less credible than that of Case Manager and Social Worker. Petitioner has not met her burden of persuasion that DCPS failed to implement substantial or significant provisions of the October 28, 2020 IEP. *See Middleton, supra.*

Remedy

In this decision, I have found that DCPS has not met its burden of persuasion that its October 28, 2020 IEP was appropriate for Student because, by placing Student exclusively in the general education setting, with only 10 hours per week of Specialized Instruction and 90 minutes per month of Behavioral Support Services, the initial IEP did not adequately address Student’s chronic absenteeism. For relief in this case, Petitioner requested that the hearing officer order DCPS to place Student full time in a BES classroom or fund Student’s placement in a nonpublic therapeutic day school.

The IDEA contemplates a continuum of educational placements to meet the

needs of students with disabilities. Depending on the nature and severity of the disability, a student may be instructed in regular classes, special classes, special schools, at the home, or in hospitals and institutions. *See* 5E DCMR § 3012, 20 U.S.C. § 1412(a)(5), 34 CFR § 300.115. The IDEA requires that students with disabilities be placed in the “least restrictive environment” so that they can be educated in an integrated setting with students who are not disabled to the maximum extent appropriate. *See, e.g., Smith v. District of Columbia*, 846 F.Supp.2d 197, 200 (D.D.C. 2012).

DCPS’ expert, Case Manager, opined that if Student had attended class, Student could have made progress under the October 28, 2020 IEP. That may be correct, but it leaves unanswered the question of what IEP services and educational placement are required in order to get Student to go to school and attend class. Petitioner’s experts, Psychologist and Educational Advocate, both opined that Student needed a full-time outside of general education placement. In light of Student’s many months of school avoidance and Psychologist’s evaluation report that Student’s school attendance is directly related to feelings of impotence and poor self worth, I found persuasive the opinions of Petitioner’s experts that to address Student’s chronic school avoidance, Student needs individualized special education support throughout the school day.

Psychologist opined that, based on her feelings about Student as a person and about Student’s prognosis, Student needs the structure and containment of a small, therapeutic, day school. Student has been accepted for admission to a private day

school, Nonpublic School. In *Branham v. Government of the Dist. of Columbia*, 427 F.3d 7 (D.C. Cir. 2005), the D.C. Circuit Court of Appeals set forth considerations “relevant” to determining whether a private school is appropriate for a particular student, including the nature and severity of the student’s disability, the student’s specialized educational needs, the link between those needs and the services offered by the private school, the placement’s cost, and the extent to which the placement represents the least restrictive educational environment. *Id.* at 12.

At the hearing in this case, no representative of Nonpublic School testified and a link was not established between Student’s needs and the services offered by Nonpublic School. I find that Petitioner has not shown that Nonpublic School is appropriate for Student. I will instead order DCPS to convene Student’s IEP team to revise Student’s IEP to provide a special class setting for all core academic courses, but I will leave it to the IEP team to determine the appropriate placement for Student, whether in a special DCPS classroom or in a special school.

Petitioner also seeks an award of compensatory education for Student. When a hearing officer finds a 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.) At the due process hearing, Petitioner's witnesses did not propose what they considered would be an appropriate compensatory education award.

Even if the October 28, 2020 initial IEP had provided for Student's full-time placement in a special education setting, this placement could not have been implemented in person due to the Coronavirus school closings. As for other students in the District, on line distance learning has been the only option available for Student. Unfortunately, since the October 28, 2020 IEP was developed, Student has only attended a handful of classes on DCPS' distance learning platform. Because in-person special education classes have not been available this school year and because Student has shown an unwillingness to consistently participate in distance learning, it appears probable that Student's position now would not be substantially different had the October 28, 2020 IEP team provided for Student's placement in a full-time special education setting.

In the October 31, 2020 HOD, Hearing Officer Seat found a child-find violation and ordered DCPS to provide funding for Student to obtain 500 hours of academic tutoring and 60 hours of counseling from independent providers chosen by Petitioner. Despite the efforts of Psychologist to arrange tutoring and counseling services, almost all of these services remain unused. With so many unused hours of tutoring and counseling already available to Student, it does not appear probable that an award of additional compensatory tutoring or counseling would be beneficial or would move Student substantially closer to the position Student should have been in, had the Public

School IEP team developed an appropriate initial IEP on October 28, 2020.

When a hearing officer finds that a school district has failed to provide a student with a FAPE, he has “broad discretion” to fashion an appropriate remedy. *See, e.g., Boose v. District of Columbia*, 786 F.3d 1054, 1056 (D.C.Cir.2015), *citing Florence County School District Four v. Carter*, 510 U.S. 7, 15–16, 114 S.Ct. 361, 126 L.Ed.2d 284 (1993). In the October 31, 2020 HOD, Hearing Officer Seat provided that the hours of tutoring and counseling he ordered would be forfeited if not used within 2 years. In lieu of ordering additional tutoring or counseling services, which would not be beneficial in this case, and in order to maximize the benefit of the compensatory education award ordered by Hearing Officer Seat, I will extend the period during which the existing compensatory education services may be used – through the end of DCPS’ 2023-2024 school year. I find that this is an equitable award

ORDER

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

ORDERED:

1. Within 20 school days of the date of this decision, DCPS shall reconvene Student’s IEP team to review Student’s IEP in light of the findings in this decision and Student’s continued chronic absenteeism. DCPS shall ensure that Student’s IEP is revised to provide for Student to be instructed for all core academic courses in an appropriate special class, outside of the general education setting, and to provide a minimum of 240 minutes per month of Behavioral Support Services to better address Student’s school avoidance issues. Until Student’s school is reopened, DCPS shall not be required to provide Student in-person specialized instruction or related services;

2. As compensatory education for the denial of FAPE found in this decision, the period for Student to use the hours of compensatory education tutoring and counseling ordered in the October 31, 2020 HOD is extended through the end of DCPS' 2023-2024 regular school year. No additional compensatory education is ordered;

3. All other relief requested by the Petitioner herein is denied.

Date: February 17, 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
Office of Dispute Resolution
OSSE - SPED
DCPS Resolution Team
[REDACTED]@k12.dc.gov
[REDACTED]@k12.dc.gov