

OSSE
Office of Dispute Resolution
February 23, 2023

¹ Personal identification information is provided in Appendix A.

Petitioner's Due Process Complaint, filed on November 28, 2022, named DCPS as Respondent. The undersigned hearing officer was appointed on November 29, 2022. On December 9, 2022, the parties met for a resolution session and were unable to resolve the issues in dispute. On December 12, 2022, I convened a telephone prehearing conference with counsel to discuss the issues to be determined, the hearing date and other matters. The due process hearing was scheduled for February 16-17, 2023. On December 12, 2022, I granted DCPS' motion, opposed by the Petitioner, to extend the final decision due date in this case from February 11, 2023 to February 24, 2023.

With consent of the parent, the due process hearing was held online and recorded, using the Microsoft Teams videoconference platform. The hearing, which was open to the public, was convened before the undersigned impartial hearing officer on February 16 and 17, 2023. Mother appeared online for the hearing and was represented by PETITIONER'S COUNSEL 1 and PETITIONER'S COUNSEL 2. Respondent DCPS was represented by DCPS' COUNSEL.

Petitioner's Counsel 1 and DCPS' Counsel made opening statements. Mother testified at the hearing and called EDUCATIONAL ADVOCATE as her only additional witness. DCPS called as witnesses TEACHER 1, TEACHER 2, TEACHER 3, SPEECH LANGUAGE PATHOLOGIST and ASSISTANT PRINCIPAL. Petitioner's Exhibits P-1 through P-42 were admitted into evidence, including Exhibits P-16, P-24 and P-42 admitted over DCPS' objections. DCPS' Exhibits R-1 through R-5, R-8 through R-10, R-13 through R-15, R-22, R-25 through R-38, R-41, R-42, R-44, R-45, R-51 through R-55,

R-59, R-69 through R-76, R-80 through R-82, R-86, R-88, R-90 through R-94, R-96 through R-100, R-103, R-104 and R-112 through R-114 were admitted into evidence without objection. At the conclusion of the taking of the evidence, Petitioner's Counsel 2 and DCPS' Counsel 2 made closing arguments. There was no request for file written closings.

JURISDICTION

The hearing officer has jurisdiction under 20 U.S.C. § 1415(f) and D.C. Regs. tit. 5-A, § 3049.1.

ISSUES AND RELIEF SOUGHT

The issues for determination in this case, as certified in the December 12, 2022 Prehearing Order, and amended by Petitioner's Counsel 1 on the record at the due process hearing, are:

- a. Whether DCPS denied Student a FAPE by failing to conduct a Functional Behavior Assessment during the 2021-2022 school year or to develop a Behavior Intervention Plan to address Student's school refusals which were related to his/her disability;
- b. Whether the DCPS denied Student a FAPE by failing to comprehensively evaluate Student in all areas of disabilities in that the November 13, 2021 OT evaluation was not sufficiently comprehensive because the evaluator was unable to obtain handwriting samples;
- c. Whether DCPS denied Student a FAPE by providing an inappropriate December 9, 2021 IEP because the IEP (1) falsely stated that the Student's behavior did not impact his/her education; (2) failed to incorporate a Behavior Intervention Plan or provide for Behavior Support Services to address Student's school refusal behavior; (3) failed to include any academic or social goals; (4) failed to include sufficient specialized instruction, based upon the Student's documented academic deficiencies; (5) failed to incorporate accommodations

recommended in the Student's evaluations; and (6) DCPS did not ensure that the IEP was revised meaningfully when the IEP progress reports indicated that the Student was making no progress or regressing on certain goals;

d. Whether DCPS denied Student a FAPE by providing an inappropriate April 8, 2022 IEP because (1) the IEP falsely stated that the Student's behavior did not impact his/her education; (2) it failed to incorporate a Behavior Intervention plan or provide for Behavioral Support Services (BSS) to address the Student's school refusal behavior; (3) it failed to include any academic or social goals; (4) it failed to include sufficient specialized instruction, based upon the Student's documented academic deficiencies; (5) it failed to incorporate accommodations recommended in the Student's evaluations; and (6) DCPS did not ensure that the IEP was revised meaningfully when the IEP progress reports indicated that the Student was making no progress or regressing on certain goals;

e. Whether DCPS denied Student a FAPE by failing to provide an appropriate placement and/or location of service for Student from September 26, 2022 until October 18, 2022 because on September 26, 2022, City School 1 disenrolled the Student without providing Petitioner with any documentation indicating that such action was imminent or convening a meeting of the IEP team to address the issues or an alternative placement. This situation continued until the parent enrolled Student at City School 2, beginning on October 18, 2022;

f. Whether DCPS denied Student a FAPE by failing to provide the parent's representatives access to all of Student's education after, on September 6, 2022, LAW FIRM sent a records request to City School 1.

For relief, Petitioner requested that the hearing officer order the following relief:

a. Order DCPS to provide for the funding or provision of in-home and/or virtual educational services for the Student, on an interim basis.

b. Order DCPS to provide for the funding or provision of any transportation necessary for the Student to access his/her services.

c. Order DCPS to fund or conduct an OT evaluation and reserving a further award of compensatory education upon the completion of this evaluations.

d. Order DCPS to conduct a Functional Behavior Assessment and to develop a Behavior Intervention Plan to address Student's school refusal behaviors and reserving a further award of compensatory education upon completion of the

assessment and plan.

e. Order DCPS to reconvene Student's IEP team within 15 days after the completion of any new evaluations and Behavior Intervention Plan (BIP) to reconsider Student's programming and placement, including consideration of a nonpublic placement.

f. Order DCPS to provide a complete response to Petitioner's records request within 15 school days of the final decision.

The parent also seeks compensatory education for the denials of FAPE alleged in the due process complaint.

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 youth, resides with Mother in the District of Columbia.

Testimony of Mother.

2. On November 23, 2021, DCPS' CITY SCHOOL 1 eligibility team determined that Student was eligible for special education services under the IDEA disability classification Autism Spectrum Disorder (ASD). Exhibit R-55. The eligibility team also determined that Student was not eligible for OT services in the school setting at that time and was not eligible for specially designed instruction in the area of math. Exhibit R-69. Student was previously identified as a child with a Developmental Delay at age three, while attending public school in Charles County, Maryland. Exhibit P-22.

3. Student is currently enrolled in CITY SCHOOL 2 in GRADE. Student was parentally placed at PRIVATE SCHOOL in the District of Columbia for the 2019-2020

school year. For the 2020-2021 school year, Student was enrolled in PUBLIC CHARTER SCHOOL in the District. Mother enrolled Student in City School 1 for the 2021-2022 school year. On September 26, 2022, City School 1 withdrew Student from its roster, purportedly for failing to attend school. On or about October 18, 2022, Mother enrolled Student in City School 2. Exhibits P-22, P-27, Testimony of Mother.

4. On March 20, 2020, a DCPS social worker conducted a functional behavior assessment (FBA) of Student, who was then enrolled in Private School. The concern for the FBA was Student's off-task behaviors (distractibility, draws, inattentive, doodles, fidgets, fails to follow directions, noncompliance, crawls under desk, fails to complete work, stares off into space, shuts down). The social worker reported, *inter alia*, that in the learning environment, Student could be academically disengaged and noncompliant. It appeared to the social worker that the function of Student's behavior may have served a need to escape from demanding tasks/negative thoughts/emotions and a need to gain attention. His/her behaviors may also have been a manifestation of low frustration tolerance. Exhibit P-19.

5. DCPS schools were closed for in-person classes from mid March 2020 until the fall of 2021. Hearing Officer Notice.

6. In October 2021, SCHOOL PSYCHOLOGIST conducted a comprehensive psychological evaluation of Student upon Mother's referral. In her November 12, 2021 report, School Psychologist reported that one of the primary challenges facing the team at City School 1 was Student's level of rigidity in his/her refusal to leave the house

and/or Mother's car to come to school. Student had received several evaluations from school teams and medical teams in the past, and consistent themes from these evaluations had been very significant levels of behavior being observed in the home environment and also significant challenges with understanding Student's educational needs due to chronic absences from school. As of October 2021, Student was displaying behaviors that indicated resistance to environmental changes, rigidity to established routines, difficulty building reciprocal relationships with peers and adults, difficulty with overall social pragmatic communication with peers, and difficulty with emotional regulation. In January of 2020, Student's performance on the Woodcock Johnson-IV achievement testing showed average skills in broad reading and broad math. As of October 2021, Student's broad reading and broad math performance dropped to the low average and low ranges respectively. As measured by behavior rating scales, Student's behaviors at home continued to be reported as very significant and impactful. City School 1-based team members had only limited time to interact with Student, but their responses showed levels of behavioral concerns in the school environment that were significant when compared to same-aged peers. School Psychologist recommended that Student's greatest area of educational need was clearly his/her school attendance, and a plan needed to be developed as soon as possible to significantly increase Student's school attendance. Exhibit P-22.

7. School Psychologist reported that as of November 10, 2021, out of 47 days of school, Student had been absent for 29 full days and tardy for 8 days. Some tardies

had been for multiple hours. From the beginning of the school year, Student had been present in-person for 10 full days and in the building for a portion of only 18 days. On average, Student had only come to school for 1 full day and 1 part day each week, and had missed an average of 3.5 days per week. Exhibit P-22.

8. In October 2021, a DCPS occupational therapist conducted a Comprehensive Occupational Therapy Initial Evaluation of Student. This OT evaluation included assessments of Fine Motor Skills, Bilateral Coordination Skills, Visual Motor Integration (VMI) Skills, Visual Perceptual Skills, Sensory Processing Skills and Activities of Daily Living. Although the assessor was unable to evaluate Student's handwriting due to absences, the assessor stated in her report that all assessment procedures within her report were valid for the intended purpose of an OT evaluation and the assessments should be considered a valid report of Student's current functioning, with the caveat that the teacher rating scale (Sensory Processing Measure) should be interpreted with caution, due to limited ability to get to know Student in the school setting because of Student's chronic absenteeism. Exhibit P-20.

9. DCPS developed an initial IEP for Student on December 9, 2021. The IEP identified only Adaptive/Daily Living Skills as an Area of Concern for Student. For baselines, the IEP reported that Student experienced a great deal of school-refusal behavior and exhibited a lot of anxiety around attending school and engaged in lots of school refusal at the start of the year, and had been observed sitting quietly and ready to work but not engaging in academic tasks without prompting from a teacher for each

step. The IEP provided for 1 hour per week of Specialized Instruction in the general education setting and for no other special education or related services. For classroom aids and services, the IEP team called for a structured, predictable classroom environment, visual daily schedule, opportunities for relaxing and calming down during the day, opportunities for meaningful contact with peers who have appropriate social behavior, alerting Student ahead of time for changes to routine and/or transitions, strategic seating placement and frequent teacher check-ins. Exhibit P-5.

10. By the end of the 2021-2022 school year, Student was reported to be regressing or to have shown no progress on his/her December 9, 2021 IEP goals. This was attributed to Student's not attending school. Exhibit R-67. Mother testified that she did not remember Student going back to school from January through June 2022.

11. At the start of the 2022-2023 school year, Student was still enrolled in City School 1. Student did not attend City School 1 at all this school year. On September 26, 2022, City School 1 withdrew Student from its roster. City School 1 did not provide prior notice to Mother of the pending withdrawal. On or about October 18, 2022, Mother enrolled Student in City School 2. As of the due process hearing date in February 2023, Student had gone to City School 2 less than 10 times. Exhibit P-27, Testimony of Mother.

12. In a late October 2022 Analysis of Existing Data (AED) report, it was reported that Mother stated Student was exhibiting refusal to leave the house and that this behavior has been present since the COVID-19 pandemic prompted virtual learning.

According to Mother, Student had become violent at home with school refusal. Student was described as a large child and it was hard for Mother to physically force Student to go to school. Exhibit R-80.

13. On or about November 3, 2022, DEVELOPMENTAL BEHAVIORAL PEDIATRICIAN completed a DCPS Physician Verification Form, on which she stated, *inter alia*, that Student refused to attend school; that due to Student's aggressive and noncompliant behavior, Mother could not physically take him/her to school; and that in order to get Student to attend school, Student would have to be restrained and brought to school by a professional team. This physician listed Student's medical diagnoses as Autism Spectrum Disorder, Attention Deficit Hyperactivity Disorder, combined presentation and Oppositional Defiant Disorder. Exhibit P-16. The physician communicated her concerns with a DCPS social worker. Testimony of Assistant Principal.

14. In both the 2021-2022 and 2022-2023 school years, Mother applied to DCPS for Home and Hospital Instruction Program (HHIP) services for Student. DCPS denied HHIP services both years. On January 19, 2023, DCPS notified Mother that Student was not eligible for HHIP services because he/she was not medically confined to the home or hospital. Testimony of Mother, Exhibit R-98.

15. On January 10, 2023, OCCUPATIONAL THERAPIST 2 conducted a comprehensive OT reevaluation of Student. Occupational Therapist 2 reported, *inter alia*, that Student presents with challenges in fine motor coordination and visual motor

integration skills, which affect Student's ability to complete classroom handwriting tasks effectively. Exhibit P-24. On January 31, 2023, the City School 2 IEP team revised Student's IEP and added 60 minutes per month of OT related services. Exhibit P-12.

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

I.

Whether DCPS denied Student a FAPE by providing an inappropriate December 9, 2021 IEP because the IEP (1) falsely stated that the Student's behavior did not impact his/her education; (2) failed to incorporate a Behavior

Intervention Plan or provide for Behavior Support Services to address Student's school refusal behavior; (3) failed to include any academic or social goals; (4) failed to include sufficient specialized instruction, based upon the Student's documented academic deficiencies; (5) failed to incorporate accommodations recommended in the Student's evaluations; and (6) DCPS did not ensure that the IEP was revised meaningfully when the IEP progress reports indicated that the Student was making no progress or regressing on certain goals;

Whether DCPS denied Student a FAPE by providing an inappropriate April 8, 2022 IEP because (1) the IEP falsely stated that the Student's behavior did not impact his/her education; (2) it failed to incorporate a Behavior Intervention plan or provide for BSS services to address the Student's school refusal behavior; (3) it failed to include any academic or social goals; (4) it failed to include sufficient specialized instruction, based upon the Student's documented academic deficiencies; (5) it failed to incorporate accommodations recommended in the Student's evaluations; and (6) DCPS did not ensure that the IEP was revised meaningfully when the IEP progress reports indicated that the Student was making no progress or regressing on certain goals.

The core of the parent's complaint in this case is that DCPS denied Student a FAPE by offering IEPs on December 9, 2021 and April 8, 2022 which were not calculated to effectively address Student's school avoidance in the 2021-2022 or 2022-2023 school years. Student is identified as a child with an Autism Spectrum Disorder (ASD) disability. It is undisputed that since DCPS reopened schools to in-person classes in the fall of 2021, Student has refused to go to school for almost all of the 2021-2022 and 2022-2023 school years. Mother testified that Student is a large child and the parent has been unable to physically force the child to leave the home and go to school.

In the 2021-2022 school year, Student made no progress on IEP goals due to nonattendance. As of the due process hearing date, Student had gone to school less than 10 times in the present, 2022-2023, school year. Mother contends that DCPS has

denied Student a FAPE because the District has not addressed Student's school refusal behavior in Student's IEPs or in behavior intervention plans. DCPS responds that it has offered appropriate IEPs, but has been unable to serve Student because Student does not come to school.

In *Endrew F. v. Douglas County School District RE-1*, 137 S. Ct. 988 (2017), the U.S. Supreme Court clarified the standards for assessing the appropriateness of IEP:

[A]n IEP must be "reasonably calculated to enable [the] child to make progress appropriate in light of the child's circumstances." *Endrew F.*, 137 S. Ct. at 999; *see id.* at 1001 ("[A]dequacy . . . turns on the unique circumstances of the child."). . . . [T]he inquiry centers on "whether the IEP is reasonable, not whether the court regards it as ideal." *Id.* at 999. A reviewing court may not "substitute [its] own notions of sound educational policy for those of the school authorities." *Bd. of Educ. of Hendrick Hudson Cent. Sch. Dist. v. Rowley*, 458 U.S. 176, 206 (1982). This deference "is based on the application of expertise and the exercise of judgment by school authorities." *Endrew F.*, 137 S. Ct. at 1001. . . . [B]ecause the deference the Court owes school authorities is a product of their expertise, "[a] reviewing court may fairly expect those authorities to be able to offer a cogent and responsive explanation for their decisions," and this explanation should show why "the IEP is reasonably calculated" to ensure that the child "make[s] progress appropriate in light of his circumstances." *Id.* at 1002.

Smith v. Dist. of Columbia, No. CV 16-1386 (RDM), 2018 WL 4680208 at *5.

The federal IDEA regulations mandate that all IEPs must include, *inter alia*, (i) a statement of annual goals, including functional goals designed to meet the child's needs that result from the child's disability to enable the child to be involved in and make progress in the general education curriculum and (ii) a statement of the special education and related services that will be provided to enable the child to advance

appropriately toward attaining the annual goals. *See* 34 C.F.R. § 300.320(a)(2), (4).

In a November 12, 2021 comprehensive psychological evaluation report on Student, School Psychologist reported that Student was displaying behaviors that indicated resistance to environmental changes, rigidity to established routines, difficulty building reciprocal relationships with peers and adults, difficulty with overall social pragmatic communication with peers, and difficulty with emotional regulation. The psychologist recommended that Student's greatest area of educational need was clearly his/her attendance, and a plan needed to be developed as soon as possible to significantly increase Student's school attendance. In the December 9, 2021 initial IEP, the IEP team stated that Student experienced a great deal of school-refusal behavior and exhibited a lot of anxiety around attending school.

A child with a disability who does not attend school cannot be expected to make educational progress and it is the duty of the IEP team to provide special education and related services directed to improving attendance, where the child's nonattendance is related to his/her disability. *See, e.g., Springfield Sch. Comm. v. Doe*, 623 F. Supp. 2d 150, 161 (D. Mass. 2009). (IEP Team needs to consider whether school truancy is related to a student's disability and, if it is, address it through the IEP.) While the City School 1 IEP team provided at least minimal attendance-related annual goals in the December 9, 2021 and April 8, 2022 IEPs, the IEPs provided only 1 hour per week of unspecified Specialized Instruction and neither IEP contained any related services, such as Behavioral Support Services or parent training, calculated to get Student to come to

school. *See* 34 C.F.R. § 300.34(a) (Related services include social work services in schools and parent counseling and training). I find that DCPS has not met its burden to offer a “cogent and responsive” explanation to show how these IEPs were reasonably calculated to address the “primary challenge” of Student’s nonattendance. This was a denial of FAPE.

The hearing officer will order DCPS to arrange, subject to obtaining the parent’s consent, a thorough special education reevaluation of Student focused on the child’s school refusal behaviors and, to the extent Student’s nonattendance is related to his/her ASD disability, ensure that a revised IEP is developed which provides special education and related services calculated to address Student’s nonattendance.

Having determined that DCPS denied Student a FAPE with the inappropriate December 9, 2021 and April 8, 2022 IEPs and that Student’s IEP must be revised, it is unnecessary to reach whether the IEPs were also deficient for the other reasons alleged by Petitioner, namely (1) not acknowledging that Student’s school avoidance behavior impacts his/her education; (2) failure to include academic or social goals; (3) failure to include sufficient specialized instruction; (4) failure to incorporate accommodations recommended in evaluations and (5) failure to ensure that the IEPs was revised meaningfully based on lack of progress. *See Green v. District of Columbia*, No. CIV.A. 05-550(CKK), 2006 WL 1193866, at *9 (D.D.C. May 2, 2006) (Whether the Hearing Officer based finding that DCPS has denied child a FAPE based on one, or two, or three alleged violations is irrelevant—the result would be the same.)

II.

Whether DCPS denied Student a FAPE by failing to conduct a Functional Behavior Assessment during the 2021-2022 school year or to develop a Behavior Intervention Plan to address Student's school refusals which were related to his/her disability

In a separate claim, Petitioner alleges that DCPS denied Student a FAPE by not conducting a Functional Behavior Assessment (FBA) in the 2021-2022 school year and not developing a Behavior Intervention Plan. Functional Behavior Assessment refers to a systematic set of strategies that are used to determine the underlying function or purpose of an interfering 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). The failure to conduct an FBA when warranted is a procedural violation of the IDEA. *See, e.g., Z. B. v. District of Columbia*, 888 F.3d 515, 524 (D.C. Cir. 2018). 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 decision, I have determined that DCPS denied Student a FAPE by not offering services in the December 9, 2021 and April 8, 2022 IEPs to address his/her

nonattendance. Student's nonattendance was discussed in the 2021 psychological evaluation and was a focus of Student's IEP teams' discussions. A DCPS social worker conducted an FBA of Student in March 2020, focused on Student's off task behaviors. There was no creditable evidence at the hearing from a psychologist or social worker that an updated FBA in the 2021-2022 school year was needed to determine the function of Student's school refusal behaviors. I find that Petitioner did not meet her burden of persuasion that DCPS' omission to conduct an FBA in the 2021-2022 school year further impeded Student's right to a FAPE or significantly impeded the parent's opportunity to participate in the decision making process.

III.

Whether DCPS denied Student a FAPE by failing to comprehensively evaluate the Student in all areas of disabilities in that the November 13, 2021 OT evaluation was not sufficiently comprehensive because the evaluator was unable to obtain handwriting samples

In DCPS' November 13, 2021 OT evaluation of Student, the DCPS occupational therapist was unable to evaluate Student's handwriting due to Student's absences from school. DCPS conducted an updated OT evaluation in in January 2023 and concluded that Student presented with challenges in fine motor coordination and visual motor integration skills, which affect Student's ability to complete classroom handwriting tasks effectively. Petitioner argues that this outcome of the 2023 OT evaluation shows that the 2020 OT evaluation was not comprehensive for want of evaluation of Student's handwriting. However the occupational therapist stated in her 2021 report that all

assessment procedures within her report were valid and the assessments should be considered a valid report of Student's then-current OT functioning. Petitioner did not call an OT expert witness at the due process hearing and the occupational therapist's 2021 validity statement was not creditably rebutted by the parent. I find that Petitioner did not meet her burden of persuasion that the November 13, 2021 OT evaluation was not sufficiently comprehensive.

IV.

Whether DCPS denied Student a FAPE by failing to provide an appropriate placement and/or location of service for Student from September 26, 2022 until October 18, 2022 because on September 26, 2022, City School 1 disenrolled Student without providing Petitioner with any documentation indicating that such action was imminent or convening a meeting of the IEP team to address the issues or an alternative placement.

On September 26, 2022, City School 1 sent Mother a final withdrawal letter and "disenrolled" Student for inadequate attendance. This happened without convening Student's IEP team or providing advanced notice to the parent. Eventually Mother enrolled Student in another DCPS school, City School 2, which was Student's neighborhood school. For a period of some 15 school days, Student did not have a school to attend. Mother contends that City School 1's disenrollment of Student was a denial of FAPE. I agree.

The DCPS Attendance and Truancy Policy, Exhibit P-37, requires that before sending a final withdrawal letter for nonattendance, the school must conduct outreach efforts directed to the parent, including sending an initial withdrawal letter and making

a phone call to student's home. In addition, students receiving special education services through an IEP cannot be withdrawn without the school's demonstrating additional reasonable efforts to contact the parent and receiving approval from the DCPS Division of Specialized Instruction.

In this case, Mother's testimony was un rebutted that she did not receive any of the required outreach communications. Moreover, there was no evidence that City School 1 received approval from the Division of Specialized Instruction before withdrawing Student. I find that in this case, not offering Student IEP services (or any education services) for some three weeks was a material failure to implement Student's IEP and a denial of FAPE. *See, e.g., Middleton v. District of Columbia*, 312 F. Supp. 3d 113, 144 (D.D.C. 2018) (Material failure to implement substantial or significant provisions of a child's IEP may constitute a denial of FAPE.)

V.

Whether DCPS denied Student a FAPE by failing to provide the parent's representatives access to all of Student's education records.

Educational Advocate, an employee of Law Firm, testified that there were education records not provided in DCPS' responses to Law Firm's requests for Student's education records, notably Student's psychological evaluation and speech-language evaluation reports from 2020. The failure to timely comply with a parent's request to inspect education records is a procedural violation of the IDEA. *See, e.g., N.P. v. E. Orange Bd. of Educ.*, No. CIV. 06-5130 DRD, 2011 WL 463037 at 7 (D.N.J. Feb. 3, 2011)

(procedural violations of the IDEA by failing to timely respond to parent's requests for records.)

In this case, it appears from Mother's testimony that she, in fact, maintained copies of the "missing" evaluation reports. Also DCPS conducted an updated psychological evaluation of Student in December 2021. Assuming there was a failure to provide all of Student's education records, I find that Petitioner did not show that Law Firm's not receiving the allegedly missing records impeded Student's right to a FAPE, caused a deprivation of educational benefit or significantly impeded Mother's opportunity to participate in the decision-making process. *See* 34 C.F.R. § 300.513(a)(2), *supra*. Although I do not order relief on this claim, DCPS is under a continuing obligation to permit Mother to inspect and review any education records relating to Student that are collected, maintained, or used by DCPS. *See* 34 C.F.R. § 300.613(a).

Remedy

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. *Boose v. District of Columbia*, 786 F.3d 1054, 1056 (D.C.Cir.2015). I find that the pressing need in this case is for Student to undergo an appropriate evaluation to assess the causes of his/her school refusal and determine whether it is related to his/her ASD disability. If so, Student's IEP must be revised to provide appropriate annual goals and, especially, special education and related services, calculated to overcome Student's school

avoidance behaviors and to enable Student to make appropriate educational progress. Given that Student has not regularly attended school since DCPS schools were closed due to the COVID-19 pandemic, this will be a tall order. I will direct DCPS to engage a qualified mental health professional, who has documented experience with school avoidance behaviors, to evaluate Student and determine whether Student's nonattendance is related to his/her IDEA disability. If the evaluator finds that there is such a relationship, the evaluator should make recommendations for consideration by the DCPS IEP team for special education services, related services, supplementary aids and services and accommodations, which could be provided in Student's IEP, to encourage Student to attend school and be involved in and make progress in the general education curriculum.

The parent also seeks compensatory education for the denials of FAPE alleged in the due process complaint. Parent's expert, Educational Advocate, recommended compensatory education to address Student's missing over a year of behavioral, academic and adaptive living skill services. She proposed that Student be awarded, *inter alia*, 235 hours of tutoring to compensate Student for missing educational services over this period. I find that this recommendation appears to be reasonably calculated to compensate for the harm to Student resulting from DCPS failure to offer appropriate IEPs beginning in December 2021 and City School 1's disenrolling Student in September 2022. *See B.D. v. District of Columbia*, 817 F.3d 792, 797-98 (D.C. Cir. 2016) (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).

Petitioner seeks an order for DCPS to provide in-home and/or virtual educational services for the Student on an interim basis. The IDEA requires that to the maximum extent appropriate, children with disabilities be educated with children who are nondisabled. Removal of children with disabilities from the regular educational environment may occur only if the nature or severity of the disability is such that education in regular classes with the use of supplementary aids and services cannot be achieved satisfactorily. *See* 34 C.F.R. § 300.114(a). At the due process hearing, Petitioner did not provide creditable evidence from a medical or mental health professional that home instruction is Student's least restrictive environment. I decline to order DCPS to provide Student in-home or virtual education services.

ORDER

1. As compensatory education for the denials of FAPE found in this decision, the hearing officer orders DCPS to promptly issue funding authorization to the parent to obtain 235 hours of one-on-one academic tutoring for Student by a qualified [REDACTED] educator;
2. Subject to the parent's providing written consent, within 20 business days of this decision, DCPS shall engage a mental health professional, experienced in working with children with school refusal and chronic absenteeism behaviors, to conduct an evaluation of Student focused on finding the causes of Student's school refusal, determining whether there is a relationship with Student's ASD disability and making recommendations to Student's IEP team to equip the IEP team to revise Student's IEP to develop goals and services aimed at getting Student to attend school regularly. Unless there is a DCPS employee with the

requisite expertise, DCPS shall engage an independent evaluator. DCPS shall promptly convene Student's IEP team and ensure that Student's IEP is revised, as appropriate, based on the evaluator's recommendations and other information available to the IEP team;

3. Pending the revision of Student's IEP, DCPS shall forthwith, in coordination with Mother, resume diligent efforts to significantly increase Student's school attendance. DCPS shall keep a record of its attempts to secure Student's attendance, including detailed records of telephone calls and electronic communications made or attempted and the results of those calls; copies of correspondence sent to the parent and any responses received and detailed records of visits made to the child's home and

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

SO ORDERED.

Date: February 23, 2023

s/ Peter B. Vaden
Peter B. Vaden, Hearing Officer

cc: Counsel of Record
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