

District of Columbia
Office of the State Superintendent of Education
Office of Dispute Resolution
1050 - First Street, N.E.; Washington, D.C. 20002
(202) 698-3819 www.osse.dc.gov

OSSE
Office of Dispute Resolution
July 24, 2023

Confidential

Parent on behalf of Student ¹)	Case No. 2022-0066
)	
Petitioner)	Hearing Dates: July 11-12, 2023
)	
v.)	Conducted by Video Conference
)	Date Issued: July 24, 2023
District of Columbia Public Schools)	
)	Terry Michael Banks,
Respondent)	Hearing Officer

HEARING OFFICER DETERMINATION

INTRODUCTION

Petitioner is the mother of an X-year-old student (“Student”) attending School A. On April 14, 2023, Petitioner filed a Due Process Complaint Notice (“*Complaint*”) alleging that the District of Columbia Public Schools (“DCPS”) denied the student a free appropriate public education (“FAPE”), by failing to provide Individualized Education Programs (“IEPs”), failing to implement Student’s IEPs, and failing to develop a behavior intervention plan (“BIP”) and/or an Attendance Improvement Plan. On April 24, 2023, DCPS filed *District of Columbia Public Schools’ Response to Parent’s Administrative Due Process Complaint* (“*Response*”), denying that it had denied Student a FAPE in any way.

SUBJECT MATTER JURISDICTION

This due process hearing was held, and a decision in this matter is being rendered, pursuant to the Individuals with Disabilities Education Improvement Act (“IDEIA”), 20 U.S.C. Section 1400 *et seq.*, its implementing regulations, 34 C.F.R. Sect. 300 *et seq.*, Title 38 of the D.C. Code, Subtitle VII, Chapter 25, and the District of Columbia Municipal Regulations, Title 5-E, Chapter 30.

¹ Personally identifiable information is attached in the Appendix and must be removed prior to public distribution.

PROCEDURAL HISTORY

On April 14, 2023, Petitioner filed the *Complaint* alleging that DCPS denied Student a FAPE by (1) failing to provide Student appropriate IEPs on or about February 8, 2023 and March 28, 2023, (2) failing to implement the IEPs, and (3) failing to develop a BIP and/or an Attendance Improvement Plan for Student during the 2022-23 school year. On April 24, 2023, DCPS filed its *Response*, in which it refuted allegations in the *Complaint* denying that it had denied Student a FAPE in any way.

The parties participated in a resolution meeting on April 28, 2023 that did not result in a settlement. A prehearing conference was conducted on May 2, 2023 by video conference, and the *Prehearing Order* was issued that day.

On June 27, 2023, Petitioner filed *Petitioner's Request for a Notice to Appear* for Athletic Director and Witness C. I issued the Notices to Appear on June 28, 2023. On June 29, 2023, DCPS filed *District of Columbia Public Schools' Motion to Quash Petitioner's Notices to Appear*. DCPS argued that the *Request* was deficient for failing to state the relevance of the requested testimony. On June 30, 2023, Petitioner filed *Petitioner's Response to the Motion to Quash*. Petitioner argued that once the Hearing Officer issued the requested Notices to Appear, "There is no legal basis to support Respondent's subsequent Motion to Quash." On July 5, 2023, I issued an order rescinding the Notice to Appear to Athletic Director; as School A's Athletic Director, I concluded that he was not in a position to offer relevant testimony as to either the appropriateness or the implementation of Student's IEPs.

The due process hearing was conducted on July 11-12, 2023 by video conference. The hearing was open to the public at Petitioner's request. Petitioner filed Five-day Disclosures on July 3, 2023 containing a witness list of eight witnesses and documents P-1 through P-64. DCPS filed objections to Petitioners' disclosures on July 7, 2023. DCPS objected to expert testimony from Witness A on the grounds of qualifications and potential financial interests. DCPS objected to testimony from Witness B as it relates to IEP implementation, Student's FBA, and the need for a BIP. DCPS objected to testimony from Witness C because she is a DCPS employee, her potential testimony was not disclosed to counsel for DCPS, and Petitioner did not disclose any potential financial interests the witness might have. These objections were deferred until DCPS conducted *voir dire*. DCPS also objected to Petitioners' Exhibits P1-P3, P5, P7, P51-52, and P54-P57 on grounds of relevance, hearsay, authentication, and lack of foundation. Ultimately, only the objections to P51, a draft Analysis of Existing Data form, and P55 – Witness A's Section 504 Eligibility Meeting Notes, were sustained. Thus, Petitioner's Exhibits P1-P50, P52-P54, and P56-P64 were admitted into evidence.

Respondent's disclosures, also filed on July 3, 2022, contained a witness list of five witnesses, including five experts, and documents R1 through R-56. Petitioners filed no objections to Respondent's disclosures. At the beginning of DCPS' direct case, its proposed Exhibits, R1 – R56 were offered and admitted into evidence.

Petitioner presented as witnesses in chronological order: Witness A, Witness B, Witness C, Student, Witness D, and Petitioner. Witness A was admitted as an expert in psychology and special education, Witness B was accepted as an expert in behavior analysis, and Witness C was accepted as an expert in special education. Respondent presented as witnesses in chronological

order: Witness E, Witness F, and Witness G. Witness E was accepted as an expert in school social work, Witnesses F was accepted as an expert in special education, and Witness G was admitted as an expert in school psychology and special education. At the conclusion of the testimony, the parties' counsel gave oral closing arguments.

ISSUES

As identified in the *Complaint* and the *Prehearing Order*, the issues to be determined in this case are as follows:

1. Whether DCPS denied Student a FAPE by failing to provide Student appropriate IEPs on or about February 8, 2023 and March 28, 2023. Specifically, Petitioner asserts that (a) behavioral concerns were not addressed in the Special Consideration sections, (b) the IEPs did not address Student's need for assistive technology ("A/T"), (c) the goals in mathematics, Emotional, Social, and Behavioral Development ("Behavior"), and transition planning were inadequate, (d) the IEPs should have provided 120 minutes per month of direct behavioral support services ("BSS") rather than 60 minutes per month of consultation services, (e) the IEPs failed to provide specialized instruction consultation services to address modification of assignments, (f) the IEPs provided insufficient amounts of specialized instruction inside and outside of general education.
2. Whether DCPS denied Student a FAPE by failing to implement Student's IEP during the 2022-23 school year. Specifically, Petitioner alleges that DCPS failed to provide the classroom aids and services, accommodations, and specialized instruction "with fidelity." "...[t]he student has been denied extended time on numerous assignments, there has been no chunking of information, or graphic organizers, student has not been provided calculation device, preferential seating or a location with minimal distractions and there is no schedule for the delivery of the special education instruction and the student's special education teacher was unable to verify that instruction was being delivered pursuant to the student's IEP."
3. Whether DCPS denied Student a FAPE by failing to develop a BIP and/or an Attendance Improvement Plan for Student during the 2022-23 school year.

FINDINGS OF FACT

1. Student is X years old and was enrolled in grade N in School A in during the 2022-23 school year.²

2. On July 31, 2020, upon Student's completion of grade K at School A, DCPS issued Student's report card for the 2019-20 school year. S/he earned the following grades: Health Education – A-, Spanish I – Pass, History I – C, English – D+, Introduction to Language – F,

² Petitioners' Exhibit ("P:") 4 at page 1 (39). The exhibit number and exhibit page numbers are followed by the electronic page number in the disclosure in parentheses, i.e., P4:1 (39).

Algebra IA– B, Physics – Part I – F, Introduction to Arts I – D, History II – A, Literature of the Americas II – Pass, Algebra IB – B+, Chinese – B+, Physics II – A-, and Modern Dance – A.³

3. For the 2020-2021 school year, when Student was in grade J, s/he earned the following grades: Pass in English, History-Area Studies, Chinese-Part I, Physics, Chemistry-Part I, Introduction to Arts II, and Geometry A and B, an A in Conditioning & Fitness, and B- in Chinese-Part II and Chemistry-Part II.⁴

4. On October 23, 2021, Student was admitted to Children’s National Medical Center.⁵ On October 29, 2021, s/he was discharged from Children’s National, Inpatient Mental Health after treatment for an acute drug overdose during a suicide attempt. Student was diagnosed with a Major Depressive Disorder.⁶

5. For the 2021-22 school year, when Student was in grade P, s/he earned the following grades: Pass in College Algebra, C- in College Biology⁷ and College Seminar II, D+ in College Seminar I, D in College World Language, and F in College Seminar I.⁸

6. After a request for Student to be evaluated, DCPS convened an Analysis of Existing Data meeting on June 24, 2022. DCPS agreed to conduct a comprehensive psychological evaluation, including an executive functioning assessment, and an occupational therapy evaluation that would not include executive functioning. DCPS declined the request to conduct a speech and language evaluation.⁹

7. On August 23, 2022, Witness G, School A’s School Psychologist, completed a Comprehensive Psychological Evaluation of Student to determine the existence of a Specific Learning Disability (“SLD”), Emotional Disturbance (“ED”), or Attention Deficit Hyperactivity Disorder (“ADHD”).¹⁰ Witness G interviewed three of Student’s teachers. Teacher A, her/his College Literature teacher, noted strengths of meticulous notetaking and passionate argumentation while noting concerns of focus during class, distracted cell phone use, and late and missing assignments. Teacher B, Student’s College Biology teacher, was unable to discern any strengths. His concerns included staying engaged in class, use of his/her cell phone in class, not completing work, and “■■■ attendance was very poor.” Teacher C, Student’s College Pre-Calculus teacher, reported that Student was a natural leader and defender of others. S/he communicates well and defends [his/her] positions well. However, his/her “performance in Mathematics is very weak... [S/he] simply has not mastered the prerequisites knowledge necessary for [him/her] to manage these advanced courses.” Student’s response to an inability to do the work was avoidance, resulting in a failing grade. Another math teacher at School A, Teacher D, offered tutoring assistance for

³ Respondent’s Exhibit (“R:”) 1 at pages 1-4. The exhibit number is followed by the electronic page number in the disclosure, i.e., R1:1-4.

⁴ P15:1 (153).

⁵ P49:13 (288).

⁶ *Id.* at 277.

⁷ Student’s testimony during the hearing revealed that s/he received no grade in Biology due to his/her failure to complete assignments.

⁸ P15:1 (153).

⁹ P50:1-2 (292-293).

¹⁰ P10:1 (97).

which Teacher C would give Student credit, but Student never sought Teacher D's help.¹¹ Witness G noted that Student did not give consistent effort during testing.

While [s/he] was sad and, at times, lacked effort, I believe this is how [s/he] is in the school setting. At times, I was able to see [her/his] true ability to compose writings or complete math problems and at other times, [s/he] was choosing to not respond. [S/he] seems to lack the emotional energy to persist. [S/he] did not seem to be experiencing any stress and the assessment is valid.¹²

On the Reynolds Intellectual Assessment Scales ("RIAS-2"), Student scored in the Average range on the Composite Intelligence Index (91), the Verbal Intelligence Index (90), the Nonverbal Intelligence Index (94), and Speeded Processing (97).¹³ On the Woodcock-Johnson Tests of Achievement ("WJ-IV"), Student scored in the Average range in Reading (90), Broad Reading (91), Mathematics (91), Written Language (96), Broad Written Language (99), Written Expression (101), Academic Skills (91), Academic Fluency (92), Academic Applications (93), Brief Achievement (95), and Broad Achievement (91), and in the Low Average range in Broad Mathematics (87), and Math Calculations Skills (84).¹⁴

Student was hospitalized from October 23 – 29, 2021 after a suicide attempt following the break-up with his/her girl/boyfriend. S/he remained affected and tearful during testing, although s/he no longer had contact with the former girl/boyfriend. On a Strength and Difficulties Questionnaire ("SDQ") Student's self-report yielded Very High scores in Overall Stress, and High in Emotional Distress, Behavioral Difficulties, and Difficulties Getting Along with Other Children. On the Behavior Rating Inventory of Executive Functioning ("BRIEF-2"), no teacher ratings were completed because testing was conducted in the summer. The parent's ratings reflected concerns related to Student's ability to resist impulses, being aware of his/her functioning in social settings, adjusting to changes in environment, people, plans, or demands, reacting to events appropriately, getting started on tasks, activities, and problem-solving, sustaining working memory, planning and organizing problem-solving, and keeping materials and belongings reasonably well-organized. Student's self-rating portends a tendency to lose emotional control when routines are challenged or when flexibility is required.¹⁵ On the Reynolds Adolescent Depression Scale ("RADS-2"), Student's overall depression was in the moderate range.¹⁶

Student's 2021-22 year-end grades included Passes in Advisory and College Algebra Recovery, D+ in Seminar I and Seminar II, Incompletes in College Biology and College Language, and Withdrawn in College Pre-Calculus.¹⁷

Witness G concluded that Student did not meet the qualifications for Specific Learning ("SLD"), Emotional Disturbance ("ED"), or Other Health Impairment ("OHI"). S/he did not qualify for SLD primarily because s/he performs in the average range in most academic areas

¹¹ *Id.* at 4-5 (100-101).

¹² *Id.* at 6 (102).

¹³ *Id.* at 7 (1030).

¹⁴ *Id.* at 9 (105).

¹⁵ *Id.* at 15-16 (111-12),

¹⁶ *Id.* at 18 (114).

¹⁷ *Id.* at 20 (116). I believe the "2020-21" on the grade report is erroneous as testimony during the hearing related to Student's incomplete grade in Biology during the 2021-22 school year.

despite low motivation.¹⁸ S/he did not qualify for ED because two research-based interventions were not completed as is apparently required by the Office of the State Superintendent of Education.¹⁹ S/he did not qualify for OHI because s/he had no diagnosis of ADHD.²⁰ Witness G recommended the development of a Section 504 Plan.²¹

8. On September 14, 2022, DCPS completed a Disability Worksheet: Emotional Disturbance. DCPS determined that Student did not qualify for services due to an Emotional Disturbance (“ED”) because the following research-based interventions had not been conducted:

A group of qualified professionals reviewed and/or conducted two scientific research-based interventions that are based a problem solving model that addresses behavioral/emotional skill deficiency and documentation of the results of the intervention, including progress monitoring documentation, and determined that the student exhibits one or more of the five [criteria for ED in IDEA].²²

DCPS also issued a Final Eligibility Determination Report on September 14, 2022 determining that Student was not eligible for services.²³

9. On September 30, 2022, petitioner filed a due process complaint alleging that DCPS denied Student a FAPE by failing to find Student eligible for special education services and for failing to provide Petitioner all of Student’s educational records.²⁴

10. On October 4, 2022, DCPS developed a Section 504 Plan for Student.²⁵ Petitioner and Attorney A, her attorney, objected to DCPS’ failure to find Student eligible for services under IDEA. Student had begun to missing Math class. Student stated that s/he did not find the teacher’s teaching style beneficial and requested individual tutoring. Witness G, the School Pscyhologist, suggested that Student attend the math teacher’s office hours.²⁶ The 504 Plan provided the following accommodations: (a) teachers will check in for understanding to make sure Student in on task, (b) Student will check in with the school psychologist weekly for 15 minute to discuss academic, behavior, and social-emotional well-being, (c) there will be regular home-school communication to discuss Student’s progress, (d) Student will get 1.5 time to complete classroom assignments, (e) s/he will be allowed three five minute breaks during class, as needed, and (f) 1.5 extended time on tests and quizzes, and one full day for PARCC testing.²⁷

11. On December 15, 2022, Witness G completed an Addendum to her Comprehensive Psychological Evaluation. The Addendum was necessary due to Student’s unavailability in August 2022 (summer vacation) for an observation in the classroom, as well as the unavailability of

¹⁸ Id. 22-23 (118-19).

¹⁹ Id. at 24 (120-21).

²⁰ Id. at 25-26 (121-22).

²¹ Id. at 26 (122). *See*, n. 25, *infra*.

²² R13:69.

²³ R20:97.

²⁴ P57:2 (336).

²⁵ P56:1 (327). The Rehabilitation Act of 1973 authorizes the development of support plans for students whose disabilities do not qualify for services under IDEA. *See* 29 U.S.C. §794, Section 504 of the Rehabilitation Act of 1973.

²⁶ P54:1-2 (317-18).

²⁷ P56:1-3 (327-29).

teachers, to complete rating scales.²⁸ Witness G interviewed four teachers and School Psychologist A. Teacher E (Seminar I) reported that Student gets along well with peers. Although s/he had consistently turned in assignments, lately this had begun to change; Student had extended time to turn in assignments on his/her 504 Plan, but Teacher E was awaiting two assignments. Student was earning an 89% in Teacher F's class. "[S/he] is always determined to complete class work." Teacher G (Political Science) reported that Student devoted a lot of effort to his/her first quarter project. Teacher G alluded to Student's reluctance to come to office hours or study skills and inconsistency turning in assignments. Teacher H (Conceptual Art) described Student as "a wonderful scholar and completes work on a regular basis," but "tries [her/his] best to make up any missed assignments. He reported that Student struggles "staying on top of due dates, and attentiveness in class," and did not complete her/his midterm project on time. S/he finally turned in an excellent final product. School Psychologist A reported that Student was passing all of her/his courses except English, in which s/he had two assignments to complete, but had time extensions.²⁹

The Conners-4 measures symptoms of ADHD as well as other disorders. Teacher E, Teacher G, and Teacher H completed rating scales. The symptoms measured were Inattention/Executive Dysfunction, Hyperactivity, Impulsivity, Emotional Dysregulation, Schoolwork (timeliness, checking for mistakes), Peer Interactions, and ADHD Index. Student was Average or Slightly Elevated in all but ADHD. Only Teacher G rated him/her Very Elevated in Emotional Dysregulation. All three teachers rated Student High on the ADHD Index.³⁰ Witness G observed that

All teachers viewed [her/his] current functional needs within normal limits and they have been giving [him/her] the 504 accommodations of additional time and support to complete assignments. [S/he] also scores at the high range with the ADHD index and is demonstrating significant symptoms of ADHD at school and at home (from previous rating scales). Therefore, [Student] is exhibiting the signs and symptoms consistent with a diagnosis of ADHD.³¹

However, Witness G concluded that Student did not qualify for special education services, because her/his ADHD symptoms are

...[n]ot adversely impairing [her/his] functioning in school. [S/he] is participating in check ins and emotional supportive sessions with [School Psychologist A]. [Student] experienced a crisis last school year and needed to have treatment and intervention to help [him/her] heal. The MDT will make the final determination as to educational programming and disability classification.³²

12. January 25, 2023, Hearing Officer Coles B. Ruff issued a Hearing Officer Determination ("HOD") resolving the complaint that was filed on September 30, 2022.³³ The Hearing Officer noted that Witness G's evaluation determined that Student's Depressive Disorder "met one criterion under IDEA for ED disability, specifically, 'a general pervasive mood of

²⁸ P11:1 (127).

²⁹ *Id.* at 2-3 (128-29).

³⁰ *Id.* at 4-6 (130-32).

³¹ *Id.* at 8 (134).

³² *Id.* at 9 (135).

³³ P57:1 (335).

unhappiness or depression.”” The record also established to the Hearing Officer’s satisfaction that Student’s depression had an adverse impact on Student’s educational performance. Although School A did not conduct the two interventions required by OSSE to satisfy eligibility,³⁴ H.O. Ruff concluded that Student met the criteria for an ED classification under IDEA³⁵ and ordered DCPS to convene an IEP meeting to develop an appropriate IEP.³⁶

13. On February 3, 2023, DCPS issued a Final Eligibility Determination Report determining that Student was eligible for services with a classification of ED.³⁷

14. On February 8, 2023, DCPS convened an Initial IEP meeting. S/he was classified ED.³⁸ Petitioner, Student, Attorney A, and Witness A, Petitioner’s Educational Advocate, attended the IEP meeting.³⁹ In Consideration of Special Factors, the IEP provided that Student’s behavior did not impede his/her learning or that of other children and that s/he did not require assistive technology and services.⁴⁰ In Mathematics, the Present Levels of Academic Performance and Functional Performance (“PLOP”) reported that Student earned a B in College Pre-Calculus, but was not currently enrolled in a math course, because s/he had accumulated sufficient mathematics credits for graduation. The PLOP reported Student’s WJ-IV scores, indicating that s/he performs in the average range. The baselines provided that Student was low average in math fluency and low average to average in math calculations. The goals were: (a) given a word problem, Student will write a sentence describing the reasonableness of the level of accuracy reported by evaluating the purpose of the value in relation to the context, and (b) given a word problem with at least three different sets of data, and a question that can be answered using part of the given information, Student will answer the question by identifying the quantities needed to answer the question and using the corresponding data to make calculations relevant to the question.⁴¹ In Reading, the PLOP reported Student’s WJ-IV scores that were generally in the Average range. The baseline was that s/he scored in the low average range in Passage Comprehension. The goal was, given a grade-level literary text, Student will correctly answer reading comprehension questions with 80% accuracy.⁴² In Written Expression, the PLOP reported his/her Average scores on the WJ-IV. The baselines were: (a) Student struggles with organizing and producing a clear thesis statement and proper use of textual evidence, and (b) s/he struggles with the basic mechanics of writing including punctuation. The goals were: (a) given a text and writing prompt, Student will write 2-3 paragraphs with a clear thesis statement, 3-4 pieces of relevant evidence from the text with an explanation that connects to the thesis and integrates each piece of evidence into the paragraph, and a concluding paragraph, and (b) given a draft of his/her own work, s/he will correct at least 12 teacher-selected language convention skills.⁴³ In Behavior, the PLOP described him/her as friendly and strengthens his/her relationships by participating in cheerleading. Student had 16 unexcused absences as of February 2, 2023. The PLOP reported Student’s suicide attempt in 2021 and the subsequent

³⁴ 5-A DCMR §3011.5, which provides the criteria for eligibility for services under the ED classification in the District, does not require the interventions described in Witness G’s evaluation, the Disability Worksheet described in paragraph 8, and referenced in the HOD.

³⁵ P57:13 (347).

³⁶ *Id.* at 17 (351).

³⁷ R27:136.

³⁸ P4:1 (39).

³⁹ P5:1 (58).

⁴⁰ P4 at 3 (41).

⁴¹ *Id.* at 4 (42).

⁴² *Id.* at 5 (43).

⁴³ *Id.* at 6 (44).

therapy. S/he had some peer conflicts that cost him/her some friendships during the 2021-22 school year. “Student’s symptoms of depression and lack of coping skills are impacting [his/her] academics.” The description of the effects of Student’s disability included the following: “It is recommended that [Student] be provided with behavior support services to include counseling.” The baselines were: (a) Student has some challenges with managing emotional regulation, feeling more comfortable expressing her/his emotions, and using coping strategies, and (b) s/he has difficulty remaining on task at times and requires prompts and encouragement to remain on task. The goals were: (a) s/he will identify and utilize coping strategies to assist with responding to problems and stressful situations, and (b) s/he will attend a non-preferred, small group activity and/or independent assignment, and remain on task with no task avoidance 75% of the time.⁴⁴ In the Post-Secondary Transition Plan, the only goal was that by the end of the IEP cycle, Student would apply for college scholarships to address his/her ambition of attending college in the fall of 2023.⁴⁵

The IEP team prescribed four hours per week of specialized instruction inside general education, one hour per week outside general education, and one hour per week of consultation behavioral support services (“BSS”). As Other Classroom Aids and Services, the team prescribed exemplars, models, graphic organizers, chunking of longer assignments, clear instructions, and a structured and supportive classroom environment with clear expectations.⁴⁶ Classroom Accommodations included use of a calculator, preferential seating, small group testing, and extended time.⁴⁷

Student’s representatives objected to the statement in the Consideration of Special Factors that Student’s behavior did not impede learning, no speech-to-text A/T, no math goal addressing quantitative reasoning, and no direct BSS. As for BSS, the team agreed that Student could meet with Witness E, the School Social Worker, “as [s/he] needs and requests.”⁴⁸

15. On March 1, 2023, Witness E, the School Social Worker, addressed an email to Petitioner enclosing a form for Petitioner to sign to provide consent to conduct an FBA of Student. The email was sent to Witness G, the School Psychologist, not to Petitioner.⁴⁹ On May 5, 2023, a DCPS Resolution Specialist forwarded a copy of the consent form to Attorney A, Petitioner’s counsel.⁵⁰ Petitioner provided consent on or about May 5, 2023.⁵¹

16. On March 10, 2023, Attorney A, Petitioner’s counsel, requested a 30-day IEP review because Student had been notified that s/he was no longer on track to graduate.⁵² On March 28, 2023, the IEP team reconvened to conduct a thirty-day review of Student’s IEP.⁵³ The PLOPs, baselines, goals, classroom aids and services, and classroom accommodations remained unchanged. The IEP team added one additional hour per week of specialized instruction outside

⁴⁴ *Id.* at 7-8 (45-46).

⁴⁵ *Id.* at 14 (52).

⁴⁶ *Id.* at 9 (47).

⁴⁷ *Id.* at 11 (49).

⁴⁸ P5:2 (59).

⁴⁹ R51:248.

⁵⁰ P34:2 (222).

⁵¹ R43:190.

⁵² R51:235; P19:1 (170), P22:2 (182); P25:5 (194).

⁵³ P6:1 (61).

general education.⁵⁴ Petitioner, Student, Attorney A, and Witness A, Petitioner's Educational Advocate, attended the IEP meeting.⁵⁵ Petitioner complained that teachers were not allowing Student extended time, to leave class to go to counseling, and she was not sure how Student's IEP was being implemented.⁵⁶ Witness F, Student's Special Education Teacher, stated that "there is no set schedule for [him/ her] to get [his/her] services, [s/he] can come when s/he needs help. Attorney A requested four additional hours per week of specialized instruction outside general education, and Petitioner and Witness A complained that teachers were unable to get Student to understand material. Witness A and Petitioner also complained of School A's failure to provide graphic organizers. Witness A suggested a significant increase in one-on-one attention: "I think [s/he] needs a lot more hand-holding and direct-support, not something that [s/he] needs to initiate, late this can be stepped down but right now [s/he] needs someone walking [her/him] through every step [s/he] takes, every class [s/he] attends and is in danger of failing."⁵⁷

17. After receiving Petitioner's consent on or about May 5, 2023, School A attempted to develop an FBA to address Student's attendance. "When [Student] reports to school, [s/he] does not attend all of [his/her] classes. When in class, [s/he] often does not remain for the entire duration and does not appear to be focused or willing to receive assistance."⁵⁸ Witness E, the School Social Worker, was unable to complete the FBA due to Student's persistent unavailability:

This writer made numerous attempts to meet with [Student] and they were unsuccessful. [Student's] classes were checked as well as emails sent asking for the student to meet with this provider. On two occasions, [Student] was asked briefly in the hallway to meet with this provider and the student responded [REDACTED] would come later...

According to Aspen, as of June 9, 2023, [Student] has 71 absences (34 unexcused) and 17 unexcused tardies. Upon review of [Student's] daily attendance, it was noticed that the majority of [Student's] absences occurred during the second semester of the school year after student receive [her/his] IEP. During that time, [Student] had 20 unexcused absences, 32 excused absences and 13 tardies...⁵⁹

Generate a hypothesis statement regarding probable function of the problem behavior. Test the hypothesis statement regarding the function of the problem behavior.

Unfortunately, this writer can not determine a hypothesis at this time due to lack of direct information from [Student]. It appears based on the limited information that the preliminary function of [Student's] behavior is multi-faceted and is a manifestation of [his/her] lack of availability for services, external variables and lack of engagement in [his/her] academics.⁶⁰

⁵⁴ *Id.* at 8 (68).

⁵⁵ P7:1 (79).

⁵⁶ *Id.*

⁵⁷ *Id.* at 2-3 (80-81).

⁵⁸ R44:192.

⁵⁹ *Id.* at 193.

⁶⁰ *Id.* at 195.

18. During the 2022-23 school year, Student was absent 76 times, 42 excused, 34 unexcused.⁶¹ Witness G testified that an absence was excused if Petitioner informed School A that Student was ill.

19. Witness A, Petitioner's Educational Advocate, opined that the February 8, 2023 IEP was inappropriate for a number of reasons: (a) in Consideration of Special Factors, the IEP indicated that Student's behavior did not impede learning and s/he did not require A/T, (b) the IEP did not provide direct BSS; Student required two hours per month, (c) the IEP should have included Mathematics goals that addressed Student's quantitative reasoning weakness, (d) the IEP should have provided an additional three hours of specialized instruction outside general education, and (e) the Transition goals did not address Student's need to research potential post-graduate support for his/her disability. Witness A also testified that School A had failed to implement the IEPs in a number of ways: (a) there was no fixed schedule for the provision of specialized instruction outside general education, and (b) teachers were not "chunking" or breaking down longer assignments for Student, and Student was not receiving extended time, exemplars, or graphic organizers. On cross-examination, Witness A conceded that Teacher E was aware of the requirement to give Student extra time and did so.⁶²

20. Witness B, Petitioner's expert witness in Behavioral Analysis, opined that School A should have developed an FBA for Student at the first sign of maladaptive behaviors.

21. Witness C, a friend of Petitioner who happens to be a DCPS special education teacher, opined that the IEP was inappropriate for several reasons: (a) the Consideration of Special Factors was erroneous in stating that Student's behavior does not impede learning, (b) Student requires A/T, specifically graphic organizers and headphones (to address distractions), (c) Student required more specialized instruction, noting that s/he passed the courses where the teachers supported him/her, (d) Student required direct BSS, (e) Student needed Math goals to support him/her in his/her Biology class, and (f) s/he required attendance goal stating s/he would attend 75% of his/her classes. On cross-examination, Witness C opined that a student could make academic progress even if s/he was absent 75 school days.⁶³

22. Student testified that s/he did not want to be pulled out of class for BSS. S/he stopped going voluntarily because ■■■ believed "anything I told her was used against me." Student testified that s/he eloped from classes because s/he "wanted to work alone, not in class." S/he stopped going to some classes because s/he did not believe the teachers had her/his IEP. S/he stopped working with Teacher F, his/her special education teacher, because s/he "was failing anyway." Student testified that s/he would come to School A, but would not go to his/her classes, choosing instead to go to the principal's office. "The teachers weren't helping me, so I'd rather be by myself." Student defined extended time as "whenever I was ready to turn it in" in denying that teachers were providing him/her extended time. Student testified that teachers did nothing to break down assignments and did not give him/her exemplars or graphic organizers. Student conceded that s/he never asked to see a behavior counselor.⁶⁴

⁶¹ R50:230-233. Witness G, the School Psychologist, testified that School A considers missing 120 minutes (two classes) during any school day to be an absence for the entire day.

⁶² P20:1 (173), P23:1 (185).

⁶³ Testimony of Witness C.

⁶⁴ Testimony of Student.

On April 13, 2023, in apparent response to an email inquiry about her/his attendance, Student responded as follows:

First of all I was going to class but certain teachers were not implementing my plan so why go to class when they aren't helping anyway. I don't want to be in that building, and I don't listen to you [WITNESS G's LAST NAME] telling me to go to class because I don't understand why you be talking to me!

I am totally capable of going to class but I hate this school and don't want to be in the school building. Y'all know this though. Also what teachers are breaking down work to me? cause it certainly ain't none!⁶⁵

Witness G replied on April 14, 2023, inquiring as to which teachers were not implementing the IEP. Witness G also invited Student to meet with her or Witness E, the School Social Worker, to discuss her/his frustration and stress. Witness G also provided Student with Witness F's office hours (Student's Special Education Teacher) for academic support.⁶⁶

23. Petitioner testified that the IEP was inappropriate because there was an insufficient amount of special education hours. She wanted Student to be pulled out of class for services, but Student objected. Petitioner testified that Student's teachers did not have Student's IEP, and Teacher J, his/her Chinese teacher, still did not have it on June 1, 2023. Petitioner testified that School A provided Student none of the classroom aids and services prescribed in the IEP except a graphic organizer a month before the end of the school year. Petitioner testified that Teacher J, Student's Chinese teacher, was unaware of the accommodations in Student's IEP, but conceded that Teacher J gave Student preferential seating. Petitioner testified that Teacher E refused to give Student extended time and Teacher K, her/his Seminar II teacher, would not break down work for [REDACTED]. On cross-examination, Petitioner conceded that Teacher E gave Student a seven-day extension on one occasion,⁶⁷ two weeks on another,⁶⁸ and Student got credit a third time even though the assignment was turned in nine days after the extended time deadline.⁶⁹

On March 3, 2023, Petitioner requested Teacher E, Student's Seminar I teacher, to excuse Student from two assignments, because "[s/he] has missed days this week because it has been a tough week for [her/him]..." Teacher E offered Student extended time.⁷⁰ On March 13, 2023, Student sent an email to Teacher E expressing her/his dislike of his class and disdain for his latest writing assignment:

I don't even want to be in your class already! This whole write a new essay is petty and dumb! You already knew when I turned them in last semester I was gonna fail so why even grade them and waste my time and have me do them!! Your class rules are dumb.⁷¹

⁶⁵ P30:1 (207).

⁶⁶ P30:1-2 (207-8).

⁶⁷ P23:1 (185).

⁶⁸ P39:3 (239).

⁶⁹ P43:2 (255).

⁷⁰ P20:1-2 (173-74).

⁷¹ P21:2 (177).

Later that day, Petitioner requested that Teacher E excuse Student from writing the essay.⁷²

On May 5, 2023, Teacher K (American History & Urban Studies) sent Student an email explaining the requirements for the final project. “This assignment has been broken down with scaffolding to help, but that involves getting the assignments in on time and being in class to learn from the discussion.” Teacher K offered to meet with Student if s/he needed help. Student requested that Teacher K send him/her the “necessary passages for the project” and to talk over with another staff member “on how to break this down for me.” Petitioner inquired if Student would be required to complete all of the requirements: “[Student] told me that [s/he] was informed about a five page essay coming up. Is the expectation for [her/him] to write all five pages?” Teacher K responded that there were two options; the five-page essay or a ten-minute presentation.⁷³

24. Witness E, the School A Social Worker, testified that Student was unwilling to meet with her and, thus, s/he was unable to provide services. Student “made it clear [s/he] did not want services.” Witness E testified that s/he tried to arrange “check-in” sessions for Student; she would approach Student in the hallway or send him/her emails, but Student would never meet with her. On the one occasion that Student sent Witness E agreeing to meet, s/he did not keep the appointment. Witness E developed the Behavior goals in Student’s IEP. The goals were designed (a) to address developing coping skills and (b) to avoid distractions and off-task behaviors. On redirect testimony, Witness E testified that direct BSS was not provided on the IEP because Student said that s/he did not want them.⁷⁴

25. Witness F was the School A Special Education Teacher assigned to provide the pull-out and push-in services prescribed in Student’s IEP. Witness F testified that Student did not attend class regularly. Witness F would attempt to schedule meeting times through emails to Student, but Student did not always respond. Sometimes Student would agree to meet but sometimes would not appear. When asked how Student’s disability affects him/her in the academic setting, Witness F opined that she only observed resistance to direction: walking out of class without permission and not coming back. As to Student’s need for A/T, Witness F observed that Student did not require additional A/T; all students at School A have calculators and tablets. Witness F opined that Student was capable of accessing the curriculum. Witness F observed that Student had already met graduation requirements in Math; in Reading the IEP goals were designed to help with his/her assignments requiring reading and critical thinking. The Written Language goal was designed to address his/her technical shortcomings. The goals were based on information provided in the Independent Living Assessment. Witness F testified that s/he emailed a copy of Student’s IEP to all of his/her teachers on February 15, 2023. She opined that the January IEP was appropriate for Student’s needs, but “you have to be there to progress.” As for the amended IEP, no additional BSS was prescribed because Student did not want it. On cross-examination, Witness F conceded that Student’s off-task behaviors in class (disengagement, using cell phone, talking to classmates) is typical of ED students, and that Student has executive functioning challenges. She disputed the suggestion that Student was disengaged due to a lack of support by pointing out Student’s lack of availability. On redirect testimony, Witness F testified that Student’s Progress Report on April 4, 2023 reflected a lack of progress due to Student’s lack of attendance.⁷⁵

⁷² P21:1 (176).

⁷³ P33:1 (218).

⁷⁴ Testimony of Witness E.

⁷⁵ R47:214-217.

26. Witness G was the School A Psychologist. She testified that her relationship with Student was good in the fall of the 2022-23 school year, but thereafter, Student stopped accepting invitations to meet and said that s/he did not want to talk to Witness G. Under the 504 Plan, Student “refused services as the year progressed.” Witness G testified that the IEP team recommended counseling for Student, but “you have to work with what [Student] says [s/he] is willing to do.” She testified that Student’s excused absences were largely notes from Petitioner stating that Student was sick. Witness G opined that the February IEP was appropriate. Student had passed higher level classes for three years without support. “We thought it was exactly what [s/he] needed, if not a little overkill.” At the time the IEP was developed, Student was on track to graduate with both a high school diploma and an Associate’s Degree. At the March 28, 2023 IEP meeting, Student again declined BSS and said that s/he wanted to meet with Witness E, the School Social Worker, at Student’s own discretion. Thereafter, Witness E attempted to arrange sessions with Student, but Student declined. The IEP team limited Student’s instruction outside general education to two hours to prevent the loss of credit hours towards graduation. The IEP team offered to have someone accompany Student to classes, but s/he declined. Witness G opined that Student would not have performed better with more specialized instruction outside general education, because Student’s problem was attendance. Student did not avail him/herself of office hours where s/he would have received one-on-one support. Witness G confirmed Witness F’s testimony that all of Student’s teachers received Student’s IEP on February 15, 2023. That Student failed courses under the IEP is not an indication that the IEP was inappropriate; “No, [s/he] did not participate.”⁷⁶

CONCLUSIONS OF LAW

Based upon the above Findings of Fact, the arguments of counsel, and this Hearing Officer’s own legal research, the Conclusions of Law of this Hearing Officer are as follows: The burden of proof in District of Columbia special education cases was changed by the local legislature through the District of Columbia Special Education Student Rights Act of 2014. That burden is expressed in statute as the following:

Where there is a dispute about the appropriateness of the child’s individual educational program or placement, or of the program or placement proposed by the public agency, the public agency shall hold the burden of persuasion on the appropriateness of the existing or proposed program or placement; provided, that the party requesting the due process hearing shall retain the burden of production and shall establish a prima facie case before the burden of persuasion falls on the public agency. The burden of persuasion shall be met by a preponderance of the evidence.⁷⁷

One of the issues in this case involves the alleged failure of DCPS to provide appropriate IEPs. Under District of Columbia law, DCPS bears the burden as to this issue. Petitioner bears the burden

⁷⁶ Testimony of Witness G. *See also*, P42-2 (251), an email from Student’s Chinese teacher: “[Student] has missed a lot of classes, and when [s/he] does attend, [s/he] usually grabs the worksheet and leaves early. I understand [s/he] has an IEP, but if [s/he] leave every time, I can’t help [her/him] catch up with the content and assignments.” The teacher also offered to provide Student individualized instruction after class or during office hours.

⁷⁷ D.C. Code Sect. 38-2571.03(6)(A)(i).

as to all other issues. The burden of persuasion must be met by a preponderance of the evidence. The burden of persuasion must be met by a preponderance of the evidence.⁷⁸

Whether DCPS denied Student a FAPE by failing to provide Student appropriate IEPs on or about February 8, 2023 and March 28, 2023. Specifically, Petitioner asserts that (a) behavioral concerns were not addressed in the Special Consideration sections, (b) the IEPs did not address Student’s need for assistive technology (“A/T”), (c) the goals in mathematics, Emotional, Social, and Behavioral Development (“Behavior”), and transition planning were inadequate, (d) the IEPs should have provided 120 minutes per month of direct behavioral support services (“BSS”) rather than 60 minutes per month of consultation services, (e) the IEPs failed to provide specialized instruction consultation services to address modification of assignments, (f) the IEPs provided insufficient amounts of specialized instruction inside and outside of general education.

The Supreme Court’s first opportunity to interpret the predecessor to IDEA, The Education of the Handicapped Act (“EHA”), came in *Board of Education of the Hendrick Hudson Central School District v. Rowley*.⁷⁹ The Court noted that the EHA did not require that states “maximize the potential of handicapped children ‘commensurate with the opportunity provided to other children.’”⁸⁰ Rather, the Court ruled that “Implicit in the congressional purpose of providing access to a ‘free appropriate public education’ is the requirement that the education to which access is provided be sufficient to confer some educational benefit upon the handicapped child...”⁸¹ Insofar as a State is required to provide a handicapped child with a ‘free appropriate public education,’ we hold that it satisfies this requirement by providing personalized instruction with sufficient support services to permit the child to benefit educationally from that instruction... In addition, the IEP, and therefore the personalized instruction should be formulated in accordance with the requirements of the Act and, if the child is being educated in the regular classrooms of the public school system, should be reasonably calculated to enable the child to achieve passing marks and advance from grade to grade.”⁸²

More recently, the Court considered the case of an autistic child under IDEA who, unlike the student in *Rowley* was not in a general education setting.⁸³ The Tenth Circuit had denied relief, interpreting *Rowley* “to mean that a child’s IEP is adequate as long as it is calculated to confer an ‘educational benefit [that is] merely... more than *de minimis*.”⁸⁴ The Court rejected the Tenth Circuit’s interpretation of the state’s obligation under IDEA. Even if it is not reasonable to expect a child to achieve grade level performance,

... [h]is educational program must be appropriately ambitious in light of [his/her] circumstances, just as advancement from grade to grade is appropriately ambitious

⁷⁸ *Schaffer v. Weast*, 546 U.S. 49 (2005).

⁷⁹ 458 U.S. 176, 187 (1982).

⁸⁰ *Id.* at 189-90, 200

⁸¹ *Id.* at 200.

⁸² *Id.* at 203-04.

⁸³ *Endrew F. ex rel. Joseph F. v. Douglas County School District RE-1*, 137 S.Ct. 988 (2017).

⁸⁴ *Id.* at 997.

for most children in the regular classroom. The goals may differ, but every child should have the chance to meet challenging objectives... It cannot be the case that the Act typically aims for grade-level advancement for children with disabilities who can be educated in the regular classroom, but is satisfied with barely more than *de minimis* progress for those who cannot.⁸⁵

In *Endrew*, the Supreme Court held that an IEP must be designed to produce more than minimal progress in a student's performance from year to year:

When all is said and done, a student offered an educational program providing 'merely more than *de minimis*' progress from year to year can hardly be said to have been offered an education at all. For children with disabilities, receiving instruction that aims so low would be tantamount to 'sitting idly... awaiting the time when they were old enough to drop out...' The IDEA demands more. The IDEA demands more. It requires an educational program reasonably calculated to enable a child to make progress appropriate in light of the child's circumstances."⁸⁶

Petitioner asserts that the IEPs were inappropriate for the specific reasons set forth in the *Prehearing Order* and above, while DCPS asserts that the IEPs were appropriate when they were developed. School A offers a college preparatory program where graduates have the opportunity to earn both a high school diploma and an Associates Degree. In fact, Student was on track for both when the February 8, 2023 IEP was developed. The WJ-IV testing conducted by Witness G in August 2022, revealed that Student performed in the Average range in Broad Reading, Mathematics, and Written Language. It is uncontroverted that Student did not qualify for services due to an SLD or OHI. Thus, to the extent Student required special education services, it was due to the effect that his/her depression had on his/her academic performance.

Behavioral concerns were not addressed in the Special Consideration section.

The yes/no box in the Consideration of Special Factors was checked "No," indicating that Student's behavior did not impede her/his learning or that of others. This is clearly erroneous as, by definition, an ED classification means that the student had an emotional condition that had an adverse effect on his/her educational performance.⁸⁷ However, this error, by itself, did not necessarily constitute a denial of FAPE; the IEP included behavioral goals and consultative behavioral services.

The IEPs did not address Student's need for assistive technology ("A/T").

The results of the WJ-VI testing reveal that Student is capable of performing in the Average range in both Broad Reading and Written Language, and had completed three years in a college preparatory program. Thus, s/he is not an obvious candidate for A/T to address low grades in English. Witness F, the School Psychologist, observed that all students at School A have calculators and tablets. Witness C, Petitioner's special education expert, testified that Student required headphones to limit distractions. However, in her Addendum to the Psychological

⁸⁵ *Id.* at 1000-01 (citations omitted).

⁸⁶ 137 S.Ct. at 1000-01.

⁸⁷ 34 C.F.R. §300.8(c)(4).

Evaluation, Witness G found that while Student had ADHD symptoms, s/he did not qualify for ADHD or an OHI classification, because her/his symptoms were not adversely impacting her/his functioning in school.

The goals in Mathematics, Emotional, Social, and Behavior, and Transition Planning were inadequate.

Student had already completed the mathematics requirements for graduation, so there would have been no denial of FAPE even if math had not been included as an Area of Concern. Petitioner argued that Student needed math goals addressing Student's weakness in quantitative reasoning to support her/him in her/his Biology course. First, in the absence of a math course, there is no ability to apply or measure math goals. Second, Witness A's assertion that Student was "weak" in math is belied by the record. In the previous two school years, Student earned a B+ in Algebra, passed Geometry A & B, and s/he scored in the Average range on the WJ-IV in Mathematics, although s/he was Low Average on Math Calculation Skills. Witness E, the School Social Worker, testified that the Behavioral goals were designed to address developing coping skills and to avoid distractions and off-task behaviors. Petitioner offered no testimony as to the inadequacy of the Behavior goals other than Witness C's suggestion that there should have been a goal of 75% attendance. A 75% attendance record violates the District's truancy law,⁸⁸ not a credible recommendation. In the Post-Secondary Transition Plan, the only goal was that by the end of the IEP cycle, Student would apply for college scholarships to address her/his ambition of attending college in the fall of 2023. Witness A opined that the Transition goals should have addressed Student's need to research potential post-graduate support for his/her disability, and the meeting notes indicate that the team agreed to add such a goal. While no such goal was added, its absence does not rise to the level of a denial of FAPE.

The IEPs should have provided 120 minutes per month of direct BSS rather than 60 minutes per month of consultation services.

Student had reached the [REDACTED] at the time of the February 2023 IEP meeting. Witness G, the School Psychologist, testified that during the fall of the 2022-23 school year, Student refused services under the 504 Plan as the year progressed, and declined invitations to meet with Witness G, despite the Plan's requirement that Student meet with a school psychologist for 15 minutes weekly. Witness G testified that direct services were not added to the IEP because Student did not want direct services. During the hearing, Student testified that s/he wanted to meet with Witness E, the School Social Worker, at her/his own discretion, to which School A acceded. However, Witness E testified that Student consistently frustrated efforts to arrange meeting times. Petitioner's witnesses did not refute DCPS' assertions that Student did not want direct, regularly scheduled BSS.

The IEPs failed to provide specialized instruction consultation services to address modification of assignments.

IEPs typically prescribe consultation services for related services to ensure that related service providers and teachers collaborate to facilitate the provision of students' related services needs. Classroom assignment modifications are addressed in the Classroom Aids and Services and

⁸⁸ D.C. Code §38-203.

Classroom Accommodations sections of the IEP. Here, Classroom Aids and Services included chunking of longer assignments, and Classroom Accommodations included extended time.

The IEPs provided insufficient amounts of specialized instruction inside and outside of general education.

As previously discussed, recent testing revealed that Student performed in the Average range in Reading, Mathematics, and Written Language. DCPS' witnesses testified that Student needed behavioral supports to address his/her depression rather than a significant amount of specialized instruction. Petitioner's concerns as to the appropriateness of the February IEP were driven by a notice, less than a month after the IEP was developed, that Student was no longer on track to graduate in June. IEPs are intended to produce academic progress over the course of a school year, not necessarily in the first month of implementation. In this case, Student categorically rejected the direct BSS that DCPS conceded were necessary and recommended.⁸⁹ Witness A, Petitioner's Educational Advocate, opined that DCPS should have prescribed an additional three hours of specialized instruction outside general education. However, she did not state what areas of concern needed academic support in those additional hours. Student had already met graduation requirements in Mathematics and was not taking any Math courses, and s/he tested in the Average range in Reading and Written Language. Witness G, the School Psychologist, testified that the IEP team limited Student's instruction outside general education to two hours to prevent the loss of credit hours towards graduation, Petitioner's primary concern. The Findings of Facts also include several instances documented in Petitioner's Exhibits where Student was invited to take advantage of teachers' office hours or individual appointments for Student where s/he would receive individualized instruction, but s/he elected not to avail him/herself of these opportunities. Finally, Witness G opined that Student would not have performed better with more specialized instruction outside general education, because Student's overriding problem was attendance, not a lack of academic support, nor an inability to access the general education curriculum.

For all of these reasons, I conclude that DCPS has met its burden of proving that it developed appropriate IEPs for Student on February 8, 2023 and March 28, 2023.

Whether DCPS denied Student a FAPE by failing to implement Student's IEP during the 2022-23 school year. Specifically, Petitioner alleges that DCPS failed to provide the classroom aids and services, accommodations, and specialized instruction "with fidelity." "...[t]he student has been denied extended time on numerous assignments, there has been no chunking of information, or graphic organizers, student has not been provided calculation device, preferential seating or a location with minimal distractions and there is no schedule for the delivery of the special education instruction and the student's special education teacher was unable to verify that instruction was being delivered pursuant to the student's IEP."

Petitioner's witnesses argued that the IEPs were not implemented primarily because Student's teachers were not providing the classroom aids, services, and accommodations prescribed in the IEPs. Witness A, Petitioner's Educational Advocate, testified that there was no

⁸⁹ P4:8 (46).

fixed schedule for the provision of specialized instruction outside general education, teachers were not breaking down longer assignments for Student, and Student was not receiving extended time, exemplars, or graphic organizers. Petitioner testified that School A provided Student none of the classroom aids and services prescribed in the IEP except a graphic organizer a month before the end of the school year.

DCPS offered no persuasive evidence that Student was provided exemplars or a graphic organizer. However, it cannot be fairly said that Petitioner's witnesses offered persuasive evidence that teachers did not have Student's IEPs and did not provide her/him the essential aids, services, and accommodations prescribed in the IEPs. While Student did not have a graphic organizer, s/he had access to a tablet. Witness F, Student's Special Education Teacher and Case Manager, testified that she emailed Student's February 8th IEP to all of his/her teachers on February 15th. Her testimony was corroborated by the School Psychologist. In terms of preferential seating, Petitioner conceded that Teacher J gave Student preferential seating, thereby confirming Teacher J's awareness of the required accommodation.

As for breaking down assignments, Witness G, the School Psychologist, responded to Student's April 13th allegation that none of the teachers were breaking down his/her assignments by asking Student to identify the teachers who were not breaking down assignments. If Student responded, Petitioner's counsel failed to include the response in her exhibits. The record more accurately reveals that Petitioner and Student used the classroom aids and accommodations to avoid having to complete assignments. In his email on May 4, 2023, Teacher K explained the final project to Student. The assignment was already broken down with scaffolding for Student, but it required Student to get assignments in on time and to attend class to learn from the classroom discussion. Teacher K also offered to help Student during office hours or "other times if needed... just email me."⁹⁰ Student responded by requesting Teacher K to provide material s/he was capable of accessing and directing him to work with another staff member to break down the assignment further. Petitioner emailed Teacher K with the incredulous question of whether Student would really be expected to write a five-page essay.

The record also reveals that Student's teachers were aware of and observed her/her right to extended time. Petitioner's Educational Advocate conceded on cross-examination that Teacher E, to whom Student addressed the intemperate email in paragraph 23 above, was aware of the requirement and gave Student extra time. On cross-examination, Petitioner conceded that Teacher E gave Student a seven-day extension on one occasion,⁹¹ two weeks on another,⁹² and Student got credit a third time even though the assignment was turned in nine days after the extended time deadline. Teacher J, Student's Chinese teacher, noted on April 4, 2023, that "I have not seen you in Chinese class for a while... I am very concerned about your grade in this class. Please see attached all the missing assignments. Make sure you complete them and let me know if you have any questions."⁹³ Encouraging Student to turn in the missing assignments makes sense only if Teacher J intended to give her/him credit with the extended time.

⁹⁰ P33:2 (219).

⁹¹ P23:1 (185).

⁹² P39:3 (239).

⁹³ P26:1 (198).

As with the chunking of assignments, Student and Petitioner used the extended time accommodation to attempt to excuse Student from assignments. Student testified quite candidly that to her/him, extended time meant that s/he could turn in assignments “whenever I was ready to turn it in.” On March 3, 2023, Petitioner requested that Student be excused from two assignments because s/he “missed days this week because it has been a tough week for [him/her]...” Teacher E offered Student extended time. Ten days later, after Student sent Teacher E an email criticizing his essay assignment as “dumb,” Petitioner requested that Teacher E excuse Student from writing the essay.

To the extent Student’s IEP was not implemented, it was due primarily to Student’s disinterest and unwillingness to participate in class or support services. Student having reached the [REDACTED] school officials were deferential, believing that, as Witness G testified, “you have to work with what [Student] says [s/he] is willing to do.” At the IEP meeting on February 8, 2023, Student stated that s/he did not want direct BSS, despite School A’s recommendation that s/he receive it, so it was not added to the IEP. Student testified that s/he did not want to be pulled out of class for BSS. S/he wanted the freedom to meet with Witness E, the School Social Worker, at Student’s discretion. School A accommodated this request. However, Witness E testified that despite her best efforts to arrange meetings with Student, Student would either not respond or not attend. Thus, behavioral services, those most likely to provide meaningful support to an ED student with no learning disability, were not provided to Student because of her/his own resistance to participating in direct BSS.

To the extent Student’s IEP was not implemented by her/his teachers, it was due primarily to Student’s unavailability. During 2022-23 school year, Student was absent 76 times, 42 of which were excused. If Petitioner reported to School A that Student was sick, it was recorded as an excused absence. Student conceded during her/his testimony that s/he stopped going to class because s/he did not believe his/her teachers had his/her IEP. In fact, teachers had his/her IEP, but they were not implementing it in the permissive fashion Student and Petitioner expected and wanted. Student conceded in her/his testimony that s/he wanted to work alone, not in class, so s/he would come to School A, but not come to class. “The teachers weren’t helping me, so I’d rather be by myself.” On April 13, 2023, Student sent an intemperate email to the School Psychologist after receiving an inquiry about her/his attendance. Student’s email indicated that s/he had no intention of improving her/his attendance, because “I hate this school and don’t want to be in the school building.” Student’s Chinese teacher observed that “[Student] has missed a lot of classes, and when [s/he] does attend, [s/he] usually grabs the worksheet and leaves early. I understand [s/he] has an IEP, but if [s/he] leaves every time, I can’t help [her/him] catch up with the content and assignments.”⁹⁴ Witness F, the special education teacher who provided Student’s specialized instruction, testified that s/he was only able to meet with Student a fraction of the time required by the IEPs due to Student’s absences and the difficulty arranging meeting times with Student.

While Petitioner asserts that DCPS’ alleged failure to provide exemplars and a graphic organizer constitutes a denial of FAPE, there was no evidence that these aids were unavailable in in any particular teacher’s classroom and, more importantly, that their unavailability affected Student’s ability to complete an assignment. The testimony of Student and Petitioner focused on teachers’ failure to provide extended time and chunking of assignments as proof that DCPS failed to implement the IEPs. I conclude that Student declined the BSS that would have been beneficial

⁹⁴ P42:2 (251).

for her/his disability, that there is evidence in the record that Student's teachers were aware of the aids and accommodations in the IEP and did, in fact, afford her/him extended time and chunked assignments. I also find that the primary reason Student's IEPs could not be effectively implemented was her/his unavailability in the classrooms and unwillingness to meet with the school's social worker. Therefore, I conclude that Petitioner has failed to meet her burden of proving that DCPS failed to implement Student's February 8, and March 28, 2023 IEPs.

Whether DCPS denied Student a FAPE by failing to develop a BIP and/or an Attendance Improvement Plan for Student during the 2022-23 school year.

As Student's eligibility derived from the HOD issued on January 25, 2023, the issue is at what point thereafter did DCPS fail to develop an BIP or Attendance Plan for Student. In the previous sections, I discussed Student's unwillingness to meet with the School Social Worker and the School Psychologist. The record includes an email from Student to Witness G, the School Psychologist, concerning attendance. Petitioner's counsel did not disclose the email that prompted Student's response, but it appears that a School A staff member sent Student an email about her/his attendance. Student's response, set forth in paragraph 22 above, expresses his/her indifference, if not unwillingness, to attend class on a regular basis.

A BIP cannot be developed without first developing an FBA. Since Student was unwilling to meet with the School Social Worker or School Psychologist, an FBA could not be developed. Once Petitioner consented to an FBA, Witness E was unable to complete a full FBA due to Student's persistent unavailability.⁹⁵ For these reasons, I conclude that Petitioner has failed to meet her burden of proving that DCPS denied Student a FAPE by failing to develop a BIP or Attendance Plan.

RELIEF

For relief, Petitioners request (1) an order requiring DCPC to amend Student's IEP to provide increased instruction in and out of general education, additional goals in mathematics, Behavior, and Transition, increased direct BSS, consultation with teachers to modify assignments, A/T, and Positive Behavior Intervention Supports; (2) an order requiring DCPS to conduct an FBA and develop a BIP and/or an Attendance Improvement Plan, (3) compensatory education services, and (4) attorneys' fees.

ORDER

Upon consideration of the *Complaint*, DCPS' *Response*, the exhibits from the parties' disclosures that were admitted into evidence, the testimony presented during the hearing, and the closing arguments of counsel for the parties, it is hereby

ORDERED, that the *Complaint* is **DISMISSED** with prejudice.

⁹⁵ R44:193, 195.

APPEAL RIGHTS

This decision is final except that either party aggrieved by the decision of the Impartial Hearing Officer shall have ninety (90) days from the date this decision is issued to file a civil action, with respect to the issues presented in the due process hearing, in a district court of the United States or the Superior Court of the District of Columbia as provided in 34 C.F.R. §303.448 (b).

Terry Michael Banks
Terry Michael Banks
Hearing Officer

Date: July 24, 2023

Copies to: Attorney A, Esquire
Attorney B, Esquire
OSSE Office of Dispute Resolution
[REDACTED]/DCPS
[REDACTED]/DCPS