

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

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

OSSE
Office of Dispute Resolution
June 28, 2017

<i>Student</i> , ¹)	Case No.: 2017-0103
through <i>Parent</i> ,)	
<i>Petitioner</i> ,)	Date Issued: 6/28/17
)	
v.)	Hearing Officer: Keith L. Seat, Esq.
)	
District of Columbia Public Schools)	Hearing Dates: 6/15/17 & 6/16/17
("DCPS"),)	ODR Hearing Room: 2006
Respondent.)	
)	

HEARING OFFICER DETERMINATION

Background

Petitioner, Student’s Parent, pursued a due process complaint alleging that Student had been denied a free appropriate public education (“FAPE”) in violation of the Individuals with Disabilities Education Improvement Act (“IDEA”) because a prior Hearing Officer Determination (“HOD”) was not fully implemented to revise Individualized Education Program (“IEP”) and provide a safe location of services, among other things. DCPS responded that it did all it could given that Student would not come to school and Parent was not cooperative.

Subject Matter Jurisdiction

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

Procedural History

Following the filing of the due process complaint on 4/18/17, the case was assigned to the undersigned on 4/19/17. Respondent filed a timely response on 4/20/17, and did not challenge jurisdiction. The resolution session meeting (“RSM”) took place on 5/17/17; the

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

Hearing Officer Determination

Case No. 2017-0103

30-day resolution period ended on 5/18/17. A final decision in this matter must be reached no later than 45 days following the end of the resolution period, which requires an HOD by 7/2/17.

The due process hearing took place on 6/15/17 and 6/16/17 and was closed to the public. Petitioner was represented by *Petitioner's counsel*. DCPS was represented by *Respondent's counsel*. Petitioner was present during much of the first day of the hearing, and listened by telephone to a portion of the second day, but was excused from the remainder upon request to care for her children.

Petitioner's Disclosures, submitted on 6/8/17, contained documents P1 through P69, which were admitted into evidence without objection. Respondent's Disclosures, submitted on 6/7/17, contained documents R1 through R25, which were admitted into evidence without objection.

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

1. *Special Education Advocate* (qualified without objection as an expert in Special Education and IEP Programming)
2. *Psychologist* (qualified without objection as an expert in Psychology)
3. Student
4. Petitioner/Parent
5. *Special Education Coordinator at Nonpublic School* ("Nonpublic School SEC")

Respondent's counsel presented three witnesses in Respondent's case (*see Appendix A*):

1. *Interim Director*, Student Placement Office, Youth Engagement Division, DCPS
2. *Special Education Coordinator at Public School* ("Public School SEC") (qualified without objection as an expert in Special Education Programming and Placement)
3. *Compliance Case Manager*, DCPS

Petitioner's counsel called *Legal Assistant* as the sole rebuttal witness.

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

Hearing Officer Determination

Case No. 2017-0103

Issue 1: Whether from March 2017 on DCPS denied Student a FAPE by failing to provide an appropriate IEP, and an appropriate placement/setting/location of services, to address Student's safety, attentional and school/work avoidance issues. *Respondent has the burden of persuasion on this issue, if Petitioner establishes a prima facie case.*

Issue 2: Whether DCPS denied Student a FAPE by failing to appropriately address chronic poor school attendance and safety concerns by conducting a Functional Behavioral Assessment ("FBA") and providing an appropriate Behavioral Intervention Plan ("BIP") and/or an attendance plan/contract. *Petitioner has the burden of persuasion on this issue.*

Petitioner seeks the following relief:

1. Within 15 business days, DCPS shall (a) fund placement and transportation for Student at a public or non-public school that can provide educational benefit, or alternatively (b) convene a Multi-Disciplinary Team ("MDT") meeting with Parent and her counsel to discuss and determine an appropriate placement/setting/location of services.
2. DCPS shall fully implement Student's February 2017 HOD.
3. Within 20 school days (with day for day extensions for delays caused by Petitioner or Student), DCPS shall (a) fund or develop and implement an appropriate FBA and BIP, and/or attendance plan/contract, to address Student's work, class and school avoidance issues and any other issues undermining ability to attend school and access the curriculum, or alternatively (b) convene a student evaluation plan meeting to determine whether additional assessments are required to address Student's attendance, academic and socio-emotional deficits, fund any needed assessments, and review them with Parent and revise Student's IEP upon completion.
4. DCPS shall fund compensatory education, including mentoring, tutoring, counseling and/or transitional services, or conduct any testing or observations necessary to determine compensatory education, for any denial of FAPE from March 2017 to date.²
5. Any other just and equitable relief.

² Petitioner's counsel was put on notice at the prehearing conference that Petitioner must introduce evidence supporting the requested compensatory education, including evidence of specific educational deficits resulting from Student's alleged denial of FAPE and the specific compensatory measures needed to best correct those deficits, i.e., to elevate Student to the approximate position Student would have enjoyed had Student not suffered the alleged denial of FAPE. Respondent was encouraged to be prepared to introduce evidence contravening the requested compensatory education in the event a denial of FAPE is found.

Hearing Officer Determination

Case No. 2017-0103

Respondent made an oral motion to adjourn the hearing at the beginning of the due process hearing upon learning that Petitioner was seeking placement at Nonpublic School, based on Respondent's understanding that Petitioner had recently chosen Public School Option B as the appropriate location for Student. Respondent's motion was denied during the hearing for the reasons set forth in the Findings of Fact and Conclusions of Law.

Petitioner made an oral motion for directed findings at the close of her case-in-chief, which was denied for the reasons stated in more detail below in the Findings of Fact and Conclusions of Law.

The parties were permitted to submit legal citations after the hearing, and Petitioner did so on 6/16/17.

Findings of Fact

After considering all the evidence, as well as the arguments of both counsel, the Findings of Fact³ are as follows:

1. Student is a resident of the District of Columbia; Petitioner is Student's Parent.⁴ Student is *Age* and in *Grade* at Public School.⁵ Student's disability classification for special education and related services is Other Health Impairment ("OHI"), due to Attention Deficit Disorder ("ADD") or Attention Deficit Hyperactivity Disorder ("ADHD").⁶

2. An HOD in Case No. 2016-0290 issued on 2/28/17 (and amended on 3/9/17 to correct that 10 hours of specialized instruction was to be inside and not outside general education) concluded that DCPS denied Student a FAPE and held, among other things, that Public School was not appropriate for Student due to safety concerns.⁷ The 2/28/17 HOD ordered the following⁸:

- a. within 10 school days of this Order, DCPS shall convene Student's MDT/IEP team to revise Student's IEP to include at least 11 hours of specialized instruction outside the general education setting, at least 10 hours of specialized

³ Footnotes in these Findings of Fact refer to the sworn testimony of the witness indicated or to an exhibit admitted into evidence. To the extent that the Hearing Officer has declined to base a finding of fact on a witness's testimony that goes to the heart of the issue(s) under consideration, or has chosen to base a finding of fact on the testimony of one witness when another witness gave contradictory testimony on the same issue, the Hearing Officer has taken such action based on the Hearing Officer's determinations of the credibility and/or lack of credibility of the witness(es) involved.

⁴ Parent.

⁵ Parent; P10-1.

⁶ P10-1.

⁷ P7-9.

⁸ P7-11.

Hearing Officer Determination

Case No. 2017-0103

instruction inside the general education setting, at least 240 minutes per month of behavioral support services outside the general education setting, and at least 120 minutes per month of speech-language pathology outside the general education setting;

- b. within 10 school days of this Order, DCPS shall convene Student's MDT/IEP team to discuss and determine an appropriate location of services for Student, and to make any necessary safety plan (to include transportation services, if necessary) for Student, and to revise Student's transition plan as appropriate;
- c. within 40 calendar days of this Order, DCPS shall conduct an FBA;
- d. within 45 calendar days of this Order, DCPS shall prepare a BIP for Student;
- e. within 30 calendar days of this Order that DCPS shall conduct a comprehensive psychological evaluation for Student; and
- f. within 5 school days of completion of the FBA and comprehensive psychological, DCPS shall reconvene Student's MDT/IEP team to consider whether any further revisions to Student's IEP and/or location of services are necessary.

3. In response to the 2/28/17 HOD, on 3/1/17 DCPS began efforts to convene an IEP team meeting to revise Student's IEP; after three emails over a week's time, a meeting with Parent and Petitioner's counsel was set for 3/15/17.⁹ DCPS set out the due dates for the various requirements of the HOD.¹⁰

4. At the 3/15/17 IEP meeting, Student's IEP was revised to provide for 11 hours/week outside general education, 10 hours/week inside general education, and 120 minutes/month of speech-language pathology outside general education.¹¹ As for BSS, the IEP was supposed to include 240 minutes/month outside general education, but instead included 120 minutes/week (480 minutes/month) of Consultation Services.¹² Credible DCPS testimony and documentary evidence demonstrated that this was an error and was intended to be 240 minutes/month of BSS provided directly to Student, rather than consultation with teachers.¹³

⁹ R15-3,2,1.

¹⁰ R17-4.

¹¹ P10-11.

¹² P7-11; P10-11.

¹³ Compliance Case Manager; R17-2; R24-3. Special Education Advocate lost credibility with the undersigned when she insisted on cross examination that she couldn't say whether "240 behavioral support" on R24-3 referred to 240 minutes or 240 hours.

Hearing Officer Determination

Case No. 2017-0103

5. DCPS created a simple safety plan at the 3/15/17 IEP meeting which included transportation to and from school, a mentor who could meet Student at the door and assist with transitioning into school, a person for Student to contact if felt unsafe, and lunch arrangements so Student would not be required to eat with peers.¹⁴ DCPS was open to suggestions for enhancing the safety plan, from Parent or anyone else.¹⁵

6. Student's 3/15/17 IEP indicating that did not require transportation services was contradicted by the safety plan and other communications between DCPS and Parent and Petitioner's counsel referring to transportation.¹⁶ Compliance Case Manager's notes state that Student's transition plan was updated; there is virtually no difference between the 3/15/17 IEP and the prior IEP dated 12/8/16.¹⁷

7. One of the purposes for the 3/15/17 IEP meeting listed by Compliance Case Manager was to "determine an appropriate location of services for Student."¹⁸ On 3/15/17, LRE placement was discussed as well as location of services; Public School SEC and Compliance Case Manager credibly testified that DCPS offered Public School Option A and Public School Option B as alternatives to Public School, but Parent didn't accept any DCPS location; the team stated that Public School was still able to implement Student's IEP with revisions.¹⁹ Parent testified that Public School Option B was not offered at the 3/15/17 meeting and that she didn't find out Public School Option B was a possible location until a telephone call in May 2017.²⁰ The IEP developed on 3/15/17 continued to list Public School as Student's school and DCPS continued to treat Public School as school.²¹

8. Parent and Student stated on 3/15/17 that Student "will not be attending" school.²² At the end of the 3/15/17 meeting, Student was "still insisting will not be attending school."²³ Student explained that would not attend Public School due to safety concerns, and in fact did not attend.²⁴ Student's 3/15/17 IEP noted that Student's lack of attendance at Public School "has made unavailable for instruction and related services"; Student did not received BSS due to "excessive absences."²⁵ Student's areas of

¹⁴ R24-4; Compliance Case Manager.

¹⁵ Compliance Case Manager.

¹⁶ P10-14; R24-4; Compliance Case Manager; P38-1; Special Education Advocate (testified that Compliance Case Manager offered private transportation for Student to and from school).

¹⁷ R24-3; P10-15 *et seq.*; P11-16 *et seq.*

¹⁸ R24-3.

¹⁹ Compliance Case Manager; R24-3.

²⁰ Parent.

²¹ Parent; R17-2; P10-1.

²² R24-3.

²³ R24-4.

²⁴ Student; R1-R8; R9-1.

²⁵ P10-9.

Hearing Officer Determination

Case No. 2017-0103

concern in the IEP stated that Student has not attended school so had not accomplished any of goals.²⁶

9. IEP goals were not discussed at the 3/15/17 IEP meeting.²⁷ Special Education Advocate testified that additional goals were needed in Student's 3/15/17 IEP to deal with work avoidance and attendance issues.²⁸ As far as Special Education Advocate knew no one from Petitioner's counsel's law firm had ever objected to any goal in the 3/15/17 IEP or proposed any goal to be added, including goals for work avoidance or for transition.²⁹ If concerns about goals not being sufficient had been raised, DCPS would have reconvened the IEP meeting to discuss them.³⁰ Student needed to have new evaluations completed prior to any change in goals.³¹ In light of Student's total absence from school, additional goals on IEP would not help at all.³²

10. DCPS did not conduct an FBA, prepare a BIP, or conduct a comprehensive psychological evaluation of Student.³³ Consistent attendance was necessary to do the FBA, BIP and comprehensive psychological; Student never came to school or made available.³⁴ No request was made by Parent or her advocates for evaluations to be conducted away from Public School.³⁵

11. After the 3/15/17 IEP meeting, on 3/31/17 Compliance Case Manager emailed Parent and Petitioner's counsel stating that she had been trying to reach Parent to arrange transportation and mentoring services, reiterating that Public School is able to implement Student's new IEP.³⁶ Compliance Case Manager testified that she included her personal cellphone number in the email, in addition to her work cellphone number, so Parent could contact her over the weekend, and that Compliance Case Manager in turn could contact the service providers over the weekend to get them going; Compliance Case Manager did not convey those details to Parent.³⁷

12. On 4/7/17, Compliance Case Manager followed up by email on whether Student was attending school, after again trying to call Parent, noting the importance of Student's attendance to carrying out the HOD-ordered evaluations and safety plan.³⁸ On 4/12/17,

²⁶ P10-3,4,6,7.

²⁷ Compliance Case Manager.

²⁸ Special Education Advocate.

²⁹ Special Education Advocate; *accord* Compliance Case Manager.

³⁰ Compliance Case Manager.

³¹ *Id.*

³² *Id.*

³³ Special Education Advocate; P36-3,4.

³⁴ P36-3,4; R17-3; Compliance Case Manager.

³⁵ Public School SEC.

³⁶ R18.

³⁷ Compliance Case Manager; R18.

³⁸ R22-5.

Hearing Officer Determination

Case No. 2017-0103

Compliance Case Manager again followed up by email with Parent and Petitioner's counsel, after being unable reach Parent by phone.³⁹ The due process complaint in the current case was filed on 4/18/17; Compliance Case Manager testified that she waited after the filing of the complaint before making further contact, as the RSM would provide an opportunity to meet on these issues.⁴⁰ When the RSM was not promptly scheduled, Compliance Case Manager again followed up with Parent and Petitioner's counsel on 5/12/17.⁴¹ Parent never returned any of Compliance Case Manager's calls or emails.⁴²

13. In response to the filing of the due process complaint in this case, Respondent's counsel emailed Petitioner's counsel asking if she had ever respond to the repeated emails from Compliance Case Manager trying to implement the HOD.⁴³ Petitioner's counsel responded that she had called Compliance Case Manager "about two weeks ago" and said that Public School was inappropriate due to safety concerns and that if another placement wasn't going to be determined then "non-traditional evaluations" would have to be done.⁴⁴ Compliance Case Manager responded to Petitioner's counsel that she didn't recall that conversation, although they had had a call that didn't last a minute in which they discussed why Student wasn't coming to school and Petitioner's counsel said she would reach out to Parent; Petitioner's counsel apparently did not respond.⁴⁵

14. At the 5/17/17 RSM, DCPS responded to the claim of failure to determine an appropriate location of services by explaining that Public School Option A and Public School Option B had been offered to Parent on 3/15/17 (although not mentioned in the meeting notes) but Parent rejected them, stating she would not send to any DCPS school.⁴⁶ At the 5/17/17 meeting, DCPS's notes (taken by Compliance Case Manager) reflected that Parent stated she would "not be registering in a school within DCPS"; that "will not be attending a DCPS school"; that "will not be attending any DCPS school"; and she's "not sending to any DCPS school."⁴⁷ Several DCPS schools were taken "off the table" to avoid certain neighborhoods; DCPS offered Public School Option C and Public School Option D.⁴⁸ Parent was able to overcome her frustration after speaking privately with Petitioner's counsel during the meeting and agreed to visit possible DCPS schools that might be a suitable alternative to Public School.⁴⁹

³⁹ *Id.*

⁴⁰ Compliance Case Manager.

⁴¹ R22-4.

⁴² R25-1.

⁴³ R25-2.

⁴⁴ R25-1,2.

⁴⁵ R25-1.

⁴⁶ R23-3.

⁴⁷ R23-3,4.

⁴⁸ R23-4.

⁴⁹ *Id.*

Hearing Officer Determination

Case No. 2017-0103

15. At the 5/17/17 RSM, Compliance Case Manager again noted that Student was not making [redacted] available for evaluations and that she had reached out several times to Parent and Petitioner's counsel without any response.⁵⁰ Parent testified that she was not receiving emails at the email address that both DCPS and Petitioner's counsel used consistently throughout the time period in issue.⁵¹ Compliance Case Manager testified that no emails ever bounced back as undeliverable and that she was never made aware that Parent wasn't receiving her emails by Parent or Petitioner's counsel.⁵² Parent never answered or returned any telephone calls from Compliance Case Manager.⁵³ Parent never responded at all to DCPS's attempts to schedule the required RSM, leading DCPS to file a motion to dismiss.⁵⁴

16. Student's safety was discussed on both 3/15/17 and 5/17/17, with Parent and Student refusing to permit Metropolitan Police Department ("MPD") involvement and refusing to provide many specifics out of concern about retaliation or reprisal if Student was perceived as a "snitch."⁵⁵ On 5/17/17, Parent was ultimately willing to discuss at least the neighborhoods she was concerned about, which permitted schools outside those neighborhoods to be identified and visited.⁵⁶ DCPS stated at the 5/17/17 meeting that Parent needed to work with Re-engagement Specialist; a meeting with Re-engagement Specialist was required to complete the enrollment process.⁵⁷

17. Parent made school visits on 5/26/17 and Petitioner's counsel wrote DCPS that day to "confirm" that as a result of the visits Parent and Student "have a strong preference towards [Public School Option B] as a future placement" with private transportation.⁵⁸ Later on Petitioner's counsel emailed DCPS, stating that on 5/26/17 she had written "informing" DCPS of Parent's "endorsement of [Public School Option B] as a DCPS proposed school placement."⁵⁹ On 5/26/17, Re-engagement Specialist emailed Legal Assistant and others to find out when Parent would be completing the enrollment process; Legal Assistant suggested pushing off a meeting to the next week.⁶⁰ Re-engagement Specialist responded that she had reached out previously by email and telephone, and that the meeting must take place to "complete the enrollment process."⁶¹

⁵⁰ *Id.*

⁵¹ Parent.

⁵² Compliance Case Manager.

⁵³ *Id.*

⁵⁴ R21-1,3.

⁵⁵ R23-3 ([redacted] isn't a snitch"); R24-3.

⁵⁶ R23-3,4.

⁵⁷ P36-1.

⁵⁸ P38-1.

⁵⁹ P63-1.

⁶⁰ P36-2.

⁶¹ P36-1.

Hearing Officer Determination

Case No. 2017-0103

18. On 6/8/17 at 2:59 pm, Re-engagement Specialist emailed asking whether Student had been placed, and in what school, noting that as a matter of routine, Student needed to come to the Student Placement Office to complete the intake process.⁶² At 3:15 pm that day, Special Education Advocate emailed stating that Parent and her counsel had not been made aware of the “next steps” that needed to occur after Parent “notified DCPS of her consent to [Public School Option B].”⁶³ Compliance Case Manager responded at 3:43 pm, stating that the next steps had been stated both in email and at the 5/17/17 meeting, but that DCPS had not understood that Parent had finalized the location of services; Compliance Case Manager asked whether Parent wanted Student to attend Public School Option B for the final 3-1/2 days of 2016/17 or to begin in 2017/18.⁶⁴ Petitioner’s counsel responded at 3:59 pm that Parent wanted Student to be enrolled and go to school as soon as possible.⁶⁵ In a separate response to Special Education Advocate’s 3:15 pm message, Respondent’s counsel stated at 3:25 pm that DCPS understood that Parent agreed to send Student to Public School Option B for 2017/18; Petitioner’s counsel responded at 3:30 pm that Parent “has confirmed” Public School Option B.⁶⁶

19. Parent confirmed in her testimony at the due process hearing that she will allow Student to go to Public School Option B for 2017/18, if transportation is provided.⁶⁷ Student visited Public School Option B and testified that it is a “good school” and that wants to go there.⁶⁸ Nonpublic School could not implement Student’s IEP, as the school has no general education options and Student’s IEP requires 10 hours/week inside general education.⁶⁹

20. DCPS acknowledged that the 2/28/17 HOD still will be implemented if Parent is a willing participant, which will include: Public School Option B or a new DCPS possibility for older students that may be better for Student than Public School Option B, with classes of fewer than 10 and a quicker path to graduation; the 50 hours of mentoring already arranged; private transportation door-to-door; and the rest of the safety plan.⁷⁰

⁶² P64-3.

⁶³ P64-2.

⁶⁴ *Id.*

⁶⁵ P64-1.

⁶⁶ P67-1.

⁶⁷ Parent.

⁶⁸ Student.

⁶⁹ Nonpublic School SEC; Special Education Advocate.

⁷⁰ Compliance Case Manager.

Hearing Officer Determination

Case No. 2017-0103

Conclusions of Law

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

The overall purpose of the IDEA is to ensure that "all children with disabilities have available to them a free appropriate public education that emphasizes special education and related services designed to meet their unique needs and prepare them for further education, employment, and independent living." 20 U.S.C. § 1400(d)(1)(A). *See Boose v. Dist. of Columbia*, 786 F.3d 1054, 1056 (D.C. Cir. 2015) (the IDEA "aims to ensure that every child has a meaningful opportunity to benefit from public education").

"The IEP is 'the centerpiece of the statute's education delivery system for disabled children.'" *Andrew F. ex rel. Joseph F. v. Douglas County Sch. Dist. RE-1*, 137 S. Ct. 988, 994, 197 L. Ed. 2d 335 (2017), quoting *Honig v. Doe*, 484 U.S. 305, 311, 108 S. Ct. 592, 98 L.Ed.2d 686 (1988). "The IEP is the means by which special education and related services are 'tailored to the unique needs' of a particular child." *Andrew F.*, 137 S. Ct. at 994, quoting *Bd. of Educ. of Hendrick Hudson Cent. Sch. Dist. v. Rowley*, 458 U.S. 176, 181, 102 S. Ct. 3034, 73 L. Ed. 2d 690 (1982).

Once a child who may need special education services is identified and found eligible, Respondent must devise an IEP, mapping out specific educational goals and requirements in light of the child's disabilities and matching the child with a school capable of fulfilling those needs. *See* 20 U.S.C. §§ 1412(a)(4), 1414(d), 1401(a)(14); *Andrew F.*, 137 S. Ct. at 994; *Sch. Comm. of Town of Burlington, Mass. v. Dep't of Educ. of Mass.*, 471 U.S. 359, 369, 105 S. Ct. 1996, 2002, 85 L. Ed. 2d 385 (1985); *Jenkins v. Squillacote*, 935 F.2d 303, 304 (D.C. Cir. 1991); *Dist. of Columbia v. Doe*, 611 F.3d 888, 892 n.5 (D.C. Cir. 2010).

The IEP must be "reasonably calculated to enable a child to make progress appropriate in light of the child's circumstances." *Andrew F.*, 137 S. Ct. at 1001. The Act's FAPE requirement is satisfied "by providing personalized instruction with sufficient support services to permit the child to benefit educationally from that instruction." *Smith v. Dist. of Columbia*, 846 F. Supp. 2d 197, 202 (D.D.C. 2012), citing *Rowley*, 458 U.S. at 203. The IDEA imposes no additional requirement that the services so provided be sufficient to maximize each child's potential. *Rowley*, 458 U.S. at 198. In its recent decision, the Supreme Court made very clear that the standard is well above *de minimis*, however, stating that "[w]hen 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." *Andrew F.*, 137 S. Ct. at 1001.

In addition, Respondent must ensure that to the maximum extent appropriate, children with disabilities are educated with children who are nondisabled, and special classes, separate schooling, or other removal of children with disabilities from the regular educational environment occurs 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

Hearing Officer Determination

Case No. 2017-0103

achieved satisfactorily. 34 C.F.R. 300.114; *Andrew F.*, 137 S. Ct. at 1000 (children with disabilities should receive education in the regular classroom to the extent possible).

A Hearing Officer's determination of whether a child received a FAPE must be based on substantive grounds. In matters alleging a procedural violation, a Hearing Officer may find that a child did not receive a FAPE only if the procedural inadequacies (i) impeded the child's right to a FAPE; (ii) significantly impeded the parent's opportunity to participate in the decision-making process regarding the provision of a FAPE to the parent's child; or (iii) caused a deprivation of educational benefit. 34 C.F.R. 300.513(a). In other words, an IDEA claim is viable only if those procedural violations affected the child's *substantive* rights. *Brown v. Dist. of Columbia*, 179 F. Supp. 3d 15, 25-26 (D.D.C. 2016), quoting *N.S. ex rel. Stein v. Dist. of Columbia*, 709 F. Supp. 2d 57, 67 (D.D.C. 2010).

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

Issue 1: *Whether from March 2017 on DCPS denied Student a FAPE by failing to provide an appropriate IEP, and an appropriate placement/setting/location of services, to address Student's safety, attentional and school/work avoidance issues. (Respondent has the burden of persuasion on this issue, if Petitioner establishes a prima facie case.)*

Petitioner established a prima facie case on this issue, shifting the burden of persuasion to Respondent, which met its burden of demonstrating by a preponderance of the evidence that under the circumstances it provided the most appropriate IEP and placement/location of services it could. This case is fundamentally about whether DCPS adequately complied with the terms of the 2/28/17 HOD. DCPS demonstrated that it did so except to the extent compliance was blocked by Student's lack of school attendance and Parent's lack of cooperation.

As a general matter, the IDEA does require that a school district respond to a student's frequent or extended absences. *See, e.g., Springfield Sch. Comm. v. Doe*, 623 F. Supp. 2d 150, 159 (D. Mass. 2009); *Lamoine School Committee v. Ms. Z. ex rel. N.S.*, 353 F. Supp. 2d 18, 34 (D. Me. 2005) (if student was not in school, he could not be said to be receiving "a free appropriate public education"). But this is certainly not a case where Student's absences have been ignored or was expected to overcome attendance issues without assistance. The 2/28/17 HOD was perfectly clear that Student needed a new school location to address safety concerns, along with more IEP service hours. While Student unambiguously refused to go to Public School, the hope and expectation was that would attend school elsewhere.

Hearing Officer Determination

Case No. 2017-0103

As required by the HOD, DCPS convened a timely IEP meeting on 3/15/17 and was able to incorporate many of the HOD requirements into Student's revised IEP, but not all. The primary issue in controversy is why a new school/location of services was not determined for Student on 3/15/17. The lack of a new school that Student was willing to attend effectively prevented the other HOD requirements from being implemented, specifically preventing an FBA/BIP and a comprehensive psychological evaluation, each of which needed consistent attendance. Student never went to Public School or made otherwise available and Parent never answered calls from DCPS, which prevented any alternative arrangements from being considered or implemented.

There is no doubt that one of the purposes of the 3/15/17 IEP meeting, according to Compliance Case Manager's notes, was to "determine an appropriate location of services for Student." LRE placement and location of services were discussed at the meeting. Both Public School SEC and Compliance Case Manager credibly testified that DCPS offered Public School Option A and Public School Option B as alternatives to Public School, although that was not captured in the 3/15/17 meeting notes. Parent, on the other hand, testified that Public School Option B was not offered at the 3/15/17 meeting and that she didn't find out Public School Option B was a possibility until May. In addition to their general credibility, the undersigned is persuaded by the testimony of Public School SEC and Compliance Case Manager that Public School Option B was offered to Parent on 3/15/17 by the simple logic that if DCPS hadn't offered other school locations at that meeting, Petitioner's counsel and Parent surely would have raised the issue of a new location themselves, but there is no indication that they did.

Discussing and determining a new location of services for Student was a key aspect of the 2/28/17 HOD. If DCPS had insisted on Public School and rejected or pushed back against any school suggested by Parent or Petitioner's counsel that could implement Student's IEP, this Hearing Officer would view the current case very differently. While Parent did want Student to be placed at Nonpublic School, Nonpublic School could not implement Student's IEP, which required at least 10 hours/week inside general education. Instead, Petitioner's counsel boldly argued at the hearing that DCPS should have unilaterally determined a different school for Student without Parent's input, even though Parent would not explain in even a general way the scope of the underlying safety concerns, so that a new school could be selected which would be safe for Student. What is certain is that Parent didn't accept any DCPS school on 3/15/17 for Student, instead stating that Student "will not be attending" because she feared for within DCPS. In the absence of Parent's cooperation in determining a new school, the IEP team stated that Public School was still able to implement Student's IEP with the revisions made. DCPS continued to treat Public School as Student's school, with the 3/15/17 IEP continuing to list Public School on the first page.

After the 3/15/17 meeting, Compliance Case Manager repeatedly reached out to try to make arrangements to implement the HOD, calling Parent by telephone and then confirming with substantive emails to both Parent and Petitioner's counsel. Petitioner's counsel now argues that DCPS could have taken other steps to be more proactive during those weeks, but the compelling evidence is that neither Parent nor Petitioner's counsel

Hearing Officer Determination

Case No. 2017-0103

responded in any way to Compliance Case Manager's multiple contacts, including emails on 3/31/17, 4/7/17, 4/12/17, and 5/12/17, as well as phone calls. *See Hawkins v. Dist. of Columbia*, 692 F. Supp. 2d 81, 84 (D.D.C. 2010) (affirming hearing officer's conclusion that DCPS was not primarily responsible for the failure to develop an IEP and determine a placement when parent "was unresponsive to DCPS's efforts to reach her for long periods of time"). Again, if DCPS had rejected any suggestion from Petitioner's counsel or Parent about alternative ways to conduct evaluations or move forward, the undersigned might well view the circumstances very differently.

The closest approach to engagement by Petitioner was when Respondent's counsel asked Petitioner's counsel if she had ever responded to the repeated emails from Compliance Case Manager trying to implement the HOD. Petitioner's counsel claimed – without documentation – that she had called Compliance Case Manager "about two weeks ago" and suggested non-traditional evaluations would have to be conducted if an alternative to Public School wasn't going to be provided. However, Compliance Case Manager promptly refuted the assertion and Petitioner's counsel didn't comment further.

An RSM in the current case was held on 5/17/17, which finally resulted in Parent sharing sufficient information about her safety concerns that DCPS was able to suggest schools that would be safe, including Public School Option C and Public School Option D. Parent was able to make some visits and on 6/8/17 finally selected Public School Option B. While the delay from the 2/28/17 HOD to selection of a new school for Student in June is unfortunate, the undersigned does not view the delay as the fault of DCPS. Here, just as in the Child Find context, "the District should not be blamed for an untimely determination if the parent does not reasonably participate in the . . . process." *DL v. Dist. of Columbia*, 2017 WL 2697992, at *9 (D.C. Cir. June 23, 2017), *quoting and affirming DL v. Dist. of Columbia*, 194 F. Supp. 3d 30, 71 (D.D.C. 2016). The record shows that DCPS got right to work the day after the HOD to try to schedule the required IEP meeting and took extra steps at each stage of the process – as it should have – to try to fully implement the HOD.

There is no doubt that in the 3/15/17 IEP DCPS did provide: (a) 11 hours/week outside general education, (b) 10 hours/week inside general education, and (c) 120 minutes/month of speech-language pathology outside general education. As for BSS, the IEP was supposed to include 240 minutes/month outside general education, but instead included 120 minutes/week (480 minutes/month) of Consultation Services rather than direct Related Services. The undersigned found DCPS's testimony and documentary evidence persuasive that this was simply an error that DCPS will correct to 240 minutes/month of BSS provided directly to Student, rather than consultation with teachers. The 3/15/17 IEP appears to contain a second error by indicating that Student does not require transportation services, even though transportation was part of the safety plan and noted throughout communications between DCPS and Parent and Petitioner's counsel.

The HOD also required Student's transition plan to be updated as appropriate. Compliance Case Manager's notes stated that Student's transition plan was updated, although there is virtually no difference between the 3/15/17 IEP and the prior 12/8/16 IEP. Further modification may not have been needed, but in any case, with Student not coming to

Hearing Officer Determination

Case No. 2017-0103

school, there was no further information or updates on which modifications could have been made.

IEP goals were not discussed at the 3/15/17 IEP meeting, and there was no evidence that any concerns with goals were ever raised by Petitioner's counsel or anyone from her law firm prior to the hearing. Compliance Case Manager testified without rebuttal that if concerns about insufficient goals had been raised, DCPS would have reconvened the IEP meeting to discuss them, even though Student needed to have evaluations updated before changing goals. Moreover, in light of Student's refusal to attend school, additional or revised goals on IEP would not have made any difference in any case. Indeed, since Student hadn't attended school or been evaluated, there was no information after the HOD on which to reach conclusions about whether anything had changed.

In sum, on Issue 1 the undersigned concludes that there was no denial of a FAPE as DCPS appropriately implemented the HOD as best it could under the circumstances, by revising Student's IEP and then determining a safe school for Student as soon as Parent cooperated.

Issue 2: *Whether DCPS denied Student a FAPE by failing to appropriately address chronic poor school attendance and safety concerns by conducting a Functional Behavioral Assessment and providing an appropriate Behavioral Intervention Plan and/or an attendance plan/contract. (Petitioner has the burden of persuasion on this issue.)*

Petitioner had not met her burden of proof on this issue, because Student did not make available for a FBA/BIP and Parent did not cooperate with DCPS, as discussed in detail above.

In appropriate circumstances failing to conduct an FBA and develop a BIP may be a denial of a FAPE. *See, e.g., Long v. Dist. of Columbia*, 780 F. Supp. 2d 49, 61 (D.D.C. 2011). However, when DCPS makes repeated efforts to move forward with an FBA and BIP but cannot get any response at all from Parent or her counsel, Petitioner is not exemplifying the cooperative approach envisioned by Congress to produce a consensus between school officials and parents. *See Sch. Comm. of Town of Burlington, Mass. v. Dep't of Educ. of Mass.*, 471 U.S. 359, 368, 105 S. Ct. 1996, 2002, 85 L. Ed. 2d 385 (1985).

Petitioner's counsel suggested that DCPS should have moved forward unilaterally to set a date for Student's evaluations, without any indication that Student would show up. While that might have been necessary or expected of DCPS in different circumstances, here DCPS made repeated efforts to call and email not only Parent but her counsel. The undersigned holds that no more was required of DCPS, for if Parent and Petitioner's counsel can't take even a minute to respond in any way, the chances of Student showing up as scheduled with an evaluator at a time and place selected without their input seems remote and unnecessarily wasteful of educational resources. This conclusion might be different if Parent or Petitioner's counsel had made any suggestion or request that DCPS conduct evaluations at another location or at Student's home, but they did not, at least not prior to the hearing. Petitioner has failed to demonstrate a denial of FAPE.

Hearing Officer Determination

Case No. 2017-0103

ORDER

Petitioner has not prevailed on either issue in this case. Accordingly, **it is hereby ordered** that any and all claims and requests for relief are **dismissed with prejudice**.

Further, DCPS's Motion to Dismiss, filed on 5/4/17 due to Parent initially not participating in the required resolution session meeting, which motion was held in abeyance at the request of counsel, is hereby **dismissed as moot**.

IT IS SO ORDERED.

Dated in Caption

/s/ Keith Seat

Keith L. Seat, Esq.
Hearing Officer

NOTICE OF RIGHT TO APPEAL

This is the final administrative decision in this matter. Any party aggrieved by this Hearing Officer Determination may bring a civil action in any state court of competent jurisdiction or in a District Court of the United States without regard to the amount in controversy within ninety (90) days from the date of the Hearing Officer Determination in accordance with 20 U.S.C. § 1415(i).

Copies to:

Counsel of Record (Appendix A, by email)

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