

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

Office of Dispute Resolution
1050 First Street, N.E., Third Floor
Washington, D.C. 20002

OSSE
Office of Dispute Resolution
June 30, 2020

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| <i>Student</i> , ¹ |) | Case No.: 2019-0301 |
| through <i>Parent</i> , |) | |
| <i>Petitioner</i> , |) | Date Issued: 6/30/20 |
| |) | |
| v. |) | Hearing Officer: Keith L. Seat, Esq. |
| |) | |
| Public Charter School |) | Hearing Dates: 6/12/20, 6/15/20, |
| ("PCS"), |) | 6/16/20 & 6/18/20 |
| Respondent. |) | Video Platform: Microsoft Teams |
| |) | |

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") due to lack of appropriate Individualized Education Programs ("IEPs") and full implementation to address absences, among other claims. PCS responded that Student should have attended school and that it did everything it reasonably could have to encourage Student's attendance.

Subject Matter Jurisdiction

Subject matter jurisdiction is conferred pursuant to the 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 12/18/19, the case was assigned to the undersigned on 12/23/19. With agreement from Petitioner, Respondent filed a timely response on 1/6/20, which did not challenge jurisdiction apart from asserting a lack of Hearing Officer jurisdiction over Section 504 of the Rehabilitation Act, the Americans with

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

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Disabilities Act, and “fraud” claims as set forth in Issues 5, 6, and 7, below. A resolution meeting was held on 1/31/20, but did not resolve the dispute. The 30-day resolution period ended on 1/17/20. A final decision in this matter must be reached no later than 45 days following the end of the resolution period, as extended by 40, 60 and 20-day continuances due to scheduling challenges, delay from the pandemic, and a medical emergency, which require a Hearing Officer Determination (“HOD”) by 6/30/20.

The prehearing conference was held on 3/4/20 and the Prehearing Order issued the same day. The due process hearing took place on 6/12/20, 6/15/20, 6/16/20, and 6/18/20 and was closed to the public. Petitioner was represented by *Petitioner’s counsel*. PCS was represented by *Respondent’s counsel*. Petitioner was present by videoconference for the hearing.

Petitioner’s Disclosures, submitted on 5/19/20, contained documents P1 through P90, which were admitted into evidence without objection, except for P14, P15, P16, P17, P18, P20, and P58 which were withdrawn by Petitioner. Respondent submitted Disclosures on 5/19/20 and Supplemental Disclosures on 6/5/20, offering into evidence R1, R3, R4, R5, R7, R8, R10, R11, R12, R13, R14, R15, R16, R 18, R19, R20, R22, R23, R24, R25, R26, R27, R28, R29, R30, R31, R32, R33, R34, R35, R36, R37, R38, R39, R40, R41, R42, R46, R47, R50, R51, R52, R55, R56, R57, R62, R63, R64, R65, R66, R67, R68, R69, R70, R71, R72, R73, R74, R75, R76, R84, R85, R89, R90, R91, R92 (pages 548-53, 555 only), R93, R94, R95, R96, R97, R98, R99, R100, R101, R104, R106, R107, R108, R109, and R110, which were admitted into evidence without objection.²

Petitioner’s counsel presented 3 witnesses in Petitioner’s case-in-chief (*see* Appendix A):

1. *Private Psychologist* (qualified without objection as an expert in Clinical Psychology and School Psychology)
2. *Education Consultant* (qualified without objection as an expert in Special Education)
3. Parent

Respondent’s counsel presented 6 witnesses in Respondent’s case (*see* Appendix A):

1. *World History Teacher* at PCS
2. *English Teacher* at PCS

² Citations herein to the parties’ documents differ based on how they were numbered. References to Petitioner’s documents begin with a “P” and the exhibit number, followed by a hyphen and the page number or numbers (e.g., P1-1 or P1-2,3,4). References to Respondent’s documents begin with an “R” immediately followed by a “p” (for page) and the page number or numbers (e.g., Rp1 or Rp2-4).

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3. *Director of Special Education* at PCS (qualified without objection as an expert in Special Education)
4. *Clinical Psychologist* (qualified without objection as an expert in Clinical Psychology)
5. *School Social Worker* at PCS (qualified without objection as an expert in Clinical and School Social Work)
6. *Former Director of Special Education* at PCS (qualified without objection as an expert in Special Education and School Psychology)

Petitioner's counsel did not present any rebuttal witnesses.

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

Issue 1: Whether PCS denied Student a FAPE by failing to provide appropriate IEPs in 2018/19³ and 2019/20 which failed to: (a) provide appropriate goals, including transition goals; (b) provide appropriate present levels of academic achievement and functional performance ("PLAAFPs") with baselines; (c) provide appropriate behavioral supports; (d) provide extended school year ("ESY") (2018/19 only); and/or (e) develop an appropriate behavior intervention plan ("BIP") based on a functional behavioral assessment ("FBA"), after noticing lack of attendance due to medical issues as well as failing scores. *(Respondent has the burden of persuasion on this issue, if Petitioner establishes a prima facie case.)*

Issue 2: Whether PCS denied Student a FAPE by failing to implement Student's IEPs in 2018/19 and 2019/20 when it did not provide (a) homebound/hospital services during extended medical absences; (b) special education and related services; and/or (c) transition services. *(Petitioner has the burden of persuasion on this issue.)*

Issue 3: Whether PCS denied Student a FAPE by preventing Parent from meaningful participation in Student's education by failing to provide (a) Parent with progress reports on Student's IEP goals; (b) Parent's rights to request services; and/or (c) information related to Student's rights to special education and related services. *(Petitioner has the burden of persuasion.)*

Issue 4: Whether PCS denied Student a FAPE by failing to conduct updated assessments (i.e., psychological and educational) after noticing significant changes in behavior, grades and attendance; an updated FBA was needed to analyze school refusal. *(Petitioner has the burden of persuasion on this issue.)*

³ All dates in the format "2018/19" refer to school years.

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Issue 5: Whether PCS denied Student a FAPE by violating Section 504 of the Rehabilitation Act of 1973 (“Section 504”). (*Petitioner has the burden of persuasion on this issue.*)

Issue 6: Whether PCS violated Student’s rights pursuant to Title II of the Americans with Disabilities Act (“ADA”). (*Petitioner has the burden of persuasion on this issue.*)

Issue 7: Whether PCS committed fraud by accepting federal and state IDEA funds but refusing to provide required services to Student under the IDEA, Section 504, and the ADA. (*Petitioner has the burden of persuasion on this issue.*)

The relief requested by Petitioner is:

1. A finding that Student was denied a FAPE.
2. Respondent shall pay for placement of Student in a nonpublic school for a minimum of 3 school years, including transportation, supplies, school fees, and food.
3. Respondent shall pay for a full battery of assessments by private Independent Educational Evaluation (“IEE”) evaluators selected by Parent, including physical health, intellectual, academic, speech language, educational, psychological, social appraisal, communication skills, motor skills, assistive technology, occupational therapy, behavior, autism, and adaptive behavior, to determine Student’s eligibility for special education and related services under the IDEA, including payment for transportation and other expenses for private evaluators located outside the DC metro area.
4. Respondent shall pay for the participation and travel expenses of all of the IEE evaluators from the previous paragraph and lead counsel for Petitioner to attend an IEP meeting to revise Student’s IEP to include: (a) measurable PLAAFPs; (b) IEP goals; (c) direct speech-language services; (d) direct occupational therapy services; (e) behavioral counseling; (f) ABA therapy; (g) placement in the least restrictive environment; and (h) all suggestions from the IEEs.
5. Respondent shall pay for an FBA and development of a BIP by private behavior specialists selected by Petitioner, including transportation and other expenses.
6. Respondent shall provide Student with in-school behavior therapy – Applied Behavior Analysis (“ABA”), Social Skills Therapy, Cognitive Behavioral Therapy, or Solution-Focused Brief Therapy – for a minimum of 36 months.
7. Respondent shall provide a minimum of 400 hours of compensatory education for any denial of FAPE.⁴

⁴ So far as Petitioner’s request for compensatory education depends on the findings of assessments that may be carried out in the future, that portion of the compensatory

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8. Respondent shall provide Student a qualified board-certified behavior analyst to serve as a one-on-one aide for a minimum of 3 school years.
9. Respondent shall pay for behavioral counseling and other necessary related services from an independent provider for a minimum of 36 months.
10. Respondent shall provide Parent with related services, including counseling and training to allow her to be a meaningful participant in Student's education by understanding Student's special needs and obtaining information and skills to facilitate implementation of Student's IEP.
11. Respondent shall provide Student with a mentor, job coach and vocational expert for a minimum of 36 months to teach skills necessary to find employment and attend college.
12. Respondent shall pay for training of its faculty, staff, and administration by private education experts on how to (a) follow IDEA procedures and requirements in identifying and evaluating children with disabilities; (b) implement positive behavior supports for children with behavioral disabilities; and (c) avoid creating a hostile and punitive educational environment for children with behavioral disabilities.
13. Any other just and proper relief.

Findings of Fact

After considering all the evidence, as well as the arguments of counsel, the Findings of Fact⁵ are as follows:

education claim is reserved pending the completion of Student's assessments and a determination of eligibility for additional special education services.

Petitioner's counsel was put on notice at the prehearing conference that at the due process hearing 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 at the due process hearing to introduce evidence contravening the requested compensatory education in the event a denial of FAPE is found.

⁵ 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.

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1. Student is a resident of the District of Columbia; Petitioner is Student's Parent.⁶ Student is *Age*, *Gender* and repeated *Grade* at PCS in 2019/20.⁷ Student is "very intelligent, bright, polite, well-grounded and [has] positive social skills with others."⁸

2. Background. Student's special education classification is Emotional Disturbance ("ED") based on symptoms of anxiety and depression, as well as challenges with behaviors and social difficulties; physical symptoms of headaches and stomach concerns cause Student to miss school regularly.⁹ A 3/8/19 doctor's visit summary for Student listed 16 medical conditions, including emotional depression, migraine without aura, chronic tension-type headache, other headache syndrome, and constipation.¹⁰ Student was meeting weekly with a community service provider to manage symptoms.¹¹

3. Student wants to engage in school, but has a high level of anxiety in multiple settings and is often fearful of leaving home; Student has a long history of symptoms and was diagnosed with Oppositional Defiant Disorder ("ODD") and Disruptive Mood Dysregulation Disorder ("DMDD") in the past 2 years.¹²

4. Student has been seen in outpatient settings and an emergency room for headache related symptoms.¹³ On 3/6/19, medical progress notes indicated that Student misses school due to migraines and stomach pain, symptoms likely related to emotional challenges with clinical depression or other mental health diagnosis.¹⁴ Student was referred to neurology due to frequent migraines and psychology due to depression.¹⁵ Student has missed a great deal of school due to somatic symptoms, with ongoing migraines and increased anxiety symptoms.¹⁶ Student's anxiety was related to school performance and a strong desire to do well and not be held back.¹⁷

5. Student wanted to attend school and was motivated, but preferred to complete school online.¹⁸ Student was sometimes able to keep up with school assignments even without attending class, but was unable to make-up enough in 2018/19 to pass to the next grade; Student felt that Student should have been in the next grade with Student's class, so refused to attend school in 2019/20.¹⁹ Student's doctor and medical team at the headache clinic

⁶ Parent.

⁷ Parent; P23-1.

⁸ P23-1.

⁹ P29-11; P23-1; P1-1.

¹⁰ P2-1; *see also* Rp153-54.

¹¹ P1-1 (4/15/19).

¹² P23-9; Private Psychologist.

¹³ P23-2.

¹⁴ P3-1,2; P11-3 (10-year history of headaches).

¹⁵ P3-2,3.

¹⁶ P23-2,7,9.

¹⁷ P22-19,21.

¹⁸ P23-3.

¹⁹ *Id.*

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stated that they believe it was in Student's "best interest to participate in school, both academically and socially, to the extent that [Student] is able."²⁰ Student's doctor (and hospital) visits indicated each time that Student should return to school; none suggested that Student should be out of school for long periods.²¹ A 7/8/19 medical Assessment and Plan stated that Student should participate and "not avoid activities because of headache" and should "desensitize" to work through pain to teach Student's brain to ignore amplified pain signals.²²

6. IEPs/Meetings. As background, Student's 9/14/17 IEP provided 7.5 hours/week of specialized instruction in math inside general education and 3 hours/week of specialized instruction outside general education, along with 180 minutes/month of Behavioral Support Services ("BSS") outside general education.²³ Student's 9/12/18 IEP provided 3 hours/week of specialized instruction outside general education, 180 minutes/month of BSS outside general education, and 30 minutes/month of specialized instruction consultation.²⁴ Former Director of Special Education believed the 9/12/18 IEP was appropriate; Parent raised no concerns or objections.²⁵

7. Student's IEP was amended on 7/10/19 to change present levels and annual goals, and add new accommodations.²⁶ The 7/10/19 IEP team meeting discussed Student's IEP and added support for chronic headaches with an amended present level to note that Student has chronic headaches that may impact functioning, and a lengthy paragraph of accommodations, including sunglasses, ear plugs, alternate locations for work, extra time for transition between classes, access to the school nurse, and extended deadlines after missing school, among other things.²⁷ The team discussed BSS and determined that 180 minutes/month was appropriate and more time was not needed or Student would be out of the classroom too much.²⁸ Petitioner's experts believed that PCS should have considered increasing Student's BSS, which continued at 180 minutes/month, with no increase from the 9/14/17 and 9/12/18 IEPs.²⁹

8. Student's 9/10/19 IEP provided 3 hours/week of specialized instruction outside general education, 180 minutes/month of BSS outside general education, and 30 minutes/month of specialized instruction consultation.³⁰ The 9/10/19 IEP was appropriate

²⁰ P12-1.

²¹ P4-9; P2-1; P7-1; P11; P12-2 ("please excuse occasional absences"); P23-3 (providers "clearly stated that [Student] should be encouraged to attend school"); Rp155 (Student "is able to return to school"); Rp195 ("patient should be able to return to school"); Rp201.

²² Rp205.

²³ P24-1,9.

²⁴ P26-1,13.

²⁵ Former Director of Special Education.

²⁶ P28-1.

²⁷ Rp269-70; P28-3,12.

²⁸ Director of Special Education; School Social Worker.

²⁹ Private Psychologist; Education Consultant.

³⁰ P29-1,13.

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according to PCS staff, and no one said it was not; Parent did not raise any objections to it.³¹ At the 9/10/19 IEP team meeting, Parent indicated that she was trying to obtain an assessment and a psychologist's letter to demonstrate the extent of Student's emotional difficulties.³² Student had been going through a lot emotionally and was not comfortable repeating Grade, which was causing behavior/health challenges.³³ Parent sought to work out a way that Student could be further along than Grade as a "hybrid" student at PCS, by transferring to another DCPS school that might have more lenient grading (since PCS considered any grade below a "C-" to be failing), or even by home schooling Student.³⁴ At the 9/10/19 IEP meeting, Parent was concerned about what PCS would have in place to address Student's behaviors if Parent got Student to attend school, due to Student's "school phobia," and the fact that Student wasn't comfortable going to another school; School Social Worker was willing to meet Student coming into school and "discuss a plan" with Student to put things in place while Student was struggling.³⁵ Student did not go to school following the 9/10/19 meeting.³⁶

9. Parent was an active and vocal participant in Student's IEP team meetings, asking questions and sharing her concerns.³⁷ Parent exhibited no confusion about Student's needs nor any lack of understanding.³⁸

10. IEP Present Levels, Goals and Baselines. Student's IEP present levels were detailed with a great deal of information for each area of concern in the 9/12/18 and 9/10/19 IEPs, including setting out and discussing goals that had not been mastered in the prior year.³⁹

11. The goals in the 9/12/18 IEP were appropriate, with no need for short-term objectives.⁴⁰ Student was making progress on the 9/12/18 IEP goals, but didn't master them, so the goals were repeated in the 9/10/19 IEP.⁴¹ Emotional, social and behavioral goals were appropriate.⁴²

12. Specifically, the 9/12/18 IEP stated that Student did not master the 9/14/17 IEP's math goals, so Student would continue to work towards those goals, plus receive new annual goals.⁴³ The 9/12/18 IEP stated that Student did not master the 9/14/17 IEP's reading goals,

³¹ Director of Special Education; School Social Worker.

³² P30-2.

³³ P30-2,11.

³⁴ P30-2; Director of Special Education.

³⁵ P30-10,11; School Social Worker; Director of Special Education.

³⁶ Director of Special Education; Rp540.

³⁷ Director of Special Education; Former Director of Special Education.

³⁸ Former Director of Special Education.

³⁹ P26; P29; Director of Special Education.

⁴⁰ Director of Special Education.

⁴¹ *Id.*

⁴² School Social Worker.

⁴³ P26-4.

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so Student would continue to work towards those goals, plus receive new annual goals.⁴⁴ The 9/12/18 IEP stated that Student did not master the 9/14/17 IEP's writing goals, so Student would continue to work towards those goals, plus receive new annual goals.⁴⁵

13. Student's 9/10/19 IEP repeated math goals from the 9/12/18 IEP as they had not been mastered.⁴⁶ The 9/10/19 IEP stated that Student did not master the prior IEP's reading goals, so Student would continue to work towards those goals, plus receive new annual goals.⁴⁷ The 9/10/19 IEP stated that Student did not master the prior IEP's writing goals, so Student would continue to work towards those goals, plus receive new annual goals.⁴⁸

14. Director of Special Education credibly testified that it was reasonable to include multiple skills in individual goals, such as proving theorems about both lines and angles, rather than separating them into 2 goals, as the subject is taught that way and that is the way they appear in the Common Core Standards.⁴⁹ When there were multiple skills in a single goal, Petitioner's expert asserted that short term objectives should have been added to the goals, which was refuted.⁵⁰

15. Many of the baselines were not optimal in providing a measurable way to determine Student's progress, but were enhanced by information in the detailed present levels; some of the baselines lacked specifics or provided data points that did not directly relate to the goal.⁵¹

16. Student's 9/10/19 IEP remained the same since Student had not made progress toward goals due to lack of submission of work.⁵² The team agreed academic goals would remain the same until Student returned to school.⁵³ Clinical Psychologist recommended the social worker draft goals related to working through anxiety of coming to school, and mindfulness training to help with self-regulation to distress, helping identify triggers and fears.⁵⁴

17. Parent testified that Student didn't receive any transition services.⁵⁵ Student was administered the Casey Life Skills assessment on 9/10/18.⁵⁶ Parent testified that Student's

⁴⁴ P26-6.

⁴⁵ P26-9.

⁴⁶ P29-5; Education Consultant; Director of Special Education.

⁴⁷ P29-7.

⁴⁸ P29-10.

⁴⁹ Director of Special Education; P26-4.

⁵⁰ Education Consultant; Director of Special Education.

⁵¹ P26; P29; Education Consultant.

⁵² P30-11.

⁵³ Rp665.

⁵⁴ *Id.*

⁵⁵ Parent.

⁵⁶ P44-1; Rp117-22.

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key interests were paleontology and wrestling, which were captured by the Post-Secondary Transition Plan.⁵⁷ Student received transition services during advisory class.⁵⁸

18. Student's 9/12/18 Transition Plan provided goals to research, identify and develop pros and cons for 3 majors of interest; to develop a detailed resume with 100% accuracy in spelling, punctuation, capitalization, and grammar; and to manage a checking account.⁵⁹ The baselines stated that Student had identified 3 areas of interest for employment; needed assistance with a resume; and needed assistance with a budget.⁶⁰

19. Student's 9/10/19 Transition Plan provided goals of researching post-secondary training and educational opportunities, including 2 and 4 year colleges and career schools; identifying 4 options for volunteer positions and complete 100 hours of community service; and managing a bank account/checking account.⁶¹ The baselines stated that Student was in the "early stages" of college or career exploration; that 100 hours of community service were required for graduation, and again that Student needed assistance with a budget.⁶² Student's transition plan was appropriate; Parent didn't object to it.⁶³

20. ESY. Nothing suggested that Student needed ESY, especially with a Working Memory in the High Average range.⁶⁴ The 9/12/18 IEP team meeting noted that Student had made a lot of growth in the summer of 2018 (without ESY).⁶⁵ After chronic absences when Student returned to school, Student was able to catch up and understand the material that had been taught.⁶⁶ The ESY Services Eligibility Worksheet was completed by the IEP team for Student on 9/12/18 and concluded that there were no critical skills that would be jeopardized by a break in service, so Student was not eligible for ESY in 2019.⁶⁷ ESY is a team decision and was not included on Student's 9/12/18 IEP (or 7/10/19 Amended IEP); Student was receiving therapy outside school so didn't need ESY for emotional-social issues.⁶⁸

21. Cognitive/Achievement Abilities. Student's 5/30/18 psychoeducational evaluation found that Student's General Ability Index ("GAI") was in the Average range (standard score ("SS") of 92, 30th percentile); the Full Scale IQ ("FSIQ") was Average (SS of 98, 45th percentile) but not considered clinically meaningful due to the spread of scores.⁶⁹ Student's

⁵⁷ P26-17; School Social Worker.

⁵⁸ Former Director of Special Education.

⁵⁹ P26-18,19.

⁶⁰ P26-18,19,20.

⁶¹ P29-18,19,20.

⁶² *Id.*

⁶³ Director of Special Education.

⁶⁴ Clinical Psychologist.

⁶⁵ P27-2; P24-12.

⁶⁶ P29-4.

⁶⁷ Rp146.

⁶⁸ P26-16; P28-15; Former Director of Special Education.

⁶⁹ P22-6,24.

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cognitive proficiency index fell in the High Average range (CPI SS of 111, 77th percentile).⁷⁰ The 5/30/18 evaluation used the Wechsler Individual Achievement Test – Third Edition (“WIAT-III”) on which Student showed solidly developed reading, mathematics and written expression skills.⁷¹

22. The 3/12/20 comprehensive psychological evaluation did not indicate any challenge with cognitive abilities; Student was in the average to high average range across most abilities, with mild difficulty in processing speed.⁷² The evaluation relied on the Wechsler Adult Intelligence Scale – Fourth Edition (“WAIS-IV”), which found Student’s FSIQ to be in the Average range (SS of 99 at the 47th percentile).⁷³ Student demonstrated strengths in achievement abilities as shown by the WIAT-III, with limitations when timed and challenges with math and spelling.⁷⁴

23. Behavior/Mental Health. The 5/30/18 psychoeducational evaluation relied on the Behavior Assessment System for Children, Third Edition (“BASC-3”) with rating scales by 2 teachers, 1 of whom found Somatization and Withdrawal to be Clinically Significant, and Leadership to be At Risk; Parent did not complete her rating scale in time for inclusion.⁷⁵ The 3/12/20 evaluation did incorporate BASC-3 responses by Parent, indicating significant concerns with depression, anxiety, ability to focus, somatic symptoms, and social skills.⁷⁶ Student was administered the Beck Youth Inventories – Second Edition (“BYI-2”) which assessed for problems with depression, anxiety, and self-concept; all responses were clinically significant and elevated across all 3 areas indicating negative thought patterns and feelings about self and outlook toward Student’s life.⁷⁷ Parent testified that not being promoted from Grade and not being in school in 2019/20 made Student more depressed and migraines worse in 2019/20.⁷⁸

24. 2017/18 Attendance and Grades. In 2017/18, Student’s absences were heavy in the beginning of the year, but improved later in the year.⁷⁹ School Social Worker contacted Parent on 10/4/17, noting that Student already had missed 8 days of school and that Student informed School Social Worker of the stress and anxiety Student was feeling at school.⁸⁰ In 2017/18, Student’s grades declined to all “Fs” in second quarter (except for Resource

⁷⁰ P22-20.

⁷¹ P22-20,26.

⁷² P23-9,10.

⁷³ P23-3,4.

⁷⁴ P23-5,9.

⁷⁵ P22-15,16,17.

⁷⁶ P23-10.

⁷⁷ P23-10; Rp663.

⁷⁸ Parent.

⁷⁹ P62-8,9,10.

⁸⁰ Rp28.

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Workshop); Student was able to pull up the grades to barely pass all subjects (except for failing English and passing Resource Workshop with a higher grade).⁸¹

25. 2018/19 Attendance, Grades, and PCS Response. In 2018/19, Student had 74 absences, with 29 in about 6 months between August and the end of February, and another 45 in about 3 months from March to early June, missing almost all days in April, May and June.⁸² When Parent pushed Student to go to school despite feeling bad, Student had a meltdown to the point that Parent worried about Student harming self.⁸³ Student was concerned about grades, which were reviewed on 9/25/18 with the social worker.⁸⁴ On 2/12/19, Student reviewed grades and discussed how attendance was greatly impacting academic progress.⁸⁵ Due to poor attendance, Student had all failing grades as of 4/15/19; Parent recognized then that Student would be held back absent improvement.⁸⁶ On 5/14/19, Student discussed the work missed from being absent for almost a month, along with Student's medical issues and their impact.⁸⁷

26. In 2018/19, Student received all "Fs" in third quarter (except for barely passing English); Private Psychologist testified that Student's IEP should have been reviewed and revised after third quarter; with Student's medical condition, PCS should have considered "bringing the school" to Student, but PCS failed to take action.⁸⁸ In 2018/19, Student received "Fs" for the entire year in every subject (except Resource Workshops).⁸⁹ Student's PARCC data for 2018/19 showed Student at level 3 with a score of 743 in math, nearly at grade-level and scoring better than 63% of students at PCS and 69% of the students in DC.⁹⁰ Private Psychologist asserted that Student did not perform in school because absences were not adequately addressed by PCS.⁹¹

27. On 12/12/18, Student completed a form entitled "My Attendance Success Plan," in which Student committed to improve attendance by (1) going to bed on time, (2) going to school "despite being sick," and (3) waking up on time and being consistent.⁹² An "Attendance Intervention Family Intake Form" completed by Student noted that attendance problems are caused by medical problems and depression, as Student was "sick a lot from migraines."⁹³

⁸¹ P60-1.

⁸² P62-4,5,6,7.

⁸³ Rp189.

⁸⁴ P44-1.

⁸⁵ P48-1.

⁸⁶ P19-4.

⁸⁷ P51-1.

⁸⁸ Private Psychologist; P61-1.

⁸⁹ P81-7; Parent.

⁹⁰ Rp678.

⁹¹ Private Psychologist.

⁹² P65-1.

⁹³ P65-03.

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28. The Parent Contacts log indicates a significant gap in school contacts, as the only recorded contact from the beginning of 2018/19 until 3/5/19 was an email on 12/3/18 informing Parent of a change in service providers.⁹⁴ School Social Worker emailed Parent on 3/5/19 after not seeing Student in school for 3 days.⁹⁵ On 3/12/19, Parent wrote that Student did not want to fail and was stressed out by having to convince PCS that Student had really been sick.⁹⁶ On 3/19/19 PCS staff wrote that they were concerned about how Student's medical condition impacted attendance and performance.⁹⁷

29. Student's teachers saved work for Student's return and worked with Student when present; teachers extended time for completing assignments.⁹⁸ On 3/21/19 and 3/22/19, Student's teachers extended deadlines from Thursday or Friday to Monday for Student.⁹⁹ When present, Student would "continuously" seek help from World History Teacher after class or during office hours.¹⁰⁰ Student was sometimes given packets and did a lot, but didn't receive teacher instruction to understand all the packets.¹⁰¹ English Teacher emailed and called Student during the extended absences in spring 2019, but didn't hear back.¹⁰² Teachers did not offer online instruction for Student in 2018/19 or in 2019/20 before March.¹⁰³

30. Former Director of Special Education suggested in a 3/14/19 email to Parent that they "formalize a process" for Student's absences with a doctor's letter explaining ongoing absences so there was no need for a doctor's note for each absence.¹⁰⁴ On 3/22/19, Parent and PCS were working collaboratively; Former Director of Special Education stated that it would be helpful to have a letter from Student's doctor stating the diagnoses and addressing how they are expected to affect attendance at school.¹⁰⁵ On 4/23/19, Former Director of Special Education emailed Parent about Student not attending since break.¹⁰⁶ On 4/30/19, School Social Worker emailed Parent about Student's ongoing absences.¹⁰⁷

31. School Social Worker checked on Student on 5/3/19 and followed up on efforts to get teachers to email work to Student to complete while out of school.¹⁰⁸ Former Director of Special Education sought a meeting with Parent to discuss attendance on 5/6/19 and

⁹⁴ Rp537.

⁹⁵ Rp168.

⁹⁶ Rp180.

⁹⁷ Rp181.

⁹⁸ World History Teacher.

⁹⁹ Rp183.

¹⁰⁰ World History Teacher.

¹⁰¹ Parent.

¹⁰² English Teacher.

¹⁰³ World History Teacher.

¹⁰⁴ Rp549-50.

¹⁰⁵ Rp185.

¹⁰⁶ Rp193.

¹⁰⁷ Rp537.

¹⁰⁸ Rp197.

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5/13/19; School Social Worker emailed Parent on 6/4/19 about Student not being in school for a month and called on 6/5/19.¹⁰⁹ Former Director of Special Education didn't hold a meeting without Parent so the team was not able to meet until 7/10/19.¹¹⁰ PCS knew of Student's depression and anxiety and that Student was anxious about being retained in Grade.¹¹¹

32. 2019/20 Attendance, Grades, and PCS Response. Student was registered, but did not attend PCS at all during 2019/20.¹¹² School began on 8/26/19; PCS staff commented on Student's absences on 8/28/19 and reached out to Parent on 8/30/19 when Student had missed the first week of school.¹¹³ Student continued to miss school and on 9/9/19 Parent said Student had a "school phobia" and anxiety; School Social Worker discussed a plan, but Student was not able to come to the building.¹¹⁴ On 9/17/19, School Social Worker spoke with Parent and Student by phone and Student expressed concerns which School Social Worker discussed with Parent to address.¹¹⁵ In October 2019, School Social Worker and Director of Special Education attempted a home visit, but were unable to speak with anyone.¹¹⁶

33. Prior to beginning Home and Hospital Services ("homebound services") in February 2020, PCS did not provide any academic supports, teletherapy, related services for Student, transition support, homebound services, or any related services for Parent to assist her in supporting Student.¹¹⁷ From March 2019 to February 2020, there was no counseling at home or teletherapy.¹¹⁸ Parent received no services herself to support Student from March 2019 to February 2020.¹¹⁹ Student needed a plan to reenter school "gently" in 2019/20, but did not receive it from PCS.¹²⁰

34. IEP Progress Reports. Parent claimed she received no IEP Progress Reports from March 2019 to February 2020 and no tutoring progress reports since February 2020.¹²¹ PCS mailed IEP Progress Reports 4 times a year with report cards and Parent never said at the time that she didn't receive them.¹²² Student's IEP Progress Reports for 2019/20 show no

¹⁰⁹ Rp537.

¹¹⁰ Former Director of Special Education.

¹¹¹ *Id.*

¹¹² Stipulation by Parties; P62-2.

¹¹³ P62-2; R1540.

¹¹⁴ P54-1; School Social Worker.

¹¹⁵ P54-1; Rp540.

¹¹⁶ School Social Worker.

¹¹⁷ Education Consultant.

¹¹⁸ Private Psychologist.

¹¹⁹ Parent.

¹²⁰ *Id.*

¹²¹ *Id.*

¹²² Former Director of Special Education.

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progress and contain little information because Student was “academically truant” for the school year.¹²³

35. Absence Excuses/CPS. PCS required Request to Excuse Student Absence forms to be submitted within 2 days of the student returning to school; they required a physician’s note only if a student was ill for more than 2 days.¹²⁴ Parent often turned in excuse forms long after they were due, such as excuses dated 2/1/19 for absences on 11/28/18, 12/5/18, 12/10/18, 1/22/19.¹²⁵ Parent stopped giving excuse notes for absences, stating that they were not being accepted.¹²⁶ Child Protective Services (“CPS”) initiated and dropped 3 cases concerning Student over the years.¹²⁷ CPS was involved on 4/15/19 due to truancy; on 11/6/19, Parent emailed that CPS said that Parent was educationally neglecting Student, which she attributed to PCS holding up progress and contributing to Student unnecessarily failing again.¹²⁸ On 5/7/19, PCS noted that it had filed truancy paperwork.¹²⁹

36. Summer School/Credit Recovery. PCS only permits 2 classes to be made up each year through summer school, but Student failed all core classes in 2018/19; also 5 absences in a quarter can result in automatic failure unless they are documented medical absences; on 6/10/19 Parent recognized that Student would not be able to make up sufficient work to be promoted from Grade, but requested that Student be allowed to take core classes during summer school or even the beginning of 2019/20.¹³⁰ Parent noted that Student had a possible anxiety attack in late May 2019 out of fear of failing and stated that Student would quit school if Student failed and was “possibly suicidal.”¹³¹

37. At the 7/10/19 IEP team meeting, Parent said she would enroll Student in another school to recover credits, but Student did not want another school and stated that Student would drop out.¹³² Parent tried to get information from PCS to get Student into a DCPS summer school in 2019 or signed up for another school entirely, but Parent reported on 9/25/19 that she received key information from PCS too late.¹³³ Parent found out about credit recovery but stated that PCS refused to provide it for Student; the head of school stated that PCS does not offer credit recover options outside summer school.¹³⁴ No credit

¹²³ Rp597-614.

¹²⁴ P66-1.

¹²⁵ P66-1; P69-1; P71-1; P72-1.

¹²⁶ Parent.

¹²⁷ Rp164.

¹²⁸ P19-4,7; P81-8; Parent.

¹²⁹ Rp552.

¹³⁰ Rp222-23; Rp269.

¹³¹ Rp223.

¹³² Rp269.

¹³³ Rp368.

¹³⁴ Rp368-69; Parent.

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recovery was available to Student prior to February 2020; Education Consultant testified it should have been made available in spring 2019.¹³⁵

38. In February 2020, PCS offered Apex credit recovery to Student as an opportunity to earn credit in math, ELA, history and (maybe) science as part of the homebound tutoring and therapy services.¹³⁶ Student was glad to be learning online.¹³⁷ Director of Special Education estimated that with a couple of months of credit recovery Student could move beyond Grade.¹³⁸ Extended credit recovery is being offered through the end of 2020 summer school, but as of the time of Director of Special Education's testimony in mid-June Student had completed only 12%.¹³⁹ If Student does not complete the work, Student would continue to be retained in Grade.¹⁴⁰

39. Homebound Services. On 10/3/19, Parent sent an "official" request for homebound services until Student could get a medication regimen working; Parent understood that homebound services could either be home visits by teachers, online instruction, a combination of the 2, or other ways that would best accommodate all parties involved.¹⁴¹ Parent did not know about homebound services prior to 10/3/19.¹⁴² Parent emailed Director of Special Education on 10/31/19 that she was still waiting on a response to her request for homebound services.¹⁴³

40. Parent provided a homebound services form on 12/12/19 to be completed by Student's physician; on 1/7/20, the head nurse asked whether Parent was seeking part-time homebound instruction, full-time, or only in case of absences; Parent responded that the homebound instruction was "only in case of an absence."¹⁴⁴ The homebound instruction form was provided by Student's physician on 1/8/20 for "concurrent home teaching" when Student was absent, as Student could attend school on "non-consecutive days based on chronic condition" with a diagnosis of Chronic Migraine without aura; the physician also "recommended that Student continue mental health treatment for major depressive disorder, recurrent, moderate and generalized anxiety disorder."¹⁴⁵ The homebound services form was sent to PCS on 1/16/20 but the document could not be opened, so was re-sent on 1/22/20.¹⁴⁶

¹³⁵ Education Consultant.

¹³⁶ Director of Special Education.

¹³⁷ Education Consultant.

¹³⁸ Director of Special Education.

¹³⁹ *Id.*

¹⁴⁰ School Social Worker.

¹⁴¹ P81-2.

¹⁴² Education Consultant; Parent.

¹⁴³ P81-1.

¹⁴⁴ Rp391-92.

¹⁴⁵ Rp395-97.

¹⁴⁶ Rp408,411.

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41. On 12/12/19, PCS's head of school asked Parent for permission to speak with Student's medical provider to understand Student's needs and devise the best support plan.¹⁴⁷ On 1/28/20, 2/3/20, and 3/16/20, PCS continued to seek a release from Parent to be able to speak with Student's physician about Student's needs; Parent did not ever sign a release, asserting that she didn't want "other personal information" to be disclosed.¹⁴⁸ On 2/11/20 Parent requested homebound services of 20 hours/week of academic instruction and access to credit recovery for core academic classes through Apex; Parent sought counseling in addition to 180 minutes/month of BSS.¹⁴⁹ PCS had not been able to speak with Student's physician, but noted that the homebound services authorization did not recommend full-time homebound instruction.¹⁵⁰ The homebound services authorization provided that Student was to return to school in 60 days unless there was another medical review and written re-verification.¹⁵¹

42. Homebound tutoring services began on 2/19/20; Parent delayed counseling services until 2/27/20; Parent cancelled many sessions due to Student's health.¹⁵² PCS provided Student homebound services beyond the end of 2019/20 to give Student the opportunity to compete the Apex credit recovery program, which needs to be completed by 7/17/20.¹⁵³ Education Consultant testified that PCS should have taken action to provide homebound services from March 2019 and its failure impacted Student academically.¹⁵⁴

43. FBA. Private Psychologist asserted that Student needed an FBA based on emotional distress or behavioral problems to see what was triggering Student's behaviors and how to intervene to address the issues.¹⁵⁵ An FBA followed by a BIP should have happened early in 2018/19.¹⁵⁶ Director of Special Education asserted that Student was not a "behavior child" and the only concern was migraines and attendance, and not behavior.¹⁵⁷

44. Reevaluation. On 3/27/19, the executive director of PCS followed up a phone call with an email to Parent stating that the school "certainly" believed Student was experiencing sickness and was concerned that these were manifestations of anxiety and/or depression; Parent was asked to reach out to Former Director of Special Education to arrange for PCS to begin assessments in school or to receive information from Parent regarding any diagnosis Student may have "so that we can build a proper plan for intervention."¹⁵⁸ The executive director also warned Parent that Student was at risk of repeating Grade and that attendance

¹⁴⁷ P81-6,7.

¹⁴⁸ Rp413,416,481; Parent; Director of Special Education.

¹⁴⁹ Rp439.

¹⁵⁰ *Id.*

¹⁵¹ School Social Worker; Rp396.

¹⁵² Rp622-23.

¹⁵³ Rp666,672.

¹⁵⁴ Education Consultant.

¹⁵⁵ Private Psychologist.

¹⁵⁶ *Id.*

¹⁵⁷ Director of Special Education.

¹⁵⁸ P81-4; Rp551.

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must improve; PCS was “pulling” for Student and hoped that the next steps of a “diagnosis and care plan” could provide guidance on how to best serve Student.¹⁵⁹

45. On 10/31/19, Parent explained in an email that Student’s diagnosis had been changed to DMDD about 2 years earlier, which included extreme irritability and temper tantrums that interfered with Student’s ability to function.¹⁶⁰ Student missed the first month of 2019/20 because of migraines due to stress; on the days between headaches, Student was not available to go to school based on DMDD and not being promoted from Grade.¹⁶¹ Student volunteered to go to a psychiatric hospital and was there for a week.¹⁶²

46. Parent requested IEEs on 11/11/19 stating that she didn’t agree with unspecified educational evaluations, and requesting evaluations at school district expense in the areas of: “Psychological, Education, Speech-Language; Occupational Therapy, Assistive Technology (“AT”), Adaptive Behavior, Behavior/Functional Behavior Assessment, and Autism Evaluation.”¹⁶³ Respondent’s counsel suggested on 12/11/19 that a reevaluation be explored, as IEEs would not be appropriate on the grounds that Petitioner’s counsel suggested.¹⁶⁴ A 1/31/20 prior written notice (“PWN”) proposed to conduct a new comprehensive psychological evaluation, consider additional AT testing, and complete an FBA if Student returned to school; Parent consented to evaluation of Student on 2/10/20.¹⁶⁵ There had been no formal reevaluation of Student from August 2018 through February 2020.¹⁶⁶

47. Nonpublic School. PCS declined to move forward with change in placement for Student to a nonpublic special education day school; OSSE recommended that a change in placement was not warranted for Student in a 3/12/20 change in placement meeting based on Student’s LRE; Student needs can be met at PCS if Student attends school.¹⁶⁷

48. Procedural Safeguards. Parent received the standard District of Columbia’s Notice of IDEA Part B Procedural Safeguards: Rights of Parents of Students with Disabilities on 9/15/16, 6/22/18, and 9/12/18.¹⁶⁸ Parent stated that she received no information about any rights to request homebound services.¹⁶⁹

¹⁵⁹ P81-5.

¹⁶⁰ P81-8.

¹⁶¹ P81-9.

¹⁶² *Id.*

¹⁶³ P59-1.

¹⁶⁴ Rp386-88.

¹⁶⁵ Rp418.

¹⁶⁶ Stipulation by Parties.

¹⁶⁷ Rp481 (PWN); Director of Special Education (therapeutic nonpublic school not needed).

¹⁶⁸ Rp11; Rp88; Rp151; Former Director of Special Education (given at 9/12/18 IEP meeting); Director of Special Education (given at 9/10/19 IEP meeting).

¹⁶⁹ Parent.

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49. Parent's Mental Health. Parent used to receive mental health services and is seeking to re-enroll, as her depressive symptoms interfere with parenting Student.¹⁷⁰ Parent is trying to keep her own severe depression and issues under control, as well as dealing with Student's issues.¹⁷¹ Parent testified that she sometimes tells people whatever they want to hear.¹⁷² Parent shared her own emotional issues with PCS.¹⁷³ Parent's responsiveness was off-and-on, sometimes responding to PCS quickly and at other times being difficult to reach.¹⁷⁴ The 5/30/18 psychoeducational evaluation noted that regular communication should occur between PCS and Student's family to provide progress updates and address any challenges and that collaboration between PCS and Student's outside services may be helpful.¹⁷⁵

50. Compensatory Education. Parent liked the many paragraphs of compensatory education proposed by her counsel in their compensatory education plan.¹⁷⁶ Education Consultant testified that 400 hours of tutoring as compensatory education should be awarded to help put Student in the position Student should have been in; Education Consultant indicated Student needed 10 hours/week for 40 weeks with a tutor who could support Student in other academic work.¹⁷⁷ Parent believes 10-15 hours/week of tutoring would be appropriate for Student over a period of 2-3 years.¹⁷⁸ Parent asserted that she should receive up to 2 hours/week of services herself to help her participate in Student's education.¹⁷⁹

51. Looking Forward. Due to Covid-19 concerns, PCS plans a hybrid approach of online and in-person classes for the upcoming 2020/21 term, with no more than 10 students per class.¹⁸⁰ School Social Worker is looking for a gradual return of Student to PCS in the fall of 2020.¹⁸¹ The 3/12/20 evaluation indicated that Student may benefit from accommodations in school due to emotional challenges, as well as numerous recommendations to help Student re-engage in the school setting; Private Psychologist agreed with them.¹⁸² The evaluation recommended "gradual exposure therapy" to work through anxiety symptoms.¹⁸³ Student should have accommodations in place for medical and emotional support; Student should be allowed rest breaks during the day as needed; Student should have extended time on assignments; St may benefit from access to teachers'

¹⁷⁰ P19-3.

¹⁷¹ Rp189 (4/11/19); Rp223 (6/10/19).

¹⁷² Parent.

¹⁷³ Former Director of Special Education.

¹⁷⁴ School Social Worker.

¹⁷⁵ P22-23.

¹⁷⁶ Parent.

¹⁷⁷ Education Consultant.

¹⁷⁸ Parent.

¹⁷⁹ *Id.*

¹⁸⁰ Director of Special Education; Clinical Psychologist.

¹⁸¹ School Social Worker.

¹⁸² P23-10; Private Psychologist.

¹⁸³ *Id.*

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notes or lectures.¹⁸⁴ Student may benefit from a smaller class setting and having a say in where Student sits; 20-30 students in a class would not be appropriate; a class of 5-10 or even 5-7 students would be good.¹⁸⁵ Student may benefit from having a tutor to help Student build confidence.¹⁸⁶ In a 6/3/20 IEP team meeting, PCS agreed to add or change counseling goals.¹⁸⁷ Clinical Psychologist agreed that Student's therapy can be centered around return to school.¹⁸⁸

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.'" *Endrew 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." *Endrew 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); *Endrew 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." *Endrew 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*

¹⁸⁴ P23-10; Rp664.

¹⁸⁵ P23-11; Private Psychologist.

¹⁸⁶ P23-11.

¹⁸⁷ Rp664.

¹⁸⁸ *Id.*

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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 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." *Endrew F.*, 137 S. Ct. at 1001.

In addition, the LEA 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 achieved satisfactorily. 34 C.F.R. § 300.114; *Endrew F.*, 137 S. Ct. at 1000 (children with disabilities should receive education in the regular classroom to the extent possible); *Montuori ex rel. A.M. v. Dist. of Columbia*, No. 17-cv-2455, 2018 WL 4623572, at *3 (D.D.C. 9/26/18).

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); *Z.B. v. Dist. of Columbia*, 888 F.3d 515, 523 (D.C. Cir. 2018) (party seeking relief bears the burden of proof); *Schaffer ex rel. Schaffer v. Weast*, 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 PCS denied Student a FAPE by failing to provide appropriate IEPs in 2018/19 and 2019/20 which failed to: (a) provide appropriate goals, including transition goals; (b) provide appropriate PLAAFPs with baselines; (c) provide appropriate behavioral supports; (d) provide ESY (2018/19 only); and/or (e) develop an appropriate BIP based on an FBA, after noticing lack of attendance due to medical issues as well as failing scores. (Respondent has the burden of persuasion on this issue, if Petitioner establishes a prima facie case.)*

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Petitioner generally established a prima facie case on this issue through expert testimony and documents, shifting the burden to PCS, which failed to meet its burden of persuasion on BSS and an FBA/BIP, as discussed below.

The applicable legal standard for analyzing the appropriateness of the IEPs at issue in this case was articulated by Chief Justice Roberts for a unanimous Supreme Court as whether they were “reasonably calculated to enable a child to make progress appropriate in light of the child’s circumstances.” *Endrew F.*, 137 S. Ct. at 1001. As the Court of Appeals for the District of Columbia emphasized in *Z.B.*, 888 F.3d at 517, *Endrew F.* “raised the bar on what counts as an adequate education under the IDEA,” requiring more than “merely some” educational benefit. *See also Damarcus S. v. Dist. of Columbia*, 190 F. Supp. 3d 35, 51 (D.D.C. 2016) (IEP must be “reasonably calculated to produce meaningful educational benefit”). The measure and adequacy of each IEP is determined as of the time it was offered to Student, rather than with the benefit of hindsight. *See Z.B.*, 888 F.3d at 524; *S.S. ex rel. Shank v. Howard Rd. Acad.*, 585 F. Supp. 2d 56, 66 (D.D.C. 2008). The appropriateness of Student’s IEPs are analyzed by considering the specific concerns raised by Petitioner, which are considered in turn.¹⁸⁹ *See* 34 C.F.R. § 300.320(a); *Honig*, 484 U.S. at 311.

(a) Goals. IEPs are required to contain measurable annual goals pursuant to 34 C.F.R. § 300.320(a)(2). While carrying over the same goals from year to year may indicate failure to make meaningful progress, *see Endrew F.*, 137 S. Ct. at 994, lack of progress is not necessarily the fault of the IEPs, as here where Student repeated Grade. “[L]imited academic progress does not *ipso facto* signal a violation of the IDEA any more so than does the existence of substantially similar IEPs year over year.” *Jackson v. Dist. of Columbia*, CV 19-197 (DAR), 2020 WL 3318034, at *14 (D.D.C. June 2, 2020), *report and recommendation adopted*, CV 19-197 (TJK), 2020 WL 3298538, at *1 (D.D.C. June 18, 2020), *quoting J.B. by & through Belt v. Dist. of Columbia*, 325 F. Supp. 3d 1, 9 (D.D.C. 2018).

Here, Student was making progress on the 9/14/17 and 9/12/18 IEP goals, but didn’t master them, so the goals were repeated in the next IEPs, plus adding additional goals. Director of Special Education credibly testified that it was reasonable to include multiple skills in individual goals, such as proving theorems about both lines and angles, rather than separating them into 2 goals, both because that is the way the subject is taught and because that is the way they appears in the Common Core Standards. The academic goals in the 9/12/18 and 9/10/19 IEPs were appropriate, with no need for short-term objectives, according to the persuasive testimony of Director of Special Education. Moreover, emotional, social and behavioral goals were appropriate in the IEPs.

¹⁸⁹ A Hearing Officer must also determine whether “the State complied with the procedures” set forth in the IDEA. *A.M. v. Dist. of Columbia*, 933 F. Supp. 2d 193, 204 (D.D.C. 2013), *quoting Rowley*, 458 U.S. at 206-07. Procedural violations were raised and are discussed herein.

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As for transition goals, the undersigned concludes that the goals in Student's Post-Secondary Transition Plans in the 9/12/18 and 9/10/19 IEPs were reasonable. Student's 9/12/18 Transition Plan provided useful goals to research majors of interest, develop a detailed and accurate resume, and manage a checking account. The corresponding baselines stated that Student had identified areas of interest for employment, needed assistance with a resume, and needed assistance with a budget, of which the third baseline was particularly weak.

Student's 9/10/19 Transition Plan provided goals of researching training and educational opportunities, identifying options for volunteer positions to complete 100 hours of community service, and managing a bank account/checking account. P29-18,19,20. The corresponding baselines were weak and stated that Student was in the "early stages" of college or career exploration, that 100 hours of community service were required for graduation, and again that Student needed assistance with a budget. The undersigned concludes that the third baselines above should be modified in future IEPs, but are not a denial of FAPE and are not included in the order below, for the bar is not high, as noted below.

In sum, the undersigned concludes that the goals in Student's IEPs were reasonably appropriate and Petitioner's challenge to the IEP goals is rejected.

(b) Present Levels and Baselines. The IDEA requires statements of present levels of academic achievement and functional performance ("PLAAFPs" or "present levels") in IEPs in 34 C.F.R. § 300.320(a)(1). Present levels were provided in Student's 9/12/18 and 9/10/19 IEPs in significant detail for each area of concern, based on standardized assessments of Student and other relevant information. The present levels also set out and discussed goals that had not been mastered in the prior year, going beyond what is often found in IEP present levels. Thus, the undersigned finds the present levels appropriate in Student's IEPs.

In contrast with present levels, the IDEA does not expressly require "baselines" in IEPs, although it does require a description of how progress toward meeting a student's IEP goals will be measured, in 34 C.F.R. § 300.320(a)(3). That measurement is typically in the form of baselines stating the level at which a student begins so one can determine whether the special education services provided were sufficient to bring about the desired improvement. Here, there were baselines, but they were not optimal in providing a measurable way to determine Student's progress, although they were enhanced by information in the detailed present levels. Many of the baselines lacked specifics or provided data points that did not directly relate to the goals. Due to the practicalities of drafting goals with suitable baselines, however, the bar is not high. *See Hill v. Dist. of Columbia*, 14-CV-1893, 2016 WL 4506972, at *22 (D.D.C. 2016) (a broad reading score was a sufficient reading baseline without even saying whether student was able to read independently, for "IEP baselines need not be so detailed"). The undersigned concludes that there was no violation of the IDEA here as a result of baselines, and if there had been a violation it would merely have been procedural due to the lack of educational harm caused here by imprecise baselines.

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(c) Behavior Supports. “Related services” must be provided if required to assist a student with a disability in benefiting from special education. *See* 34 C.F.R. § 300.34(a); *Irving Independent Sch. Dist. v. Tatro*, 468 U.S. 883, 890, 104 S. Ct. 3371, 82 L. Ed. 2d 664 (1984). The issue here is whether with the level of BSS provided – consistently 180 minutes/month in each IEP – Student’s IEPs were reasonably calculated to enable Student to make appropriate progress in light of Student’s circumstances, so that Student was able to access the curriculum to advance toward meeting Student’s annual goals pursuant to 34 C.F.R. § 300.320(a)(4). Related services, as with any other service in an IEP, are determined on an individual basis by the student’s IEP team. *See Assistance to States for the Education of Children with Disabilities*, 71 Fed. Reg. at 46663.

Student’s IEP team discussed BSS and determined that 180 minutes/month was appropriate to provide support while keeping Student from being pulled out of the classroom too much. PCS reasonably argued at the hearing that if Student was not participating in the 180 minutes/month of BSS already on Student’s IEP due to absences, then it would provide no benefit to increase (in person) BSS further.

On the other hand, Petitioner’s experts believed that PCS should have considered increasing Student’s BSS, which had not changed since 9/14/17 despite Student’s tremendous challenges with attendance. Further, Student was engaging with the BSS provider when Student was present. It seems in the circumstances that School Social Worker could have reached out to Student by telephone or online and tried to provide BSS even when Student was not physically present at PCS. Indeed, this was the approach that was finally used, beginning in February 2020 with homebound services.

It is difficult to say confidently that another 15 or even 30 minutes/week of BSS would have had a meaningful impact on Student’s ability to stay engaged in school and address the anxiety and depression that lead to somatic illness, but it certainly could not have hurt. Given the stakes for Student’s education and future, the undersigned concludes that this denial of additional services impacted Student’s education and that it was a denial of FAPE for PCS not to increase BSS when Student clearly was failing and needed more support. If the increase had come early in 2018/19, Student could have benefited from more BSS in person before attendance issues kept Student away. As a consequence, PCS is ordered below to increase Student’s BSS to 240 minutes/month. This issue contributes modestly to the compensatory education awarded herein.

(d) ESY. Respondent met its burden of persuasion on Student’s ESY eligibility for 2019, based on the evidence about Student’s needs. ESY is necessary to provide a FAPE under 34 C.F.R. § 300.106(a) when the benefits a disabled child gains during a regular school year will be “significantly jeopardized” if the child is not provided with an educational program during the summer months. *Johnson v. Dist. of Columbia*, 873 F. Supp. 2d 382, 386 (D.D.C. 2012), *quoting MM ex rel. DM v. Sch. Dist. of Greenville Cnty.*, 303 F.3d 523, 537-38 (4th Cir. 2002); *see also S.S.*, 585 F. Supp. 2d at 68-69 (adopting standard from *MM*). However, the “mere fact of likely regression” is not a sufficient basis for finding ESY eligibility, for all students may regress to some extent during lengthy breaks. ESY is required only when regression will substantially thwart the

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goal of “meaningful progress.” *Johnson*, 873 F. Supp. 2d at 386, *quoting MM*, 303 F.3d at 538.

Here, nothing suggested that Student needed ESY in 2019. Not being promoted at the end of 2018/19 was not a basis for ESY. Student was able to catch up after chronic absences and understand the material that had been taught. Student’s IEP team noted that Student had made a lot of growth in the summer of 2018, without ESY. Further, Student was receiving therapy outside school so didn’t need ESY for emotional-social issues. The IEP team completed an ESY Services Eligibility Worksheet for Student and reasonably concluded that there were no critical skills that would be jeopardized by a break in service. Thus, Student was not eligible for ESY in 2019, a decision this Hearing Officer has no basis to disturb. Summer school was, of course, a different matter, as discussed elsewhere.

(e) BIP/FBA. Petitioner next challenges the IEPs for failure to develop an appropriate BIP based on an FBA (a claim from Issue 4 considered here), which the undersigned considers meritorious. The IDEA requires in the case of a student whose behavior impedes the student’s own learning, as clearly identified here in the 9/12/18 IEP, that the IEP team consider the use of positive behavioral interventions and supports, and other strategies, to address that behavior. 34 C.F.R. § 300.324(a)(2)(i). More specifically, the IDEA requires that school districts respond to a student frequently missing school or being tardy. *See Middleton*, 312 F. Supp. 3d at 146 (failing to address attendance can be a denial of FAPE); *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 not in school, student could not be said to be receiving “a free appropriate public education”).

Facially, it may appear that Student’s attendance issue is the clear result of medical problems that are not really “behavior” at all and simply need more medical attention. But on deeper reflection, it appears that there is more going on with Student than simply migraine headaches and stomach concerns. In fact, it is Student’s ED disability involving serious depression and anxiety that frequently may be keeping Student from school and may potentially offer some solution through conducting a careful FBA and developing an appropriate BIP. Private Psychologist persuasively asserted that Student needed an FBA based on emotional distress or behavioral problems to see what was triggering Student’s behaviors and how to intervene to address the problems. Further, Private Psychologist reasonably asserted that an FBA followed by a BIP should have occurred early in 2018/19, for Student’s ED disability and attendance problems began early, with significant absences and academic difficulties in 2017/18, and possibly earlier.

Instead of seeking more helpful answers through an FBA/BIP, PCS simply continued to provide 180 minutes/month of BSS in Student’s IEPs, which as discussed above was not adequate to address Student’s behavioral/attendance challenges that increased over time from missing months of school in 2018/19 to not ever attending PCS during 2019/20. The court in *Long*, 780 F. Supp. 2d at 61, *quoting Harris v. Dist. of Columbia*, 561 F. Supp. 2d 63, 68 (D.D.C. 2008), explained that an FBA is “essential” in addressing behavioral difficulties, so plays an integral role in the development of an IEP. Here, the failure to conduct an FBA and develop a BIP caused a deprivation of substantial educational

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benefit to Student by not providing as much support as appropriate for Student's behavioral and attendance needs, which if carried out properly could have greatly reduced Student's absences. Thus, the undersigned determines that this is a substantive violation and a denial of FAPE pursuant to 34 C.F.R. § 300.513(a); *see also* Z.B., 888 F.3d at 524. This denial of FAPE contributes to the compensatory education awarded below, both for the failure to conduct an FBA (from Issue 4, on which Petitioner prevails on the burden of persuasion) and develop a BIP, along with requiring a new FBA/BIP to be provided promptly once Student is back in school.

Issue 2: *Whether PCS denied Student a FAPE by failing to implement Student's IEPs in 2018/19 and 2019/20 when it did not provide (a) homebound/hospital services during extended medical absences; (b) special education and related services; and/or (c) transition services. (Petitioner has the burden of persuasion on this issue.)*

Petitioner met her burden of persuasion on the failure to implement special education and related services in Student's IEPs along with transition services, but not based on homebound services, as discussed below. With a failure to implement claim, the IDEA is only violated when a school district deviates materially from a student's IEP. *See Middleton*, 312 F. Supp. 3d at 144; *Van Duyn ex rel. Van Duyn v. Baker Sch. Dist.* 5J, 502 F.3d 811, 822 (9th Cir. 2007). A material deviation requires more than a minor discrepancy or a "*de minimis* failure to implement all elements of [the student's] IEP." *Johnson*, 962 F. Supp. 2d at 268, *quoting Catalan ex rel. E.C. v. Dist. of Columbia*, 478 F. Supp. 2d 73, 75 (D.D.C. 2007). Courts are clear that it is "the proportion of services mandated to those provided that is the crucial measure for purposes of determining whether there has been a material failure to implement." *Turner v. Dist. of Columbia*, 952 F. Supp. 2d 31, 41 (D.D.C. 2013), *citing Wilson v. Dist. of Columbia*, 770 F. Supp. 2d 270, 275 (D.D.C. 2011). Notably, there is "no requirement that the child suffer educational harm in order to find a violation" in a failure to implement claim. *James v. Dist. of Columbia*, 194 F. Supp. 3d 131, 139 (D.D.C. 2016).

Student did not go to school for significant amounts of time at the end of 2018/19 or for the entirety of 2019/20, apart from services provided to Student at home beginning in February 2020. The fundamental question here is whether there is anything more that PCS could or should have done to address Student's absences in order to implement Student's IEPs.

(a) Home and Hospital ("Homebound") Services. The narrow answer in considering lack of IEP implementation based on lack of "homebound services" is that homebound services were not required by Student's IEPs and thus there could have been no actionable failure to implement them. Instead, homebound services may be considered as a means for implementing the special education and related services on Student's IEPs, which are discussed next. As Petitioner emphasized in this case, the IDEA does require a continuum of placements in 34 C.F.R. § 300.115, which runs from instruction in regular classes, special classes, and special schools, on to home instruction, and instruction in hospitals and institutions. Importantly, as noted above, the IDEA expressly mandates that disabled students be educated in the least restrictive environment to the maximum extent

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appropriate. 20 U.S.C. § 1412(a)(5). So an LEA must consider the less restrictive possibilities before considering home instruction.

Here, much attention was focused on the process of getting homebound services in place for Student in 2019/20. Parent requested homebound services from PCS on 10/3/19 and followed up on 10/31/19. Parent provided the homebound services form on 12/12/19 to be completed by Student's physician, but not until 1/7/20 did the head nurse ask whether Parent was seeking full-time, part-time, or homebound instruction only in case of absences. Curiously, Parent responded that the homebound instruction was "only in case of an absence," even though Student had not been to school for months at that point. PCS sought Parent's permission on 12/12/19 to speak with Student's medical provider to understand Student's needs and devise a plan, and renewed the request on 1/28/20, 2/3/20, and 3/16/20, but – unhelpfully – Parent never agreed. Student's physician finally signed the homebound instruction form on 1/8/20 for home teaching when Student was absent from school. Notably, the homebound services authorization provided that Student was to return to school in 60 days unless there was another medical review and written re-verification.

In short, homebound services were not on Student's IEPs and thus did not result in a failure to implement Student's IEPs.

(b) Special Education and Related Services. No one doubts that PCS would have provided the 3 hours/week of specialized instruction and 180 minutes/month of related services on Student's IEPs if Student had been at school to receive them. But Student wasn't able to attend school for much of 2018/19 and all of 2019/20 due to the somatic conditions resulting from Student's ED. The central question is whether PCS did everything it could or should have done to assist Student in the circumstances, or whether PCS didn't do enough to help Student avoid failing 2018/19 and having to repeat the year, which led to bigger difficulties in 2019/20 and Student's inability to engage with school due to embarrassment and the ED disability due to anxiety and depression, which often resulted in severe migraines and stomach conditions.

Considering first the challenges in 2018/19, Student had 74 absences during the year, with 45 from March to early June, as Student missed week after week of school in April, May and June. Student received almost all "Fs" in third quarter and then received "Fs" for the entire year in every subject (except Resource Workshops). To try to help, on 12/12/18 PCS worked with Student to complete a short form entitled "My Attendance Success Plan," in which Student committed to improve attendance by going to school despite being sick and to go to bed and wake up on time. Student also noted on an "Attendance Intervention Family Intake Form" that attendance problems were caused by medical problems and depression, because Student was "sick a lot from migraines."

PCS did repeatedly reach out to Student and Parent once the situation became dire in 2018/19. But earlier, when something could have been done before Student essentially stopped attending, PCS's Parent Contacts log indicated a significant gap in school contacts. In fact, the only recorded contact from the beginning of 2018/19 until 3/5/19 is a single email on 12/3/18 informing Parent of a change in service providers. Finally, School Social Worker emailed Parent on 3/5/19 after not seeing Student in school. On 3/12/19, Parent

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responded that Student did not want to fail, indicating that Student still cared and had not disengaged from school. On 3/19/19, PCS staff wrote that they were concerned about how Student's medical condition impacted attendance and performance.

PCS teachers did work with Student when present, and noted that Student would regularly seek help from teachers outside class when Student was there. However, Student's absences were not new and should have been taken more seriously by PCS, for in 2017/18 Student had missed significant numbers of days, but was able to pull things together late in the school year to complete enough work to avoid retention. Student's teachers in 2018/19 did save work for Student's return and extended time for completing assignments, but did not seem to consider that Student was being prevented by disability from attending school. Student was sometimes given packets and did a lot of them, but didn't have teacher instruction to understand all the packets. Teachers did not offer online instruction for Student in 2018/19.

PCS did continue to check about Student's absences from time to time, with Parent and PCS working collaboratively on 3/22/19 and PCS emailing Parent on 4/23/19 and 4/30/19 about Student's ongoing absences. Former Director of Special Education sought a meeting with Parent to discuss Student's attendance on 5/6/19 and 5/13/19, and PCS emailed and called other times. But Former Director of Special Education didn't hold a meeting without Parent, so Student's team did not meet until 7/10/19. PCS knew of Student's depression and anxiety and that Student was particularly anxious about being retained in Grade. PCS also knew of Parent's own depression which she had shared, which kept Parent from being as responsive as she might otherwise have been.

Considering all these facts and circumstances together for 2018/19, the undersigned concludes that Petitioner did prove that PCS failed to adequately implement Student's specialized instruction and related services in April, May and June of 2018/19. *See Middleton*, 312 F. Supp. 3d at 146-47 (D.D.C. 2018) (LEA's interventions were insufficient to address student's attendance, which violated the IDEA and was a denial of FAPE).

As for IEP implementation in 2019/20, there is no dispute that Student was registered but did not attend PCS at all during 2019/20. School began on 8/26/19 but PCS staff did not reach out to Parent until Student had already missed a week of school. On 9/9/19 School Social Worker discussed a plan for Student and on 9/17/19 spoke with Parent and Student by phone and heard Student's concerns. Various efforts were taken to develop plans and methods to encourage Student to attend PCS, even as Parent tried to find another school that would work better for Student. Given what PCS knew about Student's anxiety relating to not being promoted from Grade, on top of having missed the end of 2018/19, the undersigned is troubled that PCS had not reached out to Student and Parent prior to the beginning of 2019/20 with a plan to reenter school "gently" in 2019/20, as Parent put it. The 7/10/19 IEP team meeting did not accomplish this, despite numerous new accommodations. Instead, PCS sought enforcement by CPS, as PCS filed paperwork with CPS in May 2019 and Parent was still addressing educational neglect in November 2019.

Prior to beginning homebound services in February 2020, PCS did not provide Student any special education services or BSS at home in person, by telephone, or online.

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Considering all these facts and circumstances together for 2019/20, the undersigned concludes that Petitioner did prove that PCS failed to implement Student's specialized instruction and related services from August 2019 to February 2020. The unfortunate bottom line is that PCS failed to provide any services to Student for many months when Student was unable to go to PCS in 2018/19 and then in 2019/20. Thus, this case is similar to *Schiff v. Dist. of Columbia*, 18-CV-1382 (KBJ), 2019 WL 5683903, at *6 (D.D.C. 11/1/19), in which the court adopted the report and recommendation of U.S. Magistrate Judge Deborah A. Robinson who emphasized that a "total lack of any education is far 'more than a minor discrepancy between the services a school provides to a disabled child and the services required by that child's IEP' in violation of the IDEA," *quoting Johnson*, 962 F. Supp. 2d at 268. As Private Psychologist persuasively testified about both 2018/19 and 2019/20, given Student's medical condition, PCS should have considered "bringing the school" to Student.

PCS needed to take action to implement Student's IEPs and provide a FAPE to Student and failed to do so from April to June in 2018/19 and from August to February in 2019/20, which contributes significantly to the compensatory education awarded below. While no educational harm need be shown, as noted above, there was significant harm in this case, as Student's lack of engagement and progress in 2018/19 led to retention in Grade in 2019/20, which discouraged and prevented Student's involvement that year.

(c) Transition Services. The IDEA regulations at 34 C.F.R. § 300.320(b)(2) require transition services to be included in IEPs, as was done for Student. Former Director of Special Education testified that Student received transition services during advisory class in 2018/19, when 80 minutes/month were required by Student's IEP, but Student did not receive those services when not present at PCS in 2018/19 or in 2019/20 when Student's IEP apparently called for 140 minutes/month of transition services. Accordingly, even though PCS did not have the opportunity to provide the services at PCS when Student was absent, for the reasons set forth at length above, the undersigned concludes that PCS should have provided the services in some other manner, whether in person at home, by telephone or online. Thus, this contributes to the award of compensatory education below to make up 3 months of transition services for 2018/19 and 6 months for 2019/20, and help put Student where Student should have been.

Issue 3: *Whether PCS denied Student a FAPE by preventing Parent from meaningful participation in Student's education by failing to provide (a) Parent with progress reports on Student's IEP goals; (b) Parent's rights to request services; and/or (c) information related to Student's rights to special education and related services. (Petitioner has the burden of persuasion.)*

Petitioner did not meet her burden of persuasion on this issue, as the evidence in the hearing was that Petitioner was able to participate fully in Student's IEP meetings and related IEP team decisions.

The law does clearly require parental involvement in IEP development. *See Endrew F.*, 137 S. Ct. at 999 (crafting an appropriate program of education contemplates the input of the child's parents or guardians); *Lofton v. Dist. of Columbia*, 7 F. Supp. 3d 117, 124

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(D.D.C. 2013) (the IDEA mandates that parent be allowed to meaningfully participate in the development of child's IEP); *Lague v. Dist. of Columbia*, 130 F. Supp. 3d 305 (D.D.C. 2015). On the other hand, however, parents have no veto power over such decisions. *Pavelko v. Dist. of Columbia*, 288 F. Supp. 3d 301, 306 (D.D.C. 2018) ("plaintiffs' disagreement with the *output* of the IEP process does not mean that they were denied the chance to provide meaningful *input* into that process" (emphasis in original)); *Hawkins v. Dist. of Columbia*, 692 F. Supp. 2d 81, 84 (D.D.C. 2010) (right conferred by the IDEA on parents to participate does not constitute a veto power over the IEP team's decisions).

Here, Parent was an active and vocal participant in Student's IEP team meetings, asking questions and sharing her concerns. Parent exhibited no confusion about Student's needs nor any lack of understanding, which was also true at the due process hearing. Petitioner's specific allegations are considered in turn:

(a) Progress Reports on Student's IEP Goals. The IDEA requires IEPs to describe how a child's progress toward meeting annual goals will be measured and when periodic reports on progress will be provided, with the suggestion in the IDEA of quarterly or other periodic reports concurrent with report cards. 34 C.F.R. § 300.320(a)(3). Here, Parent asserted that she received no IEP Progress Reports from March 2019 to February 2020, while Former Director of Special Education testified that PCS mailed the IEP Progress Reports 4 times a year with report cards and that Parent never indicated she didn't receive them. Petitioner bears the burden of proof and the undersigned was not persuaded by her testimony, but in any case there was little to be seen in those Progress Reports from that period, as Student was absent from school, which Parent well knew. This did not impact Parent's participation on the IEP team for there was no disagreement that Student needed to be in school, but was not. Parent did not prove a violation here, but even if Parent had failed to receive the reports that would have amounted to no more than a procedural violation.

(b) Parent's Rights to Request Services. The IDEA requires that the LEA must give parents a procedural safeguards notice generally once a year, which contains a "full explanation" of a long list of topics. *See* 34 C.F.R. § 300.504(a). The unambiguous evidence in this case was that Petitioner was provided her Procedural Safeguards notices as required, which provide required information about Parent's rights. Parent received the standard District of Columbia's Notice of IDEA Part B Procedural Safeguards: Rights of Parents of Students with Disabilities on 9/15/16, 6/22/18, and 9/12/18. While Petitioner was focused on parental training and counseling in making this claim, which is defined as a related service in 34 C.F.R. § 300.34(c)(8), the undersigned was not persuaded that Parent was in need of such related services as she articulately discussed and cogently asserted positions on behalf of her child over the years at PCS and at hearing.

(c) Student's Rights to Special Education and Related Services. As noted above, the unambiguous evidence in this case was that Petitioner was regularly provided Procedural Safeguards notices as required, which provided all required information about Student's rights.

Issue 4: *Whether PCS denied Student a FAPE by failing to conduct updated assessments (i.e., psychological and educational) after noticing significant changes in*

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behavior, grades and attendance; an updated FBA was needed to analyze school refusal. (Petitioner has the burden of persuasion on this issue.)

Petitioner met her burden of persuasion on the need for an FBA to be conducted, as discussed in Issue 1(e), above, but not for the psychological/educational evaluation or any other assessment to be updated. The importance of assessing children in all areas of suspected disability was emphasized in *Z.B.*, 888 F.3d at 518, *quoting* 20 U.S.C. § 1414(b)(3)(B). The D.C. Circuit Court explained in *Z.B.*, at 524, that failing to conduct adequate assessments could have substantive effects by preventing the IEP team from obtaining necessary information about the student. On the other hand, the recent decision in *Jackson*, 2020 WL 3318034, at *17, noted that under the IDEA, “it is not necessary that every requested test is administered. . . .”

The IDEA requires reevaluation of each student with a disability upon request by Parent or teacher, but not more than once a year without agreement by the LEA and parent that the needs of the student warrant reevaluation. *See* 34 C.F.R. § 300.303. Decisions on the areas to be assessed are to be made based on the suspected needs of the child. *Z.B.*, 888 F.3d at 518. Here, a psychoeducational evaluation had been completed as recently as 5/30/18, but on 3/27/19 the executive director of PCS told Parent that the school was concerned that Student’s sicknesses were manifestations of anxiety and/or depression and asked Parent to arrange for PCS to begin assessments in school or for Parent to provide information regarding any diagnoses Student may have “so that we can build a proper plan for intervention.” It appears to the undersigned that information with which to plan for intervention was very much needed at that point, but Parent apparently did not seek to move forward with new assessments or provide any medical information about Student.

Parent apparently did not seek any further evaluation of Student until she requested a range of IEEs on 11/11/19, including a Psychological, Education, Speech-Language, Occupational Therapy, Assistive Technology, Adaptive Behavior, Behavior/Functional Behavior Assessment, and Autism Evaluation. Respondent’s counsel suggested on 12/11/19 that a reevaluation of Student be explored, as IEEs would not be appropriate on the grounds that had been stated. Parent consented on 2/10/20 to PCS conducting a new comprehensive psychological evaluation, which was completed on 3/12/20, but the results differed little from the prior 5/30/18 evaluation.

Apart from the need for an FBA, discussed in Issue 1(e), the undersigned concludes that there was no violation of the IDEA due to failure to conduct further assessments of Student and no denial of FAPE.

Issue 5: *Whether PCS denied Student a FAPE by violating Section 504 of the Rehabilitation Act of 1973. (Petitioner has the burden of persuasion on this issue.)*

Issue 6: *Whether PCS violated Student’s rights pursuant to Title II of the ADA. (Petitioner has the burden of persuasion on this issue.)*

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Issue 7: *Whether PCS committed fraud by accepting federal and state IDEA funds but refusing to provide required services to Student under the IDEA, Section 504, and the ADA. (Petitioner has the burden of persuasion on this issue.)*

Issues 5, 6 and 7 are addressed together here, because the undersigned lacks jurisdiction over each due to the limited jurisdiction of Impartial Hearing Officers.

In the due process complaint, Petitioner included claims against Respondent alleging violations of Section 504 and the ADA, as well as common law fraud. But in the District of Columbia, a special education Impartial Hearing Officer's jurisdiction is limited to disputes about the eligibility, identification, evaluation, educational placement, or the provision of FAPE to a child with a disability, in accordance with the IDEA, 20 U.S.C. § 1415(f). *See* 5-E D.C.M.R. § 3029.1. It is abundantly clear that this limited jurisdiction does not include Section 504, ADA or fraud claims. Accordingly, this Hearing Officer lacks subject matter jurisdiction over the Petitioner's Section 504, ADA and fraud claim, which are dismissed without prejudice in the order below. Dismissal without prejudice is to permit Petitioner, if desired, to bring the claims in a proper forum.

Conclusion. As the court explained in *Smith v. Dist. of Columbia*, CV 16-1386, 2018 WL 4680208 at *5 (D.D.C. 2018), *quoting* *Endrew F.*, 137 S. Ct. at 1002, “[a] reviewing court may fairly expect those [school] authorities to be able to offer a cogent and responsive explanation for their decisions,” and this explanation should show why “the IEP is reasonably calculated” to ensure that the child will “make progress appropriate in light of [their] circumstances.” PCS has not offered a cogent and responsive explanation for all of its decisions here and thus, on balance, failed to meet its burden of persuasion by a preponderance of the evidence that Student's 9/12/18 IEP and 9/10/19 IEP had sufficient BSS and need not include a BIP, while Petitioner met her burden of persuasion on PCS needing to conduct an FBA and failing to implement specialized instruction and related services, along with transition services, from April to June in 2018/19 and August to February in 2019/20.

Remedies

PCS is ordered below to increase Student's BSS to 240 minutes/month, develop a BIP as soon as it can conduct an FBA, and authorize compensatory education. The FBA/BIP will be carried out by PCS if Student remains at PCS, but if Student transfers to another school will be carried out independently (or by Student's new school) at PCS's expense. PCS is also required to work with Parent and Student prior to the beginning of 2020/21 to develop a reentry plan that will assist Student in returning to PCS (or another school if transferring). Whether or not the plan provides for gradual reentry, appropriate consideration must be given to providing needed services remotely (online or telephonically) if they are not all provided in person.

Compensatory education is awarded to make up for the denials of FAPE found above, especially periods when Student was unable to attend school, yet was not provided homebound or other services by PCS, resulting in a significant award of independent tutoring and counseling. *See Schiff*, 2019 WL 5683903, at *6. In determining

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compensatory education for the denials of FAPE herein, there is often “difficulty inherent in figuring out both what position a student would be in absent a FAPE denial and how to get the student to that position,” *B.D. v. Dist. of Columbia*, 817 F.3d 792, 799 (D.C. Cir. 2016), but that does not permit the effort to be avoided. *See Henry v. Dist. of Columbia*, 750 F. Supp. 2d 94, 98 (D.D.C. 2010) (a disabled student who has been denied special education services is entitled to a tailored compensatory education award and limitations of the record are no excuse). Moreover, a student is not required “to have a perfect case to be entitled to compensatory education.” *Cousins v. Dist. of Columbia*, 880 F. Supp. 2d 142, 148 (D.D.C. 2012) (citations omitted).

Here, the Compensatory Education Plan was prepared by Petitioner’s counsel, rather than an expert who could testify about the foundation and assumptions used to develop it. Education Consultant did testify that 400 hours of tutoring should be awarded to help put Student in the position Student should have been in. Education Consultant stated that Student needed 10 hours/week for 40 weeks with a tutor who could support Student in other academic work. By comparison, the services missed were 3 hours/week of specialized instruction for about 9 months, along with a modest amount of transition services. The undersigned is not convinced, based on the extent of Student’s unavailability for tutoring and counseling from February 2020, that Student would be able to handle 10 hours/week as suggested by Education Consultant. Accordingly, the undersigned awards a total of 300 hours of academic tutoring to be used within 2 years for failure to implement the specialized instruction on the IEPs, as well as to cover transition services and the impact from not having an FBA/BIP in place.

As for missed BSS, Petitioner asserted that Student needs 3 years of behavioral counseling, even though some 9 months was missed at 180 minutes/month, which the undersigned determined should have been 240 minutes/month. In addition, the Compensatory Education Plan suggested in-school behavior therapy with Applied Behavior Analysis (“ABA”), Social Skills Therapy, Cognitive Behavioral Therapy, or Solution-Focused Brief Therapy for a minimum of 36 months. After careful reflection, the undersigned awards 40 hours of independent counseling as sufficient to make up the missed BSS.

Based on the evidence and the impact of Student’s various difficulties discussed above, the undersigned concludes that the number of compensatory education hours awarded herein is appropriate and necessary to restore Student to the position Student would be in but for the denials of FAPE found herein. Further, the undersigned makes this award recognizing that PCS has been working with Student since February to provide tutoring and therapy at home, along with credit recovery in a program that is to continue until 7/17/20.

These determinations by the undersigned are specifically tailored to address Student’s unique needs as a matter of equity, as “hearing officers are reminded that ‘[t]he essence of equity jurisdiction’ is ‘to do equity and to mould each decree to the necessities of the particular case.’” *Lopez-Young v. Dist. of Columbia*, 211 F. Supp. 3d 42, 55 (D.D.C. 2016), *quoting Reid ex rel. Reid v. Dist. of Columbia*, 401 F.3d 516, 523-24 (D.C. Cir. 2005). All compensatory education hours are to be used within 2 years, although the

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undersigned encourages Parent to get Student engaged as quickly as possible to ensure that the remedial services that Student needs are obtained without undue delay.

ORDER

Petitioner has prevailed on certain issues in this case, as set forth above. Accordingly, **it is hereby ordered that:**

- (1) Within 30 days, PCS shall update Student's IEP to increase Behavior Support Services to 240 minutes/month.
- (2) Within 30 days after Student returns to school at PCS, PCS shall conduct an FBA and develop a BIP, although if Student instead transfers to another school the FBA/BIP shall be carried out independently (or by Student's new school) at PCS's expense.
- (3) As compensatory education for the denials of FAPE found herein, PCS shall provide a letter(s) of authorization for (a) 300 hours of academic tutoring, and (b) 40 hours of counseling, from independent providers chosen by Petitioner, with such letter(s) to be provided within 10 business days after Petitioner's request(s). All hours are to be used within 2 years; any unused hours shall be forfeited.
- (4) Issues 5, 6, and 7, asserting violation of Section 504 of the Rehabilitation Act of 1973, violation of Title II of the Americans with Disabilities Act, and commission of fraud, are **dismissed without prejudice**.

Any and all other claims and requests for relief are **dismissed with prejudice**.

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)

Hearing Officer Determination

Case No. 2019-0301

OSSE-SPED (due.process@dc.gov)

ODR (hearing.office@dc.gov)

██████████@k12.dc.gov

██████████@k12.dc.gov