

District of Columbia
Office of the State Superintendent of Education
Office of Dispute Resolution
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Confidential

Parent on behalf of Student¹)	Case No. 2020-0219
)	
Petitioner,)	Hearing Dates: May 25-26, 2021
)	Conducted by Video Conference
v.)	
)	Date Issued: June 7, 2021
District of Columbia Public Schools)	
)	Terry Michael Banks,
Respondent.)	Hearing Officer

HEARING OFFICER DETERMINATION

INTRODUCTION

Petitioner is the mother of an X-year-old student (“Student”) attending School A. On December 29, 2020, Petitioner filed a *Due Process Complaint Notice* (“*Complaint*”) alleging that the District of Columbia Public Schools (“DCPS”) denied the student a free appropriate public education (“FAPE”) by failing to (1) provide an appropriate Individualized Education Program (“IEP”) and placement, (2) conduct a functional behavior assessment (“FBA”) and develop a behavior intervention plan (“BIP”), (3) implement Student’s IEP, and (4) timely comply with its child find obligations. On February 8, 2021, DCPS filed *District of Columbia Public School’s Response to Parent’s Administrative Due Process Complaint* (“*Response*”) disputing that it had denied Student a FAPE in any way.

SUBJECT MATTER JURISDICTION

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

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

PROCEDURAL HISTORY

On December 29, 2020, Petitioner filed the *Complaint*, alleging that DCPS denied the student a FAPE by failing to (1) provide an appropriate IEP and placement by failing to provide (a) full-time specialized instruction outside general education, (b) an appropriate level of behavior support services (“BSS”), (c) appropriate and measurable goals and baselines for all behavior goals in the IEP, and (d) Present Levels of Performance (“PLOPs”), goals, and baselines in Written Expression (2) conduct an FBA, and develop a BIP at the beginning of the 2019-20 school year, (3) implement Student’s IEP with respect to BSS hours and reading goals, and (4) timely comply with its child find obligations.

On January 13, 2021, DCPS filed *District of Columbia Public School’s Motion to Dismiss Parent’s Administrative Due Process Complaint* on the grounds that Petitioner having reached the age of majority, Petitioner had no standing to maintain this claim. On January 19, 2021, Petitioner filed *Petitioner’s Opposition to DCPS’ Motion to Dismiss*, asserting that Student had assigned his/her right to make education decisions to Petitioner through a power of attorney. On February 1, 2021, I issued an *Order on Respondent’s Motion to Dismiss* denying DCPS’ *Motion to Dismiss* and directing DCPS to file a response to the *Complaint* on or before February 8, 2021.

On February 8, 2021, DCPS filed the *Response* and asserted that (1) DCPS denied that Student’s 2019-20 IEP and location of services, including 10 hours of specialized instruction with five hours inside and five hours outside general education, was inappropriate, as the IEP was reasonably calculated to enable Student to make progress considering her/his circumstances, (2) the 60 minutes per month of BSS, goals, and baselines were appropriate at the time the February 4, 2020 IEP was developed, (3) when Student first enrolled at [REDACTED], there was no data to support the need for an FBA or BIP, (4) DCPS denied that it failed to implement Student’s IEP during the 2019-20 school year, and (5) DCPS denied that it failed timely to identify Student as a child with a disability.

The parties participated in a resolution meeting on January 21, 2021 that did not result in a settlement. A prehearing conference was conducted by telephone on February 11, 2021, and the *Prehearing Order* was issued that day. The hearing date scheduled during the prehearing conference of March 30-31 was continued due to Petitioner’s illness. On March 26, 2021, Respondent filed *District of Columbia Public School’s Motion to Dismiss Petitioner’s Claims outside of the IDEA Statute of Limitations*.

The due process hearing was conducted on May 25-26, 2021 by video conference. The hearing was closed to the public at Petitioner’s request. Petitioner filed Disclosures on March 24, 2021 containing a witness list of five witnesses and proposed Exhibits P1-P36. DCPS filed no objections to Petitioner’s disclosures,² and Petitioner’s Exhibits P1-P36 were admitted into evidence. Respondent’s Disclosures, also filed on March 24, 2021, contained a witness list of four witnesses and documents R-1 through R-19. Petitioner filed no objection to Respondent’s disclosures. Accordingly, Respondent’s Exhibits R-1 through R19 were admitted into evidence.

² DCPS submitted a filing objecting to Petitioner’s disclosures that was not accepted by the Office of Dispute Resolution for filing for technical reasons. I notified Respondent’s counsel of the need to refile by email on March 23, 2021, to which counsel immediately replied, but no subsequent objection was filed.

Petitioner presented as witnesses in chronological order: Witness A, Petitioner, and Witness B. Witness A was accepted as an expert in IEP programming and development, and Witness B was accepted as an expert in school psychology. Respondent presented as witnesses in chronological order: Witness C and Witness D. Witness D was accepted as an expert in special education, and Witness D was accepted as an expert in school social work. Counsel for the parties provided oral closing arguments at the conclusion of the testimony.

ISSUES

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

1. Whether DCPS denied Student a FAPE by failing to provide Student with an appropriate IEP and placement on February 4, 2020 by failing to provide (a) full-time specialized instruction outside general education, (b) an appropriate level of behavior support services (“BSS”), (c) appropriate and measurable goals and baselines for all behavior goals in the IEP, and (d) Present Levels of Performance (“PLOPs”), goals, and baselines in Written Expression.
2. Whether DCPS denied Student a FAPE for failing to develop and implement an appropriate FBA and BIP at the beginning of the 2019-20 school year.
3. Whether DCPS denied Student a FAPE for failing to implement Student’s IEPs during the 2019-2020 school year with respect to BSS hours and reading goals.³

FINDINGS OF FACT

1. Student is X years old and attends School A.⁴ On August 8, 2020, Student executed a *Power of Attorney for Educational Decision Making*, transferring to Petitioner the authority to act on Student’s behalf advocating and enforcing her/his educational interests.⁵

2. Student attended School A during the 2016-17 and 2017-18 school years, School B for the 2018-19 school year, and returned to School A for the 2019-20 and 2020-21 school years.⁶

3. For the 2017-18 school year at School A, Student’s final grades and teacher comments were as follows: Spanish I – C- (Excessive absences), Culinary Arts – C- (Lacks initiative. Does not do homework. Needs to study more), English I - B, English II – F (Does not complete class assignments), Chemistry – F, World History & Geography: Modern World – F, Extended Literacy – F, Geometry Part A – C-, Geometry Part B – F, Team Sports – F (Pleasure to

³ The *Complaint* also included an alleged violation of DCPS’ child find obligations, but Petitioner’s counsel withdrew this claim by email on March 29, 2021.

⁴ Petitioner’s Exhibit (“P:”) 12 at page 1 (112). The exhibit number and page are followed by the electronic page number in the disclosure in parentheses, i.e., P12:1 (112).

⁵ P2:1 (18).

⁶ Testimony of Witness A.

have in the class. Excessive absences.)⁷

4. On January 21, 2019, when Student was enrolled at School B, Witness B completed a Comprehensive Psychological Evaluation of Student. Petitioner requested the evaluation to determine Student's eligibility for special education services.⁸ Petitioner was concerned that Student would hurt her/himself or others, having expressed wishes not to be alive, threatened to stab her/his father, and had been arrested for fighting. Student confirmed to Witness B that s/he had strong suicidal ideation two to five years previously, that fighting in school had been a problem since middle school, and admitted to daily use of marijuana.⁹

On the Wechsler Adult Intelligence Scale ("WAIS-IV"), Student's full-scale IQ was 86, in the Low Average range as were Verbal Comprehension (81) and Working Memory (81), while his/her Perceptual Reasoning was Average (105). On the Berry-Buktenica Developmental Test of Visual-Motor Integration ("Berry-VMI"), Student received an overall standard score of 96, in the Average range.¹⁰ On the Woodcock-Johnson Tests of Achievement ("WJ-IV"), Student was Below Average in Broad Achievement (80), Academic Skills (84), and Academic Fluency (82). In Broad Reading (79) and Sentence Reading Fluency (77), Student was in the Low range, while s/he scored in the Below Average range in Letter-Word Identification (86) and Passage Comprehension (83).¹¹ In Mathematics, s/he scored in the Below Average range in Broad Math (80), Applied Problems (85), and Math Fluency (88), and in the Low range in Calculation.¹² In Written Language, Student was Average in Writing Fluency (94) and Spelling (96), Below Average in Broad Written Language (87), and Low in Writing Samples (76).¹³

Student's behavior was evaluated through the Behavior System for Children ("BASC-3") with interviews of Student and Petitioner; Witness B reported that she was unable to contact a teacher to interview. Student's responses placed her/him in the Clinically Significant range for School Problems, Attitude to School, Internalizing Problems, Locus of Control, Social Stress, Depression, Attention Problems, Hyperactivity, and Sense of Inadequacy, and At-Risk in Anxiety, Somatization, Attitude to Teachers, and Sensation Seeking. Student's overall Emotional Symptoms Index was within the Clinically Significant range, "suggesting that [her/his] behavioral and social-emotional functioning is a major concern." S/he had an overall Clinically Significant rating for Person Adjustment, and Self Esteem. S/he indicated At-Risk ratings in Relations with Parents, Interpersonal Relations, and Self-Reliance.¹⁴ Petitioner's responses resulted in At-Risk scores in all but three of eighteen categories, and the others were average.¹⁵ For the Children's Depression Inventory, Student, Petitioner, and Teacher A submitted responses. Student's Total Score was in the Very Elevate range (90+). Petitioner's scores placed Student in the Very Elevated range for Total Score, and Emotional Problems, and Elevated in Functional Problems. Teacher A's scores placed Student in the Elevated range for Total Score, and Very Elevated for Functional

⁷ P27:13-15 (253-55).

⁸ P6:1 (37).

⁹ *Id.* at 3-4 (39-40).

¹⁰ *Id.* at 6-8 (42-44).

¹¹ *Id.* at 8 (44). Witness B questioned the validity of the fluency scores due to Student admitted daily use of drugs.

¹² *Id.* at 9 (45).

¹³ *Id.*

¹⁴ *Id.* at 9-10 (45-46).

¹⁵ *Id.* at 22 (58).

Problems, but Average for Emotional Problems. On the Multidimensional Anxiety Scale for Children, Student's self-report placed him/her High Average in Total Score, Separation Anxiety, Social Anxiety, and Obsessions and Compulsions, but Average on the General Anxiety Disorder Index. Petitioner rated her/him Elevated on Total Score, GAD Index, and Obsessions and Compulsions, but Average in Separation Anxiety/Phobias.¹⁶

Witness B concluded that Student met the diagnostic criteria for Bipolar II Disorder and Moderate Cannabis Use Disorder. She suggested that School B consider developing a Section 504 plan or an IEP. She also recommended, *inter alia*, a psychiatric evaluation due to Student's "excessive use of marijuana," a BIP to "assist in improving [Student's] academic engagement," and school based counseling.¹⁷

5. On February 26, 2019, when Student was in grade L at School B, School B issued a Final Eligibility Determination Report, classifying Student with an Emotional Disturbance ("ED") that impacted Student's participation in the general education curriculum in Mathematics, Reading, and Emotional, Social, and Behavioral Development.¹⁸

6. On March 24, 2019, School B conducted the initial IEP meeting.¹⁹ Student was classified with as ED. The Consideration of Special Factors reported that "[Student] often comes to class unprepared. When [s/he] comes to class under the influence of mind altering drugs [s/he] exhibits behaviors such as severely lethargic, nonproductive, refusal to participate, inappropriate language usage, struggles in comprehending content and directions..."²⁰ In Math, Student was reported to have a high rate of absenteeism due to medical reasons. S/he was failing Math due to absences and missing assignments. "[S/he] is easily distracted and has a low participation or engagement rate. [S/he] does not ask questions in whole group unless called upon. Due to [her/his] lack of attention when instructional guidance is given on the content, [Student] finds it difficult to recall information when applying it to practice. [Student] avoids one on one support in the classroom. When [Student] is focused [REDACTED] shows signs of comprehension on the content, however, [s/he] needs verbal prompting to remind [him/her] of the steps and calculations. Several verbal prompts/cues are given to engage [Student] in [her/his] classroom activities and assignments." The baselines indicated that "Student is below proficiency."²¹ In Reading, Student was in African American Literature. S/he earned an "A" in the first quarter, but was failing in the second quarter due to unexcused absences, missing or incomplete assignments, and poor test results. "[Student] currently is reading below grade level. [S/he] is challenged in reading long stories and retaining the information due to limited vocabulary."²² In Emotional, Social, and Behavioral Development ("Behavior"), the baselines indicated that s/he becomes aggressive or withdraws most of the time, has difficulty utilizing any coping strategies, and does not utilize staff as a resource.²³ The IEP team prescribed five hours per week of specialized instruction in general

¹⁶ *Id.* at 22-23 (58-59)

¹⁷ *Id.* at 16-18 (52-54).

¹⁸ P19:4 (173).

¹⁹ P11:1.

²⁰ *Id.* at 3 (94).

²¹ *Id.* at 4-5 (95-96).

²² *Id.* at 5 (96).

²³ *Id.* at 8-9 (99-100).

education, five hours outside, and one hour per month outside general education.²⁴

7. Petitioner enrolled Student at School A for the 2019-20 school year. She did not recall having concerns about Student's IEP when s/he returned to School A from School B in the fall of 2019; Petitioner's only concern was whether School A would "do its part."²⁵

8. On November 21, 2019, DCPS issued an IEP Progress Report for Student's first reporting period at School A.²⁶ In Math, Student was "making some progress towards [his/her] goal of solving expressions with inverse operations... [his/her] goal of solving multi-step equations using the substitution process... [his/her] goal of expanding combining and simplifying polynomial equations," and earned a D in Probability and Statistics in the first term.²⁷ In Reading, Student earned a D in English IV for the first term, due in part to 8 absences and incomplete assignments. S/he "is making progress towards [his/her] goal of providing definitions of unfamiliar words. [S/he] gets frequent practice with this during [his/her] daily lifelines... Student is making progress toward [his/her] goal of using questioning strategies to increase comprehension... Student is making progress toward [his/her] goal of citing textual evidence to support [his/her] responses."²⁸ In Behavior, Student's Social Worker, Witness D, indicated that Student was added to her caseload on November 14, 2019. Thus, both goals were "Just Introduced."²⁹

9. For the second term of the 2019-20 school year, Student's grades, absences, and teacher comments if provided, were as follows: Finance - F (14 absences; Request conference with parents. Is failing); Culinary Arts II - F (12); English IV - C+ (22 - Does not do homework. Excellent Behavior. Excellent Initiative); Principles of U.S. Government - B (7); - Spanish II - C+ (12 absences), AP Statistics - D+ (12); Anatomy & Physiology - D+ (23); Physics I - A- (12).³⁰

10. On January 8, 2020, Teacher B and Teacher C provided the following in a Teacher Narrative regarding Student's performance in AP Statistics:

Students are seated in small groups (maximum 3) and each student is given an assigned seat... [Student] is a pleasant student and regularly attends classes. However, [s/he] usually takes a long time to start doing the assigned tasks. [His/her] current grade in AP Statistics is D+. This is due to [her/his] incomplete classwork, low test/quiz scores, and missing assignments. Whenever [Student] attends class, [s/he] engages in the tasks for a few minutes (10-15 mins) and then stops and goes on [her/his] cellphone. As a result of this particular behavior, [s/he] never completes class assignments in a timely manner... One-on-one instruction works well with [Student]... Small group collaboration is another instructional experience that works well for [Student].³¹

²⁴ *Id.* at 10 (101).

²⁵ Testimony of Petitioner.

²⁶ P26:1 (212).

²⁷ *Id.* at 1-2 (212-13).

²⁸ *Id.* at 3-4 (214-15).

²⁹ *Id.* at 4-5 (215-16).

³⁰ P28:3-4 (260-61).

³¹ P31:3-4 (293-94); Respondent's Exhibit ("R:") 12 at page 1-2 (82-83). The exhibit number and page are followed by the electronic page number in the disclosure in parentheses, i.e., R12:1-2 (82-83).

11. On February 4, 2020, DCPS conducted an IEP Annual Review Meeting.³² The Consideration of Special Factors was unchanged from School B's March 2019 IEP.³³ The Math Present Levels of Academic Achievement and Functional Performance ("PLOP") indicated that Student was in grade M, was a pleasant student and regularly attended class. However, s/he was earning a D+ in AP Statistics, s/he took a long time to begin working, had a hard time focusing on one task for an extended period of time, struggled to complete work independently, but excelled with guided practice and one-on-one instruction. The baselines were: (1) Student has a difficult time interpreting graphs, and (2) Student struggles to complete word problems without heavy supports. The goals were: Student will be able to interpret the slope and the intercept of a linear model in the context of a given set of data, and (2) Student will be able to evaluate word problems and use data from a written sample survey to estimate a population mean or proportion.³⁴ In Reading, the PLOP indicated that Student earned a D in English IV in the first term and a C- in the second term.

While [Student] does have some trouble maintaining focus in the classroom, [s/he] is always diligent about making sure [his/her] work is turned in even if [s/he] has to take it home to complete it. [Student] does not tend to complete [his/her] vocabulary homework assignments, and relies on the use of technology to answer vocabulary assignments in class. When we have reading mastery checks in class, which are multiple choice quizzes based on reading comprehension of an unseen passage, [Student] performs reasonably well... Student is currently reading below grade level. On [her/his] most recent RI test, administered in 2017, [Student] scored an 806 which places [her/him] at a [grade E]³⁵ reading level, significantly below [her/his] current grade. [S/he] is challenged in reading long stories and retaining the information due to limited vocabulary.³⁶

The baselines were: (1) Student sometimes struggles to comprehend text as seen by his/her performance on mastery checks, and (2) His/her vocabulary base is below grade level. The goals were: (1) By February 2021, using context clues, Student will be able to determine the definitions of familiar and unfamiliar vocabulary within a sentence, and (2) After reading a short passage and answering multiple choice comprehension questions, Student will be able to create a claim and cite textual evidence to support the claim.³⁷

In Behavior, the PLOP reported that on a Strengths and Difficulty Questionnaire ("SDQ") on January 31, 2020, Student scored in the Very High range in overall stress, emotional distress, difficulties getting along with other young people, and impact of any difficulties on the young

³² P12:1 (112). The cover page indicates that Student was in Grade K, one grade lower than was indicated on the March 2019 IEP. However, the Math Present Levels of Academic Achievement and Functional Performance ("PLOP") indicates that Student is in grade M, two grades higher than indicated on the cover page. DCPS completed a Summary of Performance (P20:1 (179)) and an Analysis of Existing Data (P21:1 (186)) on the same day of the IEP team meeting.

³³ *Id.* at 4 (115).

³⁴ *Id.* at 5-6 (116-17).

³⁵ Grade E is eight grades below her/his current grade, and approximately five grades below his/her grade in 2017 when the test was administered.

³⁶ *Id.* at 6 (117).

³⁷ *Id.* at 7 (118).

person's life, Slightly Raised on hyperactivity and concentration difficulties, and Average in behavioral difficulties and helpful behavior.

[Student] is a very respectful and polite young [REDACTED]... [Student] has some challenges with skipping and remaining in class. According to the attendance record dated for January 31, 2020, [Student] has a total of 30 unexcused absences. [Student] is aware that [s/he] has to change [her/his] class avoidance behavior in order to graduate on time. According to the discipline dated for January 31, 2020, [Student] has 2 disciplinary infractions. [Student] has been involved in several group altercations this school year. [Student] does not start the altercations, however, [s/he] continues to find her/himself deeply involved in them.³⁸

The baselines were: (1) Student has been involved in several altercations involving his/her brother and peers, and (2) Student is opening up more to adults and asking for assistance more frequently. The goals were: (1) S/he will utilize learned coping skills in the school setting when frustrated, and (2) Student will demonstrate self-advocacy skills in the school setting by speaking with adults and letting them know what s/he needs.³⁹

The IEP team prescribed five hours per week of specialized instruction in general education, five hours outside, and one hour per month outside general education.⁴⁰

12. Student exhibited no significant behavioral issues during the first two terms of the 2019-20 school year. "The behaviors began in January." On two occasions in the first two months of 2020, Witness D intervened when Student became involved in an altercation involving his/her younger brother. It took about 15 minutes to redirect Student's behavior. The FBA was developed due to the off-task, class avoidance, and aggressive behaviors that began mid-year. Student's behavior was "mostly" appropriate, but s/he could be distracted by his/her brother; s/he could not resist helping her/his brother.⁴¹

13. On February 4, 2020, DCPS issued a Prior Written Notice ("PWN") indicating that it would conduct a WJ-IV, Psychological Evaluation, and an FBA.⁴²

14. DCPS conducted the WJ-IV on February 10, 2020.⁴³ Student scored in the Average range in Basic Reading Skills (93), Written Language (90), Broad Written Language (92), and Written Expression (92), Below Average in Reading (83), Broad Reading (83), Reading Fluency (86), Math Calculation (80), Academic Skills (84), Academic Fluency (89), Brief Achievement (88), and Broad Achievement (83), and Low in Mathematics (74), Broad Mathematics (78), and Academic Applications (78).⁴⁴

15. On February 14, 2020 DCPS issued an IEP Progress Report for the second reporting

³⁸ *Id.* at 8 (119).

³⁹ *Id.* at 8-9 (119-20).

⁴⁰ *Id.* at 11 (122).

⁴¹ Testimony of Witness D.

⁴² R5:1 (41).

⁴³ R7:1 (53).

⁴⁴ *Id.*

period of the 2019-20 school year.⁴⁵ In Math, Student earned a D+ in Probability and Statistics for the second term, was mostly a respectful and compliant student, had a tendency to focus in class for short increments of time, and was making “some progress” on the three goals.⁴⁶ In Reading, Student earned C- in English IV for the second term, was a diligent worker and “makes sure to send in all assignments,” had a tendency to focus only for short periods of time, sometimes leaves class before the period is over, and is making “some progress” on all goals.⁴⁷ In Behavior, Student had made progress on the goal of utilizing coping skills when frustrated, and the goal of demonstrating self-advocacy skills. S/he was compliant with BSS and fully participated in the sessions. Witness D reported that Student did not initiate, but became involved in several altercations during the school year, and had 32 unexcused absences.⁴⁸

16. On March 18, 2020, DCPS completed an FBA.⁴⁹ The identified problems were off-task behavior, class avoidance, and physical aggression. Her/his “behavior in the classroom is often calm, however, [REDACTED] is easily triggered by the emotions of [his/her] brother, who attends [School A], and peers. When [s/he] is triggered [his/her] behavior causes a disruption in the learning environment and on occasion the school... [s/he] struggles with class elopement which is impacting [his/her] academic performance...” During three observations, Witness D noted that Student displayed appropriate behavior 57% of the time, off task behavior 6% of the time, class avoidance 37% of the time, and was never physically aggressive. Teachers reported that Student’s mood was influenced by actions of his/her peers and younger brother. When the classroom was stable, “inappropriate behaviors do not occur.” On the Strengths and Difficulty Questionnaire (“SDQ”), Student scored in the Very High range in overall stress, emotional distress, difficulties getting along with other young people. Witness D recommended that School A convene a multidisciplinary team meeting to consider the findings of the FBA and develop a BIP.⁵⁰

17. On March 20, 2020, DCPS developed an Evaluation Summary Report.⁵¹ In Mathematics, Student was deemed “below means” based on her/his scores on a September 10, 2018 NWEA assessment. Her/his math teacher reported that s/he has a hard time focusing on one task for an extended period of time, takes a long time to begin working, and is easily distracted by peers or technology. Behaviorally, s/he was a pleasant student who regularly attended class.⁵² In Reading, Student performs “reasonably well” on twice monthly reading-based mastery checks. A test in 2017 placed her/him at the [grade E] level, “significantly below [his/her] current grade. [S/he] is challenged in reading long stories and retaining the information due to limited vocabulary.” While Student had trouble maintain focus in class, s/he was diligent in turning in assignments. However, s/he did not tend to complete vocabulary homework assignments, and uses technology to answer vocabulary assignments in class.⁵³ Behaviorally, as of January 31, 2020 s/he had two disciplinary infractions and had been involved in several group altercations, but was never the instigator. “[Student] is a respectful and pleasant young [man/woman] who has excellent

⁴⁵ P26 at 7 (218).

⁴⁶ *Id.* at 7-8 (218-19).

⁴⁷ *Id.* at 9-10 (220-21).

⁴⁸ *Id.* at 10-11 (221-22).

⁴⁹ P8:1 (71); R8:1 (55).

⁵⁰ P8 at 1-7 (71-77).

⁵¹ P9:1 (79).

⁵² *Id.* at 1-2 (79-80).

⁵³ *Id.* at 2 (80).

insight on [her/his] behavior. The findings of this assessment discovered that [Student] is appropriate the majority of the time in the classroom. [S/he] is making an effort to utilize [his/her] coping skills to manage [his/her] to manage [his/her] mood frequently and is expressing her/himself more during behavioral support sessions... [Student] is compliant with Behavioral Support Services and is using learned strategies to manage [his/her] behavior more frequently in the classroom. However, [s/he] struggles with class elopement which is impacting [her/his] academic performance. [Student] has made an effort to attend classes more frequently during the 3rd term and has made some improvements in [her/his] grades.”⁵⁴

18. On March 25, 2020, DCPS developed a BIP.⁵⁵ The targeted behaviors were off-task behavior, class avoidance, and physical aggression. The antecedents to the behavior were as follows:

[Student’s] behavior is drastically impacted by the climate of the school and the classroom. [S/he] easily involves her/himself in altercations that are neighborhood related or involving his/her younger sibling. If the environment is aggressive or students are hyperactive, [Student’s] behavior will escalate. During these moments, her/his affect does not match the level of aggression. S/he is often smiling and laughing during these episodes. All the incidents that [Student] has been involved in this school year did not involve [Student] directly. [S/he] was not suspended and participated in restorative justice circles with Access Youth, a community-based located in the school that specializes in mediations. [Student] is responsive to the circles and is often able to reflect how [her/his] behavior has impacted others. However, recently [Student] has been involved in two verbal incidents, most recently March 9, 2020, when [s/he] had to be isolated and removed to calm down. Once [Student] is isolated, [s/he] is able to calm her/himself down quickly and reflect on the incident.⁵⁶ For each of the targeted behaviors, there was a “reactive strategy” to be employed by teachers and other service providers.⁵⁷

19. On May 8, 2020, DCPS issued an IEP Progress Report for the third reporting period of the 2019-20 school year.⁵⁸ In Math, Student earned C in Probability and Statistics for the third term, and was reported to be progressing towards the goal of interpreting slopes and intercepts and the goal of evaluating word problems.⁵⁹ In Reading, Student failed English IV for the third term. “Since the beginning of the term, [s/he] has been unreliable with turning in assignments and was frequently absent. Since the move to distance learning, [Student] has been unreachable and has not completed any of [his/her] online reading assignments,” and was not progressing on either of his/her goals.⁶⁰ In Behavior, Student was reported to continue to make progress on both goals, but not been “consistently responsive” with the inception of virtual learning.⁶¹

⁵⁴ *Id.* at 3-4 (81-82).

⁵⁵ P10:1 (84); R9:1 (62).

⁵⁶ P10 at 3 (85).

⁵⁷ *Id.* at 4-5 (87-88).

⁵⁸ P26:13 (224).

⁵⁹ *Id.* at 13-14 (224-25).

⁶⁰ *Id.* at 14-15 (225-26).

⁶¹ *Id.* at 15-16 (226-27).

20. On June 1, 2020, DCPS issued an IEP Progress Report for the fourth reporting period of the 2019-20 school year.⁶² Student earned a C in Probability and Statistics for the fourth quarter and was reported to be continuing to make progress on both goals.⁶³ In Reading, Student “has not made any attempts to complete work or participate in any class session during the 4th quarter,” and made no progress on her/his goals.⁶⁴ In Behavior, Student made “minimal” progress. “This social worker has made several attempts to contact [Student] that is documented in the services tracker.”⁶⁵

21. For the 2019-20 school year at School A, Student’s final grades, 4th quarter absences/unexcused absences, and teacher comments if provided, were as follows: English IV – P (22/18), AP Statistics – P (12/7), Anatomy & Physiology – I (23/19), Spanish II – P (12/7), Culinary Arts II – B- (12/7), Physics – B- (12/7), Finance I – F (14/10), Principles of U.S. Government – C- (7/4), District of Columbia History & Government – I (3/3 – Does not complete class assignments. Excessive absences), Fitness & Lifetime Sports II- A (0/0 – Does not complete class assignments.)⁶⁶

22. For the first term of the 2020-21 school year at School A, Student’s grades and teacher comments if provided, were as follows; there were no recorded absences: English II – A (Pleasure to have in class), World History & Geography – C, U.S. History & Geography – C, Anatomy & Physiology – F (Pleasure to have in the class), Chemistry – C (Does not complete class assignments).⁶⁷

23. On November 6, 2020, DCPS issued an IEP Progress Report for the first reporting period of the 2020-21 school year.⁶⁸ Student was not taking math and, thus, was making no progress. In Reading, Student was earning an A in English 2, was reported to be “a pleasure to have in class,” and was making progress on both goals.⁶⁹ In Behavior, Student was reported to have made “significant progress” on coping skills goal and continued progress on the self-advocacy goal. Student was compliant with BSS and was fully engaged in sessions.⁷⁰

24. For the 2019-20 school year, Witness D offered or provided services on the following days: November 25, 2019 (60-minute observation), December 9, 2019 (60-minute meeting concerning altercation in which Student was involved), January 24, 2020 (60 minutes), February 4, 2020 (60-minute observation), February 26, 2020 (60 minutes – Crisis intervention),

⁶² *Id.* at 18 (229).

⁶³ *Id.* at 18-19 (229-30).

⁶⁴ *Id.* at 19-21 (230-32).

⁶⁵ *Id.* at 21-22 (232-33).

⁶⁶ P28:9-11 (266-68). Although Student received letter grades for the first three terms in English IV, s/he received an “HE” for the fourth term, which is the acronym for “Health Emergency.” Student received a “P” for the final grade. “P” was not one of the acronyms that was explained on the report card, but apparently means “pass,” as Student earned one credit for the course. In Statistics, s/he received letter grades for all four terms, but a P for the final grade. In Anatomy, Spanish, Culinary Arts, and District of Columbia History, Student received HE for the fourth term. S/he received an A in Fitness despite getting an F in the fourth term, the second of the two terms of the course, and the negative teacher comments.

⁶⁷ P29:1 (272).

⁶⁸ P26:24 (235).

⁶⁹ *Id.* at 25-26 (236-37).

⁷⁰ *Id.* at 26-27 (237-38).

February 9, 2020 (15 minutes - Student declined to enter classroom), March 10, 2020 (60 minutes), March 26, 2020, April 2, 2020, and April 10, 21, and 29, 2020 (Student unavailable), April 15, 2020 (15 minutes), May 4, 15, 18, and 27, 2020 (Student unavailable).⁷¹ On one of the occasions that Witness D reached Student by telephone, Student confirmed that s/he had a job and was “hanging out” that day.⁷²

25. For the 2019-20 school year, Student had 6 excused and 42 unexcused absences.⁷³ During the school year, School A staff called Petitioner or Student about attendance or services for Student on March 23-24, 2020, March 26, 2020, April 1, 2020, April 2, 2020, and April 10, 2020.⁷⁴

26. Petitioner believes that Student was in the school building daily. Petitioner attributes Student’s reluctance to attend classes to embarrassment for not being able to do better. In 2019, Student began working at a convenience store, starting at 11:00 a.m. or 3:00 p.m., four to five hours per day.⁷⁵

27. Student’s written language skills were equivalent to that of her/his classmates, as was confirmed on the February 2020 WJ-IV. When Student attended regularly, s/he could do the work. His/her poor attendance was the primary reason for his/her low grades; his/her attendance was worse in the first term than the second. Student would leave classes early; “█ had a job to get to” after the last period.⁷⁶

CONCLUSIONS OF LAW

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

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

⁷¹ P30:1-10 (274-283).

⁷² Testimony of Witness D.

⁷³ P25:2 (203).

⁷⁴ R14:1-2 (88-89).

⁷⁵ Testimony of Petitioner. She testified that shortly before the hearing, Student added a second, eight-hour per day job.

⁷⁶ Testimony of Witness C.

⁷⁷ D.C. Code §38-2571.03(6)(A)(i).

Petitioner’s first issue presented involves the alleged failure to provide an appropriate IEP and placement. Under District of Columbia law, the Respondent bears the burden of persuasion as to these issues. Petitioner bears the burden as to all other issues presented.

Whether DCPS denied Student a FAPE by failing to provide Student with an appropriate IEP and placement on February 4, 2020 by failing to provide (a) full-time specialized instruction outside general education, (b) an appropriate level of behavior support services (“BSS”), (c) appropriate and measurable goals and baselines for all behavior goals in the IEP, and (d) Present Levels of Performance (“PLOPs”), goals, and baselines in Written Expression.

Under IDEA, states and territories, including the District of Columbia, that accept federal educational funds must provide a FAPE to students with disabilities residing within their borders.⁷⁸ The IDEA defines a FAPE as an education which is “[(A)] provided at public expense, under public supervision and direction, and without charge; (B) meet[s] the standards of the State educational agency; (C) include[s] an appropriate preschool, elementary school, or secondary school education in the State involved; and (D) [is] provided in conformity with the individualized education program required” under other provisions of the IDEA.⁷⁹ Once a student is deemed eligible to receive services under the IDEA, a team including the parents, teachers, and a representative of the local educational agency develops an IEP for the student in accordance with the requirements of the IDEA.⁸⁰ In addition to developing the IEP, the student's team determines an appropriate educational placement for the student.⁸¹

The Supreme Court’s first opportunity to interpret the predecessor to IDEA, The Education of the Handicapped Act (“EHA”), came in *Board of Education of the Hendrick Hudson Central School District v. Rowley*.⁸² The Court noted that the EHA did not require that states “maximize the potential of handicapped children ‘commensurate with the opportunity provided to other children.’”⁸³ Rather, the Court ruled that “Implicit in the congressional purpose of providing access to a ‘free appropriate public education’ is the requirement that the education to which access is provided be sufficient to confer some educational benefit upon the handicapped child...”⁸⁴ Insofar as a State is required to provide a handicapped child with a ‘free appropriate public education,’ we hold that it satisfies this requirement by providing personalized instruction with sufficient support services to permit the child to benefit educationally from that instruction... In addition, the IEP, and therefore the personalized instruction should be formulated in accordance with the requirements of the Act and, if the child is being educated in the regular classrooms of the public school system, should be reasonably calculated to enable the child to achieve passing marks and advance from grade to grade.”⁸⁵

More recently, the Court considered the case of an autistic child under IDEA who, unlike

⁷⁸ 20 U.S.C. §1412(a)(1)(A).

⁷⁹ 20 U.S.C. §1401(9).

⁸⁰ 20 U.S.C. §1414(d)(1)(A and B).

⁸¹ *Id.*, §1414(e).

⁸² 458 U.S. 176, 187 (1982).

⁸³ *Id.* at 189-90, 200

⁸⁴ *Id.* at 200.

⁸⁵ *Id.* at 203-04.

the student in *Rowley*, was not in a general education setting.⁸⁶ The Tenth Circuit had denied relief, interpreting *Rowley* “to mean that a child’s IEP is adequate as long as it is calculated to confer an ‘educational benefit [that is] merely... more than *de minimis*.”⁸⁷ The Court rejected the Tenth Circuit’s interpretation of the state’s obligation under IDEA. Even if it is not reasonable to expect a child to achieve grade level performance,

... [h]is educational program must be appropriately ambitious in light of [his/her] circumstances, just as advancement from grade to grade is appropriately ambitious for most children in the regular classroom. The goals may differ, but every child should have the chance to meet challenging objectives... It cannot be the case that the Act typically aims for grade-level advancement for children with disabilities who can be educated in the regular classroom, but is satisfied with barely more than *de minimis* progress for those who cannot.⁸⁸

A school is deemed to be an appropriate placement if it is capable of substantially implementing a student’s IEP.⁸⁹

As set forth in the Findings of Fact, Student spent two years at School A before transferring to School B, where s/he was first found eligible for services as a student with ED. School B’s March 24, 2019 initial IEP prescribed 10 hours of specialized instruction and one hour of BSS per week. It is first important to note what Petitioner is not alleging. First, there is no record that Petitioner ever faulted DCPS for not identifying Student as a child with a disability during his/her earlier enrollment at School A. Petitioner has never alleged that the School B IEP was inappropriate. Petitioner also does not argue that DCPS should have reviewed and revised the School B IEP once Student returned to School A for the 2019-20 school year. In fact, when her attorney asked her if she had any concerns about Student’s IEP upon her/his reenrollment at School A, she had none.

Petitioner argues that the February 4, 2020 IEP and placement are inappropriate because by that time, it was apparent that Student was not making progress during the 2019-20 school year. Student’s first term Progress Report revealed that s/he was making progress on his/her Math goals, but earned a D. Student earned a D+ on his/her second term report card, but s/he was absent 12 times, and the January 8, 2020 Teacher Narrative revealed that Student’s grade was low “due to [his/her] incomplete work, low test/quiz scores, and missing assignments.” In Reading, the Progress Report reported that Student earned a D, but it was “due in part to 8 absences and incomplete assignments,” but made progress on her/his three goals when s/he was present. Student failed Finance in the second term, but s/he was absent fourteen times, s/he failed Culinary Arts, but was absent twelve times, s/he earned a D+ in Anatomy & Physiology, but was absent 23 times. S/he earned a C+ in English IV despite 22 absences and not doing homework, an A- in Physics despite twelve absences, a B in Principles of U.S. Government despite seven absences, and a C+

⁸⁶ *Endrew F. ex rel. Joseph F. v. Douglas County School District RE-1*, 137 S.Ct. 988 (2017).

⁸⁷ *Id.* at 997.

⁸⁸ *Id.* at 1000-01 (citations omitted).

⁸⁹ *Johnson v. District of Columbia*, 962 F.Supp.2d 263 (D.D.C. 2013), citing *Savoy v. District of Columbia*, 844 F.Supp.2d 23, 34 (D.D.C. 2012) and *Catalan ex. rel. E.C. v. District of Columbia*, 478 F.Supp.2d 73, 76 (D.D.C. 2007). See also, *O.O. ex rel. Pabo v. District of Columbia*, 573 F.Supp.2d 41, 53 (D.D.C. 2008).

in Spanish despite 12 absences. Student's class attendance worsened once DCPS instituted virtual learning due to the COVID-19 restrictions. The third and fourth term Progress Report revealed that Student failed English due to frequent absences and the failure to turn in "any of [his/her] online reading assignments" in the third term, and "has not made any attempts to complete work or participate in any class session during the 4th quarter."

Student's 2019 psychological evaluation and teacher comments confirm that s/he is performing below grade level in Math and Reading.⁹⁰ Student's achievement scores were similar on the WJ-IV conducted on February 10, 2020. However, there was no evidence submitted indicating that additional services or accommodations, or a more restrictive setting, would enhance Student's academic progress. Witness B, who conducted the February 2019 psychological evaluation, recommended either a Section 504 plan or an IEP, but a Section 504 plan would not provide for specialized instruction.

The *Complaint* alleges that the IEP is inadequate due to insufficient hours for BSS and the absence of Written Expression as an Area of Concern. When Student returned to School A in August 2019, his/her initial IEP had been in effect for three school months. The record reflects that until January, Student's behavior in school was appropriate. Witness D testified that in January 2020, student was involved in two incidents involving his/her brother. The record also reveals that although s/he tended to become involved in group altercations, s/he was never the instigator. Otherwise, according to Witness D, Student's behavior was "mostly" appropriate. Student's Math, English, and Anatomy teachers commented that s/he was a pleasure to have in the classroom. On WJ-IV administered to Student in January 2019, s/he scored in the Average range in Writing fluency and Spelling, and slightly Below Average (87) in Broad Written Language.

The record supports that Student's failure to make academic progress during the 2019-20 school year was due primarily to his/her excessive absences and failure to turn in assignments. Petitioner testified that Student started working part-time in 2019, four to five hours per day, starting at 11:00 a.m. or 3:00 p.m. Thus, Petitioner has been aware for two years, that Student was missing a substantial amount of class time for this activity. The record also reveals that Student had 42 unexcused absences during the 2019-20 school year, and admitted to daily use of marijuana.

I conclude that DCPS has met its burden of proving that the IEP that it developed on February 4, 2020, which included identical services to those in the March 24, 2019 School B IEP that was acceptable to Petitioner, was appropriate, as was the inclusion placement.

Moreover, I find that DCPS has met its burden of proving that it provided an appropriate level of BSS. The level of BSS was identical to the amount prescribed by School B, which was acceptable to Petitioner. Student's behavior for the first four months of the 2019-20 school year was unremarkable. Student's primary behavioral problem was involvement in group altercations involving his/her brother, which began in January 2020. Witness D provided intervention services on each occasion and indicated on the tracking form that Student was redirected within fifteen minutes. From her testimony and other entries in the record, Witness D has devoted considerably more time to Student than is prescribed in the IEP.

⁹⁰ Witness B conceded that Student's scores may have been affected by drug use on the day s/he was tested in January 2019.

Finally, the record does not warrant adding Written Expression as an Area of Concern to Student's IEP. Student's Written Language scores on the 2019 WJ-IV were roughly Average, while her/his Broad Math (80) and Broad Reading (79) scores were roughly Low.⁹¹ His/her English teacher testified that Student's written language skills were equivalent to those of his/her classmates.

Whether DCPS denied Student a FAPE for failing to develop and implement an appropriate FBA and BIP at the beginning of the 2019-20 school year.

Student reenrolled in School A for the 2019-20 school year with an initial IEP that had been in effect for three school months. Her/his previous school, which found him/her eligible for services as a student with ED, developed no FBA or BIP, and prescribed but one hour per month of BSS. The record reveals that from August 2019 until January 2020, Student exhibited no behaviors that were concerning to School A staff. The Teacher Narrative completed by Student's Math teachers, described him/her as a "pleasant student." Witness D testified that there were no significant behavioral issues until Student became involved in two altercations in January and February 2020 involving his/her younger brother. The record documented that Student had difficulty resisting coming to her/his brother's assistance at the slightest provocation, and was involved in several group altercations that s/he did not initiate. Otherwise, his/her behavior was "mostly" appropriate. His/her social worker, Witness D, described him/her as "a respectful and pleasant young [man/woman] who has excellent insight on [her/his] behavior." DCPS developed an FBA and BIP in March 2020 to address off-task behavior, class avoidance, and physical aggression.

I conclude that Petitioner has failed to meet her burden of proving that Student required an FBA and a BIP at the inception of his/her enrollment at School A. Student had neither at School B, and Petitioner found no fault with the program provided to Student at School B during the immediate three school months before Student returned to School A. There is no evidence that Student exhibited any behaviors at School A prior to January 2020 that warranted consideration of an FBA.

Whether DCPS denied Student a FAPE for failing to implement Student's IEPs during the 2019-2020 school year with respect to BSS hours and reading goals.

The documentation of BSS provided to Student during the 2019-20 school year appears in paragraph 24 above. Witness D testified that she began providing services to Student in November 2019. Thus, there is no record of DCPS providing Student with services prior to November 25, 2019. Thereafter, Witness D either provided, or made attempts to provide, the monthly services prescribed in the IEP. As discussed above, Student's behavior for the first two terms was unremarkable. Witness D began providing required services during the second term. Thus, under these circumstances, despite DCPS' failure to provide required BSS until November 2019, compensatory education services are not warranted.

⁹¹ Student's Math and Reading scores improved on the February 10, 2020 WJ-IV that was conducted a week after the development of the subject IEP.

Petitioner offered no evidence of a failure of DCPS to implement Student's Reading goals other than his/her poor grades in English. As discussed above, Student's English teacher specifically attributed Student's poor grades to his/her poor attendance, including no participation at all in virtual classes from late March through the end of the school year, and failure to turn in assignments.

I conclude that Petitioner has failed to meet her burden of proving that DCPS failed to implement Student's IEP with respect to Reading goals. While DCPS failed to provide BSS in September and October, Student's behavior was appropriate during this period, Student suffered no educational harm due to the deprivation of those services, and compensatory education services are not warranted.

RELIEF

For relief, Petitioner requests (1) compensatory education, (2) an order for DCPS to develop an appropriate IEP with appropriate related services and transportation, and (3) attorney's fees.

ORDER

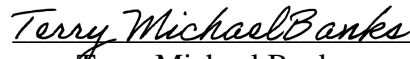
Upon consideration of the *Complaint*, DCPS' *Response*, the exhibits from the parties' disclosures that were admitted into evidence, the testimony presented during the hearing, and the arguments of opposing counsel, it is hereby

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

IT IS FURTHER ORDERED, that *District of Columbia Public School's Motion to Dismiss Petitioner's Claims Outside of the IDEA Statute of Limitations* is **DENIED** as moot.

APPEAL RIGHTS

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


Terry Michael Banks
Hearing Officer

Date: June 7, 2021

Copies to: Attorney A, Esquire
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OSSE Office of Dispute Resolution
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